



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: M16/2023
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Important Information

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BETWEEN: REHMAT & MEHAR PTY LTD (ACN 640 452 991)
First Plaintiff

and

GAURAV SETIA
Second Plaintiff

and

ROBERT HORTLE
Defendant

PLAINTIFFS' SUBMISSIONS

PART I: PUBLICATION CERTIFICATION

1. This submission is in a form suitable for publication on the internet.

PART II: STATEMENT OF THE ISSUES

2. The *Fair Work Act 2009* (Cth) (**FW Act**) enacts a system of inspection, compliance and enforcement of terms and conditions conferred on national system employees by the FW Act, and the instruments made under it. So does the *Wage Theft Act 2020* (Vic) (**WT Act**). The first issue is whether the WT Act is invalid by operation of s 109 of the *Constitution*. The second issue is what declaratory relief should be ordered given the extent of the inconsistency.

PART III: SECTION 78B NOTICE CERTIFICATION

3. Section 78B notices were served on all Attorneys General on 23 February 2023 [Demurrer Book (**DB**) 116-121].

PART IV: JUDGMENT BELOW

4. This proceeding is in this Court's original jurisdiction and there is no judgment below.

PART V: FACTS

5. The proceeding is by way of demurrer.¹ The Defendant (**Hortle**) admits all express and implied facts alleged in the Amended Statement of Claim but not the legal conclusions therein.² Procedural facts are set out in the Plaintiff's chronology.
6. Material facts may be stated thus. The First Plaintiff (**Rehmat & Mehar**) is a body corporate that operated a restaurant (known as the Macedon Lounge) in regional Victoria.³ The Second Plaintiff (**Setia**) is a director and company secretary of Rehmat & Mehar.⁴ Rehmat & Mehar employed employees to conduct the restaurant and the *Restaurant Industry Award 2020* (**RIA**) (a modern award made under the FW Act) applied to Rehmat & Mehar and these employees.⁵
7. Hortle is the Commissioner of the Wage Inspectorate Victoria (**WIV**) appointed under s 25 of the WT Act, legislation that commenced on 1 July 2021.⁶ On and from 27 July 2021, delegates and Inspectors commenced investigating the Plaintiffs for alleged offences of the WT Act. Inspectors exercised their powers in Pt 4 of the WT Act to procure evidence in that investigation, including the powers of entry, search and seizure by warrant, and the production of documents and answers to questions.⁷
8. On 24 November 2022 Hortle filed 94 charges against the Plaintiffs in the Magistrates Court of Victoria. Forty-seven charges were filed against Rehmat & Mehar alleging contravention of s 6(1)(a) of the WT Act in the dishonest withholding of an employee entitlement. Forty-seven charges were filed against Setia alleging contravention of s 6(7)(a) of the WT Act in the dishonest withholding of an employee entitlement. The 47 charges laid against Rehmat & Mehar have been duplicated onto Setia; all charges concern the same alleged conduct in respect of four employees, for sums that total \$7,265.67 overall, alleged to be withheld during

¹ Demurrer filed 19 May 2023 [DB135].

² *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117, 135 (Gibbs J).

³ ASOC [2(a)], [5]-[6] [DB125, 127].

⁴ ASOC [3(a)] [DB126].

⁵ ASOC [11]-[12] [DB128].

⁶ ASOC [4(a)], [13] [DB126, 128].

⁷ ASOC [14]-[15] [DB128-129].

periods of employment spanning between 29 June 2021 to 25 November 2021.⁸

9. All charges allege that there were sums payable by Rehmat & Mehar under the RIA that were not paid to employees. The charges engage with obligations to pay casual loading (cl 11 of the RIA), payment in lieu of breaks (cl 16), minimum rates of pay (cl 18), superannuation (cl 22),⁹ overtime (cl 23), penalty rates (cl 24) and public holiday pay (cl 30).¹⁰

PART VI: ARGUMENT

10. The Plaintiffs rely on both the ‘direct’ and ‘indirect’ tests of inconsistency.¹¹ These tests are mutually exclusive – establishing a direct inconsistency will mean that indirect inconsistency need not to be considered, and vice versa.¹² On the other hand each test involves interrelated and overlapping inquiries.¹³ Both tests are directed at discerning whether there is real conflict¹⁴ between the two laws as opposed to a de minimis one.¹⁵
11. Direct inconsistency testing involves asking whether the State law alters, impairs or detracts¹⁶ from the operation of the Commonwealth law, or directly collides¹⁷ with the Commonwealth law. Whilst each of those phrases have their own ordinary meaning,¹⁸ they all convey the idea that a State law conflicts if it undermines the

⁸ ASOC [16]-[18] [DB129-130]. Rehmat & Mehar has paid the four employees the sums reflecting what is alleged, with additional sums reflecting interest and gratuity, on a without admissions basis.

⁹ Charges 45, 46 and 47 also engage, in turn, with Rehmat & Mehar’s capacity to reduce the amount of tax liable to be paid to the Australian Taxation Office through superannuation fund contributions under ss 22 and 23 of the *Superannuation Guarantee (Administration) Act 1992* (Cth).

¹⁰ ASOC [18(b)] [DB129-130]; charge sheet laid against the Rehmat & Mehar dated 22 November 2022 [DB4-54]; charge sheet laid against the Setia dated 22 November 2022 [DB55-105].

¹¹ *Telstra Corporation v Worthing* (1997) 197 CLR 61, 76-77 [28] (the Court); *Dickson v The Queen* (2010) 241 CLR 491, 502 [13]-[14] (the Court); *Jemena Asset Management (3) Pty Ltd v CoInvest Ltd* (2011) 244 CLR 508, 525 [42] (the Court).

¹² *Telstra Corporation v Worthing* (1997) 197 CLR 61, 76-77 [28] (the Court).

¹³ *Jemena Asset Management (3) Pty Ltd v CoInvest Ltd* (2011) 244 CLR 508, 525 [42] (the Court).

¹⁴ *Jemena Asset Management (3) Pty Ltd v CoInvest Ltd* (2011) 244 CLR 508, 525 [42] (the Court).

¹⁵ *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 400-401 [206]-[208] (Gummow J), 449 [375] (Hayne J), 489 [486] (Callinan J).

¹⁶ *Jemena Asset Management (3) Pty Ltd v CoInvest Ltd* (2011) 244 CLR 508, 524 [39] (the Court).

¹⁷ *Telstra Corporation v Worthing* (1999) 197 CLR 61, 76 [27] (the Court); *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253, 258-259 (Barwick CJ).

¹⁸ Other synonyms have been used, such as “qualify” and “negate” (*Telstra Corporation v Worthing* (1999) 197 CLR 61, 76 [27] (the Court); *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330, 339 (the Court)) and “disturb or vary” (*Wenn v Attorney-General (Vic)* (1948) 77 CLR 84, 108-109 (Latham CJ); *Clyde Engineering Co Ltd v. Cowburn* (1926) 37 CLR 466, 491 (Isaacs J)).

Commonwealth law.¹⁹ The examination concerns the laws' legal operation and practical effect. Operative or practical features that have resulted in invalidity include conflicting curial punishments,²⁰ industrial entitlements,²¹ civil remedies,²² offence elements,²³ and trial mode, procedure and forum.²⁴ Whether operative or practical features produce inconsistency will be a question of fact and degree.²⁵

12. Indirect inconsistency testing involves asking whether the subject matter ('field') covered by the Commonwealth law was intended as a complete statement of the law to govern that subject matter.²⁶ By comparison, this testing can involve a more subtle contrariety,²⁷ but modern Commonwealth legislation increasingly tends to make the intent of the law express.²⁸ An express statement of coverage intent assists to ascertain what the Commonwealth law intends to cover but is not wholly determinative: the substantive provisions of the Commonwealth law must be capable of supporting the express intent.²⁹
13. Both tests require an analysis of the laws to discern their intended subject matter, scope, and purpose. The analysis proceeds by applying the principles of statutory construction bearing in mind the metaphorical concept that is "*intention*".³⁰

¹⁹ *Jemena Asset Management (3) Pty Ltd v CoInvest Ltd* (2011) 244 CLR 508, 525 [41] (the Court).

²⁰ E.g. *Ex Parte McLean* (1930) 43 CLR 472, 486 (Dixon J); *Hume v Palmer* (1926) 38 CLR 441, 448 (Knox CJ), 450-451 (Isaacs J), 462 (Starke and Gavan Duffy JJ); *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253, 271 (Menzies J).

²¹ E.g. *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632, 642-644 (Gibbs CJ, Wilson and Dawson JJ), 655 (Murphy J); *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253, 258-259 (Barwick CJ), 271 (Menzies J); *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 483-484 (Isaacs J).

²² E.g. *Telstra Corporation v Worthing* (1999) 197 CLR 61, 76 [30]-[33] (the Court)

²³ E.g. *Dickson v The Queen* (2010) 241 CLR 491, 504 [22] (the Court).

²⁴ E.g. *Viskaukas v Niland* (1983) 153 CLR 280, 292-293 (the Court); *Hume v Palmer* (1926) 38 CLR 441, 450-451 (Isaacs J); *Dickson v The Queen* (2010) 241 CLR 491, 504 [20] (the Court).

²⁵ *Bell Group N.V. (in liquidation) v Western Australia* (2016) 260 CLR 500, 521 [51] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

²⁶ *Jemena Asset Management (3) Pty Ltd v CoInvest Ltd* (2011) 244 CLR 508, 524 [39] (the Court).

²⁷ *Jemena Asset Management (3) Pty Ltd v CoInvest Ltd* (2011) 244 CLR 508, 524 [40] (the Court).

²⁸ See for e.g. the examples collected in *Momcilovic v The Queen* (2011) (2011) 245 CLR 1, 192-193 [484] (Heydon J).

²⁹ *John Holland Pty Ltd v Victorian Workcover Authority* (2009) 239 CLR 518, 527-528 [20]-[21] (the Court); *Momcilovic v The Queen* (2011) (2011) 245 CLR 1, 74 [112] (French CJ), 121 [272] (Gummow J), 134 [316], 141 [342] (Hayne J), 189 [472]-[473] (Heydon J); 234 [633] (Crennan and Kiefel JJ), 241 [660] (Bell J).

³⁰ *Momcilovic v The Queen* (2011) (2011) 245 CLR 1, 74 [111]-[112] (French CJ), 115 [258] (Gummow J), 133-134 [315], 141 [342] (Hayne J), 189 [474] (Heydon J); 235 [638] (Crennan and Kiefel JJ), 241 [660] (Bell J); *Dickson v The Queen* (2010) 241 CLR 491, 506-507 [32] (the Court); *Bell Group N.V. (in*

Commonwealth legislative paramountcy means there is no interpretive presumption against conflict.³¹ Inconsistency will not arise if, on the construction of the Commonwealth law, there is subject matter that the Commonwealth law has designedly left open for State law to operate,³² or if the Commonwealth law is found to be operating supplementary to, or cumulative upon, the State law in question.³³ The Commonwealth law must necessarily be examined first, followed by an examination of the State law.³⁴

FW ACT: SUBJECT MATTER, SCOPE AND PURPOSE

14. The subject matter of the FW Act is first addressed in Div 3 of Pt 1-1 (“*Guide to this Act*”). The sections therein (ss 4-9) indicate that the FW Act relevantly intends to provide for the terms and conditions of national system employees, and the inspection, administration, compliance and enforcement for same.
15. Division 2 of Pt 1-3 (“*Interaction with State and Territory laws*”) contains express statements of coverage intent. Variants of these statements have come before the Court previously in *WorkChoices* and *John Holland*.³⁵
 - (a) Section 26 is an exclusive operation provision. Section 26(1) states that the FW Act applies “*to the exclusion of State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer.*” A “*State or Territory industrial law*” relevantly includes a State law “*that applies to employment generally*” that has one or more of its main purposes being the “*enforcement of terms and conditions of employment*” or the “*enforcement of agreements (including individual agreements and collective agreements), and other industrial instruments or orders, determining*

liquidation) v *Western Australia* (2016) 260 CLR 500, 521-522 [52] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

³¹ *Butler v Attorney General (Vic)* (1961) 106 CLR 268, 276 (Fullagar J).

³² *Dickson v The Queen* (2010) 241 CLR 491, 505 [25] (the Court); *Momcilovic v The Queen* (2011) (2011) 245 CLR 1, 74 [111] (French CJ), 122 [276] (Gummow J), 479 [479] (Heydon J); 234 [633] (Crennan and Kiefel JJ), 241 [660] (Bell J).

³³ *Telstra Corporation v Worthing* (1999) 197 CLR 61, 76 [27] (the Court).

³⁴ *Momcilovic v The Queen* (2011) (2011) 245 CLR 1, 74 [111] (French CJ), 117 [262] (Gummow J), 131 [306], 133 [314] (Hayne J), 232 [625] (Crennan and Kiefel JJ), 241 [660] (Bell J); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 425 [302] (Kirby J).

³⁵ *New South Wales v Commonwealth* (2006) 229 CLR 1, 159-169 [346]-[377] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *John Holland Pty Ltd v Victorian Workcover Authority* (2009) 239 CLR 518, 526-527 [17]-[18] (the Court).

terms and conditions of employment” (s 26(2)(b)(i) and (ii)). A State law “*that applies to employment generally*” is one that applies to all employers and employees in the State or Territory (with or without exempted classes) and “*it does not matter whether or not the law also applies to other persons*” (s 26(4)).

- (b) Section 27 is a roll-back clause. It disapplies s 26 to specified equal opportunity legislation (s 26(1A)) and other State laws that deal with “*non-excluded matters*” of specified kinds (s 27(2)).
 - (c) Section 28 creates a regulation making power to prescribe additional excluded State laws, whilst s 29 enacts a regime for modern awards and enterprise agreements to similarly prevail over State law to what exists for the FW Act in ss 26-28. Section 30 states that these provisions are not intended to be exhaustive of the circumstances in which the FW Act (and its instruments) are to prevail over State law. Section 38 tells the reader that the legislature intends the FW Act to have every valid application as a matter of legislative power.
16. What is apparent from these sections is there is an intention to create one, exclusive, field of federal industrial law “*in relation to a national system employee or a national system employer*” (s 26(1)) yet allow State law defined by subject matter to continue to apply to this national system (s 27).
 17. The concurrency provision in s 536C(1) serves as a useful contrast:³⁶ There, the FW Act seeks to preserve State law insofar as it can apply in relation to the corrupting benefits offences in Pt 3-7 without relation to the national system. Section 536C(2) and (3) go on to identify that this intent remains even if the State law imposes different sanctions, fault elements, defences or modes of trial. An affinity between s 536C(2) and (3) and the law of direct inconsistency testing developed by the Court is apparent.
 18. As can be seen, the concepts of “*national system employer*” and “*national system employee*” (ss 13, 14) are primarily used to define the outer limits of the field. These concepts relevantly include constitutional corporations and their employees and extend further insofar as the State of Victoria is concerned by reason of its reference

³⁶ See also s 527CA concerning the sexual harassment provisions Pt 3-5A, which commenced to operate on 6 March 2023.

of power by the *Fair Work (Commonwealth Powers) Act 2009* (Vic) (**Referral Act**). By s 30B(1) of the FW Act, Victoria is a “referring State”³⁷ and has referred legislative powers that relevantly include “minimum terms and conditions of employment, (including employment standards and minimum wages,” “terms and conditions of employment contained in instruments,” “compliance with, and enforcement of, [the FW Act],” “the administration of [the FW Act],” and “matters incidental or ancillary to the operation of [the FW Act] or of instruments made or given effect under [the FW Act].”³⁸ Acting upon that reference of legislative power, the FW Act extends the concept of “national system employee” to include any “individual” in Victoria employed by any “person” in Victoria (ss 30C(1)(a), 30D(1)(a)) to the extent that the Referral Act contemplates (s 30H).³⁹

19. This national system concept is then applied as a lynchpin throughout the balance of the FW Act, save where Commonwealth heads of power support a broader field of operation with respect to common law employers and employees.⁴⁰ Chapter 2 establishes a set of terms and conditions for the national system by enacting the National Employment Standards (**NES**) (Pt 2-2) and enacting the creation of instruments in the form of modern awards (Pt 2-3), enterprise agreements (Pt 2-4), workplace determinations (Pt 2-5), national minimum wage orders (Pt 2-6), and equal remuneration orders (Pt 2-7). Sections 44, 45, 50, 280, 293 and 305 in Ch 2 each contain the obligation to comply with the terms and conditions established by the NES and these instruments. Each section is enforceable as a “civil remedy provision” (a subject returned to below).
20. Payment obligations imposed by Div 2 of Pt 2-9 should be noted next. Division 2 addresses the same mischief addressed by “Truck Acts”⁴¹ and the *Victorian Workers’ Wages Protection Act 2007* (Vic) that the Referral Act repealed in order to facilitate

³⁷ The Referral Act commenced on 17 June 2009.

³⁸ See Referral Act, ss 3 (definition of “referred subject matter”), 4(b); FW Act, s 30A (definition of “referred subject matter”). The reference is delimited by excluded subject matters: see Referral Act, ss 3 (definition of “excluded subject matter” and “state subject matter”), 5; FW Act, s 30A (definition of “excluded subject matter”).

³⁹ See Referral Act, s 5 which preserves powers that touch on aspects of public sector employment and essential services regulation.

⁴⁰ See FW Act, s 11. See for example FW Act, s 335.

⁴¹ *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, 633-634 [45] (Crennan, Kiefel, Bell, Gageler and Keane JJ); *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)* (2015) 239 FCR 461, 502-507 [150]-[175] (Bromberg J).

the Commonwealth's entry into this subject matter.⁴² Section 323(1) requires a national system employer to pay a national system employee amounts payable in relation to the performance of work in full, including those amounts to be payable under the NES and instruments summarised above. Again, section 323(1) is a civil remedy provision.

21. Chapter 4 enacts a system of compliance and enforcement for this national system (and for other purposes). In summary:

- (a) Pt 4-1 establishes forms of remedies (ss 545-547), standing (ss 539-542) and fora (s 539) for these remedies, including remedies in respect of non-compliance with the NES and FW Act instruments. Pt 4-2 invests jurisdiction in Courts to enforce these remedies and establishes specialist Fair Work Divisions within the Federal Courts for this purpose (ss 562-568).
- (b) Contravention of a "*civil remedy provision*" can have a penal consequence in addition to a remedial one. Section 546 allows for an application for a pecuniary penalty order to be enforced as a debt (s 546(4)). Maximum pecuniary penalty amounts are specified (s 546(2) and 539(2)), as are who they can be paid to (s 546(3)) and who can apply for them (s 539(2)). Div 4 of Pt 4-2 contains procedural matters and safeguards, including that the rules of evidence and procedure for civil matters apply (s 551) and that a contravention of a civil remedy provision is not an offence (s 549).
- (c) Sections 558A and 558B deal with a "*serious contravention*" of a civil remedy provision, a finding of which increases the applicable maximum for a pecuniary penalty tenfold. A finding of serious contravention turns on the knowledge of the contravener and whether the contravention was part of a systemic pattern of conduct relating to one or more national system employees. The attribution of knowledge to a corporate contravener for this purpose is established via the language of intention; if the body corporate "*expressly, tacitly or impliedly authorised the contravention*" (s 558B(1)).
- (d) By ss 550 and 557A(5A), civil penalty provisions become actionable on a "*person*" involved in the contravention of a civil penalty provision through

⁴² Referral Act, s 1(b). See also s 36 (as made on 17 June 2009).

species of accessorial liability which the Court will be well familiar. These species of accessorial liability likewise involve establishing forms of conduct, knowledge, and intent.⁴³

22. Chapter 5 enacts a system of labour administration to support the system through establishing an industrial tribunal (titled the Fair Work Commission) and an inspectorate (titled the Fair Work Ombudsman (**FWO**)).⁴⁴ The functions, powers, and duties to be exercised by the FWO are found in Pt 5-2. Functions include the monitoring, inquiry, investigation, and enforcement of terms and conditions established by the national system (s 682(1)(b) to (c)), and to commence legal proceedings for same (s 682(1)(e)). Inspectors are invested with powers of investigation for this purpose (Sub-div D to DD) and are conferred standing to apply for pecuniary penalties and remedies for contraventions (s 539(1)).
23. The record keeping provisions in Div 3 of Pt 3-6 should be finally noted. There, a national system employer must make and keep records, and give pay slips, of the kind prescribed by regulation: ss 535(1) and 536(1). Each is a civil remedy provision. A procedure exists for the reversal of onus in litigation where these provisions have not been complied with and the information that was required to be recorded becomes relevant in the litigation (s 557C). Sections 535(4) and 536(3) establish civil remedy provisions for making or keeping a record or giving a pay slip that a national system employer knows to be false or misleading.

WT ACT: SUBJECT MATTER, SCOPE AND PURPOSE

24. The subject matter of the WT Act is “*wage theft*”, a term originating from the United States and a misnomer when set within ordinary English and the Australian legal system.⁴⁵ The purpose of the WT Act is “*to create offences relating to the theft of employee entitlements and the keeping of records relating to employee entitlements*” (s 1(a)), to establish the WIV (s 1(b)), and to establish its functions and powers for

⁴³ See generally *Giorgianni v The Queen* (1985) 156 CLR 473, 504-505 (Wilson, Deane and Dawson JJ); *Yorke v Lucas* (1985) 158 CLR 661, 670 (Mason ACJ, Wilson, Deane and Dawson JJ); *Miller v The Queen* (2016) 259 CLR 380, 412 [87] (Gageler J).

⁴⁴ “*Inspectorate*” being the language used in the *Convention Concerning Labour Inspection in Industry and Commerce*, open for signature on 11 July 1947, 54 UNTS 3 (entered into force on 7 April 1950) (ratified by Australia on 24 June 1975).

⁴⁵ S Green, “Wage Theft as a Legal Concept” in E Bogg et al (eds), *Criminality At Work* (Oxford University Press, 2020) 134, 134-142.

investigating and enforcing “*employee entitlement offences*” (s 1(c)).

25. The scope of the WT Act is provided for in s 5. The WT Act is to apply to “*employee entitlements that are paid, payable or attributable by an employer for or in relation to services that are performed by an employee ... wholly in Victoria*” (s 5(a)). “*Employee*” and “*employer*” take their common law meaning (s 3). The geographical application of the WT Act is extended outside Victoria in terms consistent with the principles of legislative territorial competence (s 5(b) and (c)).
26. The “*employee entitlement offences*” are chiefly found in Pt 2. Six offences are created in ss 6(1), 6(7), 7(1), 7(2), 8(1) and 8(2) to apply an employer and their “*officer[s]*.”⁴⁶ Conspiracy, incitement, attempt, and witness intimidation offences in the *Crimes Act 1958* (Vic) are also defined as “*employee entitlement offences*” should they have a nexus with the offences established by the WT Act (s 3).
- (a) The lead offence (s 6(1)) gives “*wage theft*” content. It criminalises an employer dishonestly withholding an “*employee entitlement*” in whole or in part owed to an employee, and an employer dishonestly authorising or permitting another person to do the same on its behalf. Section 6(7) provides an offence in similar terms for an officer. An “*employee entitlement*” is in-part defined to mean “*an amount payable by an employer to or in respect of an employee, or any other benefit payable or attributable by an employer to or in respect of an employee, including wages or salary, allowances and gratuities, and the attribution of annual leave, long service leave, meal breaks and superannuation, in accordance with the relevant laws, contracts and agreements*” (s 3). The terms “*relevant laws*” “*contracts*” and “*agreements*” are not defined by the WT Act but must extend to the FW Act and the instruments made under it (as Hortle’s charge sheets assert).
- (b) Section 7 enacts two offences in the same style for the falsification of an “*employee entitlement record*” done with a view to dishonestly obtaining financial advantage or preventing the exposure of a financial advantage. Section 8 enacts two offences in the same style for the failure to make or keep

⁴⁶ WT Act, s 3. “*Officer*” is defined to by reference to *Corporations Act 2001* (Cth), s 9 and extended to other natural persons such as a partner, office holder of an unincorporated association, a person who participates in significant decisions, or a person who has capacity to significantly affect an entity’s financial standing.

such a record with a view to dishonestly obtaining financial advantage or preventing the exposure of a financial advantage. An “*employee entitlement record*” is circularly defined to be “*a record of an employee entitlement*” (s 3).

27. Sections 6, 7 and 8 also provide content for the elements of the offences and create defences based on due diligence. The balance of Pt 2 deals with attribution and like rules for corporations (ss 10-13), partnerships (s 14), unincorporated associations (s 15) and the Crown (s 16-17). Maximum sentences for each offence are 6,000 penalty units (\$1,109,520) for an employer (2,500 penalty units or \$462,300 if tried summarily⁴⁷) and 10 years’ imprisonment for officers.
28. Part 3 establishes the WIV and Hortle’s office as Commissioner. The functions of the WIV relevantly include “*to promote, monitor and enforce compliance with [the WT Act]*” (s 20(1)(b)), “*to investigate the commission or possible commission of employee entitlement offences and related matters*” (s 20(1)(c)) and “*to bring criminal proceedings in relation to alleged employee entitlement offences*” (s 20(1)(d)). The WIV has the power to do all things necessary or convenient in connection with its functions and duties (s 21) and Hortle has all the duties, functions and powers of the WIV (s 30).
29. Part 4 provides for the appointment of Inspectors (s 33) who are invested with powers typically conferred for the investigation of criminal offences (Div 3-8). Part 5 sets out ancillary matters, including offences that may be committed during an investigation (ss 66-70), a process of referral to the Office of Public Prosecutions (ss 71-73), and a process for the acceptance of enforceable undertakings in lieu of prosecution (ss 63-65).

INDIRECT INCONSISTENCY

30. Indirect inconsistency should be considered at the outset for Div 2 of Pt 1-3 of the FW Act directs one’s attention here first. The intent to exhaustively state the law to apply to national system employers and employees – that is, all natural persons employed by all legal persons in Victoria (excluding the employments set out in s 5 of the Referral Act) – is plain from the text of s 26. The WT Act is expressly

⁴⁷ WT Act, s 18. Penalty unit amounts are calculated as at 24 November 2022.

precluded from operating on the national system through the definition of “*State or Territory industrial law*.” The WT Act meets the description of being a law “*that applies to employment generally*” (s 26(4)) having as its purpose the inspection, compliance and enforcement of terms and conditions of employment and industrial instruments through the invocation of Victoria’s criminal justice system (s 26(2)(b)(ii) and (iii)).

31. The law that is exhaustively stated by the FW Act for which s 26 refers is, for present purposes, the system of inspection, compliance and enforcement of the terms and conditions conferred on national system employees by the FW Act and the instruments made under it. This is indicated internally within s 26 upon considering the definitional content of what s 26 seeks to exclude – that is, a “*State or Territory industrial law*” under s 26(2). It is made clear by an examination of the system of inspection, compliance, and enforcement that the balance of the FW Act enacts. In other words, the intent expressed in s 26 is fully supported by the FW Act’s substantive provisions.⁴⁸
32. The WT Act is not capable of being characterized as a law dealing with a “*non-excluded matters*” (s 27(2)) for s 26 to be disapplied. It is not a law dealing with “*claims for enforcement of contracts of employment*” (s 27(2)(o)) if that be Hortle’s contention; this provision referring to claims for remedies for contractual breach rather than contemplating criminal process.⁴⁹ The word “*claims*” in an inapt description for the invocation of criminal process. Were this intended one would have expected the Commonwealth legislature to have expressed itself as it has in the concurrency provision in s 536C. It has not.
33. The outcome in *John Holland* applies mutatis mutandis. It is “[un]necessary to undertake a detailed analysis of the remaining provisions of the [FW] Act in order to determine with precision the field which it is intended the law should cover.”⁵⁰

⁴⁸ *John Holland Pty Ltd v Victorian Workcover Authority* (2009) 239 CLR 518, 527-528 [20]-[21] (the Court); *Momcilovic v The Queen* (2011) (2011) 245 CLR 1, 74 [112] (French CJ), 121 [272] (Gummow J), 134 [316], 141 [342] (Hayne J), 189 [472]-[473] (Heydon J); 234 [633] (Crennan and Kiefel JJ), 241 [660] (Bell J).

⁴⁹ Note that, in addition to preserving state jurisdiction for the enforcement of contracts of employment, the FW Act gives standing to the FWO and jurisdiction to the Federal Courts to enforce contractual entitlements that are “*safety net contractual entitlements*” (ss 541-543).

⁵⁰ *John Holland Pty Ltd v Victorian Workcover Authority* (2009) 239 CLR 518, 527 [20] (the Court).

DIRECT INCONSISTENCY

34. Direct inconsistency testing results in the same conclusion being reached. The WT Act undermines the subject matter, scope, and purpose of the FW Act chiefly by criminally penalising what the FW Act intends to be penalised through the imposition of a civil penalty (ss 44, 45, 50, 280, 293, 305, 323(1), 546 and 549). The undermining of the FW Act further extends to the WT Act's duplication of a system of inspection, compliance, and enforcement for the same subject matter. What results is competing and conflicting laws for inspection and investigation, modes of trial, trial procedure, fora, and punishment.
35. The Commonwealth's legislative intent for the enactment of civil penalty regimes was explained by the plurality in the *Agreed Penalties Case*.⁵¹ The FW Act's civil penalty regime establishes pecuniary penalty orders enforceable as a debt due (s 546(5)) and prescribes the law of civil procedure and proof for that regime (s 551). It is "*precisely calculated to avoid the notion of criminality*"⁵² that the WT Act places on the same subject matter.
36. It is no answer to distinguish WT Act offences on the basis that they depend upon proving dishonesty or contain a defence of due diligence. All states of mind (from a dishonest one to a benevolent one), as well as the extent of any diligence, will be relevant to synthesising what level of civil penalty is necessary to deter a contravener of the FW Act.⁵³ The same becomes even more apparent for the FW Act's serious contravention provisions. It is difficult to foresee a body corporate (or an accessory) having the requisite state of mind(s) in ss 557A and 557B of the FW Act being found to not have acted dishonestly as defined in the WT Act.

HORTLE'S POSITION SHOULD BE REJECTED

37. The Victorian Parliament has been told that Hortle will defend this proceeding based on legal advice, and that this legal advice is to the effect that the WT Act is

⁵¹ *Viskaukas v Niland* (1983) 153 CLR 280, 292-295 (Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ).

⁵² *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482, 505 [54] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

⁵³ *Australian Building and Construction Commission v Pattinson & Anor* (2022) 399 ALR 599, 605 [17]-[19] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

constitutional because it is a criminal law.⁵⁴ Regrettably these are the best particulars of Hortle's demurrer that are available to the Plaintiffs. This must be rejected, however it is precisely put.

38. "*Criminal laws*"⁵⁵ is an incomplete characterisation of the subject matter, scope, and purpose of the WT Act. The WT Act's subject matter, scope and purpose is the creation of a system of inspection, compliance and enforcement of terms and conditions of employment established by (inter alia) the FW Act and instruments made under it. This is not a situation of the Commonwealth law operating cumulative or supplementary upon State law but the converse. The WT Act is seeking to operate cumulatively or supplementary upon the FW Act.
39. Hortle's argument may seek to depend upon ss 552-555 of the FW Act, which set out procedural and double-jeopardy safeguards where a contravener is subject to concurrent civil penalty and criminal proceedings concerning substantially the same conduct. These provisions were first inserted into federal industrial law by the *Workplace Relations Amendment (Work Choices) Act 2005 (Cth)*. The explanatory memorandum for that Act identifies that the parliament was concerned with (for example) the situation where unlawful industrial action was engaged in that potentially entailed the commission of both a criminal offence and a civil remedy provision under the *Workplace Relations Act 2006 (Cth)*.⁵⁶ This potential continues under the FW Act in relation to unlawful industrial action (ss 417(1), 418(1) and 675(1)). There are 18 offences in the FW Act that may engage with these provisions⁵⁷ in addition to the diverse conduct that may engage with criminal laws at common law and statute.
40. Sections 522-555 of the FW Act do not, in and of themselves, designedly leave area for the WT Act to operate on the same subject matter covered by the FW Act. Such a conclusion is unavailable upon construing Div 2 of Pt 1-3 and the FW Act as a

⁵⁴ Evidence to the Public Accounts and Estimates Committee, Parliament of Victoria, Melbourne, 2 June 2023, p.2 (Matt O'Connor, Deputy Secretary, Department of Premier and Cabinet).

⁵⁵ Evidence to the Public Accounts and Estimates Committee, Parliament of Victoria, Melbourne, 2 June 2023, p.2 (Matt O'Connor, Deputy Secretary, Department of Premier and Cabinet).

⁵⁶ Explanatory Memorandum, *Workplace Relations Amendment (Work Choices) Bill 2005 (Cth)*, [2410]-[2414] (see in particular the illustrative example).

⁵⁷ Ss 536D(1), 536D(2), 536F(1), 536G(1), 674(1), 674(2), 674(3), 674(4), 674(5), 674(7), 675(1), 676, 677(1), 677(2), 677(3), 678(1), 678(2), 702(5). All these provisions concern the commission of conduct that is extraneous to the system of inspection, compliance and enforcement of the terms and conditions established by the FW Act and the instruments under it.

whole. Sections 522-555 of the FW Act contemplate concurrent criminal proceedings being brought in respect of conduct subject of a civil remedy provision, but extraneous to the system of inspection, compliance and enforcement of the terms and conditions established by the FW Act and the instruments under it.

PART VII: ORDERS SOUGHT

41. Declaratory relief follows “*to the extent of the inconsistency*” and in accordance with the principles laid down by Dixon J in *Wenn*.⁵⁸
- (a) Ascertaining the extent of the WT Act’s inconsistency with the FW Act depends upon a construction of the WT Act using ordinary principles.
- (b) Construction of the WT Act proceeds naturally and objectively as an exercise of the Victorian legislature’s plenary power to enact the WT Act’s subject matter.⁵⁹ The rule contained in s 6 of the *Interpretation of Legislation Act* 1984 (Vic) is concerned with legislative power, not inconsistency of law,⁶⁰ and is “*unimportant*”⁶¹ to the exercise.
- (c) Reading down or severance of the WT Act may occur but not at “*the cost of producing provisions which the State Parliament never intended to enact.*”⁶² Reading down or severance must produce an enactment that remains an expression of the legislative will of the Victorian Parliament.⁶³

⁵⁸ *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84, 122 (Dixon J); *Bell Group NV (in liq) v Western Australia* (2016) 260 CLR 500, 521-522 [52], 527 [71] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ), 532-533 [77] (Gageler J).

⁵⁹ The reference of legislative power by the Referral Act does not mean that legislative power is withdrawn from Victoria. Rather, the power referred to the Commonwealth continues coextensively: *Graham v Paterson* (1950) 81 CLR 1, 19 (Latham CJ), 22 (McTiernan J), 24-25 (Williams J), 25 (Webb J), 26 (Fullagar J); *Airlines of NSW Pty Ltd v New South Wales* (1964) 113 CLR 1, 52 (Windeyer J); *New South Wales v Commonwealth* (2006) 229 CLR 1, 381 [903] (Callinan J). See also *Western Australia v The Commonwealth* (1995) 183 CLR 373, 464 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

⁶⁰ *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298, 317 [13] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Bell Group NV (in liq) v Western Australia* (2016) 260 CLR 500, 527 [71] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

⁶¹ *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84, 122 (Dixon J). It is to be noted that Dixon J had before him a different interpretive rule in s 2 of the *Acts Interpretation Act* 1930 (Vic) which sought to ensure Victorian legislation was to be read “*subject to*” the *Constitution*.

⁶² *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84, 122 (Dixon J).

⁶³ *Bell Group NV (in liq) v Western Australia* (2016) 260 CLR 500, 527 [71] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ), 532-533 [77] (Gageler J).

42. What should be added to this is the importance of s 109 “*not only for the adjustment of the relations between the legislatures of the Commonwealth and States, but also for the citizen upon whom concurrent and cumulative duties and liabilities may be imposed by laws made by those bodies.*”⁶⁴ Reading down or severance should produce a result that gives the Victorian citizen clarity with respect to what law prescribes the system of inspection, compliance and enforcement of terms and conditions of employment established by the FW Act and the instruments made under it.⁶⁵
43. This cannot be achieved. Severance or reading down will not produce an enactment that the Victorian parliament ever intended. The WT Act is a package of interrelated provisions for the inspection, compliance, and enforcement of “*employee entitlements*” intended to operate completely and fully according to its terms.⁶⁶ Nowhere within the WT Act can an intention be found for it to have a more limited operation divorced from the system of inspection, compliance and enforcement of terms and conditions prescribed by the FW Act and the instruments made under it.
44. Excising provisions of the WT Act so that it does not undermine the national system for the inspection, compliance and enforcement of terms and conditions prescribed by the FW Act would produce a legal and practical fiction. Legally, it belies the purposes of the WT Act as expressed in s 1. Practically, it is the case that every natural person employed by a legal person in Victoria (save for the limited exceptions in section 5 of the Referral Act) will rely upon the FW Act for the derivation of their “*wage[s]*” and “*employee entitlements*”; be those entitlements deriving from the NES (e.g. annual leave or personal leave) or instrument (e.g. the national minimum wage order, modern award or enterprise agreement).
45. The declaration should therefore be that the entire WT Act is invalid. In the alternative, the declaration should invalidate all provisions concerning the inspection, compliance, and enforcement of “*employee entitlement offences*”, being Pt 2, s 20(1)(c) to (e) and Pt 4. This alternative order should run to the record keeping

⁶⁴ *Dickson v The Queen* (2010) 241 CLR 491, 503-504 [19] (the Court).

⁶⁵ This point can be alternatively described as an incident of the construction process.

⁶⁶ See by analogy *Bell Group NV (in liq) v Western Australia* (2016) 260 CLR 500, 526-528 [69]-[73] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ), 532-533 [77] (Gageler J).

offences in ss 7-8 of the WT Act given Div 3 of Pt 3-6 of the FW Act (analysed at paragraph 23 above).

46. Hortle's investigation and prosecution of the Plaintiffs was constitutionally infirm. In the interests of finality, the Plaintiffs seek an additional declaration that the charges laid against the Plaintiffs, and the exercise of powers of investigation leading to those charges, were invalid and of no effect.
47. Subject to issues that seem to be raised by the appellant in *Qantas Airways Limited & Anor v Transport Workers Union of Australia (S153/2022)*, it appears to the Plaintiffs that s 570 of the FW Act applies to this proceeding and the question of costs. The Plaintiffs will address this issue orally.

PART VIII: ORAL ARGUMENT ESTIMATE

48. Up to 3.5 hours, including reply.

Dated: 7 July 2023



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BETWEEN:

REHMAT & MEHAR PTY LTD (ACN 640 452 991)
First Plaintiff

and

GAURAV SETIA
Second Plaintiff

and

ROBERT HORTLE
Defendant

ANNEXURE
STATUTORY MATERIAL REFERRED TO

No	Description	Version	Provisions
1	<i>Constitution</i>	Current Compilation No 6 (27 Jul 1977 –)	s 109
2	<i>Fair Work Act 2009 (Cth)</i>	Current Compilation No 51 (1 Jul 2023 –)	Pt 1-1: ss 4-9 Pt 1-2: ss 11, 13, 14 Pt 1-3: ss 26-30, 30A, 30B, 30C, 30D, 30H, 38 Pt 2-1: ss 44, 45, 50 Pt 2-5: s 280 Pt 2-6: s 293 Pt 2-7: s 305 Pt 2-8: s 323 Pt 3-1: s 335 Pt 3-5A: s 527CA Pt 3-6: ss 535-536 Pt 3-7: ss 536C, 536D, 536F Pt 4-1: ss 539-542, 545-547,

No	Description	Version	Provisions
			549-556, 557A-557C, 562-568 Pt 5-1: ss 674-678 Pt 5-2: ss 682, 702-717
3	<i>Retail Industry Award 2020</i>	Incorporating amendments up to 1 Nov 2021	cll 11, 16, 18, 22, 23, 24, 30
4	<i>Wage Theft Act 2020 (Vic)</i>	Current Version No 002 (1 July 2022 –)	Pt 1: ss 1, 3, 5 Pt 2: ss 6-8, 10-18 Pt 3: ss 20, 21, 25, 30 Pt 4: ss 33, 38-62 Pt 5: ss 66-70, 71-73, 63-65
5	<i>Fair Work (Commonwealth Powers) Act 2009 (Vic)</i>	Current Version No 012 (31 May 2019 –)	ss 1, 3-5
6	<i>Victorian Workers' Wages Protection Act 2007 (Vic)</i> (repealed)	Repealed Version No 012 (1 Dec 2008 – 1 Jul 2009)	ss 6-10