

NOTICE OF FILING

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PTY LTD ABN 47 078 925 658 & ORS
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

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.



Form 33
Rule 16.32

Defence

No. VID 1036 of 2024

Federal Court of Australia
District Registry: Victoria
Division: Fair Work

Jayson Lloyd Gillham
Applicant

Melbourne Symphony Orchestra Pty Ltd ABN 47 078 925 658 and others
Respondents

Notes:

A. In this Defence, the First Respondent (**MSO**) and the Fourth Respondent (**Mr Ross**) respond to the allegations in the Amended Statement of Claim (**ASOC**) filed in this proceeding on 16 October 2024.

B. All documents referred to in the Particulars to this Defence are available to the parties for their inspection by arrangement at the offices of the lawyers for the MSO and Mr Ross.

TABLE OF CONTENTS

A	Parties	2
A.1	Jayson Lloyd Gillham (the Applicant)	2
A.2	Melbourne Symphony Orchestra Pty Ltd (ABN 47 078 925 658) (the First Respondent)	2
A.3	Symphony Services Australia Limited (ABN 69 121 149 755).....	5
A.4	Sophie Galaise (the Third Respondent)	7

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A.5	Guy Ross (the Fourth Respondent)	7
B	Mr Gillham’s alleged engagement by the MSO	7
C	The Recital	12
D	Mr Gillham’s alleged cancellation by the MSO	15
E	The MSO’s attempts to negotiate with Mr Gillham (on a without prejudice basis and in good faith) about the Concert	18
F	Mr Gillham is not an employee of the MSO	22
G	The alleged contraventions of the FW Act by the MSO	24
H	The alleged accesorial liability of Ms Galaise	28
I	The alleged accesorial liability of Mr Ross	29
J	Relief	29

A PARTIES

A.1 Jayson Lloyd Gillham (the Applicant)

1 In response to the matters alleged about the Applicant (**Mr Gillham**) at ASOC [1], the MSO and Mr Ross admit the allegations therein.

A.2 Melbourne Symphony Orchestra Pty Ltd (ABN 47 078 925 658) (the First Respondent)

2 In response to the matters alleged about the MSO at ASOC [2], the MSO and Mr Ross:

- (a) admit that it is a company limited by shares, incorporated in the State of **Victoria**, and that it is a corporation for the purposes of the *Corporations Act 2001* (Cth);
- (b) admit that the MSO is capable of being sued in its own name;
- (c) say that:
 - (i) the MSO’s registered business address is ABC Southbank Centre, cnr Southbank Boulevard and Sturt Street, Southbank, Victoria, 3006;
 - (ii) under its Constitution, the MSO is incorporated as a charitable, cultural organisation for musical purposes, and that it has the specific charitable purposes of:

- (1) managing, maintaining and using the Melbourne Symphony Orchestra;
- (2) encouraging and fostering greater local community involvement in the development and activities of the Melbourne Symphony Orchestra;
- (3) advancing the work and profile of the Melbourne Symphony Orchestra in the Australian and international orchestral music communities as Australia's pre-eminent symphony orchestra, including through concert performances, touring, recording, broadcasting, fundraising and obtaining sponsorship;
- (4) developing and maintaining widely-based audiences for the performance of orchestra music;
- (5) promoting the public benefit derived from the maintenance of a world class symphony orchestra; and
- (6) conducting fund raising from the public, sponsors and any other persons to assist in the activities of the MSO;

Particulars

MSO Constitution, pp 2-3, at cl 5.1(a)-(e), (j)

(iii) the MSO's:

- (1) strategic vision is stated to be "*Enriching lives through music*";
- (2) strategic mission is stated to be "[through] *the shared language of music, [to] create meaningful cultural experiences for [the MSO's] audiences, delivered to the highest possible standard*";
- (3) strategic values are for it to be an organisation that is "*respectful, collaborative, innovative, diverse*"; and
- (4) strategic pillars / guiding principles are stated to be "*We Listen, We Create, We Unite*";

Particulars

A. MSO's Strategic Plan 2025-2028, p 8

B. MSO Annual Report 2023, p 12

- (iv) at all material times, the business of the MSO was managed under the direction of the **MSO Board**, and the MSO Board was comprised of the following individual natural persons:
- (1) David Li AM (Chairman);
 - (2) Margaret Jackson AC (Co-Deputy Chair);
 - (3) Diane Jameson OAM (Co-Deputy Chair);
 - (4) Shane Buggle (Director);
 - (5) Andrew Dudgeon AM (Director);
 - (6) The Hon Martin Foley (Director);
 - (7) Lorraine Hook (MSO Employee-Elected Director);
 - (8) Gary McPherson (Director);
 - (9) Farrel Meltzer (Director);
 - (10) Edgar Myer (Director);
 - (11) Mary Waldron (Director); and
 - (12) Sophie Galaise, Managing Director of the MSO and the Third Respondent in this proceeding (**Ms Galaise**); and
- (v) the MSO's donors, supporters and partners, as well as its various revenue sources received on an annual basis, are transparently identified and accounted for in the MSO's Financial Statements and Annual Report, and the MSO regularly provides reports on its financial position to the Australian Charities and Not-for-profits Commission;

Particulars

MSO Annual Report 2023, pp 72-77, 92-115

- (d) admit that the MSO is technically capable of meeting the definition of a “*national system employer*” by reason of it being a “*constitutional corporation*” for the purposes of s 14(1)(a) of the *Fair Work Act 2009* (Cth) (**FW Act**) but deny at all material times that the MSO was an employer of Mr Gillham for any purpose under the FW Act or at all (for the reasons outlined below at **Section F**);
- (e) admit the existence and operative effect of s 793 of the FW Act concerning any conduct engaged in on behalf of the MSO (by an officer, employee or agent of the MSO) and otherwise refers to and relies on the express terms of that provision for its full force and effect; and
- (f) say that, in 2023, the MSO:
 - (i) physically hosted audiences totalling 304,623 people;
 - (ii) digitally hosted 4.03 million people; and
 - (iii) held 177 performances, with 168 Australian works performed.

Particulars

MSO Annual Report 2023, pp 10-11

A.3 Symphony Services Australia Limited (ABN 69 121 149 755)

- 3 In response to the matters alleged about the Symphony Services Australia Limited (ABN 69 121 149 755) (**SSA**) at ASOC [3], the MSO and Mr Ross:
 - (a) admit that the SSA is a company limited by shares, incorporated in New South Wales, and that it is a corporation for the purposes of the *Corporations Act 2001* (Cth);
 - (b) admit that the SSA is capable of being sued in its own name, but says it is no longer a party to this proceeding by reason of Mr Gillham filing a Notice of Discontinuance in this proceeding on 16 October 2024 in relation to his claims against SSA; and

- (c) say that:
- (i) the SSA's registered business address is Area W4 – Y The Ultimo Trade Centre, 42 Wattle Street, Ultimo, NSW 2007;
 - (ii) the allegation that the SSA is a “*national system employer*” for the purposes of s 14(1)(a) of the FW Act:
 - (1) is irrelevant to any pleaded cause of action and it is therefore susceptible to be struck out under *Federal Court Rules 2011* (Cth) (**FCR**) r 16.21(d) (likely to cause prejudice, embarrassment or delay in the proceeding); and
 - (2) under cover of the objection at (1), deny at all material times that SSA was an employer of Mr Gillham for any purpose under the FW Act or at all (for the reasons outlined below at **Section F**);
 - (iii) admit the existence and operative effect of s 793 of the FW Act concerning any conduct engaged in on behalf of the SSA (by an officer, employee or agent of the SSA), and otherwise refers to and relies on the express terms of that provision for its full force and effect;
 - (iv) the SSA generally provides specialised services to several “*Member Orchestras*”, including the Adelaide Symphony Orchestra, the Melbourne Symphony Orchestra, the Queensland Symphony Orchestra, the Sydney Symphony Orchestra, the Tasmanian Symphony Orchestra and the West Australian Symphony Orchestra;
 - (v) the MSO and the SSA executed a written agreement on 15 July 2010 for the SSA to supply to or for the benefit of the MSO (with the MSO concomitantly agreeing to obtain from the SSA) various “Services” (**the SSA / MSO Service Level Agreement**), and as subsequently amended in a further executed written agreement between the SSA and the MSO on 20 June 2013 (**the Amendment to the SSA / MSO Service Level Agreement**). The SSA/MSO Service Level Agreement:
 - (1) identified that the SSA would provide to the MSO the core service category of “*International Tour Co-ordination*”, as described within

the SSA/MSO Service Level Agreement, including “*contracting and contract management for international artists’ engagement*”; and

- (2) contained an express acknowledgment by the MSO that the SSA acted as its agent, including to enter agreements on behalf of the MSO for “*International Tour-Coordination*” and that the MSO would fulfil all obligations required in order for the SSA to perform the contractual obligations under those agreements; and

Particulars

C. The SSA / MSO Service Level Agreement, pp 1-3 at cll 3, 5, 10 and sch 1 at p 5

D. The Amendment to the SSA / MSO Service Level Agreement, p 2 (“*General*”) and sch 1 at p 2

- (vi) at all material times, the SSA / MSO Service Level Agreement (as amended by the Amendment to the SSA / MSO Service Level Agreement), operated as between the SSA and the MSO.

A.4 Sophie Galaise (the Third Respondent)

- 4 In response to the matters alleged about Ms Galaise at ASOC [4], the MSO and Mr Ross admit the allegations therein and say further that Ms Galaise’s tenure as the Managing Director of the MSO ceased on or around 26 August 2024.

A.5 Guy Ross (the Fourth Respondent)

- 5 In response to the matters alleged about Mr Ross at ASOC [5], the MSO and Mr Ross admit the allegations therein.

B MR GILLHAM’S ALLEGED ENGAGEMENT BY THE MSO

- 6 In response to the matters alleged at ASOC [6], the MSO and Mr Ross admit that Mr Gillham entered into a written agreement with the SSA (**the Gillham / SSA Agreement**) on or around 11 June 2024 and say further that:

- (a) on or around 7 May 2024, Mr Ross, in his capacity as Chief Operating Officer (**COO**) of the MSO, and acting for and on behalf of the MSO, approved a contractual order for the SSA to engage Mr Gillham as a part of its service to

the MSO of arranging “*International Tour Co-ordination*” under the SSA/MSO Service Level Agreement;

- (b) as to the Gillham / SSA Agreement:
- (i) on or around 27 May 2024, it was signed by Kate Lidbetter, Chief Executive Officer of the SSA and Dilek Henderson, Finance Manager of the SSA for and on behalf of the SSA; and
 - (ii) on or around 11 June 2024, it was signed by Elaine Armstrong, of Emblem Artists (a classical music agency operated by Armstrong Production Facilities Pty Ltd) (**Ms Armstrong**), and who was, at all material times, Mr Gillham’s agent and authorised signatory; and

Particulars

The MSO refers to and relies on the express terms of the Gillham / SSA Agreement and executed between Mr Gillham and the SSA

- (c) the Gillham / SSA Agreement was:
- (i) made within the scope of the SSA’s authority to act for and on behalf of the MSO as its agent under the SSA / MSO Service Level Agreement referred to above at [3(c)(v)]; and
 - (ii) a contract for services as between Mr Gillham and the SSA and it was not a contract for services as between Mr Gillham and the MSO or a contract for services between the SSA and the MSO.
- 7 In response to the matters alleged at ASOC [7], the MSO and Mr Ross:
- (a) admit that under the Gillham / SSA Agreement, Mr Gillham was to perform “**the Recital**” on Sunday, 11 August 2024 and “**the Concert**” on Thursday, 15 August 2024;
 - (b) admit that Mr Gillham was to participate in rehearsals in preparation for the Concert in the **Iwaki Auditorium** located in the ABC Southbank Centre Southbank, 120-130 Southbank Boulevard, in Victoria between 13 August to 15 August 2024; and

- (c) say that the Recital:
- (i) was to be performed by Mr Gillham in the Iwaki Auditorium from around 11am; and
 - (ii) involved Mr Gillham performing each of Beethoven's Sonata No.21 in C Major ("*Waldstein*"), Ligeti's *Études* for Piano (Book 1), and Fauré's Nocturne no. 6 D flat major op. 63.

Particulars

"Preliminary Itinerary" annexed to the Gillham / SSA Agreement

- 8 In response to the matters alleged at ASOC [8], the MSO and Mr Ross:
- (a) refer to and rely upon the express terms of the Gillham / SSA Agreement for their full force and effect; and
 - (b) say that, under the Gillham / SSA Agreement, Mr Gillham's core obligations as "*the Artist*" included:
 - (i) to perform the "*Repertoire*"¹ (at all Performances in the Itinerary during the "*Tour*"² and perform all of his obligations under the Gillham / SSA Agreement with all due care and skill;
 - (ii) to comply with all the reasonable directions of the SSA and each of the relevant "*Member Orchestras*"³, (such as the MSO), in relation to the "*Services*"⁴;
 - (iii) to comply with the policies and procedures of the relevant Member Orchestras (such as the MSO) and venues, of which he was notified;

¹ Meaning the "*repertoire of works to be performed, set out in the Annexure 1*" being the "*Preliminary Itinerary*": Schedule to the Gillham / SSA Agreement.

² Meaning the "*concert tour of Australia by [Mr Gillham] as detailed in [the Gillham / SSA Agreement]*": Schedule to the Gillham / SSA Agreement.

³ Meaning the "*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*": The Gillham / SSA Agreement at 1.1(c) (p 1).

⁴ Meaning the "*performance of the Artist's obligations under the Gillham / SSA Agreement*": The Gillham / SSA Agreement at 1.1(d) (p 1).

- (iv) to be ready, willing and able to provide the Services, and to avoid any circumstance within his control which might render him then unable to fully perform the Services;
- (v) not by any act or omission to bring, or threaten to bring, any discredit on or cause any nuisance or disruption to, the SSA, its Member Orchestras (such as the MSO), their audiences or other entities or broadcasters which directly or indirectly participate in the Tour;
- (vi) never make any derogatory statement regarding the SSA, its personnel or its business, or its Member Orchestras (such as the MSO); and
- (vii) not give any performance, other than the Performances and any Master Class, without the prior written permission of the SSA;

Particulars

The Gillham / SSA Agreement, pp 1-2, at cl 1.1(c)-(d) and cl 2.1(a), (c)-(d), (g), (i)-(j), & (m)

9 In response to the matters alleged at ASOC [9], the MSO and Mr Ross:

- (a) admit that, for the purposes of cl 2.1(d) of the Gillham / SSA Agreement, the MSO did not notify Mr Gillham of any applicable policies or procedures, such as the MSO's Code of Conduct;
- (b) say that the MSO Code of Conduct applied to all of the MSO's employees, including employed musicians in the Orchestra, and generally outlined "*the standard of conduct acceptable for musicians, administration and management staff, volunteers and contractors of the MSO*";

Particulars

MSO Code of Conduct, p 1

- (c) say the MSO Code of Conduct, for which the MSO expected Mr Gillham to comply, dealt with conduct in relation to matters of "*Public Comment*"; and

Particulars

- A. The MSO Code of Conduct identified that public comment should only be made by an MSO employee when it was required to perform their public duties and with the authority of the Managing Director of the MSO (p 4).
- B. The MSO Code of Conduct affirmed the MSO's commitment for its employees, as members of the community, to have a right to make public comment and to enter into public debate on political and social issues (p 4).
- C. The MSO Code of Conduct precluded MSO employees from making public comments where:
- it was implied that the public comment (even if it was made in a private capacity) was in some way an official comment of the MSO; or
 - public comments amounted to gratuitous personal attacks (p 4).
- (d) say that the MSO's Code of Conduct as to matters of "*Public Comment*" referred to above at (c) (specifically in the Particulars at [A] and [C]), while specifically referable to the MSO, were of such general notoriety amongst Australian and international artists performing with orchestras as a general custom and practice so as to be impliedly incorporated as a term into the Gillham / SSA Agreement as a matter of business efficacy.
- 10 In response to the matters alleged at ASOC [10] as to the alleged implied contract between Mr Gillham and the MSO, the MSO and Mr Ross:
- (a) under cover of objection to the use of Particulars to ASOC [10] instead of the articulation of allegations of material fact and to the assertion of a legal conclusion without articulation of material facts to support that conclusion:
- (i) refer to and rely upon the matters above at [6]-[8];
- (ii) say that the alleged implied contract between Mr Gillham and the MSO is otherwise inconsistent:
- (1) with the entire agreement as between Mr Gillham and the SSA, including as to his core obligations that he owed to the SSA (and not the MSO), and that there are no conditions, warranties,

promises or obligations written or oral, express or implied, in relation to the SSA / Gillham Agreement overall other than those stated in the SSA / Gillham Agreement or as necessarily implied by law; and

- (2) with Mr Gillham's rights and obligations under the Gillham / SSA Agreement being personal and not capable of assignment or being dealt with in any way without the SSA's prior written approval; and

Particulars

Gillham / SSA Agreement cl 22.1 (p 7) & cl 27.4 (p 8)

(b) otherwise deny the allegation therein.

- 11 In response to the matters alleged at ASOC [11] as to the agency relationship that operated as between SSA and the MSO, the MSO and Mr Ross refer to and repeat the matters referred to above at [3(c)(v)] and otherwise deny the allegation therein.
- 12 N/A (noting the ~~withdrawn allegation~~ at ASOC [12]).

C THE RECITAL

- 13 In response to the matters alleged at ASOC [13], the MSO and Mr Ross admit that on 5 August 2024, Ms Armstrong, as Mr Gillham's agent, made a written request to the MSO to perform at the Recital "*a short meditative piece*" titled "*Witness*" by Connor D'Netto and suggested that Mr Gillham could "*announce from the stage this lovely addition*" if the MSO's program had already been printed.

Particulars

Email from Ms Armstrong to Katharine Bartholomeusz-Plows, MSO Head of Artistic Planning and Andrew Groch, MSO Artistic Planning Manager dated 5 August 2024 at 7.11pm

- 14 In response to the matters alleged at ASOC [14], the MSO and Mr Ross:
- (a) admit that Ms Bartholomeusz-Plows informed Ms Armstrong in writing that the MSO's program for the Recital had "*gone to print*" and that the MSO could

provide Mr Gillham with a microphone “so that he [could] speak during the [Recital] should he wish”;

- (b) deny that by Ms Bartholomeusz-Plows stating an intention to provide Mr Gillham with a microphone for use during the Recital, the MSO expressly or impliedly authorised him with an unfettered discretion to make any comment he wished to make, including of the kinds referred to in the MSO Code of Conduct concerning matters of “*Public Comment*” (see above at [9(c)]); and
- (c) say that, on 6 August 2024, Ms Armstrong informed the MSO of Mr Gillham’s intention to “*let the audience know about the very short little addition*” during the Recital.

Particulars

- A. Email from Ms Bartholomeusz-Plows, MSO to Ms Armstrong dated 6 August 2024 at 10.02 am.
- B. Email from Ms Bartholomeusz-Plows, MSO to Ms Armstrong dated 6 August 2024 at 10.41 am.

15 In response to the matters alleged at ASOC [15], the MSO and Mr Ross:

- (a) say that the Recital was not transcribed or recorded by the MSO;
- (b) say that Ms Bartholomeusz-Plows provided to Andrew Moore, the MSO Director of Programming (**Mr Moore**), an informal report during the Recital to the effect that Mr Gillham had made a statement in which he referred to “*Israeli Killing of Palestinian Media in the Gaza war as a war crime*”;

Particulars

SMS text from Ms Bartholomeusz-Plows to Mr Moore dated
11 August 2024 at 11.58am

- (c) say that the MSO later requested from Mr Gillham a copy of his remarks about the piece titled “*Witness*” that he made during the Recital; and
- (d) otherwise admit the allegations therein.

Particulars

On 12 August 2024, the MSO requested information from Mr Gillham as to what he specifically said during the Recital (see below at [21(a)]).

- 16 In response to the matters alleged at ASOC [16], the MSO and Mr Ross:
- (a) refer to and relies on the matters above at [15];
 - (b) say that “**the Introduction**” referred to at ASOC [16] corresponds to the information that Mr Gillham later provided to the MSO on 12 August 2024 in response to its request for a copy of his remarks about the piece titled “*Witness*” as he made during the Recital and, on that basis, admits that Mr Gillham made remarks at the Recital consistent with the content of the information he later provided to the MSO; and
 - (c) under cover of objection to the use of Particulars to ASOC [16] instead of the articulation of allegations of material fact, say that:
 - (i) to the extent that Mr Gillham asserts that the matters referred to in the Particulars contain matters of undisputed or incontrovertible fact as to the (alleged) conduct of actors for and on behalf of the State of Israel, the MSO and Mr Ross does not respond to the matters therein as these matters are:
 - (1) irrelevant to any pleaded cause of action;
 - (2) included only for an extraneous or collateral purpose as to impugn the (alleged) conduct of a foreign state, which cannot and should not be the subject of any factual or legal determination by this Court;
 - (3) otherwise susceptible to be struck out under FCR r 16.21(a) (scandalous material), (b) (frivolous or vexatious material), (d) (likely to cause prejudice, embarrassment or delay in the proceeding), and (f) (otherwise an abuse of the process of the Court); and

- (4) it does not know and cannot admit what research Mr Gillham had undertaken prior to making any statement in the form of the Introduction during the Recital.

17 In response to the matters alleged at ASOC [17], the MSO and Mr Ross:

- (a) do not know and therefore cannot specifically admit whether the Introduction was an expression of Mr Gillham's genuinely held political belief, but does not dispute that it may have been; and
- (b) under cover of objection to the use of Particulars to ASOC [17] instead of the articulation of allegations of material fact, say that these matters are embarrassing and ambiguous and on that basis are susceptible to be struck out under FCR r 16.21(1)(c) (evasive or ambiguous) and/or r 16.21(1)(d) (likely to cause prejudice, embarrassment or delay in the proceeding).

18 In response to the matters alleged at ASOC [18], the MSO and Mr Ross:

- (a) refer to and rely on the matters above at [15] to [16]; and
- (b) otherwise admit the allegations therein.

19 In response to the matters alleged at ASOC [19], the MSO and Mr Ross:

- (a) refer to and rely on the matters above at [15] to [16];
- (b) do not know and therefore cannot specifically admit whether Mr Gillham received the level and signification of applause from the audience as specifically alleged; and
- (c) otherwise refer to and repeat the Particulars at [15] and [16] above.

20 In response to the matters alleged at ASOC [20], the MSO and Mr Ross refer to and rely on the matters above at [18] to [19] and otherwise admit the matters alleged therein.

D MR GILLHAM'S ALLEGED CANCELLATION BY THE MSO

21 In response to the matters alleged at ASOC [21], the MSO and Mr Ross:

(a) say that, before the “**Cancellation Message**” was issued by the MSO on 12 August 2024, in response to a request made by the MSO to Ms Armstrong, on 12 August 2024, Ms Armstrong:

(i) forwarded to Mr Moore a copy of an email from Mr Gillham in which he set out his “*note*” of his remarks about the piece titled “*Witness*”, in which the following statement (in near identical terms to the Introduction referred to in ASOC [16]) was recorded:

“Connor’s only note is

Witness – dedicated to the journalists of Gaza.

My note:

Over the last 10 months, Israel has killed more than one hundred Palestinian journalists. A number of these have been targeted assassinations of prominent journalists as they were travelling in marked press vehicles or wearing their press jackets. The killing of journalists is a war crime in international law, and it is done in an effort to prevent the documentation and broadcasting of war crimes to the world.

In addition to the role of journalists who bear witness, the word Witness in Arabic is Shaheed, which also means Martyr”;

(ii) expressed her view to Mr Moore that the statement made by Mr Gillham during the Recital was “*very unfortunate*” and that she “*had no idea that [he] was going to be saying this or [she] would have stopped it*”;

Particulars

Email from Ms Armstrong to Mr Moore, MSO dated 12 August 2024 at 9.29am (AEST)

(b) say that, following discussions between Ms Armstrong and Mr Moore during the course of 12 August 2024, Mr Moore informed Ms Armstrong and the SSA (in writing) that the MSO sought to terminate Mr Gillham’s engagement with

the MSO with immediate effect under cl 17.3 of the Gillham / SSA Agreement **(the Termination of the Gillham / SSA Agreement)**; and

Particulars

Email from Mr Moore, MSO to Ms Armstrong (copying in "artists@symphonyinernational.net") dated 12 August 2024 at 6.29pm (AEST)

- (c) say that shortly after sending the email referred to above at (b), Mr Moore informed Ms Armstrong (in writing) of a communication that had been sent from the MSO to "*audience members that attended*" the Recital, the terms of which are in identical terms to the Cancellation Message at ASOC [21].

Particulars

A. Email from Mr Moore, MSO to Ms Armstrong dated 12 August 2024 at 6.31pm (AEST).

B. The Cancellation Message was circulated by the MSO by a generic email update to attendees of the Recital at or around 7pm on 12 August 2024.

22 In response to the matters alleged at ASOC [22], the MSO and Mr Ross:

- (a) admit that they did not seek Mr Gillham's consent to the content or the sending of the Cancellation Message to audience members who attended the Recital; and
- (b) say that they were under no legal obligation to obtain Mr Gillham's prior consent to the matters referred to above at (a).

23 In response to the matters alleged at ASOC [23], the MSO and Mr Ross:

- (a) refer to and rely upon the matters above at [21(b)]; and
- (b) otherwise admit the allegation therein.

24 In response to the matters alleged at ASOC [24], the MSO and Mr Ross:

- (a) refer to and rely upon the matters above at [21(b)];

- (b) say that:
- (i) the SSA had a discretion to terminate the Gillham / SSA Agreement on the grounds of convenience by giving Mr Gillham prior written notice of termination;
 - (ii) the SSA was able to assign its rights and obligations under the Gillham / SSA Agreement, in whole or in part, to one or more “*Member Orchestra*” (such as the MSO);
 - (iii) in consequence of the matters referred to above at (i)-(ii), say that Mr Moore’s email to both Ms Armstrong and the SSA was effective as prior written notice of termination on the grounds of convenience for the purposes of cl 17.3 of the Gillham / SSA Agreement; and
 - (iv) on 16 August 2024, the MSO paid for the SSA the Fee using the method specified in cl 17.3 of the Gillham / SSA Agreement; and

Particulars

A. The SSA / MSO Service Level Agreement (p 3) cl 10

B. The Gillham / SSA Agreement cl 17.3 (p 6) & cl 27.6 (p 8)

- (c) otherwise deny the allegation therein.

25 In response to the matters alleged at ASOC [25], the MSO and Mr Ross:

- (a) refer to and rely upon the matters above at [24]; and
- (b) otherwise admit the allegation therein.

E THE MSO’S ATTEMPTS TO NEGOTIATE WITH MR GILLHAM (ON A WITHOUT PREJUDICE BASIS AND IN GOOD FAITH) ABOUT THE CONCERT

26 In response to the matters alleged at ASOC [26], the MSO and Mr Ross say that:

- (a) on 14 August 2024, Mr Ross, in his capacity as COO of the MSO and acting within his authority for and on behalf of the MSO, engaged in good faith negotiations with Paul Davies of the Media, Entertainment and Arts Alliance, who was acting as Mr Gillham’s trade union representative, with the objective

of attempting to effect an agreement between the MSO and Mr Gillham for Mr Gillham to perform at the Concert (following the earlier Termination of the Gillham / SSA Agreement);

- (b) the good faith negotiations referred to above at (a) were conducted between Mr Ross and Mr Davies on a “*without prejudice*” basis for and on behalf of Mr Gillham and the MSO; and
- (c) under cover of objection to the use of Particulars at ASOC [26] instead of the articulation of allegations of material fact:
 - (i) the communications referred to therein between Mr Ross and Mr Davies are subject to without prejudice privilege and ought not be adduced as evidence in this proceeding; and
 - (ii) in so far as it is alleged, deny that there was a binding contractual obligation as between Mr Gillham and the MSO arising from Mr Ross’s communications to Mr Davies and otherwise deny the allegation therein.

27 In response to the matters alleged in the ASOC [27], the MSO and Mr Ross:

- (a) refer to and rely on the matters above at [26]; and
- (b) under cover of the objection above at [26(c)], in so far as it is alleged, deny that there was a binding contractual obligation as between Mr Gillham and the MSO arising from either Mr Moore’s communications to Ms Armstrong or Mr Ross’s communications to Mr Davies and otherwise deny the allegation therein.

28 In response to the matters alleged in the ASOC [28], the MSO and Mr Ross refer to and rely on the matters above at [9(d)] and [26] to [27].

29 In response to the matters alleged in the ASOC [29], the MSO and Mr Ross:

- (a) refer to and rely on the matters above at [9(d)] and [26] to [28]; and
- (b) in so far as it is alleged, deny that there was a binding contractual obligation as between Mr Gillham and the MSO arising from either Mr Moore’s communications to Ms Armstrong or Mr Ross’s communications to Mr Davies and otherwise deny the allegation therein.

30 In response to the matters alleged in the ASOC [30], the MSO and Mr Ross:

(a) say that:

- (i) on 14 August 2024, Mr Moore, in his capacity as Director of Programming and acting within authority for and on behalf of the MSO, engaged in good faith negotiations with Ms Armstrong and Mr Samuel Cairnduff (a Communications and Public Relations Consultant) with the objective of attempting to effect an agreement between the MSO and Mr Gillham as to the terms of a public statement to be issued by the MSO in the event that Mr Gillham agreed to perform at the Concert (following the earlier Termination of the Gillham / SSA Agreement);
- (ii) the good faith negotiations referred to above at (i) were conducted between Mr Moore and Ms Armstrong on a “*without prejudice*” basis for and on behalf of the MSO and Mr Gillham respectively; and
- (iii) no agreement was ultimately reached as between Mr Gillham and the MSO as to the terms of any public statement about the Concert; and

(b) otherwise deny the allegation therein.

31 In response to the matters alleged in the ASOC [31], the MSO and Mr Ross:

- (a) admit the content of the email as sent by Mr Cairnduff to Mr Moore as referred to therein;
- (b) refer to and rely on the matters identified above at [30(a)]; and
- (c) say that the communications referred to in the Particulars to ASOC [31] between Mr Cairnduff and Mr Moore are subject to without prejudice privilege and ought not be adduced as evidence in this proceeding.

32 In response to the matters alleged in the ASOC [32], the MSO and Mr Ross:

- (a) admit that the MSO did not publish a statement in the terms identified in the Particulars to ASOC [30];
- (b) refer to and rely upon the matters above at [30(a)]; and

(c) otherwise deny the allegation therein.

33 In response to the matters alleged in the ASOC [33], the MSO and Mr Ross:

- (a) admit that the MSO published the “**Final Public Statement**” on its website sometime between 8am to 9am on the morning of 15 August 2024 and say that it also circulated a generic email update (at approximately 9.50am) to ticket holders of the Concert with the content of the Final Public Statement contained therein;
- (b) refer to and rely upon the matters above at [30(a)]; and
- (c) say that, prior to publishing the Final Public Statement, the MSO had obtained advice on Thursday, 14 August 2024 from an independent expert as to security and safety risks in the event of the Concert going ahead (regardless of whether Mr Gillham performed at the Concert);

Particulars

A. Email from Emily O’Brien, Director, Elucidate Consulting Pty Ltd to Mr Foley of the MSO Board dated 14 August 2024 at 9.54pm (AEST) with attached risk assessment of the same date.

B. Ms O’Brien provided oral advice to the MSO and to the similar effect as the written risk assessment referred to at Particular [A] before providing the written risk assessment to the MSO.

(d) otherwise deny the allegation therein.

34 In response to the matters alleged in the ASOC [34], the MSO and Mr Ross:

- (a) admit that the MSO circulated the Final Public Statement to media outlets on or around 15 August 2024;
- (b) refer to and rely upon the matters above at [30(a)]; and
- (c) otherwise say that they do not know and cannot specifically admit the allegation as to the amount of subsequent publication by such media outlets, but they do not dispute that publication by media outlets did occur.

35 In response to the matters alleged in the ASOC [35], the MSO and Mr Ross:

- (a) refer to and rely on the matters above at [34]; and
- (b) otherwise say that they do not know and cannot specifically admit the allegation as to Mr Cairnduff's motivation and conduct as alleged therein.

F MR GILLHAM IS NOT AN EMPLOYEE OF THE MSO

36 In response to the allegation at ASOC [36], the MSO and Mr Ross:

- (a) refer to and rely on the matters above at [6(c)];
- (b) admit 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; and
- (c) otherwise do not plead to the matters therein as no allegations are specifically made against them.

37 In response to the allegation at ASOC [37], the MSO and Mr Ross:

- (a) refer to and rely on the matters above at [36];
- (b) admits that the Gillham / SSA Agreement constituted "*employment*" for the purposes of the definition in s 4(1) of the *Equal Opportunity Act 2010* (Vic) (**EO Act**) by reason of it being an "*engagement under a contract for services*";
- (c) say that, under the Gillham / SSA Agreement, Mr Gillham agreed that he was an independent contractor and not an employee of SSA or the MSO; and

Particulars

The Gillham / SSA Agreement at cl 13.1 (p 5) & cl 27.3 (p 7)

- (d) otherwise do not plead to the matters therein as no allegations are specifically made against them.

38 In response to the allegation at ASOC [38], the MSO and Mr Ross:

- (a) refer to and rely on the matters above at [36] to [37];

- (b) deny that the MSO met the definition of a “*principal in relation to a contract worker*” for the purposes of the definition in s 4(1) of the EO Act by reason of the SSA / MSO Service Level Agreement (see above at [3(c)(v)]) as Mr Gillham did not do work for the MSO under the SSA / MSO Service Level Agreement, rather, Mr Gillham did work for the SSA under the Gillham / SSA Agreement and the MSO agreed to fulfil all obligations required in order for the SSA to perform its contractual obligations under the Gillham / SSA Agreement in accordance with the agency relationship between the SSA and the MSO (see above at [3(c)(v)(2)]); and
- (c) say that, in consequence of the matters referred to above at (b), Mr Gillham did not meet the definition of a “*contract worker*” for the purposes of the definition of s 4(1) of the EO Act.

39 In response to the matters at ASOC [39], the MSO and Mr Ross:

- (a) refer to and rely on the matters above at [36] to [38];
- (b) deny that Mr Gillham had the right as alleged therein, and say that any remedy arising from a contravention of the statutory prohibitions of “*Discrimination in Employment*” set out in Div 1 of Part 4 of the EO Act are only available to a person if they meet the relevant threshold definitions in s 4(1) of the EO Act and if such a person then establishes prohibited discrimination as against another person on the basis of a protected attribute in s 6 of the EO Act;
- (c) deny that the MSO, in fact, discriminated against Mr Gillham as a (purported) contract worker of the MSO for the purposes of s 21 (read with s 6(k) and s 8) of the EO Act; and
- (d) otherwise deny the allegation therein.

39A In response to the matters at ASOC [39A], the MSO and Mr Ross:

- (a) refer to and rely the matters above at [10], [36] to [39] above; and
- (b) otherwise deny the allegation therein.

39B In response to the matters at ASOC [39B], the MSO and Mr Ross:

- (a) refer to and rely the matters above at [10], [36] to [39A] above;

- (b) deny that the MSO, in fact, discriminated against Mr Gillham as a (purported) contract worker of the MSO for the purposes of s 18 (read with s 6(k) and s 8)) of the EO Act; and
- (c) otherwise deny the allegation therein.

G THE ALLEGED CONTRAVENTIONS OF THE FW ACT BY THE MSO

40 In response to the matters at ASOC [40], the MSO and Mr Ross:

- (a) deny that the EO Act is a “*workplace law*” for the purposes of s 341(1)(a) of the FW Act, because the EO Act is not a “*workplace law*” within the meaning of s 12 of the FW Act, specifically as it is not “*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)*”;
- (b) further to the matters above at (a), say that the EO Act provides for an extended definition of “*employment*” (in s 4(1) of the EO Act) to enable persons who are not employees within the “*ordinary meaning*” of the terms “*employee*” and “*employer*” to be treated as “*employees*” for the purposes of the EO Act, and not for the purposes of the FW Act itself;
- (c) further to the matters above at (a) and (b), say that Mr Gillham was not an “*employee*” of the MSO, and the MSO was not an “*employer*” of Mr Gillham, for any purpose under Part 3-1 (General Protections) of the FW Act; and

Particulars

- A. FW Act s 11 provides that in Part 1-2 (“Definitions”) the terms “*employee*” and “*employer*” have their “*ordinary meaning*”, and FW Act s 12 is within Part 1-2.
- B. FW Act s 12 provides definitions for each of the terms “*employee*” and “*employer*” as being “*defined in the first Division of each Part [of the FW Act] (other than Part 1-1) in which the term appears*”.

C. FW Act s 335 provides that within Part 3-1 (*“General Protections”*) *“employee”* and *“employer”* have their *“ordinary meaning”*.

D. Mr Gillham was not an *“employee”* of the MSO (and the MSO was not the employer of Mr Gillham) within the *“ordinary meaning”* of those words (see above at [37(c)]).

(d) further and in the alternative to the matters above at (a) to (c), say that:

- (i) s 18 in the EO Act (*“Discrimination against employees”*) is only a *“workplace law”* for the purposes of s 341(1)(a) of the FW Act (read with FW Act s 12) to the extent, and only to the extent, that it regulates the relationships between *“employers”* and *“employees”* within the *“ordinary meaning”* of those terms at common law; and
- (ii) s 21 in the EO Act (*“Discrimination against contract workers”*) is not in its terms a law that *“regulates the relationships between employers and employees”* for the purposes of s 341(1)(a) of the FW Act (read with FW Act s 12).

Particulars

The Particulars at (c) are referred to and relied upon by the MSO and Mr Ross

41 In response to the matters at ASOC [41], the MSO and Mr Ross:

- (a) refer to and rely on the matters above at [40]; and
- (b) otherwise deny the allegation therein.

42 In response to the matters at ASOC [42], the MSO and Mr Ross:

- (a) refer to and rely on the matters above at [40] to [41]; and
- (b) otherwise deny the allegation therein.

43 In response to the matters at ASOC [43], the MSO and Mr Ross:

- (a) by reason of the matters above at [40] to [42], deny that Mr Gillham is entitled under Part 3-1 of the Act to claim that the MSO took “*adverse action*” within the meaning of s 342 of the FW Act;
 - (b) further to the matters above at (a), and having regard to the matters above at [3(c)(v)(2)], [6(c)], [24(b)] and [38(b)] deny:
 - (i) that the Termination of the Gillham / SSA Agreement (see above at [21(b)]) constitutes a “*termination of a contract*” for the purposes of Item 3 in the Table of s 342(1) as the MSO did not terminate a contract for services as between itself and Mr Gillham; and
 - (ii) otherwise deny that the Termination of the Gillham / SSA Agreement constitutes any other form of “*adverse action*” for the purposes of Item 3 in the Table of s 342(1); and
 - (c) under cover of the objections raised above in **Section E**, say that the Cancellation Message (see above at [21]), the alleged imposition of the “**Second Condition**” (referred to in the ASOC [27]), and the publication of the Final Public Statement (see above at [33]), each do not constitute an instance of “*adverse action*” within the meaning of s 342 of the FW Act.
- 44 In response to the matters at ASOC [44], the MSO and Mr Ross:
- (a) refer to and rely on the matters above at [40] to [43];
 - (b) say that the identification of the Termination of the Gillham / SSA Agreement (see above at [21(b)]) in ASOC [44] as an action that constitutes multiple forms of “*adverse action*” for the purposes of s 342 of the FW Act (without any specification as to alternative characterisations) is embarrassing and ambiguous and on that basis is susceptible to be struck out under FCR r 16.21(1)(c) (evasive or ambiguous) and/or r 16.21(1)(d) (likely to cause prejudice, embarrassment or delay in the proceeding); and
 - (c) otherwise deny the allegations therein.
- 45 In response to the matters at ASOC [45], the MSO and Mr Ross:
- (a) refer to and rely on the matters above at [40] to [44]; and

(b) otherwise deny the allegations therein.

46 In response to the matters at ASOC [46], the MSO and Mr Ross:

(a) refer to and rely on the matters above at [40] to [45]; and

(b) otherwise deny the allegations therein.

47 In response to the matters at ASOC [47], the MSO and Mr Ross:

(a) refer to and rely on the matters above at [40] to [46]; and

(b) otherwise deny the allegations therein.

48 In response to the matters at ASOC [48], the MSO and Mr Ross:

(a) refer to and rely on the matters above in **Section F** and at [40] to [47];

(b) deny that:

(i) the Termination of the Gillham / SSA Agreement (see above at [21(b)]);

(ii) the Cancellation Message (see above at [21(c)]); and

(iii) the publication of the Final Public Statement (see above at [33(a)]);

occurred because of, or for reasons that included, Mr Gillham's purported exercise of a protected workplace right within the meaning of s 341(1) of the FW Act; and

(c) say that the reasons why the matters in (b) occurred were:

(i) for the reasons stated in the express terms of each of the Cancellation Message and the Final Public Statement, which included the reason that the conduct engaged in by Mr Gillham at the Recital (referred to above in **Section C**) was not authorised by the MSO; and

(ii) otherwise consistent with attempts by the MSO (through the actions of Ms Galaise, Mr Ross, Mr Moore and the MSO Board) to fulfil its objectives set out in the MSO's Constitution (see above at [2(c)(ii)]) and its strategic vision and strategic mission (see above at [2(c)(iii)]).

49 In response to the matters at ASOC [49], the MSO and Mr Ross:

- (a) refer to and repeat the matters above at [48]; and
- (b) otherwise deny the allegations therein.

50 In response to the matters at ASOC [50], the MSO and Mr Ross:

- (a) refer to and repeat the matters above at [48] to [49]; and
- (b) otherwise deny the allegations therein.

51 In response to the matters at ASOC [51], the MSO and Mr Ross:

- (a) refer to and repeat the matters above at [48] to [50]; and
- (b) otherwise deny the allegations therein.

52 N/A (noting the ~~withdrawn allegation~~ at ASOC [52]).

H THE ALLEGED ACCESORIAL LIABILITY OF MS GALAISE

53 In response to the matters at ASOC [53], the MSO and Mr Ross:

- (a) refer to and rely upon the matters above in **Section G**; and
- (b) otherwise do not plead to the matters at ASOC [53] as no allegations are made against either of them.

54 In response to the matters at ASOC [54], the MSO and Mr Ross:

- (a) refer to and rely upon the matters above in **Section G**; and
- (b) otherwise do not plead to the matters at ASOC [54] as no allegations are made against either of them.

55 In response to the matters at ASOC [55], the MSO and Mr Ross:

- (a) refer to and rely upon the matters above in **Section G**; and
- (b) otherwise do not plead to the matters at ASOC [55] as no allegations are made against either of them.

I THE ALLEGED ACCESSORIAL LIABILITY OF MR ROSS

56 In response to the matters at ASOC [56]:

- (a) Mr Ross refers to and relies upon the matters above in **Section G**;
- (b) Mr Ross otherwise denies the allegations therein; and
- (c) the MSO otherwise does not plead to the matters at ASOC [56] as no allegations are made against it.

57 In response to the matters at ASOC [57]:

- (a) Mr Ross refers to and relies upon the matters above in **Section G**;
- (b) Mr Ross otherwise denies the allegations therein; and
- (c) the MSO otherwise does not plead to the matters at ASOC [57] as no allegations are made against it.

58 In response to the matters at ASOC [58]:

- (a) Mr Ross refers to and relies upon the matters above in **Section G**;
- (b) Mr Ross otherwise denies the allegations therein; and
- (c) the MSO otherwise does not plead to the matters at ASOC [58] as no allegations are made against it.

59 In response to the matters at ASOC [59]:

- (a) Mr Ross refers to and relies upon the matters above in **Section G**;
- (b) Mr Ross otherwise denies the allegations therein; and
- (c) the MSO otherwise does not plead to the matters at ASOC [59] as no allegations are made against it.

J RELIEF

60 In response to the matters at ASOC [60], the MSO and Mr Ross:

- (a) for the reasons outlined in this Defence, deny that Mr Gillham has any entitlement to the declarations sought for the alleged contraventions by the MSO and/or Mr Ross of the FW Act; and
- (b) otherwise say that the declarations sought by Mr Gillham are inutile if this Court finds, contrary to the matters raised in this Defence, that the MSO and/or Mr Ross have contravened the FW Act.

61 In response to the matters at ASOC [61], for the reasons outlined in this Defence, the MSO and Mr Ross deny that Mr Gillham has any entitlement to the remedies sought for the alleged contraventions by the MSO and/or Mr Ross of the FW Act.

62 In response to the matters at ASOC [62], for the reasons outlined in this Defence, the MSO and Mr Ross deny that Mr Gillham has any entitlement to the pecuniary penalties sought for the alleged contraventions by the MSO and/or Mr Ross of the FW Act.

AND THE MSO AND MR ROSS SEEK THE FOLLOWING ORDER:

63 For the reasons outlined in this Defence, the MSO and Mr Ross seek that the Further Amended Originating Application filed in this proceeding on 16 October 2024 be dismissed.

7 November 2024



**Signed by Leon Zwier
Arnold Bloch Leibler
Lawyers for the First Respondent and the
Fourth Respondent**


This Defence was prepared by Philip Crutchfield KC and Christopher McDermott of counsel.

Certificate of lawyer

I, Leon Zwier, certify to the Court that, in relation to the Defence filed on behalf of each of the First Respondent and the Fourth Respondent the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non-admission in the pleading.

Date: 7 November 2024



**Signed by Leon Zwier
Arnold Bloch Leibler
Lawyers for the First Respondent and
The Fourth Respondent**