IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY **No. B23 of 2014**

BETWEEN:

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

Appellant

and

BHP COAL PTY LTD

Respondent

RESPONDENT'S SUBMISSIONS

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Part I: Certification

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

Part II: Issues

2 The *Fair Work Act* 2009 (Cth) makes it unlawful to dismiss an employee because the employee engaged in an industrial activity. An employee of the respondent misconducted himself while engaging in an industrial activity. The primary judge's unchallenged findings were that the employee was dismissed because of his misconduct, and the fact that he was engaged in industrial activity did not play any part in the decision-making process.[1] Following *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, do these

20 findings mean that the employee's dismissal was not unlawful?

3 The respondent, BHP Coal Pty Ltd, contends that the issues presented by this appeal are:

(a) Is this case materially indistinguishable from *Barclay*, such that it was correctly decided by the Full Federal Court in the same way?

(b) The appellant, the CFMEU, contends for a construction of the general protection provisions in the *Fair Work Act* by which, if two employees misconduct themselves in the same way, but only one of them happens to be engaged in an industrial activity within s.346(b) and 347(b), then for that reason that employee will be immune from discipline, but the other will not. Does that result reflect the balance between

[1] 228 IR 195, 209 [30]; see also 211 [36].

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employees and employers that is central to the operation of s.361 of the *Fair Work Act*?[2]

4 In [2] of its submissions the CFMEU asks whether an employer can avoid liability under the general protection provisions by 'characterising' an employee's industrial activity as 'being in breach of a policy or code of conduct promulgated by [the] employer'. This is a false issue: it does not arise on the findings of the primary judge or in the reasoning of any member of the Full Court. This proposition is developed in [42] of these submissions.

Part III: Notice under sec 78B of the *Judiciary Act 1903*

5 No notice is required to comply with s.78B of the *Judiciary Act* 1903 (Cth).

Part IV: Facts

BHP's response to the CFMEU's narrative of facts

6 BHP contests one material aspect of the CFMEU's narrative of facts. The CFMEU understates the conduct of the employee, Mr Doevendans.[3] The scabs sign is described at 228 IR 201 [11] and [2013] FCAFC 132, 32 [75].[4] Mr Doevendans did not just 'hold up' the scabs sign. The primary judge found that Mr Doevendans repeatedly waved the scabs sign at passing non-striking workers[5], that the message on the scabs sign was aimed at those workers, and that it was intended to be read and understood by them 'because they had declined to take part in industrial action'.[6]

7 BHP contends that the CFMEU's narrative of facts contains two material omissions.

8 First, the CFMEU omits crucial findings about the connotations of the word 'scab' and its effect on the workers at whom it was aimed. The primary judge accepted that Mr Brick, the decision-maker for the purposes of s.361 of the *Fair Work Act*, was motivated by his conclusion that 'Mr Doevendans's use of the scabs sign, as such, was objectionable'.[7] The primary judge's finding was that Mr Brick's objection focused on the word 'scab'.[8] The primary judge accepted that the word 'scab' was used to 'intimidate and incite a negative and hateful reaction against people who chose to attend work during periods of protected industrial action', that it 'was used as an expression of contempt and insult', and that it was 'the worst insult that a person can be

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[2] *cf* 248 CLR 523[61].
[3] CFMEU's Submissions, [13].
[4] See also King, 11.07.12, Annexures KK1, KK2.
[5] 228 IR 201 [12], 202 [14], 202 [15], 203 [19], 233 [109].
[6] 228 IR 229 [95], 233 [109].
[7] 228 IR 216 [54].
[8] 228 IR 204 [22], 207-209 [28], 209 [29], 210 [32].

called in the mining industry'.[9] Relying on the CFMEU's evidence[10], the primary judge found that 'scab' was offensive and abusive, that 'the whole point of calling someone a scab was to offend and belittle them', and that it was 'conspicuously offensive language'.[11] In the Full Court, Dowsett J likened it to 'common abuse'.[12] *Fair Work Ombudsman v Maritime Union of Australia* [2014] FCA 440, 32 [163], 47 [247], 47-48 [248] and 48 [250] supports these conclusions. Modern industrial tribunals have described 'scab' as 'the worst appellation that can be attributed to a workmate in a unionised Australian industrial relations workplace'[13], and held that 'as a title for a strike-breaker [it] is still at about the highest level 10 on the scale of insults.'[14]

9 Second, the CFMEU omits crucial findings about (a) the significance that Mr Brick attached to BHP's charter and conduct policies, and (b) the culture that he was trying to foster at the mine.[15] Mr Brick considered Mr Doevendans's use of the word 'scab' 'offensive, humiliating, harassing and intimidating'.[16] BHP's charter and conduct policies prohibited conduct of that kind.[17] 'Scab' had been used on other occasions during the industrial dispute[18], and BHP had objected to its use, including on signs, as being 'highly offensive' and 'threatening and intimidating'.[19] Employees had reported to Mr Brick 'that they had felt intimidated when the scabs sign was waved at them as they drove past the protest'.[20] Mr Brick's evidence, accepted by the primary judge[21], was that

> use of the word 'scab' is inappropriate and unacceptable. As General Manager, I have an obligation to all workers to ensure their health and safety, and to ensure that all workers are free to choose whether to participate in protected industrial action…My position is that the use of the word 'scab' in connection with any worker constitutes inappropriate conduct, bullying and harassment contrary to the BMA Workplace Conduct Policy…Its use works against the culture of cooperation and inclusion that I am trying to develop at the Saraji Mine.[22]

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[9] 228 IR 228 [92].
[10] 228 IR 228-229 [93]. The full text of the ode is at Vickers, 18.06.12, p 188.
[11] 228 IR 229 [96].
[12] [2013] FCAFC 4-5 [8].
[13] *AFMEPKIU v Midland Brick Co* [2002] WAIRComm 6902, 5 [25].
[14] *Burge v NSW BHP Steel* [2000] NSWIRComm 1026, p36.
[15] 228 IR 211 [36].
[16] 228 IR 204 [22]; see also Brick, 25.06.12, [15].
[17] Hamilton, 25.06.12, pp 63, 146 to 156.
[18] 228 IR 206 [26]; Brick, 25.06.12, [66(e)]; Hamilton, 25.06.12, [16].
[19] 228 IR 211-212 [39], 212 [40]; Brick, 25.06.12, [66(f)], and pp 42, 43, 45, 48, 50, 51, 52, 55; Hamilton, 25.06.12, [23]; Ex 4.
[20] 228 IR 201 [12].
[21] 228 IR 212 [41].
[22] Brick, 25.06.12, [16]; see also 228 IR 209-210 [31].

BHP's investigations into Mr Doevendans's misconduct were focused on the charter and conduct policy.[23] The primary judge found at 228 IR 204 [22] that during Mr Brick's careful and systematic deliberations[24] he asked himself whether someone who had displayed 'such deliberate, intentional, repeated and blatant disregard for the charter and conduct policy could be rehabilitated into the culture'. The primary judge's finding at 228 IR 211 [36] was that Mr Brick concluded that Mr Doevendans's conduct was 'not only contrary to the policy, but...antagonistic to the culture which [Mr Brick] was seeking to develop at the mine'.[25]

BHP's response to the CFMEU's history of the litigation

10 The CFMEU's description of the primary judge's findings about why Mr Brick dismissed Mr Doevendans at [22] of its submissions is incomplete. At 228 IR 211 [36] and 212 [41] the primary judge accepted Mr Brick's evidence without qualification. The CFMEU did not challenge any of those findings in the Full Court. Two crucial aspects of Mr Brick's evidence that are omitted at [22] are:

(a) Mr Doevendans's conduct in holding up and waving the scabs sign was not an independent operative reason for the decision. The fact that this occurred whilst Mr Doevendans was engaged in industrial activity was only the occasion of Mr Brick's real concerns. His real concerns are set out in paragraphs [8] and [9] of these submissions. The primary judge's findings at 228 IR 204 [22] and 211 [36] were that those concerns, coupled with Mr Doevendans's arrogance, were the reasons for Mr Brick's decision to dismiss Mr Doevendans. Flick J correctly analysed this aspect of Mr Brick's evidence in the first two sentences of [2013] FCAFC 41-42 [107].

(b) '[T]he fact that [Mr Doevendans] was engaged in industrial action or activity did not play any part in [Mr Brick's] decision-making process'[26] was also an integral part of the primary judge's findings about Mr Brick's mental processes.

The majority in the Full Court correctly found at [2013] FCAFC 5 [11], 6 [12], 6 [13], 41-42 [107] and 42 [108] that the primary judge's unqualified acceptance of all Mr Brick's evidence was, taken as a whole, a complete answer to the CFMEU's case when *Barclay* was properly applied.

Part V: Legislation

11 BHP accepts the CFMEU's statement of the applicable statutory provisions.

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[23] 228 IR 202 [15], 204 [22], 204-205 [23], 207-209 [28], 209 [29].
[24] 228 IR 201 [13] – 210 [32].
[25] 228 IR 211 [36].
[26] See also 228 IR 211 [36] and 212 [41], which must be read with 204 [22] and 207-209 [28].

Part VI: Argument

This case cannot be distinguished from *Barclay*

12 The facts of *Barclay* are materially indistinguishable from this case, such that this case could only have been decided in the same way.

13 *Barclay* concerned an employee who was subjected to adverse action because he had engaged in conduct that his employer regarded as unacceptable.

14 The employee was a union delegate who, in that capacity, wrote and broadcast an email that was scurrilously critical of some of his colleagues, for which conduct his employer subjected him to adverse action.

15 As in this case, the employee claimed that the adverse action contravened s.346(b) of the *Fair Work Act* because his conduct in sending the email constituted an industrial activity within both s.347(b)(iii) and (v).[27]

16 The majority in the Full Court held that 'all of the relevant conduct in issue in this case involved [the employee] in his union capacity'[28], and accepted that in writing and broadcasting the email the employee was engaged in industrial activity within both s.347(b)(iii) and (v).[29]

17 This Court also decided *Barclay* on the basis that all of the conduct for which the employee was subjected to adverse action 'happened to be'[30] an industrial activity within both s.347(b)(iii) and (v).

18 The primary judge in *Barclay* accepted the employer's evidence that it had subjected the employee to adverse action because the content of the email breached the employer's code of conduct and his obligations as an employee, and not because he had been engaged in industrial activity under either s.347(b)(iii) and (v).[31]

19 Those findings were not challenged on appeal, but the majority in the Full Court nevertheless held that it followed from the fact that the employee happened to be acting on behalf of his union when he sent the email, and was engaged in industrial activities within both s.347(b)(iii) and (v), that the employer had contravened s.346(b) by suspending him.

20 That analysis was unanimously rejected in this Court, on the ground that the primary judge's finding exculpated the employer.

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[27] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251, 252 [1], 252 [2], 252 [3], 255 [10].
[28] *Barclay and Another v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, 233 [73].
[29] 191 FCR 231 [63], 231 [64], 231 [65]; see also [2013] FCAFC 132, 1 [2].
[30] 248 CLR 523 [60].
[31] 248 CLR 511 [26]-514 [33].

21 This case, like *Barclay*, turned on the primary judge's unchallenged acceptance at 228 IR 211 [36] and 212 [41] of the decision-maker's evidence as to the innocent reasons why the adverse action was taken, and the unchallenged finding at 228 IR 209 [30] that the fact that the employee was engaged in industrial activity did not play any part in the decision. These findings meant that this case had to be decided in the same way as *Barclay*. This was acknowledged by the majority in the Full Court as to both s.347(b)(iii) and (v) at [2013] FCAFC 6 [12] (Dowsett J) and 43-44 [110] (Flick J), and as to s.347(b)(iii) by Kenny J at [2013] FCAFC 24 [57]. Dowsett J held:

> Clearly, holding and waving the sign comprised part of the reason for the adverse action as did, in *Barclay*, the sending of the relevant email. Although Mr Barclay's conduct was in discharge of his union duties, and may have involved his representing or advancing the claims or interests of the union, such characterisation did not mean that the adverse action was because of his engagement in industrial activity. Rather, it was the content of the email, the circumstances in which it was sent and the likely effects on [his employer's] operations which caused the adverse action.[32]

Preserving the proper balance between employees and employers

The balanced legislative purposes of the general protection provisions

22 The CFMEU submits that the decision of the Full Court is contrary to the legislative purpose and objects of the general protection provisions in the *Fair Work Act*.[33]

23 The CFMEU rightly points to the fundamental statutory object, identified in s.336(1)(b), of protecting and promoting freedom of association.[34] One incident of this is the particular object, articulated in s.336(1)(b)(iii), of protecting employees' freedom to participate, or to not participate, in lawful industrial activities.

24 However, the error in the CFMEU's submission is that it does not recognise that the purpose of protecting and promoting freedom of association is balanced against (a) an employer's right to regulate the conduct of their employees in relation to each other, and (b) in cases such as this, an employer's duty to do so under the general law[35], occupational health and safety legislation such as s.19 of the *Work Health and Safety Act* 2011 (Qld) or s.39 of the *Coal Mining Safety and Health Act* 1999 (Qld), or the anti-bullying provisions in Part 6-4B of the *Fair Work Act*.

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[32] [2013] FCAFC 6 [12].
[33] CFMEU's Submissions, [3], [4].
[34] CFMEU's Submissions, [29], [30].
[35] See, eg, *Harrison v P & T Tube Mills* (2009) 181 IR 162, 232 [282], *McManus v Scott-Charleton* (1996) 70 FCR 16, 28-29, *Koehler v Cerebos (Australia)* (2005) 222 CLR 44, 53 [19], *Nationwide News v Naidu* (2007) 71 NSWLR 471, 478 [23]-[27].

25 This balance was recognised in *Barclay* at 248 CLR 515-516 [40], 518-519 [47], 523 [61] and 532 [91] as being central to the operation of s.361, and in this case by the Full Court at [2013] FCAFC 6 [14] and 43-44 [110].

The distinction by which that balance is achieved

26 The CFMEU submits that a distinction between 'conduct which is explicitly protected by the legislation and particular attributes of that conduct which an employer finds to be unpalatable' is 'artificial and impermissible.'[36]

27 However, that distinction was explicitly recognised in *Barclay*[37], and is a *ratio* of *General Motors-Holdens v Bowling* (1976) 51 ALJR 235[38], 239[39], *Cuevas v Freeman Motors Ltd* (1975) 25 FLR 67, 78-79[40], and *Lewis v Qantas Airways Ltd* (1981) 54 FLR 101, 113[41]; see also *Hyde v Chrysler (Australia) Ltd* (1977) 30 FLR 318, 332, *AFMEPKIU v Australian Health and Nutrition Association Ltd* (2003) 147 IR 380, 381, *Harrison v P & T Tube Mills* (2009) 188 IR 270, 276 [31], 276 [33], *Cicciarelli v Qantas Airways Ltd* [2012] FCA 56, 74 [260], *CFMEU v Bengalla Mining Company* [2013] FCA 267, 17 [70], *CFMEU v Corinthian Industries (Australia)* [2014] FCA 239, 9 [13].

28 The CFMEU makes the related submission that there is a 'conflict' between the primary judge's finding that Mr Doevendans's conduct in holding and waving the scabs sign at non-striking workers was part of an industrial activity, and the primary judge's acceptance of Mr Brick's evidence that the fact that Mr Doevendans was engaged in industrial activity did not play any part in his decision-making process.[42]

29 The proposition implicit in the submissions set out in [26] and [28] above is that, because an employer takes adverse action against an employee engaging in an industrial activity, it necessarily 'follows' that there could not be any reason for the adverse action other than the employee's participation in the industrial activity.

30 However, that proposition was disapproved in *Bowling* at 51 ALJR 239; and was rejected in *Barclay*, first by Lander J dissenting in the Full Court at (2011) 191 FCR 258 [227][43], and in this Court by French CJ and Crennan J at 248 CLR 515-516 [40] and by Heydon J at 547 [148].[44]

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[36] CFMEU's Submissions, [53].
[37] 248 CLR 517 [45], 542 [128].
[38] *General Motors Holden v Bowling* is reported as a note at (1976) 136 CLR 676. The full report is (1976) 51 ALJR 235.
[39] In the passage quoted at 248 CLR 522 [56], 531 [88].
[40] In the passage from 193 IR 257 [19] quoted at 248 CLR 536-537 [108].
[41] In the passage quoted at 248 CLR 532 [91].
[42] CFMEU's Submissions, [43].
[43] In a passage approved at 248 CLR 542 [128].
[44] Gummow and Hayne JJ did not address the issue.

31 Instead, in *Barclay* this Court applied *Bowling*[45] to hold that:

(a) an employer can be exculpated even if its reasons for taking adverse action are not 'entirely dissociated' from the industrial activities described in s.347(b)(iii) and (v)[46]; and

(b) an employee is not immune, and protected, from adverse action merely because their industrial activities are 'inextricably entwined' with the adverse action.[47]

32 These principles make irrelevant the CFMEU's submission that Mr Doevendans's misconduct was an 'indispensible' or 'integral' part of the industrial activity in which he was participating.[48]

33 In this case, every member of the Full Court correctly identified the principles set out in [31] of these submissions.[49] For example:

(a) '[T]he fact that an employee participated in such an activity or represented or advanced such views, claims or interests does not necessarily lead to the conclusion that adverse action was taken because of such engagement. *Barclay* establishes that engagement in industrial activity may be closely related to a decision to take adverse action, without necessarily being the cause of such a decision'.[50] (Dowsett J)

(b) '[A]n employee may act in a way which falls within ss.346 and/or 347, but may do so in a way, or in circumstances which cause the employer to act adversely, not because of the employee's engagement in industrial activity, but because of other concerns'.[51] (Dowsett J)

(c) 'An activity is not insulated from adverse action by an employer because it "happens to be" done in the course of otherwise lawful industrial activity'.[52] (Kenny J)

(d) It is an error to conclude that once it is found that an employee is engaging in an industrial activity within either s.347(b)(iii) or (v), 'such an employee cannot be dismissed for any conduct relating to these activities. It would be to conclude that that the task imposed by s.346 and the need to determine the reason or reasons for a decision as explained [in *Barclay*] need not be undertaken.' (Flick J)[53]

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[45] 248 CLR 523 [59].
[46] 248 CLR 517 [45], 523 [62].
[47] 248 CLR 523 [61].
[48] CFMEU's Submissions, [49], [50], [57].
[49] [2013] FCAFC 2-3 [4] (Dowsett J); 11 [26], 12-13 [30(2)], 24 [57] (Kenny J); and 41-42 [107] (Flick J).
[50] [2013] FCAFC 5 [10].
[51] [2013] FCAFC 6 [12].
[52] [2013] FCAFC 24 [57].
[53] [2013] FCAFC 43 [108].

(e) An employer has never been prevented 'from taking prejudicial [action] against an employee because the conduct of the employee may objectively (and correctly) be characterised as conduct that falls within s.347'.[54] (Flick J)

34 The Full Court correctly held that the primary judge's error was in not applying the principles identified in [31] and [33] of these submissions. Instead, the primary judge applied the incorrect proposition identified in [29] of these submissions to uphold the CFMEU's case. This error occurred in relation to s.347(b)(iii) at 228 IR 234 [115] and in relation to s.347(b)(v) at 228 IR 237 [124]. The Full Court correctly identified this error:

(a) unanimously as to the case under s.347(b)(iii), at [2013] FCAFC 6 [12]-[13] (Dowsett J), 23 [54] – 24 [57] and 25 [59] (Kenny J), and 41 [105] – 43 [109] (Flick J);

and

(b) by majority as to the case under s.347(b)(v), at [2013] FCAFC 132, in the paragraphs from the reasons of Dowsett and Flick JJ identified in the preceding subparagraph. (Kenny J's dissent on the facts on this point is addressed in paragraphs [44] to [46] of these submissions.)

Applying the balancing principles articulated in Bowling *and* Barclay

35 The statutory objects identified in [23] of these submissions show that the focus of the protection given by s.346(b) and (c) is on an industrial association's involvement in the activity. Accordingly, the defining feature of every industrial activity referred to in s.346(b) and (c), and identified in s.347, is the involvement in that activity of an industrial association.

36 The balancing principles set out in [31] and [33] of these submissions mean that an employer can lawfully take adverse action against an employee for misconduct committed in a circumstance within s.347(b)(iii). The employer will discharge its onus under s.361 if it proves that the fact that the activity in which the employee participated had been organised or promoted by an industrial association was not a substantial and operative reason for the adverse action. That is a consequence of the distinction, identified and explained in [26], [27], [31] and [33] of these submissions, between the misconduct and the industrial activity in which it occurs. So, if two employees were guilty of the same misconduct, but only one happened to do so while participating in a lawful activity organised or promoted by a particular industrial association, that employee would not for that reason be immune from adverse action taken because of the misconduct.

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[54] [2013] FCAFC 43-44 [110].

37 Applying the balancing principles set out in [31] and [33] of these submissions to s.347(b)(v), if two employees abused their fellow workers as 'scabs', but only one happened to be representing the views or interests of a particular industrial association, while the other did so idiosyncratically, then the first employee would not for that reason be immune from adverse action taken because of the misconduct.

38 At [2013] FCAFC 132, 27-28 [66] Kenny J wrongly rejected the propositions set out in [35] and [37] of these submissions as a 'gloss' on the general protection provisions. Her Honour's reasoning was contrary to (a) the result of, and reasoning in, *Barclay*, and in particular to the balancing principles set out in [31] and [33] of these submissions, and (b) the fair, reasonable and natural meaning of the language used in s.346(b) and 347(b)(iii) and (v).[55] The application of the balancing principles set out in [31] and [33] of these submissions avoids the hypothetical problem posed by Kenny J in [2013] FCAFC 132, 28-19 [68].

39 To illustrate the operation of the balancing principles by reference to s.347(b)(v), suppose that a particular industrial association disapproved of the employment of workers of a particular race, ethnicity or national origin and had the view that those workers should be vilified by other employees using language that was offensive, insulting, humiliating or intimidating. Or suppose that the industrial association had an interest in resisting a change in working arrangements, and encouraged employees to advance that interest by disobeying their employer's directions to implement that change. No formality necessarily regulates the adoption of any view or interest to which s.347(b)(v) refers[56], and no requirement of lawfulness qualifies any element of s.347(b)(v). If s.347(b)(v) operates as the primary judge and Kenny J held, and as the CFMEU now contends, then in both of these hypotheticals employees who represented or advanced the industrial association's view or interest would be immune from any discipline. This would be so notwithstanding that in the first hypothetical the employees' misconduct would be unlawful[57], and in the second a breach of fundamental contractual obligations.[58] The legislature did not intend such a result. The proper construction of s.347(b)(v) is that in both cases the employer could lawfully discipline its employees for their misconduct, provided that in doing so the employer's reasons did not include the fact that the view or interest that the employees were representing or advancing were those of an industrial association.

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[55] *Waugh v Kippen* (1986) 160 CLR 156, 165, *IW v City of Perth* (1997) 191 CLR 1, 11, *Minister for Immigration and Ethnic Affairs v Teo* (1995) 57 FCR 194, 206G.
[56] 228 IR 236 [122].
[57] *Racial Discrimination Act* 1975 (Cth), s.18C(1).
[58] *R v Darling Island Stevedoring & Lighterage Co; ex p Halliday and Sullivan* (1938) 60 CLR 601, 621.

The CFMEU's attempts to sidestep *Barclay*

40 The CFMEU tries to avoid the consequences of the primary judge's findings and the reasoning and result of *Barclay* in three ways.

41 First, the CFMEU submits that the primary judge's errors at 228 IR 234 [115] and 237 [124] are findings of fact.[59] They are not: they are conclusions, arrived at by applying the incorrect proposition identified in [29] of these submissions, instead of giving effect to the findings of fact made at 228 IR 204 [22], 211 [36] and 212 [41].

42 Second, the CFMEU makes two related submissions. The first is that the majority in the Full Court adopted 'a purely subjective frame of reference', and acted on the basis that Mr Brick's 'subjective characterisation of his reasons' was determinative.[60] The second submission is that Mr Brick impermissibly 'characterised' or 'recharacterised' his reasons in terms that were designed to avoid the operation of the general protection provisions.[61] The latter submission is the false issue postulated in [2] of the CFMEU's submissions. There are three reasons why there is no substance in either of these submissions:

(a) The inquiry required by s.346(b) is 'into the mental processes of the person responsible for the [adverse] action': *Barclay*, at 248 CLR 544 [140]; see also 248 CLR 506 [5], 517 [44], 534-535 [101] and 542 [127]. The primary judge undertook that inquiry, and the Full Court acted on the findings that resulted, as it was obliged to do when they were not challenged. There was no element of subjectivity in the reasoning of the primary judge or any member of the Full Court, except to the permissible extent that the inquiry related to Mr Brick's mental processes.

(b) The suggestion that Mr Brick's reasons, as found by the primary judge, involved an element of 'recharacterisation' is incorrect. The expression has an unjustified pejorative quality, hinting at later reconstruction. The primary judge rejected that attack on Mr Brick's evidence at 228 IR 211-212 [36]-[41]. Mr Brick did not give any 'character' to his reasons. Instead, Mr Brick exhaustively described the distinctive features of his mental processes, and the primary judge accepted the truth of that description. *Barclay* authorised that approach.

(c) The primary judge did not restrict his inquiry to Mr Brick's 'mere declarations of innocent reason or intent'[62], but instead evaluated Mr Brick's evidence about his mental processes against all of the surrounding facts, as *Barclay* required at 248 CLR 542 [127]; see

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[59] CFMEU's Submissions, [42], [50].
[60] CFMEU's Submissions, [48].
[61] CFMEU's Submissions, [2] and [51].
[62] *cf* CFMEU's Submissions, [37]; see also CFMEU's Submissions, [36].

also 521 [54] and 544 [140]. Having done so, the primary judge found that '[t]here was no inferential case, based on the objective facts as a whole, that was to any extent inconsistent with [Mr Brick's] evidence'.[63]

43 Third, the CFMEU submits that Mr Brick's evidence of his reasons was 'at odds with the objective facts relating to the conduct of the protest.'[64] This may be another way of putting the submissions addressed in [41] of these submissions. If it is an oblique challenge to the correctness of the findings made at 228 IR 204 [22], 211 [36] and 212 [41], it is too late to make it now.

The dissenting reasons of Kenny J on s.347(b)(v)

44 Her Honour's dissent was not on any point of principle, but turned on a different, and erroneous, analysis of the primary judge's findings in relation to s.347(b)(v).

45 The first error in her Honour's analysis is in the last sentence of [2013] FCAFC 17-18 [39], where her Honour addressed the primary judge's finding at 228 IR 209 [30] that Mr Doevendans's engagement in industrial activity did not play an operative part in Mr Brick's decision. Her Honour wrongly interpreted this finding to be limited to Mr Doevendans's stop work, overtime bans and protest activities. At 228 IR 201 [12] to 209-210 [31] the primary judge set out Mr Brick's evidence about all of his mental processes. That evidence, when read as a whole, excludes the possibility that Mr Brick took into account the fact that Mr Doevendans had engaged in an industrial activity within the meaning of s.347(b)(v).

46 The second error in her Honour's analysis is in the last sentence of [2013] FCAFC 23 [55], if that sentence is understood to mean that 'choosing to hold and wave the scabs sign on a number of occasions over a number of days' operated as a separate and distinct reason for Mr Brick's decision. The correct position is set out in [10(a)] of these submissions. Without this error, her Honour would not have undertaken the exercise set out in the last sentence of [2013] FCAFC 28 [67]. In any event, that exercise was vitiated by a misunderstanding of the hypothetical statement set out at 228 IR 207-209 [28]. Kenny J concluded that this evidence 'precluded an argument that an operative factor was not the waving of the scabs sign'. This conclusion was incorrect. Mr Brick meant only that every one of the facts and matters that he actually took into account needed to have been present before he could be certain that Mr Doevendans should be dismissed.

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[63] 228 IR 212 [41].
[64] CFMEU's Submissions, [42]. The submission is repeated in [47].

Part VII: Notices of contention or cross-appeal

47 There are no notices of contention or cross-appeal.

Part VIII: Time estimate

48 BHP estimates that two hours will be required for the presentation of its oral argument.

Dated: 11 July 2014

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