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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 078 925 658 AND OTHERS
Respondents

REPLY SUBMISSIONS OF THE FIRST RESPONDENT AND FOURTH RESPONDENT[1]

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[1] The First Respondent and the Fourth Respondent adopt the nomenclature and the short-hand descriptions used in their Outline of Submissions filed 2 December 2024 (**MSO / Mr Ross Submissions**).

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1 The MSO and Mr Ross reply to the submissions of Mr Gillham filed on 3 March 2025 (**Mr Gillham's Submissions**)[2] as follows.

A PROCEDURAL ISSUES

2 On 24 February 2025, the Chief Justice made orders for the MSO and Mr Ross's **Interlocutory Application** filed on 21 November 2024 to be listed for hearing on 17 March 2025, on an estimate of up to one day, and the matter otherwise be adjourned to that date for any necessary further case management.[3] The principal issue for determination in the Interlocutory Application is whether Mr Gillham's Further Originating Application[4] (and the claims in his ASOC[5]) should be summarily dismissed under s 31A(2) of the FCA and / or r 26.01(1)(a) of the FCR on the basis that he has no reasonable prospect of successfully prosecuting this proceeding.[6] An alternative, but related, issue is whether the ASOC fails to disclose a reasonable cause of action and is susceptible to be struck out.[7]

3 As to the further (and distinct) alternative of the two separate preliminary questions,[8] Mr Gillham is correct in his assumption[9] that the MSO and Mr Ross are not agitating for answers to those separate preliminary questions to be given by the Court immediately following the parties' arguments at the hearing on 17 March 2025. The real issue is whether the MSO and Mr Ross are correct in their position that judgment should be given in their favour on a summary basis for the reasons set out in their primary submissions and in their reply submissions below. The MSO and Mr Ross otherwise reserve their position to make further oral submissions as necessary at the hearing on 17 March 2025 in respect of the separate questions.[10]

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2 An amended version of Mr Gillham's Submissions was served on 5 March 2025 and filed on 6 March 2025.

3 Orders of Chief Justice Mortimer dated 24 February 2025 at [2].

4 Filed on 17 October 2024.

5 Filed on 17 October 2024.

6 Interlocutory Application at [1].

7 Interlocutory Application at [2]; note FCR r 26.01(1)(c).

8 Interlocutory Application at [3].

9 Mr Gillham's Submissions at [3].

10 On that basis, the MSO and Mr Ross do not address Mr Gillham's submissions directed to this discrete topic: see, Mr Gillham's Submissions at [19], [48] & [88(2)].

B THIS DISPUTE CAN, AND SHOULD, BE RESOLVED AT AN INTERLOCUTORY STAGE

4 Mr Gillham contends that the MSO and Mr Ross's summary dismissal application is inapt for judicial determination at an interlocutory stage because:

(a) the MSO and Mr Ross ignore Mr Gillham's allegation of an implied contract as set out in the Particulars to [10] of the ASOC;[11] and

(b) it is necessary for the Court to hear evidence of whether an implied contract existed between Mr Gillham and the MSO.[12]

5 The mere raising of a factual dispute between the parties does not preclude the possibility of the Court resolving a proceeding by way of summary dismissal; there needs to be a real issue of fact, not one that is improbable, fanciful, trifling, implausible, or tenuous.[13] The Court is obliged to assess whether there is evidence of "sufficient quality and weight" to enable a party to succeed at trial and some asserted facts may appear to be "so improbable that there is no point in allowing them to go trial".[14] Further, while a Court is obliged to draw all reasonable inferences in favour of the non-moving party, the Court ought not refuse to award summary judgment to the moving party on the basis of a factual dispute which "is said to arise only from a plausible, as opposed to a reasonable, inference".[15]

6 Here, Mr Gillham's substantive allegation is that he entered into an implied contract with the MSO[16] (which was a contract for services), and was thereby an employee of the MSO for the purposes of the (expanded) definition of "employee" in s 4 of the EO Act.[17] In consequence, Mr Gillham alleges that he had a right not to be discriminated against by the MSO under s 18 of the EO Act by reason of the protected attribute of political belief or activity.[18] The substantive allegation is denied by the MSO and Mr Ross on the basis that the strong *prima*

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11 Mr Gillham's Submissions at [17].

12 Mr Gillham's Submissions at [18].

13 *Fair Work Ombudsman v Austrend International Pty Ltd* (2018) 273 IR 439 at [20] (Gilmour J, citing *Australian Securities and Investments Commission v Cassimatis* (2013) 220 FCR 256 at [46]-[47] (Reeves J)).

14 *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Limited* (2008) 167 FCR 372 at [23] (Finkelstein J); *Fair Work Ombudsman v Austrend International Pty Ltd* (2018) 273 IR 439 at [18] (Gilmour J).

15 *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Limited* (2008) 167 FCR 372 at [127] (Gordon J); *Fair Work Ombudsman v Austrend International Pty Ltd* (2018) 273 IR 439 at [14]-[15] (Gilmour J).

16 ASOC [10] and Particulars.

17 ASOC [39A]; MSO and Mr Ross's Submissions at [25(b)] & [26].

18 ASOC [39B].

facie evidence is to the contrary. Namely, that the implied contract is inconsistent with several of the express terms in Mr Gillham's written contract with SSA,[19] and on the basis that there was no contract for services as between Mr Gillham and the MSO for the purposes of the EO Act.[20]

7 The **only** factual matters Mr Gillham points to in support of the implied contract with the MSO is conduct which is either:

(a) directly contemplated by the terms of the Gillham / SSA Agreement[21] in the form of his obligations to the SSA to:

(i) perform "**the Repertoire**" (including participating in rehearsals);[22]

(ii) to not withhold or delay in consenting to any amendment to the Repertoire proposed by the MSO and communicated by the SSA;[23] and

(iii) in relation to staging, venue management and printing and distribution of concert programs as determined by the MSO;[24] or

(b) merely facilitative of the Repertoire being performed by Mr Gillham – namely, the MSO providing him with access to a piano, a microphone and the means of enabling his music to be amplified in its auditorium.[25] The MSO's facilitation of these matters aligns with its express obligation to SSA under the SSA / MSO Service Level Agreement "to fulfil all obligations required in order for SSA to perform the contractual obligations under those agreements…with artists".[26] No such obligation was owed directly by it to Mr Gillham. This conduct otherwise post-dates the obligations agreed between Mr Gillham and SSA and is thereby irrelevant.[27]

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19 Defence [10], [39B]; MSO and Mr Ross's Submissions at [28]-[29].

20 Defence [39A]; MSO and Mr Ross's Submissions at [28]-[29].

21 Defence [6]-[8]; MSO and Mr Ross's Submissions at [28].

22 See, cl 2.1(a) of the Gillham / SSA Agreement (Zwier Affidavit, Annexure LZ-9, p 242, read with the Schedule (p 240) and the Annexure (pp 250-252)); *cf* ASOC [10] Particulars (i) & (ii)(A)-(C), (E) & (H).

23 See, cl 3 and cl 5.2 of the Gillham / SSA Agreement (Zwier Affidavit, Annexure LZ-9, p 243); *cf* ASOC [10] Particulars (i) & (ii)(D).

24 See, cl 5.1 of the Gillham / SSA Agreement (Zwier Affidavit, Annexure LZ-9, p 243; *cf* ASOC [10] Particulars (i) & (ii)(E).

25 ASOC [10] Particulars (i) & (ii)(G).

26 See, cl 10 of the SSA / MSO Service Level Agreement (Zwier Affidavit, Annexure LZ-7, p 229).

27 *EFEX v Group Pty Ltd v Bennett* (2024) 330 IR 171 at [11] (Katzmann & Bromwich JJ): "The nature of the work contract for and the arrangements of the supply or provision of any tools or equipment to the putative employee may also be relevant. Generally, things said or done after a contract was made are not legitimate aids to its construction".

8 Mr Gillham has not alleged that any aspect of the Gillham / SSA Agreement, including his express acknowledgment in cl 13.1 that he is an independent contractor and not an employee of SSA or the MSO, is a "sham".[28] However, a tentative allegation to this effect appears to be advanced in his submissions which "may well be found, at trial"[29] based on the general acknowledgment by each of the MSO and SSA as to the existence of an agency relationship between them.[30] A serious allegation of this kind cannot be entertained by the Court without being properly and formally articulated;[31] procedural fairness demands no less in a civil penalty proceeding.[32]

9 A "sham" is not established by pointing to the theoretical possibility of Mr Gillham's enforcement of legal rights (as a third party) against the MSO (as a principal) if SSA (as the MSO's agent) were not to fulfil certain of its contractual obligations to Mr Gillham under the Gillham / SSA Agreement (for example, as to payment for services rendered). Put differently, the existence of an agency relationship does not establish that the Gillham / SSA Agreement was "brought into existence as a 'mere piece of machinery' serving some purpose of than that of constituting the whole of the arrangement".[33] This submission also conveniently ignores that the Gillham / SSA Agreement is evidently a contractual template for prescriptive legal relations between artists and SSA for the performance of repertoires for **any** of the "member orchestras",[34] for which the MSO is but one.[35] If it be a "sham" document, it is truly an elaborate one, particularly given some of the other rights and obligations that inhere in SSA (see, for example, cl 8 relating to "publicity and promotion"[36] and cl 14 relating to "recording and broadcasting rights"[37]).

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28 See, cl 13.1 of the Gillham / SSA Agreement (Zwier Affidavit, Annexure LZ-9, p 246).

29 Mr Gillham's Submissions at [30]-[31].

30 See, cl 10 of the SSA / MSO Service Level Agreement (Zwier Affidavit, Annexure LZ-7, p 229).

31 See, for example, *ZG Operations Australia Pty Ltd v Jamsek* (2022) 275 CLR 254 at [63] (Kiefel CJ, Keane & Edelman JJ): "In Australia, claims of sham cannot be made by stealth under the obscurantist guise of a search for the 'reality' of the situation".

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

33 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165 at [177] (Gordon J, citing *Raftland Pty Ltd as a trustee of the Raftland Trust v Commissioner of Taxation* (2008) 238 CLR 516 at [34]-[35] (Gleeson CJ, Gummow & Crennan JJ)).

34 Namely, the Sydney Symphony Orchestra, the Melbourne Symphony Orchestra, the Adelaide Symphony Orchestra, the West Australian Symphony Orchestra, the Tasmanian Symphony Orchestra and the Queensland Symphony Orchestra: see, cl 1.1(c) of the Gillham / SSA Agreement (Zwier Affidavit, Annexure LZ-9, p 242).

35 See, too, the purpose of the MSO / SSA Service Level Agreement, cl 3 (Zwier Affidavit, Annexure LZ-7, p 227).

36 See, cl 8 of the Gillham / SSA Agreement (Zwier Affidavit, Annexure LZ-9, p 245).

37 See, cl 14 of the Gillham / SSA Agreement (Zwier Affidavit, Annexure LZ-9, p 246).

10 Mr Gillham has not joined specific issue with the MSO and Mr Ross's defence to the substantive allegation, as would be required by r 16.08[38] and r 16.33[39] of the FCR if the defence to the allegation is infirm. Moreover, he discontinued his claim against SSA (as the former Second Respondent) in this proceeding,[40] in circumstances where, if Mr Gillham sought relief as to the validity of the Gillham / SSA Agreement, it would be a necessary party arising from any such serious allegation.[41] There are otherwise no facts alleged by Mr Gillham in his ASOC, including as to any material oral conversations between Mr Gillham and officers of the MSO or the like, which indirectly justify any allegation to this effect.

11 The starting (and end) point is the determination of the rights and liabilities of the parties under the Gillham / SSA Agreement as a written agreement, which is capable of being determined objectively on the face of the document, using the construct of a reasonable person, not Mr Gillham's subjective viewpoint.[42] Mr Gillham represented to SSA that he read and approved the terms he agreed in the Gillham / SSA Agreement,[43] and it is simply not open to him to ignore or brush aside such clearly articulated obligations.[44] There is otherwise no evidence Mr Gillham points up which suggests that the MSO effected any agreement directly with Mr Gillham; the factual matters above at [7] do not demonstrate any shared "understanding or agreement…or manifestation of mutual assent to be legally bound"[45] to each other in any way. Nor does Mr Gillham identify how any implied contract

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38 Which relevantly provides: "In a pleading subsequent to a statement of claim, a party must expressly plead a matter of fact or point of law that: (a) raises an issue not arising out of the earlier pleadings; or (b) if not expressly pleaded, might taken another party by surprise if later pleaded; or (c) the party alleges makes another party's claim or defence not maintainable".

39 Which relevantly provides: "If a respondent files a defence and the applicant wants to plead a matter of fact or point of law of the kind mentioned in rule 16.08, the applicant must file a reply, in accordance with Form 34, within 14 days after being served with the defence".

40 Notice of Discontinuance filed on 16 October 2024.

41 See, *United Firefighters' Union of Australia v Country Fire Authority (No 3)* [2022] FCA 1116 at [18] and [20] (O'Callaghan J, citing *News Litd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 525-525 (Lockhart, von Doussa and Sackville JJ).

42 *Realestate.com.au Pty Ltd v Hardingham* (2022) 277 CLR 115 at [17] (Kiefel CJ & Gageler J), [43]-[44] (Gordon J, citing *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40], [45] (Gleeson CJ, Gummow, Hayne, Callinan & Heydon JJ)) and [86], [102]-[107] (Edelman & Steward JJ).

43 *Realestate.com.au Pty Ltd v Hardingham* (2022) 277 CLR 115 at [17] (Kiefel CJ & Gageler J), [43]-[44] (Gordon J, citing *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40], [45] (Gleeson CJ, Gummow, Hayne, Callinan & Heydon JJ)) and [86], [102]-[107] (Edelman & Steward JJ).

44 *Equuscorp Pty Ltd v Glengallen Investments Pty Ltd* (2004) 218 CLR 471 at [35] (Gleeson CJ, McHugh, Kirby, Hayne & Callinan JJ): "The obligations of written agreements between parties cannot simply be ignored or brushed aside".

45 *Realestate.com.au Pty Ltd v Hardingham* (2022) 277 CLR 115 at [47] (Gordon J, citing *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 525 at [369] (Allsop J)).

is to be implied in law as a matter of necessity such as to potentially enliven the exception in cl 22.1[46] of the Gillham / SSA Agreement.[47]

12 Accordingly, it is not a reasonable inference for the Court to draw (see above at [5]) that an implied contract existed as between Mr Gillham and the MSO, in circumstances where Mr Gillham and SSA have so comprehensively and clearly turned their minds to the same subject matters in the Gillham / SSA Agreement. The reasonable inference to be drawn by the Court is that the terms of the Gillham / SSA Agreement preclude the possibility of any real issue of fact apt for determination at trial as to the existence of any implied contract between Mr Gillham and the MSO.

C MR GILLHAM WAS NOT A "CONTRACT WORKER" AND / OR AN "INDEPENDENT CONTRACTOR" OF THE MSO

13 The MSO and Mr Ross have admitted that Mr Gillham was an "independent contractor" for the purposes of s 338A of the FW Act in connection with his engagement with the SSA,[48] and that the Gillham / SSA Agreement constituted "employment" for the purposes of the definition in s 4(1) of the EO Act by reason of it being "an engagement under a contract for services",[49] noting that Mr Gillham agreed in the Gillham / SSA Agreement that he was an independent contractor and not an employee of SSA or the MSO.[50] The MSO has also denied that it meets the definition of a "***principal***, in relation to a contract worker" in s 4(1) of the EO Act because it was not a person who contracted with another person (SSA) for work to be done by employees of the other person (putatively, Mr Gillham).[51]

14 The SSA / MSO Service Level Agreement is not concerned with the contracting for work to be done by SSA employees (even if Mr Gillham is a putative employee of SSA under the expanded definition of s 4(1) of the EO Act). The evident purpose of the SSA / MSO Service Level Agreement (and the Amendment to the SSA / MSO Service Level Agreement) is for the MSO to secure from SSA a broad array of services to or for its benefit, those services include: the National Music Library, Program Notes, National Artist Development and

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46 See, cl 22.1 of the Gillham / SSA Agreement (Zwier Affidavit, Annexure LZ-9, p 248).

47 Mr Gillham's Submissions at [17] and fn 26. As to the approach to implications of terms in law and "necessity", see, *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at [29] (French CJ, Bell & Keane JJ).

48 Defence [36(a)]; MSO and Mr Ross's Submissions at [28(a)-(c)]; *cf* Mr Gillham's Submissions at [21].

49 Defence [37(b)]; MSO and Mr Ross's Submissions at [28(a)-(c)]; *cf* Mr Gillham's Submissions at [23].

50 Defence [37(c)]; MSO and Mr Ross's Submissions at [28(a)-(c)].

51 Defence at [38(b)]; MSO and Mr Ross's Submissions at [28(a)-(c)].

International Tour Co-ordination.[52] Discrete components of the international tour co-ordination services include contracting and contract management for international artists' engagement, and artists' payments and ensuring tax and other compliance requirements are met.[53] There are clear commercial benefits to both SSA and MSO beyond the supply of international tour co-ordination arising under the MSO/SSA Service Level Agreement. It is otherwise artificial to construe Mr Gillham's engagement with SSA as though he was actually an employee of SSA, or an independent contractor of SSA facilitated for work in a labour hire context with the MSO,[54] both circumstances of which are the more likely focus of the prohibition in s 21(1) of the EO Act.[55] Further, it is not apparent that the existence of the SSA / Gillham Agreement would have been the sole means by which Mr Gillham could have been contracted to undertake work for the MSO;[56] the SSA / MSO Service Level Agreement does not purport to limit the capacity of the MSO to directly contract with artists without involving the SSA.

15 Allegations of unfairness as to "labels" and the purported deprivation and "contracting out" of statutory rights under the EO Act[57] assume the very existence of legal relations as between the MSO and Mr Gillham (which is contested for the reasons outlined above in **Section B**) and are otherwise entirely overstated. A label for a contractual relationship may not be dispositive,[58] but that does not mean a label is not potentially confirmatory of the rights and obligations which constitute the essence of the relationship. Without any admission, Mr Gillham has elected not to pursue alternative claims.

D RESPONSES TO MR GILLHAM'S SUBMISSIONS AS TO THE "WORKPLACE LAW" UNDER THE FW ACT

16 The correct approach to the identification of the existence of "workplace law" for the purposes of the definition of s 12 of the FW Act is whether it effects a rule that regulates the

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52 See, cl 5 of the SSA / MSO Service Level Agreement (Zwier Affidavit, Annexure LZ-7, p 227) and Sch 1 of the Amendment to the SSA / MSO Service Level Agreement (Zwier Affidavit, Annexure LZ-8, pp 236-237).

53 MSO and Mr Ross's Submissions at [28(a)-(c)]; Zwier Affidavit Annexure LZ-8 Sch 1, p 237; *cf* Mr Gillham's Submissions at [22]-[24].

54 *cf* Mr Gillham's Submissions at [32].

55 See, for example, *Perkrestov v Ward (Human Rights)* [2019] VCAT 115 at [37]-[45] (Member Joseph).

56 *cf* Mr Gillham's Submissions at [23].

57 *cf* Mr Gillham's Submissions at [32], [83], [85].

58 *Workplace Pty ltd v Rossato* (2021) 271 CLR 456 at [97] (Kiefel CJ, Keane, Gordon, Edelman, Steward & Gleeson JJ); *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165 at [63] (Kiefel CJ, Keane & Edelman JJ) and [184] (Gordon J).

relationship between employees and employers.[59] The FW Act also "postulates the existence of employment at common law as a precondition to its operation",[60] such that "unless two persons are or have been in a relation of employment at common law independently of the operation of the [FW Act], one of those persons cannot be an 'employer' and the other cannot be an employee' within the meaning of the [FW Act]".[61]

17 Mr Gillham's reliance on the overall Objects of the FW Act (in s 3)[62] and the Objects of Part 3-1 (in s 336)[63] and the explanatory memorandum to the Fair Work Bill 2008[64] do not overcome the effect of *ratio decidendi*[65] of the Full Federal Court in ***Tattsbett Ltd v Morrow*** (2015) 233 FCR 46, where it was necessarily held that "someone who was not an employee in the common law sense, was not entitled to the benefit of so much of the [*Superannuation Guarantee (Administration) Act 1992* (Cth)] as was a 'workplace law' within the meaning of s 341(1)(a) of the FW Act", because that law was not a "workplace law" within the meaning of Part 3-1 of the FW Act.[66] The Full Federal Court held that s 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (Cth),[67] did no more than extend the operation of the provisions of that law "beyond the circumstances of employees strictly so called" (i.e. common law employment), and were not concerned with the regulation of relationships between (it may be interpolated common law) employers and employees.[68] Mr Gillham's submission that this issue was not properly ventilated by the parties before the Full Federal Court in the appeal is without merit.[69]

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59 *The Environmental Group Ltd v Bowd* (2019) 288 IR 396 at [133]-[134] (Steward J, citing *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 at [102] (Jessup J, with whom Allsop CJ & White J agreed at [1] and [140] respectively); MSO and Mr Ross's Submissions at [33].

60 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165 at [98] (Gageler & Gleeson JJ).

61 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165 at [98] (Gageler & Gleeson JJ).

62 *cf* Mr Gillham's Submissions at [37]-[40].

63 *cf* Mr Gillham's Submissions at [43]-[44].

64 *cf* Mr Gillham's Submissions at [43]-[44].

65 As to the distinction between *ratio decidendi* and *obiter dicta*, see *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 4)* (2010) 268 ALR 108 at [136]-[137] (Rares J).

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

67 Which relevantly provided: "If the 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".

68 *Tattsbett Ltd v Morrow* (2015) 233 FCR 46 at [99], [104] (Jessup J, Allsop CJ agreeing at [1], White J agreeing at [140]).

69 *cf* Mr Gillham's Submissions at [48]; *Tattsbett Ltd v Morrow* (2015) 233 FCR 46 at [100], [106]-[108] (Jessup J, Allsop CJ agreeing at [1], White J agreeing at [141]).

18 Mr Gillham's reliance on the "case-law" he identifies in his submissions as essentially undermining or diluting the effect of *Tattsbett Ltd v Morrow*[70] are also without merit, for the following reasons:

(a) as to ***Auimatagi*** *v Australian Building and Construction Commissioner* (2018) 267 FCR 268,[71] the Full Federal Court found it was not appropriate for one of the parties to agitate a ground of appeal relating to the law in question (the *Work Health and Safety Act 2011* (Cth)) by reason of a concession at trial that it was a "workplace law" (i.e. a *Coulton v Holcombe* limitation[72]), such that it was not appropriate for that party to argue there had been a (potential) exercise of a workplace right under Part 3-1 of the FW Act through the enforcement of a policy in purported compliance with s 19 of the *Work Health and Safety Act 2011* (Cth).[73] This case provides no support for the proposition that *Tattsbett v Morrow* was incorrectly decided, or that a more expansive interpretation of "workplace law" is otherwise warranted;

(b) as to ***Bayford*** *v Maxxia Pty Ltd* (2011) 207 IR 50,[74] which concerned an argument as to whether the *Equal Opportunity Act 1995* (Vic) (not the current EO Act) and specifically s 14A ("Employer must accommodate employee's responsibilities as parent or carer") was a "workplace law" within the meaning of s 12 of the FW Act,[75] this judgment precedes *Tattsbett v Morrow*, is not binding on this Court, and, in any event, clearly involved a circumstance of common law employment.[76] Further, the criticism as to the brevity of the reasons in *Vukovic v Myer Pty Ltd* [2014] FCCA 985 at [91] (Judge Cameron),[77] essentially to the contrary conclusion in *Bayford*, could (respectfully) equally be levelled at Riley FM's reasons in *Bayford*, and otherwise is unhelpful to the resolution of this issue;

(c) as to ***Reynolds*** *v Harrier Group Pty Ltd* [2023] FedCFamC2G 930,[78] the Court accepted a concession made by the Respondents that a common law employee[79] had a

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70 *cf* Mr Gillham's Submissions at [49].
71 *cf* Mr Gillham's Submissions at [49]-[51].
72 (1986) 162 CLR 1; *Auimatagi v Australian Building and Construction* (2018) 267 FCR 268 at [68] (Allsop CJ, Collier & Rangiah JJ).
73 *Auimatagi v Australian Building and Construction Commissioner* (2018) 267 FCR 268 at [61]-[68] (Allsop CJ, Collier & Rangiah JJ).
74 *cf* Mr Gillham's Submissions at [52].
75 *Bayford v Maxxia Pty Ltd* (2011) 207 IR 50 at [138]-[141] (Riley FM).
76 *Bayford v Maxxia Pty Ltd* (2011) 207 IR 50 at [1] (Riley FM).
77 *cf* Mr Gillham's submissions at [56].
78 *cf* Mr Gillham's Submissions at [57].
79 *Reynolds v Harrier Group Pty Ltd* [2023] FedCFamC2G 930 at [1] (Judge Ladhams).

workplace right under s 341 of the FW Act (which sub-paragraph is unclear) as to a right not to be "unlawfully discriminated against on the ground of…gender" and "not to be victimised" in accordance with the *Equal Opportunity Act 1984* (WA) and the *Sex Discrimination Act 1984* (Cth).[80] The issue of whether either law was properly a "workplace law" was not agitated by any party, and the same submissions as to *Bayford* above at (b) are otherwise made as to *Reynolds*;

(d) as to ***Regulski** v State of Victoria* [2015] FCA 206,[81] another case involving common law employment,[82] the laws in question (ss 195[83] and 196[84] of the *Accident Compensation Act 1985* (Vic)) were found to constitute a "workplace law" because they required "employers to act in certain ways, and in that sense were regulatory". Specifically, Jessup J found that these provisions were connected to the "field…of the relationships which [employers] had with their relevant employees",[85] and that the regulation of the employment relationship was "presumptively achieved by obedience to [ss 195 and 196 of the *Accident Compensation Act 1985* (Vic)] [such] that employees would perform work, in the service of their employers, which they would, or at least might, not otherwise have performed".[86] His Honour's reasons in *Regulski* do not undermine the *ratio decidendi* in *Tattsbett Ltd v Morrow* (a decision he was instrumental in deciding only one month earlier, and which (respectfully) His Honour may be taken to have been cognisant of). The issue in *Tattsbett Ltd v Morrow* clearly did not arise in *Regulski* and the provisions of the *Accident Compensation Act 1985* (Vic) are also clearly connected to the words "including by dealing with occupational health and safety matters" in the definition of "workplace law" as it relates to "any other law of the Commonwealth, a State or a Territory that regulates the relationships between employers and employees". The same submissions are made in response to Mr Gillham's reliance on ***Milardovic** v Vemco Services Pty Ltd* [2016] FCA 19,[87]

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80 *Reynolds v Harrier Group Pty Ltd* [2023] FedCFamC2G 930 at [98(d)] & [99] (Judge Ladhams).

81 *cf* Mr Gillham's Submissions at [60]-[62], [64].

82 *Regulski v State of Victoria* [2015] FCA 206 at [1]-[2] (Jessup J).

83 Which involved civil penalty provisions as to planned returns to work (e.g. s 195(1): "An employer must, to the extent that it is reasonable to do so, plan the return to work of a worker from the date on which the employer knows or ought reasonably to have known of the worker's incapacity for work, which is the earlier date". See, *Regulski v State of Victoria* [2015] FCA 206 at [178] (Jessup J).

84 Which involved an obligation imposed on employers to consult about the return to work of a worker. See, *Regulski v State of Victoria* [2015] FCA 206 at [179] (Jessup J).

85 *Regulski v State of Victoria* [2015] FCA 206 at [200] (Jessup J).

86 *Regulski v State of Victoria* [2015] FCA 206 at [200] (Jessup J).

87 *cf* Mr Gillham's Submissions at [63]-[64].

which also involved consideration of the *Accident Compensation Act 1985* (Vic) and common law employment,[88] too.

19 As to Mr Gillham's submissions as to the status of the EO Act effecting "vital social policy" in the workplace and thereby being of a different character to other laws regulating conduct of employees by employers,[89] the MSO and Mr Ross reiterate the distinction between the regulation of the employment relationship *per se*, as opposed to prohibitions in conduct arising therein.[90]

E RESPONSE TO MR GILLHAM'S INTERNATIONAL LAW ARGUMENTS

20 A principal argument[91] raised by Mr Gillham is that the definition of a "workplace law" in s 12 of the FW Act should be interpreted consistently[92] with Australia's international law obligations under the International Labour Organisation (**ILO**) Discrimination (Employment and Occupation) Convention 1958, the ILO Convention (No.111) concerning Discrimination in respect of Employment and Occupation, and the International Covenant on Civil and Political Rights (ICCPR) so as to ensure greater efficacy of the protection in the (Victorian) EO Act. This argument does not account for the "postulate" of common law employment inhering in the statutory underpinnings of much of the FW Act (see above at [16]), and otherwise ignores the requirement to give primacy the text of definition itself,[93] which deploys the ordinary meaning of employer and employee. The observations of the United Nations Special Rapporteur as relied on by Mr Gillham[94] are otherwise irrelevant to any construction of the FW Act,[95] and clearly do not have the same force as any international specific obligations Australia has committed to ratifying as identified in the FW Act itself.

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88 *Milardovic v Vemco Services Pty Ltd* [2016] FCA 19 at [1] (Mortimer J).

89 *cf* Mr Gillham's Submissions at [54]-[55],

90 MSO and Mr Ross's Submissions at [35]. *The Environmental Group Ltd v Bowd* (2019) 288 IR 396 at [140]-[141] (Steward J) (Part 9.4AAA of the *Corporations Act 2001* (Cth)); *Austin v Honeywell Ltd* (2013) 277 FLR 372 at [50]-[77] (Judge Riley) (*Privacy Act 1988* (Cth)).

91 *cf* Mr Gillham's Submissions at [65]-[82].

92 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287-288 (Mason CJ & Deane J): "If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail. So expressed, the principle is no more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations".

93 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] (Kiefel CJ, Nettle & Gordon JJ).

94 *cf* Mr Gillham's Submissions at [86]-[87].

95 see, by analogy, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 (Mason CJ & Deane J): "Where a statute or subordinate legislation is ambiguous, the courts should favour a construction which accords with Australia's obligations under a treaty or international convention to which Australia s a party, **at least in those cases in which the legislation is enacted after, or in contemplation**

21 Mr Gillham's case is otherwise not one which has been (or could be) brought under s 351(1) of the FW Act (which prohibits adverse action being taken by an employer against an employee because of the employee's political opinion[96]). The protected attribute of "political opinion" otherwise does not require some supererogatory protective interpretation *vis-à-vis* other protected workplace rights.[97]

F CONCLUSION

22 The disposition and costs consequences the MSO and Mr Ross agitate for in their earlier submissions at [44]-[45] remains appropriate in so far as the summary dismissal / strike out remedies and as to costs. If the MSO and Mr Ross are unsuccessful in their Interlocutory Applicant, they seek a further opportunity to be heard as to any order about costs, noting s 570 of the FW Act and that no such application has been formally made by Mr Gillham.[98]

11 March 2025

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Aickin Chambers

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of, entry into, or ratification of, the relevant international instrument. That is because Parliament, *prima facie*, intends to give effect to Australia's obligations under international law" (**emphasis added**).

96 See, *Sayed v Construction, Forestry, Mining and Energy Union* (2015) 327 ALR 460 at [164]-[177] (Mortimer J) as to "the meaning of political opinion" in s 351 of the FW Act.

97 See, *Rumble v The Partnership trading as HWL Ebsworth Lawyers* (2020) 275 FCR 423 at [45]-[47] (Rares & Katzmann JJ), in particular at [47]: "There is no reason why s 351(1) [of the FW Act] should be construed so as to give Dr Rumble an advantage that other employees, consultants and partners of the firm did not enjoy if they wished to criticise non-Government actual or potential clients of the firm in the media".

98 *cf* Mr Gillham's Submissions at [90].