



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: M16/2023
File Title: Rehmat & Mehar Pty Ltd & Anor v. Hortle
Registry: Melbourne
Document filed: Form 27C - Intervener's submissions
Filing party: Interveners
Date filed: 01 Sep 2023

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M16/2023

M16/2023

BETWEEN:

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

and

GAURAV SETIA
Second Plaintiff

and

ROBERT HORTLE
Defendant

**SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR
THE STATE OF QUEENSLAND (INTERVENING)**

PART I: Internet publication

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

PARTS II and III: Intervention

2. The Attorney-General for the State of Queensland (**Queensland**) intervenes in these proceedings pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of the defendant.

PART IV: Submissions

SUMMARY OF ARGUMENT

3. Queensland submits that there is no inconsistency for the purposes of s 109 of the Constitution between the provisions of the *Fair Work Act 2009* (Cth) (**FW Act**) and the *Wage Theft Act 2020* (Vic) (**WT Act**) because:
 - (a) the ‘enforcement of terms and conditions of employment’ is not a ‘main purpose’ of the WT Act, and so the WT Act is not a ‘State or Territory industrial law’ within the meaning of s 26(1) of the FW Act (**Part A**); and
 - (b) ss 552-555 of the FW Act otherwise make plain that the FW Act does not intend to state completely, exhaustively, or exclusively what shall be the law in relation to the non-payment of employee entitlements (**Part B**).
4. Accordingly, once s 26(1) is put aside as inapplicable, it is apparent that no inconsistency—whether described as ‘direct’ or ‘indirect’—arises.
5. Queensland otherwise adopts the joint submissions of the defendant and Victoria.

STATEMENT OF ARGUMENT

A. ‘Enforcement of terms and conditions’ is not a main purpose of the WT Act

6. The ordinary meaning of the word ‘enforcement’ is ‘the act or process of compelling compliance with a law, mandate, command, decree or agreement’.¹ ‘Enforcement’ is a process which ensures that legal prohibitions are observed, and legal obligations are

¹ *Black’s Law Dictionary* (11th ed, 2019), p 669; see also *Shorter Oxford English Dictionary* (6th ed, 2007), p 833 (‘the process of compelling observance of a law, regulation’).

performed.²

7. In construing s 26(2)(b)(ii) of the FW Act, there is no reason to depart from that ordinary meaning; on the contrary, the context and purpose of the statute confirm that the word is used in its ordinary sense.³ Section 3 of the FW Act outlines that the object of the Act⁴ is to be achieved by, amongst other things, ‘ensuring a guaranteed safety net of fair, relevant and *enforceable* minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders’ (emphasis added). As s 3 foreshadows, the terms and conditions of employment established by the FW Act are made *enforceable* by Chapter 4 (headed ‘Compliance and enforcement’). Chapter 4 provides a range of processes for enforcement of those terms and conditions of employment—including by way of injunction, orders for reinstatement and compensation, and the imposition of civil penalties.⁵
8. The fact that chapter 4 of the FW Act provides for the imposition of ‘civil penalties’ does not deny, but rather reinforces, the conclusion that the word ‘enforcement’ in s 26(2)(b)(ii) is concerned with processes for securing compliance with terms and conditions of employment. As this Court has explained, civil penalty provisions in general, and s 546 of the FW Act in particular, have the ‘statutory function of securing compliance with the provisions of the [statutory] regime’.⁶ A civil penalty is ‘primarily if not wholly protective in promoting the public interest in compliance’; it promotes compliance by ‘put[ting] a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene

² Cf *Australian Pipeline Ltd v Alinta Ltd* (2007) 159 FCR 301, 323 [83] (Finkelstein J); see also *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 580 [105] (Heydon J); and *Traxys Europe SA v Balaji Coke Pvt Ltd* (2012) 291 ALR 99, where in the context of the enforcement of a foreign arbitral award, Foster J held (at 114, [69]) that “‘Enforcement’ means applying legal sanctions to compel the party against whom the award has been made to carry out its obligations thereunder.”

³ Cf *Masson v Parsons* (2019) 266 CLR 554, 572 [26] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

⁴ ‘[T]o provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.’

⁵ FW Act ss 545 and 546 FW Act; see also joint submissions of the defendant and the Attorney-General for Victoria [19]-[20].

⁶ *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450, 458 [14] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ) (*Pattinson*), citing *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482, 495 [24] (French CJ, Kiefel, Bell, Nettle and Gordon JJ) (*Agreed Penalties Case*).

the Act'.⁷ A civil penalty is therefore 'fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business'.⁸ By contrast, and as explained further below, a key concern of criminal punishment is retribution; that is, ensuring that the punishment 'fits the crime'.⁹

9. Text, context and purpose therefore compel the conclusion that s 26(2)(b)(ii) of the FW Act, properly construed, is relevantly concerned with State laws with a main purpose of setting out processes by which compliance with the terms and conditions of employment may be secured.
10. That is not a main purpose of the WT Act. Its main purpose is, instead, to stigmatise and denounce certain conduct—being the dishonest withholding of employee entitlements—and to punish those who engage in that conduct. As explained in the second reading speech for the Wage Theft Bill, 'theft is theft ... just because it was committed by an employer does not make it any less of a crime'.¹⁰ It is, no doubt, the moral aspect of criminal conviction and punishment which has meant that a 'conviction and fine even though lesser in amount than a penalty ordered to be paid would be regarded as harsher treatment'.¹¹
11. It is true that the punishment of criminal offences may also have a deterrent effect. For the criminal law, however, deterrence remains a 'secondary criterion'.¹² Consistently

⁷ *Agreed Penalties Case* (2015) 258 CLR 482, 506 [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ), citing *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076, 52,152 (French J). This passage from the *Agreed Penalties Case* was itself cited with approval in *Pattinson* (2022) 274 CLR 450, 459 [15] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

⁸ *Pattinson* (2022) 274 CLR 450, 460 [17] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). See also 475 [66] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ): 'The theory of s 546 of the [FW] Act is that the financial disincentive involved in the imposition of a pecuniary penalty will encourage compliance with the law by ensuring that contraventions are viewed by the contravenor and others as an economically irrational choice'. Significantly, s 546(3) of the FW Act allows the court to order that a civil penalty be paid to the Commonwealth, to a particular organisation, or to a particular person. The award of a penalty is not compensatory, but is generally awarded to the initiating party: Philip Boncardo and Ben Bromberg, 'Civil Penalties in Industrial Law' in Dennis Kayis, Eloise Gluer and Samuel Walpole (eds), *The Law of Civil Penalties* (Federation Press, 2023), 269. This practice encourages the making of claims for contraventions, which in turn 'ensures the enforcement of the legislative scheme': *Sayed v CFMEU* (2016) 239 FCR 336, 357 [121] (the Court).

⁹ *Pattinson* (2022) 274 CLR 450, 467 [39] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), observing also that in the civil penalty regime of the FW Act, retribution 'has no part to play'. See also *Veen v The Queen [No 2]* (1988) 164 CLR 465, 473-4 (Mason CJ, Brennan, Dawson and Toohey JJ).

¹⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 19 March 2020, 1097.

¹¹ *Gapes v Commercial Bank of Australia Ltd* (1979) 38 FLR 431, 457 (JB Sweeney J).

¹² *Pattinson* (2022) 274 CLR 450, 480-1 [88] (Edelman J); see also *Veen [No 2]* (1988) 164 CLR 465, 472-4 (Mason CJ, Brennan, Dawson and Toohey JJ).

with its retributive purpose, the primary focus of punishment is on ensuring that the punishment ‘fits the crime’, and that a person is not punished any more than the seriousness of their past conduct requires.¹³ That criminal punishment may have a deterrent effect therefore cannot support the conclusion that the ‘main purpose’ of the WT Act is to provide for the ‘enforcement of terms and conditions of employment’. That is simply not a ‘main purpose’ of the WT Act.

B. No inconsistency otherwise arises

12. Once s 26(2)(b)(ii) of FW Act is set aside as inapplicable, it is necessary to consider whether any inconsistency otherwise arises as between the FW Act and the WT Act (cf PS [34]-[36]). That question is to be resolved by an analysis of whether the FW Act evinces an intention to state exhaustively, the law governing the dishonest withholding of employee entitlements.¹⁴ As Dixon J said in *Ex parte McLean*, where Commonwealth and State laws are ‘susceptible of simultaneous obedience’, inconsistency ‘depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed’.¹⁵ Where such an intention is shown, a State law upon the same subject matter ‘is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent’.¹⁶ As that analysis will reveal whether there is a ‘real conflict’¹⁷ between the laws, it is unnecessary to consider whether any such inconsistency is more accurately described as ‘direct’ or ‘indirect’.¹⁸

¹³ *Pattinson* (2022) 274 CLR 450, 467 [39] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *Veen v The Queen [No 2]* (1988) 164 CLR 465, 473-4 (Mason CJ, Brennan, Dawson and Toohey JJ).

¹⁴ *Ex parte McLean* (1930) 43 CLR 472, 483 (Dixon J). See also *McWaters v Day* (1989) 168 CLR 289, 296 (the Court); *R v Winneke*; *Ex parte Gallagher* (1982) 152 CLR 211, 224 (Mason J); *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, 260-1 (Mason J), 280 (Aickin J); *R v Loewenthal*; *Ex parte Blacklock* (1974) 131 CLR 338, 346-7 (Mason J); *Momcilovic v The Queen* (2011) 245 CLR 1, 115-6 [258]-[261] (Gummow J), 235 [637] (Crennan and Kiefel JJ) (*Momcilovic*); *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, 459 [72] (Gageler J).

¹⁵ (1930) 43 CLR 472, 483 (Dixon J).

¹⁶ *Victoria v Commonwealth ('The Kakariki')* (1937) 58 CLR 618, 630 (Dixon J). See also *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128, 136 (Dixon J); *Ex parte McLean* (1930) 43 CLR 472, 483 (Dixon J).

¹⁷ *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 525 [42] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

¹⁸ In *Dickson v The Queen* (2010) 241 CLR 491, 505 [25], there was said to be a ‘direct’ inconsistency because the State law intruded upon an ‘area of liberty designedly left’ by the Commonwealth law. The phrase ‘area of liberty’, applied in *Dickson*, originated in *Wenn v Attorney-General (Vic)*, in a passage in which Dixon J

13. Applying that analysis, there are two interrelated reasons why no inconsistency arises as between the FW Act and the WT Act.
14. *First*, contrary to PS [34] and [36], ‘the particular conduct or matter to which [the FW Act’s] attention is directed’ is not the same as the conduct or matter to which the WT Act is directed. The FW Act relevantly prohibits the contravention of a modern award (s 45) and prescribes the method and frequency of the payment of wages (s 323¹⁹). Nowhere does the FW Act deal with, or direct its attention to, the dishonest withholding of employee entitlements. Contrary to PS [36], that an employer had a ‘dishonest’ state of mind when withholding entitlements will not, of itself, be relevant to ‘synthesising what level of civil penalty’ is to be imposed. That is because under s 546 ‘retribution has no part to play’.²⁰ In other words, the fact that dishonest conduct *deserves* greater punishment than honest conduct is not relevant in fixing a civil penalty under the FW Act (but is central to the WT Act’s operation). Nor do the ‘serious contravention’ provisions of the FW Act cover the same conduct as the WT Act. Those provisions apply only where the underpayment is both deliberate *and* ‘part of a systemic pattern of conduct relating to one or more other persons’ (s 557A(1)(b)).²¹ The same cannot be said of the offences under the WT Act.
15. *Second*, and in any event, the FW Act does not intend to completely, exhaustively, or exclusively state the law in relation to conduct which constitutes the contravention of a civil remedy provision. There is no presumption that, by creating an offence, the Commonwealth evinces an intention to deal with the act to the exclusion of any other law.²² Much less can it be presumed that, by attaching *civil* penalties to conduct, the

described the device of legislating ‘upon a subject exhaustively to the intent that the areas of liberty designedly left should not be closed up’: (1948) 77 CLR 84, 120 (emphasis added). As Gummow J observed in *Momcilovic*, the Commonwealth law in *Dickson* contained an ‘implicit negative’: (2011) 245 CLR 1, 122 [276]. Yet identifying an ‘implicit negative proposition’ is the ‘essential notion of indirect inconsistency’: *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, 448 [35] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

¹⁹ As explained in *CFMEU v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, 633-4 [45] (Crennan, Kiefel, Bell, Gageler and Keane JJ), the mischief addressed by s 323 is ‘that an employee’s entitlement to payment for work might be compromised by an employer requiring the employee to accept some form of payment in kind of less value than the payment of money forgone’.

²⁰ *Pattinson* (2022) 274 CLR 450, 471 [51] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

²¹ As the explanatory memorandum makes clear, the inclusion of the ‘serious contravention’ provisions was designed to ‘more effectively deter unlawful practices’: Explanatory Memorandum, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth), page ii.

²² *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, 449 [40] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211, 224 (Mason J).

Commonwealth intends to exclude the application of State criminal laws to that conduct. The reason is that a law imposing civil penalties will never ‘serve the same purpose as laws forming part of the ordinary criminal law’.²³

16. In this case, the absence of an intention that the FW Act deal exclusively with the conduct with which the plaintiff is charged is put beyond doubt by ss 552-555. Those sections provide for what is to occur where conduct constituting contravention of a civil remedy provision is ‘substantially the same’ as conduct constituting an offence. Like s 4C(2) of the *Crimes Act 1914* (Cth), ss 552-555 are provisions which assume the concurrent operation of State laws.²⁴

PART V: Time estimate

17. It is estimated that Queensland will require 15 minutes for oral argument.

Dated 1 September 2023.



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²³ *McWaters v Day* (1989) 168 CLR 289, 299 (the Court).

²⁴ *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, 449 [40] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Momcilovic* (2011) 245 CLR 1, 114 [253]-[255], 119 [268] (Gummow J). See also 74 [110] (French CJ); *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211, 224 (Mason J).

Annexure 1

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M16/2023

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

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ROBERT HORTLE
Defendant

and

ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
Intervener

**ANNEXURE TO SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR
THE STATE OF QUEENSLAND (INTERVENING)**

Statutes and Statutory Instruments referred to in the submissions

Pursuant to *Practice Direction No. 1 of 2019*, Queensland sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
<i>Constitutional provisions</i>			
1.	<i>Commonwealth Constitution</i>	s 109	Current, Compilation No. 6
<i>Statutes</i>			
2.	<i>Fair Work Act 2009 (Cth)</i>	Ch 1: s 3 Ch 2: ss 45 and 50; Pt 2-9 Div 2; Pt 1-3 Div 2; Ch 4: ss 552-555	Current, Compilation No. 51
3.	<i>Wage Theft Act 2020 (Vic)</i>	ss 1, 3, and 6	Current, Authorised Version No. 002