

NOTICE OF FILING

Details of Filing

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File Title:	JACQUELINE ELLEN HENDERSON & ANOR v COMMONWEALTH BROADCASTING CORPORATION PTY LTD (ACN 000 019 796) & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "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.

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Federal Court of Australia
District Registry: New South Wales
Division: Fair Work

Henderson & Anor v Commonwealth Broadcasting Corporation Pty Ltd & Anor
(NSD507/2026)

RESPONDENTS' SUBMISSIONS ON AMENDMENT APPLICATION

I. INTRODUCTION AND SUMMARY

- 1 These proceedings commenced in March and are set down for hearing on an expedited basis, commencing on 12 October. Though the reason for expedition no longer applies, the Respondents would like to maintain the trial date, if that can be done fairly.
- 2 The Applicants served their evidence on 11 June. The Respondents have served lay evidence. Their expert evidence is due on 20 August. A timetable has been made for the Applicants and Respondents to serve reply evidence. Discovery has not occurred.
- 3 Having now had the opportunity to properly analyse the Applicants' evidence, and prepared almost all of their own evidence, the Respondents now propose a handful of amendments to their Defence, and Cross-claim. Generally, the proposed amendments add further detail in respect of matters already pleaded, in large part arising from the evidence that has been served. To the (limited) extent that these are matters about which the Applicants might wish to adduce evidence, they are properly the subject of reply evidence, and in any event the Respondents do not object to the Applicants serving evidence about these matters when they serve reply evidence.
- 4 It is not unusual for a party to amend its pleadings once evidence has been served, so as to bring the pleadings in line with the evidence. There is no reason why the proposed amendments should threaten the trial date, especially if the Applicants address procedural steps with an expedition commensurate with the final hearing being expedited. But this is a case which does *not* require expedition, started less than 5 months ago, in which the Applicants seek over \$80 million. If the Applicants insist that the trial cannot be kept if the amendments are allowed, a new trial date should be set down.

5 **Part II** below explains the nature of the case. **Part III** below sets out a few points of procedural background. **Parts IV** and **V** explain the proposed amendments.

II. NATURE OF THE CASE

6 The basic facts are straightforward. The First Applicant (**Ms Henderson**) had for many years presented a very successful breakfast radio show with Mr Kyle Sandilands, called ‘The Kyle and Jackie O Show’. The First Respondent (**CBC**), is an ultimate subsidiary of the Second Respondent (**ARN**), and holds a radio broadcast licence. In 2023, CBC entered into its latest contract (the **Henderson BSA**) with Ms Henderson and the Second Applicant (**Henderson Media**). Under the Henderson BSA, Henderson Media promised to provide its employee, Ms Henderson, to present the ‘Program’. The ‘Program’ was defined as a *breakfast* program presented by *Ms Henderson and Mr Sandilands* in the absence of agreement otherwise,¹ and indeed it was a condition that Mr Sandilands entered into a corresponding contract.² In return, CBC promised to pay Henderson Media substantial fees (inter alia, \$9.4m pa, plus revenue share).³

7 In February 2026, Ms Henderson resolved that she would no longer present a show with Mr Sandilands, or at breakfast.⁴ In a meeting on 26 February 2026, her manager, Ms Gemma O’Neill, told this to ARN management. Though there is dispute about what precisely she said, a letter shortly thereafter from Ms Henderson’s solicitors⁵ (defined in the Amended Statement of Claim (**ASOC**) as the ‘Complaint Letter’) confirmed that Ms Henderson “*cannot continue to work with Mr Sandilands*”, direct contact with him was “*untenable*”, and Ms Henderson would not be returning to work a breakfast show. The letter purported to ‘require’ ARN to “*propose an alternate daypart*”.

8 On 3 March 2026, CBC sent a letter asserting that this was a repudiation of the Henderson BSA, and for that reason it was terminating the Henderson BSA.⁶ On the

¹ Exhibit **GO-1** to the affidavit of Ms Gemma O’Neill affirmed 8 June 2026 (**O’Neill Affidavit**) at pages 828 and 853.

² GO-1, pages 174 (“Both offers are on the basis that both Kyle and Jackie sign and continue to broadcast as a duo over the contract Term) and 851.

³ See eg GO-1 at pages 31 (definition of ‘Fee’) and 32 (‘Revenue Share’).

⁴ O’Neill Affidavit at [246].

⁵ Exhibit **JH-1** to the affidavit of Ms Henderson affirmed 10 June 2026 (**Henderson Affidavit**) at page 432.

⁶ JH-1, page 438.

same day ARN made an ASX **Announcement**⁷ saying relevantly:

ARN... announces that Ms... Henderson has given notice that she “cannot continue to work with Mr Kyle Sandilands.” Accordingly, ARN has terminated the services agreement with Henderson Media Pty Ltd, under which Ms Henderson presents the Kyle and Jackie O show. Ms Henderson will cease to present the Kyle and Jackie O show. ARN has also offered to Ms Henderson the possibility of an alternative show on the ARN network.

- 9 Against that background, the Applicants bring 3 different kinds of claim.
- 10 *First*, the Applicants contend that the Complaint Letter did not repudiate the Henderson BSA. The realistic basis for this is not clear given the terms of the contract, especially once one understands the contractual background. At the time, the Applicants contended that there was no repudiation because of an alleged implied term that the “*services would be performed in a safe manner*” which *required* CBC to comply with the demand for a different show.⁸ But Henderson Media, as Ms Henderson’s *employer*, had acknowledged and agreed that *Henderson Media* is responsible for ensuring Ms Henderson’s health and safety,⁹ and this contention, based on the implied term, has not found its way into the ASOC. Instead, the Applicants now suggest that the Complaint Letter was a mere *request* for the Applicants to be allowed to provide the ‘Program Services’ differently: ASOC [55], [56]. Even if this were an accurate characterisation of the Complaint Letter (which the Respondents do not accept), it is difficult to see why that would matter. That is because the Complaint Letter made it clear – and it is common ground¹⁰ – that Ms Henderson was never again going to provide a breakfast show with Mr Sandilands *irrespective of the response to the letter* (see eg Defence [36(c)], [37(c)]). It may be that in point of fact, the reason all this occurred is simply that Ms O’Neill thought that Ms Henderson could unilaterally change the nature of the services provided under the Henderson BSA.¹¹
- 11 The Respondents’ cross-claim then hinges off this part of the case, as it alleges that the Applicants’ repudiation of the Henderson BSA caused loss to CBC and ARN, and makes claims for damages and under a contractual indemnity.

⁷ JH-1, page 436.

⁸ JH-1, page 446 (at paragraphs 4.2 and 4.3).

⁹ GO-1, page 835 (cl 13.1).

¹⁰ O’Neill Affidavit [246].

¹¹ O’Neill Affidavit [145], [147].

- 12 *Secondly*, the Applicants bring a *Fair Work Act 2009* (Cth) (the **Act**) claim, alleging that the Henderson BSA was terminated because the Complaint Letter included statements that (it is said) exercised or proposed to exercise workplace rights: ASOC [38]-[43], [48]. This case factually turns on the reasons of the decision makers, which was the board of ARN.¹² The Respondents say that once it is understood what services Henderson Media was contracted to provide, it becomes fairly obvious that the Henderson BSA was terminated because Henderson Media and Ms Henderson had refused to provide them anymore. The Respondents have served evidence from the Board members explaining exactly that.¹³ There are other issues with this claim, including: (a) whether the Act applies at all to services contracts of this kind (Defence [2(c)], [5(b)(v)], [7(d)], [47(b)], [48(c)(i)]); (b) whether the Applicants exercised or proposed to exercise a workplace right (Defence [48(c)(ii)]); and (c) if they did, whether it was done in good faith and for a proper purpose, as opposed to the extraneous purpose¹⁴ of trying to induce CBC, *in terrorem*, to agree to let Ms Henderson present some different show without Mr Sandilands but still have Henderson Media receive \$9.4m a year (Defence [41(b)(ii)], [42(b)], [43(b)]). But those interesting issues ultimately will not matter if the Court finds that the contract was terminated for a reason that was not proscribed.
- 13 *Thirdly*, there is a claim for misleading or deceptive conduct in relation to the Announcement. The claim is difficult to parse. The main complaint seems to be that by stating that Ms Henderson has “*given notice that she ‘cannot continue to work with Mr Kyle Sandilands’*”, ARN represented that Ms Henderson had resigned,¹⁵ even though the next sentence said (bold added) “*Accordingly, ARN has terminated the services agreement with Henderson Media Pty Ltd, under which Ms Henderson presents the Kyle and Jackie O show.*” Since the words themselves do not say that Ms Henderson resigned – indeed, they say the opposite – this case seems to be based on what is said

¹² See the resolution of the board minute at page 135 of Exhibit HM-1 to the affidavit of Mr Hamish McLennan sworn 6 August 2026 (**McLennan Affidavit**).

¹³ See eg paragraphs 62-69 of the affidavit of Ms Alison Cameron affirmed 5 August 2026; paragraphs 82-86 of the affidavit of Mr Brent Cubis sworn 5 August 2026; paragraphs 46 and 63-65 of the affidavit of Ms Belinda Rowe affirmed 6 August 2026; McLennan Affidavit [129]-[135].

¹⁴ See the analysis in *Shea v TRUenergy Services Pty Ltd (No 6)* (2014) 314 ALR 346 at [29(c)], [29(d)], [731]-[744].

¹⁵ See the solicitors’ letter at JH-1, page 443 (paras 1.2-1.4); report of Ms Sally Branson (commencing at page 110 of Exhibit SD-1 to the affidavit of Ms Sally Dalwood affirmed 10 June 2023) (**Branson Report**) at [31].

to be expert evidence from a public relations consultant about the objective meaning of ordinary English words.¹⁶ The Respondents will contend that this evidence is plainly inadmissible, and in any event it is absurd. The other complaint is about whether it is true that ARN “*offered to Ms Henderson the possibility of an alternative show on the ARN network*”. This seems to resolve to a debate about whether this statement represented that there had been a ‘legal offer capable of acceptance’ as opposed to something less formal (see ASOC [71(b)] and JH-1, page 443-444 (paras 1.6-1.9)). The alleged loss suffered is obscure; the complaint of the Respondents’ ‘expert’ on the meaning of words is that Ms Henderson was harmed because the statement about an alternative show was not made *strongly enough*.¹⁷

III. PROCEDURAL HISTORY

- 14 These proceedings commenced on 30 March 2026. At that time, Mr Sandilands and two associated companies had commenced proceeding NSD442 of 2026. On 2 April 2026, the Associate to Justice Stewart wrote to the parties in both matters, saying amongst other things that given the obvious overlap between the matters, they would be case managed together, and that the parties should address the Court as to whether they should be heard together, and the requisite level of expedition or urgency.¹⁸
- 15 At the following case management hearing, the Applicants in the Sandilands proceeding sought to have the matter heard expeditiously on the basis that they sought specific performance.¹⁹ The Applicants in *this* proceeding said they did not seek formal expedition but that if the two matters were to be heard together or consecutively, they would be ready if necessary.²⁰ The Court expressed the *prima facie* view that the matters had to be heard together, and set the matters down for two weeks commencing on 13 October 2026, leaving to be determined whether they should be heard together or consecutively. The Sandilands applicants were content with this on the basis that it was still ‘fairly expeditious’.²¹

¹⁶ Branson Report [11(a)], [31].

¹⁷ Branson Report [42].

¹⁸ Exhibit **NJ-1** to the affidavit of Ms Nerida Jessup affirmed 19 August 2026 (**Jessup Affidavit**) at pages 1 to 3.

¹⁹ NJ-1, pages 14 to 21, see pages 1 to 8 of the submissions; NJ-1 pages 23 to 70.

²⁰ NJ-1, page 45, page 23 of the transcript; NJ-1, page 21, page 8 of the submission.

²¹ NJ-1, pages 64 to 66, pages 42 to 44 of the transcript; NJ-1, pages 71 to 76.

16 The Applicants in these proceedings then served their evidence on 11 June 2026, 13 days after the initial due date following some agreed extensions to the timetable.

17 The Sandilands proceedings then settled. It was for that reason that at the next case management hearing, although neither party sought to vary the hearing date, Justice Stewart noted that the reason for expedition no longer applied, and so he did not consider the hearing date to be “*fixed in the sense that I’m quite prepared to vacate them*”. The Court made orders permitting the Applicants to serve an amended Statement of Claim,²² and the Applicants and the Respondents agreed that the Respondents’ Defence to that Amended Statement of Claim may include some matters not strictly in response to the Applicants’ amendments that the Respondents wish to add to their Defence.²³

IV. PROPOSED AMENDMENTS TO THE DEFENCE

18 **Proposed Defence [5(b)(vi)].** This proposed addition adds express reference to a condition precedent of the Henderson BSA requiring that Mr Sandilands enter into a similar agreement. The Respondents say this is relevant to the interpretation of the Henderson BSA, in particular to whether the commercial object of the contract was to obtain Ms Henderson’s presentation of a radio program that, absent contrary agreement, was presented with Mr Sandilands (cf Defence [11(c)] and Reply [1(b)(ii)]). This is relevant to whether Ms Henderson’s indication that she would never again present with Mr Sandilands was a repudiation. In any event, this is not a matter that could require further evidence or factual investigation.

19 **Proposed Defence [10(d)(xiA)]-[10(d)(xiE)], [10(d)(xii)], [11(c)].** Defence [10(d)(i)]-[10(d)(xi)] already pleads a number of contextual matters that the Respondents rely upon as being relevant to the interpretation of the Henderson BSA: see Defence [11]. Proposed Defence [10(d)(xiA)]-[10(d)(xiE)] adds some further contextual matters taken from (mostly) the Applicants’ evidence and (in one case) the Respondents’ evidence, in all cases drawn from business records. The objective of the amendments is to put the Applicants squarely on notice that the Respondents propose to use those matters as surrounding circumstances relevant to contractual interpretation. The

²² NJ-1, page 83, page 2 of the transcript; NJ-1, pages 77 to 81.

²³ NJ-1, pages 96 to 105.

changes in Proposed Defence [10(d)(xii)], [11(c)] then tie the surrounding circumstances to the pleadings about interpretation more explicitly (although note this is already done through the particulars to Defence [10(d)(xi)], and Defence [10(a)]).

- 20 **Proposed Defence [41].** Regarding the Fair Work claim, paragraph 12 above notes that the Respondents already plead that any exercise or propose exercise of workplace rights was not in good faith for a proper purpose. As the case has been worked up and evidence and subpoenaed documents have been received, the Respondents have been able to get a better picture of the events leading up to the Complaint Letter. Given the nature of an allegation of want of good faith, it is appropriate that the Respondents plead, as explicitly as they can, the facts that they propose to rely upon in this regard. Hence the proposed additions in Proposed Defence [41].
- 21 As one can see from the matters themselves, and Jessup Affidavit [10], [15], [17], almost all of these matters are things of which the Respondents have only become aware since the Applicants served their evidence. The want of good faith is already pleaded and the proposed additions simply provide more detail. Ms Henderson has already served evidence about why she gave instructions to send the Complaint Letter at Henderson Affidavit [462]-[463]. She will have the opportunity to address the matters proposed to be added in Proposed Defence [41] in her reply evidence, if she wishes.
- 22 **Proposed Defence [48].** Again regarding the Fair Work claim, the Respondents' served affidavit evidence now includes evidence from board members of ARN explaining why they considered the Henderson BSA should be terminated. The additional proposed text simply reflects the effect of that evidence in a positive pleading, lest there be any suggestion that the Applicants must positively plead it to discharge the reverse onus. This is not something about which Ms Henderson could adduce evidence, and which will be the subject of discovery anyway.
- 23 **Proposed Defence [50(b)(iii)], [62].** This concerns the Applicants' claim for damages in contract and under the Act. The Applicants proceed on the basis that if CBC had not terminated the Henderson BSA, Henderson Media would still have been able to take all of the benefits of that contract despite it being clear that Henderson Media would not provide Ms Henderson to present the 'Program', as it was required to do. Particulars

(A) and (B) of ASOC [50] and [62] simply assert that the Applicants would have received those benefits, ignoring the reality that Ms Henderson was not going to present a breakfast show with Mr Sandilands, and that CBC never agreed to Ms Henderson presenting any other show. The Applicants must plead a direct, unambiguous identification of the material facts relied on to establish the causal link between the impugned conduct and the loss they allege they have suffered, unless the link is obvious.²⁴ Often these kinds of ambiguities are solved, pragmatically, with expert quantification evidence from the claimant that quantifies the current value of the lost future benefits, including incorporating the usual kinds of discounts for vicissitudes, the time value of money, and countervailing benefits that the claimant has received that must be offset against the claimed loss. The respondent can then consider whether to plead some different counterfactual that is different to the assumptions underlying the quantification exercise, challenge those assumptions through evidence if they want, and lead responsive expert quantification evidence if appropriate. The Respondents had thought that might occur here, but it has not. That makes it difficult for the parties (and the Court) to work out what the Applicants' suggested counterfactual involves, and accordingly to assess the claim for loss and damage.

- 24 To address this, the Respondents propose to bring some precision to the assessment of the Applicants' allegations of loss and damage by pleading what the *Respondents* say would have happened but for the termination of the Henderson BSA. It is difficult to see what further evidence the Applicants would want to adduce about these counterfactual contentions. In substance what they do is identify provisions of the Henderson BSA and identify how they would have applied if the Henderson BSA not been terminated on 3 March, in circumstances where it is common ground Ms Henderson was never going back on the 'The Kyle and Jackie O Show'. But of course, the Applicants may address this at the time of their reply evidence if they wish to.
- 25 Relatedly, Proposed Defence [50(b)(vi)] and [62(b)(iv)] identifies what the Respondents say the Applicants ought reasonably to have done, either to mitigate loss or by way of identifying that at least part of the loss claimed was caused by their own conduct. O'Neill Affidavit [279]-[284] already explains why the Applicants say Ms

²⁴ *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 7)* [2019] QSC 241 at [17]; followed in (for example) *Re Taliberry Entertainment Pty Ltd* [2023] NSWSC 698 at [45]; *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151 at [72] (Gageler and Edelman JJ).

Henderson rejected ARN's alternative engagement proposals, and O'Neill Affidavit [285]-[297] already deals with her other employment prospects at length, so there does not seem to be anything further to say on the topic.

- 26 **Proposed Defence [68(b)(iii)] and [71].** These paragraphs address the misleading or deceptive conduct claim. Where the impugned conduct was directed to the public or part of the public, the analysis of whether the conduct was misleading or deceptive must be undertaken by reference to the effect or likely effect of the conduct on the ordinary and reasonable members of the relevant class of persons.²⁵ The ASOC does not plead to whom the Announcement was directed. These proposed additions are included so as to put the Applicants on notice as to who the Respondents say it was directed to. This does not seem to be a matter for evidence at all, as opposed to requiring a consideration of the character of the announcement in its legal context.²⁶
- 27 **Proposed Defence [69(b)(ii)].** Although the Complaint Letter told the Respondents not to disclose any of the matters referred to therein, part of Ms Henderson's complaint about misleading or deceptive conduct is that the Announcement failed to include 'material context' (ASOC [69(c)]), the substance of which is not pleaded. This is already pointed out at Defence [69(b)(i)]; the proposed additional wording simply identifies explicitly *how* the Respondents rely upon this fact on the question of causation.

V. PROPOSED AMENDMENTS TO THE CROSS-CLAIM

- 28 The proposed amendments to the cross-claim plead out the legal effect of Ms Henderson's evidence of pain and suffering: ASOC [50], particular (D).
- 29 The gist of the Applicants' evidence identified in the particulars to proposed paragraph 11 of the Statement of cross-claim is that Ms Henderson has incurred pain and suffering by reason of, broadly, alleged bullying by Mr Sandilands and ARN's supposed failure

²⁵ *Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd* (2023) 277 CLR 186 at [83] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ).

²⁶ See eg *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486 at [36] (French CJ, Gummow, Hayne and Kiefel JJ). As to the legal context, see s 674 of the *Corporations Act 2001* (Cth).

to address it. But Henderson Media, as Ms Henderson's employer, was responsible for Ms Henderson's health and safety in the provision of the 'Program Services'.

30 Accordingly, as an alternative argument in the event that this evidence is accepted and Ms Henderson is successful on this part of her claim, proposed paragraphs 8-12 contend that the Respondents must be able to recover damages or an indemnity against Henderson Media. This claim does no more than observe what the Respondents say is the legal effect of Ms Henderson's own evidence and claim.

31 Similarly, paragraphs 13-24 point out that Henderson Media owed a 'well-established'²⁷ duty of care to its employee, Ms Henderson. On that basis, the Respondents contend that if Ms Henderson is successful in this part of her claim, the Respondents are able to claim contribution from Henderson Media. This part of the case also involves pointing to two particular aspects in which Henderson Media appears to have failed to take reasonable care, including not disclosing Ms Henderson's real issues to ARN or CBC: see the particulars to proposed paragraph 21. Both of these aspects emerge from the evidence that has been served.

Tom Blackburn
Peter Gaffney

19 August 2026

²⁷ *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at [19] (McHugh, Gummow, Hayne and Heydon JJ).