HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

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

and

GAURAV SETIA
Second Plaintiff

and

ROBERT HORTLE
Defendant

PLAINTIFFS' REPLY[1]

PART I: PUBLICATION CERTIFICATION

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

PART II: REPLY

2. At a high level, Hortle and the interveners press the same contentions. There are five areas of contest (or perceived contest).

AREA 1: THE PRINCIPLES CONCERNING SECTION 109

3. Much ink is spilt by some but no real difference in the applicable principles emerges. The various straw men erected distract attention from the task. Resolution of this proceeding does not depend upon revising the direct and indirect inconsistency tests, or the metaphors used to describe them. The tests serve as useful reference points for the collection of the principles. The jurisprudence of this Court does not elevate them any higher.

AREA 2: THE CONSTRUCTION OF SECTION 26

4. Much toil is avoided, and the Plaintiffs succeed, if the WT Act is found to be "*State or Territory industrial law*" for the purposes of s 26(1) of the FW Act. No

[1] Definitions adopted in the Plaintiffs' Submissions are continued in this reply.

submission contradicts the Plaintiffs' contention that the approach in *John Holland* applies if that be so: PS[33].

5. The constructional errors engaged in by Hortle and the interveners are usefully encapsulated by what McHugh J observed in *Kelly*:

> Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment ... [O]nce ... the definition applies, ... the only proper ... course is to read the words of the definition into the substantive enactment and then construe the substantive enactment - in its extended or confined sense - in its context and bearing in mind its purpose and the mischief that it was designed to overcome. To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment.[2]

6. The narrow and literal approach taken to the concepts in ss 26(2) and (4) finds no support in, and defeats the intent of, s 26(1). Section 26 in terms declares the Commonwealth legislature's intent to apply one industrial law in relation to the national system that the FW Act creates, to the exclusion of all State or Territory industrial laws so far as they would otherwise apply to that system.[3] The purpose of s 26 is to "*prevent the operation of separate and possibly varying State enactments dealing with the same subject*."[4] That is a different purpose to ss 527CA and 536C of the FW Act that intend to preserve concurrency of law with respect to sexual harassment and corruption respectively. This preventative purpose must be given effect to in construing the definitional concepts in ss 26(2) and (4). The narrow and literal approach adopted is conducive of avoidance and is unwarranted.

The one or more main purposes of the WT Act (s 26(2)(b))

7. Equating the purposes of criminal sentencing as the purposes of the WT Act bears no

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[2] *Kelly v The Queen* (2004) 218 CLR 216, 253 [103] (McHugh J). The approach taken by McHigh J in *Kelly* is, at the least, analogous as section 26(2)-(4) serve to shorten the substantive enactment in s 26(1): *Qantas Airways Limited v Transport Workers Union of Australia* [2023] HCA 27, [32] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [79]-[80] (Gordon and Edelman JJ). See also FW Act, s 12 (definitions of "*State or Territory industrial law*" and "*applies to employment generally*").

[3] And so far as State or Territory laws are permitted to apply through the roll-back mechanism in s 27, or not apply through the regulation making power in s 28. Sections 27-28 apply to all State or Territory law, not just "*industrial*" law of the kind enumerated in s 26(2).

[4] *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84, 111-112 (Latham CJ, McTiernan J agreeing); quoted with approval in *WorkChoices* (2006) 229 CLR 1, 167-168 [371] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

relationship to how one identifies statutory purpose.[5] The statutory purposes of the WT Act reside in its text and structure.[6] The text and structure of the WT Act enact 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). This issue is addressed further in Areas 3 and 4 below.

The enforcement of terms and conditions of employment in the WT Act (s 26(2)(b)(ii))[7]

8. There is no textual, contextual or purposive basis to adopt the construction of "*enforcement*" that is offered.[8] This word is not a term of art. As a matter of ordinary language, "*enforcement*" connotes the process of compelling compliance with law.[9] As a matter of context and purpose, it connotes the enforcement system established in Chapter 4 (titled "[c]*ompliance and enforcement*") and includes the enforcement processes involved in obtaining a pecuniary penalty order on the contravention of a civil remedy provision.

9. An enforcement system that entails criminal offences and sanctions remains an enforcement system. The WT Act itself describes the system that it creates as one of enforcement in ss 1(c) and 20(b). The second reading speech likewise described the WT Act as enacting an "*enforcement model*"[10] established because the Commonwealth's enforcement model is not "*strong enough*."[11] Other Commonwealth statutes similarly relate criminal offences and sanctions to an enforcement system: see for example the *Corporations Act* 2001 (Cth),[12] the *Competition and Consumer Act* 2010 (Cth),[13] and the *Australian Securities and*

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5 DS[39]-[40]; NSW[9]; SA[24], NT[45]-[46]. The principles of constitutional characterisation are inapt for discerning statutory purpose (cf. NT[24]).

6 DS[35], citing *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 389 [25] (French CJ and Hayne J).

7 The Plaintiffs are content to proceed on the basis that s 26(2)(ii), not (iii), is engaged.

8 DS[38], NSW[8]-[9], QLD[6]-[9], SA[20], NT[27]-[29].

9 QLD[6], citing *Black's Law Dictionary* (11th ed, 2019), 669; *Shorter Oxford English Dictionary* (6th ed, 2007), 833.

10 Victoria, Parliamentary Debates, Legislative Assembly, 19 March 2020, 1099 (Jill Hennessy, Attorney General). See also the Explanatory Memorandum, Wage Theft Bill 2020, 1.

11 Victoria, Parliamentary Debates, Legislative Assembly, 19 March 2020, 1097 (Jill Hennessy, Attorney General).

12 Sub-div A, Div 7 of Part 7.7; Div 9 of Part 7.8; Div 7 of Part 7.9.

13 Pt VI.

Investments Commission Act 2001 (Cth),[14] all of which treat criminal and civil penalty regimes as being encapsulated by one system of "*enforcement*." So, too, did the ALRC's *Principled Regulation* in its adoption of the enforcement pyramid theory.[15]

10. Introducing a textual gloss based on the "*employer-employee relationship*" does not assist in the task of construing the word "*enforcement*" in s 26(2)(b)(ii).[16] The submissions based upon it forget that federal industrial law has historically placed both criminal and civil penalty consequences on that relationship as a means of enforcing obligations imposed on it.[17]

The WT Act applies to employment generally (s 26(4))

11. The avoidance of s 26(4) based on the WT Act's territorial reach in s 5(1) must be rejected.[18] What "*applies to employment generally*" is "*subject to constitutional limitations*" — territorial legislative competence is one such limitation. The presumptions about the outer limits of Victoria's territorial competence drawn at DS[45] do not need to be collaterally resolved. If the WT Act does not apply to the hypothetical employers and employees at DS[45] then this result is "*otherwise*" "*identified*" by s 5(1) for the purposes of s 26(4)(b).

12. Subject to other constitutional limitations,[19] the WT Act indeed applies to all employees in Victoria. The submissions to the contrary whittle down the meaning of the word "*applies*" as if that word requires obligations, rights, privileges and immunities that might be established by an Act have to be invested in both employers and employees. That renders s 26(1) meaningless. "*Applies*" for the purpose of s 26(4) is not a query of what obligation is created and for who, but asks whether employers and employees "*in*" a State or Territory "*generally*" take benefits

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14 Sub-div G of Pt 2.

15 Australian Law Reform Commission, *Principled Regulation*, Report No 95 (2002). See for e.g. [2.60]-[2.62], [3.32]-[3.35], [3.82]-[3.83] where the enforcement pyramid in regulatory theory is discussed and embraced. For *Principled Regulation*'s influence on Ch 4 of the FW Act, see for e.g., *Construction Forestry Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* (2014) 225 FCR 210, 218 [32] (the Court); *Qube Ports Pty Ltd v Maritime Union of Australia* [2018] FCAFC 72, [104] (White J, Mortimer and Bromwich JJ agreeing).

16 DS[38], SA[20]-[21].

17 *Agreed Penalties Case* (2015) 258 CLR 482, 493 [17] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

18 DS[44]-[45].

19 Discussed in PS[18].

and burdens from the Act as a matter of practicality.[20] The WT Act applies "*wholly in Victoria*" (s 5(1)(a)). Employees in Victoria take the practical benefits of the system of inspection, compliance and enforcement enacted by the WT Act. They also carry the practical burdens of being required to participate in that system as a result of the investigative powers in Pt 4.[21]

13. The assertion that the WT Act seeks to apply to employee entitlements, but not employees,[22] underscores the error taken to the construction of "*applies*" and is otherwise an incomplete reading of s 5(1). An employee entitlement is defined in s 3 as "*an amount payable by an employer to … an employee*." There is no employee entitlement to apply the WT Act to without an employee and an employer to apply the WT Act to.

AREA 3: INDIRECT INCONSISTENCY

14. A construction of s 26(1) favourable to the Plaintiffs avoids the detailed analysis of the remaining provisions of the FW Act that Div 2 of Pt 1-3 is directed to avoiding.[23] Indirect inconsistency nevertheless results even if the Plaintiffs' construction of s 26 is not accepted. Section 30 of the FW Act preserves the possibility of inconsistency (be that on a direct or indirect mode of analysis) notwithstanding what is stated in the balance of Div 2 of Pt 1-3.[24] There is no basis to read s 30 as preserving only particular tests of inconsistency[25] if the "*different tests of inconsistency directed to the same end are interrelated and in any one case more than one test may be applied in order to establish inconsistency for the purposes of s 109*."[26]

15. The comparative analysis of the subject matter, scope and purpose of the FW Act and

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[20] "*Apply*" has the ordinary meaning of "*to bring to bear; put into practical operation, as a principle, law, rule etc*": *Macquarie Dictionary* (Online), definition 2. It takes this meaning rather than the (albeit largely equivalent) meaning given to it in ss 47 and 52: see FW Act, s 12 (definition of "*applies*" and "*applies to employment generally*").

[21] They can also be subject to prosecution if they are an "*officer*" (as defined in WT Act, s 3).

[22] SA[22]. This is not the position taken at DS[47] which accepts that the WT Act "*applies to particular classes of employees*" (a position also adopted at NSW[4], QLD[5], NT[fn39]).

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

[24] *Port Kembla Coal Terminal Ltd v Industrial Court of New South Wales* (2009) 182 IR 453, 469 [78] (Spigelman CJ, Beazley JA and Handley AJA agreeing) (in relation to the predecessor ss 16 and 18 of the *Workplace Relations Act* 1996 (Cth).

[25] SA[31]. The submission therein is a contradiction in terms: it promotes one form of test in order to read down s 30, but then goes on to level criticism at the utility of the tests.

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

WT Act essayed in PS[14]-[29] amount to indirect inconsistency whether or not s 26 operates to resolve the proceeding.

Subject matter

16. The Court will look past the technique of widely casting the FW Act's subject matter and then narrowly casting the WT Act's subject matter.[27] Legislation can have multiple subject matters.[28] This proceeding concerns the duplicate systems of inspection, compliance and enforcement of terms and conditions conferred on national system employees by the FW Act and the WT Act. The boundary concerns the inspection, enforcement and compliance of that which is contained in the National Employment Standards (Pt 2-2), and the obligations that can be proscribed by a modern award (ss 135-138), an enterprise agreement (ss 172(1) and 253(1)(a)), a workplace determination (s 272(3)), the national minimum wage order (s 294(1)), and an equal remuneration order (s 303(1)). Section 109 operates on this subject matter.

Scope

17. The usual inference to be drawn from the extensive detail contained in the FW Act going to its system of inspection, compliance and enforcement has been sidelined by Hortle and the interveners.[29]

18. Hortle and the interveners go on to omit the implications deriving from Victoria's referral of subject matter from the analysis: see PS[18]. Div 2A of Pt 1-3 of the FW Act discloses the Commonwealth's intent to act on the Referral Act by applying to Victorian employees and employers the system of inspection,[30] compliance and enforcement[31] of terms and conditions[32] established in the FW Act. With that system

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27 The technique identified in Hanks et al, *Constitutional Law in Australia* (4th edition, LexisNexis, 2018) [5.104]. See DS[15], NSW[7], SA[26], NT[18].

28 DS[15], citing *HJ v Independent Broad-Based Anti-Corruption Commission* (2022) 370 FLR 342, 347 [20] (the Court).

29 *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, 447 [35] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

30 Definition of "*referred subject matters*" in s 30A(1), which includes "*(e) administration of* [the FW Act]." "*Administration*" is a reference to Ch 5 and the inspectorate, FWO, established in Pt 5-2.

31 Definition of "*referred subject matters*" in s 30A(1), which includes "*(d) compliance with, and enforcement of,* [the FW Act]."

32 Referral Act, s 1

established, Div 2A of Pt 1-3 then discloses the intent to apply[33] that system to Victorian employees and employers. Read together with s 26, its surrounding provisions in Div 2 of Pt 1-3, the lynchpin concepts of "*national system employer*" and "*national system employee*", and the constitutional implications of Victoria referring subject matter pursuant to s 51(xxxvii) of the *Constitution*, it can be comfortably concluded that the Commonwealth's intent is to enact a single system of inspection, compliance and enforcement to the exclusion of Victorian laws that seek to apply on the same subject matter. That is why the Referral Act repealed the *Victorian Workers' Wages Protection Act* 2007 (Vic).[34]

Purpose

19. The purpose of the WT Act is not solely characterised by reference to the objects of a sentence to be passed under it.[35] Sentencing an offender is the final stage of the WT Act's system of inspection, compliance and enforcement, not its entire statutory purpose discernible after the principles of statutory construction are applied. Attaching the "*beneficial*"[36] label to the FW Act as a means to subvert the constructional task has been rejected by this Court again,[37] and again,[38] and again.[39]

20. There is no overarching legal principle or theory that a criminal penalty system of enforcement is unique to a civil penalty one,[40] nor is there any textual indication that the FW Act intended to evoke this supposed principled distinction in relation to its

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33 Definition of "*referred subject matters*" in s 30A(1), which includes "*(f) application of* [the FW Act]."

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

35 DS[37]-[41], NSW[9], QLD[10]-[11], NT[45].

36 SA[26]-[27].

37 *Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, 518-519 [47], 523 [61] (French CJ and Crennan JJ). See also *Construction, Forestry, Energy and Mining Union v BHP Coal Pty Ltd* (2014) 253 CLR 243, 248 [6], 252 [20] (French CJ and Kiefel J); *Qantas Airways Limited v Transport Workers Union of Australia* [2023] HCA 27, [110] (Steward J).

38 *Construction, Forestry, Energy and Mining Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, 632-633 [40]-[41] (the Court).

39 *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 271 CLR 495, 504 [14] (Kiefel CJ, Nettle and Gordon JJ).

40 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161, 172-173 [29] (Gummow J), 178-179 [56], 183 [67] (Kirby J), 198-199 [114], 205-206 [136] (Hayne J, Gleeson and McHugh JJ agreeing). Glanville Williams correctly placed procedure at the centre of the definition of a crime when he wrote that "*a crime is an act capable of being followed by criminal proceedings having a criminal outcome, and a proceeding or its outcome is criminal if it has certain characteristics which mark it as criminal*" ('The Definition of Crime' (1955) 8 *Current Legal Problems* 107, 130).

system of inspection, compliance and enforcement.[41] That Hortle and the interveners cannot uniformly articulate the purpose of the WT Act based on principle or theory, nor one for the FW Act, serves to make out that proposition. The now-posited distinction between a punitive and a protective system of enforcement has already been rejected by this Court in *Rich v Australian Securities and Investments Commission*.[42]

21. The imposition of a pecuniary penalty under s 546 of the FW Act indeed intends to have punishing effect on a contravener as a means to achieve deterrence.[43] The notion of punishment is not the exclusive province of the criminal law. After all, it is called a pecuniary penalty. "*Punitive ends may be pursued in civil proceedings, and, conversely, the criminal process is frequently employed to attain remedial rather than punitive ends*."[44] That the process of quantifying a civil penalty is directed at securing specific and general deterrence (not retribution, denunciation and rehabilitation) does not place a pecuniary penalty outside of the concept of punishment, nor bring it within the realm of remedial orders of the kind found in s 545.[45] The punishment to be imposed by a civil penalty must be calculated to "*sting*."[46] A penalty that does not have this effect is not an adequate deterrent.

The reliance on ss 552-556

22. Sections 552-556 cannot, in and of themselves, disclose the Commonwealth's legislative intent to leave open duplicate systems of inspection, compliance and enforcement of terms and conditions established by the FW Act and the instruments

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41 In truth, modern Commonwealth statutes (like the FW Act) proceed upon the enforcement pyramid theory (embraced in *Principled Regulation*, Report No 95 (2002), [2.60]-[2.62], [3.32]-[3.35], [3.82]-[3.83]) under which criminal enforcement is at the apex.

42 (2004) 220 CLR 129, 145-146 [32]-[35] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). See also *Alexander v Minister for Home Affairs* (2022) 401 ALR 438, 464-465 [111]-[113] (Gageler J).

43 *Naismith v McGovern* (1953) 90 CLR 336, 340-341 (the Court); *Agreed Penalties Case* (2015) 258 CLR 482, 520 [100]-[101] (Keane J); *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161, 198-199 [114] (Hayne J). Cf. DS[37], [51], NSW[8]-[9], QLD[8], SA[23]-[24], NT[45].

44 *United States ex rel Marcus v Hess*, 317 US 537, 554 (Frankfurter J) (1943), quoted with approval in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161, 172-173 [29] (Gummow J). See also *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129, 146 [35] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

45 NSW[8].

46 *Australian Building Constitution Commission v Construction, Forestry, Mining and Energy Union & Anor* (2018) 262 CLR 157, 195-196 [116] (Keane, Nettle and Gordon JJ).

made under it.[47] Sections 552-556 give effect to Recommendations 11-2 to 11-4 of *Principled Regulation*[48] and intend to provide generalised procedural protections in circumstances where the panoply of state and federal law penalises (through a criminal sanction or civil penalty) substantially the same conduct that the panoply of what the FW Act penalises. Hortle and the interveners neglect that Ch 4 is a funnel that concerns the enforcement of 131 norms that extend far beyond national system terms and conditions.[49] The generality of what ss 552-556 are directed does not negate the specific and detailed legislative intent to enact one system of inspection, compliance and enforcement of terms and conditions established by the FW Act and the instruments made under it.

Sections 552-556 do not leave area for WT Act offences

23. Relatedly, ss 552-556 do not disclose an intent to designedly leave area for Victorian law to criminalise contravening conduct that involves dishonesty or a lack of due diligence.[50] The state of mind and diligence of the contravener is relevant to synthesising the level of civil penalty that is necessary to deter, and these issues are all the more important for the penalty assessment for serious contraventions: PS[36]. The submission that the exercise of imposing a civil penalty on a contravener does not concern dishonesty or diligence must be rejected.[51] Many of the French Factors will be informed by these issues. For example, the deliberateness of the conduct admits an inquiry into all states of mind,[52] and the corporate culture of the contravener will invite consideration of the diligence taken to avoid the contravention.[53] Conversely, many of the French Factors will inform whether an accused has acted dishonesty or with due diligence for the purposes of the WT Act.

24. That the FW Act has chosen to adopt the terms it does, rather than enact the elements

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47 *R v Loewenthan; Ex parte Blacklock* (1974) 131 CLR 338, 347 (Mason J, Barwick CJ and Jacobs J agreeing); *McWaters v Day* (1989) 168 CLR 289, 299 (the Court). See DS[55]-[56], NSW[10], QLD[16], SA[25], NT[39]-[40]. NT[39] misinterprets the submission made at PS[39].

48 Australian Law Reform Commission, *Principled Regulation*, Report No 95 (2002) p.31-32.

49 The provisions that can entail remedies and civil penalties are listed in s 539(2) and r 4.01A of the *Fair Work Regulations* 2009 (Cth).

50 QLD[14].

51 QLD[14], NT[47].

52 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25, 58 [131]-[132] (the Court).

53 *Australian Building and Construction Commission v Pattinson* (2022) 274 CLR 450, 461 [20]-[21] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), 489 [111] (Edelman J).

and defences in the WT Act, does not give rise to the conclusion that the Commonwealth legislature has designedly left an area. "*Section 109 may operate where the Commonwealth chooses to enact a scheme involving a more detailed form of regulation than State law provides. Equally, s 109 may operate where the Commonwealth creates a scheme involving less detailed regulation than State law provides. And s 109 may operate where the Parliament has done what it has in the* [FW Act] *- to provide a more detailed scheme than State law in some respects and a less detailed scheme in other respects*."[54]

25. State legislation "*can neither add or subtract*"[55] from the FW Act's system of inspection, compliance and enforcement of national terms and conditions. The submissions that the WT Act is valid because it "*enhances*" or "*helps*" the FW Act do not assist the Court.[56] In fact, the submission confirms the existence of invalidity.

Analogies with prior cases

26. Insofar as analogies with previous case law can assist, *McWaters v Day* (1989) 168 CLR 289 is not one of them.[57] As a matter of constitutional and common law principle, military discipline is separate and additional to the ordinary criminal law. Its subject matter is directed to the efficacy, good order and discipline of permanent armed forces.[58] There is no constitutional or common law principle which demarks the subject matter of the WT Act from the FW Act. Nor can it be said that the subject matter of the WT Act is the "*ordinary criminal law*."[59] It is a regulatory statute that enacts an interlocking system of inspection, compliance and enforcement of terms and conditions established by the FW Act and the instruments made under it.

27. Justice Dixon's hypothetical in *Ex parte McLean* is to be set to one side for the same reasons: his Honour was conjecturing about state criminal laws "*which do not*

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54 *WorkChoices* (2006) 229 CLR 1, 166-167 [370] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

55 *R v Loewenthan; Ex parte Blacklock* (1974) 131 CLR 338, 342 (Menzies J, Barwick CJ and Jacobs J agreeing).

56 SA[29], VIC[41], NT[54].

57 NSW[12], [14], SA[24], NT[15].

58 *R v Tracey; Ex parte Ryan* (1989) 166 CLR 518, 538-540, 545-546 (Mason CJ, Wilson and Dawson JJ), 562-565 (Brennan and Toohey JJ) 583-585 (Deane J), 598-599 (Gaudron J); applied in *McWaters v Day* (1989) 168 CLR 289, 297-298 (the Court).

59 QLD[24], SA[24], NT[29], [36].

regulate industry <u>*at all*</u>" and an arbitrator's award that settled an industrial dispute.[60] It is the actual (not hypothetical) subject matter settings in *Ex parte McLean* that provide the most appropriate analogue: a New South Wales law that imposed a £10 penalty for neglect of duty enforceable in proceedings before a Police Magistrate was inconsistent with an award which required observance with the contract of employment as a whole, with such obligation enforceable by the imposition of a different level of penalty in proceedings before the Commonwealth Court of Conciliation and Arbitration. Windeyer KC's approach of distinguishing the state legislation's subject matter as being as fixed as neglect of duty ('work theft'), rather than the contract of employment as a whole, was rejected.[61] The same approach is being taken here with respect to the WT Act's offences, its offence elements, and its defences, and it falls to be rejected again.

AREA 4: DIRECT INCONSISTENCY

28. Hortle and the interveners' position on direct inconsistency largely relies upon contentions that have been advanced in respect of indirect inconsistency.[62] This approach does not address that, absent a finding that the FW Act intends to be exhaustive, direct inconsistency can nonetheless be found if there is conflict that significantly undermines the FW Act. This conflict can be identified in terms or from the legal or practical operation of both laws.[63]

29. The undermining of the FW Act is obvious, be that on its terms or a matter of legal or practical operation. The legislative choice to establish a system of inspection, compliance and enforcement for national system terms and conditions, with the

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60 *Ex parte McLean* (1930) 43 CLR 472, 485-486 (Dixon J). The hypothetical (tentative as it was) was incomplete. Had Dixon J had the benefit of the developed jurisprudence as to what constitutes an "*industrial dispute*" for the purposes of s 51(xxxv), he would have concluded that disputants were not able settle social and political matters between them: *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 338-339 [60], 346-347 [80]-[81] (McHugh J), 396 [245] (Callinan J). If a federal award could not regulate social and political matters, and could only regulate industry, then s 109 could only apply to a state law that also regulated industry. These boundaries are continued in the FW Act through the industrial restraints on what can be contained in a modern award (ss 136-139), enterprise agreement (ss 172(1), 253(1)(a)), workplace determination (s 272(3)), the national minimum wage order (s 294(1)) and equal remuneration order (s 303(1)). The WT Act transgresses them.

61 *Ex parte McLean* (1930) 43 CLR 472, 478-479 (Isaacs CJ and Starke J), 483 (Dixon J).

62 DS[51]-[54], NSW[14]-[19], QLD[12]-[16], SA[31], NT[54]-[56].

63 *Bell Group NV (in liq) v Western Australia* (2016) 260 CLR 500, 521 [51] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

imposition of civil (and not criminal) penalties at its apex, is "*emphatic*."[64] It manifests from the detailed way in which the system is enacted throughout the FW Act that produces all of the conflicts with the WT Act in inspection, investigation, mode of trial, trial procedure, fora, and punishment. All of these conflicts are encapsulated in, and culminate in, s 549: "[a] *contravention of a civil remedy provision is not an offence*." This provision has no direct equivalent in prior federal industrial law,[65] and significance should be attached to the choice to introduce it in the processes of construction.

30. The existence of double jeopardy provisions in a statute cannot wholly resolve the question of direct conflict.[66] Why that is so can be demonstrated by a hypothetical. Here, a stay (s 553(1)) or dismissal (s 553(2)) of a FW Act proceeding commenced in relation to the conduct that is the subject of Hortle's charges would result in the Plaintiffs being exposed to imprisonment and conviction via an accusatorial, not adversarial, legal process. The subject matter, scope and purpose of the FW Act is calculated to avoid that outcome and the legal and practical notions that attach to it. The FW Act is thereby undermined.

AREA 5: ORDERS SOUGHT

31. The DS does not dispute the summary of principles at PS[41]-[42], nor contend that the facts demurred to do not establish the jurisdictional prerequisites for declaratory relief.

First declaratory order in prayer A

32. The DS does not offer any provisions of the WT Act which it says do not conflict with the system of inspection, compliance and enforcement of the FW Act which should be excised from relief. A submission of that kind was unavailable given how the DS addresses the subject matter, scope and purpose of the WT Act (DS[24]-[30], [36]-[37]), and given the principles summarised at PS[41]-[42].

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64 *Australian Building and Construction Commission v Pattinson* (2022) 274 CLR 450, 458 [14] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

65 Cf. *Workplace Relations Act* 1996 (Cth), Pt 14, Div 3.

66 *R v Loewenthan; Ex parte Blacklock* (1974) 131 CLR 338, 347 (Mason J, Barwick CJ and Jacobs J agreeing); *McWaters v Day* (1989) 168 CLR 289, 299 (the Court). See DS[55]-[56], NSW[16], QLD[16].

33. Instead it is contended that the declaratory relief sought is too broad: DS[57]. This submission seems to derive from equitable principles concerning private litigation, which are inapt for proceedings in this Court's original jurisdiction.[67] Section 109 operates to the extent of the WT Act's inconsistency, and this is the issue which is to be found and to be declared.[68] The extent of that inconsistency depends upon the construction of the WT Act as a whole, not the adjudicative facts demurred to, and this has three consequences for the framing of a declaration. First, there is no basis to limit the relief to only employee entitlements raised on Hortle's charge sheets: DS[59]. Second, the declaration can (and should) run to the WT Act's record keeping offences: the constructional exercise reveals that these offences are just as inconsistent with the FW Act as is the balance of the system of inspection, compliance and enforcement that the WT Act enacts (PS[23], [26(b)]). Third, the restraint exercised in relation to constitutional questions has little work to do in this particular proceeding, because what is "*necessary … in order to do justice*"[69] in this case is to find and declare what section 109 requires using the processes of statutory construction. Those processes reveal that the Victorian Parliament did not intend to enact a Record Inspectorate.

34. An appeal is then made to the practical consequences of the relief on other Victorian statutes: DS[31] and [58]. These consequences are irrelevant; the Victorian Parliament intended to establish an inspectorate to perform the 12 functions in s 20(1)(a) to (l) of the WT Act, not the sole function in s 20(1)(l). The consequences are also overstated. Nothing stops the Victorian executive from immediately arranging an administrative office to perform the functions that are conferred on the WIV under other statutes. The WIV operated as an administrative office prior to the enactment of the WT Act[70] and can do so again without passing off to the Victorian community that it has a mandate to enforce terms and conditions established by the FW Act and the instruments made under it.

35. Little analysis is offered as to why the Plaintiffs' alternative framing is also

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[67] *Judiciary Act* 1903 (Cth), s 32; See by analogy *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 144 [19] (Gleeson CJ, Gummow, Kirby, and Hayne JJ).

[68] And is the issue raised by the Plaintiffs' prayer for relief: ASOC, prayer A **[DB133]**.

[69] *Knight v Victoria* (2017) 261 CLR 306, 324 [32] (the Court). Cf DS[59]; the Court is not 'formulating a constitutional rule' in this proceeding but is giving effect to one expressly stipulated in s 109.

[70] *Infosys Technologies Limited v State of Victoria* (2021) 64 VR 61, 72 [43] (Kennedy JA and McDonald AJA).

objectionable. If there is to be some excision of the provisions of the WT Act, then the Court can frame the declaration on such terms as it thinks are just: see s 32 of the *Judiciary Act* 1903 (Cth) and the approach in *Viskauskas v Niland*.[71]

Second declaratory order in prayer B

36. Contrary to what is put in NSW[19], this relief can flow from operational inconsistency if the conclusions of this Court were necessary to so extend.

Dated: 22 September 2023

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[71] (1983) 153 CLR 280, 295-296 (the Court).

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

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 IN REPLY

No	Description	Version	Provisions
1	*Australian Securities and Investments Commission Act* 2001 (Cth)	Current Compilation No 92 (4 Jul 2023 –)	Pt 2, sub-div G
2	*Constitution*	Current Compilation No 6 (27 Jul 1977 –)	ss 51(xxxv), 51(xxxvii), 109
3	*Corporations Act* 2001 (Cth)	Current Compilation No 123 (4 Jul 2023 –)	Pt 7.7, Div 7, Sub-div A Pt 7.8, Div 9 Pt 7.9, Div 7
4	*Competition and Consumer Act* 2010 (Cth)	Current Compilation No 143 (1 Jan 2023 –)	Pt VI
5	*Fair Work Act* 2009 (Cth)	Current Compilation No 51 (1 Jul 2023 –)	Pt 1-1: s 12 (definitions of "*applies*," "*State or Territory industrial law*," "*applies to employment generally*") Pt 1-2: ss 26-30

No	Description	Version	Provisions
			Pt 1-3: s 30A-30H Pt 2-1: ss 47, 52 Pt 2-3: ss 136-139 Pt 2-4: s 172, 253 Pt 2-5: s 272 Pt 2-6: s 294 Pt 2-7: s 303 Pt 3-5A: s 527CA Pt 3-7: s 536C Pt 2-7: s 303 Pt 4-1: 539, 545, 546, 549-556
6	*Fair Work (Commonwealth Powers) Act* 2009 (Vic)	Current Version No 012 (31 May 2019 –)	s 1
7	*Fair Work Regulations* 2009 (Cth)	Current Compilation No 49 (28 February 2022 –)	r 4.01A
8	*Judiciary Act* 1903 (Cth)	Current Compilation No 45 (1 Jul 2023 –)	s 32
9	*Wage Theft Act* 2020 (Vic)	Current Version No 002 (1 July 2022 –)	Pt 1: s, 3 (definition of "*employee entitlement*", "*officer*"), 5 Pt 4
10	*Victorian Workers' Wages Protection Act* 2007 (Vic) (repealed)	Repealed Version No 012 (1 Dec 2008 – 1 Jul 2009)	-

No	Description	Version	Provisions
11	*Workplace Relations Act* 1996 (Cth) (repealed)	Compilation prepared on 6 January 2009 (23 June 2008 – 30 June 2009)	ss 16, 18 Pt 14, Div 3