HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL AND GAGELER JJ

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION — APPELLANT

AND

BHP COAL PTY LTD — RESPONDENT

Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd
[2014] HCA 41
16 October 2014
B23/2014

ORDER

Appeal dismissed.

On appeal from the Federal Court of Australia

Representation

H Borenstein QC with C M Howell for the appellant (instructed by Hall Payne Lawyers)

B W Walker SC with I M Neil SC and R P P Dalton for the respondent (instructed by Ashurst Australia)

CATCHWORDS

Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd

Industrial law (Cth) – General protections – Adverse action – Section 346(b) of *Fair Work Act* 2009 (Cth) prohibits employer from taking adverse action against employee because employee engages in industrial activity or has engaged in industrial activity – Where appellant was industrial association – Where member of appellant engaged in industrial activity – Where officer of respondent employer took adverse action against member – Where officer gave evidence at trial that adverse action not taken for prohibited reasons – Whether adverse action taken for prohibited reason.

Words and phrases – "because", "engages in industrial activity", "prohibited reason".

Fair Work Act 2009 (Cth), ss 346(b), 347(b)(iii), 347(b)(v), 360, 361.

1 FRENCH CJ AND KIEFEL J. This appeal concerns the termination of the employment of an employee of the respondent ("BHP Coal") at the Saraji Mine, and whether that termination was an action taken for a reason which is prohibited by the *Fair Work Act* 2009 (Cth) ("the Act").

2 The employee in question, Mr Doevendans, was a member of the appellant ("the CFMEU"), an industrial association. Some months prior to the termination of his employment he had participated in a protest organised by the CFMEU, which was a lawful activity within the meaning of s 347(b)(iii) of the Act. In the course of that protest he held and waved a sign at passing motorists, which had been supplied by the CFMEU, and which read "No principles SCABS No guts".

3 The general manager of the Saraji Mine, Mr Brick, gave evidence before the Federal Court of Australia as to why Mr Doevendans' employment had been terminated. The primary judge in the Federal Court, Jessup J, detailed this evidence in his reasons. His Honour then made findings, under the heading "The Reasons for Mr Doevendans' Dismissal". His Honour accepted the reasons given by Mr Brick for his action[1]. Those reasons may be summarised as follows: the word "scab", which appeared on the sign Mr Doevendans held up and waved, was inappropriate, offensive, humiliating, harassing, intimidating, and flagrantly in violation of BHP Coal's workplace conduct policy (that policy required courtesy and respect to be accorded to fellow employees); Mr Doevendans was well aware of the policy; Mr Doevendans demonstrated arrogance when confronted with the objections to his conduct; and Mr Brick regarded the conduct as not only contrary to the policy, but antagonistic to the culture that Mr Brick was endeavouring to develop at the mine. His Honour added[2] that the decision to terminate Mr Doevendans' employment was "not a spur-of-the-moment reaction", but one arrived at by Mr Brick over time and after a systematic consideration of the facts.

4 His Honour did not find that the mere fact that Mr Doevendans had held and waved the sign was one of Mr Brick's reasons for terminating the employment. Mr Brick's reasons had to do with the nature of Mr Doevendans' conduct. His Honour accepted Mr Brick's evidence that the fact that

---

1 *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 3)* (2012) 228 IR 195 at 211 [36], referring to 204 [22], 207-210 [28]-[31].

2 *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 3)* (2012) 228 IR 195 at 211 [36].

Mr Doevendans occupied certain positions within the CFMEU, and had engaged in industrial activity, did not play any part in Mr Brick's decision[3].

5 Section 346(b) appears in Pt 3-1 of Ch 3 of the Act. It prohibits a person taking "adverse action" against another person "because" the other person has engaged in industrial activity within the meaning of s 347(a) or (b). "Adverse action" includes dismissal (s 342(1), Item (1)(a)). Section 347(b) relevantly provides that a person "engages in industrial activity" if the person: (iii) participates in a lawful activity organised by an industrial association; or (v) represents or advances the views or interests of an industrial association.

6 Section 346 directs attention to the reason why a person – here Mr Brick – took the adverse action. If there were multiple reasons, s 360 provides that "a person takes action for a particular reason if the reasons for the action include that reason." Section 361 provides that if it is alleged that a person took action for a particular reason, being a prohibited reason, it is presumed that the action was taken for that reason unless the person proves otherwise. Section 361 therefore places the onus on BHP Coal to prove that a reason for the adverse action was not one of the two prohibited reasons in s 347(b)(iii) and (v). Central to the operation of s 361 is a balance between employers and employees determined by the legislature[4].

7 The focus of the enquiry as to whether s 346(b) has been contravened is upon the reasons for Mr Brick taking the adverse action[5]. This is evident from the word "because" in s 346, and from the terms of s 361. The enquiry involves a search for the reasoning actually employed by Mr Brick[6]. The determination to be made by the court is one of fact, taking account of all the facts and circumstances of the case and available inferences[7].

---

3 *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 3)* (2012) 228 IR 195 at 211 [36], referring to 209 [30].

4 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1]* (2012) 248 CLR 500 at 523 [61]; [2012] HCA 32.

5 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1]* (2012) 248 CLR 500 at 517 [44], 542 [127], 544 [140].

6 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1]* (2012) 248 CLR 500 at 546 [146].

7 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1]* (2012) 248 CLR 500 at 517 [45]; see also at 542 [127].

8 In *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1]*[8], French CJ and Crennan J observed that it would ordinarily be difficult for an employer who has taken adverse action to discharge the onus of proof in s 361 without calling direct evidence from the decision-maker as to his or her reasons. The court is not obliged to accept such evidence. It may be unreliable for a number of reasons. For example, other objective evidence may contradict it.

9 However, s 346 does not involve an objective test. In *Bendigo*, Gummow and Hayne JJ explained[9] that it is misleading to use the terms "objective" or "subjective" to describe the enquiry in s 346. To speak of objectively ascertained reasons risks the substitution by the court of its own view, rather than making a finding of fact as to the true reason of the decision-maker.

10 None of the reasons given by Mr Brick, and accepted by the primary judge as true in fact, was a reason prohibited by s 346(b). Mr Brick did not dismiss Mr Doevendans because he participated in the lawful activity of a protest organised by the CFMEU (s 347(b)(iii)), nor did he dismiss Mr Doevendans because, in carrying and waving the sign, Mr Doevendans was representing or advancing the views or interests of the CFMEU (s 347(b)(v)), as the CFMEU alleged. Mr Brick's reasons related to the content of Mr Doevendans' communications with his fellow employees, the way in which he made those communications and what that conveyed about him as an employee. Mr Brick's reasons included his concern that Mr Doevendans could not or would not comply with the standards of behaviour which Mr Brick was attempting to instil in employees at the mine.

11 The CFMEU submitted before the primary judge that it was to be inferred that Mr Brick was in fact motivated by these prohibited reasons rather than the reasons he gave. His Honour rejected[10] the submission.

12 Despite the findings referred to above, the primary judge concluded that s 346(b) had been contravened in two respects. His Honour held that Mr Doevendans' conduct in holding and waving the sign was, for the purposes of

---

8 (2012) 248 CLR 500 at 517 [45].

9 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1]* (2012) 248 CLR 500 at 540-541 [121], [126].

10 *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 3)* (2012) 228 IR 195 at 211-212 [38]-[41].

s 347(b)(iii), conduct by way of participation in a lawful activity organised by an industrial association. His Honour said[11]:

> "Since a reason for his dismissal was that he did so hold and wave the sign, it follows that his dismissal was done in contravention of s 346(b)".

His Honour also determined that holding and waving the sign could be characterised as representing or advancing the views and interests of an industrial association, for the purposes of s 347(b)(v)[12]. His Honour again concluded[13]:

> "Since he was dismissed for that conduct, it follows that the dismissal was done in contravention of s 346(b)".

13 In the Full Court, Dowsett and Flick JJ considered that these conclusions were not based on the factual enquiry as to the reasons for the adverse action required by s 346(b), and which *Bendigo* confirmed as the correct enquiry[14]. Dowsett J also expressed the view[15] that the primary judge's finding that the employee's engagement in industrial activity played no part in Mr Brick's decision-making process disposed of the matter.

14 Kenny J agreed that the primary judge was in error in considering that Mr Doevendans was dismissed because he participated in a lawful activity organised by the CFMEU[16]. Her Honour pointed out[17] that this Court in *Bendigo*

---

11 *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 3)* (2012) 228 IR 195 at 234 [115].

12 *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 3)* (2012) 228 IR 195 at 236-237 [122]-[124].

13 *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 3)* (2012) 228 IR 195 at 237 [124].

14 *BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* (2013) 219 FCR 245 at 276-277 [109]-[110]; see also at 250 [12].

15 *BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* (2013) 219 FCR 245 at 250-251 [13].

16 *BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* (2013) 219 FCR 245 at 264 [59].

17 *BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* (2013) 219 FCR 245 at 263 [57].

rejected the proposition that an employer must establish that the reasons for the adverse action were entirely dissociated from the employee's union activities, in order to discharge the onus of proof. Her Honour added that an employee's activity is not insulated from adverse action by an employer because it happens to be done in the course of an otherwise lawful industrial activity.

15 Kenny J did not, however, consider that the primary judge was in error in concluding that Mr Doevendans was dismissed for representing or advancing the views or interests of the CFMEU, which was the second alleged ground for the contravention of s 346(b)[18]. The difficulty with this conclusion is that the primary judge's reasoning with respect to each of the two alleged grounds for contravention proceeded from the same premise. That is, it is a necessary inference from his Honour's reasons that, if the adverse action (the termination of employment) was connected to an industrial activity, it must be taken to be a reason for the adverse action. That reasoning is incorrect for the reasons Kenny J identified with respect to the first alleged ground for contravention.

16 The reasoning of the primary judge is analogous to that of the majority of the Full Court of the Federal Court[19] in *Bendigo*, which this Court held to be incorrect.

17 In *Bendigo*, an employee, who was an officer of an industrial association, sent an email to other employees who were also members of the association. In the email, he warned them not to participate in the creation of false or fraudulent documents for the purposes of an audit being conducted of the employer Institute, the implication being that such fraudulent conduct was taking place. The Chief Executive Officer of the Institute suspended the employee and required him to show cause why he should not be subject to disciplinary action for serious misconduct. In evidence to the Federal Court, she explained her motivations for this action by saying that the employee had made serious allegations in the email without first having made any report or complaint to senior management about the alleged conduct. The primary judge accepted[20] the Chief Executive Officer's evidence and found that the adverse action taken by her was not actuated by any reason associated with the employee's position as an officer of the industrial association, or his engagement in industrial activity.

---

18 *BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* (2013) 219 FCR 245 at 267 [70].

19 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212.

20 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251 at 264-265 [54].

18 On appeal, a majority of the Full Court of the Federal Court reasoned that, because the sending of the email amounted to engagement in an industrial activity, and because the employer's adverse action was consequent upon the sending of the email, it necessarily followed that a reason why the adverse action was taken was that the employee was an officer of the industrial association and had engaged in industrial activity[21]. It is to be inferred that the majority considered that, so long as there was a connection between the industrial activity and the adverse action, it followed that the adverse action contravened s 346(b). Lander J, in dissent, held that a contravention is not made out simply by establishing that adverse action was taken whilst the union official was engaged in industrial activity[22]; which is to say, by a temporal connection between the two.

19 Section 346 does not direct a court to enquire whether the adverse action can be characterised as connected with the industrial activities which are protected by the Act. It requires a determination of fact as to the reasons which motivated the person who took the adverse action.

20 In *Bendigo*[23], French CJ and Crennan J pointed out that it is erroneous to treat the onus imposed on the employer by s 361 as being heavier, or different, if adverse action is taken while an employee happens to be engaged in industrial activity. Their Honours said that it is incorrect to conclude that, because the employee's union position and activities were inextricably entwined with the adverse action, the employee was therefore immune, and protected, from the adverse action. Such an approach would destroy the balance between employers and employees which the Act seeks to attain and which is central to s 361.

21 In the present case, the reasons found by the primary judge to actuate Mr Brick's decision did not include Mr Doevendans' participation in industrial activity, or his representing the views of the CFMEU. To the contrary, his Honour found that Mr Brick had not been motivated by such considerations. This was consistent with the reasons given by Mr Brick in evidence accepted by his Honour, which related to the nature of Mr Doevendans' conduct and what it represented to Mr Brick about Mr Doevendans as an employee.

---

21 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 234 [77]-[78].

22 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 258 [227].

23 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1]* (2012) 248 CLR 500 at 523 [60]-[61].

22 The primary judge then went on to consider whether Mr Doevendans' conduct constituted an industrial activity in the relevant respects. The only inference which can be drawn from this additional reasoning is that, because the adverse action was based upon the sign which Mr Doevendans held and waved, this activity must be taken as one of the reasons for the action. That is to say no more than that the adverse action had a connection, in fact, to the industrial activity. That connection may necessitate some consideration as to the true motivations of Mr Brick, but it cannot itself provide the reason why Mr Brick took the action he did. That enquiry was concluded by his Honour's earlier findings. His Honour, in effect, wrongly added a further requirement to s 361, namely that the employer dissociate its adverse action completely from any industrial activity.

23 The appeal should be dismissed.

HAYNE J.

The issue

24 In May 2012, the respondent ("BHP Coal") dismissed one of its employees: Mr Henk Doevendans. Mr Doevendans had been employed at the Saraji mine, as a machinery operator, for about 24 years. He was a member of the appellant union ("the CFMEU").

25 The General Manager of the Saraji mine, Mr Geoff Brick, decided that Mr Doevendans should be dismissed because, during protests the CFMEU held in connection with a seven-day work stoppage, Mr Doevendans had several times held up, and waved at those entering the mine property, a sign which used the word "scab". Mr Brick decided that Mr Doevendans' conduct was intentional, deliberate and repeated, and breached a workplace conduct policy and a charter of values. In Mr Brick's view, the use of the word "scab" was "unacceptable in the workplace".

26 Under the *Fair Work Act* 2009 (Cth)[24] ("the Act"), dismissal is a form of "adverse action". The Act prohibits[25] persons taking adverse action against another person because that person has engaged in "industrial activity" within the meaning of s 347(a) or (b). Two forms of "industrial activity" specified in s 347(b) are to "participate in ... a lawful activity organised or promoted by an industrial association" (sub-par (iii)) and to "represent or advance the views, claims or interests of an industrial association" (sub-par (v)). The CFMEU is an industrial association.

27 The Act provides[26] that, for the purposes of the relevant provisions, "a person takes action for a particular reason if the reasons for the action include that reason". BHP Coal bore[27] the onus of proving that it did not act for a prohibited reason.

28 Did BHP Coal establish that it dismissed Mr Doevendans for reasons that did not include a prohibited reason? Did BHP Coal show that it acted only for reasons *other than* because Mr Doevendans had participated in "a lawful activity

---

24 s 342.

25 s 346.

26 s 360.

27 s 361(1).

organised or promoted by"[28] the CFMEU, or because he had represented or advanced "the views, claims or interests"[29] of the CFMEU?

Proceedings in the Federal Court and this Court

29 At trial in the Federal Court of Australia, Jessup J held[30] that BHP Coal did dismiss Mr Doevendans because he had participated in a lawful activity organised by an industrial association (the CFMEU), and because he had represented and advanced the views and interests of that association. BHP Coal was ordered to pay a pecuniary penalty and to reinstate Mr Doevendans.

30 BHP Coal appealed to the Full Court of the Federal Court. By majority (Dowsett and Flick JJ, Kenny J dissenting) the appeal was allowed[31] and the orders made by Jessup J were set aside. Dowsett and Flick JJ concluded[32] that BHP Coal had not dismissed Mr Doevendans because he had engaged in industrial activity within the meaning of either s 347(b)(iii) or s 347(b)(v). In dissent, Kenny J concluded[33] that BHP Coal had not proved that Mr Doevendans' representing or advancing the views of the CFMEU written on the sign was not a reason for his dismissal. His dismissal was therefore because of his engaging in industrial activity of the kind described in s 347(b)(v).

31 By special leave the CFMEU appeals to this Court. The appeal should be allowed, the orders of the Full Court of the Federal Court set aside and the appeal to that Court dismissed.

The facts

32 During 2011 and 2012, BHP Coal and its employees were negotiating about a new enterprise agreement to apply to BHP Coal's operations at various mines, including the Saraji mine. For the purpose of supporting or advancing

---

28 s 347(b)(iii).

29 s 347(b)(v).

30 *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 3)* (2012) 228 IR 195 at 234 [115], 237 [124].

31 *BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* (2013) 219 FCR 245.

32 (2013) 219 FCR 245 at 247 [1] per Dowsett J, 275-277 [107]-[111] per Flick J.

33 (2013) 219 FCR 245 at 264 [60]-[61], 267 [70].

their claims, employees of BHP Coal took protected industrial action[34] in the form of work stoppages and overtime bans. There was a seven-day work stoppage between 15 and 22 February 2012.

33 During this stoppage, members of the CFMEU who were employed at the Saraji mine, including Mr Doevendans, participated in protests beside the road leading into the mine property. Standing behind barriers BHP Coal had erected at the side of the road, the protesters held up signs which the CFMEU had provided and waved the signs at those who were driving into the mine. The signs were directly or indirectly critical of BHP Coal and of those who were driving into the mine. On four occasions over three days, Mr Doevendans held up a sign that read: "No principles Scabs No guts" ("the scabs sign").

34 Some employees of BHP Coal complained to management about the scabs sign. The trial judge described[35] in some detail the steps that were then taken. For present purposes, it is enough to observe that, first, Mr Doevendans was given notice of what was alleged against him and was given opportunities (which he took) to respond to the allegations. Then, the General Manager of the mine, Mr Brick, wrote to Mr Doevendans saying, in effect, that what was alleged was not disputed and that he found Mr Doevendans' conduct to be inconsistent with the applicable workplace conduct policy and charter of values and "unacceptable in the workplace". In his letter, Mr Brick described the conduct as constituting "harassment and/or intimidation" of non-union employees and employees who chose to attend work during the industrial action, as creating a potential risk to the health and safety of workers who chose to attend work during the industrial action, and as failing to meet BHP Coal's "expectation that each employee will treat others in the workplace with courtesy, dignity and respect". Mr Brick recorded, in his letter, that Mr Doevendans admitted "that use of the word 'scab' at work is not acceptable". The letter required Mr Doevendans, in effect, to show cause why his employment should not be terminated. After further correspondence between the CFMEU and BHP Coal, Mr Brick decided to terminate Mr Doevendans' employment.

35 At trial, there was elaborate examination of, and much debate about, why Mr Brick made that decision. Close consideration was given to whether Mr Brick had acted with some ulterior motive. But the trial judge rejected those arguments and found[36] that Mr Brick dismissed Mr Doevendans for the reasons Mr Brick gave in evidence.

---

34 *Fair Work Act* 2009 (Cth), Ch 3, Pt 3-3, Div 2 (ss 408-416A).

35 (2012) 228 IR 195 at 201-209 [13]-[29].

36 (2012) 228 IR 195 at 211-212 [36]-[41].

36 In his evidence, Mr Brick had described those reasons in 14 separate points. But shorn of the characterisations and consequences Mr Brick attributed to Mr Doevendans' conduct, which reflected Mr Brick's view of whether what had been done could be justified, the reasons for dismissal can be accurately summarised as being that Mr Doevendans had repeatedly, and deliberately, held up the scabs sign and waved it at those driving into the mine, even though he knew that the word "scab" was inappropriate in the workplace. No doubt, as the trial judge[37] and Flick J[38] both observed, Mr Brick also thought it important that the sign was contrary to BHP Coal's workplace conduct policy and that Mr Doevendans had demonstrated arrogance when confronted with his conduct. But the former consideration was Mr Brick's characterisation of the conduct and the latter was a consequence following from the parties' competing views about whether what had been done could be justified. Neither consideration adds to or subtracts from the accuracy of the summary which has been given of Mr Brick's reasons. And neither bears upon the relevant inquiry, being whether BHP Coal established that it acted only for reasons other than because Mr Doevendans had taken part in the protests. As the summary indicates, Mr Brick's complaint was with the *manner* in which Mr Doevendans had taken part in the protests.

37 Did Mr Brick act for reasons that included a prohibited reason?

Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1]

38 Properly, close consideration was given at all stages of the litigation (including in the appeal to this Court) to what this Court said in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1]*[39]. It is important, however, to recognise that the central holding in *Bendigo* was that direct testimony from an employer's decision-maker, if accepted as reliable, is capable of discharging[40] the burden on an employer under s 361(1), even where the employee is an officer or member of an industrial association and engages in industrial activity. *Bendigo* did not decide that accepting the decision-maker's evidence of why adverse action was taken necessarily concluded the issue in a case where the employee was engaged in industrial activity. As counsel for the Minister, intervening, rightly submitted[41]

---

37 (2012) 228 IR 195 at 211 [36].

38 (2013) 219 FCR 245 at 275 [103].

39 (2012) 248 CLR 500; [2012] HCA 32.

40 (2012) 248 CLR 500 at 517 [45] per French CJ and Crennan J, 525 [71] per Gummow and Hayne JJ.

41 (2012) 248 CLR 500 at 504.

in *Bendigo*, "[i]t is an error to reduce the question to a binary choice between believing or rejecting the evidence" of the relevant decision-maker.

39 In *Bendigo*, neither side challenged in this Court the findings of fact made by the trial judge. As French CJ and Crennan J noted[42], the trial judge found that "Mr Barclay's union position and activities were not operative factors" in his being suspended from duty. In *Bendigo*, argument proceeded in this Court by reference to the supposed distinction between "objective" and "subjective" reasons and whether, as the Full Court of the Federal Court had held[43], there could be a "real reason" for the conduct that was "unconscious or not appreciated or understood". Because the trial judge's findings of fact were not challenged, rejection of the reasoning of the Full Court required that the appeal be allowed and the trial judge's orders restored. But that does not entail that this Court's decision in *Bendigo* foreclosed the analysis made by the trial judge in this matter. The underlying statutory question remains. Why was adverse action taken? Did the employer show that the reasons for acting did not include a prohibited reason?

Dismissal for reasons which included a prohibited reason?

40 In this case, the lawful activity organised by the CFMEU was a protest. The protest was held close to, but not on, the mine property. Neither the holding of the protest nor the manner in which it was conducted was unlawful. Mr Brick dismissed Mr Doevendans because he repeatedly and deliberately displayed the scabs sign.

41 There can be no dispute that, as the trial judge found[44], the sign which Mr Doevendans held ("No principles Scabs No guts") was offensive and abusive and that "the whole point of calling someone a scab was to offend and to belittle them". In an industrial context, the word cannot be used[45] except to demean those who choose to exercise their right not to join in concerted industrial action. And it may readily be accepted that its use in this case was antithetical to what

---

42 (2012) 248 CLR 500 at 524 [65] (Gummow and Hayne JJ agreeing at 525 [71]).

43 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 221 [28] per Gray and Bromberg JJ.

44 (2012) 228 IR 195 at 229 [96].

45 *The Oxford English Dictionary*, 2nd ed (1989), vol XIV at 550, describes one use of the word as "[a] term of abuse or depreciation applied to persons" and gives, as a definition, "[a] workman who refuses to join an organized movement on behalf of his trade; in extended uses: a person who refuses to join a strike or who takes over the work of a striker; a blackleg; a strike-breaker".

Mr Brick said[46] was BHP Coal's expectation: "that each employee will treat others in the workplace with courtesy, dignity and respect".

42 But Mr Doevendans' use of the word (by his displaying the sign) cannot be divorced from the circumstances in which it was used. He used it in the course of participating in a union-organised protest. The protest was directed at BHP Coal as employer. But it was also directed at those employees who had not joined the work stoppage.

43 As has been noted earlier, Mr Brick's reasons for dismissing Mr Doevendans hinged around the language in which Mr Doevendans chose to express that latter form of protest. The central point was that he had chosen to express his protest using a word which he knew was offensive. That is, Mr Doevendans had participated in a lawful activity organised by the CFMEU (a protest against his employer and his fellow employees who were not participating in the work stoppage) in a way which he knew would give offence to others.

44 At trial, BHP Coal sought, unsuccessfully, to establish that displaying the sign was contrary to law (either as offensive behaviour contrary to s 6 of the *Summary Offences Act* 2005 (Q) or as a form of adverse action contrary to s 346(c) of the Act). The trial judge rejected[47] those submissions. They were not renewed on appeal to this Court. It follows that the conduct which was the focus of Mr Brick's reasons for dismissing Mr Doevendans must be taken to have been lawful conduct.

45 The conclusion that Mr Brick did not act for a prohibited reason can be reached only by distinguishing between Mr Doevendans' participation in the protest near the entrance to the mine property and the manner in which he expressed his protest. No relevant distinction of that kind can be drawn.

46 The engaging in industrial activity identified in s 347(b)(iii) is participating in a *lawful* activity. The Act draws no express distinction between kinds of participation in a lawful activity. It may be accepted that, if the activity must be lawful, the method and manner of participation in the activity must also be lawful. But when, as here, the activity is a protest, no further distinction can be made between those protests which are courteous or polite and those which (lawfully) give offence.

47 Both the activity and the manner in which Mr Doevendans took part in it were lawful. So long as the protest was conducted lawfully, it was not to the point to ask (as Mr Brick did) whether what was said or done in the protest

---

46 (2012) 228 IR 195 at 205 [23].

47 (2012) 228 IR 195 at 233 [108], [111].

would offend others or, in particular, would offend some employees. And when Mr Brick concluded that Mr Doevendans should be dismissed because he had deliberately and repeatedly protested in an offensive manner, Mr Brick acted for a prohibited reason. He dismissed Mr Doevendans because he had participated in a lawful activity organised by the CFMEU.

Representing or advancing union views or interests

48 The CFMEU provided the scabs sign which Mr Doevendans chose to display. The trial judge found[48] that the sign represented the views and interests of the CFMEU. The very terms of the sign ("No principles Scabs No guts") admitted of no other conclusion.

49 Contrary to BHP Coal's submissions, it is neither necessary nor useful to inquire whether Mr Brick, in the course of his deliberations, paused to consider whether the sign represented the views or interests of the CFMEU. It may be accepted that he did not. But to attach significance to Mr Brick's *not* connecting the views expressed on the scabs sign with the CFMEU would be to resort again to the contrast between objective and subjective reasons dismissed[49] in *Bendigo* as "an illusory frame of reference".

50 There could be no doubt that Mr Brick understood that the word "scab" was used in the manner and circumstances that have already been described. That is, Mr Brick knew not only that the word was used to demean those who had not joined in the work stoppage, but also that the CFMEU had organised the protest at which the sign was repeatedly displayed. And Mr Brick knew that the protest was directed at both BHP Coal and those of its employees who had not joined in the work stoppage.

51 Again, unless some distinction can be drawn between the act of representing or advancing the views or interests of the CFMEU and the *manner* in which that was done, Mr Doevendans was dismissed for reasons that included his representing or advancing those views. For the reasons given in connection with the application of s 347(b)(iii), no distinction of that kind can be made.

Conclusion and orders

52 The appeal to this Court should be allowed. The orders of the Full Court of the Federal Court of Australia made on 13 December 2013 should be set aside and in their place there should be an order that the appeal to that Court is dismissed. The appellant made no application for costs.

---

48 (2012) 228 IR 195 at 236-237 [122]-[123].

49 (2012) 248 CLR 500 at 540 [121].

53 CRENNAN J. The issue and the facts in this appeal are set out in the reasons for judgment of Hayne J and will only be repeated here as necessary to explain these reasons. I agree with the orders which his Honour proposes.

54 As to the issue involving ss 346(b), 347(b)(iii) and (v) and 361 of the *Fair Work Act* 2009 (Cth) ("the Act"), I agree with Hayne J. What follows are brief additional comments concerning what this Court said in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1]*[50], added because of the wider implications of misunderstanding *Barclay*.

55 Section 346 of the Act protects an employee who engages in "industrial activity"[51], either by participating in a lawful activity organised or promoted by an industrial association[52] (s 347(b)(iii)), or by advancing the views, claims or interests of an industrial association (s 347(b)(v)), from "adverse action"[53] by an employer. Importantly, s 360 provides that, for those purposes, "a person takes action for a particular reason if the reasons for the action include that reason". Under s 361(1) it is presumed that action taken by an employer was taken for a prohibited reason, or reasons which included a prohibited reason, unless the employer establishes otherwise. As recognised in *Barclay*, the provisions present an issue of fact to be decided on the balance of probabilities in the light of all the established facts and circumstances[54]. The court's task is to ask "why the employer took adverse action against the employee, and to ask whether it was for a prohibited reason or reasons which included a prohibited reason"[55].

56 In *Barclay*, the primary judge was satisfied that the decision-maker acted for the reasons she gave. His Honour also accepted her denials that she acted for any reason prohibited under the Act, particularly under s 346(a)[56]. Neither party challenged those findings of fact by the primary judge. In this Court it was acknowledged that direct testimony of a decision-maker which is accepted as

---

50 (2012) 248 CLR 500; [2012] HCA 32.

51 Act, s 346(b).

52 Defined in s 12 of the Act.

53 Defined in s 342(1) of the Act.

54 *Barclay* (2012) 248 CLR 500 at 523 [62] per French CJ and Crennan J, 531 [88], 542 [127] per Gummow and Hayne JJ.

55 *Barclay* (2012) 248 CLR 500 at 506 [5] per French CJ and Crennan J.

56 See *Barclay* (2012) 248 CLR 500 at 505-506 [4] per French CJ and Crennan J.

reliable is capable of discharging the burden of proof cast upon an employer[57]. This does not mean that an assertion by a credible decision-maker that adverse action was not taken because of any prohibited reason will always discharge the statutory onus on an employer to prove that the reasons for taking adverse action did not include a prohibited reason. It is open to a trier of fact to accept as honest and credible a decision-maker's explanation of his or her decision for taking adverse action, then to weigh all the evidence (including an assertion that the decision-maker did not act for any prohibited reason) but not be satisfied that an employer has discharged the statutory onus of proving that the reasons did not include any prohibited reason.

57 In this case the decision-maker, Mr Brick, gave evidence of the factors on which his decision to dismiss the employee, Mr Doevendans, depended. The factors included the circumstance that Mr Doevendans had, on four occasions over three days, held up and waved at passing motorists the scabs sign described more fully in the reasons of Hayne J[58]. They also included Mr Brick's views: that Mr Doevendans' conduct in holding and waving the scabs sign was "offensive, humiliating, harassing and intimidating"; that the conduct was unacceptable for an employee of the respondent, flagrantly violated the respondent's charter and conduct policy and was contrary to the culture Mr Brick had developed at the mine; and that Mr Doevendans was arrogant when confronted with objections to his conduct. As well as giving evidence of the factors upon which his decision to dismiss Mr Doevendans depended, Mr Brick asserted that Mr Doevendans' engagement in industrial action or activity played no part in his decision-making process.

58 The respondent advanced no serious submission at the trial that the protest in which Mr Doevendans participated was not lawful, and the appeal in this Court was conducted on that basis. It was also uncontested that the appellant was the source of the scabs sign, and that holding and waving it was part of a lawful protest.

59 The respondent's unsuccessful attempts at trial to contend that holding and waving the scabs sign was unlawful, either under s 6 of the *Summary Offences Act* 2005 (Q), or under ss 342(1) and 346(c) of the Act, were not pressed in this Court. This left management's objection that the scabs sign was offensive as the basis for the respondent's contention that Mr Doevendans was precluded from invoking s 347(b)(iii) or (v).

---

57 *Barclay* (2012) 248 CLR 500 at 521 [54], 523 [62] per French CJ and Crennan J.

58 Reasons of Hayne J at [33].

60 This Court has had occasion to consider cognate legislative predecessors to ss 346 and 361 of the Act in *Pearce v W D Peacock & Co Ltd*[59] and in *General Motors-Holden's Pty Ltd v Bowling*[60]. In *Pearce*[61], a decision-maker affirmed that in dismissing an employee he did not concern himself with whether the employee was a union member or not; he dismissed the employee because the employee was not satisfied with his wages and conditions. The decision-maker also said he would not have dismissed the employee "because of being in a union" and added that he "would not keep a man in my employ who was dissatisfied"[62]. Of this assertion and the inquiry to be made under the statute, Barton ACJ said[63]:

> "No doubt, it is an inquiry in a large measure as to motive; and no doubt also, the motive is to be inferred from facts, and mere declarations as to the mental state that prompted the employer's action are entitled to little or no regard, though in the present case they seem to have been admitted without objection."

61 His Honour went on to say that, if the evidence in defence of the employer was believed, it was open to a court to conclude that the statutory onus was discharged[64].

62 In *Barclay*, when considering *Pearce*, it was observed that declarations by an employer's decision-maker of innocent reasons for taking adverse action may not satisfy the statutory onus if contrary inferences are available on the facts[65].

63 In *Bowling*[66], Mason J considered that, to be comprehensive, an employer's expression of reasons for the dismissal of an employee might well

---

59 (1917) 23 CLR 199; [1917] HCA 28.

60 (1976) 51 ALJR 235; 12 ALR 605.

61 Which involved the *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Commonwealth Conciliation and Arbitration Act (No 2)* 1914 (Cth)), s 9(1) and (4).

62 *Pearce* (1917) 23 CLR 199 at 202.

63 *Pearce* (1917) 23 CLR 199 at 203.

64 *Pearce* (1917) 23 CLR 199 at 204.

65 *Barclay* (2012) 248 CLR 500 at 521 [54] per French CJ and Crennan J.

66 Which involved the *Conciliation and Arbitration Act* 1904 (Cth) (as amended by the *Conciliation and Arbitration Act* 1973 (Cth)), s 5(1) and (4).

include evidence that a dismissal of a shop steward occurred "without regard at all to his position as a shop steward"[67]. His Honour then said[68]:

> "even if [that evidence] had been given, there may have been a question as to its reliability. Once it is said that the [employer] dismissed [the employee] because he was deliberately disrupting production and was setting a bad example it is not easy to say without more that this had nothing to do with his being a shop steward."

That passage makes it plain that the inquiry which the protective provisions require involves asking more than why a decision-maker acted as he or she did[69].

64 The primary judge found that Mr Brick was a reliable witness and he was satisfied that Mr Brick did not dismiss Mr Doevendans "for reasons other than those given by [Mr Brick]". When his Honour made that finding of fact, his Honour did not state, or imply, that he accepted Mr Brick's assertion that Mr Doevendans' engagement in industrial activity played no part in his decision-making process. His Honour's decision demonstrates that he reached the contrary view.

65 The primary judge's approach to Mr Doevendans' case under s 346(b) can be contrasted with his Honour's statement that he accepted the denials of Mr Brick that Mr Brick acted for any reason prohibited under s 346(a) of the Act.

66 The circumstance that the scabs sign used "conspicuously offensive language" (as found by the primary judge, and as it was considered to do by Mr Brick) does not take Mr Brick's dismissal of Mr Doevendans outside s 346(b). The only qualification of the protection given by s 347(b)(iii) is that the activity (in which an employee participates) which has been organised by a union be lawful – there is no additional qualification that it be anodyne.

67 The factors which Mr Brick listed as justifying his dismissal of Mr Doevendans were accepted by the primary judge as honest explanations of why Mr Brick dismissed Mr Doevendans. However, the circumstances and conduct for which Mr Doevendans was dismissed were inconsistent with, and rendered unreliable, Mr Brick's assertion that Mr Doevendans' engagement with industrial action or activity had nothing to do with his decision. On all of the material before him the primary judge rejected the respondent's contention that holding and waving the scabs sign as part of lawful industrial activities protected

---

67 *Bowling* (1976) 51 ALJR 235 at 241; 12 ALR 605 at 617.

68 *Bowling* (1976) 51 ALJR 235 at 241; 12 ALR 605 at 617-618.

69 See also *Barclay* (2012) 248 CLR 500 at 506 [5] per French CJ and Crennan J.

under s 347(b)(iii) and (v) could be abstracted from the Act's protection because the sign was offensive, albeit lawful.

68 Having accepted Mr Brick's evidence of the factors which explained his decision to dismiss Mr Doevendans, which included Mr Doevendans' holding and waving the scabs sign, the primary judge was entitled to conclude that Mr Brick terminated Mr Doevendans' employment for the reasons he gave and that those reasons supported Mr Doevendans' inferential case against the respondent that the circumstances and the conduct for which he was dismissed fell within the protection of s 347(b)(iii) and (v). Such a possibility was anticipated by Mason J in *Bowling*, in the passage extracted above. *Barclay* does not hinder the drawing of available inferences which may controvert an honest decision-maker's assertion that he or she did not take adverse action for any prohibited reason.

69 Mr Brick's evidence failed to prove that Mr Doevendans had been dismissed solely for reasons other than because of his engagement in industrial activity. For the reasons given by Hayne J, it was correct for the primary judge to conclude that the respondent had not discharged the statutory onus of proving that Mr Doevendans' dismissal had not contravened s 346(b) of the Act.

70 GAGELER J. This appeal, from a decision of the Full Court of the Federal Court, concerns the operation of s 346(b) of the *Fair Work Act* 2009 (Cth) ("the Act"), which prohibits one person taking adverse action against another person "because" that other person has engaged in "industrial activity" within the meaning of s 347(a) or (b) of the Act.

Facts

71 Mr Henk Doevendans was employed by BHP Coal Pty Ltd ("BHP Coal") at the Saraji Mine, owned by BHP Billiton Mitsubishi Alliance ("BMA"), in the Bowen Basin in Queensland. He was an active member of the Construction, Forestry, Mining and Energy Union ("the CFMEU"), an industrial association registered under the *Fair Work (Registered Organisations) Act* 2009 (Cth).

72 In the week commencing 15 February 2012, some workers at the Saraji Mine took protected industrial action in the form of a strike. Mr Doevendans was not rostered to work that week, but he chose to participate in a lawful protest near the entrance to the mine. The protest was organised by the CFMEU. As part of his participation in the protest, Mr Doevendans held signs supplied by the CFMEU and waved them at non-striking workers. The signs read "No principles SCABS No guts".

73 Mr Geoff Brick was BHP Coal's General Manager of the Saraji Mine. Mr Brick was informed by a number of non-striking workers that they felt intimidated when the signs were waved at them. On 18 May 2012, after investigation, correspondence and meetings with Mr Doevendans, Mr Brick decided to terminate Mr Doevendans' employment. Mr Brick gave effect to that decision by letter to Mr Doevendans three days later.

74 In evidence accepted at trial, Mr Brick explained in detail his reasons for the decision he made to terminate Mr Doevendans' employment. Prominent amongst those reasons was Mr Doevendans' repeated and deliberate use of the word "scab" displayed on the signs which Mr Doevendans had chosen to hold and wave at non-striking workers. Mr Brick understood the word "scab" to be used to describe workers who do not take part in industrial action, and to convey contempt for those workers. He understood its use in that way to have a long history within the mining industry in Australia and, in particular, to be entrenched throughout the mining community in the Bowen Basin. He was aware of, and evidently shared, the position of BMA "that there is no place for words like 'scab' to be used in a 21st century working environment".

75 Mr Brick explained that he took the view that the word "scab" was "an offensive, intimidating and humiliating word" and that its use had "the potential to cause workers and other people at the Saraji Mine to feel harassed, insulted, abused, bullied and intimidated". He took the view that Mr Doevendans' use of the word was a "[f]lagrant violation" of BMA's workplace policy, which was

known to Mr Doevendans and under which each employee was "expected to treat others in the workplace (at work and outside of work) with courtesy, dignity and respect". It was "[c]ompletely contrary" to the culture Mr Brick had developed and was continuing to develop at the Saraji Mine. Mr Brick took the view that Mr Doevendans had shown no "contrition or acknowledgement that his behaviour was inappropriate", had been "defensive and arrogant" in his meetings with Mr Brick, and was "unlikely to be able to be rehabilitated to the culture [Mr Brick] had developed and was continuing to develop at the Saraji Mine".

76 Mr Brick explained that the fact that Mr Doevendans was an active member of the CFMEU "entered and operated" in his mind only to the extent he was conscious that any decision to take disciplinary action against Mr Doevendans would be controversial. Mr Brick explained that the fact that Mr Doevendans was engaged in industrial action or activity did not play any part in his decision-making process.

Act

77 Section 346 is within Pt 3-1 of Ch 3 of the Act. It provides, so far as relevant:

> "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); ..."

Section 342(1) relevantly provides that one of the circumstances in which an employer takes adverse action against an employee is if the employer dismisses the employee.

78 Section 347 provides, so far as relevant:

> "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:
>
> ...

> (iii) encourage, or participate in, a lawful activity organised or promoted by an industrial association; or
>
> ...
>
> (v) represent or advance the views, claims or interests of an industrial association; ..."

79 Section 360 provides, for the purposes of Pt 3-1, that "a person takes action for a particular reason if the reasons for the action include that reason". Section 361 provides, so far as relevant, that if, in an application in relation to a contravention of Pt 3-1, it is alleged that a person took action for a particular reason or with a particular intent, and taking that action for that reason or with that intent would constitute a contravention of that Part, it is presumed that the action was taken for that reason or with that intent unless the person proves otherwise.

Federal Court

80 In proceedings brought in the Federal Court by the CFMEU, the primary judge (Jessup J), accepting the evidence of Mr Brick, concluded that BHP Coal did not dismiss Mr Doevendans because he was a member of the CFMEU, and therefore did not contravene s 346(a) of the Act[70]. His Honour concluded, however, that BHP Coal did dismiss Mr Doevendans because he had engaged in industrial activity within the meaning of s 347(b)(iii) and (v), and therefore did contravene s 346(b) of the Act. The essence of his Honour's reasoning was captured in the statements of his conclusions.

81 As to the conclusion that BHP Coal dismissed Mr Doevendans because he had engaged in industrial activity within the meaning of s 347(b)(iii), his Honour said[71]:

> "I take the view that Mr Doevendans' holding and waving of the scabs sign was conduct by way of participation in a lawful activity organised by an industrial association. Since a reason for his dismissal was that he did so hold and wave the sign, it follows that his dismissal was done in contravention of s 346(b) of [the Act]."

---

70 *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 3)* (2012) 228 IR 195 at 216 [54].

71 (2012) 228 IR 195 at 234 [115].

82 As to the conclusion that BHP Coal dismissed Mr Doevendans because he had engaged in industrial activity within the meaning of s 347(b)(v), his Honour said[72]:

> "I take the view that, in displaying the scabs sign at the protest, Mr Doevendans was representing and advancing the views and interests of an industrial association. Since he was dismissed for that conduct, it follows that the dismissal was done in contravention of s 346(b) of [the Act]."

83 The majority in the Full Court (Dowsett and Flick JJ) disagreed with those conclusions[73]. Each considered that the primary judge's acceptance of Mr Brick's explanation that the fact that Mr Doevendans was engaged in industrial action or activity played no part in Mr Brick's decision-making process foreclosed a holding that BHP Coal dismissed Mr Doevendans because he had engaged in industrial activity within the meaning of either s 347(b)(iii) or s 347(b)(v)[74].

84 The other member of the Full Court (Kenny J) agreed with the majority as to the primary judge's conclusion in relation to s 347(b)(iii)[75], but disagreed with the majority as to the primary judge's conclusion in relation to s 347(b)(v), in respect of which her Honour discerned no error[76]. Her Honour considered it sufficient to justify the primary judge's conclusion as to s 347(b)(v) that Mr Brick's evidence established that Mr Doevendans' holding and waving of the "scab" signs was an operative factor in Mr Brick's decision to dismiss and that in holding and waving these signs Mr Doevendans was representing the views and interests of the CFMEU[77].

Analysis

85 Analysis in the appeal to this Court must begin, as analysis began at each stage of the proceedings in the Federal Court, with consideration of this Court's decision in *Board of Bendigo Regional Institute of Technical and Further*

---

72 (2012) 228 IR 195 at 237 [124].

73 *BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* (2013) 219 FCR 245.

74 (2013) 219 FCR 245 at 250-251 [13], 276 [108].

75 (2013) 219 FCR 245 at 264 [59].

76 (2013) 219 FCR 245 at 267 [70].

77 (2013) 219 FCR 245 at 266 [66]-[67].

Education v Barclay [No 1][78]. The unanimous holding in that case was that, read in the context of ss 360 and 361 of the Act and of its legislative history, the word "because" in s 346 of the Act connotes the existence of a particular reason as an operative and immediate reason for taking adverse action[79]. Where the adverse action taken is in consequence of a decision made by a responsible individual within a corporation, the existence or non-existence of a particular reason as an operative and immediate reason for taking that adverse action turns on an inquiry into the mental processes of that individual[80].

86 The conclusion in *Barclay* was that the employer in that case had taken adverse action against the employee neither because the employee was an officer of an industrial association nor because the employee had engaged in industrial activity within the meaning of s 347(b)(iii) or (v). That conclusion was held to follow from the primary judge's acceptance of the evidence of the chief executive officer of the employer that her reasons for taking the action did not include the employee's membership or role in the union of which he was a member or the employee's engagement in any industrial activity.

87 Two aspects of the background to the decision in *Barclay* are important to an understanding of the significance of that conclusion. The first was that evidence of the chief executive officer accepted by the primary judge did include prominently amongst the reasons for taking the adverse action the fact that the employee had sent an email to other employees. The second was that the majority in the Full Court of the Federal Court had made additional findings. Those additional findings were that the employee, in sending that email, encouraged or participated in a lawful activity organised by his union, and represented or advanced the views or interests of his union[81]. The conclusion in this Court was reached without addressing, much less disturbing, those additional findings. Whether or not the employee, in sending the email, encouraged or participated in a lawful activity organised by his union or represented or advanced the views or interests of his union was irrelevant to the reasoning adopted in this Court to reach the conclusion.

88 The majority in the Full Court of the Federal Court in the present case was correct to treat *Barclay* as foreclosing the mode of analysis adopted by the primary judge in the present case to conclude that BHP Coal's dismissal of

---

78 (2012) 248 CLR 500; [2012] HCA 32.

79 (2012) 248 CLR 500 at 524 [65], 535 [103]-[104], 544 [140].

80 (2012) 248 CLR 500 at 517 [44]-[45], 542 [127], 544 [140].

81 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at 231 [64].

Mr Doevendans was because he had engaged in industrial activity within the meaning of s 347(b)(iii) and (v).

89 In a case where the totality of the operative and immediate reasons for one person having taken adverse action against another person are proved, the question presented by s 346(b) is whether any one or more of those reasons answers the description of the other person having engaged in any one or more of the industrial activities listed in s 347(a) or (b). The specific question presented by s 346(b) in its application to s 347(b)(iii) is whether any one or more of those reasons was that the person had, or had not, encouraged or participated in some lawful activity organised or promoted by an industrial association. The specific question presented by s 346(b) in its application to s 347(b)(v) is whether any one or more of those reasons was that the person had, or had not, represented or advanced some view, claim or interest of an industrial association.

90 In the present case, the totality of the operative and immediate reasons for BHP Coal having taken adverse action against Mr Doevendans were proved by the evidence of Mr Brick about his own process of reasoning. The fact that Mr Doevendans held and waved the signs while participating in the protest organised by the CFMEU was not an operative part of Mr Brick's reasoning. Nor was the fact that the signs represented or advanced the views or interests of the CFMEU. The correct answer to the question presented by s 346(b) in those circumstances was that given by the majority in the Full Court: BHP Coal's dismissal of Mr Doevendans was not because he had engaged in industrial activity within the meaning of s 347(b)(iii) and (v) and therefore did not contravene s 346(b).

91 The CFMEU argues that the consequence of allowing the decision of the Full Court in the present case to stand will be to undermine the statutory protection afforded to protected industrial activity by allowing an employer to escape culpability by choosing to apply its own characterisation to otherwise protected industrial activity.

92 Part of the answer to that argument lies in recognition of the nature of the protection that is afforded to protected industrial activity through the operation of s 346(b). The protection afforded by s 346(b) is not protection against adverse action being taken by reason of engaging in an act or omission that has the character of a protected industrial activity. It is protection against adverse action being taken by reason of that act or omission having the character of a protected industrial activity.

93 Another part of the answer lies in recognition of the significance of the combined operation of ss 360 and 361. An employer could not escape the proscription in s 346(b) merely by proving that the employer applied its own characterisation to an act or omission having the character of a protected industrial activity. The employer would need, in addition, to prove that the act or

omission having the character of a protected industrial activity played no operative part in its decision.

Order

94 The appeal should be dismissed.