NOTICE OF FILING

Details of Filing

Document Lodged:	Outline of Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	2/12/2024 4:26:41 PM AEDT
Date Accepted for Filing:	2/12/2024 4:26:53 PM AEDT
File Number:	VID1036/2024
File Title:	JAYSON LLOYD GILLHAM v MELBOURNE SYMPHONY ORCHESTRA PTY LTD ABN 47 078 925 658 & ORS
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.

IN THE FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: Victoria
DIVISION: Fair Work

No. VID 1036 of 2024

JAYSON LLOYD GILLHAM
Applicant

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

OUTLINE OF SUBMISSIONS OF THE FIRST RESPONDENT AND THE FOURTH RESPONDENT

TABLE OF CONTENTS

Filed on behalf of: the First Respondent and Fourth Respondent
Prepared by: Leon Zwier and Rachel Soh Ref: 011928243
Law firm: **ARNOLD BLOCH LEIBLER**
Tel: (03) 9229 9999 Fax: (03) 9229 9900
Email: lzwier@abl.com.au and rsoh@abl.com.au
Address for service: Level 21, 333 Collins Street, Melbourne, VIC 3000

A OVERVIEW

1 By interlocutory application filed in this Court on 21 November 2024, the First Respondent (**MSO**) and the Fourth Respondent (**Mr Ross**, the Chief Operating Officer (**COO**) of the MSO) jointly seek orders on the following alternative bases:

(a) for summary judgment (dismissal),[1] on the ground that the Applicant (**Mr Gillham**) has no reasonable prospect of successfully prosecuting this proceeding, or, relatedly, to strike out the whole of the Amended Statement of Claim[2] (**ASOC**[3]), on the ground that the ASOC fails to disclose a reasonable cause of action; or

(b) for determination of separate questions before the trial[4] is to commence on 17 March 2025. The MSO and Mr Ross submit that if the separate questions are answered in the negative, this will substantially dispose of the proceeding or render any further trial of the proceeding unnecessary.[5]

2 Mr Gillham's case against the MSO is premised on it having allegedly[6] contravened s 340(1)(a)(ii) of the *Fair Work Act 2009* (Cth) (**FW Act**) by:

(a) cancelling Mr Gillham's performance at "**the Concert**" (on Thursday, 15 August 2024);[7]

(b) sending "**the Cancellation Message**" (on Monday, 12 August 2024);[8] and

(c) publishing the "**Final Public Statement**" (on Thursday, 15 August 2024);[9]

because Mr Gillham had exercised his protected workplace right to hold and express his political belief or engage in political activity without discrimination.

---

1 Pursuant to s 31A(2) of the *Federal Court of Australia Act 1975* (Cth) (**FCA**) and/or r 26.01(1)(a) of the *Federal Court Rules 2011* (Cth) (**FCR**).

2 Pursuant to FCR r 16.21(1)(e).

3 The ASOC was filed on 16 October 2024.

4 Pursuant to FCR r 30.01(1).

5 Which then enables a party to apply to the Court or an order dismissing the whole or any part of the proceeding: FCR r 30.02.

6 ASOC [48] p 15.

7 ASOC [7(b)].

8 ASOC [21] p 7.

9 ASOC [33] p 10.

3 Mr Gillham also alleges[10] that the MSO contravened s 340(1)(a)(i), s 340(1)(a)(ii) and/or s 340(1)(b) by imposing (through Mr Ross on behalf of the MSO) the "**Second Condition**":[11]

(a) because he had a protected workplace right to hold and express his political belief and engage in political activity, in order to contract out of such right; and/or

(b) because he exercised his protected workplace right to hold and express his political belief and engage in political activity when he made his remarks at "**the Recital**" (on Sunday, 11 August 2024);[12] and/or

(c) to prevent him from exercising his protected workplace right to express his political belief and engage in political activity at the Concert (on Thursday, 15 August 2024).[13]

4 Mr Ross,[14] as well as the Third Respondent[15] (**Ms Galaise**, as the (former) Managing Director of the MSO), are each joined as accessories to the MSO's alleged contraventions; their respective liability is contingent upon the MSO being found liable as a contravener.

5 Central to the disposition of this proceeding overall is whether Mr Gillham relevantly has, exercised, or was prevented from exercising, a protected workplace right for the purposes of s 340 of the FW Act. Section 341 of the FW Act identifies "as a matter of substance that a person has a workplace right in specified circumstances",[16] and it is to be read into the terms of the protection in s 340 of the FW Act.[17] Sections 340-341 of the FW Act are dealt with below in **Section E**. The existence of a workplace right must be established by an applicant as a matter of objective fact to maintain a claim of adverse action under s 340 of the FW Act.[18]

---

10 ASOC [49]-[50] p 15.

11 ASOC [27] p 8: "The second condition was that Mr Gillham agree that there would be '*No physical or verbal statement from the stage*'".

12 ASOC [7(a)] p 3, [16] p 5.

13 ASOC [7(b)].

14 ASOC [56]-[59] p 17.

15 ASOC [53]-[55] p 16.

16 *Qantas Airways Limited v Transport Workers Union of Australia* (2023) 97 ALJR 711 at [32] (Kiefel CJ, Gageler, Gleeson & Jagot JJ) and [79] (Gordon & Edelman JJ).

17 *Qantas Airways Limited v Transport Workers Union of Australia* (2023) 97 ALJR 711 at [80] (Gordon & Edelman JJ).

18 *Gunawardena v Boeing Aerostructures Australia Pty Ltd (Strike-out Application)* [2024] FCA 1206 at [13] (Wheelahan J, citing *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 at [119] (Jessup J, Allsop CJ agreeing at [1], White J agreeing at [140]); see, too, *Australian Building and Construction Commissioner v Hall* (2018) 261 FCR 347 at [100] (Tracey, Reeves & Bromwich JJ); *TechnologyOne Limited v Roohizadegan* (2021) 309 IR 262 at [35] (Rangiah, White & O'Callaghan JJ); *Alam v National Australia Bank Limited* (2021) 288 FCR 629 at [14(b)] (White, O'Callaghan & Colvin JJ).

6 For the reasons outlined below in **Section E**, the MSO and Mr Ross submit that Mr Gillham had no such protected workplace right(s) within the meaning of s 341(1) of the FW Act, and therefore has no relevant protected workplace right(s) for the purposes of s 340(1) of the FW Act. In headline, this is because, contrary to Mr Gillham's case,[19] he had no entitlement to the benefit of a workplace law for the purposes of s 341(1)(a) of the FW Act. Mr Gillham's reliance on s 18 and / or s 21 of the *Equal Opportunity Act 2010* (Vic) (**EO Act**) as the relevant "workplace law" from which such an entitlement is said to be derived is misconceived (see below in **Section F**). Mr Gillham was **not** an employee of the MSO, for the purposes of the FW Act and / or the EO Act; his claims are therefore entirely premised on an infirm basis. In consequence, Mr Gillham has no entitlement to any relief based on asserted contraventions by the MSO under Part 3-1 (General Protections) of the FW Act. If this headline submission be correct, then Mr Gillham has no reasonable prospects of success and/or no reasonable cause of action is disclosed in his ASOC, such that the MSO and Mr Ross are thereby entitled to summary judgment / strike out on that basis.

7 As an alternative to summary judgment / strike out, this Court may determine the questions posed by the MSO and Mr Ross ahead of the commencement of the trial on 17 March 2025. If the Court answers either of the questions posed by the MSO and Mr Ross in the negative (see below in **Section G**), this will substantially dispose of the proceeding or render any further trial of the proceeding unnecessary. This would have the same practical result as a summary judgment / strike out.

8 In support of its interlocutory application, the MSO and Mr Ross refer to and rely upon the affidavit of Leon Zwier sworn on 21 November 2024 (**Zwier Affidavit**). Mr Zwier is a Partner of Arnold Bloch Leibler (**ABL**), the lawyers for the MSO and Mr Ross.[20]

B THE NEED FOR DETERMINATION OF THE INTERLOCUTORY APPLICATION AHEAD OF THE TRIAL

9 The MSO and Mr Ross submit that it is necessary to determine the issue of Mr Gillham's alleged workplace right(s) ahead of the trial as a more efficient, effective and proportionate resolution of the dispute between the parties at the earliest juncture. If the MSO and Mr Ross are correct, it would completely obviate the need for any trial of the proceeding, which is a relevant consideration to the potential exercise of the power to summarily dismiss the

---

19 ASOC [36]-[39B], [40]-[42] pp 11-13.

20 Zwier Affidavit at [1].

proceeding.[21] In the alternative, if the MSO and Mr Ross are incorrect, then the issues at trial will have substantially narrowed to a factual dispute as to what actuated the MSO, as a corporate entity, to have taken the alleged adverse actions against Mr Gillham. The issues raised by the interlocutory application[22] are primarily questions of law, and as to the nature of the specific relationship as between Mr Gillham and the MSO involve only simple questions of mixed fact and law based on the interpretation of key contractual documents, none of which realistically involve any contestable dispute between the parties.[23] This is because "the characterisation of [a] relationship as one of employment or otherwise proceeds by reference to the rights and obligations of the parties under [a written] contract".[24]

10 In order to discharge the reverse onus it bears under ss 360-361[25] of the FW Act, and although not conceding that this is necessary, the MSO may consider itself obliged to call as witnesses in its defence all those persons who do or may know the answer to the Court's factual inquiry for the "critical question"[26] as to why the alleged adverse action was taken against Mr Gillham. It may be necessary for the Court to assess "the product of many motivations, causes, influences and process of reasoning" of persons within the MSO as a corporate entity.[27] This is so despite the fact that a person may not formally possess the authority or power to effect a decision for the corporate entity to take the adverse action(s) in question.[28]

---

21 *Davis v Military Rehabilitation and Compensation Commission* [2024] FCA 736 at [31] (Sarah C Derrington J): "If it is clear that the outcome of a proceeding will not be altered by the holding of a trial, it is apposite to the proper administration of justice to require the parties to be put to the effort and expense of conducting a full hearing…" (citations omitted). Her Honour also observed (at [31]) that: "…merely because complexity exists in the underlying issues, courts should not shy away from granting summary judgment where, after considering the facts and law of the present case, the outcome of the disputation is apparent".

22 As to the need for caution based on the complexity of the issues of fact and law, see, *Spencer v The Commonwealth* (2010) 241 CLR 118 at [25]-[26] (French CJ & Gummow J).

23 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165 at [39], [43]-[44], [58]-[59] (Kiefel CJ, Keane & Edelman JJ), [183]-[189] (Gordon J) & [203] (Steward J); *EFEX Group Pty Ltd v Bennett* (2024) 330 IR 171 at [6]-[14] (Katzmann & Bromwich JJ).

24 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165 at [59] (Kiefel CJ, Keane & Edelman JJ).

25 As to s 361, see, *Qantas Airways Limited v Transport Workers Union of Australia* (2023) 97 ALJR 711 at [63] (Gordon & Edelman JJ): "The presumption in s 361 recognises that the decision-maker is uniquely placed to know the reasons for their action and should thus be made to prove them" (footnote #56 omitted). See, too, *Milardovic v Vemco Services Pty Ltd (Administrators Appointed)* [2016] FCA 19 at [60] (Mortimer J, as Her Honour then was): "…the task [involves] determining whether the act of the alleged discriminator was 'actuated' by a protected attribute…it is a decision about the internal reasoning process of an alleged discriminator".

26 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 at [44] (French CJ & Crennan J).

27 *Qantas Airways Limited v Transport Workers Union of Australia* (2023) 97 ALJR 711 at [104] (Steward J).

28 See, *Wong v National Australia Bank Limited* (2022) 318 IR 148 at [25]-[26] (Katzmann, Charlesworth & O'Sullivan JJ); *Dorsch v Head Oceania Pty Ltd* [2024] FCAFC 133 at [60] (Snaden, Hatcher & Shariff JJ);

11 If the Court accedes to either of the alternative bases for the orders sought by the MSO and Mr Ross, this Court will have efficiently and effectively[29] determined a critical dispositive issue at an early juncture, without there then being any need for the MSO, as a not-for-profit charitable organisation, to be put to the unnecessary and likely considerable cost, time and effort in filing affidavit material from members of the MSO Board and its Executive Leadership Team, and in having to prepare for trial more generally in circumstances where the existence of the objective fact of the alleged workplace right(s) is in issue between the parties.[30]

12 The MSO and Mr Ross otherwise submits that its position in bringing the interlocutory application is consistent with this Court giving effect to the "overarching purpose" in FCA s 37M(1)(a) to facilitate the just resolution of this dispute "as quickly, inexpensively and efficiently as possible", including by resolution of the dispute at a cost that is proportionate to the importance and the complexity of the matters in dispute.[31]

13 Consistent with their obligation to act consistently with the overarching purpose in FCA s 37M,[32] the MSO and Mr Ross bring this interlocutory application promptly after having filed its joint defence on 7 November 2024.

C PROCEDURAL CONTEXT

14 This proceeding commenced by way of Originating Application and Statement of Claim filed on Thursday, 3 October 2024. On Tuesday, 8 October 2024, the Court conducted a case management hearing, and on Wednesday, 9 October 2024, the Court made orders, *inter alia*, for the parties to file further appropriate pleadings[33] and listed the matter for a trial commencing on 17 March 2024 (on an estimate of 5 days).[34]

15 Mr Gillham filed the ASOC on 16 October 2024.[35] On that date, he also filed a Notice of Discontinuance of his claims made against Symphony Services Australia Limited (ABN 69

Avard v Australian Capital Territory [2024] FCA 690 at [103] (Kennett J); *Pilbrow v University of Melbourne* [2024] FCA 1140 at [77] (Snaden J).

29 FCA s 37M(2)(b)-(d).

30 Zwier Affidavit at [9].

31 FCA s 37M(2)(e).

32 FCA s 37N(1).

33 See, [1]-[2] of the Orders of Mortimer CJ dated 9 October 2024. The dates were relevantly extended by further Orders of Mortimer CJ dated 24 October 2024 (at [1]-[2]), and 8 November 2024 (at [1]). A copy of each of the Court's Orders are in Annexure **LZ-2** to the Zwier Affidavit (at [7], pp 11-18).

34 Over 17-20 March and 24 March 2025. See, [7] of the Orders of Mortimer CJ dated 9 October 2024. A copy of each of the Court's Orders are in Annexure **LZ-2** to the Zwier Affidavit (at [7], pp 11-18).

35 Zwier Affidavit at [7(a)].

121 149 755) (**SSA**).[36] The MSO and Mr Ross and Ms Galaise filed their Defences on 7 November 2024.[37]

D RELEVANT LAW: SUMMARY JUDGMENT / STRIKE OUT

16 Section 31A(2) of the FCA provides that this Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:

(a) the first party is defending the proceeding or that part of the proceeding; and

(b) the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.

17 Section 31A(3) of the FCA makes clear that for the purposes of s 31A(2), a proceeding or part of a proceeding need not be:

(a) hopeless; or

(b) bound to fail;

for it to have no reasonable prospects of success.

18 Rule 26.01 of the FCR also provides that a party may apply to the Court for an order that judgment be given against another party because (relevantly) (a) the applicant has no reasonable prospect of successfully prosecuting the proceeding or part of the proceeding, or (c) no reasonable cause of action is disclosed.

19 The key principles concerning the application of s 31A of the FCA[38] and r 26.01 of the FCR are succinctly and correctly essayed in ***Branch v Papyrus Australia*** *Ltd* [2019] FCA 1879 at [27]-[28] (Wheelahan J); ***Plaintiff M38/2019*** *v Morrison (No 2)* [2020] FCA 1198 at [46]-[53] (Mortimer J, as Her Honour then was); ***Dunstan v Orr (No 2)*** [2023] FCA 1536 at [84]-[91] (Wigney J); ***Haire v WorkCo Australia*** *Pty Ltd* ***(No 2)*** [2024] FCA 1266 [12]-[21] (Horan J). The MSO and Mr Ross refer to and rely upon the principles as referred to therein.

---

36 Zwier Affidavit at [11(c)].

37 Mr Gillham filed his Concise Statement on 16 October 2024. Ms Galaise filed her Concise Response on 7 November 2024. The MSO and Mr Ross filed their joint Concise Response on 8 November 2024: Zwier Affidavit at [7(a)-(b)].

38 Noting that each Judgment referred to in this paragraph refers to the seminal Judgment of the High Court of Australia in *Spencer v Commonwealth* (2010) 241 CLR 118 concerning FCA s 31A, see, in particular at [17]-[27] (French CJ & Gummow J) and [49]-[60] (Hayne, Crennan, Kiefel & Bell JJ).

20 Rule 16.21(1)(e) of the FCR provides that a party may apply to the Court for an order that all or part of a pleading be struck out on the ground that the pleading (relevantly) fails to disclose a reasonable cause of action. The key principles concerning the application of r 16.21(1) of the FCR are succinctly and correctly essayed in *Branch v Papyrus Australia* at [29] (Wheelahan J); *Plaintiff M38/2019 v Morrison (No 2)* at [46]-[53] (Mortimer J, as Her Honour then was); *Dunstan v Orr (No 2)* at [92]-[102] (Wigney J); *Haire v WorkCo Australia (No 2)* at [22]-[29] (Horan J). The MSO and Mr Ross refer to and rely upon the principles as referred to therein.

21 As was noted in *Plaintiff M38/2019*, a reasonable cause of action may be available on the facts alleged, but the pleadings may fail to disclose it; the relevant question is then whether a party has been given a sufficient opportunity to attempt to articulate the cause of action.[39] In that scenario, the Court is not empowered to summarily dismiss the proceeding.[40] This Court must also be appropriately cautious as to the exercise of its powers to summarily dismiss / strike out the ASOC.[41]

E MR GILLHAM HAS NO WORKPLACE RIGHT UNDER THE FW ACT

22 Section 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.

23 Section 340(1) is identified as a "civil remedy provision".[42] It is therefore an "inherently serious" form of allegation that requires an applicant to plead such contravention with "sufficient precision for a respondent to know the case against it".[43]

---

39 *Plaintiff M38/2019* at [47] (Mortimer J, as Her Honour then was).

40 *Dunstan v Orr (No 2)* at [86] (Wigney J).

41 *Plaintiff M38/2019* at [48] (Mortimer J, as Her Honour then was); see, too, *Spencer v The Commonwealth* (2010) 241 CLR 118 at [25]-[26] (French CJ & Gummow J) and [60] (Hayne, Crennan, Kiefel & Bell JJ).

42 See, Note to FW Act s 340; see, too, Item 11 in the "Table" referred to in FW Act ss 539(1)-(2).

43 *Monash Health v Singh* (2023) 327 IR 196 at [57(2)] (Katzmann, Snaden & Raper JJ, citations omitted).

24 Section 341(1) provides for the meaning of a "workplace right"[44] (and see above at [5]). Relevantly, s 341(1)(a) provides that a person has a workplace right if the person is "entitled to the benefit of…a workplace law". The Dictionary in s 12 of the FW Act defines a "***workplace law***" to (relevantly) mean "(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").

25 Mr Gillham has identified the EO Act[45] as the relevant workplace law underpinning his alleged workplace right "not to be discriminated against by the MSO for (a) holding or expressing a political belief; or (b) engaging in political activity".[46] There are then two alternative sources of his alleged workplace right[47] impleaded:

(a) **first**, by reason of Mr Gillham's contract for services with SSA,[48] he is said to be a "contract worker"[49] of the MSO (as a "principal"[50]) within the meaning of s 4(1) of the EO Act because he "did work for the MSO pursuant to a contract between SSA and the MSO".[51] The contract between SSA and the MSO therein is not referred to, but this may be a reference to the "express contract" between "SSA and the MSO for the supply of Mr Gillham's services as a concert pianist by SSA to the MSO" at ASOC [11] p 4.

---

44 FW Act s 12 definition of "***workplace right***" is "see subsection 341(1)".

45 ASOC [40] p 13.

46 ASOC [39] p 11, [39B] p 12.

47 ASOC [40]-[42] p 13.

48 ASOC [46]-

49 EO s 4(1) defines "***contract worker***" to mean a "person who does work for a principal under a contract between the person's employer and the principal".

50 EO s 4(1) defines "**'*principal*', *in relation to a contract worker*"** to mean "a person who contracts with another person for work to be done by employees of the other person".

51 ASOC [38] p 11.

Mr Gillham then alleges[52] he had a right not to be directly discriminated[53] against by the MSO as a contract worker[54] on the basis of his political belief or activity;[55] and

(b) **second (and in the alternative)**, by reason of Mr Gillham's implied contract for services with the MSO,[56] he is thereby an "employee" of the MSO within the meaning of s 4(1) of the EO Act. The definitions of "***employment***" (and relatedly "***employee***" and "***employer***") under the EO Act are dealt with below at [26]. Mr Gillham then alleges he had a right not to be directly discriminated[57] against by the MSO as an employee[58] on the basis of his political belief or activity.[59]

---

52 ASOC [39] p 11.

53 EO Act s 8(1) relevantly provides: "Direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute". Section 4(1) of the EO Act defines "***attribute***" to mean an attribute in EO Act s 6.

54 EO Act s 21(1) relevantly provides:

> (1) A principal must not discriminate against a contract worker –
>
> (a) in the terms on which the principal allows the contract worker to work; or
>
> (b) by not allowing the contract worker to work or continue to work;
>
> (c) by denying or limiting access by the contract worker to any benefit connected with the work;
>
> (d) by subjecting the contract worker to any other detriment.

55 EO Act s 6(k) relevantly provides: "The following are attributes on the basis of which discrimination is prohibited in the areas of activity set out in Part 4…(k) political belief or activity". Section 4(1) of the EO Act defines "***political belief or activity***" to mean: "(a) holding or not holding a lawful political belief or view; (b) engaging in, not engaging in or refusing to engage in a lawful political activity".

56 The "implied contract" is referred to in the particulars to ASOC [10] pp 3-4.

57 See above fn #53.

58 EO Act s 18 provides:

> An employer must not discriminate against an employee –
>
> (a) by denying or limiting access by the employee to opportunities for promotion, transfer or training or to any other benefits connected with the employment; or
>
> (b) by dismissing the employee or otherwise terminating his or her employment; or
>
> (c) by denying the employee access to a guidance program, an apprenticeship program or other occupational training or retraining program; or
>
> (d) by subjecting the employee to any other detriment.

59 See above fn #55.

26 The definition of "***employment***" in s 4(1) of the EO Act relevantly includes "(a) employment under a contract of service, whether or not under a federal agreement or award" or "(c) engagement under a contract for services". Relatedly, there are also definitions for:

(a) "***employee***", which include "(a) a person employed under a contract of services, whether or not under a federal agreement or award" or "(c) a person engaged under a contract for services"; and

(b) "***employer***", which include "(a) a person who employs another person under a contract of service, whether or not under a federal agreement or award" or "(b) a person who engages another person under a contract for services".

27 The definitions of "***employment***" (and relatedly "***employee***" and "***employer***") in s 4(1) of the EO Act differ from the definitions of "***employee***" and "***employer***" as used throughout the FW Act. Relevantly:

(a) in the Dictionary in s 12 of the FW Act, it is made clear that each of the words "***employee***" and "***employer***" are defined by reference to "the first Division of each Part [of the FW Act] (other than Part 1-1 [of the FW Act]) in which the term appears"; and

(b) s 335 appears in Div 1 of Part 3-1 (General Protections) of the FW Act, and provides that "[in Part 3-1], employee and employer have their ordinary meanings", being the meaning "comprehended by the common law".[60]

28 The MSO and Mr Ross raise in the Defence that Mr Gillham is neither a "contract worker" of the MSO (as the relevant "principal") or an "employee" of the MSO for any purpose under the EO Act.[61] This is based on the following factual matters:

(a) in the written agreement between Mr Gillham and SSA made on or around 11 June 2024 (the "**Gillham / SSA Agreement**"[62]) was a contract for services as between Mr Gillham and SSA, not between Mr Gillham and the MSO.[63] Accordingly, the extended definition of "employment" beyond the common law meaning in s 4(1)

---

60 *C v Commonwealth of Australia* (2015) 234 FCR 81 at [36] (Tracey, Buchanan & Katzmann JJ); *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165 at [93] (Gageler & Gleeson JJ).

61 Joint Defence [36]-[39B] pp 22-24.

62 Joint Defence [6] p 7. A copy of the Gillham / SSA Agreement is annexed to the Zwier Affidavit at [11(e)], Annexure **LZ-9** pp 239-254. See, too, ASOC [6] p 3, [36] p 11.

63 Joint Defence [6(c)(ii)] p 8.

of the EO Act (see above at [26]) has no application as between Mr Gillham and the MSO;

(b) cl 13.1[64] of the Gillham / SSA Agreement expressly provides that Mr Gillham is an independent contractor, not an employee of SSA or of any "member orchestra"[65] such as the MSO.[66] To similar effect is cl 27.3 of the Gillham / SSA Agreement which relevantly provided that "[nothing] in this Agreement will be construed as constituting…employment";[67]

(c) the contractual obligations between SSA and the MSO are contained in a written agreement made on 15 July 2010 ("**the SSA / MSO Service Level Agreement**"[68]), as relevantly amended on 20 June 2023 ("**the Amendment to the SSA / MSO Service Level Agreement**"[69]). SSA's relevant obligation to the MSO was to provide it with "contracting and contract management for international artists' engagement",[70] like the engagement of Mr Gillham to perform the Recital and the Concert. The MSO's obligations to the SSA were to fulfil all obligations required in order for the SSA to perform its contractual obligations under the Gilham / SSA Agreement in accordance with the agency relationship as between SSA and the MSO.[71] The MSO had no obligation to Mr Gillham arising from the SSA / MSO Service Level Agreement; and

(d) Mr Gillham's allegation of an implied contractual relationship of employment with the MSO[72] (which is denied by the MSO and Mr Ross[73]) is inconsistent with the entire

---

64 Gillham / SSA Agreement at cl 13.1: "The Artist is an independent contractor, and not an employee of Symphony Services or of any Member Orchestra" (Zwier Affidavit at [11(e)], Annexure **LZ-9**, p 246).

65 Gillham / SSA Agreement at cl 1.1(c): "**Member Orchestra** means Sydney Symphony Orchestra Holdings Pty Ltd, Melbourne Symphony Orchestra Pty Ltd, Adelaide Symphony Orchestra Pty Ltd, West Australian Symphony Orchestra Pty Ltd, Tasmanian Symphony Orchestra Pty Ltd and Queensland Symphony Orchestra Pty Ltd as applicable" (Zwier Affidavit at [11(e)], Annexure **LZ-9**, p 242).

66 Joint Defence [37(c)] p 22.

67 Joint Defence [37(c)] p 22; Zwier Affidavit at [11(e)], Annexure **LZ-9**, p 248.

68 A copy of the SSA / MSO Service Level Agreement is annexed to the Zwier Affidavit at [11(c)], Annexure **LZ-7,** pp 226-232.

69 A copy of the Amendment to the SSA / MSO Service Level Agreement is annexed to the Zwier Affidavit at [11(d)], Annexure **LZ-8**, pp 233-238.

70 Joint Defence [3(c)(v)(1)] pp 6-7; SSA / MSO Service Level Agreement, pp 1-3 at cll 3, 5, 10 and sch 1 at p 5 (Zwier Affidavit at [11(c)], Annexure **LZ-7** pp 227-229, 231) and Amendment to the SSA / MSO Service Level Agreement, p 2 "General" and sch 1 at p 2 (Zwier Affidavit at [11(d)], Annexure **LZ-8**, p 237).

71 Joint Defence at [3(c)(v)(2)] p 7, [38(b)] p 23; SSA / MSO Service Level Agreement, pp 1-3 at cll 3, 5, 10 and sch 1 at p 5 (Zwier Affidavit at [11(c)], Annexure **LZ-7** pp 227-229, 231) and Amendment to the SSA / MSO Service Level Agreement, p 2 "General" and sch 1 at p 2 (Zwier Affidavit at [11(d)], Annexure **LZ-8**, p 237).

72 ASOC [10]

73 Joint Defence at [10] pp 11-12.

agreement (in cl 22.1[74]) between Mr Gillham and the SSA under the Gillham / SSA Agreement, and the personal nature of the rights and obligations that Mr Gillham had with SSA (in cl 27.4[75]).

29 Having regard to the matters above at [28]:

(a) there is no objective factual basis to allege that he was a "contract worker" of the MSO (as the relevant "principal, in relation to a contract worker") for the purposes of the definitions in s 4(1) of the EO Act and for the purposes of the statutory prohibition in s 21 of the EO Act (see above at [25(a)]). The MSO did not make a contract with the SSA for work to be done by Mr Gillham as one of its employees. Rather, the MSO made the SSA / MSO Service Level Agreement for it to provide – on an ongoing basis – various core services of which "contracting and contract management for international artists' engagement" was but one. Moreover, Mr Gillham was not an employee of the SSA under the Gillham / SSA Agreement (see above [28(b)]). On that basis, he clearly has no right as against the MSO by reference to any of the provisions of the EO Act he has identified at ASOC [36]-[39] p 11; and

(b) there is also no objective factual basis for Mr Gillham to allege that he was in an employment relationship with the MSO for the purposes of the definitions in s 4(1) of the EO Act (see above at [26]) and for the purposes of the statutory prohibition in s 18 of the EO Act (see above at [25(b)]). On that basis, he clearly has no right as against the MSO by reference to any of the provisions of the EO Act he has identified at ASOC [39A]-[39B] p 12.

30 For the reasons outlined above at [28] to [29], it is clear that Mr Gillham does not have a workplace right for the purposes of s 341(1)(a) of the FW Act on the basis that he has no relevant entitlement to the benefit of a "workplace law"; he cannot have such a right as against the MSO because he is not an employee or a contract worker for relevant purposes under the EO Act. This is necessarily so in circumstances where Mr Gillham would have no

---

74 Gillham / SSA Agreement cl 22.1: "This Agreement contains the entire agreement of the Parties (and supersedes all prior agreements, if any) in relation to its subject matter. There are no conditions, warranties, promises or obligations written or oral, express or implied, in relation to that subject matter other than those expressly stated in this Agreement or necessarily implied by law. This Agreement can only be modified by written instrument signed by both Parties except pursuant to specific provisions of this Agreement" (Zwier Affidavit at [11(e)], Annexure **LZ-9**, p 248).

75 Gillham / SSA Agreement cl 27.4: "The Artist's rights and obligations under this Agreement are personal and cannot be assigned or dealt with in any way without the prior written approval of Symphony Services" (Zwier Affidavit at [11(e)], Annexure **LZ-9**, p 249).

such entitlement to a remedy arising from an alleged contravention of the statutory prohibitions in Div 1 of Part 4 of the EO Act (which deal with "Discrimination in Employment, and in which s 18 and s 21 are located). Such remedies are only available to a person if they meet the relevant threshold definitions in s 4(1) of the EO Act and if they establish prohibited discrimination as against another person on the basis of a protected attribute (in s 6 of the EO Act).[76]

31 Having regard to the principles set out above at [5], [9] and in **Section D**, the absence of any objective factual basis for the existence of a workplace right is an ample basis for this Court to summarily dismiss this proceeding and/or to strike out the whole of the ASOC.[77]

F THERE IS NO "WORKPLACE LAW" FOR THE PURPOSES OF THE FW ACT

32 The MSO and Mr Ross join issue with the EO Act being a "workplace law" for the requisite purpose of s 341(1)(a) of the FW Act.[78] In essence, the MSO and Mr Ross allege that the EO Act is not, for the purposes of the definition in the Dictionary in s 12 of the FW Act, a "workplace law" because it is not a State law that regulates the relationships between employers and employees[79] (see above at [24]), and relatedly, that Mr Gillham was not an employee and the MSO was not an employer for any purpose under Part 3-1 (General Protections) of the FW Act).[80] In the alternative, the MSO and Mr Ross allege that s 18 and s 21 of the EO Act (which are the relevant sources of Mr Gillham's alleged workplace right(s), see above at [25]), are only a "workplace law" for the purposes of s 341(1)(a) of the FW Act to the extent, and only to the extent, that each regulates the relationships between common law employees and employers (see above at [27]).[81]

33 The task of assessing whether a State law is a "workplace law" which "regulates the relationship between employers and employees" refers to the specific rule relied upon by an applicant;[82] this may involve "consideration of a single provision of an act, a group of provisions, or an act as a whole".[83]

---

76 Joint Defence at [39(b)] p 23.

77 Compare, *C v Commonwealth of Australia* (2015) 234 FCR 81 at [54]-[60], [67] (Tracey, Buchanan & Katzmann JJ).

78 Joint Defence [40] pp 24-25.

79 Joint Defence [40(a)] p 24.

80 Joint Defence [40(b)-(c)] p 24.

81 Joint Defence [40(d) p 25.

82 *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 at [102] (Jessup J, Allsop CJ agreeing at [1], White J agreeing at [140]); *The Environmental Group Ltd v Bowd* (2019) 288 IR 396 at [134] (Steward J).

83 See, *Regulski v State of Victoria* [2015] FCA 206 at [198] (Jessup J); *Milardovic v Vemco Services Pty Ltd (Administrators Appointed)* [2016] FCA 19 at [70]-[71] (Mortimer J, as Her Honour then was).

34 Here, the whole of the EO Act concerns a broad array of objectives[84] going well-beyond the purported regulation of the employment relationship. For example, the EO Act establishes statutory prohibitions of discrimination in: employment (Div 1, Part 4); in employment-related areas (Div 2, Part 4); education (Div 3, Part 4); the provision of goods and services and disposal of land (Div 4, Part 4); accommodation (Div 5, Part 4); clubs and club members (Div 6, Part 4); sport (Div 7, Part 4); and local government (Div 7, Part 4). The EO Act is therefore legislation of a general nature "with no particular link to the workplace".[85]

35 Sections 18 and 21 of the EO Act, which are located in Div 1 of Part 4 ("Discrimination in Employment"), are also not laws which seek to specifically regulate the relationship as between employers and employees; rather, these specific provisions seek to prohibit or prevent certain conduct.[86] A provision which does "no more than use the status of employer or employee as an incidental touchstone for the imposition of duties serving other ends"[87] also does not render a rule a workplace law for the purposes of s 341(1)(a) of the FW Act. In any event, these specific provisions concern the relationships between persons beyond the common law meaning of a relationship between employee and employer (see above at [27(b)]) and thereby have extended "operation beyond the circumstances of [common law employer and employee] strictly so called".[88] Accordingly, these specific provisions do not "regulate the relationships between employers and employees" and are not "workplace laws" for the purposes of s 341(1)(a) of the FW Act.[89]

36 In the alternative to matters identified above at [34] to [35], the MSO and Mr Ross submit that s 18 of the EO Act is a "workplace law" to the extent, and only to the extent, that it

---

84 EO Act s 3.

85 *Vukovic v Myer Pty Ltd* [2014] FCCA 985 at [91] (Judge Cameron, referring to the *Disability Discrimination Act 1992* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Australian Human Rights Act 1986* (Cth)). Note, the contrary view was reached in *Bayford v Maxxia Pty Ltd* (2011) 207 IR 50 at [141] (Riley FM, concerning an earlier version of the EO Act, the *Equal Opportunity Act 1995* (Vic)).

86 Compare, at *Australian Licenced Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* (2011) 193 FCR 526 at [236] (Barker J); contrast, *Wroughton v Catholic Education Office Diocese of Parramatta* (2015) 255 IR 284 at [55], [75]-[79] (Flick J). A statutory objective in s 3(a) of the EO Act is "to eliminate discrimination, sexual harassment and victimisation, to the greatest extent possible".

87 *Australian Licenced Aircraft Engineers Association v Sunstate Airlines (Qld) Pty Ltd* (2012) 208 FCR 386 at [33] (Logan J).

88 *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 at [103] (Jessup J, Allsop CJ agreeing at [1], White J agreeing at [140]).

89 *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 at [103]-[104] (Jessup J, Allsop CJ agreeing at [1], White J agreeing at [140]). The specific provision in question was s 12(3) of the *Superannuation Guarantee (Administration Act) 1992* (Cth). Also, note the different conclusions reached in respect of s 341(1)(b) and s 341(1)(c) of the FW Act based on the same provision identified as the "workplace law" (at [107]-[110] (Jessup J)).

concerns the regulation of common law employment.[90] If, contrary to the above at [28], it is found by this Court that Mr Gillham was an employee of the MSO within the extended meaning of "employment" under s 4(1) of the EO Act, the extended operation does not concern the regulation of a common law employment relationship, which is the necessary underpinning for the purposes of deriving any entitlement to the benefit of the workplace law in question. On any view, Mr Gillham was not in a common law employment relationship with the MSO, and Mr Gillham does not otherwise allege that he was so employed.[91] Further, and in any event, s 21 of the EO Act has no relevant connection to employment relationships and on that basis it cannot be a rule that regulates employers and employees, and thereby a "workplace law", either.

37 Having regard to the principles set out above at [5], [9] and in **Section D**, the absence of any objective factual basis for the existence of a workplace right is also an ample basis for this Court to summarily dismiss this proceeding and / or to strike out the whole of the ASOC.[92]

G SEPARATE QUESTIONS

38 As an alternative to summary judgment / strike out, the MSO and Mr Ross seek orders for the determination of separate questions ahead of the trial to commence on 17 March 2015.

39 Rule 30.01(1) of the FCR relevantly provides that a party may apply to the Court for an order that a question arising in the proceeding be heard separately from any other questions. However, FCR r 30.01(2) conditions the timing for any such application to "before a date is fixed for trial of the proceeding".

40 Here, the parties were called upon to attend a case management hearing on 8 October 2024, within 3 business days of the initiation of Mr Gillham's proceeding.[93] The trial dates were then fixed shortly thereafter by orders dated 9 October 2024.[94] In those circumstances, and in circumstances where the MSO and Mr Ross have filed their Joint Defence and made this interlocutory application as soon as reasonably practicable thereafter, the MSO and Mr Ross seek to be alleviated from the ordinary requirement to comply with FCR r 30.01(2).

---

90 *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 at [103]-[104] (Jessup J, Allsop CJ agreeing at [1], White J agreeing at [140]).

91 ASOC [10] p 3, [39A] p 12.

92 Compare, *C v Commonwealth of Australia* (2015) 234 FCR 81 at [54]-[60], [67] (Tracey, Buchanan & Katzmann JJ).

93 Zwier Affidavit at [6] and Annexure **LZ-1** (pp 7-10).

94 Over 17-20 March and 24 March 2025. See, [7] of the Orders of Mortimer CJ dated 9 October 2024.

41 The purpose of FCR r 30.01(2), which is to "ensure that, if there is to be a separate question determined, it occurs at a time well before trial",[95] thereby saving resources and possibly promoting earlier resolution of the proceeding,[96] is not relevantly undermined if the Court hears (and, if convenient, possible determines) the interlocutory application before this year's end. This is especially so in circumstances where the MSO and Mr Ross are not relevantly precluded by any Rule of Court from bringing their interlocutory application for orders summary judgment / strike out. The Court would otherwise have regard to the "overarching purpose" under the FCA (s 37M, and see above at [12]) and its broad powers under the FCR to dispense with strict compliance under FCR r 30.01(2).[97]

42 The MSO and Mr Ross otherwise refer to and rely upon the arguments outlined above in **Section E** and **Section F** in answer to the following separate questions:

> **Q1:** Having regard to ASOC [40]-[42], did the Applicant have a "workplace right" within the meaning of s 341(1)(a) of the FW Act?
>
> **Answer**: For the reasons outlined above at **Section E**, the answer is "**No**".
>
> **Q2:** Do either s 18 and s 21 of the EO Act constitute a "workplace law" for the purposes of s 341(1)(a) of the FW Act in so far as those provisions relate to the relationship between the Applicant and the First Respondent?
>
> **Answer**: For the reasons outlined above at **Section F**, the answer is "**No**".

43 If either question posed above at [42] is answered in the negative, then it is highly likely that the MSO and Mr Ross will have a basis to apply for judgment under FCR r 30.02 on the basis that the Court's decision has substantially disposed of Mr Gillham's proceeding or has rendered any further trial of his proceeding unnecessary.

H DISPOSITION AND COSTS

44 For the reasons outlined above in their submissions, the MSO and Mr Ross are entitled to the relief they seek in one of the two alternative bases.

---

95 *Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd (No 2)* (2014) 146 ALD 59 at [55] (Mortimer J, as Her Honour then was).

96 *Australian Securities and Investments Commission v Sunshine Loans Pty Ltd* [2023] FCA 640 at [29] (Derrington J).

97 Compare, *Chief Disruption Officer Pty Ltd as Trustee for the McDonald Family Trust v Michel, in the matter of Laava ID Pty Ltd* [2022] FCA 148 at [25]-[28] (Goodman J).

45 As to costs, and noting the Court's general power under FCA s 43 to award costs is constrained by s 570(2) of the FW Act,[98] the MSO and Mr Ross reserve their respective positions to make submissions either at the hearing of the interlocutory application, or on a date thereafter, as to any order that Mr Gillham pay their costs of, and incidental to, bringing this application.

2 December 2024

Philip Crutchfield
Owen Dixon Chambers West

Christopher McDermott
Aickin Chambers
Counsel for the First Respondent and the Fourth Respondent

Leon Zwier
Arnold Bloch Leibler
Solicitor for the First Respondent and the Fourth Respondent

98 See, generally, *Messenger v Commonwealth of Australia (Represented by the Department of Finance) (No 2)* [2023] FCA 20 at [7]-[17] (Snaden J).