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

VID1036/2024

Jayson Lloyd Gillham
Applicant

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

APPLICANT'S WRITTEN CLOSING SUBMISSIONS
REQUESTED BY HILL J ON 5 JUNE 2026

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(1) Introduction

1. The instant submissions are provided in compliance with the request of Justice Hill at the start of 5 June 2026.

(2) Matters taken on notice on 4 June 2026

2. Senior counsel for the Applicant (hereinafter **"A"**) commenced to make oral closing submissions in the afternoon of 4 June 2026. On that occasion, she took three points on notice to address the following day. On the following day, his Honour requested that she include those matters in the instant submissions. They were as follows.

3. **First**, his Honour asked counsel where in the judgment in *Lattouf v Australian Broadcasting Corporation (No 2)*,[1] Rangiah J had pronounced upon the definition of "political [opinion]" in the *Fair Work Act 2009* (Cth) (**FWA**). The relevant paragraphs are [104] – [116], in particular [110] in which Rangiah J held: *"The expression "political opinion" within s 772(1) of the FWA encompasses the opinion of an employee about the policies or actions of the government of a country or its armed forces..."*

4. While addressing on *Lattouf*, A notes that it was put to counsel for the Respondents (hereinafter **"Rs" or "1R" or "4R"** as appropriate) in reply: *"Would it be relevant – and I only say this because it's a factual difference. It may not be relevant – that the ABC, of course, is a public broadcaster. It has to be an open church. If there's ever an organisation that has to tolerate different views, it's the ABC. It's funded wholly by government. It's not a commercial organisation. MSO – it's funded by government, but it's trying to break even, and it's, you know – as Ms Jackson said, money is short. Does that make a difference, or is that completely - - -"*[2] Counsel for Rs replied "It may make a difference" and went on to refer to 1R's "Jewish donors."

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[1] [2025] FCA 669.
[2] T1291 L15.

Filed on behalf of (name & role of party) Jayson Lloyd Gillham
Prepared by (name of person/lawyer) Sheryn Omeri KC and Nilanka Goonetillake of counsel
Law firm (if applicable) Marque Lawyers
Tel 02 8216 3000 Fax
Email michaelb@marquelawyers.com.au
Address for service (include state and postcode) Level 4, 343 George St, Sydney NSW 2000

5. A observes however, that anti-discrimination law applies equally to private as to public institutions. Accordingly, the fact the MSO may be a private institution (though in receipt of significant public monies[3]) does not exempt it from precisely the same anti-discrimination principles[4] as were applied to the ABC in *Lattouf*. It does not accord with anti-discrimination law (nor with s.15 of the Charter with which the EOA must be construed consistently) for an institution to allow its private donors to operate as *de facto* determinants of acceptable expression, rather than State or Federal Parliaments through legislation. Though senior counsel for Rs said repeatedly that he did not like the expression "Jewish donors," if Rs' witnesses' *perception* (at least) of the views of those donors[5] in relation to Israel's war on Gaza was a substantial and operative reason for the pleaded adverse actions, to separate such reason from the fact of A having expressed a view about that subject would be to allow such perceptions to operate as such (unlawful) determinants. The death knell would sound for Australian democracy if one interest group, because of its financial support, could silence the expression of the lawful political beliefs of another.[6]

6. **Second**, his Honour asked counsel for A whether [94] of *Tattsbet* altered her view about [100] and [101] of the judgment of Jessup J being *obiter* rather than part of the *ratio* of that judgment.[7] Counsel's response is 'no,' for the following reasons. In the final sentence of [6], Jessup J indicates that Ms Morrow's cross-appeal was against the dismissal of her case under s.340, not against any finding that she was not a deemed employee within s.12(3) of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (**SGA Act**). At [77] Jessup J makes clear that the latter was not considered at first instance. Accordingly, there could be no appeal in relation to it. The same is reflected in [93] where the first ground of Ms Morrow's cross-appeal is reproduced. That ground does not advert to Ms Morrow's contract falling within s.12(3) of the SGA Act ('the deemed employee point');[8] its reference to s.340(1)(a)(iii) must be to the finding reproduced by Jessup J at [85]. There is fleeting mention of the point at [94], which appears to be raised of Jessup J's own initiative (that is, not on the basis of the first ground of appeal) when it ought properly to have been left for determination by the primary judge on remission. The issue is not picked up again until s.12(3) is quoted at [99] (and no more is said of it than it simply being quoted).

7. Then at [100], Jessup J records that: *"no specific attention was given to that proposition in the submissions of either party."* The absence of attention may have amounted to an abandonment of the

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[3] See oral closing submission of senior counsel for Rs at T1102 L9-10. Submissions concerning the small contribution of "Jewish donors" ignores Finance Committee Minutes which show that one third of the funding of the MSO's European tour would come from Gandel monies. See Vol 3, tab 98, p.1277 and Dr Galaise's evidence about the importance of the tour at T386 L9-16.
[4] If not law, given *Lattouf* concerned s.772(f) of the FWA.
[5] And even sponsors, such as Emirates upon which Rs appeared to rely as if to suggest: *"It's the Arabs/Muslims too who would be against Mr Gillham expressing himself as he did!"* without adducing any evidence as to the view of Emirates or of the United Arab Emirates (UAE) on Israel's war on Gaza or 1R's understanding of the same. The UAE has been described as *"Israel's primary Gulf partner"* (https://www.palestinechronicle.com/exposed-how-the-uae-became-central-to-gazas-concentration-camp-plot/) In any event, the fact a sponsor such as Emirates *might* not wish to associate itself with Mr Gillham's views simply demonstrates that the reason for the pleaded adverse actions against him was the expression of his lawful political belief.
[6] Senior counsel for Rs' suggestion that the audience reaction to Maestro Volkov's statement from the stage which was in evidence demonstrated why it was necessary for 1R to be able to control its stage (T1113 L10 *et seq*) was entirely wrong-headed. 'Disturbing the musical experience' (which did not occur in Mr Gillham's case in any event) is not a lawful reason for limiting the right to express one's political belief without discrimination. That audience members yelled "fuck off!" or left the Royal Albert Hall is a reflection of their exercising *their* democratic freedoms (of expression and movement). The distinction sought to be drawn between Mr Gillham's case and Maestro Volkov 'doing it at the end of the concert' was irrelevant where all R witnesses admitted that Mr Gillham had expressed a political belief as part of his *introduction* to 'Witness.'
[7] T1217 L 18.
[8] Junior counsel for Rs submitted that the disposition of Ms Morrow's cross-appeal necessarily included the holding (on deemed employment point) (at T1165 L23-26). However, the same is not borne out by [93] of *Tattsbet*.

point by Ms Morrow, or reflected the absence of appeal in relation to it. Jessup J dismisses the notion that Ms Morrow's contract fell within the terms of s.12(3) in one sentence and based on one single criterion. The same is extremely short compared to typical analyses of employment status.[9] Then his Honour says: *"Without the benefit of the assistance of counsel on the connotation of the word "principally" in s 12(3), I would not be prepared to assume, favourably for the respondent, that the agency agreement was a contract of a kind referred to in that subsection."* The same suggests that had his Honour had the benefit of assistance from counsel, he may have been persuaded to make such finding.

8. Following, at [101], Jessup J states: *"If it were such a contract…"* demonstrating that his Honour had not reached a concluded view about the same at [101]. Then his Honour says: *"the question then would be…"* The same reflects that no attention having been given by either party to the first question (set out at [100]) counsel's submissions came nowhere near addressing on the question at [101]; the question was not even posed ("the question *then would be"*). At [101], his Honour then determines the question in two and a half terse sentences.[10]

9. In view of the foregoing (no mention of the deemed employment/'workplace law' point in Ms Morrow's grounds of cross-appeal, no assistance from counsel, a terse analysis by Jessup J), A presses that the conclusion in [103] is *obiter* and therefore not binding upon this Court. In the alternative, A submits that her Honour Mortimer CJ determined that: *"The applicant's construction of para (d) of the s 12 definition of 'workplace law' was certainly not considered by Jessup J"*[11] and for that reason also, the case is not binding upon this Court where such construction is squarely put by A and responded to by Rs.

10. As to the textbook reference to *Tattsbet* which Rs produced for the first time *in reply*, A does not accept that the same is a *leading* employment law textbook. Moreover, it is telling that it was apparently the only textbook reference to *Tattsbet* that Rs were able to find across the interlocutory proceedings (heard on 17 March 2025) to date. Importantly, the section relied upon by Rs (which is missing two pages) says nothing about (d) of the definition of "workplace law" being limited to laws which *only* regulate the relationship between employers and employees. On the contrary, footnote 25 refers to *Auimatagi v Australian Building and Construction Commissioner*[12] (on which A sought to rely in the instant case) as authority for the proposition that the relevant legislation is a "workplace law" where in that case it was a "workplace law" as applied to independent contractors and even though such outcome was reached by concession between the parties. Page 152 also refers to an "anti-discrimination law" being found to be a "workplace law" in the case of *Bayford v Maxxia*[13] on which A also sought to rely in the instant proceedings. Accordingly, if Rs are permitted to rely on the relevant textbook, A must equally be able to take its benefit (the weight of which appears to be exclusively in A's favour).

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[9] *"As mentioned above, the respondent's own net personal income represented only about a third of the gross receipts of the Logan Central agency."*

[10] *"…the answer must be no. If the respondent was entitled to anything under the SGA Act, that entitlement arose under the provisions of that Act that extended its operation beyond the circumstances of employees strictly so called. Those provisions did not regulate the relationships between employers and employees."*

[11] *Gillham v Melbourne Symphony Orchestra Pty Ltd* [2025] FCA 458 at [87].

[12] [2018] FCAFC 191.

[13] [2011] FMCA 202.

11. **Third**, on 4 June 2026, there was some confusion about a question his Honour had asked counsel and the question to which she had replied.[14] Regardless of the *question*, A presses the answer given[15] that *"any other law of the Commonwealth, a State or Territory that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters)"* picks up the whole of an Act only part of which regulates the relationship of common law employment. The same is apparent from the use of the word "including" which must mean that the whole of a law dealing (in parts) with occupational health and safety is picked up. It would also be contrary to the ordinary principles of statutory interpretation for only some provisions to be picked up and construed in isolation from others.[16] Moreover, it is worthy of note that s.351(2) and (3) pick up the whole of the anti-discrimination acts in respect of employees. For example, s.351(3)(b) lists the whole of the *Equal Opportunity Act 2010* (Vic) (**EOA**). However, the only sections of the EOA which could possibly be relevant to s.351 are those which concern employees and <u>because of</u> the terms of s.351. Section 351 does not permit of the sections of the EOA concerning discrimination in education (to use his Honour's example in oral argument) to create a right of action pursuant to the FWA.

12. Equally, this was counsel's point when she said: *"The whole of the Act would be picked up, but the limitation would come at the stage of section 340 and 341 and 42. So if you were someone in…education – was your Honour's other example…So that provision may well fall within the definition of workplace law, but it doesn't help you when you get to 340, specifically because 342 says, 'Well, you have to be an employee or an independent contractor or a prospective employee or a prospective independent contractor or the other heads.'"*[17]

13. In relation to exchanges between Bench and Bar on the same point concerning <u>*Regulski v State of Victoria*</u>,[18] what Jessup J was doing at [198] – [200] of <u>*Regulski*</u> was looking for provisions of the *Accident Compensation Act 1985* (Vic) which could be said to regulate the relationship between common law employers and employees in order to find the statutory "hook" or connection to the FWA definition of "workplace law." That is the threshold question, before one comes to which aspects of an Act are operative and which fall away in Part 3-1 of the FWA. Jessup J did not determine that only the provisions which regulate common law employment were picked up by the definition of "workplace law" in s.12 of the FWA. As Mr Regulski was an employee, Jessup J did not need to look beyond the sections his Honour had identified as meeting the threshold question to find the provisions which were operative within Part 3-1. In that case they were one and the same provisions. That would not be so in the case of independent contractors. The relevant law would require to regulate the relationship of employers and employees in some way, and if it did so, by virtue of that, it would be picked up by the definition in s.12(d). Then, if the applicant were an independent contractor, the Court would be required to identify the provisions of the Act which regulated the relationship of independent contracting, which would be operative for the purposes of s.340, s.341 and s.342 of the FWA.

14. The foregoing submissions were and are consistent with Mortimer CJ's construction of s.342(1) of the FWA which refers to: *"(d) discriminates between the employee and other employees of*

[14] At T1208.
[15] At T1208 L25-30.
[16] See for example, *Acts Interpretation Act 1901* (Cth), s.15AA.
[17] T1208 L25 – 36.
[18] [2015] FCA 206.

the employer" in Sayed v CFMEU.[19] At [161] of Sayed her Honour held: *"However, the terms of s 351(2), read with subs (3), then must be applied. Those provisions expressly pick up* ***the detailed regimes*** *of each of the territory, state and federal anti-discrimination statutes. In other words, the requirements that there be "less favourable treatment", the complicated requirements for indirect discrimination, and the exceptions for which each statute provides are, through these provisions, incorporated so as to limit the protections given by Div 5 of Pt 3-1 of the Fair Work Act in a way which is intended to mirror the limits under those other legislative schemes"* (bolding added). Her Honour referred to the detailed regimes of each of the territory, state and federal anti-discrimination statutes being picked up, not merely certain individual sections which provide the statutory "hook" to the FWA.

15. Relatedly, in argument, his Honour put to counsel for A that s.342 item 4(b)[20] was (or could be) free-standing (i.e. not pick up the state anti-discrimination acts) even where item 1(d) does pick up the state regimes (as confirmed by Mortimer CJ in *Sayed*). However, A submits that the language of item 1(d) reads in more of a free-standing way than the language of item 4(b) since item 1(d) provides a test for discrimination (i.e. "discriminates between," implying a comparator test) where item 4(b) does not. Yet, Mortimer CJ has held that item 1(d) does pick up the state anti-discrimination acts. Moreover and more generally, it would be an odd result if s.342 item 1(d) picked up the state anti-discrimination acts while item 4(b) did not in circumstances where there is no definition of "discriminates" anywhere else in the FWA on which item 4(b) would or could be based. The same tells strongly against the EOA not being picked up in respect of independent contractors.

16. In addition to the foregoing, his Honour was content for A to respond in writing to Rs' oral submissions deriving from *Ambulance Employees Association of Western Australia Incorporated v United Workers' Union*[21] at [21].[22] In that paragraph, the plurality simply points out that the general objectives of the *Fair Work (Registered Organisations) Act 2009* (Cth) do not shed light on how far the legislature has chosen to go in Part 2 of Chapter 2 in order to effect that purpose, or the balance Parliament has decided to strike when reconciling it with other, perhaps competing, objectives. A notes that s.5(4) of the Act does not reference any specific source, unlike s.3(a) of the FWA which refers specifically to Australia's international *labour* obligations. The relevant ILO Conventions - particularly No.111 concerning discrimination, which is engaged in this case, imposes very specific requirements on members to enact national legislation that ensures equality of treatment including in respect of political opinion. Moreover, A's case does not stop at s.3(a) of the FWA, instead also relying on the specific objects of Part 3-1 at s.336 which *specifically* refer to "workplace discrimination" and to providing effective relief for "persons" who have been discriminated against and specifically state that such protections are provided to a person whether an employee, an employer "or otherwise." In the instant case Rs have not identified any competing objectives which they say would necessarily diminish the protection Part 3-1 provides to independent contractors. The instant case is a world away from *Ambulance Employees Association*.

17. Beyond the above but relatedly, counsel for A had provided the Court and Rs with a further authority relevant to the question of the construction of the definition of "workplace law" on which counsel

[19] [2015] FCA 27.
[20] *"discriminates against the independent contractor in the terms or conditions on which the principal offers to engage the independent contractor"*
[21] [2026] FCAFC 26.
[22] T1304 L40 *et seq.*

did not have the opportunity to address in oral submissions, namely *CFMMEU v BM Alliance Coal Operations Pty Ltd*.[23] In that case, Mr Meikle was an independent contractor of BM Alliance. He contended that certain standard operating procedures (**SOPs**) made pursuant to the *Coal Mining Safety and Health Act 1999* (Qld) (and associated Regulations) were "workplace instruments" within s.12 of the FWA. Relevantly to the instant case, the second limb of the definition of "workplace instrument" was[24] *"concerns the relationships between employers and employees."*[25] BM Alliance argued (as Rs in this case do), on the basis of *Australian Licensed Aircraft Engineers Association v Sunstate Airlines (Qld) Pty Ltd*,[26] that the SOPs did not concern such relationships. Collier J held[27] that they did concern such relationships. From there, despite being assisted by counsel for both parties, her Honour did not analyse the question of whether insofar as the SOPs were picked up by the s.12 definition of "workplace instrument" they were picked up in respect of independent contractors. Instead, her Honour appears to have proceeded on that basis, and ultimately upheld Mr Meikle's claim in adverse action. A contends that the absence in the judgment of a very experienced Federal Court judge of analysis of the question which has been the subject of much attention in the instant case simply demonstrates that A's case on "workplace law" reflects the obvious and natural construction of (d) of the definition of "workplace law."

18. Finally on the statutory construction point, A notes that in reply, junior counsel for Rs addressed on the anomaly which would be created in s.341(1)(b) read with (2)(k) of the FWA if the EOA were not picked up by the definition of "workplace law."[28] Junior counsel conceded that s.341(1)(b) read with (2)(k) exposed a deficiency in Rs' construction of the definition of "workplace law" in s.12 of the FWA. However, junior counsel offered up as the answer to such deficiency, s.341(1)(c)(ii). A submits that the same is not the answer for at least two reasons. First, s.341(1) plainly confers workplace rights on independent contractors as well as employees (not simply employees) since it begins *"A **person** has a workplace right if **the person**…"* (bolding added). Section 341(1)(c)(ii) is directed solely to common law employment. The fact it specifies the same indicates that s.341(1)(b) and (1)(c)(i) apply beyond that relationship. Section 341(1)(c)(ii) would not address a situation where an independent contractor were told by a prospective principal that the principal will not engage the independent contractor unless he or she waives their right to 'refer a dispute to the Commission' under the EOA. Only s.341(1)(b) or (c)(i) do this and both depend upon the term "workplace law." If independent contractors did not have such a workplace right (i.e. pursuant to the EOA) they could not move to s.342 item 4(b) of the FWA. The latter does not have direct operation, instead depending upon there being a "workplace right" in the first place. Such circumstances would plainly undermine the specific objects of Part 3-1, set out in s.336(1)(c) and (d) and (2).

19. Secondly, even in relation to common law employees, if the EOA were not picked up by the definition of "workplace law" s.341(1)(c)(ii) cannot be construed so broadly as to leave s.341(1)(b) and (c)(i) without any work to do. The example of 'Freddy going to the ACCC' in the Explanatory Memorandum would go to s.341(1)(c)(ii) precisely because the laws governing the ACCC do not in any sense regulate the relationship between employers and employees. That does not mean that laws which do were not intended to fall within s.341(1)(b) and (c)(i). Accordingly, A maintains that the

[23] [2023] FCA 30.
[24] And still is, but the second limb has been further expanded somewhat.
[25] See [114].
[26] [2012] FCA 1222.
[27] At [131] – [134].
[28] T1303.

consequences of the EOA not being picked up by the definition of "workplace law" for s.341(1)(b) read with (2)(k) show that it *is* so picked up. A also presses the same point in respect of s.558B of the FWA.

20. In addition, A points to the definition of "industrial association" in s.12 of the FWA, which begins: *"(a) an association of employees or independent contractors, or both, or an association of employers, that is registered or recognised as such an association (however described) under a workplace law."* To take one example, the *Industrial Relations Act 1996* (NSW) permits of the registration of associations of independent contractors (for example s.335 concerning contract drivers of freight). If it were not picked up as a "workplace law" to its full extent (i.e. insofar as it covers associations of independent contractors) the words *"association of...independent contractors"* in the definition of "industrial association" would not, contrary to its plain words, cover associations of independent contractors formed under the NSW Act.

(3) Matters in 'Applicant's Proposed Findings in the Case' document

21. His Honour also requested that counsel address in writing on the below matters which had been adverted to in the 'Applicant's Proposed Findings in the case' document.

Construction of s.8 of the EOA

22. A contends that the Court is bound to determine the correct construction of s.8 of the EOA in order to determine precisely A's "workplace right" upon which he relies for the purposes of is claim pursuant to s.340 of the FWA. On 29 May 2026, his Honour expressed some disinclination for doing so.[29] However, it is commonplace and unremarkable for Federal Court judges to determine questions of construction of State Acts in the General Protections jurisdiction.[30]

23. A has set out the correct construction of s.8 of the EOA at [32] and [33] of his Written Outline of Submissions for Trial. The same is consistent with the plain words of s.8, which are *"treat a person **unfavourably** because of an attribute"* (bolding added), not "less favourably." Moreover, A notes that the rationale for the re-drafting of s.8 was the report of Mr Gardener (cited in footnote 10), which, at [5.8], refers to difficulties with the "less favourably" formulation, relevantly, that *"...treatment that is detrimental to a person, but not by comparison 'less favourable' is not unlawful."* The formulation of "less favourably" would *facilitate* the very mischief the EOA seeks to address.

24. A further difficulty with such formulation is precisely that identified by his Honour on 4 June 2026, namely that "political belief" is different from protected attributes which are immutable such as age in that an appropriate comparator might be someone who holds no political belief rather than someone who holds a different political belief from A.[31] Hence the formulation of an appropriate comparator would not be straightforward.[32] The re-drafting of s.8 in 2010 aimed to overcome this unnecessary technicality.[33]

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[29] T998 L13-17 where his Honour said: *"And as a Federal Court judge, I'm wary about venturing too far into the interpretation of state law. That's authoritatively determined by the Supreme Court. So if I can find a way of dealing with that aspect of the case without having to make a bold proposition of law in either direction on your broad argument, I think I would prefer to do that."*

[30] See for example, *Regulski* which concerned the construction of the *Accident Compensation Act 1985* (Vic) and *CFMMEU v BM Alliance* which concerned the construction of the *Coal Mining Safety and Health Act 1999* (Qld).

[31] T1126 L25-35.

[32] T1126, L23 *et seq*.

[33] See [33] of A's Written Outline of Submissions for Trial.

25. Rs appeared to concede that s.8 of the EOA must be construed in accordance with A's submission.[34] However, they appeared also to contend that the word "lawful" in s.4 of the EOA required consideration of the *particular* political belief in question.[35] The same is plainly not correct. The requirement of lawfulness merely goes to the *quality* of a political belief rather than to its substance. Both pro- and anti-immigration political beliefs would be lawful provided neither advocated the murder of supporters of immigrants or of immigrants for example. Rs also relied upon *Austin Health v Tsikos*,[36] as suggesting that there remained scope, in the s.361 analysis, for consideration of comparators. A submits that the same is equally incorrect. *Tsikos* did not concern the FWA. Moreover, a comparison between Ms Tsikos' pay and that of her male colleagues formed part of the way she had put her case. The same is not a feature of Mr Gillham's case. Nowhere in the FASOC does he plead that he was treated less favourably than someone who may have expressed a different political belief (or no political belief).[37]

26. In view of the foregoing, A submits that the Court must determine whether Rs treated him unfavourably because he expressed a political belief and if so, whether such unfavourable treatment amounted to adverse action within the meaning of that expression in s.342 item 3 or 4 (as applicable).

Requirement of an extant contract

27. Rs raise this point in respect of only the second – fourth pleaded adverse actions. A notes that clause 17.3 of the Contract states: *"Symphony Services may terminate this Agreement at any time by giving the Artist prior written notice of termination…"* The Contract does not state what length of time constitutes "prior" written notice of termination as most employment and other contracts would. Accordingly, it is far from clear that Mr Moore's email to Ms Armstrong and "Tara" at SSA constituted immediate termination of the contract, indeed, so immediate as to have occurred prior to the sending of the Cancellation Message approximately 30 minutes later. Even assuming Mr Moore's email resulted in immediate termination, A contends that an extant contract is not required for the adverse action of prejudicial alteration of position. In this regard, A relies upon [50] – [51] of his Written Outline of Submissions for trial.

28. A relies on [72] – [76] of *Australian Meat Industries Employees' Union v Belandra Pty Ltd*.[38] *After* the employment of the meat workers had come to an end they were expecting to be re-employed. It was by the decision not to re-employ them that their position was said and held to have been altered to their prejudice. At [72], Justice North contrasts the language of "employment" in "injures the employee in his or her employment" with the language of "position" in "alters the position of the employee to the employee's prejudice" as a part of his Honour's finding that the latter was intended to be broader than the former. At [31] – [32] of *Qantas Airways Limited v Australian Licensed Aircraft Engineers Association*, the Full Court held (writing of *Belandra*): *"The statutory provision prohibiting prejudicial alteration applied to them and it was held that the disappointment of their expectation was an alteration of their position to their prejudice. The authorities thus establish that*

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[34] T1127 L 15-20.
[35] T1126 L10.
[36] [2023] VSCA 82. Junior counsel for Rs also submitted (T1154 L20 – 36) that [215] of *Sayed* provided some authority for the existence of a 'comparator' exercise at the s.361 stage. The same is only very faintly referred to at [215]. In any event, as Mr Sayed had been an employee, the case concerned s.351 of the FWA which says: *"An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of **the person's…political opinion**…"* (bolding added). The same refers to adverse action because of a particular person's political belief which may invite comparisons with the political beliefs of others.
[37] At most, the comparator exercise is addressed upon, taking a 'belt and braces' approach in the penultimate and ultimate paragraphs of A's Outline of Written Submissions for Trial.
[38] (2003) 126 IR 165. Cited with approval by the Full Court in *Qantas Airways Limited v Australian Licensed Aircraft Engineers Association* [2012] FCAFC 63 at [31] – [32].

a prejudicial alteration to the position of an employee may occur even though the employee suffers no loss or infringement of a legal right."

29. The Full Court having determined the point, it is clear that prejudicial alteration of a person's position can occur even when they are no longer in a contractual relationship with the respondent. A also presses his alternative case with respect to his third and fourth pleaded adverse actions, pleaded at [18] of his Reply.

Rs' Public Comment Custom and Practice/Convention a mistake of law

30. Rs' "Public Comment Custom and Practice" is defined at [9](d) of the Further Amended Defence (**FAD**) as: *"that an artist is not to make a public statement of a political or social nature at a performance without the authorisation of the host of the musical event..."* This same definition is picked up at [9](g) as the "Convention" and as amounting to "Inherent Requirements" (at [9](j)).

31. By such definition, R's Public Comment Custom and Practice/Convention is plainly designed to operate as a limit or constraint upon the right to express one's political belief or to engage in political activity set out in the EOA and accordingly, a limit upon A's workplace right to do so. Indeed, it is difficult to understand why Rs would have pleaded it if it did not, or what it could possibly go to. Even if it *now* be Rs' position that the Court need not determine whether such a Convention in fact exists, they still seek to rely on it as something their witnesses *thought* existed, in order to rebut the s.361 presumption. If it is 'merely' relied upon as something their witnesses "thought" their witnesses were mistaken in relation to the law concerning limitations upon the right to express one's political belief or to engage in political activity. They were mistaken in thinking that such limitations could derive from a Convention applicable to classical musical artists without reference to the EOA or the Charter. The latter indicates that such limitations can only be as provided for by law.[39]

32. Accordingly, it is plain that Rs seek to get in by the back door (s.361), a limitation on the right to express a political belief or to engage in political activity, which they cannot get in through the front because the same is not provided for by law. The Court cannot countenance the same.

33. It is trite principle that people are presumed to know the law and that, accordingly, ignorance of the law is no defence. In other words, a defendant or respondent cannot rely upon a mistake of law in order to evade liability in <u>any</u> area of law. One cannot say: "I killed a man because I found him irritating and when I did it, I assumed I had a defence to murder of 'irritation'" and thereby create such a defence. Equally, a respondent to an adverse action claim cannot say "I understood the law to be X and because that is what I thought, even though I was wrong about the law, I am saved from the presumption in s.361." Nothing in the appeal decision in <u>*McMaster v Qube Ports Pty Ltd*</u> (<u>*Qube Ports Pty Ltd v McMaster*</u>[40] on appeal) detracts from this principle. The appeal succeeded because it was held that the primary judge had misinterpreted the relevant Enterprise Award. Mistake of law was referred to in the fifth ground of appeal of which Allsop CJ said, at [2]: *"I agree that it is both unnecessary and unwise to say anything about the fifth ground of appeal."*

34. Jessup J said of it, at [38]: *"The appellant's second, third and fifth grounds of appeal were advanced in the alternative to the first. Since I would uphold the first, and subject to what follows in the next*

[39] Charter of Human Rights Bench Book at [29] and as recognised by his Honour at T692 L5-10.
[40] (2016) 248 FCR 414.

three paragraphs below, I would not find it necessary to consider the second, third and fifth." The high point of Jessup J's *obiter* consideration of the fifth ground of appeal was [41] at which his Honour quoted a passage from *Otrowski v Palmer*[41] which merely expressed the principle that ignorance of the law is no defence in different words namely that it is irrelevant to the question of guilt that the accused person was not aware that certain elements constituted an offence. Equally, it must be irrelevant that a respondent was not aware that he could not (if it had been right in that case) compel an employee to accept a promotion or (in this case) limit someone's right to express a lawful political belief by means outside the relevant statute(s). The final member of the full court, Bromberg J, held at [62]: *"As the appellant's success on the first ground of the appeal determines the appeal, it is not necessary to consider the appellant's other grounds of appeal"* but went on to say, at [62] that there was force in Mr McMaster's submission concerning mistake of law. Accordingly, Rs cannot derive from a silent Chief Justice and two judges each offering up *dicta* pointing in opposite directions a principle of law that a mistake of law can be exculpatory in a s.361 context.

35. In oral submissions in reply, it was said against A on this point that 'mistake of law' had not been pleaded in his Reply.[42] The same is neither here nor there. If a matter is a mistake of law, a party cannot rely upon it whether it has been pleaded or not. The Court allowing a party so to rely would undermine the administration of justice (since anyone could defend any claim by alleging that they had misunderstood the law) and indeed its own obligation to apply the law.

36. Moreover, the same was a rich submission for Rs to make given they had changed their pleaded case on day 1 of the trial and again on day 8. In the Amended Defence, a breach of the Inherent Requirements (defined to include the Public Comment Custom and Practice/Convention) was pleaded, at [9](k), to constitute a fundamental breach or repudiation of the contractual relationship between A and the MSO. The notion of a fundamental breach or repudiation was then picked up as part of 1R's s.361 case at [48](c)(iii)(3). At the outset of the trial, senior counsel for Rs said: *"We're no longer running an implied contract case. It all involves express terms or the natural incident of those terms, or the fundamental obligation to act as a professional musical artist, your Honour."*[43] Rs never clarified the meaning of "natural incident" of express terms of a contract before, on day 8 of the trial, changing their case in order to avoid producing a legal advice they had received which likely made clear that A had not breached the Contract. On day 8, Rs contended that their "Public Comment Custom and Practice," "Inherent Requirements" and "Deliberate misleading" were all free-standing matters.

37. Prior to day 8 of the trial, A had been prepared to respond to Rs' case on the basis of the principles of contract law, as reflected in [4] of the Reply. Once Rs' case was cast as comprising "free-standing" matters there was no scope for A to plead 'mistake of law' in the Reply otherwise than by amendment. Counsel for A had given notice of the mistake of law point on 2 June 2026 and again in writing in his Applicant's Proposed Findings in the Case table. If Rs continue to press their pleading point, A seeks leave to amend his Reply in the manner set out in the attached.

Inherent requirements

38. It is unclear what remains of Rs' "Inherent Requirements" case, at [48](c)(iii)(2) of the FAD, since "Inherent Requirements" are defined at [9](j) as the "Public Comment Custom and Practice" and the

[41] (2004) 218 CLR 493.
[42] T1298 L20 – 25.
[43] T48 L10.

"Convention." Accordingly, insofar as Rs ask only that the Court determine whether Rs believed they existed or not, and assert that Rs did so believe, the Inherent Requirements must equally amount to a mistake of law (for the reasons set out above).

39. In the event Rs press that inherent requirements mean something else, they must be pressing that such inherent requirements in fact existed upon the role of a classical musician (though it is not clear what they are). However, inherent requirements upon the role of a classical musician are not provided by law and therefore do not exist. The EOA very carefully sets out three exceptions to political belief discrimination at ss.27, 66A and 74 and exceptions to and exemptions from the prohibition of discrimination based on inherent requirements at ss.75-91. Accordingly, given the State legislature has turned its mind to the matter, Rs cannot rely on any other inherent requirements of their own invention in relation to the role of classical musician.

40. Insofar as Rs rely on inherent requirements by parity of reasoning with s.351(2) of the FWA concerning employees, the same cannot mean anything additional to inherent requirements where the same are already provided for in the relevant anti-discrimination law referred to in s.351(3). As to Rs' subsidiary argument on this point, principals take the benefit of inherent requirements exceptions in the EOA in the same way as employers. In the alternative, if s.351(2)(b) does allow for a case-by-case development of inherent requirements, the same cannot be developed without regard for the relevant ILO Convention (No.111) which refers to inherent requirements in its Article 1(2).[44] Inherent requirements are explained by the ILO itself in its publication "Fundamental Rights At Work and International Labour Standards"[45] as: *"This exception must be interpreted restrictively…In no circumstances…may the same qualification be required for an entire sector of activity. Systematic application of requirements involving one or more of the grounds of discrimination set out in the Convention is inadmissible. Careful examination of each individual case is required…Political opinion may in certain limited circumstances constitute a bona fide requirement for certain senior policy-making positions."* There is no sense in which the role of a classical musician is a "senior policy-making position."

41. In oral closing submissions concerning the alleged "proportionality requirement", junior counsel for Rs submitted: *"There is a degree of overlap with our threshold objection in relation to what is referred to as the inherent requirements, picking up the language of section 351(2). These are not quite the same things for the purposes of the pleaded case, but it's impossible to disaggregate the proportionality requirement without having regard to the actual job in question, or the task in question, and the employer's enterprise."*[46] Given that the Court was unpersuaded by Rs' "proportionality requirement" A contends that it must be equally unpersuaded by Rs' "Inherent Requirements" contention.

Rumble

42. Rs appear to place a great deal of weight on the case of ***Rumble***. A contends that it may be that ***Rumble*** is problematic and ripe for reconsideration by the High Court. A acknowledges however, that the latter is not the task of *this* Court.

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[44] And upon which Rs rely at [24] of their Written Opening Submissions.
[45] At Joint Authorities Book, tab 101.
[46] T1141 L35.

43. In any event, A contends that ***Rumble*** is distinguishable both on the law and on the facts. In relation to the law, given that Dr Rumble was an employee of Ebsworths he had (and exercised) a right of action pursuant to s.351 of the FWA. That section specifically refers to an employer not taking adverse action against a person who is an employee because of **the person's** political opinion. Accordingly, it appears on its face to require consideration of the *particular* political opinion a person holds or expresses. For the foregoing reasons, that is different from s.8 of the EOA.

44. In relation to the facts of ***Rumble***, they were very different from those of the instant case on at least two fronts. First, there was a firm policy of which Dr Rumble had been informed and which he had breached. In this case, Rs admitted from the outset that they did not notify A of the MSO's Code of Conduct and so pursuant to clause 2.1(d) of the Contract, he was not bound by it. Moreover, counsel for A cross-examined every R witness about their not notifying A of other matters such as the MSO's so-called neutral position. No one had notified Mr Gillham of *any* policies of the MSO.

45. Further, in ***Rumble*** there was a factual finding (set out at [23] and [40]) that the dismissing officer, Mr Martinez, did not appear to care about the politics of the situation. The same could hardly be said of any of 1R's decision-makers.

46. Moreover and finally, the limits of 1R's s.361 case are drawn by their own pleadings.[47] They are set out at [48](c) of the FAD. Those reasons, particularly those set out at (iii) are all bound up in the fact A expressed a political belief on 11 August 2024.

47. In addition to the foregoing and for the avoidance of doubt, A presses the matters set out in his adverse inferences table provided to the Court and to Rs on 4 June 2026. Rs chose not to call Ms Jameson even though senior counsel had said that she would not be in New York during the trial. She was plainly a decision-maker in relation to the final public statement, at a crucial time when discussion was had as to whether (at least) it would include an apology to A. Similarly, Mr Luff had drafted versions of the final public statement which had included an apology to A before the same was removed, apparently by Mr Smith who would not say, in cross-examination, on whose authority if not his own. For these and the reasons set out in the adverse inferences table, A invites the Court to draw the inference that nothing Ms Jameson or Messrs Imber or Luff could have said would have assisted Rs' case. *Mutatis mutandis* in relation to the documents which should have been, but were not, discovered by 1R – perhaps most shockingly the alleged responses to complaints about A's cancellation. Without discovery, the Court cannot determine whether they were personalised responses or nothing more than "Thank you for taking the time to contact the MSO. We take all feedback seriously." A invites the Court to infer that, as they were not discovered, they were not sent.

Sheryn Omeri KC
Cloisters Chambers

Nilanka Goonetillake
Koiki Mabo Chambers

12 June 2026

[47] Despite a strange closing submission by senior counsel for Rs that cases should not be determined by reference to the pleadings, at T1298 L1. If that be correct, it is not clear why Rs bothered to file pleadings in the first place or to amend them on day 8 of the trial.