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| Document Lodged: | Submissions |
| Court of Filing | FEDERAL COURT OF AUSTRALIA (FCA) |
| Date of Lodgment: | 23/04/2026 9:53:59 AM AEST |
| Date Accepted for Filing: | 23/04/2026 9:54:01 AM AEST |
| File Number: | NSD507/2026 |
| 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 |



Sia Lagos

Registrar

Important Information

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NO. NSD507 of 2026

**FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: FAIR WORK**

JACQUELINE ELLEN HENDERSON and anor
Applicants

COMMONWEALTH BROADCASTING CORPORATION PTY LTD and anor
Respondents

APPLICANTS' SUBMISSIONS REGARDING CASE MANAGEMENT

A. INTRODUCTION

1. On 30 March 2026, the Applicants (the **Henderson Parties**) commenced proceedings by filing an Originating Application and a Statement of Claim (**Henderson Claim**) against the Respondents (Commonwealth Broadcasting Corporation Pty Ltd (**CBC**) and ARN Media Ltd (**ARN Media**)) seeking declarations, damages (including interest), penalties and costs (**Henderson Proceedings**).
2. In separate, albeit factually related, proceedings (NSD442 of 2026), Mr Kyle Sandilands and others (collectively, **Sandilands Parties**) commenced proceedings against CBC and Australian Radio Network Pty Ltd (**Sandilands Proceedings**).
3. On 21 April 2025, CBC and ARN Media filed a Defence in the Henderson Proceedings (**Henderson Defence**) and a Cross-Claim against the Henderson Parties (**Henderson Cross-Claim**).
4. Also on 21 April 2025, CBC and Australian Radio Network Pty Ltd filed a Defence in the Sandilands Proceedings (**Sandilands Defence**) and a Cross-Claim against the Sandilands Parties and, curiously, the Henderson Parties (**Sandilands Cross-Claim**). The only relief sought against the Henderson Parties in the Sandilands Cross-Claim is a declaration that CBC validly terminated the the contract between it and the Henderson Parties (**Henderson BSA**). The necessity and appropriateness of seeking that relief in the Sandilands Proceedings is not apparent and is unexplained in the affidavit of Nerida Jessup affirmed on 21 April 2026 (**Jessup Affidavit**).

5. On 2 April 2026, the parties in the Henderson Proceedings and the Sandilands Proceedings received correspondence from the chambers of Stewart J directing the parties to file short written submissions addressing the following two topics:
 - (a) whether the two proceedings should travel together, including whether they should be heard together; and
 - (b) what level of expedition or urgency there is in either proceeding, but particularly having regard to what the prospects are of an order for specific performance ultimately being made in the Sandilands Proceeding.
6. In accordance with the above direction, the Henderson Parties make the following submissions.

B. SUMMARY OF THE HENDERSON CLAIM

7. In order to address the relevant overlap between the Henderson Proceedings and the Sandilands Proceedings, which will naturally inform if and how the proceedings should travel together, it is important to summarise the claims made by the Henderson Parties, and the issues that will likely arise.
8. The Henderson Parties seek relief on the basis of three independent claims. That is to say, none of the claims are dependent on success in another. The claims are:
 - (a) A claim of a breach of the general protections provisions of the *Fair Work Act 2009* (Cth) (**FW Act**) by CBC. The claim, in summary, is that CBC terminated the Henderson BSA because Ms Jacqueline Henderson sent a Complaint Letter (as defined in the Henderson Claim), in which she exercised various workplace rights (for the purposes of the FW Act) (**General Protections Claim**);
 - (b) A claim for breach of contract by CBC by its repudiation of the Henderson BSA (**Contract Claim**); and
 - (c) A claim for breaches of s 18 of the Australian Consumer Law (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) (**ACL**) by ARN Media by reason of two representations (the Notice Representation and the Alternate Show

Representation, as defined in the Henderson Claim) contained in the media announcement made by ARN Media on 3 March 2026 (**ACL Claim**).

9. With respect to the General Protections Claim, the issues that will arise are broadly as follows:¹

- (a) Whether the issuance of the Complaint Letter amounted to an exercise of workplace rights for the purposes of s 341 of the FW Act: Henderson Defence, [41]-[43];
- (b) Whether, in terminating the Henderson BSA, CBC engaged in ‘adverse action’ for the purposes of s 342 of the FW Act: Henderson Defence, [47];
- (c) Whether the termination of the Henderson BSA was actuated by reasons that (at least) included one or more of exercises of workplace rights, noting that CBC will bear the onus to disprove that it was actuated by reasons that (at least) included one or more of exercises of workplace rights: see s 361 of the FW Act: Henderson Defence, [48]-[49]. Two decisions of the High Court reinforce that the test called for in rebutting the presumption under section 361 of the FW Act is whether the CBC can prove that it did not take the action for the proscribed reason: *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 314 ALR 1 at [6]; and *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 at [43]-[45]. That presumption may be displaced by direct testimony from the decision maker as to the actual reasons for the action: *Barclay* at [43]-[45]; *BHP* at [85]. The enquiry is confined to the reason or reasons of the person or persons who made the decision in question, and also any other person(s) whose involvement “had ‘a material effect on the ultimate outcome’ or made an ‘indispensable contribution’ to the outcome”: *Laing O’Rourke Australia Management Services Pty Ltd v Haley* [2024] FCA 1323 [296]. See also *Serpanos v Commonwealth* [2022] FCA 1226 at [123]; and
- (d) If contravention is established:
 - (i) what compensation is appropriate: see s 545 of the FW Act; and

¹ Having regard to the Henderson Defence.

- (ii) what penalty ought be imposed.
- 10. It is common for the penalty aspect of a general protections claim to be bifurcated from the liability aspect of the claim. It is also possible (albeit less common) for damages to be bifurcated and determined at the penalties stage.
- 11. With respect to the Contract Claim, the issues that will arise are broadly:
 - (a) Whether the Henderson Parties, in issuing the Complaint Letter, repudiated the Henderson BSA, which will likely involve arguments as to the proper construction of the Henderson BSA and the objective intention of the Complaint Letter: Henderson Defence, [56]-[58];
 - (b) If the answer to (a) is ‘no’, whether the termination of the Henderson BSA by CBC amounted to repudiation: Henderson Defence, [59(c)(ii)]; and
 - (c) If breach is established, the damages that flow from CBC’s breach.
- 12. With respect to the ACL Claim, the issues that will likely arise are:
 - (a) Whether ARN Media’s media announcement on 3 March 2026 containing the:
 - (i) the Notice Representation; and/ or
 - (ii) the Alternate Show Representation,conveyed the representations alleged: Henderson Defence, [68] and [71];
 - (b) If the answer to (a) is ‘yes’, whether:
 - (i) the Notice Representation; and/ or
 - (ii) the Alternate Show Representation,were misleading or deceptive, or were likely to mislead or deceive: Henderson Defence, [69] and [72]; and
 - (c) If the answer to (b) is ‘yes’, the damages that flow from ARN Media’s contravention(s): Henderson Defence, [74].

13. The Henderson Cross-Claim relies entirely on the factual assertion that the Complaint Letter amounted to a repudiation of the Henderson BSA (an existing issue in the Henderson Proceedings), and the application of the indemnity clause in the Henderson BSA.
14. The Henderson Parties anticipate calling three lay witnesses (on the question of liability) and up to two expert witnesses (on the question of damages).

C. WHETHER THE PROCEEDINGS SHOULD TRAVEL TOGETHER

15. There are a number of ways that the Henderson Proceedings and the Sandilands Proceedings may ‘travel together’, being:
 - (a) The proceedings are formally joined pursuant to rule 9.02 of the *Federal Court Rules 2011* (Cth);
 - (b) The proceedings are heard concurrently (traditionally, with evidence in one being evidence in the other);²
 - (c) The proceedings are heard consecutively; and
 - (d) The proceedings are subject to case management together, but heard at different times.
16. Although there is, as the email from his Honour’s chambers notes, obvious overlap in the circumstances giving rise to the claims in both proceedings, the actual overlap between the proceedings appears to be:
 - (a) The commonality in proceedings being brought against CBC (noting that the second respondent in the two proceedings is different);
 - (b) Both the Henderson Parties and the Sandilands Parties allege breaches of their respective contracts, although the contracts themselves appear to be different,³ and the conduct which is said to amount to a breach is different;
 - (c) The fact (and one would expect, circumstances) of the termination of the Henderson BSA is a matter that underpins the Sandilands Parties’ claim under

² *GetSwift Ltd v Webb* (2021) 283 FCR 328 at [57].

³ Noting that the Henderson Parties do not have a copy of the relevant contracts in the Sandilands Proceedings.

the ACL (i.e. unconscionable conduct in contravention of s 21(1) of the ACL); and

- (d) The curious, and unexplained, relief sought against the Henderson Parties in the Sandilands Cross-Claim.

17. Although the Jessup Affidavit asserts “some” overlap in witnesses (see [34]), the overlap in any *evidence* such witnesses will give in each of the proceedings is not apparent from the pleadings. This is in circumstances where:

- (a) The factual allegations in the Henderson Claim are largely admitted: see Henderson Defence, [17]-[37];
- (b) As set out above, the issues that arise in the Henderson Proceedings are largely in the nature of questions of law or mixed fact and law (where the facts are largely admitted), issues that relate to the General Protections Claim, and the discharge of the associated reverse onus (unique to the Henderson Claim), and issues as they relate to damages;
- (c) It is not in dispute (as between the parties in the Henderson Proceedings) that:
 - (i) Mr Sandilands repeatedly bullied Ms Henderson in the workplace: Sandilands Defence, [16D];
 - (ii) Mr Sandilands made comments to Ms Henderson that were offensive and degrading: Sandilands Defence, [16F];
 - (iii) Ms Henderson repeatedly complained about Mr Sandilands’ conduct: Sandilands Defence, [16J], [16K], [16O], [16P]; and
 - (iv) Mr Sandilands engaged in a persistent course of workplace bullying and harassment of Ms Henderson, of which she had complained: Sandilands Defence, [16Z(d)],
- (d) The position of CBC in the Henderson Proceedings is, essentially, that once any broadcast began, CBC had no ability or power to contemporaneously prevent Mr Sandilands from engaging in bullying of Ms Henderson: Henderson Defence, [28(b)(ii)].

18. Given the limited nature of the factual and legal overlap, it does not appear that it would be suitable for the proceedings to be formally joined pursuant to rule 9.02.
19. As to the proceedings being heard concurrently or consecutively, the Henderson Parties have no objection to both matters being heard by Stewart J, and the matters being heard **consecutively**. Indeed, natural efficiencies arise from the same judge hearing two matters which clearly have overlap in the circumstances giving rise to the claims, and in (at least some of) the factual underpinnings of the claims. The overlap will likely lead to an overlap in (perhaps some) of the evidence and the discovery that will be sought in due course.
20. The difficulties that arise in the matters being heard **concurrently** (if evidence in one is to be evidence in the other) include:
 - (a) The limited factual overlap between the proceedings – even if some of the witnesses are common;
 - (b) The risk of the claims made by the Henderson Parties and the claims made by the Sandilands Parties, and the separate factual issues, being conflated;
 - (c) The need for the Henderson Parties to attend the whole of the proceedings in circumstances of (a) above, and in light of the Henderson Proceedings being subject to the costs mechanism contained in s 570 of the FW Act: see *Melbourne Stadiums Ltd v Sautner* (2015) 317 ALR 665 at [156]-[157]; and
 - (d) The need for Ms Henderson to attend the whole of the hearing (which Ms Jessup estimates will span some weeks) in the physical presence of Mr Sandilands – the very person who the parties (in the Henderson Proceedings) agree engaged in a persistent course of workplace bullying and harassment of Ms Henderson and which Ms Henderson has alleged exposed her to psychosocial risk and harm.
21. Although ultimately a matter for the Court, the Henderson Parties see the benefit in, and do not oppose, **consecutive** hearings of the Henderson Proceedings and the Sandilands Proceedings.
22. Appreciating that the extent of the factual overlap will not be apparent to the Court until the parties have filed their evidence, if the Court is not minded to determine the

issue at this stage of the proceedings, the matters should be case managed together and the issue of concurrent or consecutive hearings ought be revisited after the evidence has been filed. With that approach, there would be no difficulty with the Court setting down the dates for the hearing now.

23. If the proceedings are not to be heard concurrently or consecutively, it may give rise to difficulties in both proceedings remaining in the docket of Stewart J. If the matters did not both remain in the docket of Stewart J, there does not appear to be any good reason as to why the proceedings would be case managed together.

D. LEVEL OF EXPEDITION AND URGENCY

24. The Henderson Parties have not sought, and do not anticipate (presently) seeking formal expedition of the Henderson Proceedings.

25. However, the Henderson Parties are eager to have the matter heard as expeditiously as possible. The immediate termination of the Henderson BSA has had immediate and severe financial consequences for the Henderson Parties, and the ongoing doubt over the assertions of repudiation (by both sides) give rise to uncertainty as to the post-employment restraints contained in the Henderson BSA (see *Crowe Horwath (Aust) Pty Ltd v Loone* (2017) 54 VR 517 at [271]). The uncertainty as to the enforceability of the post-employment restraints will undoubtedly impact Ms Henderson's ability to find alternative work.

26. If the Court is minded to hear the Henderson Proceedings consecutively before or after the Sandilands Proceedings, the Henderson Parties will ensure that the Henderson Proceedings will be ready to be heard on an expedited basis (assuming the Sandilands Proceedings are to be heard on the dates currently provisionally reserved).

E. TIMETABLING

27. The Henderson Parties propose the orders **attached** to these submissions.
28. The orders proceed on the basis that the Henderson Proceedings will be heard in or around late June or early July 2026.
29. If the Court is not in a position to hear the matter until later in the year, the dates currently in the order can and ought be adjusted accordingly.

Vanja Bulut

12 Wentworth Selborne Chambers

Counsel for the Applicants

23 April 2026