

NOTICE OF FILING

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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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Amended Reply

No. VID1036 of 2024

Federal Court of Australia

District Registry: Victoria

Division: Fair Work

Jayson Lloyd Gillham

Applicant

Melbourne Symphony Orchestra Pty Ltd ABN 47 078 925 658 and Another named in the

Schedule

Respondents

To the Further Amended Defence of the Respondents, dated ~~16 July 2025~~ 28 May 2026

(**Further Amended Defence**), the Applicant (**Mr Gillham**) replies as follows:

1. As to paragraph 6, Mr Gillham:
 - (a) admits that the Contract was signed by Ms Armstrong acting as Mr Gillham's agent;
 - (b) says that as to the Respondents' pleading that Ms Armstrong was Mr Gillham's agent and authorised signatory "more generally," the same is a fresh averment never previously pressed. It is embarrassing and susceptible to strike-out pursuant to FCR 16.21(1)(c) (evasive or ambiguous) or (d) (likely to cause prejudice, embarrassment or delay). Mr Gillham does not know what is meant by the Respondents' averment that Ms Armstrong was his agent and authorised signatory "more generally" and accordingly does not admit the same. Mr Gillham denies that Ms Armstrong was his agent for all purposes; and
 - (c) objects to the use of particulars to subparagraph 6(b)(ii) instead of the proper articulation of material facts. Without prejudice to such objection, Mr Gillham says that the particular at subparagraph 6(b)(ii)C, that by his conduct he at all times held Ms Armstrong out as his agent is embarrassing and susceptible to strike-out pursuant to FCR 16.21(1)(c) (evasive or ambiguous) or (d) (likely to cause prejudice, embarrassment or delay). Without prejudice to the same, Mr Gillham denies that he held Ms Armstrong out as, or that she was, his agent "at all times" in the sense of "for all purposes."

Filed on behalf of (name & role of party) Jayson Lloyd Gillham (Applicant)

Prepared by (name of person/lawyer) Michael Bradley

Law firm (if applicable) Marque Lawyers

Tel +61 2 8216 3000

Fax _____

Email michaelb@marquelawyers.com.au; laureng@marquelawyers.com.au;

lailab@marquelawyers.com.au

Address for service Level 4, 343 George St, SYDNEY NSW 2000

(include state and postcode)

2. As to paragraph 7, Mr Gillham:
 - (a) denies that the Recital only involved Mr Gillham performing Beethoven's Sonata No.21 in C Major ("*Waldstein*"), Ligeti's Etudes for Piano (Book 1), Faure's Nocturne no. 6 D flat major op. 63 and Chopin's Etudes op.10;
 - (b) denies that he was only required to attend a general rehearsal for the Concert on the morning of the Concert; and
 - (c) denies that the Concert only involved him performing Mozart's Piano Concerto No. 12 in A major.
3. As to paragraph 8, Mr Gillham says that, so far as the Contract was concerned, the obligations with which he was required to comply were those set out in the Contract itself, and any agreed variations to the same (see paragraph 5 below), and not with the Respondents' gloss thereon in the form of their pleaded "Core Contractual Obligations."
4. As to paragraph 9, Mr Gillham:
 - (a) says that as he was not notified of the MSO Code of Conduct, he does not know and therefore does not admit the content of subparagraph 9(b) or any of the content of the MSO Code of Conduct. Mr Gillham also denies that he was bound by the MSO Code of Conduct since the Contract, at clause 2.1(d), expressly required him to comply only with policies and procedures of the MSO of which he had been notified;
 - (b) says that the alleged 'expectation' on the part of the MSO that he comply with its Code of Conduct was never conveyed to him. Moreover, if such 'expectation' was truly held by the MSO, in circumstances where the MSO did not notify Mr Gillham of its Code of Conduct, such 'expectation' was contrary to the express term of the Contract at clause 2.1(d);
 - (c) denies that the MSO's Code of Conduct as to matters of "Public Comment" reflected a custom and practice within the classical music industry either in Australia or internationally and alternatively says, that even if it did, the Contract, at its clause 2.1(d), expressly only required him to comply with policies and procedures of the MSO of which he had been notified;
 - (d) says that the Respondents' averment that the "Public Comment Custom and Practice" constituted a term that was incorporated as a term into the Contract can only be an averment that the "Public Comment Custom and Practice" was a term that was implied in the Contract. Mr Gillham denies that such a term was implied, or in any other way "incorporated" into the Contract. Mr Gillham further says that such an averment is contrary to law since a term cannot be implied into a contract where it contradicts or undermines an express term. The pleaded "Public Comment Custom and Practice" term contradicts clause 2.1(d) of the Contract and the "Entire Agreement" term of the Contract at clause 22.1. Mr Gillham further says that this averment is so obviously bad in law as not to be maintainable. Its pleading amounts to an "unreasonable act" on the part of the Respondents pursuant to s.570(2)(b) of the *Fair Work Act 2009 (Cth)* (**FWA**);
 - (e) denies that it was necessary for him to comply with the pleaded "Public Comment Custom and Practice" term in order to comply with the Contract;

- (f) denies that compliance with the pleaded “Public Comment Custom and Practice” term reflected any standard or well accepted convention of professional behaviour of a concert musician within the classical music industry;
 - (g) denies that “the Convention” constituted a term that was incorporated as a term into the Contract;
 - (h) denies that it was necessary for him to comply with “the Convention” in order to comply with the Contract;
 - (i) says that the Respondents’ averment that the “Public Comment Custom and Practice” and/or “the Convention” constituted inherent requirements of any relationship between an artist and a host of a classical music event is embarrassing and susceptible to strike-out pursuant to FCR 16.21(1)(c) (evasive or ambiguous) or (d) (likely to cause prejudice, embarrassment or delay). Mr Gillham does not know what is meant by “inherent requirements.” Without prejudice to the foregoing, Mr Gillham denies that the “Public Comment Custom and Practice” term and/or “the Convention” constituted such allegedly inherent requirements of his independent contractor relationship with the MSO; and further says that the “Public Comment Custom and Practice,” “the Convention” and “the inherent requirements” if they existed, were unlawful as they amounted to restraints on the right to express a lawful political belief or engage in lawful political activity which are not set out in the EOA or otherwise provided for by law;
 - (j) denies that any non-compliance with the pleaded “Inherent Requirements” by him would or did constitute a fundamental breach or repudiation of the contractual relationship with SSA and/or the MSO. Mr Gillham says that for the “Inherent requirements” to ‘inhere’ in the Contract would contradict or undermine two express terms of the Contract, at clause 2.1(d) and clause 22.1. Accordingly, they cannot inhere in the contract. Mr Gillham further says that such an averment by the Respondents is so obviously bad in law as not to be maintainable. Its pleading amounts to an “unreasonable act” on the part of the Respondents pursuant to s.570(2)(b) of the FWA; and
 - (k) in any event, without prejudice to the foregoing, Mr Gillham’s right to freedom of expression, protected in international law, cannot be subject to a requirement to seek “authorisation” or to the absolute discretion of the MSO, lest this very important democratic right be rendered illusory.
5. As to paragraph 10, Mr Gillham says that on the basis (only) that the Respondents now admit, at paragraph 6A of the Further Amended Defence, that the MSO could sue and be sued by Mr Gillham under a direct contractual relationship made under the law of agency, Mr Gillham no longer presses his averment as to the existence of an implied contract between himself and the MSO set out at paragraph 10 of the FASOC. So far as may be necessary, Mr Gillham will rely on the matters he has pleaded as “central terms” of such implied contract, as agreed variations to the Contract.
 6. As to paragraph 10C Mr Gillham says that at the hearing of Gillham v Melbourne Symphony Orchestra Pty Ltd [2025] FCA 458 on 17 March 2025, the Respondents accepted that the orchestral environment, both in terms of rehearsals and performances, is a workplace (Gillham v Melbourne Symphony Orchestra Pty Ltd [2025] FCA 458 [8 May 2025] at [29]).
 7. As to paragraph 14, Mr Gillham:
 - (a) says that the Respondents’ allegation at subparagraph 14(d) is a fresh averment, never previously pressed. It is embarrassing and susceptible to strike-out pursuant to FCR

16.21(1)(a) (contains scandalous material), (c) (evasive or ambiguous) or (d) (likely to cause prejudice, embarrassment or delay). Without prejudice to the foregoing, Mr Gillham denies that he, or Ms Armstrong, in any way misled the MSO as to the Introduction or in any other way. Further, Mr Gillham contends that the making of such a scandalous allegation some 8 months after the Respondents filed their original Defence and in such vague terms demonstrates that it is made in bad faith and for the collateral purpose of damaging Mr Gillham's reputation. Its making amounts to an "unreasonable act" pursuant to s.570(2)(b) of the FWA;

- (b) denies that he was required to comply with the pleaded "Core Contractual Obligations";
- (c) refers to and relies upon subparagraphs 4(i) and (j) above;
- (d) denies that the Introduction in isolation or taken together with anything else he did or said constituted a breach or repudiation of the Contract. The same was never conveyed to him or to Ms Armstrong at the point at which the MSO terminated the Contract or at all until the filing of the Amended Defence on 16 July 2025; and
- (e) without prejudice to the foregoing, denies that the Introduction constituted a breach of anything. Mr Gillham notes that the entirety of paragraph 14(e) is a fresh averment never previously pressed. The lateness of its making and the vagueness of its foundations ("the Inherent Requirements"; the "Deliberate Misleading of the MSO") demonstrate that it is made in bad faith and for the collateral purpose of damaging Mr Gillham's reputation. Its pleading is an "unreasonable act" pursuant to s.570(2)(b) of the FWA.

8. As to paragraph 16, Mr Gillham:

- (a) notes the Respondents' absence of response in subparagraph 16(c)(i); and
- (b) says that as to subparagraphs (1) – (4) of paragraph 16(c)(i), the matters to which they refer are included in the FASOC as particulars demonstrating the genuineness of Mr Gillham's comments comprising the Introduction. Mr Gillham admits and agrees, insofar as the Respondents' aver it, that in order to amount to "political belief or activity" a person's expressed belief need not be true or factually accurate.

9. As to paragraph 19, Mr Gillham says that the averment at paragraph 19(c) is embarrassing and susceptible to strike-out pursuant to FCR 16.21(1)(a) (contains scandalous material), (c) (evasive or ambiguous) or (d) (likely to cause prejudice, embarrassment or delay). It is an entirely fresh averment and is irrelevant to any defence pleaded in the Amended Defence and Further Amended Defence. It is included in the Amended Defence and the Further Amended Defence for the collateral purpose of further damaging Mr Gillham's reputation. Its lateness, vagueness and irrelevance cause its making to be an "unreasonable act" pursuant to s.570(2)(b) of the FWA.

10. As to paragraph 21, Mr Gillham:

- (a) repeats and relies upon paragraph 21 of the FASOC; and
- (b) denies that Ms Armstrong's view, which is correctly described at subparagraph 21(a)(ii) as "her view," amounted to an "Acknowledgment of Wrongdoing" by Mr Gillham or an admission of any kind by Mr Gillham. Without prejudice to the foregoing, Mr Gillham denies that he committed any "wrongdoing" or that there was anything for him to "admit." As to the "Deliberate Misleading of the MSO," the "Core Contractual Obligations" and the "Inherent Requirements" Mr Gillham refers to and relies upon paragraphs 4 and 7 above. Mr Gillham

further notes that the “Acknowledgment of Wrongdoing” and paragraph 21(b) are entirely fresh averments, not pressed (nor in substance alleged at the material time) until some 8 months after the Respondents filed their original Defence. Their lateness, and the vagueness of their foundations (“Deliberate Misleading of the MSO”; “Inherent Requirements”) demonstrate that they are raised in bad faith and for the collateral purpose of damaging Mr Gillham’s reputation. Their making amounts to an “unreasonable act” pursuant to s.570(2)(b) of the FWA.

11. As to paragraph 22, Mr Gillham says that the Respondents were under a legal obligation not to take adverse action against him and not to damage his reputation.
12. As to paragraph 24, Mr Gillham says that:
 - (a) the MSO was not permitted to terminate the Contract if the same would amount to a breach of the FWA as Mr Gillham alleges it did;
 - (b) SSA did not assign its rights and obligations under the Contract to the MSO. No such assignment is pleaded in the Amended Defence or the Further Amended Defence;
 - (c) denies, for the reasons at paragraph 7 above, that by reason of the matters at paragraph 14 of the Amended Defence, the MSO had a right to terminate the Contract. Moreover, Mr Gillham says that no such matters, as set out at paragraph 14 of the Amended Defence and the Further Amended Defence were ever raised with him, including through Ms Armstrong, nor was it ever suggested (prior to the filing of the Amended Defence) that they gave the MSO a right to terminate the Contract or that the MSO exercised such right. Mr Gillham repeats that the Respondents’ averments at paragraph 14(d) and (e) of the Amended Defence and the Further Amended Defence are raised, so late, in bad faith and for the collateral purpose of damaging Mr Gillham’s reputation. They are an “unreasonable act” pursuant to s.570(2)(b) of the FWA;
13. As to paragraph 26, Mr Gillham notes the Respondents’ withdrawal of their objection to the adducing of evidence of the relevant communications.
14. As to paragraph 27, Mr Gillham:
 - (a) denies the allegations in paragraph 27(d) of the Amended Defence and the Further Amended Defence; and
 - (b) relies on the matters set out about the “Inherent Requirements” pleading at subparagraphs 4(i) and (j) above and the “Deliberate Misleading of the MSO” pleading at 7 above. Mr Gillham says that neither the alleged “Inherent Requirements” nor the alleged “Deliberate Misleading of the MSO” were raised with Mr Davies and further, that it is not credible that the Respondents would seek to “reinstate” Mr Gillham if they genuinely believed that he had deliberately misled the MSO. If the latter were the case, no “second condition” would prevent Mr Gillham from doing so in respect of the Concert. Accordingly, the matters set out at subparagraph 27(d) are plainly raised in bad faith and for the collateral purpose of damaging Mr Gillham’s reputation. Their pleading by the Respondents is an “unreasonable act” pursuant to s.570(2)(b) of the FWA.
15. As to paragraph 39D, Mr Gillham:
 - (a) refers to and relies upon the matters set out at paragraphs 3 and 4, and subparagraphs 7(b) - (e) and 12(c) above. Mr Gillham denies that there was anything ‘unlawful’ about the

Introduction or his uttering of it such as to cause it to fall outside of the definition of “political belief or activity” in s.4(1) of the *Equal Opportunity Act 2010* (VIC) (EOA). Even if (which is denied) the Introduction breached the Contract, the same would not alter its status as a lawful political belief or lawful political activity. For the Respondents to aver otherwise, amounts to an averment that they are able to contract out of the EOA which so bad in law that its pleading is an “unreasonable act” pursuant to s.570(2)(b) of the FWA; and

- (b) in relation to subparagraph (b)(iii), says that the pleaded “Proportionality Requirement” is embarrassing and susceptible to strike-out pursuant to FCR 16.21(1)(c) (evasive or ambiguous) or (d) (likely to cause prejudice, embarrassment or delay). Without prejudice to the foregoing, Mr Gillham denies that there is such a requirement in the EOA.
16. As to paragraph 40, Mr Gillham says that the assertion that the EOA “only has a limited operation for the purposes of ss.351(1), 351(2)(a) and 351(3)(b) of the FW Act” is embarrassing and susceptible to strike-out pursuant to FCR 16.21(1)(c) (evasive or ambiguous) or (d) (likely to cause prejudice, embarrassment or delay).
17. As to paragraph 42, Mr Gillham:
- (a) denies paragraph 42(b); and
 - (b) says that subparagraphs 42(c) and 42(d) are embarrassing and susceptible to strike-out pursuant to FCR 16.21(1) (c) (evasive or ambiguous) or (d) (likely to cause prejudice, embarrassment or delay). Without prejudice to the foregoing, in respect of subparagraph 42(c), Mr Gillham denies that there was anything unreasonable or disproportionate about the Introduction. In respect of subparagraph 42(d), Mr Gillham further refers to and relies upon the matters set out at paragraphs 4 and 7 above.
18. As to paragraph 43, Mr Gillham:
- (a) denies that each of the acts of sending the Cancellation Message, imposing or seeking to impose the Second Condition, and publishing the Final Public Statement do not constitute an instance of adverse action within the meaning of s.342(1) of the FWA; and
 - (b) says that if the Contract had been validly terminated at the point at which each of the sending of the Cancellation Message, imposing or seeking to impose the Second Condition and the publishing of the Final Public Statement occurred, the MSO was, accordingly at that time, a person (the principal) proposing to enter into a contract of services with Mr Gillham as an independent contractor, within row 4 of s.342(1) of the FWA. In sending the Cancellation Message, the MSO was refusing to (re-)engage Mr Gillham to perform at the Concert. In imposing or seeking to impose the Second Condition and publishing the Final Public Statement, the Respondents discriminated against Mr Gillham in the terms and conditions on which the MSO was offering to engage him in the future.
- 18A. As to paragraph 48(c)(iii), Mr Gillham:
- (a) refers to and relies on paragraph 4(i) above:
 - (b) says that insofar as the Respondents suggest that they believed each of the “Public Comment Custom and Practice” (including or extending to the “Convention”) and “Inherent Requirements” existed, they made a mistake of law since the “Public Comment Custom and Practice”/“Convention” and “Inherent Requirements” seek to impose a restraint on the

expression of a lawful political belief or engagement in lawful political activity which is not set out in the EOA or otherwise provided for by law and is therefore unlawful;

- (c) accordingly denies that the Respondents are able to rely on them in any way, including, as a purported reason why the matters at paragraphs 48(b) or 49 occurred.

19. As to paragraph 63, Mr Gillham resists the Respondents' request that the Further Amended Originating Application filed on 20 June 2025 be dismissed for the reasons set out in this Reply and in the FASOC.

AND MR GILLHAM SEEKS THE FOLLOWING ORDER:

20. For the reasons indicated throughout this Reply in respect of particular averments in the Amended Defence and the Further Amended Defence including those which Mr Gillham contends are advanced in bad faith and those which are obviously bad in law, Mr Gillham will seek an order that his costs of preparing this Reply and prosecuting the instant proceeding to final hearing be paid by the Respondents.

Date: ~~23 July 2025~~ 25 June 2026



Signed by Michael Bradley
Lawyer of the Applicant

Certificate of lawyer

I Michael Bradley certify to the Court that, in relation to the reply filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for:

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

Date: ~~23 July 2025~~ 25 June 2026



Signed by Michael Bradley
Lawyer for the Applicant

Schedule

No. VID1036 of 2024

Federal Court of Australia

District Registry: Victoria

Division: Fair Work

Respondents

Fourth Respondent: Guy Ross

Date: ~~23 July 2025~~ 25 June 2026