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FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: Victoria
DIVISION: Fair Work

No. VID 1036 of 2024

JAYSON LLOYD GILLHAM
Applicant

MELBOURNE SYMPHONY ORCHESTRA PTY LTD
ABN 47 078 925 658 and another
Respondents

**RESPONDENTS' SUBMISSIONS IN RESPONSE TO
THE APPLICANT'S WRITTEN CLOSING SUBMISSIONS
FILED ON 12 JUNE 2026**

Filed on behalf of the Respondents
Prepared by Justin L Bourke KC, Christopher McDermott and Monique Hardinge of counsel
Name of law firm Arnold Bloch Leibler
Address for service in Australia Level 21, 333 Collins Street
Melbourne State Victoria Postcode 3000
Email lzwier@abl.com.au; rsch@abl.com.au
Tel (03) 9229 9962 Fax Attention

A OVERVIEW

1 The MSO / Mr Ross only respond to the following submissions made by the Applicant in his Closing Written Submissions (ACWS) dated 12 June 2026. Where the MSO / Mr Ross do not expressly respond to a submission, they are not to be taken as agreeing with the same.

A.1 *Lattouf (No 2)* and *Charter of Human Rights and Responsibilities Act 2006* (Vic)

2 **Response to ACWS [4]-[5].** There is no evidence that any of the MSO’s stakeholders sought to influence the conduct of those persons alleged to have been involved in the alleged adverse actions, with the concomitant effect of the MSO having “[allowed] *its private donors to operate as de facto determinants of acceptable expression*”. Consideration of such potential adverse impact on audiences / commercial partnerships is also not anathema to anti-discrimination principles / law.¹ *Lattouf (No 2)* does not stand for such a bald proposition.² Nor does s 15(1) or s 15(2) of the *Charter*;³ such rights are not unlimited in scope and are capable of being informed by other (competing) public / private interests.⁴ The Applicant’s highlighting of “*Jewish donors*” (including in footnote #3) engages in base conflation of Jewish identity with the actions of the State of Israel, as well as the classic antisemitic trope of (amorphous) “Jewish” control / influence over institutions like the MSO (see also Gillham oral closing at T1236.10-.23).⁵ The Applicant otherwise cannot (as he does in footnote #5) rely after closing of evidence on the content of a media article (which is inadmissible hearsay) to justify abject conjecture as to the corporate mind of a major commercial partner (Emirates). Finally, the Applicant’s submissions as to Maestro Volkov (in footnote #6) are otherwise entirely without merit.

A.2 *Tattsbet Ltd v Morrow*

3 **Response to ACWS [6]-[13].** The MSO / Mr Ross rely on their closing submissions at **T1164:18 – T1168:8** as to why the core reasoning in *Tattsbet Ltd v Morrow* is dispositive *ratio*, not *obiter*. If that be correct, this Court is bound to follow a decision of the Full Federal Court (exercising appellate jurisdiction) because it is “*a case decided by a court above [this Court] in the hierarchy*”.⁶ The Full

¹ Compare *Rumble* at [50] (Rares & Katzmann JJ); *Western Sydney University v Thiab* at [142] (Bell CJ, Meagher & Leeming JJA), *Quirk v Construction, Forestry, Maritime, Mining and Energy Union* [2021] FCA 1587 at [279] (Perram J).

² *Lattouf (No 2)* at [337]-[349] (Rangiah J).

³ The MSO otherwise does not accept that it is “*public authority*” within the meaning of s 4(1) of the *Charter*.

⁴ See, *Magee v Delaney* (2010) 39 VR 50 at [86]-[99] (Kyrou J); See, further, in the context of s 38 (Conduct of public authorities), *Browne v Assistant Commissioner of Police, North West Metro Region* (2026) 315 FCR 110 at [126] (Bennett J, citing *Castles v Secretary Department of Justice* (2010) 28 VR 141 at [185] (Emerton J)).

⁵ The conflation of the Holocaust with the Middle East conflict is another antisemitic trope that everything Jewish is connected to the Middle East conflict (see Myer XXN T923.37 – 924.10).

⁶ *Viro v The Queen* (1978) 141 CLR 88 at 120 (Gibbs J) and see, too, at 93 (Barwick CJ), 150-152 (Jacobs J) and 173-174 (Aickin J); *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 189 (McHugh JA); *Fieldhouse v Commissioner of Taxation* (1989) 25 FCR 187 at 223-224 (Hill J); *Businessworld Computers Pty Limited v Australian Telecommunications Commission* (1988) 82 ALR 499 at 504 (Gummow J); *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* (2021) 287 FCR 181 at [31] (Allsop CJ).

Federal Court has “*laid down [the] principle as part of the relevant law*”.⁷ This Court cannot substitute its own view of the law based on its perception of the (de-)merits of the reasoning.⁸ The MSO / Mr Ross otherwise deal with *Auimatagi v ABCC*, *v Bayford v Maxxia Pty Ltd*, and *Regulski* in their earlier Submissions.⁹

A.3 *CFMMEU v BM Alliance*

- 4 **Response to ACWS [17].** The Applicant relies upon *CFMMEU v BM Alliance Coal Operations Pty Ltd* [2023] FCA 30, which concerned whether Standard Operating Procedures (SOPs) constituted “*workplace instruments*” made under a “*workplace law*” for the purposes of s 12 of the FW Act. The Court’s conclusion (at [114]- [134]) that the SOPs were “*workplace instruments*” says nothing about any of the disputed issues in this case. *Tattsbet Ltd v Morrow* was not raised. Unlike here, the allegation was that adverse action had been taken by BM Alliance against an employee of one of its independent contractors (WorkPac) on a mining site BM Alliance operated (see Declaration, and at [139]-[146]). The Court found that the SOPs “*prescribed the way employees perform duties for the employer, and directions the employer may give to the employee regarding the performance of those duties*” (at [133]). This may refer to BM Alliance’s employees generally. It is also unclear from the Court’s findings if the employee’s contractual obligations with WorkPac required him to comply with such SOPs imposed by BM Alliance.

A.4 FW Act s 341(1)(c)(ii)

- 5 **Response to ACWS [19].** The Applicant submits that s 341(1)(b) and s 341(1)(c)(i) of the FW Act might be rendered otiose if a broad construction is taken to s 341(1)(c)(ii). Establishing the factum underpinning one limb of s 341(1)(a)-(c) does not render the other two limbs otiose; these limbs are alternatives (“*or*”).¹⁰

A.5 Construction of s 8 of the EO Act

- 6 **Response to ACWS [22]-[26].** The construction of s 8(1) of the EO Act has been authoritatively decided by the Victorian Court of Appeal in *Austin Health v Tsikos* (2023) 324 IR 1 (at [77]-[91]). There is “*no barrier to using a comparator to assist to establish the existence of unfavourable treatment, as well as to establish the reason for the unfavourable treatment*” (at [86]). The ultimate question for determination by this Court as to the reasons why adverse action was taken permits it to receive probative evidence

⁷ *Favelle Mort Ltd v Murray* (1976) 133 CLR 1 580 at 591 (Barwick CJ).

⁸ *Favelle Mort Ltd v Murray* (1976) 133 CLR 1 580 at 591 (Barwick CJ).

⁹ Reply Submissions of the MSO / Mr Ross filed 11 March 2025 at [18(a)-(b) & (d)]: CB Tab 73 pp 1136-1137.

¹⁰ As to the example of “*Freddy going to the ACCC*”, it is the ACCC’s lack of capacity under a “*workplace law*” (for example, the FW Act) to do anything to assist Freddy which means he cannot rely on s 341(1)(c)(i). Nonetheless, Freddy can rely on s 341(1)(c)(ii) as a general protection from adverse action by his employer, even though he is mistaken as to the ACCC’s capacity. If the EO Act is not a “*workplace law*”, an employee nevertheless “*is able to make*” a “*complaint or inquiry*” “*in relation to their employment*” to Victorian Equal Opportunity & Human Rights Commission (see *Alam v NAB* at [67], citing *Murrihy v Betezy.com.au Pty Ltd* (2013) 238 IR 307 at [141]-[143] (Jessup J)).

from a decision-maker as to a comparison between alleged differential treatment against an employee based on a protected attribute compared to a counterfactual involving another without that attribute.¹¹

A.6 Requirement of an extant contract

7 **Response to ACWS [27]-[28].** The Applicant's reliance on *Australian Meat Industries Employees' Union v Belandra Pty Ltd* (2003) 126 IR 165 is misconceived in circumstances where the Applicant cannot demonstrate any comparable disappointment of an expectation arising from an action "raised" (at [76]) by the MSO, when he expressly agreed in the SSA / Gillham Agreement to the possibility of termination for convenience under cl 17.3 of that contract.¹²

A.7 Custom and practice / mistake of law / leave to amend reply / inherent requirements

8 **Response to ACWS [30]-[41].** The MSO / Mr Ross do not object to leave being granted to the Applicant to amend his reply as is proposed.¹³ As to the substance of the Applicant's argument, the Court is concerned with what actuated the alleged contravener, and whether that actuation was "because of" a protected workplace right under Part 3-1 of the FW Act. The search is for the subjective intent of the decision-maker.¹⁴ There is no binding authority that an alleged contravener is to be imputed as having been actuated by "reason of a presumption that they knew the law" (that is, that the Applicant had a workplace right, a point that is misconceived).¹⁵ The Applicant's argument is contingent upon the Court not accepting the Threshold Objection, the very existence of the alleged (and contested) workplace right.

9 Finally, the relevance of a custom or practice only goes to the question of actuation, not the terms of the contract. That is, did the MSO think there was a custom and practice.¹⁶

22 June 2026

Justin Bourke KC
Christopher McDermott
Monique Hardinge

¹¹ *Barclay* at [63] (French CJ & Crennan J); *Klein* at [100] (Gordon J); *Sayed* at [215] (Mortimer J); *cf RailPro v Flavel* at [112] (Perry J). Note, *State of New South Wales Sydney Trains v Annovazzi* (2024) 425 ALR 272 at [107]-[116] (Bromwich, Raper & Shariff JJ).

¹² Compare, *Avard v Australian Capital Territory* [2024] FCA 690 at [154] (Kennett J).

¹³ The MSO/Mr Ross do not, however, accept the accuracy of any allegation by the Applicant as to (latent) amendment to Joint Amended Defence. The allegation of the Public Comment Custom and Practice being an incorporated (and not implied) term of the SSA / Gillham Agreement was made clear from 25 July 2025 at [9(e)].

¹⁴ *Barclay* at [44] (French CJ & Crennan J); at [146] (Heydon J); and see the survey of authorities in *Rumble* at [32]-[39] (Rares & Katzmann JJ).

¹⁵ *Qube Ports Pty Ltd v McMaster* (2016) 248 FCR 414 at [41] (Jessup J). See, too, *Retail and Fast Food Workers Union Incorporated v Tantex Holdings Pty Ltd* (2020) 299 IR 56 at [32] (Logan J).

¹⁶ If custom and practice is relevant as to whether it is incorporated into the contract, the implication into a contract is ultimately a question of fact: *Con-stan Industries of Australia Pty. Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1985) 160 CLR 226 at 236 (Gibbs CJ, Mason, Wilson, Brennan & Dawson JJ). It is unnecessary for any such custom or practice to be "universally accepted, for such a requirement would always be defeated by the denial by one litigant of the very matter that the other party seeks to prove in the proceedings": *Con-stan* at 237 (Gibbs CJ, Mason, Wilson, Brennan & Dawson JJ). It is also not necessary for the Applicant to have had knowledge of the custom or practice to be bound by it, either: *Con-stan* at 237 (Gibbs CJ, Mason, Wilson, Brennan & Dawson JJ).