



HIGH COURT OF AUSTRALIA

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Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

No. M16/2023

BETWEEN:

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

and

10

GAURAV SETIA
Second Plaintiff

and

ROBERT HORTLE
Defendant

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**JOINT SUBMISSIONS OF THE DEFENDANT AND THE ATTORNEY-GENERAL
FOR THE STATE OF VICTORIA (INTERVENING)**

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUES

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2. The *Wage Theft Act 2020* (Vic) creates indictable offences that enable the imposition of criminal punishment, including potential imprisonment, on employers who steal wages and other entitlements from employees who provide services in various circumstances that are connected to Victoria. The *Fair Work Act 2009* (Cth) is a national industrial law, which provides for terms and conditions of employment. To the extent that it deals with the enforcement of those terms and conditions, it specifically contemplates the co-existence of State criminal proceedings and *Fair Work Act* civil proceedings. The central question arising in this proceeding is whether the *Wage Theft Act* is inconsistent with the *Fair Work Act* for the purposes of s 109 of the Constitution. It is not.

PART III: SECTION 78B NOTICES AND INTERVENTION

3. The Attorney-General for the State of **Victoria** intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of the defendant.
4. The plaintiffs have given notice pursuant to s 78B of the *Judiciary Act 1903* (Cth).

PART IV: MATERIAL FACTS

5. By demurrer dated 19 May 2023 (Demurrer Book (**DB**) 135), the defendant demurred to the whole of the plaintiffs’ amended statement of claim dated 16 May 2023. The demurrer “assumes that the pleadings exhaust the universe of relevant factual material”.¹ For the purposes of the proceeding, the defendant is taken to admit the facts pleaded in the amended statement of claim (DB 125-133), but not the pleaded conclusions of law.² The defendant and Victoria therefore do not dispute the facts taken from the amended statement of claim at [5]-[9] of the plaintiffs’ submissions filed on 7 July 2023 (**PS**).

PART V: ARGUMENT

10 A. INTRODUCTION AND SUMMARY

6. It is well settled that when a law of a State is inconsistent with a law of the Commonwealth, s 109 of the Constitution resolves the conflict by giving the Commonwealth law paramountcy and rendering the State law invalid to the extent of the inconsistency.³ “Invalid” in this sense means that the State law is “inoperative” while the federal law is in force.⁴ It does not mean that the State law is beyond the legislative power of the State Parliament.⁵
7. The question of whether a State law is inconsistent with a Commonwealth law is to be determined as a matter of construction.⁶

¹ *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 357 [50] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also *Director of Public Prosecutions (Cth) v JM* (2013) 250 CLR 135 at 154 [33] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

² *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 135 (Gibbs J), referring to *Ford v Peering* (1789) 1 Ves Jun 72; *Levy v Victoria* (1997) 189 CLR 579 at 598-599 (Brennan CJ).

³ *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428 at 446 [29] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

⁴ See *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 274 (Fullagar J); *Western Australia v Commonwealth* (‘Native Title Act Case’) (1995) 183 CLR 373 at 465 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

⁵ *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557 at 573 (Latham CJ).

⁶ *Outback Ballooning* (2019) 266 CLR 428 at 447 [34] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); PS [13].

8. The plaintiffs have addressed the question of inconsistency by reference to the “direct” and “indirect” “tests” of, or approaches to, inconsistency (PS [10]). The first approach involves asking whether the State law would “alter, impair or detract from” the operation of the Commonwealth law. The second approach involves asking whether a Commonwealth law is to be read as expressing an intention to say “completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed”, often described as an intention to “cover the field”.⁷
9. There has been some criticism of the utility in distinguishing between direct and indirect inconsistency.⁸ The “more complete explanation” offered by Aickin J in *Ansett Transport Industries (Operations) Pty Ltd v Wardley*, and endorsed by Gageler J in *Outback Ballooning*,⁹ is that “[t]he two different aspects of inconsistency [ie direct and indirect inconsistency] are no more than a reflection of different ways in which the Parliament may manifest its intention that the federal law, whether wide or narrow in its operation, should be the exclusive regulation of the relevant conduct”.¹⁰ And it is, at least, accepted that that the two approaches are “interrelated”, rather than “mutually exclusive” (cf PS [10]).¹¹ Both “approaches” are “directed to the same end”: to discern whether a “real conflict” exists between the two laws.¹²
10. However, given that the direct and indirect tests of inconsistency have been accepted in several cases,¹³ Victoria addresses each in responding to the plaintiffs’ submissions.

⁷ *Outback Ballooning* (2019) 266 CLR 428 at 447 [32]-[33] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), drawing on the two approaches adopted by Dixon J in *Victoria v Commonwealth* (*‘The Kakariki’*) (1937) 58 CLR 618 at 630.

⁸ See, eg, *Momcilovic v The Queen* (2011) 245 CLR 1 at 116 [261] (Gummow J), 134 [318], 140-142 [339]-[342] (Hayne J); *Outback Ballooning* (2019) 266 CLR 428 at 458-459 [70]-[72] (Gageler J), 472-473 [105]-[107] (Edelman J).

⁹ *Outback Ballooning* (2019) 266 CLR 428 at 459 [71].

¹⁰ *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 280.

¹¹ *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 525 [42] (the Court).

¹² *Jemena* (2011) 244 CLR 508 at 525 [42] (the Court).

¹³ See, eg, *Dickson v The Queen* (2010) 241 CLR 491 at 502 [13]-[14] (the Court); *Jemena* (2011) 244 CLR 508 at 525 [39] (the Court); *Williams v Wreck Bay Aboriginal Community Council* (2019) 266 CLR 499 at 522 [63], 522-523 [65] (Kiefel CJ, Keane, Nettle and Gordon JJ).

11. Applying each of those approaches to the present case, the *Wage Theft Act* is not inconsistent with the *Fair Work Act*.

11.1 *First*, s 26(1) of the *Fair Work Act* does not apply to the *Wage Theft Act* because the *Wage Theft Act* is not a “State ... industrial law” for the purposes of that provision. This is because the *Wage Theft Act* does not meet the criteria prescribed by the definition of that term in s 26(2)(b), which is relied on by the plaintiffs. It does not “appl[y] to employment generally” for the purposes of the chapeau to s 26(2)(b) as that phrase is defined in sub-s (4), nor does it provide for the “establishment or enforcement of terms and conditions of employment” (s 26(2)(b)(ii)) or the “making and enforcement” of instruments “determining terms and conditions of employment” (s 26(2)(b)(iii)). Accordingly, the asserted basis for indirect inconsistency falls away.

11.2 *Second*, there is no direct inconsistency between the *Fair Work Act* and the *Wage Theft Act*. The *Fair Work Act* expressly recognises that the same conduct (or substantially the same conduct) can give rise to both civil penalty proceedings under the *Fair Work Act* and criminal proceedings. It makes express provision for the sequencing of, and interaction between, such proceedings. Far from altering, impairing or detracting from the *Fair Work Act*, the *Wage Theft Act* operates harmoniously with the Commonwealth scheme.

20 12. It follows that the relief sought by the plaintiffs should be refused.

13. However, even if the Court was to determine that there is an inconsistency between the *Wage Theft Act* and the *Fair Work Act*, the declarations of inconsistency sought by the plaintiffs are too broad. Any declaration of inconsistency should not invalidate the entire *Wage Theft Act*; it should go no further than the alleged inconsistency, which arises from the provisions of the *Wage Theft Act* concerned with the specific types of employee entitlements that the plaintiffs are charged with withholding.¹⁴ There is no basis, for example, for any declaration of inconsistency to extend to the provisions of the *Wage Theft Act* that establish the Wage Inspectorate, which has powers and functions not only

¹⁴ Being those relating to casual loading, breaks and payment in lieu, minimum rates, superannuation, overtime, penalty rates and public holidays: amended statement of claim, DB 129-130, [18(b)]; PS [9].

under the *Wage Theft Act* but also under other Victorian Acts. Nor is there any basis for declaratory relief to extend to the Wage Inspectorate’s investigation and prosecution of the record-keeping offences in ss 7 and 8 of the *Wage Theft Act* or to provisions in the *Wage Theft Act* in so far as they concern “non-excluded matters” under s 27 of the *Fair Work Act*.

14. Finally, the plaintiffs are precluded from relying upon PS [37]-[39], which purport to impugn statements made by Departmental officers to a parliamentary committee.¹⁵ That is both because the pleadings exhaust the universe of relevant factual material in this proceeding,¹⁶ and because the reliance on statements made to a parliamentary committee would breach parliamentary privilege.¹⁷

B. THE FAIR WORK ACT

15. The *Fair Work Act* “is a sprawling Act of the Commonwealth Parliament covering a range of employment and industrial matters”.¹⁸ It applies principally to “national system employers” (s 14) and “national system employees” (s 13). In Victoria (as a “referring State” that referred matters before 1 July 2009), the meanings of “national system employee” and of “national system employer”¹⁹ are extended by ss 30C and 30D of the *Fair Work Act*, to apply generally to employers and employees in Victoria except where

¹⁵ Being the Public Accounts and Estimates Committee, a Joint House Committee established under s 5(h) of the *Parliamentary Committees Act 2003* (Vic).

¹⁶ See footnotes 1-2 above. The charge sheets at DB 4-54 (charges against the first plaintiff) and DB 55-105 (charges against the second plaintiff) are included in the demurrer book because those filed charges are referred to in the amended statement of claim at DB 129-130, [16]-[18].

¹⁷ Section 50(1)(b) of the *Parliamentary Committees Act* provides that the proceedings of a Joint Investigatory Committee “must not be the subject of, or in any way be called into question in, a proceeding before a court”. Section 10 of the *Evidence Act 1995* (Cth) preserves the operation of parliamentary privilege laws as they arise in a proceeding before a court to which the *Evidence Act* applies, including a proceeding in the High Court: s 4(1), s 3, Sch (Dictionary), definition of “federal court”. See *Mees v Roads Corporation* (2003) 128 FCR 418 at 442 [75] (Gray J); *Australian Workers’ Union v Registered Organisations Commissioner (No 7)* [2019] FCA 195 at [45]-[48] (Bromberg J).

¹⁸ *HJ v Independent Broad-based Anti-Corruption Commission* (2022) 370 FLR 342 at 347 [20] (Emerton P, Beach and Macaulay JJA).

¹⁹ The ordinary operation of which is necessarily limited by the limits of Commonwealth legislative power.

the extended operation of the *Fair Work Act* is excluded by the *Fair Work (Commonwealth Powers) 2009* (Vic) (the **Referral Act**).²⁰

16. Chapter 1, Part 1-3, Division 2 of the *Fair Work Act* concerns the interaction between the *Fair Work Act* and State and Territory laws. Section 26(1) states that the *Fair Work Act* is “intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer”. Relevantly,²¹ s 26(2)(b) provides that a “State or Territory industrial law” is “an Act of a State or Territory that **applies to employment generally** and has **one or more** of [the matters listed at (i)-(vi) of subparagraph (b)] **as its main purpose** or one or more of its main purposes” (emphasis added). These matters include: “providing for the establishment or enforcement of terms and conditions of employment” (s 26(2)(b)(ii)); and “providing for the making and enforcement of agreements ... and other industrial instruments or orders, determining terms and conditions of employment” (s 26(2)(b)(iii)). Section 27 of the *Fair Work Act* identifies State and Territory laws and matters (“non-excluded matters”) that are not excluded by the operation of s 26(1).
17. Chapter 2 provides for terms and conditions of employment of national system employees (s 5(1)). Part 2-1 deals with compliance with, and interaction between, the sources of the main terms and conditions provided under the Act (s 5(2)). Part 2-2 contains one of those sources — the National Employment Standards, which are minimum terms and conditions that apply to all national system employees (s 5(3)). Parts 2-3, 2-4 and 2-5 concern other sources, which include modern awards, enterprise agreements, workplace determinations made by the Fair Work Commission, national minimum wage orders, and equal remuneration orders (ss 5(4)-(6) and (8)(a)). Relevantly,²² Chapter 2 contains provisions prohibiting contraventions of the National Employment Standards (s 44(1)) and the terms of modern awards (s 45), enterprise agreements (s 50), workplace determinations (s 280), national minimum wage orders (s 293), and equal remuneration

²⁰ See Referral Act, s 5. The Referral Act effected a referral of legislative power to the Commonwealth by reference to (a) the initial referred provisions (being the schedule text of the *Fair Work Act*), (b) the referred subject matters but only with respect to any such matter by the making of express amendments, and (c) the referred transition matters: Referral Act, s 4. See also *Fair Work Act*, s 30H.

²¹ See PS [15(a)], [30].

²² See PS [19], [34].

orders (s 305). Part 2-9, Division 2 also provides for other terms and conditions of employment, including s 323, which concerns the method and frequency of payments to employees for the performance of work.²³

18. Chapter 3 sets out rights and responsibilities of national system employees, national system employers, organisations, and other entities such as independent contractors and industrial associations (s 6(1)). Part 3-6 imposes responsibilities on employers that include obligations to keep records (s 535(1) and (4)) and give payslips (s 536(1) and (3)).²⁴
- 10 19. Chapter 4 provides for compliance with, and enforcement of, the Act (s 7). Part 4-1 provides for civil remedies in relation to the contravention of provisions that are designated as civil remedy provisions (s 537). Division 2, Subdivision A concerns applications for orders in relation to contraventions of civil remedy provisions (s 537). It includes s 539, which provides that specified persons may apply to specified courts for orders in relation to a contravention or proposed contravention of a civil remedy provision.²⁵
- 20 20. The orders which a particular court can make in relation to the contravention of a civil remedy provision are set out in Part 4-1, Division 2, Subdivision B. Section 545(2), without limiting the broad power to make appropriate orders in s 545(1), includes examples of orders that the Federal Court or the Federal Circuit and Family Court of Australia may make, including an injunction “to prevent, stop or remedy the effects of a contravention”, an order awarding compensation for loss suffered because of the contravention, and an order for the re-instatement of a person. Section 545(3) provides that eligible State or Territory courts “may order an employer to pay an amount to, or on behalf of, an employee” in certain circumstances. Section 546 specifies when pecuniary penalty orders may be made, the maximum amount for any such penalty, and enables the court to order that the pecuniary penalty (or part of it) be paid to the Commonwealth, or a particular organisation or a particular person. Pecuniary penalty orders may be made in addition to one or more orders under s 545 (s 546(5)).

²³ See PS [20], [34].

²⁴ See PS [23], [45].

²⁵ The civil remedy provisions, persons, courts and maximum penalties are specified in a table at s 539(2).

21. Part 4-1, Division 4 contains general provisions relating to civil remedies. It includes s 549, which provides that the contravention of a civil remedy provision is not an offence. Division 4 also contains ss 552, 553 and 554, which “deal with the interaction between civil and criminal proceedings” arising from substantially the same conduct.²⁶
- 21.1 Section 552 prohibits a court from making a pecuniary penalty order against a person for a contravention of a civil remedy provision if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention.
- 10 21.2 Section 553(1) provides that proceedings for a pecuniary penalty order against a person for a contravention of a civil remedy provision are stayed if: (a) criminal proceedings are commenced or have already commenced against the person for an offence; and (b) the offence is constituted by conduct that is substantially the same as the conduct in relation to which the order would be made. The proceedings may be resumed if the person is not convicted of the offence (s 553(2)).
- 21.3 Section 554 provides that criminal proceedings may be commenced against a person for conduct that is substantially the same as conduct constituting a contravention of a civil remedy provision, regardless of whether an order has been made against the person under Division 2 (contravention of civil penalty provisions).
- 20 22. In addition, s 555(1) provides that information given or documents produced by an individual in proceedings for a pecuniary penalty order for a contravention of a civil remedy provision are not admissible as evidence in criminal proceedings against the individual if the conduct alleged to constitute the offence is substantially the same as the conduct in relation to which the pecuniary penalty order is sought. This provision does not apply where the criminal proceedings relate to the falsity of evidence given by the individual in proceedings for the pecuniary penalty order (s 555(2)).
23. Chapter 5 provides for the administration of the *Fair Work Act* by establishing the Fair Work Commission (Pt 5-1) and the Office of the Fair Work Ombudsman (Pt 5-2) (s 8).

²⁶ Explanatory Memorandum, Fair Work Bill 2008 (Cth), 332 [2180].

C. THE *WAGE THEFT ACT*

24. The purposes of the *Wage Theft Act* are: 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 Wage Inspectorate Victoria (s 1(b)); and to provide for its functions and powers in relation to the investigation and enforcement of employee entitlement offences and related matters (s 1(c)).
25. An “employee entitlement”, as defined in s 3(1) of the *Wage Theft Act*, is “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”, and includes “wages or salary, allowances and gratuities, and the attribution of annual leave, long service leave, meal breaks and superannuation” payable in accordance with relevant laws, or contracts or agreements, whichever gives rise to the greater amount or benefit.
26. An “employee entitlement offence” is defined in s 3(1) to mean:
- 26.1 an offence against ss 6(1) or 6(7) (dishonest withholding of employee entitlements by an employer or an officer of an employer);
- 26.2 an offence against ss 7(1) or 7(2) (falsification of an employee entitlement record by an employer or an officer of an employer);
- 26.3 an offence against ss 8(1) or 8(2) (failure to keep an employee entitlement record by an employer or an officer of an employer);
- 26.4 an offence against ss 321 (conspiracy), 321G (incitement) or s 321M (attempt) of the *Crimes Act 1958* (Vic) in relation to the offences referred to in [26.1]-[26.3] above; and
- 26.5 an offence against s 257(1) of the *Crimes Act* (intimidation or reprisals relating to a criminal investigation or criminal proceeding) in relation to the offences referred to in [26.1]-[26.4] above.
27. Part 2 of the *Wage Theft Act* is entitled “Wage theft offences” and provides, among other things, for the employee entitlement offences referred to in [26.1] to [26.3] above, each

of which is punishable by a maximum of 10 years imprisonment²⁷ or, in the case of a body corporate, a penalty of up to 6000 penalty units.

28. Part 3, Division 1 of the *Wage Theft Act* concerns the Wage Inspectorate. Section 19 establishes the Wage Inspectorate and s 20 sets out its functions, which include: investigating the commission or possible commission of employee entitlement offences and related matters (s 20(1)(c)); bringing criminal proceedings in relation to alleged employee entitlement offences (s 20(1)(d)); and working with the Office of Public Prosecutions in respect of criminal proceedings in relation to alleged employee entitlement offences (s 20(1)(e)).
- 10 29. Part 4 empowers the Wage Inspectorate to investigate possible employee entitlement offences (Div 1, s 32), provides for the appointment of inspectors (Div 2), and confers powers on inspectors (Div 3 to Div 6). The Wage Inspectorate has the power to compel production of documents and to require a person to attend to give evidence (Div 8).
30. The application of the *Wage Theft Act* is specified in s 5 of the Act. As explained in further detail below, s 5 does not provide that the Act applies to all employers and employees in Victoria. Instead, whether it applies requires an assessment of where the relevant employee performs the services for which employee entitlements are paid, payable or attributable.
- 20 31. Further, the Wage Inspectorate exercises powers and performs functions under the *Child Employment Act 2003* (Vic),²⁸ *Owner Drivers and Forestry Contractors Act 2005* (Vic),²⁹ *Long Service Leave Act 2018* (Vic),³⁰ and *Child Wellbeing and Safety Act 2005* (Vic).³¹ The Wage Inspectorate is also a “prescribed sector regulator” for the purposes of

²⁷ Or “level 5 imprisonment”, which renders each of the offences indictable offences: see *Sentencing Act 1991* (Vic), s 112.

²⁸ Which has various purposes related to the regulation of the employment of children under the age of 15 years and the protection of those children: s 1.

²⁹ Which regulates the relationship between persons who contract to transport goods in a vehicle, or harvest forest products using motorised equipment supplied by them, and persons who hire them: s 1(1).

³⁰ Which makes provision with respect to the long service leave entitlements of certain employees: s 1(a).

³¹ Which has various purposes related to child wellbeing and safety: s 1.

the *Child Wellbeing and Safety Act*.³² Among other things, the Wage Inspectorate may appoint persons to exercise powers under those Acts,³³ and has the power to prosecute offences.³⁴

D. NO INDIRECT INCONSISTENCY: *WAGE THEFT ACT* IS NOT EXCLUDED BY S 26(1) OF THE *FAIR WORK ACT*

32. The plaintiffs submit that there is an indirect inconsistency between the *Wage Theft Act* and the *Fair Work Act* because of s 26(1) of the *Fair Work Act* (PS [30]-[31]). The plaintiffs submit that the *Wage Theft Act* is a “State or Territory industrial law” for the purposes of s 26(1), with the result that the *Fair Work Act* applies to the exclusion of the *Wage Theft Act* insofar as it would otherwise apply to national system employees and employers. In support of that submission they rely, in particular, on the alternative limbs of the definition of “State or Territory industrial law” in s 26(2)(b)(ii) and (iii). However, s 26(1) does not apply because the *Wage Theft Act*:

32.1 does not have “as its main purpose or one or more of its main purposes” the provision of the matters described in s 26(2)(b)(ii) or (iii) of the *Fair Work Act* (cf PS [30]); and

32.2 in any event, is not an Act that “applies to employment generally” as that phrase is defined in s 26(4) of the *Fair Work Act*, for the purpose of the chapeau to s 26(2)(b).

D.1 The *Wage Theft Act* does not have either of the asserted “main purposes”

33. Section 26(2)(b)(iii) of the *Fair Work Act* describes a State Act that has as its main purpose, or one of its main purposes, providing for³⁵ the **making and enforcement** of certain agreements and other industrial instruments and orders that determine terms and conditions of employment (cf PS [15]). This purpose can be eliminated immediately,

³² See *Child Wellbeing and Safety Act*, s 25B(1)(a)(i), Sch 1 item 41, and *Child Wellbeing and Safety Regulations 2017* (Vic), reg 7A(b).

³³ *Child Employment Act*, s 38; *Owner Drivers and Forestry Contractors Act*, s 60A; *Long Service Leave Act*, s 29; *Child Wellbeing and Safety Act*, s 27.

³⁴ *Child Employment Act*, s 49A; *Owner Drivers and Forestry Contractors Act*, s 60K; *Long Service Leave Act*, s 40; *Child Wellbeing and Safety Act*, s 29S.

³⁵ The ordinary meaning of “provide” in this context is “[t]o supply (something) for use; to make available; to yield, afford” and is “[f]requently with *for, to*, indicating the beneficiary”: *Oxford English Dictionary* (online at 1 August 2023) (def II.6). See *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452 at 465 [49]-[50] (the Court) in a different statutory context.

because the *Wage Theft Act* does not provide for the “making and enforcement” of any such agreements, instruments or orders (cf PS [30]).

34. Section 26(2)(b)(ii) describes a State Act that has as its main purpose, or one of its main purposes, providing for the **establishment or enforcement** of terms and conditions of employment.
35. The purpose of the *Wage Theft Act* “resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction”.³⁶ The starting point is the express statements of purpose in s 1 of the Act.
36. The first (and primary) purpose in s 1 is “to create offences relating to the theft of employee entitlements and the keeping of records relating to employee entitlements”.³⁷ This purpose is achieved through the offence provisions in Part 2. The offence provisions are carefully calibrated such that criminal consequences are only capable of attaching to deliberate, in particular “dishonest”, withholding of entitlements or record-keeping failures.³⁸ Having created those offences, the *Wage Theft Act* also empowers the Wage Inspectorate to investigate and prosecute such offences.³⁹ That is clear from the second and third stated purposes in s 1 and from the text and structure of the balance of the Act.
37. It is through this scheme for the creation, investigation and prosecution of criminal offences that the Act achieves its “key objective”, which is to hold employers who commit such offences “to account” by the imposition of criminal sanctions.⁴⁰ In other words, the Act is designed to enable the criminal justice system, through the application of criminal

³⁶ *Lacey v A-G (Qld)* (2011) 242 CLR 573 at 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378 at 389 [25] (French CJ and Hayne J).

³⁷ *Wage Theft Act*, s 1(a).

³⁸ The offences in ss 7 and 8 cannot provide a hook to engage s 26(2)(b)(iii) of the *Fair Work Act*. They concern employer record-keeping obligations, which are not understood to be a “term or condition of employment”. Consistently with this, the record-keeping obligations of national system employers are found in Chapter 3, Part 3-6, Division 3 of the *Fair Work Act*, which deals with employer “responsibilities” (see [18] above), and not in Chapter 2.

³⁹ *Wage Theft Act*, s 20(1)(b)-(e).

⁴⁰ See Explanatory Memorandum, Wage Theft Bill 2020, 1; see also the reference in the second reading speech to “jail terms” and that “theft is theft ... just because it was committed by an employer does not make it any less of a crime”: Victoria, *Parliamentary Debates*, Legislative Assembly, 19 March 2020, 1097.

process and the criminal standard of proof, to impose *punishment* on those who commit the offences created by the Act.

38. The enforcement of terms and conditions of employment is therefore not a main purpose of the *Wage Theft Act*. To enforce terms and conditions of employment, as the *Fair Work Act* does, is to regulate matters which concern the relationship *between employers and employees*.⁴¹ The *Wage Theft Act* does not seek to regulate that relationship. To the contrary, by creating criminal offences that enable courts to punish offenders, its operation is directed to the relationship *between the State and its subjects*.
39. As this Court has recognised, criminal punishment imports notions of retribution.⁴² In contrast, civil penalties such as those capable of being imposed under the *Fair Work Act* are not retributive and are instead protective of the public interest, in that they aim to secure compliance by deterring repeat contraventions.⁴³ Indeed, to introduce considerations drawn from theories of retributive justice into the application of civil penalty regimes would undermine the primary significance of deterrence.⁴⁴ The imposition of criminal punishment achieves public denunciation of the unlawful conduct of the offender. It signifies the recognition by society of the nature and significance of the wrong and the public attribution of responsibility for that wrongdoing to the perpetrator. A civil penalty proceeding is precisely calculated to avoid the notion of criminality.⁴⁵
40. The criminal regime created by the *Wage Theft Act* is designed to punish and denounce those who engage in the dishonest conduct that is proscribed by the Act. The fundamental

⁴¹ Albeit that such regulation may involve persons outside that direct relationship. For example, persons able to apply to a court for a breach of a civil remedy provision may include an employee organisation and a Fair Work Inspector: *Fair Work Act*, s 539.

⁴² *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 (*'Agreed Penalties Case'*) at 506 [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ). Retribution has been described as playing a "central role" in criminal sentencing: *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 at 467 [38] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

⁴³ *Pattinson* (2022) 274 CLR 450 at 468 [42] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *Agreed Penalties Case* (2015) 258 CLR 482 at 495 [24], 506 [55], 508 [59] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

⁴⁴ *Pattinson* (2022) 274 CLR 450 at 468 [42] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

⁴⁵ *Agreed Penalties Case* (2015) 258 CLR 482 at 505 [54] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

difference in the character of that criminal regime and the industrial regime created by the *Fair Work Act* is not altered by the fact that the civil penalty scheme established by the *Fair Work Act* enables a pecuniary penalty order to be made for a contravention of a civil remedy provision (s 546) and for the size of any pecuniary penalty to be increased for a serious contravention of civil remedy provisions (ss 539, 557A, 557B) (cf PS [36]). Indeed, “the Act is emphatic in drawing a distinction between its civil penalty regime and criminal proceedings”.⁴⁶

41. And while there may be associated public benefits with the creation, investigation, and prosecution of the offences for which the *Wage Theft Act* provides, to accept this is simply to accept that the deterrent effect of that criminal law may “help” prevent the theft of employee entitlements.⁴⁷ That does not make *enforcement* of the terms and conditions of employment a main purpose of the Act (cf PS [30]).⁴⁸

D.2 The *Wage Theft Act* does not apply to employment generally

42. In addition, in order to qualify as an Act that “applies to employment generally”, s 26(4) of the *Fair Work Act* requires that the *Wage Theft Act* apply (subject to constitutional limitations) to:

42.1 all employers and employees in the State or Territory (s 26(4)(a)); or

42.2 all employers and employees in the State or Territory except those identified (by reference to a class or otherwise) by a law of the State or Territory (s 26(4)(b)).

⁴⁶ *Pattinson* (2022) 274 CLR 450 at 458-459 [14] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), referring to *Fair Work Act*, ss 549 (contravening a civil remedy provision is not an offence), 551 (civil evidence and procedure rules), 552 (civil proceedings after criminal proceedings).

⁴⁷ Victoria, *Parliamentary Debates*, Legislative Assembly, 19 March 2020, 1097.

⁴⁸ Sections 84(4A) to (4C) of the *Sentencing Act* provide that an application may be made for a restitution order if a person is found guilty or convicted of an offence against ss 6(1), 6(7), 7(1), 7(2), 8(1) or 8(2) of the *Wage Theft Act*. Section 84(5)(b) permits an application to be made by the person who seeks the restitution order, or on that person’s behalf by the Director of Public Prosecutions or the informant or police prosecutor, as the case may be. Section 85 provides for the enforcement of a restitution order. A conviction (or finding of guilt) for an offence under the *Wage Theft Act* therefore provides a necessary criterion for an application for restitution under the *Sentencing Act*. However, these provisions of the *Sentencing Act* also do not convert the main purpose of the *Wage Theft Act* from that described above at [35]-[37].

43. Section 5 of the *Wage Theft Act* specifies how the Act applies. Its effect is that the *Wage Theft Act* does not apply to “all employers and employees” in Victoria, or to all employers and employees but for an identified class.
44. Pursuant to s 5(1)(a) of the *Wage Theft Act*, the Act applies to employee entitlements paid, payable or attributable by an employer for or in relation to services that are performed by an employee “wholly in Victoria”. In addition, it applies:
- 44.1 where the performance of services by an employee is split between “2 or more Australian jurisdictions” or split between “one or more Australian jurisdictions” and a location “outside Australia”, as long as certain specified criteria that provide for a connection with Victoria are satisfied (s 5(1)(b)); and
- 44.2 where the performance of services by an employee is wholly outside Australia, but the employee entitlements are paid, payable or attributable in Victoria (s 5(1)(c)).
45. On a plain reading of s 5, the *Wage Theft Act* does **not** apply to:
- 45.1 an employer based in Victoria whose employees are based in another Australian jurisdiction and perform services wholly in that jurisdiction; or
- 45.2 an employer based in Victoria whose employees are based in another Australian jurisdiction and perform services partly in Victoria and partly in that other jurisdiction; or
- 45.3 an employer based outside of Victoria whose employees are based in another Australian jurisdiction and perform services partly in Victoria and partly in that other jurisdiction.
46. It follows that the *Wage Theft Act* does not apply to all employers and employees in Victoria for the purposes of s 26(4)(a) of the *Fair Work Act*.
47. Further, the *Wage Theft Act* does not apply to “all employers and employees” in Victoria “except those identified (by reference to a class or otherwise)”, for the purposes of s 26(4)(b) of the *Fair Work Act*. Section 26(4)(b) would be engaged if s 5 was framed in terms that applied the *Wage Theft Act* to apply to “all employers and employees” except an identified group, for example “casual employees”. The statutory test in s 26(4)(b)

requires consideration of whether the relevant State Parliament has carved out a class from the law's general application to all employers and employees. The *Wage Theft Act* is not framed in this way. Although the operation of s 5 means that the Act applies to some persons and not others, that is generally true of legislation, so cannot be the test for engaging s 26(4)(b).⁴⁹ The *Wage Theft Act* applies to particular classes of employees and employers, albeit those classes are broadly framed. To find that the *Wage Theft Act* is an Act that engages s 26(4)(b) would turn the statutory test on its head.

48. It follows that the *Wage Theft Act* is not “an Act ... that applies to employment generally” and s 26(2)(b) of the *Fair Work Act* does not apply.

10 49. For the reasons outlined above at [33]-[41], and the reasons outlined at [42]-[48], the *Wage Theft Act* is not a State industrial law, s 26(1) of the *Fair Work Act* does not apply to it, and the plaintiffs' submissions as to indirect inconsistency must fail.

E. NO DIRECT INCONSISTENCY

50. Consideration of an allegation of direct inconsistency requires a careful analysis of the two relevant laws and their proper construction, bearing in mind that it is necessary that any alteration, impairment of, or detraction from a Commonwealth law “be significant and not trivial”, which is a question of fact and degree.⁵⁰

20 51. The plaintiffs' broad submission is that there is “direct inconsistency”⁵¹ between the *Fair Work Act* and the *Wage Theft Act* because those Acts result in “competing and conflicting laws for inspection and investigation, modes of trial, trial procedure, fora, and

⁴⁹ A State Act of this nature was not intended to be captured by s 26(4)(b). See Explanatory Memorandum, Fair Work Bill 2008 (Cth), 20 [137]: “Examples of laws that do not apply to employment generally include laws that apply to a single industry sector, or to a particular class of employees and their employers or to only one employer and its employees (e.g., a law creating a body corporate and setting terms and conditions of employment for its employees)”.

⁵⁰ *Bell Group NV (in liq) v Western Australia* (2016) 260 CLR 500 at 521-522 [52] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ), citing *Jemena* (2011) 244 CLR 508 at 525 [41] (the Court). See also *Burns v Corbett* (2018) 265 CLR 304 at 389 [190] (Gordon J).

⁵¹ Although the plaintiffs frame their argument here as that of “direct inconsistency”, it could equally be put as an argument as to “indirect inconsistency” arising outside the context of s 26 of the *Fair Work Act* – to which these submissions would also be applicable. Indeed, the primary cases cited by the plaintiffs in support of their direct inconsistency case on the basis of “conflicting curial punishments” are more properly characterised as cases of indirect inconsistency: see *Ex parte McLean* (1930) 43 CLR 472 at 479 (Isaacs CJ and Starke J), 483 (Dixon J); *Hume v Palmer* (1926) 38 CLR 441 at 447-448 (Knox CJ).

punishment” (PS [34]). The plaintiffs refer specifically to the civil remedy provisions in ss 44, 45, 50, 280, 293, 305, 323(1),⁵² 546 and 549 of the *Fair Work Act* and rely, “chiefly”, on the fact that the *Fair Work Act* provides for the imposition of civil, not criminal, “punishment” (PS [34]-[35]).⁵³ However, an analysis of both laws reveals that the *Wage Theft Act* does not undermine the Commonwealth law.

- 10 52. Although the civil penalty regime established by the *Fair Work Act* avoids the notion of criminality (PS [35]), it does not follow that a State law imposing criminal sanctions for the same conduct will be inconsistent with the Commonwealth Act. The “mere fact” that a Commonwealth Act and State Act impose different penalties for the same conduct is insufficient to establish inconsistency.⁵⁴ There is no presumption that a Commonwealth offence (or civil remedy provision) excludes the operation of other laws.⁵⁵
53. The civil penalty regime in the *Fair Work Act* makes clear that the availability of civil remedies for certain conduct does not exclude the operation of the criminal law. Sections 552 to 554 were included in the *Fair Work Act* precisely to deal with the interaction between civil and criminal proceedings, including proceedings in respect of

⁵² Note that it has been doubted that there is any “settled authority to the effect that an employer contravenes s 323(1) of the [*Fair Work Act*] *only because* an employer ... fails to pay an employee for work done”: *Coote v Mainline Access Pty Ltd (No 3)* (2019) 344 FLR 1 at 17 [56] (Judge Manousaridis) (emphasis in original). And see *Robinson v BMF Pty Ltd (in liq) (No 2)* [2022] FCA 1191 at [235] (Mortimer J), noting the existence of conflicting authorities.

⁵³ It is notable that the plaintiffs do not here refer to ss 535 and 536 of the *Fair Work Act*, but nevertheless assert at PS [43] that the *Wage Theft Act* record-keeping offences should be declared invalid by the Court.

⁵⁴ See *McWaters v Day* (1989) 168 CLR 289 at 296 (the Court), in which the Court undertook the inconsistency analysis through the prism of indirect inconsistency (reflecting the interrelated nature of the two approaches: see [9] above).

⁵⁵ *Outback Ballooning* (2019) 266 CLR 428 at 449 [40] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) (also considering this issue through the prism of indirect inconsistency). See also the example given by Dixon J in *Ex parte McLean* (1930) 43 CLR 472 at 485-486: “[I]f the [Commonwealth] award in this case expressly forbade shearers to injure sheep when shearing, it would not be a necessary consequence that a shearer who unlawfully and maliciously wounded a sheep he was shearing could not be prosecuted under the State criminal law for unlawfully and maliciously wounding an animal”.

State criminal laws⁵⁶ (see [21] above). More specifically, these provisions are directed at ensuring that the rule or principle against double jeopardy is not infringed.⁵⁷

54. The criminal proceedings to which these provisions apply include prosecutions of “offences in contravention of one or more numerous State and Commonwealth laws and further or alternatively, the common law”.⁵⁸ The manner in which those proceedings are filed, prosecuted and disposed of varies between the Commonwealth and the State and in between States,⁵⁹ as do the particular investigative processes leading to such proceedings. It follows that the differences in “inspection and investigation, modes of trial, trial procedure, fora, and punishment” upon which the plaintiffs fasten (PS [34]) are specifically contemplated by the *Fair Work Act*. Further, to the extent that procedural differences in the *Wage Theft Act* are relied upon by the plaintiffs to establish inconsistency (such as modes of trial, fora, and sentencing regimes), those matters are not part of the “law of a State” which may give rise to constitutional inconsistency.⁶⁰
55. Sections 552 to 554 of the *Fair Work Act* make express provision for what is to occur when conduct that gives rise to the contravention of a civil remedy provision also gives rise to a criminal offence. For example, in *Barkly Region Alcohol and Drug Abuse Advisory Group Aboriginal Corporation v Naylor*,⁶¹ proceedings were brought against Mr and Mrs Naylor for contraventions of s 50 of the *Fair Work Act*, which prohibits contraventions of an enterprise agreement. The Naylor’s were also defendants in criminal proceedings in the Northern Territory. The Court, applying *Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate*,⁶² found that part of the proceeding was stayed by operation of s 553, but that the balance of the proceeding (seeking relief in the form of declarations, compensation and related orders)

⁵⁶ See *HJ* (2022) 370 FLR 342 at 357-358 [81]-[83] (Emerton P, Beach and Macaulay JJA).

⁵⁷ *Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* (2014) 225 FCR 210 at 218 [32] (Buchanan, Gordon and Wigney JJ) (*‘CFMEU v Director’*).

⁵⁸ *CFMEU v Director* (2014) 225 FCR 210 at 218 [31] (Buchanan, Gordon and Wigney JJ), referring to s 553 of the *Fair Work Act*.

⁵⁹ *CFMEU v Director* (2014) 225 FCR 210 at 218 [31] (Buchanan, Gordon and Wigney JJ).

⁶⁰ *Momcilovic* (2011) 245 CLR 1 at 73-74 [109] (French CJ), 108-109 [237] (Gummow J), 190-191 [479] (Heydon J), 239 [655] (Crennan and Kiefel JJ), 240-241 [660] (Bell J).

⁶¹ [2019] FCA 1292.

⁶² (2014) 225 FCR 210 at 220-221 [41]-[42] (Buchanan, Gordon and Wigney JJ).

was not stayed by s 553.⁶³ This is just one illustration of ss 552 to 554 operating to provide a carefully calibrated scheme for the co-existence of *Fair Work Act* civil proceedings and criminal proceedings arising from the same conduct,⁶⁴ thus providing a strong indication that a criminal law such as the *Wage Theft Act* will in no way “undermine” the operation of the *Fair Work Act*.⁶⁵

56. The *Fair Work Act* specifically embraces the continued operation of the criminal law in respect of conduct that also contravenes a civil penalty provision. There is no direct inconsistency with the *Wage Theft Act*.

F. RELIEF

- 10 57. It follows from the above that the relief sought by the plaintiffs should be refused.⁶⁶ However, for completeness, the defendant and Victoria submit that the declarations sought by the plaintiff (PS [45]) should be refused even if the Court finds a relevant inconsistency between the Commonwealth and State Acts. This is because the plaintiffs’ conception of “the extent of the inconsistency” is too broad — in respect of both the plaintiffs’ primary position and alternative position as to relief.
58. As outlined at [31] above, the Wage Inspectorate has a wide variety of functions under several Victorian Acts. If the entire *Wage Theft Act* is declared invalid (as is the plaintiffs’ primary position), critical aspects of other Victorian regulatory schemes will fail. A failure to “excise” from any declaration of invalidity those sections of the *Wage Theft Act* which provide for the continued existence of the Wage Inspectorate will result in
20 confusion for the citizens of Victoria, not “clarity” (cf PS [42], [44]), and will remove important protections conferred upon those citizens by the performance of the Wage Inspectorate’s functions in those other legislative contexts.

⁶³ *Naylor* [2019] FCA 1292 at [16]-[20] (Reeves J). His Honour ultimately stayed the remainder of the proceeding in the exercise of his residual discretion: at [21]-[26].

⁶⁴ Of course, ss 552 to 554 do not contemplate the concurrent operation of a State criminal law that is excluded by s 26(1) of the *Fair Work Act* (PS [40]). But that is not the case here: see Part D above.

⁶⁵ *Outback Ballooning* (2019) 266 CLR 428 at 447 [32] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

⁶⁶ See amended statement of claim, DB 133.

59. Any declaration of inconsistency should render the *Wage Theft Act* inoperative only in so far as it supports the investigation and prosecution of the plaintiffs for withholding the specific types of employee entitlements that are the subject of the charges. The plaintiffs provide no basis for the submission that any declaration should “run to the record keeping offences” in ss 7 and 8 of the *Wage Theft Act* (with which the plaintiffs have not been charged),⁶⁷ save for pointing to the existence of the record-keeping civil remedy provisions in the *Fair Work Act* (PS [45]). Further, the relief sought by the plaintiffs takes no account of the extent to which the provisions of the *Wage Theft Act* concern non-excluded matters (such as long service leave) to which s 26 of the *Fair Work Act* does not apply.⁶⁸ The plaintiffs’ position as to relief ignores the well-settled approach of this Court to constitutional matters — that it does not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.⁶⁹
60. Finally, in respect of s 570 of the *Fair Work Act*, the defendant and Victoria consider that s 570 of the *Fair Work Act* does not apply to this proceeding (cf PS [47]).⁷⁰

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

61. It is estimated that up to 2.5 hours will be required for the presentation of the joint oral argument of the defendant and Victoria.

Date: 18 August 2023

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⁶⁷ See amended statement of claim, DB 129-130, [18].

⁶⁸ *Fair Work Act*, s 27. As noted in [25] above, “employee entitlement” is defined in s 3(1) to include long service leave.

⁶⁹ *Clubb v Edwards* (2019) 267 CLR 171 at 216 [135] (Gageler J), quoting the principles of judicial restraint of the Supreme Court of the United States (citations omitted).

⁷⁰ See *Re McJannet; Ex parte Australian Workers’ Union of Employees (Qld)* (1997) 189 CLR 654 at 656-657 (Brennan CJ, McHugh and Gummow JJ); *Tristar Steering and Suspension Australia Ltd v Industrial Relations Commission (NSW) (No 2)* (2007) 159 FCR 274 at 275 [2] (Kiefel J), 279 [16] (Buchanan J).

**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

No. M16/2023

BETWEEN:

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

and

10

GAURAV SETIA
Second Plaintiff

and

ROBERT HORTLE
Defendant

**ANNEXURE TO THE JOINT SUBMISSIONS OF THE DEFENDANT AND THE
ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)**

20 Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, set out below is a list of the particular constitutional provisions and statues referred to the joint submissions of the defendant and the Attorney-General for the State of Victoria (intervening).

	Commonwealth Act	Provision(s)	Version
1.	Commonwealth Constitution	s 109	Current, Compilation No. 6
2.	<i>Evidence Act 1995</i>	s 3, Sch (Dictionary) ss 4, 10	Current, Compilation No. 34
3.	<i>Fair Work Act 2009</i>	Pt 1-1: ss 5, 6, 7, 8 Pt 1-2: ss 13, 14 Pt 1-3: ss 26, ss 30C, 30D, 30H Pt 2: ss 44, 45, 50, 280, 293, 305, 323 Pt 3-6: ss 535, 536 Pt 4-1: ss 537, 539, 545, 546, 549, 552, 553, 554, 555, 557A, 557B Pt 4-2: s 570	Current, Compilation No. 51

	Victorian Act	Provision	Version
4.	<i>Child Employment Act 2003</i>	ss 1, 38, 49A	Current, Authorised Version No. 023
5.	<i>Child Wellbeing and Safety Act 2005</i>	ss 1, 27, 29S	Current, Authorised Version No. 040
6.	<i>Crimes Act 1958</i>	ss 257, 321, 321G, 321M	Current, Authorised Version No. 299
7.	<i>Long Service Leave Act 2018</i>	ss 1, 29, s 40(1)	Current, Authorised Version No. 004
8.	<i>Fair Work (Commonwealth Powers) 2009</i>	ss 4, 5	Current, Authorised Version No. 012
9.	<i>Owner Drivers and Forestry Contractors Act 2005</i>	ss 1, 60A, 60K	Current, Authorised Version No. 20
10.	<i>Parliamentary Committees Act 2003</i>	ss 5(h), 50(1)(b)	Current, Authorised Version No. 041
11.	<i>Sentencing Act 1991</i>	s 84, 85, 112	Current, Authorised Version No. 222
12.	<i>Wage Theft Act 2020</i>	Pt 1: ss 1, 3(1), 5 Pt 2: ss 6, 7, 8 Pt 3: ss 19, 20 Pt 4: s 32	Current, Authorised Version No. 002