FORM 27E

(Rule 44.0.05.5)

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

B 23 of 2014

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:

Construction, Forestry, Mining and Energy Union

Appellant

and

BHP Coal Pty Ltd

Respondent

REPLY

APPELLANT'S ~~SUBMISSIONS~~

Part I: Suitable For Publication

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

Part II:

2. BHP's submissions ("**RS**") at [2] contain a false premise. There was no finding by the primary judge that Mr Doevendans in holding and waving the union sign at the protest had "*misconducted himself*". The findings were as to the reasons for the dismissal, not whether the conduct giving rise to the dismissal constituted misconduct.

3. The issue as framed by BHP at RS [3](b) does not arise in the appeal.

4. As to RS [4], the issue of employer 'characterisation' of reasons is squarely raised by the appeal, as elaborated in the Appellant's Submissions at paragraph 2. If an employer, as in the present case, takes action because of some attribute of protected industrial activity which it finds objectionable, or because the industrial activity contravenes a policy of the Respondent, does this *necessarily* mean, as the majority of the Full Court found, that the employer escapes liability?

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5. Throughout its submissions, BHP proceeds on the erroneous basis that a finding that "*the fact that Mr Doevendans was engaged in industrial activity did not play any part in his decision making process*"[1] is the same as a finding that "*Mr Brick did not dismiss Mr Doevendans because he engaged in industrial activity*". The difference between the two propositions is fundamental to a proper understanding of the primary judge's reasoning.

6. As a consequence, BHP does not engage with the fundamental error in the reasoning of the Full Court, which was to treat the subjective characterisation by Mr Brick of his reasons as *necessarily* determinative and exculpatory. As pointed out in the Appellant's Submissions (an issue not addressed by BHP), this has the consequence that the degree of protection afforded under Part 3-1 will depend entirely upon the subjective state of mind of the decision maker.

7. BHP's submissions generally proceed on the false premise that the CFMEU's case is that a person engaging in industrial activity is thereby immunized from disciplinary action in respect of any conduct "associated with" that industrial activity[2].

8. BHP also purports to create a new test, that in order to establish that adverse action was because of industrial activity, the industrial activity must not only be a "*substantial and operative reason*" but it must also be an "*<u>independent</u> operative reason*"[3]. Whilst it is unclear what this means, it is inconsistent with the statutory test as explained in *Barclay* and *Bowling*.

<u>Relevant Facts</u>

9. Contrary to the submissions in RS [6], the primary judge's findings went no further than that Mr Doevendans attended the protest, and at the request of the union picked up and waved at passing cars various signs which were already on display, including the 'scab sign'. The relevant findings of the primary judge as to the reasons for the adverse action are at [36] of the primary judgment.

<u>Respondent's Arguments Concerning Barclay</u>

10. Contrary to the submissions in RS [12], the facts in *Barclay* are significantly distinguishable from the present cases because the conduct to which offence was there

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1 Primary decision at [30].
2 See for example RS [24].
3 RS [10a].

taken, was only able to be protected (if at all) by the Act because of the attribute of the actor.

11. It was for that reason that the decision-maker, Dr Harvey was able to say that she would have taken the same action in similar circumstances against a person who was not a member or officer of the union (see Barclay at [28]).

12. If Mr Brick said the same thing here it would not exculpate him because in this case it is the action itself which is protected independently of any protected attribute of Mr Doevendans.

13. This is not a case where the decision maker's reason can be separated from the prohibited reason, such as in *Barclay*.

14. This is a case where the employer has explicitly nominated the actual conduct which is protected by the Act as the conduct which formed an indispensable part of the reasons for dismissal. Mr Brick's disavowal does not avoid that.

15. The authorities cited at RS [27] do not support the proposition for which they are advanced. They do not support the conclusion that industrial activity will not be protected if the employer finds some aspect of that activity to be unacceptable. They all involve a search for the *real reasons* for the adverse action. For example, in *Cuevas v Freeman* Motors Ltd[4], where the protection to be afforded to a union delegate was considered by the then Australian Industrial Court. The Full Court held in respect of the predecessor provision, s. 5(1) of the *Conciliation and Arbitration Act1905*[5] that it:

> *..does not purport to prevent dismissal of a shop steward if he, being a shop steward, indulges in conduct in that capacity to which the employer objects, unless it is conduct specified in s. 5(1)(f).*
>
> (emphasis added)

16. BHP wrongly characterizes the Appellant's argument at RS [28] and [29]. The Appellant has never suggested that, if adverse action is taken against an employee who is engaging in industrial activity, there "*could not be any other reason for the adverse action*".

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4 (1975) 25 FLR 67 at 78

5 Section 5(1)(f) of the *Conciliation and Arbitration Act 1904* was a predecessor to s. 347(b). It is conveniently set out in full in *Barclay* at [82].

17. The extracts from the reasoning of the Full Court set out at RS [33], with the exception of 33(e), are consistent with the position advanced by the CFMEU. That is, it is for the primary judge, having regard to all of the evidence, to determine whether engagement in industrial activity was a substantial and operative reason for the adverse action. However the Full Court went significantly further than these observations, and fell into error, by regarding the subjective characterisation of the reasons by the decision maker as necessarily determinative of that question.

18. The error of the Respondent's approach at RS [35] – [37] is simply demonstrated. If an employee held up a union banner at a protest which said that the employer should pay its employees higher wages, the employer could legitimately, under BHP's '*balance*', sack the employee for disloyalty or for publicly criticizing the employer.[6] On BHP's '*balanced*' approach disciplinary action could legitimately be taken in those circumstances and the purpose of Part 3-1 would be defeated.

19. The Respondent's purported comparison of two employees, guilty of the same misconduct, is at a level of generalization which is entirely unhelpful. Thus for example, two employees may both be guilty of an unauthorised absence from work, this would generally constitute misconduct. However the unauthorised absence may be *protected industrial action* within the meaning of s.341(2)(c) of the FW Act. If so the employee would be protected from adverse action. If the unauthorised absence is not protected industrial action, the employee may be disciplined.

20. BHP's purported 'balance' also fails utterly when applied to conduct other than industrial activity which is protected under Part 3-1. Thus for example, an employee may be disciplined for exercising a workplace right by taking sick leave if the reason for the adverse action is not the exercise of the workplace right, but rather the fact that (as a result of the sick leave) the employee is regarded as being unreliable in his attendance[7].

21. As to RS [36], the words "*misconduct committed in a circumstance within s. 347(b)(iii)*" are ambiguous and beg the question. The primary judge did not find that Mr Doevendans was dismissed for conduct which occurred *in a circumstance within*

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6 See for example, *Finance Sector Union v ANZ Banking Group* [2002] FCA 631; (2002) 120 FCR 107.

7 See for example *Construction, Forestry, Mining & Energy Union v Endeavour Coal Pty Ltd* [2013] FCCA 703 (27 June 2013) at [172] – [174]; currently under appeal

s. 347(b)(iii), but rather he was dismissed because of conduct which *constituted* industrial activity *within the meaning of s. 347(b)(iii)*.

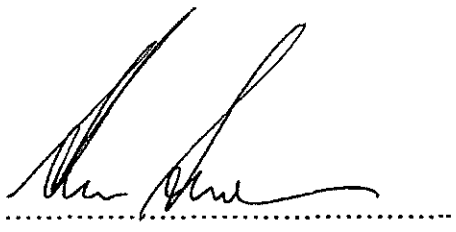
22. As to RS [39], BHP's examples are extreme and implausible hypotheticals. However it does not follow from the Appellant's argument, or from the primary judge's reasoning, that employees in such circumstances would necessarily be immune from any disciplinary action. Were such a factual situation ever to occur, the Court would assess all of the relevant evidence to determine whether it could properly be said that the adverse action was taken *because of* the engagement in industrial activity.

23. As to RS [41], the findings of the primary judge as to why the adverse action was taken are findings of fact. At RS [42], BHP advocates what is, in substance, a purely subjective approach to this fact finding exercise. There is a very significant difference between enquiring into the mental processes of the decision maker as part of the fact finding exercise and accepting that the decision maker's subjective characterisation of his or her reasons is determinative.

Reasoning of Kenny J

24. Contrary to BHP's submissions, Kenny J correctly reasoned that once it was accepted that Mr Doevendans was dismissed for holding and waving the sign, and that this conduct constituted industrial activity within the meaning of s. 347(b)(v), it was open to the primary judge to find that he was dismissed because he engaged in industrial activity. The Respondent's criticism of Kenny J's reasoning is founded on the erroneous basis that a contravention is found only where a prohibited reason operates as a "*separate and distinct reason*" for adverse action.

Dated: 25 July 2014



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