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Federal Court of Australia VID1036/2024

District Registry: Victoria

Division: Fair Work

Jayson Lloyd Gillham

Applicant

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

Respondents

APPLICANT'S WRITTEN SUBMISSIONS IN RESPONSE TO FIRST & FOURTH RESPONDENTS' INTERLOCUTORY APPLICATION OF 21 NOVEMBER 2024

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A. Introduction

1. The instant document is provided in compliance with Order 1 of the Minutes of Consent made by Chief Justice Mortimer in Chambers on 21 February 2025. That Order required the Applicant, on or before 4pm on 4 March 2025, to file and serve written submissions in response to the Interlocutory Application filed by the First and Fourth Respondents (hereinafter or "**1R**, "**4R**" or "**Rs**" as appropriate) on 21 November 2024 ("the **Interlocutory Application**"). These submissions also respond to 1R's and 4R's submissions in support of their Interlocutory Application, filed on 2 December 2024 ("**submissions**").

2. Consistently with [14.1] of the Central Practice Note, the Applicant herein, so far as is possible, uses the same headings as 1R and 4R have used in their submissions.

3. The Applicant notes that the Interlocutory Application seeks that the Applicant's Further Originating Application be dismissed on the ground that the Applicant has no reasonable prospect of successfully prosecuting the proceeding.[1] Alternatively, the Interlocutory Application seeks that the whole of the Amended Statement of Claim ("**ASOC**") be struck out on the ground that it fails to disclose a reasonable cause of action. *In contrast,* at paragraph 3 the Interlocutory Application, 1R and 4R merely seek *that the Court order* that two questions be heard before the trial to commence on 17 March 2025. Accordingly, the Applicant understands that, on 17 March 2025, the Court will <u>not</u> be considering or determining the two separate questions, as such, as no order of the kind sought in paragraph 3 of the Interlocutory Application has been made. Rather, on 17 March 2025, the Court may consider whether to order that the two questions be heard thereafter and before the trial of the Applicant's claim. If the position has been misunderstood, full oral submissions concerning the separate questions will be made on the Applicant's behalf on 17 March 2025.

B. Relevant Law: summary judgment/strike-out

<u>Summary dismissal: FCAA s.31A(2); FCR 26.01 (1)(a) and (c)</u>

4. The tests for summary dismissal pursuant to FCAA s.31A(2) and FCR 26.01(1)(a) are substantively the same.[2] In the case of reliance upon either or both, the moving party bears the onus of establishing that the other party has no reasonable prospect of successfully prosecuting its claim. Alternatively, the moving party bears the onus of

[1] The Applicant observes that the Interlocutory Application differs from 1R's and 4R's submissions. The former refers to summary dismissal of the Further Originating Application, while paragraph 1 of the submissions refers to summary dismissal (and strike-out) of the Amended Statement of Claim only.

[2] *<u>Shammas v Canberra Institute of Technology</u>* [2014] FCA 71 at [13] and [51].

establishing one of the matters identified in FCR 26.01(1)(b) – (e).[3] Such onus is heavy.[4] In relation to FCR 26.01, the Applicant understands that the Interlocutory Application is concerned only with FCR 26.01(1)(a) and, possibly (c).[5] Accordingly 1R and 4R do not suggest that the Applicant's claim is frivolous or vexatious,[6] nor that it is an abuse of the process of the Court.[7]

5. Summary judgment is not concerned with mere pleading points. Instead FCA s.31A is concerned with the bringing and defending of proceedings and with substance, not just with form.[8] Section 31A is not a vehicle for simply striking out parts of pleadings that are deficient. Section 31A allows for "judgment" or nothing.[9]

6. What is required is not a mini-trial based on incomplete evidence to decide whether the proceedings are likely to succeed or fail at trial. Instead, the court is required to undertake a critical examination of the material advanced in support of the application to determine whether there is a real question of fact or law that should be decided at trial. Where proceedings involve questions of fact and law, or mixed questions of fact and law, the court should, as a general principle, be particularly cautious about ordering summary determination. The moving party would need to show a substantial absence of merit on either the question of fact or law, or on the mixed question, before having any chance of success in persuading the court that questions of these kinds should be resolved summarily.[10]

7. Further principles relevant to the Court's determination of an application for summary dismissal were conveniently summarised by the High Court in *Spencer v Commonwealth* (2010) 241 CLR 118 as follows:

   (i) Summary dismissal will apply to the case in which the pleadings disclose no reasonable cause of action and their deficiency is incurable (at [22]);

   (ii) The exercise of powers summarily to terminate proceedings must always be attended with caution (at [24]);

   (iii) Section 31A(2) requires a *"practical judgment"* by the Federal Court as to whether the applicant has more than a fanciful prospect of success (at [25]);

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[3] *Kitoko v University of Technology Sydney* [2021] FCA 360 at [54] – [55].
[4] *Hicks v Ruddock* [2007] FCA 299 at [13].
[5] Interlocutory Application, paragraph 2 where FCR 16.21(1)(e) is expressly cited. FCR 26.01(1)(c) is in similar terms to FCR 16.21(1)(e). See also [18] of 1R's and 4R's submissions.
[6] Pursuant to FCR 26.01(1)(b).
[7] Pursuant to FCR 26.01(1)(d).
[8] *Wills v Australian Broadcasting Corporation* (2009) 173 FCR 284 at [43].
[9] *Fortron Automotive Treatments Pty Ltd v Jones (No 2)* [2006] FCA 1401 at [21] cited in *Wills*, *op. cit.,* at [44].
[10] *Australian Securities and Investments Commission v Cassimatis* (2013) 220 FCR 256 at [46] – [50].

(iv) Where there are factual issues capable of being disputed and in dispute, summary dismissal should not be awarded to a respondent, even where the court has formed the view that the applicant is unlikely to succeed on a factual issue (at [25]);

(v) Where the success of a proceeding depends upon propositions of law apparently precluded by existing authority, that may not always be the end of the matter. Existing authority may be overruled, qualified or further explained. Summary processes must not be used to stultify the development of the law (at [25]);

(vi) The power to dismiss an action summarily must not be exercised lightly (at [60]).

8. In relation, specifically, to FCR 26.01, it has been held that sub-rule 26.01(1)(c) requires that the causes of action relied upon are so obviously untenable that they could not possibly succeed.[11] Proceedings which are apt to be dismissed pursuant to this rule include:

(i) those where the originating application is not accompanied by pleadings, affidavits or submissions and simply makes 'bare demands' without articulating the legal bases for the claims;[12] and/or

(ii) those where pleadings consist of scandalous, conclusory allegations, with no attempt to plead any material facts upon which the allegations are made and which raise no reasonable cause of action.[13]

Strike out: FCR 16.21

9. The power to strike out pleadings should be exercised only in plain and obvious cases, not where a pleaded cause of action has some chance of success, even if weak.[14] That is, a pleading will only be struck out as failing to disclose a reasonable cause of action or defence where it is clear that there is no real question to be tried.[15] Moreover, normally, the power to strike out should be exercised only where no reasonable amendment could cure the alleged defect.[16]

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[11] *Stankovic v The Hills Shire Council* [2013] FCA 652 at [111].
[12] *Sullivan v North West Crewing Pty Ltd* [2016] FCA 1130 *per* McKerracher J (at [33] – [34]).
[13] *Kimber v Owners Strata Plan No 48216* [2016] FCA 1090 *per* Perry J (at [72]).
[14] *Polar Aviation Pty Ltd v Civil Aviation Safety Authority* [2012] FCAFC 97 at [42] – [43], upheld at [93].
[15] *Global Brand Marketing Inc v Cube Footwear Pty Ltd* [2005] FCA 479 at [22], citing *Spotwire Pty Limited v Visa International Services Inc* [2003] FCA 762.
[16] *Hodson v Pare* [1899] 1 QB 455 as quoted in *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd* (1994) 217 ALR 226 at 236(4)(3).

10. If a substantial case is involved in the claim, the power to strike out cannot be exercised.[17]

11. As in the case of applications for summary judgment, the moving party bears the onus of establishing that the proceedings should be struck out pursuant to FCR 16.21.[18] All of the facts alleged in the relevant pleading are to be accepted as true.[19]

12. The Court may receive evidence in opposition to an application seeking summary disposal, including strike-out, of proceedings.[20]

13. In considering an application for strike-out, the Court will not engage in an evaluation of an applicant's prospects of success. If the question raised by a pleading is fairly arguable, the Court will decline to strike out the pleading and allow the matter to proceed to trial.[21]

14. Moreover, a court should be careful not to risk stifling the development of the law by summarily dismissing a claim where there is a reasonable possibility that, as the law develops, a cause of action may be held to lie.[22]

15. In any event, where the court has a doubt as to whether it should strike out proceedings, it should err on the side of allowing the claim to proceed.[23]

C. Mr Gillham has no 'workplace right' under the FWA

16. In Section E of their submissions, 1R and 4R deny that the Applicant has any "workplace right" under the *Fair Work Act 2009 (Cth)* ("**FWA**"). They do so on the basis that they assert that the Applicant was neither of:

    (a) a contract worker as defined in s.4 of the *Equal Opportunity Act 2010 (Vic)* ("**EOA**");

    (b) an independent contractor, pursuant to a contract for services with the MSO.[24]

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[17] *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd* (1994) 217 ALR 226 at 236(4)(4).
[18] *Granite Transformations Pty Ltd v Apex Distributions Pty Ltd* (2018) 359 ALR 62 at [30] citing *Turner (t/as Classic Gourmet Sausages Pty Ltd) v Leda Commercial Properties Pty Ltd* (2000) 97 FCR 313 at [39] – [40].
[19] *Granite Transformations Pty Ltd v Apex Distributions Pty Ltd* (2018) 359 ALR 62 at [3].
[20] *Thorpe v Commonwealth (No 3)* (1997) 144 ALR 677 at 681.
[21] *Termite Resources NL (In Liq) v Meadows; Termite Resources NL (In Liq)* [2016] FCA 1171 at [24].
[22] *Young Investments Group Pty Ltd v Mann* [2012] FCAFC 107 at [6], further cited in *Kemppi v Adani Mining Pty Ltd (No 2)* [2017] FCA 1086 at [27] and *Haire v WorkCo Australia Pty Ltd (No 2)* [2024] FCA 1266 at [29].
[23] *Thorpe v Commonwealth (No 3)* (1997) 144 ALR 677 at 686 *per* Kirby J.
[24] At [28] of 1R's and 4R's submissions.

Matters not apt to be decided at interlocutory stage

17. These matters are not apt to be decided on an application for summary dismissal or strike-out, or at a hearing of a separate question. In relation to [16](b) above, it is plain that the question of whether there existed an implied contract between the Applicant and the MSO, and if so, what the terms of it were, are matters requiring the Court to hear evidence about the parties' conduct.[25] They cannot be disposed of justly simply by Rs pointing to the 'entire agreement' or 'personal rights' clauses of the written contract between the Applicant and SSA.[26] In their submissions, 1R and 4R have not said anything about the terms of an implied contract set out in the particulars to [10] of the ASOC.

18. In the case of both applications for summary dismissal and strike-out the onus is on 1R and 4R to establish that the Applicant has no reasonable prospect of successfully prosecuting his claim, or that the Applicant's pleadings disclose no reasonable cause of action. The onus is a heavy one.[27] 1R and 4R simply cannot discharge it on either application without evidence being heard, at least on the question of whether there existed a contract between the Applicant and the MSO.

19. Equally, the ('workplace right') separate question cannot be determined without the Court hearing such evidence. The same would be inappropriate and would fail to effect much, if any, real saving of court time or the parties' costs as compared to the question being determined at the final hearing.[28] Evidence would need to be adduced of the

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[25] Consistently with the *ratio* of *CFMMEU v Personnel Contracting Pty Ltd* (2022) 275 CLR 165; [2022] HCA 1 at [42] where the plurality held: *"A contract of employment may be partly oral and partly in writing, or there may be cases where subsequent agreement or conduct effects a variation to the terms of the original contract or gives rise to an estoppel or waiver. In such cases, it may be that the imposition by a putative employer of its work practices upon the putative employee manifests the employer's contractual right of control over the work situation; or a putative employee's acceptance of the exercise of power may show that the putative employer has been ceded the right to impose such practices."* See also *EFEX Group Pty Limited v Bennett* [2024] FCAFC 35 at [7], quoted at footnote 29 below.

[26] As 1R and 4R impliedly suggest at [28](d) of their submissions. Moreover, while the Applicant does not accept that the terms of his written contract with SSA are determinative, it is worthy of note that clause 22.1 of that contract states: *"…There are no conditions, warranties, promises or obligations written or oral express or implied in relation to [the subject matter of the contract] other than those expressly stated in this Agreement* ***or necessarily implied by law****"* (emphasis added). Hence the entire agreement clause does not, itself, preclude the implication of terms, indeed an entirely separate contract between the Applicant and MSO. It is further worthy of note that despite the personal rights clause 27.6 allows SSA to assign its rights and obligations under the contract to the MSO.

[27] *Hicks v Ruddock* [2007] FCA 299 at [13]. In relation to strike-out, see *Uber Australia Pty Ltd v Andrianakis* [2020] VSCA 186 at [35], where the Court of Appeal held (in relation to similar strike-out provisions in Victorian law): *"Uber's contentions…fail to grapple with the high hurdle it must cross, and the low bar confronting the plaintiff."*

[28] This is a matter weighing against the listing of a separate question hearing prior to trial. See *Instyle Contract Textiles Pty Ltd v Good Environmental Choice Services Pty Ltd (No 3)* [2010] FCA 466 at [22] where it was held: *"In the ordinary course, all issues of fact and law should be determined at the one time…Her Honour at [8] noted that the factors that tended to support the making of an order for the separate determination of a question included the fact that the separate determination may*

Applicant's and 1R's relationship with one another, including as reflected in the fact and manner of 1R cancelling the Applicant.[29] If the separate question were not determined in 1R's favour, the same witnesses would be required to give evidence at trial. Such a course does not accord with the settled principles concerning the hearing of separate questions.[30]

20. Without prejudice to the Applicant's primary contention with respect to the "workplace right" matter, namely that it is not apt to be determined at the interlocutory stage, he makes the following substantive submissions in response to the two matters set out at [16] above.

Was Mr Gillham a 'contract worker' ([16](a) above)?

21. In relation to whether the Applicant was a "contract worker" within the meaning of s.4 of the EOA, 1R and 4R admit that the Applicant was an independent contractor of SSA.[31] Accordingly, they must, and apparently do, accept that he meets the definition of "employee" (of SSA) in s.4 of the EOA.[32] Such admission leaves one matter between the parties in respect of this issue: whether the Applicant did work for the MSO pursuant to a contract between SSA and the MSO. 1R's and 4R's submissions on this matter are so weak as to be bound to fail; they certainly do not come close to discharging the heavy onus upon them in the context of their summary dismissal and strike-out applications.

22. Points made at [28](c) and [29](a) of 1R's and 4R's submissions underscore that the aim (or at least one of the aims) of the SSA/MSO Service Level Agreement ("**SLA**") was to enable SSA to arrange for work to be done by international artists for the MSO and as part of the concert offering of the MSO – indeed "international artists' engagement" can have no other meaning. Moreover, the aim of the contract between the Applicant and SSA was plainly to enable him to perform for the MSO and as part of the MSO's concert offering to *its* audience.

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contribute to savings of cost and time by substantially narrowing the issues at trial or even leading to the disposal of the proceeding, including by way of settlement. Her Honour also noted that the factors that would tell against the making of an order for the separate determination of a question included the fact that the separate determination may lead to a significant overlap between the evidence adduced on the hearing of the separate question and at the later hearing, with the possible calling of the same witness or witnesses at both stages of the proceeding and with the attendant risk and inconvenience of credibility findings being made at the first stage."

[29] See *EFEX Group Pty Limited v Bennett* [2024] FCAFC 35 at [7] where it was held: *"In the absence of a written contract and no evidence of a particular conversation during which the contract was made, 'evidence of the parties' conduct must necessarily be considered in order to draw inferences as to whether the meeting of minds necessary to create a contract has occurred and what obligations they have thereby undertaken'" per* Katzmann and Bromwich JJ and at [59] *per* Lee J (re relevance of post-contractual conduct).

[30] *Prescott Securities Limited v Gobbett* [2017] FCA 81 at [13]. See also *Hazeldine v Arthur J Gallagher Australian & Co (Aus) Limited* [2017] FCA 575 at [12].

[31] 1R's and 4R's Defence, [36](b).

[32] See 1R's and 4R's Defence, [37](b) and (c).

23. Accordingly, it is clear that the Applicant meets the definition of "contract worker" set out in s.4 of the EOA in that he did work for the MSO under a contract between SSA and MSO. The contract between the Applicant and SSA merely gave effect to that contract (the SLA) specifically in relation to the Applicant. The contract between the Applicant and SSA could not and would not have come into existence without a contract between SSA and the MSO.

24. 1R's and 4R's submission at [29](a) that *"The MSO did not make a contract with SSA for work to be done by Mr Gillham* ***as one of its employees****"* (emphasis added) is not to the point. The definition of "contract worker" in s.4 of the EOA does not require that a contract between a principal and the contract worker's employer stipulate or intend that the worker undertake work as one of the principal's employees.

25. Similarly, 1R's and 4R's statement, at [28](c) of their submissions, that *"The MSO's obligations to the SSA were to fulfil all obligations required in order for the SSA to perform its contractual obligations under the Gillham/SSA Agreement in accordance with the agency relationship as between SSA and MSO"* does not address the definition of "contract worker" in the EOA. That is, regardless of any obligations the MSO may have owed to SSA, it contracted with SSA to engage artists like the Applicant to perform for it to its audiences. Accordingly, the Applicant did work for the MSO pursuant to that arrangement between MSO and SSA. 1R's and 4R's submissions seek to obscure that plain and obvious reality. They cannot succeed.

Was Mr Gillham an independent contractor of the MSO (pursuant to [16](b) above)?

26. Points made at [28](a) and (b) of 1R's and 4R's submissions amount to a contention that the MSO, through the use of the device of SSA as its agent, may contract (and has contracted) out of the definition of employment set out in the EOA, or that SSA's/the MSO's labelling of relationships created by contract is determinative. Neither proposition is correct as a matter of law.

27. In relation to [28](a) it is trite principle that parties to a contractual arrangement may not contract out of the law, perhaps most especially out of the law concerning the rights of a third party.

28. In relation to [28](b), and to labels, in *CFMMEU v Personnel Contracting Pty Ltd* (2022) 275 CLR 165; [2022] HCA 1, the plurality of the High Court held, at [64]:

> *"Subject to statute, under the common law the parties are free to agree upon the rights and obligations by which they are to be bound. But the determination of the character of the relationship constituted by those rights and obligations is a matter for the court."*

29. In relation to [29](b) of 1R's and 4R's submissions, as stated at [17] above, this is a matter which can only be justly determined upon the Court hearing evidence about the nature of the relationship between the Applicant and the MSO, including in relation to the matters set out in the particulars to [10] of the ASOC.

30. There is also an important point of law arising from this aspect of the Applicant's case which merits full argument on the basis of *evidence* (adduced at a full hearing of the Applicant's claim) about the relationship between 1R and SSA. Such point arises from 1R's and 4R's admission that, in concluding the contract between itself and the Applicant, SSA was acting as the MSO's agent.[33] As noted by Dal Pont (among others), where an agent makes a contract with a third party on behalf of an existing disclosed principal pursuant to the agent's actual authority, a direct contractual relationship is thereby created between principal and third party by the acts of the agent, who does not become a contracting party, this being the very purpose and rationale of agency law. Signing by an agent acting within authority is signing by the principal.[34]

31. Hence while SSA is identified as a party to the contract signed by the Applicant, in light of 1R's and 4R's admission that SSA was, in concluding such contract, acting as 1R's agent, this may well be found, at trial, to have been a sham (or more politely, a 'device') and that the true *proferens* (and maker) of the contract was 1R. In such case, the Applicant would plainly have been an independent contractor of 1R and therefore its employee, pursuant to ss.4 and 18 of the EOA.

32. Taking a step back from the detail of the parties' submissions, the effect of 1R's and 4R's case on "workplace right" is that the MSO and SSA are able to fashion (and have fashioned) a tripartite arrangement (the Applicant being the third party) which successfully deprives the Applicant of rights which the Parliament of Victoria has thought fit to confer on those in the Applicant's position.[35] That is, because of this 'clever arrangement,' if it is in fact the case that Mr Gillham was cancelled by the MSO by reason of his having expressed his genuine political belief, he has no remedy against it. Essentially, it is his tough luck; not only his tough luck, but the tough luck of all artists who are engaged by SSA as agent of one of its member orchestras. The same is a deeply unattractive case.[36] Importantly, its patent unfairness must demonstrate, on its face, that 1R's and 4R's case does not reflect a correct statement or application of the law – all the more so when the objects of the EOA[37] and FWA are considered (below).

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[33] As admitted by 1R and 4R at [3](c)(2) and [6](c)(i) of their Defence. See also [11] of the ASOC.
[34] Dal Pont, G. E, *Law of Agency,* 4th Ed, LexisNexis, 2020 at [19.1].
[35] and which the Applicant contends (in his response to Section F below) enable him to access the General Protections provisions of the FWA. Indeed, this is the effect of [30] of 1R's and 4R's submissions.
[36] See, by analogy, *Qantas Airway Ltd v Transport Workers' Union of Australia* (2023) 97 ALJR 711 at [86] *per* Gordon and Edelman JJ.
[37] EOA, s.3. For example: *"to eliminate discrimination, sexual harassment and victimisation,* ***to the greatest possible extent****."* (emphasis added).

D. There is no 'workplace law' for the purposes of the FWA

33. In Section F of their submissions, 1R and 4R contend, primarily, that the EOA is not a "workplace law" because it is not a State law that regulates the relationships between employers and employees (in the common law sense), or alternatively, that ss.18 and 21 of the EOA (on which the Applicant relies) are only a "workplace law" to the extent that each regulates the relationships between common law employees and employers.

34. Such contentions run contrary to the plain wording of s.12 of the FWA and are inconsistent with the objects of, and Explanatory Memorandum to, the FWA. Further, they are not supported by the weight of the case-law.

Legislative provisions

35. Section 12 of the FWA defines "workplace law" (relevantly to the instant proceedings) as:

> *"any other law of the Commonwealth, a State or a Territory that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters)."*

36. Such definition is plainly *inclusive* rather than exclusive or limiting. It does not state that a law of the Commonwealth, State or Territory cannot fall within the definition of "workplace law" if it does more than regulate the relationships between (common law) employers and employees and to the full extent it does more. Had Parliament intended such meaning, it would have been a straightforward thing for it to include the words "to the extent that it does so" at the conclusion of the above-quoted passage.[38] Instead, the existing definition merely indicates that in order to fall within its terms a law must regulate the relationships between (common law) employers and employees, but not that it must *only* do this. Indeed, such construction of s.12 would amount to an impermissible reading down of the section and of Part 3-1 of the FWA.[39] It is worthy of note that the definition of "workplace law" includes the *Independent Contractors Act 2006 (Cth).* It also includes laws dealing with occupational health and safety matters. The latter frequently regulate relationships between employers and employees as well as between employers and independent contractors ("workers").

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[38] See *Australian Licensed Aircraft Engineers Association v Sunstate Airlines (Qld) Pty Ltd* (2012) 208 FCR 386 at [30] by parity of reasoning, where Logan J stated: *"Had Parliament intended to confine the scope of para (d) of the definition of 'workplace law' to 'enactments' it would have been easy to have used that narrower term."*

[39] Reading down its plain words. In addition, the General Protections provisions of the FWA are, as the name suggests ("Protections") beneficial provisions. Accordingly, they must be interpreted in a manner beneficial to those who are to benefit from them. See Pearce, D. C. *Statutory Interpretation in Australia.* 10th Ed, LexisNexis, 2024, [9.2].

37. It is a well-known cannon of statutory interpretation that in construing a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.[40] Material that may be considered in order either to: (i) confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or (ii) determine the meaning of a provision when the provision is ambiguous or obscure, includes any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted.[41]

38. In relation to the above-mentioned cannon of statutory interpretation, one of the objects of the FWA, set out in s.3, is:

> *"enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented,* ***protecting against unfair treatment and discrimination****, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms."*[42] (emphasis added)

39. This object is not limited to common law employees. The first bolded expression is "at work" and not "in employment." The second bolded phrase makes no reference to employees; the protection against unfair treatment and discrimination is unqualified. This may be contrasted with object (d) which refers specifically to *"assisting* ***employees*** *to balance their work and family responsibilities…"* (emphasis added).

40. The object of the FWA concerning protection from unfair treatment and discrimination is plainly intended to apply to independent contractors, whether they also be "contract workers" (in the EOA sense) or not. This is consistent with the FWA conferring rights on independent contractors to sue in adverse action.[43] Accordingly, interpreting as falling within the definition of "workplace law" provisions of the EOA (and other similar legislation) that regulate the workplace (and not merely the relationships

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[40] *Acts Interpretation Act 1901 (Cth)*, s.15AA. See also *Australian Licensed Aircraft Engineers Association v Sunstate Airlines (Qld) Pty Ltd* (2012) 208 FCR 386 at [26] where the Court stated: *"As with any statutory provision, the definitions of 'workplace instrument' and 'workplace law' in s 12 of the* Fair Work Act *must be construed by reference not only to the language employed in those definitions but in context, and in particular, in a way which is consistent with the language and purpose of that Act read as a whole:* Project Blue Sky Inc v Australian Broadcasting Authority *(1998) 194 CLR 355 at [69]" per* Logan J.

[41] *Acts Interpretation Act 1901 (Cth)*, s.15AB(1) and (2)(e).

[42] FWA, s.3(e). In *Qantas Airway Ltd v Transport Workers' Union of Australia* (2023) 97 ALJR 711, the majority of the High Court held that Chapter 3 of the FWA is particularly directed to this object (at [19]).

[43] FWA, s.340 and s.342.

between common law employers and employees) would best achieve this object of the FWA. Not doing so is inconsistent with the objects of the FWA.

41. More specifically, s.336 of the FWA sets out the objects of Part 3-1, which concerns General Protections. Relevantly to the instant proceedings, it states:

> *"(1) The objects of this Part are as follows:*
>
> *...*
>
> (c) *to provide protection from* ***workplace*** *[*not 'employment'] discrimination;*
>
> (d) *to provide effective relief for* ***persons*** *[*not 'employees'] who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of this Part.*
>
> *(2) The protections referred to in subsection (1) are provided to a person (****whether an employee, an employer or otherwise****)."* (emphasis added). [44]

42. Such specific objects of Part 3-1 make abundantly clear that the General Protections provisions concerning discrimination are not limited to protecting employees. Given that s.351 of the FWA refers specifically to employees and the rows of s.342 dealing with independent contracting relationships do not make specific mention of discrimination between the independent contractor in question and others, the only way in which the specific objects may be advanced in the case of non- (common law) employees is if s.12 of the FWA is interpreted as including such legislative provisions as regulate working relationships beyond common law employment. Hence excluding the EOA, or ss.18 and 21 of it, in situations such as that of the Applicant from the definition of "workplace law" would run contrary to, and indeed defeat, this aspect of the objects of Part 3-1.[45]

43. Moreover, the explanatory memorandum to the FWA states, at [1346], [1347] and [1360], that:

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[44] See also FWA, s.6(2)(c).

[45] In *Australian Licensed Aircraft Engineers Association v Sunstate Airlines (Qld) Pty Ltd* (2012) 208 FCR 386, Logan J referred, at [24], to: *"an evident,* ***beneficial*** *parliamentary purpose in s 340 and the definitions it incorporates of protecting* ***workers*** *from adverse action (as defined) taken as a result of an exercise or a proposed exercise of a workplace right."* (emphasis added). See also *Qantas Airways Ltd v Transport Workers' Union of Australia* (2023) 97 ALJR 711 at [19] – [22]. At [20], the majority of the High Court held: *"Part 3-1 is entitled "General protections". It has three broad concerns: (1) protecting workplace rights; (2) protecting freedom of association and involvement in lawful industrial activities; and (3) providing other protections, including protection from discrimination. There is a long and complex history of provisions in Commonwealth industrial legislation that protect* ***workplace participants*** *against unfair treatment.* ***At a high level of generality, the historical arc of the protections against adverse action has generally tended to expand the scope of workplace rights, the classes of persons who are covered by the general workplace protections, and the limits upon adverse action****…****The complex legislative history does not support any narrower reading of s 340(1)(b) than is otherwise suggested by the text, context and purpose of the provision****."* (emphasis added).

"[1346] Part 3-1 does not rely on the terms national system employer and national system employee as defined in clauses 13 and 14. Instead, Division 2 sets out how the Part applies to action taken by a person. ***It does not apply on the same basis as the main provisions of this Bill, which regulate the rights and obligations of national system employers and employees in relation to each other and the rights and obligations of organisations in relation to those employment relationships****.*

[1347] On the face of the provisions of Part 3-1, the Part regulates the conduct of ***all*** *employers, employees,* ***principals, independent contractors****, industrial associations and, in some cases, all persons…"*

[1360] Paragraph 341(1)(a) provides that a person has a workplace right if the person is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body. Workplace law, workplace instrument and industrial body are defined in clause 12 in a way that is intended to ensure that this Division protects entitlements, roles and responsibilities under Commonwealth, State and Territory laws, and instruments made under those laws, that regulate employment ***and similar relationships*** *and industrial associations."* (emphasis added).

44. These passages make abundantly clear that the legislature did not intend that "workplace law" be defined to exclude working relationships other than that of common law employer and employee. That is, they confirm that the meaning of s.12(d) is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act. The relationship of the Applicant to the MSO was undoubtedly a "similar relationship" to the relationship of employment. Exemplifying this, ss.18 and 21 (even insofar as they may apply to non-common law employees) are included within a portion of the EOA which is entitled: *"Discrimination in Employment."*

<u>*Case-law*</u>

45. 1R and 4R place significant reliance on the case of <u>*Tattsbet Ltd v Morrow*</u> (2015) 233 FCR 46, particularly the passages at [1], [102] (and most likely also [103]) and [140]. Such reliance is misplaced for a number of reasons.

46. First, and perhaps most importantly, [1] and [140] are nothing more than generalised expressions of agreement with the (whole of the) judgment of Jessup J. They contain no analysis of the question of what amounts to a "workplace law."

47. Paragraphs 102 and 103 (in the judgment of Jessup J), are quite plainly *obiter dicta*. They cannot be read independently of [100] – [101] which state:

"In the respondent's alternative case under Pt 3-1 of the FW Act (ie that which relied on the application of that Part to the circumstances of an 'independent contractor'), it was treated as self-evident that, if she were not an employee as understood at common law, she was within the extended definition of the word in s 12(3) of the SGA Act. ***But no specific attention was given to that proposition in the submissions of either party****. For my own part, I would not regard it as self-evident at all….*

If it were such a contract, the question ***then would be*** *whether it followed that the respondent was entitled to the benefit of a 'workplace law' within the meaning of Pt 3-1 of the FW Act …"* (emphasis added).

48. It is apparent from that portion of the judgment of Jessup J, that the question which Rs raise in Section F of their submissions was not the subject of argument before the Federal Court in *Tattsbet*. Accordingly, it would be unsafe for this Court to strike out or give summary judgment on the point (or to determine a separate question) in the instant case in reliance on that authority.[46] It is worthy of note that none of the leading employment law reference books refer to *Tattsbet* as authority for the proposition that where an Act, or provision thereof, regulates working relationships beyond those of common law employment, such Acts or provisions are not "workplace laws."[47]

49. Moreover, *Tattsbet* is at least "met" (if not superseded) by the more recent decision of the full court of the Federal Court (similarly presided over by the then Chief Justice) of *Auimatagi v Australian Building and Construction Commissioner* [2018] FCAFC 191. In that case, the 'employer,' John Holland owed duties to all workers (not just its own) on the site over which it had control pursuant to s.19 of the *Work Health and Safety Act 2011 (Cth)*.[48] Indeed, the majority of workers on the site were employed by subcontractors, rather than by John Holland.[49] The question was whether John Holland was exercising a "workplace right" in enforcing a dress code on those workers pursuant to s.19 of the WHS Act.

50. On appeal, it was argued that whilst s.19 *does* regulate in some respects the relationship between employers and employees, it also imposes duties on a party such as John Holland to do things in relation to persons who are not its employees and in that respect is not a "workplace law."[50] At [67], the Court noted:

"In answer to the first argument it was pointed out that the matter had been conceded below. In both submissions at the commencement of the hearing and in closing

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[46] Contrast the judgment of Jessup J in *Regulski v State of Victoria* [2015] FCA 206, discussed below.
[47] See Sappideen, C, O'Grady, P and Riley, J. *Macken's Law of Employment*. 9th Ed, Thompson Reuters, 2022; Stewart, A. *Stewart's Guide to Employment Law.* 7th Ed, Federation Press, 2021; Pittard, M and Moore, B. *Australian Labour and Employment Law*. 2nd Ed, LexisNexis, 2024.
[48] *Auimatagi v Australian Building and Construction Commissioner* [2018] FCAFC 191 at [3].
[49] *Auimatagi* at [18].
[50] *Auimatagi* at [63].

addresses the respondent had clearly accepted that the WHS Act was a workplace law …"

51. While, in view of the concession, the Court did not engage in a detailed analysis of the question of whether the WHS Act was a "workplace law" equally, nor did it raise any difficulty with this proposition.

52. Moreover, the notion that an Act can be a "workplace law" even where it does more than regulate the relationships between (common law) employers and employees was answered in the affirmative in *Bayford v Maxxia Pty Ltd* (2011) 207 IR 50 which concerned the predecessor to the EOA. At [140] – [141], Riley FM stated:

"The respondent argued that the Equal Opportunity Act 1995 (Vic) *is not a workplace law as defined. The respondent said that the objects of the Act made no reference to regulation of the workplace. The respondent said that, although the Act prohibited discrimination in the workplace, it was concerned to eliminate discrimination in society generally. Therefore, the respondent said, the Act was not a workplace law.*

I do not accept that submission. 'Workplace law' is defined in the FWA to include a State law that regulates the relationships between employers and employees. ***The fact that the* Equal Opportunity Act 1995 (Vic) *regulates other relationships as well does not take it outside the definition of 'workplace law****.'"* (emphasis added)

53. Similar to the latter points taken by the respondent in *Bayford*, 1R and 4R further contend that ss.18 and 21 of the EOA *"seek to prohibit or prevent certain conduct"* and are (as well as, the Applicant understands, the entirety of Division 1 of Part 4 of the EOA) provisions which do *"no more than use the status of employer or employee as an incidental touchstone for the imposition of duties serving other ends."*[51]

54. Such contention is unsustainable for a number of reasons. First, it seeks to rely upon *Australian Licensed Aircraft Engineers Association v Sunstate Airlines (Qld) Pty Ltd* (2012) 208 FCR 386 (at [33]). That case is inapposite as it concerned the *Civil Aviation Regulations 1988 (Cth)* and not legislation concerning discrimination. The particular regulations on which the applicant union relied required the reporting of defects in aircraft and compliance with an operations manual. These were described by the learned Judge as regulations which 'impose a duty on a person as an incident of undertaking a particular task in the course of employment or as an incident of a particular type of employment (operations personnel)' (at [33]) by way of explanation as to why they did not regulate the relationship between that person and their employer.

55. The relevant CAA regulations are in no way comparable to ss.18 and 21 of the EOA which protect those in a working relationship with another from being discriminated

[51] 1R's and 4R's submissions at [35].

against by that other. It is a vital social policy that discrimination in the workplace (specifically) be eliminated, given it can result from an inequality in bargaining power between the work-assigning entity and the work-performing person, which is a common feature of the workplace. Discrimination in the workplace also has particular *consequences* arising specifically from the fact it occurs in the workplace (such as an absence of diversity in the national workforce, increased unemployment, reduced national productivity and economic disadvantage among those who are discriminated against).

56. Secondly, the contention also relies upon the case of *Vukovic v Myer Pty Ltd* [2014] FCCA 985 which refers to the *Disability Discrimination Act 1992 (Cth),* the *Sex Discrimination Act 1984 (Cth)* and the *Australian Human Rights Commission Act 1986 (Cth)*. The notion that those Acts were "workplace laws" was not the subject of any detailed consideration by the FCCA but rather, was dismissed in one brief paragraph ([91]). It was said that while those Acts did "potentially" provide Mr Vukovic with certain rights, they were rights of a general nature, with no particular link to the workplace.

57. However, and thirdly, in the more recent case of *Reynolds v Harrier Group Pty Ltd* [2023] FedCFamC 2G 930, the Court accepted that the complainant had a workplace right not to be unlawfully discriminated against on the ground of her gender and not to be victimised, pursuant to the *Equal Opportunity Act 1984 (WA)* and the *Sex Discrimination Act 1984 (Cth)* (at [98](d) and [99]).

58. As mentioned above (at [33]), in the alternative to their contention that the whole of the EOA is not a "workplace law," at [32] of their submissions, 1R and 4R contend that ss. 18 and 21 of the EOA (on which the Applicant specifically relies) are only workplace laws to the extent, and only to the extent, that each regulates the relationships between common law employees and employers.

59. At [33] of their submissions, 1R and 4R go on to submit that the task of assessing whether a "State law" is a "workplace law" which "regulates the relationship between employers and employees" refers to the specific rule relied upon by an applicant and may involve "consideration of a single provision of an act, a group of provisions, or an act as a whole." While this may indeed be the case, both of the authorities on which 1R and 4R rely in this regard held that legislative provisions that went beyond the regulation of the relationship between common law employees and employers were, nevertheless, "workplace laws." Accordingly, such authorities assist the Applicant's case and undermine 1R's and 4R's case on their Interlocutory Application.

60. In *Regulski v State of Victoria* [2015] FCA 206, the provisions in question were ss.195 and 196 of the *Accident Compensation Act 1985 (Vic)* (as it then was). Both referred to

employers and "workers" not "employees."[52] The concept of "worker" is broader than that of common law employee.[53]

61. At [198] and [200] of *Regulski* Jessup J said:

> *"198…The respondents submitted that the AC Act was not such a law [that regulated relationships between employers and employees]. That submission, in my view, approached the question at too high a level of generality. A 'law' may be a single provision of an Act, it may be a group of provisions, or it may be an Act as a whole. It may be (although I do not hold) that, at the high level, the AC Act did not have the purpose of regulating the relationships between employers and employees. But the question is whether, in pursuit of the objects referred to in paras (b) and (c) of s.3…the AC Act operated in a way which effected such regulation.*
>
> *200. These provisions required employers to act in certain ways, and in that sense were regulatory. The field in which they were required to act was that of the relationships which they had with their relevant employees. Most relevantly to the present case, they were required to plan the return to work of injured employees, and to consult with them. The result presumptively achieved by obedience to these provisions was that employees would perform work, in the service of their employers, which they would, or at least might, not otherwise have performed. In my view, ss 195 and 196 of the AC Act were workplace laws within the meaning of the FW Act."*

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[52] *Regulski v State of Victoria* [2015] FCA 206 at [178] – [179].

[53] Section 5(2)(a) of the *Accident Compensation Act 1985 (Vic)* states: *"Unless inconsistent with the context or subject-matter –*

(a) words and expressions defined in section 3 of the Workplace Injury Rehabilitation and Compensation Act 2013 have the same meaning in this Act as they have in that Act."

Section 3 of the *Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)* states, relevantly:

"'worker' means an individual -

(a) who –

(i) performs work for an employer; or

(ii) agrees with an employer to perform work –

at the employer's direction, instruction or request, whether under a contract of employment (whether express, implied, oral or in writing) ***or otherwise****; or*

(b) who is deemed to be a worker under this Act." (emphasis added). See also s.129A of the AC Act.

The Victorian Chamber of Commerce and Industry's Workplace Relations Fact Sheet states:
"Who can make a worker's compensation claim?
A 'worker' is defined as anyone who 'performs work for an employer' or 'agrees with an employer to perform work.' This broad definition includes more than just employees of a business – certain independent contractors, labour hire employees working for a host employer and even volunteers can make a worker's compensation claim in certain circumstances…" at https://www.victorianchamber.com.au/cdn/bkznkmstlggk8g0k#:~:text=A%20%E2%80%9Cworker%E2%80%9D%20is%20defined%20as,earnings%20prior%20to%20the%20injury.

62. By his final sentence quoted above, his Honour did not limit the characterisation of ss.195 and 196 as a "workplace law" to their regulation of relationships between common law employers and employees only.

63. Similarly, in *Milardovic v Vemco Services Pty Ltd* [2016] FCA 19 for the same reasons as Jessup J in *Regulski* at [198] and [200], quoted above, Mortimer J (as her Honour then was), held that the exercise of a right to make a WorkCover claim under the *Accident Compensation Act* was a "workplace right."[54] Such right is not limited to common law employees.[55]

64. Accordingly, 1R's and 4R's alternative submission, that ss.18 and 21 of the EOA are only "workplace laws" to the extent that they regulate the relationship between common law employers and employees is not supported even by the authorities on which they themselves rely. No such holding was reached in either *Regulski* or *Milardovic*. On the contrary, in those cases, the learned Judges held that where, in pursuit of certain of the objects of the *Accident Compensation Act*, the relevant legislative provisions on which the respective applicants relied required employers to act in certain ways, the same was sufficient to render each provision a "workplace law." Mr Gillham respectfully adopts that approach in response to 1R's and 4R's alternative submission.

E. Australia's obligations under International Law

65. In addition to the object of the FWA, cited at [38] above, and those of Part 3-1 of the FWA, referred to at [41] above, there is another important object of the FWA which must be taken into account in the construction of s.12 of that Act, and the meaning of "workplace law," in accordance with the cannon of statutory construction cited at [37] above. That is the very first object of the FWA, set out at s.3(a) which states (including the chapeau provision):

"The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

(a) providing workplace relations laws that…take into account Australia's international labour obligations."

66. On 25 June 1958, the International Labour Organization ("**ILO**") adopted the *Discrimination (Employment and Occupation) Convention 1958* ("**Convention**")

[54] *Milardovic v Vemco Services Pty Ltd* [2016] FCA 19 at [71].
[55] See footnote 53 above.

which is considered by the ILO to be "fundamental."[56] Australia ratified the Convention on 15 June 1973 and it remains in force in respect of Australia.[57]

67. Indeed, of the foregoing, the Explanatory Memorandum states, at [2251]:

"The objects of the Bill require FWA to take into account Australia's international labour obligations – see paragraph 3(a). Australia has international labour obligations under instruments including…

…

ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation *(Geneva, 25 June 1958) [1974] ATS 12"*

68. Articles 2 and 3 of the Convention relevantly state:

*"**Article 2***

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

Article 3

Each Member for which this Convention is in force undertakes, by methods appropriate to national conditions and practice-

…

(b) ***to enact such legislation*** *and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;*

…" (emphasis added)

69. The ILO (presently) defines "employment" as *"any activity to produce goods or provide services for pay or profit."*[58] In the context of the drafting of the Convention, the ILO understood and accepted that "persons in employment" included all persons above a specified age who were "at work" and that the phrase "at work" included not only persons whose status was that of employee but also those whose status was that of "worker on own account," "employer" or "unpaid family worker."[59]

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[56] https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12000:0::NO:::.

[57] https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312256.

[58] https://www.ilo.org/resource/employment-1.

[59] *X v Mid Sussex Citizens Advice Bureau* [2013] ICR 249 (UK Supreme Court) at [35]. See also V. De Stefano, "Not as simple as it sees: The ILO and the personal scope of International Labour Standards." (2021) *International Labour Review* 160(3), 387 – 406 at 398 where the learned author states: *"Anti-Discrimination Conventions also apply universally and include self-employment and the informal economy. The CEACR also recalled that, during the negotiation of the Discrimination (Employment and Occupation) Convention 1958 (No. 111), the proposal to exclude self-employed*

70. Importantly, Article 1(a) defines "discrimination" as:

> *"any distinction, exclusion or preference made on the basis of race, colour, sex, religion, **political opinion**, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."* (emphasis added).

71. Accordingly, Australia, as a (founding) Member of the ILO,[60] which has ratified the Convention, has (pursuant to Articles 2 and 3) an obligation to enact such legislation as may be calculated to secure the acceptance and observance of a national policy designed to promote equality of opportunity and treatment in respect of employment (broadly defined) with a view to eliminating any discrimination in respect of (relevantly) political opinion, in respect thereof.

72. The FWA is the only *national* legislation capable of promoting equality of opportunity and treatment in respect of employment (broadly defined) with a view to eliminating any discrimination in respect of political opinion.

73. The FWA plainly meets this requirement in respect of common law employment, in s.351.

74. In respect of those in non-common-law employment relationships, which fall within the ILO definition of "employment," the FWA can only meet the requirements of Articles 2 and 3 by giving effect to State legislation that protects workers from any distinction, exclusion or preference made on the basis of political opinion.[61] Arguably Australia falls short in meeting this international obligation as not all State anti-discrimination acts protect against discrimination on the basis of political opinion.[62]

75. However, consistently with the object set out at s.3(a) of the FWA, quoted above, and the requirement to prefer the interpretation of a statute that would best achieve its purpose or object, in circumstances where a relevant piece of State legislation *does* protect workers (not limited to common law employees) from any distinction, exclusion or preference made on the basis of political opinion, the FWA must be interpreted so as to give effect to such protection.

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workers from the protection afforded by the instrument was rejected twice (ILO CEACR 2012, 307-308);" and B. Creighton and S. McCrystal, "Who is a 'Worker' in International Law?" (2016) *Comparative Labor Law and Policy Journal* 37(3), 691-725 at 704, 706 and 722.

[60] https://www.ilo.org/australia#standards.

[61] It is not sufficient to meet Australia's international law obligation to point to the existence of State-based legislation that protects against discrimination on the basis of political opinion (or in the case of the EOA political belief or activity) since the international obligation is owed by the Commonwealth of Australia and not by its individual states or territories such as the State of Victoria.

[62] See for example the *Anti-Discrimination Act 1977 (NSW)*.

76. Accordingly, Australia's obligations pursuant to international law are yet another reason why the meaning of "workplace law" in s.12 of the FWA cannot be read down so as to exclude any other law of a State that regulates working relationships other than common law employment.[63]

77. Beyond the specific objects of the FWA, Australia is a signatory to the International Covenant on Civil and Political Rights ("**ICCPR**")[64] Article 19 of which states:

"1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals."

78. As is plain on its face, Article 19 applies to "everyone" *a priori* including employees, independent contractors and all others. The right to freedom of expression enshrined in paragraph 2, may only be restricted in limited circumstances.

79. States party to the ICCPR, including Australia, must uphold the right to freedom of expression.[65] Where it is alleged that this right has been infringed in a manner that is not provided by law and/or is not necessary for the respect of the rights or reputations of others or for the protection of national security or of public order, or of public health or morals, States parties must provide an effective means of challenge and (if the

[63] Provided such law also regulates common law employment.
[64] And has been since 1972. See: https://indicators.ohchr.org/.
[65] Indeed, Article 2 of the ICCPR states: *"1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant…"*

challenge is successful) an effective remedy. In this regard, Article 2(3) relevantly states:

"3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted."

80. As the Court will be aware, the High Court held, as long ago as 1908 that *"every statute is to be so interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with the established rules of international law."*[66] Over the course of the past forty years, courts have taken international agreements into consideration in the process of interpreting legislation even though the legislation is not directed to giving effect to a given agreement.[67] In other words, international obligations may arise under agreements that Australia has signed but which have not been enacted into Australian domestic law. Indeed, in *Chu Kheng Lim v Minister for Immigration and Local Government and Ethnic Affairs* (1992) 176 CLR 1, Brennan, Dean and Dawson JJ held: [68]

"We accept the proposition that the courts should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty."

81. In *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 Mason CJ and Deane J said: [69]

"…Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, *intends to give effect to Australia's obligations under international law… In this context, there are strong reasons for rejecting a narrow conception of ambiguity. If the language of*

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[66] *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* [1908] HCA 95 at 363 *per* O'Connor J.
[67] Pearce D.C. *Statutory Interpretation in Australia*, 10th Ed, LexisNexis, 2024, [3.73].
[68] At 38.
[69] At 287.

the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail."

82. It is plain that the FWA was enacted well after Australia signed (in 1972) and ratified (in 1980) the ICCPR. Given the existence of authorities pointing in both directions, it is possible to characterise the final limb of the definition of "workplace law" as ambiguous in the sense that it is susceptible of a construction which is consistent with the ICCPR's guarantee of freedom of expression to "everyone."

83. In contrast, 1R's and 4R's submissions that the Applicant has no workplace right for the purpose of the FWA and that there is no workplace law in the EOA for the purposes of the FWA seek to lead the Court to deprive Mr Gillham of his internationally-enshrined right to have his complaint of infringement of his right to freedom of expression by the MSO and Mr Ross (put as a claim in adverse action in respect of his workplace right not to be discriminated against on the basis of his political belief or activity) determined by a competent authority. While 1R's and 4R's submissions concerning these matters address the FWA (and, accordingly, the jurisdiction of the Federal Court), their submissions concerning Mr Gillham having no workplace right, if they were to succeed, would also eliminate his right to have his complaint against the MSO and Mr Ross determined by the Victorian Civil and Administrative Tribunal ("**VCAT**") pursuant to the EOA only. They would leave him entirely without the possibility of raising a claim of discrimination in respect of what the MSO and Mr Ross do not dispute at least "may" have been an expression of his genuinely held political belief.[70]

84. Accordingly, such construction of the FWA (in particular s.12) and indeed of the EOA runs entirely contrary to Australia's international obligation to uphold the right to freedom of expression as set out in Article 19 of the ICCPR.

85. To the extent that 1R and 4R may respond to the foregoing submission by suggesting that the Applicant may bring proceedings *against SSA* in VCAT, such response is wrong in both fact and law. It is wrong in fact given that it was the MSO and Mr Ross who discriminated against Mr Gillham by cancelling him[71] and then seeking to impose certain conditions upon him respectively, and not SSA. It is wrong in law because1R and 4R admit that SSA was acting as the MSO's agent.[72] Accordingly, the only appropriate respondent to Mr Gillham's primary complaint of discrimination is the *principal*, that is, the MSO.[73]

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[70] 1R and 4R Defence, [17](a).
[71] 1R and 4R Defence, [21](b).
[72] 1R and 4R Defence, [3](c)(v)(2).
[73] Dal Pont, G.E. *Law of Agency*, 4th Ed, LexisNexis, 2020 at [19.1] where the learned author states: *"Where an agent makes a contract with a third party on behalf of an existing disclosed principal pursuant to the agent's actual authority, generally speaking the principal alone can sue, and be sued by, the third party on that contract. A direct contractual relationship is thereby created between*

86. In support of the Applicant's above submissions concerning the importance of rejecting 1R's and 4R's interpretation of the FWA and the EOA because it seeks to evade Australia's international obligations, the Applicant further relies upon the conclusions and recommendations of the United Nations Special Rapporteur on Freedom of Opinion and Expression, Irene Khan, in her most recent report, promulgated on 23 August 2024 entitled "Global Threats to Freedom of Expression arising from the Conflict in Gaza."[74] On the basis of well-recognised principles of international law, from [85] of her report, Special Rapporteur Khan, relevantly concluded (and recommended) that:

"85. People have the right to express their views and to protest peacefully. States have a duty to respect, protect and facilitate those rights on an equal basis for all persons…

86….Blanket prohibition of Palestinian protests, slogans or symbols is inherently incompatible with international human rights law. Any restriction of freedom of expression must respect scrupulously the requirements of legality, legitimate aims and the necessity and proportionality of measures to achieve those aims, as set out in international law.

….

88. …The genocide in Gaza, the violation of human rights in the occupied Palestinian Territory and the failure of Israel to respect its international legal obligations, including the occupation of the Palestinian territory, are matters of global public interest. ***There is no scope for restricting freedom of expression on such matters.***

…

90. Not only States, but also organs of society, such as companies, universities and cultural and philanthropic organizations, have reneged on their responsibility to respect freedom of opinion and expression on a non-discriminatory basis.

…

A. Recommendations for States

92. States must respect, protect and fulfil the right to freedom of opinion and expression without discrimination against any individual or groups on the grounds of race, religion, ***political beliefs****, or other protected characteristics. Any restriction of expression, including in relation to counter-terrorism laws or anti-semitism, must*

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principal and third party by the acts of the agent, who does not become a contracting party, this being 'the very purpose and rationale of agency law'. Signing by an agent acting within authority is signing by the principal…the agent is 'the mere conduit for the principal and for that reason, the contract is that of the principal and not the agent.'

[74] https://www.ohchr.org/en/documents/thematic-reports/a79319-global-threats-freedom-expression-arising-conflict-gaza-report.

follow strictly the criteria set out in articles 19(3) and 20(2) of the International Covenant on Civil and Political Rights.

…

C. Recommendations for academic and cultural institutions

…

112. Cultural and artistic institutions and event sponsors should not discriminate against individuals or deny their participation purely on account of their support or political views regarding Israel or Palestine. The artistic community should reject the 'cancel culture', which chills artistic freedom and encourages discrimination, and use the arts as a means to promote intercultural understanding and fight stereotypes." (emphasis added).

87. For the FWA (and indeed the EOA) to be construed in the manner contended for by 1R and 4R, and the Applicant's case to be summarily dismissed or struck out would eschew the important principles of international law on which the Special Rapporteur's conclusions and recommendations are based and, indeed, her conclusions and recommendations.

F. Disposal and costs

88. In light of the foregoing, a number of matters are clear, namely:

(1) 1R's and 4R's contentions concerning the matter of "workplace right" cannot be determined on 17 March 2025 or otherwise in the absence of the Court hearing evidence;[75]

(2) Equally, at least the first separate question requires the hearing of evidence and ought not be listed for separate determination as the same would not effect much, if any, saving of Court time and the parties' (and public) costs;

(3) 1R's and 4R's contentions concerning the matter of "workplace law" do not come close to discharging the "heavy onus" upon them in the context of their applications for summary dismissal and strike-out. Indeed, their contentions are wrong, running contrary to the plain words of s.12 of the FWA, its objects and Explanatory Memorandum *and* Australia's international labour obligations and its broader international legal obligations as set out in Article 19 of the ICCPR.

[75] See [6] and [7](iv) above.

89. Accordingly, the Applicant respectfully submits that 1R's and 4R's Interlocutory Application falls to be dismissed in its entirety.

90. Subject to his making fuller submissions if and when required by the Court, the Applicant further respectfully submits that he should have his costs of defending the Interlocutory Application. In bringing their unmeritorious application, Rs have caused the hearing dates (commencing on 17 March 2025) to be lost and final hearing of this matter to be potentially significantly delayed.

Sheryn Omeri KC
Cloisters Chambers

3 March 2025