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IN THE FEDERAL COURT OF AUSTRALIA **No. VID 1036 of 2024**
DISTRICT REGISTRY: Victoria
DIVISION: Fair Work

JAYSON LLOYD GILLHAM
Applicant

MELBOURNE SYMPHONY ORCHESTRA PTY LTD
ABN 47 078 925 658 AND OTHERS
Respondents

OUTLINE OF SUBMISSIONS OF THE THIRD RESPONDENT

A. INTRODUCTION

1. These submissions are filed in accordance with the orders of the Court dated Monday 24 February 2025, as varied on 3 March 2025. The interlocutory application made by the first and fourth respondents should succeed, with the consequence that the proceeding should be dismissed.

2. The third respondent respectfully adopts the outline of submissions filed on behalf of the first and fourth respondents. In addition, the third respondent addresses below the question of whether the *Equal Opportunity Act 2010* (Vic) (the **EO Act**) is a workplace law within the meaning of s 341 of the *Fair Work Act 2009* (Cth) (the **FW Act**).

B. THE STRUCTURE OF THE APPLICANT'S CASE

3. The applicant's case proceeds as follows:

    (a) on or about 11 June 2024, the applicant entered into a written contract with Symphony Service Australia Pty Ltd (**SSA**) (the **SSA Contract**);[1]

    (b) the SSA Contract was a contract for services and, accordingly, SSA was the applicant's employer within the meaning of s 4 of the *Equal Opportunity Act 2010* (Vic) (the **EO Act**);[2]

    (c) there was an express contract between SSA and the MSO for the supply of the applicant's services as a concert pianist by SSA to the MSO (the **SSA-MSO Contract**);[3]

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[1] Amended statement of claim (16 October 2024) (**ASOC**), [6].
[2] ASOC, [36]-[37].
[3] ASOC, [11].

(d) the applicant worked for the MSO pursuant to the SSA-MSO Contract[4] and was, therefore, a 'contract worker' of the MSO within the meaning of s 4 of the EO Act;[5]

(e) there was an implied contract between the applicant and the MSO;[6]

(f) the implied contract between the applicant and the MSO was a contract for services and, accordingly, the applicant was an employee of the MSO within the meaning of s 4 of the EO Act;

(g) as a "contract worker", and therefore an employee within the meaning of s 4 of the EO Act, the applicant had a right not to be discriminated against by the MSO for:

(i) holding or expressing a political belief; or

(ii) engaging in political activity;[7]

(h) the EO Act is a workplace law within the meaning of s 341 of the FW Act;[8]

(i) the applicant was entitled to the benefit of the EO Act in that (by operation of s 6(k), 8 and 18 of the EO Act) he was entitled not to be discriminated against because he held or expressed a political belief or engaged in political activity;[9]

(j) by reason of (i), the applicant had a workplace right within the meaning of s 341 of the FW Act;[10] and

(k) at a Recital,[11] the applicant gave an introduction, which was an expression of political opinion;[12] and

(l) the MSO took adverse action against the applicant[13] because he exercised his right to the benefit of the EO Act,[14] and thereby contravened s 340 of the FW Act.[15]

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4 ASOC, [38].
5 ASOC, [38].
6 ASOC, [10].
7 ASOC, [39]; [39B].
8 ASOC, [40].
9 ASOC, [41].
10 ASOC, [42].
11 ASOC, [7(a)]; [15].
12 ASOC, [16]-[17].
13 ASOC, [43].
14 ASOC, [48].
15 ASOC, [50].

4. Just as important is what the applicant does not allege. The applicant <u>does not</u> allege that he was an employee of the MSO at common law. Instead, the applicant relies on the extended definition of employee in s 4 of the EO Act, which defines 'employee' to include a person engaged under a contract for services. Accordingly, the applicant's claim <u>cannot succeed</u> unless the EO Act is a workplace law within the meaning of s 341 of the FW Act to the extent that it regulates the relationship between persons who are employees by reason of the extended definition in s 4 of that EO Act, and their employers.

C. A QUESTION OF STATUTORY CONSTRUCTION

5. The question that arises is whether the EO Act is a 'workplace law' within the meaning of s 341 of the FW Act to the extent that it regulates the relationship between persons who are deemed to be employees by operation of statute and their deemed employers (or, put differently, to persons engaged under a contract for services, and their principals). That question is to be answered by reference to the proper construction of the phrase "workplace law".

6. The principles of statutory construction are well-settled. For present purposes, it is enough to recall that statutory construction involves attribution of meaning to statutory text.[16] Statutory text must be considered in its context, including its legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text.[17] The 'context' of a statute includes consideration of the statute as a whole and 'the general purpose and policy of the legislation, in particular the mischief to which the statute is directed and which the legislature intended to remedy'.[18] Objective discernment of statutory purpose is integral to contextual construction.[19]

7. **As to the text**, s 340(1) of the FW Act relevantly provides that:

> (1) A person must not take adverse action against another person:
> (a) because the other person:
> (i) has a workplace right;
> (ii) has, or has not, exercised a workplace right; or
> (iii) ...
> (b) to prevent the exercise of a workplace right by the other person.

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16 *Thiess v Collector of Customs* [2014] HCA 12; 250 CLR 664 at [22]-[23] (per curiam).

17 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 5; (2012) 87 ALJR 98 at 107 [39] (per curiam).

18 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378; [2012] HCA 56 at [88] (Kiefel J).

19 *Thiess v Collector of Customs* [2014] HCA 12; 250 CLR 664 at [22]-[23] (per curiam).

8. By s 341(1) of the FW Act, a person has a workplace right if, among other things, they are **entitled to the benefit of**, or has a role or responsibility under, **a workplace law,** workplace instrument or order made by an industrial body. Section 12 of the FW Act defines 'workplace law' as:

(a) the FW Act;

(b) the *Fair Work Registered Organisations Act 2009* (Cth);

(c) the *Independent Contractors Act 2006 (*Cth); and

(d) any other law of the Commonwealth, a State or a Territory that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters).[20]

9. The terms 'employee' and employer' are defined for the purposes of Part 3-1 by section 335, which provides that they have their 'ordinary meanings'. The ordinary meaning of 'employee' is its common law meaning. That meaning does not extend to contracting relationships. Accordingly, the text of the statute, without more, supplies the answer to the question.

10. That this is the case is confirmed by the surrounding **context**. First, division 2 of part 3-1 provides that part 3-1 applies only to the extent provided by that division. Within division 2, s 338 prescribes the circumstances in which the part operates by reference to the identity of the various actors to whom it applies. Section 338 provides the constitutional underpinnings for the operation of the part. Next, s 338A defines, inclusively, the term "independent contractor". Section 339 is headed "Additional effect of this Part", and provides that, in addition to the effect provided by section 338, part 3-1 also has the effect it would have if any one or more of specified circumstances applied. Most relevant for the present case is the circumstances that "a reference to an employee in one or more provisions of this Part were a reference to a national system employee". Careful attention has been given to the meaning of the definitional terms used in the part, including the term 'employee'. By operation of ss 335, as expanded by s 339, the term 'employee' is given express meaning by the statute.

11. Second, it is a feature of the FW Act that the meanings of 'employee' and 'employer' are separately defined for each part within the Act. As explained above, for the purposes of part 3-1, they have their ordinary meanings. It being an essential component of the constitutionality of the law, it is apparent that the legislature has carefully considered the meaning of the term 'employee' throughout the statute. In these circumstances, it is inherently improbable that any part of that meaning would be left to implication. If it was intended that 'employee' was

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[20] s 12.

to include a person deemed to be such by operation of a different statutory regime, it is likely that the parliament would have achieved this aim by words of plain intendment.

12. Third, part 3-1 regulates relationships other than that of employee and employer. A person can take adverse action against another person in any of the circumstances prescribed by s 342 of the FW Act. It is evident that the legislature turned its mind to the relationships other than that of employee and employer that would be regulated by part 3-1. The relationships include, relevantly, independent contractor and principal. This is a contextual indication that confirms that 'employee' was not intended, for the purposes of part 3-1, to have anything other than its common law meaning. To the extent that part 3-1 regulates the relationship between a contractor and their principal, it does so in express terms.

13. Fourth, section 351 proscribes adverse action that is taken against a person because of one or more of a prescribed list of attributes. However, by operation of s 351(2)(a) of the FW Act does not apply to adverse action that is not unlawful under any anti-discrimination law in force in the place where the action is taken. "Anti-discrimination law" is defined by s 351(3) to include the *Equal Opportunity Act 2010* (Vic). It is apparent that the legislature turned its mind to the relationship between part 3-1 and other laws that regulate relationships in the workplace, including the EO Act. Having done so, it elected to use the EO Act (and other anti-discrimination laws) to place a *limitation* on the operation of s 351 of the FW Act. It did not, in terms, elect to extend the protections of part 3-1 to persons who enjoy the benefit of the protections provided by anti-discrimination laws.

14. Fifth, the construction contended for by the applicant requires the Court to read into the provision the words "including deemed employees" in circumstances where, as set out above, the term has already been defined to mean common law employees. There are at least two reasons why it is unlikely that this is what the legislature intended. The first is that deeming provisions are common in the workplace context, and are found in legislation that regulates, for example, workplace health and safety, discrimination and superannuation. If 'employee' were to be read to include each and every 'deemed employee' the scope of part 3-1 would become ambulatory. That is, the ambit of part 3-1 would fall to be determined by circumstances beyond the control of the commonwealth legislature. The second is that, as explained above, part 3-1 contains express provisions that extend its operation. One of those provisions expands the meaning of 'employee' for the purposes of the part. Where 'employee' has already been expressly given an expanded meaning, it is unlikely that a further expansion of its meaning would be left to implication, particularly where that meaning would become ambulatory.

15. Sixth, s 340 (and other provisions within part 3-1) are civil remedy provisions, contravention of which exposes a person to, among other things, the imposition of pecuniary penalties. It is necessary that such provisions are drafted so as to make clear to those bound by them the circumstances in which they can be contravened. It is inherently improbable that the legislature would have intended to expand the class of persons to whom the

protections in part 3-1 applies by the device of an implied expanded meaning of a critical definitional term. Doing so would have the effect of exposing various persons to significant legal consequences without that being clear on the face of the statute.

16. As to **purpose**, s 340 is found within part 3-1 of the FW Act. That Part is headed "General protections". The objects of Part 3-1 are:

(a) to protect workplace rights;

(b) to protect freedom of association by ensuring that persons are:

(i) free to become, or not become, members of industrial associations; and

(ii) free to be represented, or not represented, by industrial associations; and

(iii) free to participate, or not participate, in lawful industrial activities;

(c) to provide protection from workplace discrimination; and

(d) to provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of this Part.

17. Part 3-1 has a beneficial purpose and is to be construed accordingly. The evident purpose is to protect various rights of workplace participants and to provide meaningful remedies when those rights are infringed. Legislation with a beneficial or remedial purpose will be construed according to that purpose, giving the legislation a 'fair, large and liberal' interpretation, rather than one which is 'literal or technical'.[21] However, it must be borne in mind that the principle that beneficial legislation is to be construed beneficially is a manifestation of the more general principle that all legislation is to be construed purposively."[22] The beneficial purpose of Part 3-1 cannot itself support a wide interpretation of the word 'employee' in circumstances where the part itself carefully prescribes the persons to whom it applies, and the nature of the relationships which it regulates.

18. The precise question that arises here was the subject of consideration by a Full Court of the Federal Court in *Tattsbet Ltd v Morrow* [2015] FCAFC 62; 233 FCR 46. There, the Court was concerned with, among other things, the question of whether the *Superannuation Guarantee (Administration) Act 1992 (Cth)* (**SGA Act**) was a workplace law within the meaning of s 341(1)(d) of the FW Act. The question was whether the SGA Act

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21 *IW v City of Perth* (1997) 191 CLR 1, 12 per Brennan CJ and McHugh J, 39 per Gummow J).

22 *New South Wales Aboriginal Land Council v Minister Administering the Crown Land Act* (2016) 260 CLR 232 at [92] (Justice Gageler).

was a law of the Commonwealth that "regulates relationships between employers and employees" within the meaning of section 341(d) of the FW Act.[23]

19. It was not controversial that, to the extent that it conferred benefits on common law employees, the SGA Act was such a law. However, 12(3) of the SGA Act contained the following deeming provision:

> If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract.

20. The Full Court did not decide the question of whether the applicant's contract fell within the scope of the deeming provision in the SGA Act.[24] However, assuming that the answer was 'yes', Justice Jessup (Allsop CJ and White JJ agreeing) went on to consider whether the applicant was, to that extent, entitled to the benefit of a law of the Commonwealth that regulated the relationships between employers and employees within the meaning of s 341(1) of the FW Act. The answer was 'no'.

21. In reaching that conclusion, Justice Jessup observed that the "presently critical aspect of para (d) of the definition of "workplace law" is the term "law of the Commonwealth". His Honour extracted *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 497, where Isaacs J said:

> [T]he "law" is not the piece of parchment or paper, nor is it the letters and words and figures printed upon the material. It consists of the "rule" resolved upon and adopted by the legislative organ of the community as that which is to be observed, positively and negatively, by action or inaction according to the tenor of the rule adopted. Constitutions may prescribe, and do prescribe, how that rule shall be arrived at and how evidenced. But "the law" is essentially the rule itself, and not the material evidence of it.

22. His Honour concluded that if the applicant was entitled to anything under the SG Act, that entitlement arose under the provisions of that Act <u>that extended its operation beyond the circumstances of employees strictly so called</u> and that these provisions "did not regulate the relationships between employers and employees".[25]

23. The decision of the Full Court is directly on point. If it is ratio, it is binding, and determinative of the applicant's case on this point. If it is dicta, it is seriously considered dicta of an intermediate appellate court to which significant weight should be given.

24. For these reasons, the EO Act is a workplace law to the extent, and only to the extent, that it regulates the relationships between common law employees and their employers. It is not a workplace law to the extent that it regulates the relationships between deemed employees and their deemed employers.

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23 at [99].
24 at [100].
25 at [103].

D. DISPOSITION

25. For the reasons given above, the application cannot succeed. It should be dismissed before the parties incur the significant costs of a final hearing.

4 March 2025

Siobhan Kelly
Market Chambers