

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

B 23 of 2014

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

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BETWEEN:

Construction, Forestry, Mining and Energy Union
Appellant

and

BHP Coal Pty Ltd
Respondent

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APPELLANT'S SUBMISSIONS

Part I: Suitable For Publication

1. This submission is in a form suitable for publication on the internet.

Part II: Issues Presented By the Appeal

- 30 2. Can an employer avoid liability under s.346(b) of the *Fair Work Act 2009* (Cth) (**FW Act**) for adverse action taken against an employee who has engaged in industrial activity within the meaning of clauses (iii) or (v) in s.347(b) of the FW Act, by characterizing that activity or some part of it as being in breach of a policy or code of conduct promulgated by the employer?
3. Is the decision of the Full Court with respect to the alleged contravention of s.346(b) of the FW Act in respect of industrial activity under s.347(b)(iii) of the FW Act contrary to the legislative purpose and objects of the general protections provisions in Part 3-1 of the FW Act, and to the reasoning of the High Court in *Bendigo Regional*

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*Institute of Technical and Further Education v Barclay*¹ (**Barclay**) and *General Motors Holding v Bowling*² (**Bowling**)?

4. Is the decision of the majority of the Full Court (Dowsett and Flick JJ) with respect to the alleged contravention of s.346(b) of the FW Act in respect of industrial activity under s.347(b)(v) of the FW Act contrary to the legislative purpose and objects of the general protections provisions in Part 3-1 of the FW Act, and to the reasoning of the High Court in *Barclay* and *Bowling*?
- 10 5. Did of the majority of the Full Court (Dowsett and Flick JJ) with respect to s. 347(b)(v) of the FW Act, and the Full Court with respect to s. 347(b)(iii) of the FW Act, err in holding that it was not open to the primary judge to find in all the circumstances that the employer dismissed Mr Doevendans because he engaged in industrial activity?

Part III: *Judiciary Act 1903*

6. The appellant has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* and has concluded that such a notice is not required.

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Part IV: Citations

7. The reasons for judgment of the Full Court of the Federal Court of Australia, from which the appeal is brought, are unreported. Their medium neutral citation is [2013] FCAFC 132.
8. The reasons for judgment of the primary judge of the Federal Court are reported as *Construction Forestry Mining and Energy Union v BHP Coal Pty Ltd* (2012) 228 IR 195; [2012] FCA 1218.

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¹ (2012) 86 ALJR 1044; (2012) 290 ALR 647.

² (1976) 51 ALJR 235; (1976) 12 ALR 605.

Part V: Relevant Facts

9. Mr Henk Doevendans was employed by the respondent (**BHP**) at the Saraji coal mine in North Queensland (**the mine**) as a machinery operator for 24 years. He was summarily dismissed by BHP on 21 May 2012. Mr Doevendans was, during his employment, a member of the applicant (**CFMEU**).
10. In 2011 and 2012, CFMEU members at the mine ceased work on a number of occasions in support of negotiations for a new industrial agreement. The stoppages were protected industrial action within the meaning of s. 408(a) of the FW Act.
11. The local branch of the CFMEU, known as the Lodge, organised a peaceful protest (**the protest**) at the side of the road leading to the mine during the stoppages. Relevantly, the Lodge obtained a police permit for the protest on 16, 17 and 19 February 2012. On those dates the participants in the protest at all material times stood 3m back from the road behind water bollards, in conformity with the permit.
12. The Lodge purchased a range of signs for the purpose of the protest. Some of these signs bore the words *No Principles, Scabs, No Guts*. Officials of the Lodge took the signs to the protest. They encouraged union members to pick up the signs and hold them so that they could be seen by cars driving by. The police attended the protest and made no complaint about any of the signs.
13. On 16, 17 and 19 February 2012 Mr Doevendans attended the protest and, whilst in attendance, held up various signs, including (on several occasions) a *No Principles, Scabs, No Guts* sign (**the sign**).
14. In March 2012, Mr Doevendans' conduct in holding and waving the sign was investigated by Mr Greg Hamilton, BHP's human resources manager at the mine. He reported the outcome of his investigation to Mr Geoff Brick, the manager of the mine. Thereafter, Mr Brick and Mr Hamilton met with Mr Doevendans on 12 April 2012, and gave him a letter setting out allegations of misconduct in breach of the BMA Workplace Conduct Policy,³ BMA's Charter Values and expected workplace

³ BMA refers to BHP Billiton Mitsubishi Alliance, which owns the mine.

behaviours. The allegations all relate to Mr Doevendans' conduct in holding and waving the sign at the protest.⁴

15. Further meetings were held between Mr Brick and Mr Doevendans in the following weeks and written submissions were made on behalf of Mr Doevendans by his union representatives.⁵

16. Finally, Mr Doevendans was summarily dismissed by the respondent on 21 May 2012. Mr Brick gave Mr Doevendans a letter of dismissal on that date, setting out the reason for dismissal.⁶ The reasons were based on Mr Doevendans' conduct in holding and waving the sign at the protest. Mr Brick said that this conduct was in breach of the Conduct policy and Charter Values referred to in paragraph 13 above.

17. Mr Brick's evidence at the trial about his reasons for dismissing Mr Doevendans is extracted by the primary judge at [28] and [30] of his reasons for Judgment. Significantly, the list of matters set out in [28] upon which Mr Brick said his decision depended, makes prominent reference to the holding and waiving of the sign. He then said that his decision depended on his assessment of ALL of all of factors numbered (a) to (n) and that if any one or more of those factors had not been present he may have come to a different decision. The holding and waving of the scab sign was therefore clearly a substantial and operative reason in the dismissal.

18. The primary judge also noted at [30] of the Reasons for Judgment, Mr Brick's further evidence that the fact that Mr Doevendans was engaged in industrial action or activity did not play any part in his decision making process.

History of the litigation

19. The appellant claimed at trial that BHP had contravened s.346(b) of the FW Act, by taking adverse action against Mr Doevendans because he had engaged in industrial activity within the meaning of s.347(b)(iii) and (v).

⁴ The letter is set out at [15] in the Reasons for Judgment of the primary judge.

⁵ These events are recounted by the primary judge at [19]-[27] of his Reasons for Judgment.

⁶ The letter is extracted at [29] of the primary judge's Reasons for Judgment.

20. By definition, dismissal is adverse action.⁷ Section 347(b)(iii) covers participation in a lawful activity organised or promoted by an industrial association. Section 347(b)(v) covers the representation or advancement of the views, claims or interests of an industrial association.
21. The central controversy in the case was about the employer's reason for the dismissal.
22. The primary judge found that Mr Doevendans was dismissed *because* while at the protest he had held up and waved the union sign at passing motorists.⁸ This finding was made on the basis of Brick's own evidence set out at [28]. This finding was not challenged in the appeal to the Full Court.
23. The primary judge found that the holding and waving of the sign constituted participation in a lawful activity organised by an industrial association within the meaning of s. 347(b)(iii) of the FW Act. The primary judge further found that since a reason for his dismissal was that he held and waved the sign, Mr Doevendans was dismissed because he participated in such a lawful activity in contravention of s. 346(b) of the FW Act.
24. The primary judge also found at [123] that, in holding and waving the sign, Mr Doevendans was representing and advancing the views and interests of an industrial association within the meaning of s. 347(b)(v) of the FW Act.⁹ This finding was not challenged on appeal to the Full Court. The primary judge further found at [123] that, as Mr Doevendans was dismissed for holding and waving the sign, Mr Doevendans was dismissed because he represented or advanced the views and interests of an industrial association in contravention of s. 346(b) of the FW Act.¹⁰
25. On appeal, the majority of the Full Court (Dowsett and Flick JJ) found that Mr Doevendans was not dismissed for participating in a lawful activity of the union

⁷ Adverse action is defined in the table in s.342(1) of the FW Act, and relevant for present purposes is item 1, paragraph (a) in the table.

⁸ Reasons for Judgment at [36]

⁹ Reasons for Judgment at [114]

¹⁰ Reasons for Judgment at [123]

(s.347(b)(iii)) or for representing or advancing the views and interests of the union (s.347(b)(v)).

26. Their Honours noted the evidence of Mr Brick that Mr Doevendans' participation in industrial action or activity did not play any part in his decision making process, and that the primary judge said he accepted that evidence.¹¹ Their Honours held that in view of that evidence, it was not open to his Honour to find a contravention for the alleged prohibited reason.¹²

10 27. Kenny J agreed with the other members of the Full Court that there was no contravention of s.346(b) in relation to s.347(b)(iii) because of the accepted evidence of Mr Brick referred to in the previous paragraph.¹³

28. However, her Honour found that the primary Judge's finding of contravention of s.346(b) with respect to s.347(b)(v) was correct. Her Honour found that once it was accepted that:

(a) in holding and waving the sign Mr Doevendans was representing or advancing the views of the union; and

20 (b) Mr Doevendans was dismissed because he held and waved the sign;

it followed that he was dismissed because he represented and advanced the views and interests of an industrial association.

Part VI: Argument

29. Part 3-1 of the FW Act contains what are described as General Protections. The objects of Pt 3-1 set out in s.336(1), reveal that Parliament sought to protect the rights conferred by the Part and to provide for persons on whom those rights are conferred effective relief from being discriminated against, victimised or otherwise adversely affected by reason of the holding or exercising of those rights. The rights with which
30 the Part deals with are:

¹¹ Reasons for Judgment at [36]

¹² Full Court Reasons for Judgment, at [13] per Dowsett J and [108] per Flick J

¹³ Full Court Reasons for Judgment, at [56]-[57]

- (a) the workplace rights conferred by Div 3;
- (b) the rights of association and participation in the industrial activities conferred by Div 4; and
- (c) anti-discrimination rights and other protections conferred by Divs 5 and 6.

30. Section 346 is in Division 4 which deals with freedom of association. Protection for participation in industrial organisations such as trade unions, and for particular forms of industrial activity, has been a feature of Commonwealth industrial legislation since 1904. The antecedents of these freedom of association provisions was traced back to 1904, in both the joint judgments in *Barclay*.¹⁴

31. These provisions are clearly beneficial and in accordance with principle, should be given a generous construction in aid of the benefits they seek to bestow.

32. Section 346(a) prohibits the taking of adverse action because a person is or is not a member or officer of an industrial association. Section 346(b) prohibits the taking of adverse action because a person engages in industrial activity within the meaning of paragraphs (a) or (b) of s.347. Relevantly, s. 347(b)(iii) protects participation in a lawful activity organised or promoted by an industrial association, and s. 347(b)(v) protects conduct of representing or advancing the views, claims and interests of an industrial association.

33. In *Barclay*, the task of a court in a proceedings alleging a contravention of s. 346(b) of the FW Act, was identified as being to determine whether adverse action was taken by an employer against an employee, and if so, why the adverse action was taken and whether it was for a prohibited reason or reasons which include a prohibited reason.¹⁵

34. It is a question of fact to be determined in light of all the facts established in the proceeding.¹⁶ French CJ and Crennan J held that it was a question of fact to be answered in light of all of the facts established in the proceedings and that the direct

¹⁴ At [46] – [48] per French CJ and Crennan J and at [73]-[93] per Gummow and Hayne JJ.

¹⁵ At [5] and [44] per French CJ and Crennan J

¹⁶ At [45] per French CJ and Crennan J

evidence of the decision maker is significant but must be weighed against other evidence or objective facts.

35. Justices Gummow and Hayne rejected the objective-subjective dichotomy as an illusory frame of reference and went on to hold that the direct evidence of the decision maker was to be balanced against other evidence and the overall facts and circumstances of the case in order to identify why the adverse action was taken.¹⁷

36. Justices Gummow and Hayne referred at [79] to the judgment of Barton ACJ in *Pearce*, with whom Gavan Duffy and Rich JJ agreed, in which he stated:

10 *“mere declarations as to the mental state that prompted the employer’s action are entitled to little or no regard.”*

37. That passage was explained by French CJ and Crennan J as meaning that mere declarations of innocent reason or intent in taking adverse action may not satisfy the onus on the employer if contrary inferences are available on the facts.¹⁸

38. In the circumstances of this case, Mr Doevendans was participating in a lawful activity organised by the union, within the meaning of s.347(b)(iii), when he attended at the protest and held up and waved the sign provided by the union. Further, in holding up and exhibiting the sign prepared by the union, Mr Doevendans was representing and advancing the views and interests of the union within the meaning of s.347(b)(v).

39. It is not in dispute that the holding and waving of the sign was a substantial and operative reason for Mr Brick’s decision to dismiss Mr Doevendans.

40. In his evidence, Mr Brick sought to distinguish the holding and waving of the union sign from the participation in the protest organised by the union. Upon a proper characterization of Mr Doevendans’ conduct at the protest, the distinction sought to be made by Mr Brick is unsustainable.

¹⁷ At [121], [126] and [127].

¹⁸ At [54]

41. This is the very situation which the judgments in *Barclay* warn against.

42. Mr Brick's evidence of his reasons for the termination was at odds with the objective facts relating to the conduct of the protest. The credence and weight to be given to his evidence had to be weighed against those objective facts. Once it was accepted that Mr Doevendans was dismissed for this very conduct, the findings of the primary judge:

10 (a) at that he was dismissed because he represented or advanced the views and interests of an industrial association; and

(b) at because he participated in a lawful activity organised by an industrial association,

were both open and was correct. There was no basis to overturn these findings of fact.

43. The error made by the Full Court was to treat as determinative the disavowal by Mr Brick that participation in industrial action or activity played any part in his decision. The Primary Judge's finding that the holding and waving of the "scab" sign was part of the protest was not challenged in the appeal to the Full Court. Yet the Full Court did not seek to resolve the conflict between that finding and Mr Brick's disavowal.

20 44. Dowsett J held that once Mr Brick's disavowal was accepted, the fact that the stated reasons for dismissal fell within the categories of protected conduct under s.347, was irrelevant.¹⁹

45. Kenny J held that the disavowal meant that Mr Doevendans was dismissed for what he did in the course of participating in the protest but that that was not equivalent to dismissing him because he participated in the protest.²⁰

46. Flick J held that the acceptance of the disavowal excluded any prospect of a finding of contravention.²¹

¹⁹ Full Court Reasons for Judgment, at [13]

²⁰ Full Court Reasons for Judgment, at [56]

²¹ Full Court Reasons for Judgment, at [108]

47. None of their Honours went on, as they should have in accordance with *Barclay*, to consider whether that subjective evidence of Mr Brick was consistent with all the circumstances of the case including the objective facts, and whether it was open to an employer to dissemble protected activities in this way in order to escape liability.

48. The majority erroneously approached the reasons for the adverse action by reference to a purely subjective frame of reference. They wrongly proceeded on the basis that the decision maker's subjective characterisation of his reasons was determinative of the outcome. Such an approach is inconsistent with the reasoning in *Barclay* and has the unjustified effect of substantially narrowing the scope of the protections in Part 3-1.

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49. In circumstances where Mr Brick had explicitly nominated the holding and waiving of the "scab" sign as an indispensable part of the reasons for the dismissal, the disavowal cannot be taken at face value and must be assessed against the reasons positively asserted by Mr Brick for his action and the objective facts of the union protest. So much is required by the judgments in *Barclay*.

50. Once it was accepted that Mr Doevendans was dismissed for this conduct which was an integral part of the industrial activity protected under s.347(b), the findings of the primary judge that he was dismissed because he represented or advanced the views and interests of an industrial association²² and that he was dismissed because he participated in a lawful activity organised by an industrial association²³ were both open and was correct. There was no basis to overturn these findings of fact.

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51. The Appellant submits that it is not permissible or effective under the Act for an employer to recharacterise the reason for taking adverse action in terms that are designed to avoid the operation of the Act. To allow it would defeat the effective operation of this remedial legislation.

²² at [123]

²³ at [114]

52. Yet that is precisely what the employer has sought to do in this case and it was accepted by the Full Court.

53. The approach of the Full Court enables artificial and impermissible distinctions to be drawn between conduct which is explicitly protected by the legislation and particular attributes of that conduct which an employer finds to be unpalatable.

10 54. In relation to this case, the approach of Full Court enables BHP to avoid liability under s.346(b) of the *Fair Work Act 2009* (Cth) (FW Act) for adverse action taken against Mr Doevendans who has engaged in industrial activity if it takes adverse action because of attributes of the conduct which it regards as being unacceptable.

55. Such an outcome is inconsistent with the beneficial interpretation which this legislation should receive, and should be rejected.

56. The primary judge was required to, and did, weigh all parts of the evidence given by Mr Brick, and all of the relevant facts and circumstances, for the purpose of determining whether adverse action was taken because Mr Doevendans engaged in industrial activity.

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57. It is respectfully submitted that the primary judge was correct in rejecting the distinction between participation in the protest and holding and waving the sign. The industrial association purchased the signs for the purpose of the protest, brought the signs to the protest, and encouraged attendees to hold the signs up at the protest. The holding and waving of the signs was an integral part of the lawful industrial activity. The scope of the protections in ss. 347(b)(i) – (v) ought not be read in a narrow way. It was, at the least, open to the primary judge to find that dismissal for holding and waving the union's sign, in all the circumstances, constituted dismissal because of participation in a lawful industrial activity. Accordingly there was no basis to disturb the primary judge's finding in this regard.

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Part VII: Legislation

58. The applicable legislative provisions, as they existed at the time of the hearing before the primary judge, are attached to this submission as an annexure. Those provisions remain in force.

Part VIII: Orders Sought

59. The appellant seeks orders that:

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- (1) the appeal be allowed;
 - (2) orders 1, 2 and 3 made by the Full Court on 13 December 2013 be set aside;
 - (3) the appeal to the Full Court be dismissed; and
 - (4) such further orders as appear appropriate to the Court.

Part IX: Time Estimate

60. It is estimated that the presentation of the appellant's oral argument (including reply) will take approximately three hours.

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Dated: 20 June 2014



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Division 2—Object of this Act

3 Object of this Act

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 are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
- (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
- (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
- (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
- (e) 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; and
- (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and
- (g) acknowledging the special circumstances of small and medium-sized businesses.

336 Objects of this Part

The objects of this Part are as follows:

- (a) to protect workplace rights;
- (b) to protect freedom of association by ensuring that persons are:
 - (i) free to become, or not become, members of industrial associations; and
 - (ii) free to be represented, or not represented, by industrial associations; and
 - (iii) free to participate, or not participate, in lawful industrial activities;
- (c) to provide protection from workplace discrimination;
- (d) to provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of this Part.

Division 4—Industrial activities

346 Protection

A person must not take adverse action against another person because the other person:

- (a) is or is not, or was or was not, an officer or member of an industrial association; or
- (b) engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of paragraph 347(a) or (b); or
- (c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of paragraphs 347(c) to (g).

Note: This section is a civil remedy provision (see Part 4-1).

347 Meaning of *engages in industrial activity*

A person *engages in industrial activity* if the person:

- (a) becomes or does not become, or remains or ceases to be, an officer or member of an industrial association; or
- (b) does, or does not:
 - (i) become involved in establishing an industrial association; or
 - (ii) organise or promote a lawful activity for, or on behalf of, an industrial association; or
 - (iii) encourage, or participate in, a lawful activity organised or promoted by an industrial association; or
 - (iv) comply with a lawful request made by, or requirement of, an industrial association; or
 - (v) represent or advance the views, claims or interests of an industrial association; or
 - (vi) pay a fee (however described) to an industrial association, or to someone in lieu of an industrial association; or
 - (vii) seek to be represented by an industrial association; or
- (c) organises or promotes an unlawful activity for, or on behalf of, an industrial association; or

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- (d) encourages, or participates in, an unlawful activity organised or promoted by an industrial association; or
- (e) complies with an unlawful request made by, or requirement of, an industrial association; or
- (f) takes part in industrial action; or
- (g) makes a payment:
 - (i) that, because of Division 9 of Part 3-3 (which deals with payments relating to periods of industrial action), an employer must not pay; or
 - (ii) to which an employee is not entitled because of that Division.

348 Coercion

A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to engage in industrial activity.

Note: This section is a civil remedy provision (see Part 4-1).

349 Misrepresentations

- (1) A person must not knowingly or recklessly make a false or misleading representation about either of the following:
 - (a) another person's obligation to engage in industrial activity;
 - (b) another person's obligation to disclose whether he or she, or a third person:
 - (i) is or is not, or was or was not, an officer or member of an industrial association; or
 - (ii) is or is not engaging, or has or has not engaged, in industrial activity.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (2) Subsection (1) does not apply if the person to whom the representation is made would not be expected to rely on it.

350 Inducements—membership action

- (1) An employer must not induce an employee to take, or propose to take, membership action.

Note: This subsection is a civil remedy provision (see Part 4-1).

Division 7—Ancillary rules

360 Multiple reasons for action

For the purposes of this Part, a person takes action for a particular reason if the reasons for the action include that reason.

361 Reason for action to be presumed unless proved otherwise

- (1) If:
 - (a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and
 - (b) taking that action for that reason or with that intent would constitute a contravention of this Part;it is presumed, in proceedings arising from the application, that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.
- (2) Subsection (1) does not apply in relation to orders for an interim injunction.

362 Advising, encouraging, inciting or coercing action

- (1) If:
 - (a) for a particular reason (the *first person's reason*), a person advises, encourages or incites, or takes any action with intent to coerce, a second person to take action; and
 - (b) the action, if taken by the second person for the first person's reason, would contravene a provision of this Part;the first person is taken to have contravened the provision.
- (2) Subsection (1) does not limit section 550.

363 Actions of industrial associations

- (1) For the purposes of this Part, each of the following is taken to be action of an industrial association:
 - (a) action taken by the committee of management of the industrial association;