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Important Information

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IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY No NSD442 of 2026

KYLE DALTON SANDILANDS & ORS
Applicants

COMMONWEALTH BROADCASTING CORPORATION PTY LTD & ANOR
Respondents

APPLICANT'S WRITTEN SUBMISSIONS
concerning the procedural questions raised in Stewart J's associate's email of 2 April 2026

Introduction and overview

1. The Applicants (collectively, **Sandilands Applicants**):

   (a) continue to seek for this proceeding to be expedited;

   (b) oppose any order being made to the effect that this proceeding be heard together with, or "*travel with*", proceeding NSD507/2026 (**Henderson Proceeding**).

2. In short:

   (a) Expedition of this proceeding is necessary to preserve the Sandilands Applicants' claim for specific performance in exercise of the power historically exercised by courts of chancery (**specific performance in equity**) or in the exercise of the power conferred on this Court by s 237 of the **A**ustralian **C**onsumer **L**aw (**specific performance under the ACL**). Contrary to the Respondents' **Defence** (at [31(c)(i)]), it is not the law that a court does not have power to grant specific performance in equity in particular categories of case (whether absolutely or conditionally). And even if it were otherwise, that would not limit this court's power to order specific performance under the ACL. That said, it is likely that discretionary factors will arise over time that will militate against the grant of specific performance. Those factors are likely to increase in significance over time. Expedition is therefore warranted to avoid the claim for specific performance becoming substantially defeated through effluxion of time. What level of expedition should be ordered should be decided at a **c**ase **m**anagement **c**onference next week after the Sandilands Applicants file their responsive pleadings.

   (b) This proceeding and the Henderson Proceeding are of fundamentally different characters. This proceeding principally concerns how largely admitted conduct should be characterised for the purposes of a contract to which the applicants in the Henderson Proceeding are not parties. The Henderson Proceeding largely concerns whether the present Respondents contravened the *Fair Work Act 2009* (Cth). None of the Sandilands Applicants are parties to the Henderson Proceeding and none of the ultimate issues to be determined in that proceeding arise for determination in this proceeding. The Henderson Proceeding is just about money and does not have a claim to expedition. It would be unfair for the Sandilands Applicants to be a risk of being unable promptly to vindicate their position by the (likely slower moving) Henderson Proceeding.

The Sandilands Applicants have reasonable prospects of obtaining specific performance in equity or under the ACL but those prospects are likely to diminish over time. Expedition is therefore warranted

3. The parties have been directed to address the following by written submissions:

> What level of expedition or urgency there is in either [this proceeding or the Henderson Proceeding], but particularly having regard to what the prospects are of an order for specific performance being made in the Sandilands proceedings.

4. The Court should find that there are reasonable prospects of an order for specific performance being made in this proceeding but that those prospects are likely to diminish over time. The Court should therefore find that expedition of the Sandilands Proceeding is warranted.

5. There does not appear to be any suggestion that the Sandilands Applicants do not have reasonable prospects of demonstrating that the purported termination of the Sandilands BSA[1] was invalid. Nor could there be given the case that the Sandilands Applicants have pleaded in their **S**tatement **o**f **C**laim. In this regard, it is noteworthy that – in the Respondents' Defence – the Respondents seek to pivot away from the narrow allegations made in the purported "*Notification of Breach and Direction to Remedy*" and instead seek to rely on **additional conduct** not referred to that purported notice. The Sandilands Applicants say that that is not an available course for the Respondents having regard to the terms of the Sandilands BSA. But that is a matter for trial.

6. Common law damages are not an adequate remedy to vindicate the Sandilands Applicants' position that the Sandilands BSA has not been validly terminated and that, consequently, CBC's obligations under that agreement (such as its obligation under cl 6(f) to "*produce and promote the Program*" and to "*broadcast the Program on the Radio Station*") persist.

7. Indeed, common law damages are not even an available remedy to vindicate the Sandilands Applicants' position in this regard. It is elementary that an "*unaccepted*" repudiation (like the one that the Sandilands Applicants say was communicated by notice of termination purportedly given by CBC at about 12:03am on 18 March 2026) does not confer legal rights: see, eg, *Howard v Pickford Tool* [1951] 1 KB 417 (EWCA) at 421 per Asquith LJ.

8. And, in any event, even if common law damages were available, they are not apt wholly to vindicate the interest that the Sandilands Applicants seek to vindicate by specific performance.

9. In short, Mr Sandilands wants to get back on air as soon as possible so that he can be with his audience. The Sandilands Applicants seek that outcome through this proceeding.

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[1] In these submissions, terms defined in the Sandilands Applicants' Statement of Claim filed 7 April 2026 are used save that what is there defined as the "*BSA*" is referred to in this document as the Sandilands BSA.

10. As the NSW Court of Appeal explained in *Curro v Beyond* (1993) 30 NSWLR 337 at 343, broadcasters and performers like Mr Sandilands have a "*special interest*" in "*keeping their name and talents before the public*". Even if they were available, common law damages would not be an adequate remedy to vindicate that interest given, in particular, the difficulty of quantifying the value of such an interest in monetary terms.

11. Contrary to the Respondents' Defence (at [31(c)(i)]), it is not the law that a court of equity does not have the power (either absolutely or conditionally) to grant "*specific performance of a contract that involves the performance by one party of service to the other*" or one that requires "*continued cooperation*". On the contrary, it is now well-established that there is no rule against the grant of specific performance (or similar relief) in any particular category of case.

12. As Megarry J (later Megarry V-C) explained in *CH* ***Giles v Morris*** [1972] 1 WLR 307 (EWHC) at 318-319 in a passage that has been cited with approval in this Court,[2] the correct view is that, in every case where specific performance is sought:

> As is so often the case in equity, the matter is one of the balance of advantage and disadvantage in relation to the particular obligations in question.

13. That having been said, it is acknowledged that there has been what has been described in this Court as a "*historical reluctance*" to grant specific performance of employment contracts.[3]

14. However, as was explained by Bromberg J in ***Quinn*** *v Overland* (2010) 199 IR 40 at [97], that historical reluctance must be understood by reference to its original rationale:[4]

> That reluctance was based on two primary considerations – the need for mutual confidence and the perceived need to avoid constant supervision by a court. Courts have increasingly released that those considerations are no longer as applicable to modern day employment relations as historically was the case.

15. Thus, even if (which is denied) it were necessary or appropriate to seek to categorise the Sandilands BSA as being or not being an "*employment contract*" (or a "*contract that involves the performance by one party of service to the other*") and even if (which is denied) the Sandilands BSA were properly characterised as such a contract, it would not follow from that the specific performance should not be ordered.

16. One way of putting the point is to say that, to the extent that it has been suggested in the past that special or exceptional circumstances need to be shown to justify an order for specific performance of an employment contract, the burden of that requirement "*ought to be considered particularly onerous*".[5]

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[2] See *Quinn v Overland* (2010) 199 IR 40 at [99] per Bromberg J.

[3] *Quinn v Overland* (2010) 199 IR 40 at [97] per Bromberg J.

[4] *Quinn v Overland* (2010) 199 IR 40 at [97] per Bromberg J.

[5] *Quinn v Overland* (2010) 199 IR 40 at [104] per Bromberg J referring to *obiter* observations of the three justices of the High Court in *Byrne v Australian Airlines* (1995) 185 CLR 420.

17. A more precise way of putting the same point is to say that, while there may be particular kinds of contracts in respect of which the "*balance of advantage and disadvantage*" is more likely to tip in favour of refusing to grant specific performance (such that specific performance in such a case is the exception), the question for the Court is to decide where the "*balance of advantage and disadvantage*" lies in the particular case. The suggestion by the Respondents that there is a categorical rule or "*principle*" against an order for specific performance is itself wrong in principle, inconsistent with the proper approach to discretions in (or derived from) equity and is contrary to authority. The correct view is that, in a case like the present, the court has power to order specific performance in equity if it is established that the Sandilands BSA has not been validly terminated (or specific performance under the ACL if unconscionable conduct is established) but has a discretion not to do so in the circumstances of the particular case.

18. In the present case, there are no discretionary considerations that are decisive against an order for specific performance in equity.

19. As for the "*primary consideration*" referred to in Quinn as "*the need for mutual confidence*" (referred to in the Respondents' Defence at [31(c)((ii)(2)], [31(c)(iii)] as a "*require[ment]*" of "*personal co-operation*" and "*trust and mutual goodwill*"), that "*consideration*" is concerned with the practical utility of making an order for specific performance or ordering like relief. As the Supreme Court of New South Wales explained in ***Downe*** *v Sydney West Area Health Services* (2008) 71 NSWLR 633 at 690 [462],[6] that consideration does not justify refusing to make an order that would continue an employment relationship merely because there was an absence of "*mutual affection and friendship*" between the parties to the litigation that leads to the order. Rather, it is concerned with the "*common sense*" question of whether "*it is reasonable to expect that future co-operation to perform work*" (where that be necessary) is "*impossible*" (or, we would add, unlikely or practicable).

20. There is no basis on the material presently before the Court to conclude that the "*mutual confidence*" consideration, properly understood, will be decisive (or, for that matter, is likely to be weighty) against an order for specific performance. In this regard, it might be noted that nowhere in the Respondents' discursive 55-page Defence is any credible basis identified for thinking that – if specific performance is ordered – what is described in *Downe* as a "*proper working relationship*" would be impossible or unlikely to be capable of being achieved. The highest that the Defence goes (other than generalised assertions) is to assert (at [31(c)(iv)]) that, if specific performance is ordered, Mr Sandilands might do something that "*do[es] not amount to a breach of the [Sandilands] BSA*", might do something that is "*difficult to … constrain*" or might do something that risks "*publication of defamatory material, contempt of court, and regulatory action*".

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[6] Referring to *Printing and Kindred Industries Union v Vista Paper Products* [1991] 12 CAR 167 at 199.

21. Those assertions do not support a conclusion that the claim for specific performance is destined to fail or so weak as to not justify expedition (which is all that need be considered now):

    (a) The fact that an applicant might do something lawful is no basis for refusing specific performance;

    (b) CBC has ample power under cl 5.3(c) of the Sandilands BSA to "*constrain*" conduct that it does not like by giving "*reasonable directions… particular in regard to broadcasts and Program content*". On the material presently before the Court, there is no reason to think that such directions will not be efficacious – despite pages of allegations of an alleged course of "*serious misconduct*", the Respondents make no allegation that any of the Sandilands Applicants has in the past failed to comply with a reasonable direction given by CBC;

    (c) the risk of defamatory material, contempt of court and regulatory action is dealt with specifically in cl 6(d) of the Sandilands BSA by imposing a duty on CBC to monitor recordings and to Dump content that does not comply with applicable laws (including content that may give rise to a Claim for defamation or contempt of court). CBC is also given the "*final decision*" on what gives to air and the power under the Sandilands BSA to give a "*specific direction*" as to what "*specific material*" may be presented.

22. As for the "*constant supervision*" consideration (referred to in the Defence as the "*regular superintendence*" issue), again the law has moved on from that "*historical*" consideration being one that regarded as determinative (or presumptively determinative) against an order for specific performance or like relief. As this Court observed in *Quinn* at [98], "*[d]ismissed employees are regularly reinstated into their former employments without apparent consequent difficulties*". A similar observation may be made in relation to another classic historical case for regularly refusing specific performance or like relief: building contracts. An order of that nature is now the default order in some cases: see, eg, *Home Building Act 1989* (NSW) s 48MA. Again, without apparent difficulties.

23. This is not, of course, to say that the risk or likelihood of "*constant supervision*" cannot be a reason for refusing specific performance or like relief in a particular case.

24. To take as an example the famous case of *Lumley v Wagner* (1852) 1 De G M & G 604; 64 ER 1209, a court will ordinary refuse specifically to enforce a contract of an opera singer who promised to sing at a particular venue but no longer wishes to do so.[7]

25. The court will ordinarily take such a course not because it has no power to order specific performance of contracts of a particular kind but because courts of equity are pragmatic as

[7] *Lumley v Wagner* (1852) 1 De G M & G 604; 64 ER 1209.

to the exercise of their discretionary powers and as to the enforceability of its orders. Courts of equity do not usually act in vain.

26. As Meggary J (later Megarry V-C) explained in *Giles v Morris*:

> If a singer contracts to sing, there could no doubt be proceedings for committal if, ordered to sing, the singer remained obstinately dumb. But if instead the singer sang flat, or sharp, or too fast, or too slowly, or too loudly, or too quietly, or resorted to a dozen of the manifestations of temperament traditionally associated with some singers, the threat of committal would reveal itself as a most unsatisfactory weapon : for who could say whether the imperfections of performance were natural or self-induced? To make an order with such possibilities of evasion would be vain; and so the order will not be made.

27. Mr Sandilands is not akin to such a singer. He wants to be on air and to be back with audience. Unlike the singer in *Lumley v Wagner*, he would not be (metaphorically) dragged kicking and screaming to the microphone if an order for specific performance were made. He wants to be behind the microphone. And, unlike the example given in *Giles v Morris* (apparently based on *Lumley v Wagner*), there is no reason to think that an order for specific performance will constitute this Court as some kind of a reviewer (or censor) of Mr Sandilands' work. The Sandilands BSA provides ample provision for dealing with the content to be prepared and presented by Mr Sandilands and gives the final say to CBC on what is to be broadcast.

28. Another point should be made about the supposed "*principle*" that is said by the Respondents to deny the Sandilands Applicants specific performance in equity – even if, which is denied, there were such a principle it would not apply to specific performance under the ACL.[8] This seems to be common ground: the Respondents' pleading concerning the "*principle*" that is said to apply to defeat the Sandilands Applicants' claim for specific performance in equity (Defence at [31(c)]) is not repeated in relation to the claim for specific performance under the ACL (Defence at [39]).

29. All of the above having been said, the Sandilands Applicants accept that it is likely that discretionary factors will arise over time that will militate against the making of an order for specific performance (whether in equity or under the ACL). Put simply, as time goes on, there is increased risk that KIIS FM will "*move on*" from Mr Sandilands such that it could be argued by the Respondent that it is impracticable or unfair to expect CBC to "*unscramble the egg*"

30. For example, if CBC were to appoint a "*permanent*" replacement for Mr Sandilands and that replacement built a personal following, it could be said against the Sandilands Applicants that specific performance would be unfair to the replacement and, depending on the circumstances, difficult or impracticable to carry out. That is particularly so if Mr Sandilands' audience migrates to other programs or forms of media. The strength of such a submission

[8] See, eg, *Murphy v Overton Investments* (2004) 216 CLR 388 at 407 [44].

will obviously increase over time and may eventually be fatal to the claim for specific performance.

31. The upshot of the above is:

    (a) the Sandilands Applicants have reasonable prospects of obtaining an order for specific performance or like relief in equity or under the ACL (albeit that claim for relief appears likely to be hotly contested);

    (b) those prospects are likely to diminish over time due to the likelihood that discretionary reasons for refusing specific performance increasing;

    (c) an appropriate level of expedition should be ordered so that Sandilands Applicants' claim for specific performance is not rendered nugatory and is not significantly diminished by effluxion of time.

32. That (of course) leaves a question of what level of expedition (or urgency) is warranted in the particular case.

33. It is respectfully submitted that the Court is not now in a position realistically to determine that question at tomorrow's CMC but is likely to be within short order.

34. Since being served with the Respondents pleadings (both in this proceeding and in the Henderson Proceeding) at about 6:20pm on Tuesday night, the Sandilands Applicants legal team have been working around the clock to prepare responsive pleadings and finalise the Sandilands Applicants' evidence in chief. Both exercises are well progressed but unlikely to be completed before the CMC tomorrow. It is anticipated that they will be complete by Wednesday of next week (five business days after receipt of the Respondents' pleadings).

35. As matters presently stand, it is anticipated that the Sandilands Applicants will admit that Mr Sandilands engaged in all the conduct alleged against him but will deny that the Respondents are entitled to rely upon conduct not referred to in the purported Notice to justify the Purported Termination and, in any event, deny that any of the conduct that Mr Sandilands engaged in meets the contractual description of "*serious misconduct*". It is also anticipated that the Sandilands Applicants will admit the CBC validly terminated the Henderson BSA.

36. Assuming that those admissions are made, the issues for determination in this proceeding will be reasonably confined, notwithstanding the Respondents' attempts to introduce the Additional Conduct as a justification for the Purported Termination. It seems unlikely, for example, that there will be duelling lay witnesses about what was and was not said or done by Mr Sandilands on particular occasions. That conduct will likely not be in issue. Rather, it appears that the key issue for determination will be the correct legal characterisation of admitted or established conduct.

37. In light of the above, it is respectfully submitted that the most appropriate procedural course is to order the Sandilands Applicants to file and serve their defence to cross-claim and any reply by Wednesday of next week with the proceeding returned for further case management on the following Friday.

No order should be made to the effect that this proceeding be heard together with the Henderson Proceeding

38. This proceeding and the Henderson Proceeding two proceedings are of a fundamentally different character.

39. As has already been noted, the key issue for determination in this proceeding is likely to be the characterisation of Mr Sandilands' conduct for the purposes of the Sandilands BSA. That determination will be of no moment to the Henderson Proceeding.

40. The Henderson Proceedings is, principally, a claim that CBC as contravened s 340 of the FW Act. Success in such a claim will require establishment of the following: (i) that "*adverse action*" for the purposes of Item 3 of s 342(1) of the FW Act was taken against the applicants by CBC; (ii) that Ms Henderson exercised or proposed to exercise a "*workplace right*" within ss 341(1)(a) and/or (b) of the FW Act; and (iii) one or more of the substantial and operative reasons for the adverse action were the proscribed ones pleaded: see ***TWU v Qantas*** *Airways Limited* (2021) 308 IR 244 at [208] and [216]-[224] per Lee J. All these elements are put in issue in CBC's defence.

41. None of these issues are material to the determination of the Sandilands Proceeding.

42. The Henderson Proceeding also includes a "*contract claim*" that alleges that the termination of the Henderson BSA was invalid.

43. Again, the determination of that issue is not material to the determination of the Sandilands Proceeding. The Sandilands Applicants' SOC is agnostic as to whether the termination of the Henderson BSA was or was not valid (see SOC at [12]). While the cross-claim that has been filed by the Respondents does raise the question of the validity of the termination of the Henderson BSA, as has already been noted, the Sandilands Applicants are likely to admit that the Henderson BSA was validly terminated with the result that there will be no issue for determination as between the Sandilands Applicants and the Respondents as to that question.

44. It follows that there is no necessary reason why the two proceedings should be heard together.

45. Nor would that be a desirable or fair course in the interests of justice.

46. The Sandilands Applicants seek an expeditious determination of their claims and have been moving heaven and earth with a view to obtaining such a determination.

47. They commenced proceedings just two days after the Purported Determination, sought expedition in their originating process and are proposing to submit to an order that they

serve a defence to cross-claim and any reply within just five business days of receiving the Respondents' pleadings.

48. In contrast, the applicants in the Henderson Proceedings (**Henderson Applicants**) are moving somewhat slower. They commenced proceedings about four weeks after the purported termination of the Henderson BSA. They did not seek expedition. On several occasions, there have been failures on the part of the Henderson Applicants to respond to the Sandilands Applicants' correspondence or delays in doing so.[9]

49. That foregoing is not said to criticise – there may be good reasons as to why the Henderson Applicants are prosecuting their case slower than the Sandliands Applicants are and good reasons as to where there has been absences or delays in responding to the Sandilands Applicants' correspondence. But the short history of the two sets of proceedings confirms that, at least so far, the Sandilands Applicants are in a position to and wish to proceed to seek to vindicate their claims with a significantly greater degree of alacrity than the Henderson Applicants apparently can or wish to. Absent good reason (and there is none here), the Sandilands Applicants should not be put at risk that the vindication of their position will be delayed by reason of delays sourced in the Henderson Applicants' camp.

50. In those circumstances and in the circumstances otherwise explained above, there should be no order that this proceeding be heard with or "*travel together*" with the Henderson Proceeding.

23 April 2026

SCOTT ROBERTSON

PHILIP BONCARDO

PAUL FARRELL

[9] See affidavit of Kevin Lynch sworn 23 April 2026.