IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M 128 of 2011

BETWEEN:

THE BOARD OF BENDIGO REGIONAL INSTITUTE OF TECHNICAL AND FURTHER EDUCATION Appellant

and

GREGORY PAUL BARCLAY First Respondent

and

AUSTRALIAN EDUCATION UNION Second Respondent

APPELLANT'S SUBMISSIONS

PART I – Certification of suitability for publication

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

PART II – Issues in the appeal

2. Is the question of whether a person has taken adverse action because of a proscribed reason under the general protection provisions in Part 3-1 (**general protection provisions**) of the *Fair Work Act 2009* (Cth) (**FW Act**) answered by the application of a subjective test or an objective test (**Grounds 2 and 3**)?

3. If the trial judge accepts the evidence of a decision-maker and finds that adverse action was taken for an innocent and non-proscribed reason, does a defendant have a good defence to a cause of action (**Ground 2**)?

4. If a general protection provision claim is answered by the application of an objective test, did the majority below apply the correct objective test or one that was impermissibly narrow (**Grounds 4(a)-(b)**)?

5. Were the trial judge's findings as to the innocent reasons of the decision-maker only findings as to the conscious mind of the decision-maker,

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Date: 30 September 2011

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permitting the majority below to determine what were the unconscious reasons of the decision-maker (**Ground 4(c)**)?

PART III – Certification of compliance with s.78B of the Judiciary Act

6. The Appellant (**BRIT**) has considered whether any notice should be given in compliance with s.78B of the *Judiciary Act 1903* (Cth). No notice is required.

PART IV – Citation of reasons below

7. The reasons of the trial judge are:

Barclay v The Board of Bendigo Regional Institute of Technical and Further Education [2010] FCA 284 (25 March 2010, Tracey J); (2010) 193 IR 251.

8. The reasons of the Full Court of the Federal Court of Australia are:

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

PART V – Narrative statement of relevant facts

9. BRIT was to be subject to an audit conducted by the Victorian Registration and Qualifications Authority on 16 and 17 February 2010. Certain documentation was to be provided to the auditors in the course of the audit. The audit was conducted to establish whether or not BRIT had complied with the various requirements on which its continuing accreditation and funding depended (reasons at trial at [6], AB#).

10. The First Respondent (**Barclay**) is a senior teacher and is the Sub-Branch President of the Second Respondent (**AEU**) at BRIT.

11. Four members of the AEU spoke to Barclay about the preparation of the audit documentation. They told him that they had become aware that incorrect information had been included in documents being prepared for audit purposes. None of them told Barclay that they considered that the person responsible for making the entries had deliberately inserted details which they knew to be incorrect in an attempt to mislead the auditors (reasons at trial at [1], AB#, [43], AB#).

12. On 29 January 2010, only a little over two weeks prior to the due date of the audit, Barclay sent an email to members of the AEU employed by BRIT which read (reasons at trial at [4], AB#):

> *"The flurry of activity across the Institute to prepare for the upcoming reaccreditation audit is getting to the pointy end with the material having been sent off for the auditors to look through prior to the visit in February.*
>
> *It has been reported by several members that they have witnessed or been asked to be part of producing false and fraudulent documents for the audit.*
>
> *It is stating the obvious but,* ***DO NOT AGREE TO BE PART OF ANY ATTEMPT TO CREATE FALSE/FRADULENT*** (sic) ***DOCUMENTATION OR PARTICIPATE IN THESE TYPES OF ACTIVITIES****. If you have felt pressured to participate in this kind of activity please (as have several members to date) contact the AEU and seek their support and advice."* (emphasis in original)

13. The email is signed off as *"Greg Barclay President BRIT AEU Sub-Branch"*.

14. On 1 February 2010, Dr Harvey, the Chief Executive Officer of BRIT, was given a copy of the email. Dr Harvey had concerns that:

    (a) the allegations of fraudulent conduct were made by Barclay without any complaint or report of conduct of that kind being raised by him with Dr Harvey or any other member of senior management at BRIT;

    (b) further, these matters were not raised despite Barclay being employed as Team Leader in the Unit responsible for overseeing the preparation of the audit process; and

    (c) the language used by Barclay in the email was bound to cause distress to members of staff, bring the reputation of the BRIT into question and undermining staff confidence in the audit process (reasons at trial at [49], AB#).

15. Dr Harvey considered that this conduct provided prima facie evidence of a breach of the Code of Conduct for Victorian Public Sector Employees and Barclay's obligations as a BRIT employee (reasons at trial at [51], AB#).

16. BRIT conceded that it had taken *"adverse action"* within the meaning of that term in s 342 of the FW Act by:

    (a) suspending Barclay from duty (albeit on full pay);

    (b) suspending Barclay's email access; and

(c) imposing a requirement on Barclay that he not attend BRIT's premises (reasons at trial at [46], AB#).

Given these concessions, the trial Judge did not find it necessary to determine whether the institution of the disciplinary proceedings also constituted adverse action (reasons at trial at [47], AB#).

17. Dr Harvey:

(a) denied that any adverse action was taken because of Barclay's membership of the AEU or because of any role he held within that organisation or because he had engaged in industrial activity (reasons at trial at [53], AB#);

(b) decided to suspend Barclay (on full pay) because:

(i) the allegations against him were serious; and

(ii) she was concerned that, if Barclay was not suspended, he might cause further damage to the reputation of BRIT and of the staff of BRIT (reasons at trial at [52], AB#, [58], AB#);

(c) determined to exclude Barclay from BRIT campuses and suspend his email access because she did not want Barclay on the premises while the auditors were there and because she did not want any other *"loose allegations"* made inappropriately during the audit to the detriment of BRIT (reasons at trial at [54], AB#); and

(d) determined to institute an investigation into Barclay's actions[1] because it appeared to her that Barclay had:

(i) failed to bring serious allegations to the attention of senior managers; and

(ii) proceeded to cast aspersions and innuendo upon his colleagues by way of a widely circulated email (reasons at trial at [51], AB#).

18. There is no dispute that:

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[1] The trial judge found that *"Dr Harvey was entitled (if not bound) to investigate the allegations"* (reasons at trial at [45], AB#).

(a) the AEU is an *"industrial association"* for the purposes of Part 3-1 of the FW Act; and

(b) Barclay is an *"officer"* of an industrial association for the purposes of Part 3-1 of the FW Act.

19. The critical question for determination by the trial judge was whether the adverse action was taken by Dr Harvey because of a proscribed reason.

PART VI – Appellant's argument

Statutory history

20. The general protection provisions commenced operation on 1 July 2009. They are, however, not new. They were enacted against the background of a long history of similar provisions, starting with the enactment of the *Conciliation and Arbitration Act 1904* (Cth) (**C&A Act**).

21. Relevantly, s.346(a) of the FW Act has the effect that an employer must not take adverse action against an employee because the employee is an officer of an industrial association.

22. Statutory provisions to similar effect have been in place since 1904, being:

(a) from 1904, s.9(1) of the C&A Act;

(b) from 1914, s.9(1)(a) of the C&A Act;

(c) from 1947, s.5(1)(a) of the C&A Act;

(d) from 1988, s.334(1)(a) of the *Industrial Relations Act 1988* (Cth) (**IR Act**);

(e) from 1996, ss.298K(1) and 298L(1)(a) of the *Workplace Relations Act 1996* (Cth) (**WR Act**); and

(f) from 2006, ss. 792(1) and 793(1)(a) of the WR Act.

23. Relevantly, s.346(b) and 347(b)(iii) and (v) of the FW Act have the effect that an employer must not take adverse action against an employee because the employee has:

(a) encouraged, or participated in, a lawful activity organised or promoted by an industrial association; or

(b) represented or advanced the views, claims or interests of an industrial association.

24. Statutory provisions to similar effect have been in place since 1973, being:

(a) from 1973, s.5(1)(f) of the C&A Act;[2]

(b) from 1988, s.334(1)(j) of the IR Act;

(c) from 1996, ss.298K(1) and 298L(1)(n) of the WR Act; and

(d) from 2006, ss.792(1) and 793(1)(o) of the WR Act.

25. Relevantly, s.361 of the FW Act has the effect that, it is presumed that the adverse action was taken by the employer for the reason proscribed by s.346 unless the employer proves otherwise.

26. Statutory provisions to similar effect have been in place since 1914, being:

(a) from 1914, s.9(4) of the C&A Act;[3]

(b) from 1947, s.5(4) of the C&A Act;

(c) from 1988, s.334(6) of the IR Act;

(d) from 1996, s.298V of the WR Act; and

(e) from 2006, s.809 of the WR Act.

27. The rationale for the reverse onus provision in s.361 is that the reason why adverse action is taken is ***"a matter peculiarly within the knowledge of"*** the employer: *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605 (**Bowling**) at 617.5 (Mason J, with whom Stephens and Jacobs JJ agreed). In the face of that practical difficulty, by reversing the onus the Parliament has sought to facilitate proof of the connection between the adverse action and the proscribed reason.

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[2] As regards other protections for union officers carrying out union duties, see s.9(1)(d) , inserted into the C&A Act in 1920, and s.5(1)(e), inserted into the renumbered provision of the C&A Act in 1947. A comprehensive account of the statutory history is set out in *Elliott v Kodak Australasia Pty Ltd* (2001) 108 IR 23 at 27.2-28.7 [27]-[33], cited in the reasons at trial at [20], AB#.

[3] In the Second Reading Speech of the then Attorney-General, Mr Hughes, in respect of this amendment, it was said: *"Under the Act as it stands, in order to secure a conviction it is necessary to prove that an employee has been dismissed merely because he is a unionist. ... An employer may discharge a man because he is a unionist, and say that he has dismissed him because he does not like his appearance. We are amending the Principal Act so that the onus will rest on the employer"* (Hansard, 13 November 1914, p.659).

28. Section 360 of the FW Act further facilitates the proof of the connection between the adverse action and the proscribed reason by providing that the proscribed reason need be only one of the reasons for taking the adverse action.

29. Section 360 has a more recent statutory history.

(a) From 1996, a similar provision first appeared in the prefatory words to s.298K of the WR Act: *"An employer must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following ..."*.

(b) From 2006, s.792(1) of the WR Act was in similar terms.

30. Upon the enactment of the FW Act, there was no discernible departure by the Parliament from the accepted interpretation of the predecessor provisions to ss.360 and 361 of the FW Act. To the contrary, the Parliament:

(a) embraced the jurisprudential interpretation of the meaning of *"reason"* in the authorities which have consistently applied the test since *Bowling* in 1976: *Explanatory Memorandum to the Fair Work Bill 2009* (Cth) at [1458];[4] and

(b) acknowledged that, ***"it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason"*** by shifting the onus in respect of the relevant state of mind of the decision-maker which the decision-maker must discharge: *Explanatory Memorandum to the Fair Work Bill 2009* (Cth) at [1461].[5]

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[4] "1458. Clause 360 provides that for the purposes of Part 3-1, a person takes action for a particular reason if the reasons for the action include that reason. **The formulation of this clause embodies the language in existing section 792** which appears in Part 16 of the WR Act (Freedom of Association) **and includes the related jurisprudence.** This phrase has been interpreted to mean that the reason must be **an operative or immediate reason for the action** (see *Maritime Union of Australia Pty Limited v CSL Australia Pty Ltd* [2002] FCA 513; 113 IR 326 at [54]-[55]). The 'sole or dominant' reason test which applied to some protections in the WR Act does not apply in Part 3-1." (emphasis added)

[5] "1461. However, subclause 361(1) provides that once a complainant has alleged that a person's actual or threatened action **is motivated by a reason or intent** that would contravene the relevant provision(s) of Part 3-1, that person has to establish, on the balance of probabilities, that the conduct was not carried out unlawfully. This has been **a long-standing feature of the freedom of association** and unlawful termination protections and **recognises that, in the absence of such**

A subjective test applies – Grounds 2 and 3

31. The role of ss.360 and 361, and their application to s.346(a) and (b), confirm that whether a decision-maker has taken adverse action for a proscribed reason involves a subjective – not an objective – test. This conclusion is supported by the legislative history of these provisions, a history that is also confirmed in the Explanatory Memorandum.[6]

The reverse onus provision (s.361) – the need for the decision-maker to establish they had no proscribed reason

32. Section 361 operates on all civil penalty provisions in Part 3-1 of the FW Act which include an element that a person took action:

(a) for a particular reason; or

(b) with a particular intent.

33. The first category applies those civil penalty provisions which prohibit taking adverse action ***"because of"*** a proscribed reason. That is:

(a) s.340, protection of workplace rights;

(b) s.346, protection of freedom of association; and

(c) ss.351, 352 and 354, protection from discrimination.

34. The retention of the phrase *"for a particular reason"* from predecessors to s.361 reveals a Parliamentary intent that use of the phrase *"because of"* in the general protection provisions, as opposed to the phrase *"by reason of"* in the predecessor provisions, was nothing more than an adaption to modern statutory language. If *"because of"* carried a different meaning, namely, creating an objective causal test, the reverse onus in s.361 would have no work to do in relation to the first category of civil penalty provisions.[7]

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a clause, it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason." (emphasis added)

[6] See especially at [1458] and [1461] of the Explanatory Memorandum, set out at footnotes 3 and 4 above.

[7] This was the view of the trial Judge (reasons at trial at [29], AB#) and the unanimous view of the Full Court of the Federal Court below (majority reasons at [24]-[25], AB#, Lander J in dissent at [191]-[193], AB#)

35. The second category applies to those civil penalty provisions which do not use the expression *"because of"* but which nevertheless refer to an element of intent. See, for example, ss.343, 344, 345, 348, 349, 350, 355, 358 and 359.

36. The statutory provisions call upon the employer to establish that the reasons for the adverse action do not include a proscribed reason.

37. When ascertaining the reasons for adverse action, objective considerations may be weighed against, and used to test, the evidence of the decision-maker. If having done so, however, the trial judge accepts the denial of any proscribed reasons, the reverse onus is discharged (s.361) and the defence is made good.

Section 360 – confirms the subjective test

38. Section 360 and its application to s.346 further confirms that the causal test is subjective, not objective. In order to determine whether action was taken for reasons that include a proscribed reason, one needs to:

(a) first, identify the reasons that operated on the mind of the decision-maker;[8] and

(b) secondly, determine whether any reason which did operate on the mind of the decision-maker was a proscribed reason.

39. If the test under s.346 was objective, one would expect **one reason** – that is, whether the *"reason"* was for a proscribed reason, based on an objective assessment of all the circumstances of the case. In contrast, s.360 confirms that a number of reasons may exist.

40. Section 360 recognises that the mind of a decision-maker may be subjectively motivated by more than one reason. If any of those reasons involve a proscribed reason, the adverse action claim is made out.

41. The majority (at [26], AB#) in effect put the previous interpretations of similar provisions by this Court and the Federal Court to one side. In doing so, the majority relied on the approach in *Purvis v State of New South Wales* (2003) 217 CLR 92. In *Purvis*, the word *"because"* in s.5 of the *Disability Discrimination Act 1992* (Cth) (**DD Act**) was found to suggest an objective

[8] That is the *"operative reasons"*. See footnote 3 above.

test. This approach to the use of the word *"because"* in the DD Act, however, cannot be transplanted into s.346 the FW Act by reason of;

(a) the application of ss.360 and 361 upon s.346; and

(b) the legislative history of these general protection provisions.

42. Nowhere in the majority decision do their Honours adequately deal with the role of s.360, and the crucial role of the reverse onus provision in s.361. If s.346 only requires the relatively lower objective, and not a subjective, test, the courts have proven to be well equipped to make such an objective assessment without the necessity of hearing evidence from the decision-maker in question. There would be no justification for giving a complainant the additional forensic advantage of a respondent facing a reverse onus.

43. The only cogent explanation for the reverse onus is that the test is subjective, not objective. Section 361 recognises the difficulty a complainant will face in proving the subjective intent of a respondent without the aid of s.361.

The statutory history – further confirms a subjective test

44. Prior to the decision of the majority, a subjective test has been the position throughout the entire statutory history of the provisions as outlined above. See, for example:[9]

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[9] See also:

(a) decisions in respect of s.5(4) of the C&A Act: *Ferguson v George Foster & Sons Pty Ltd* (1969) 14 FLR 370 at 379.7 to 379.9 (Cth Industrial Court, Spicer CJ, Smithers and Kerr JJ); *Cuevas v Freeman Motors Ltd* (1976) 25 FLR 67 at 87.8 to 88.1 (Cth Industrial Court, Spicer CJ, Smithers and Evatt JJ); *Childs v Metropolitan Transport Trust* [1981] IASCR 946 at 957.5 to 957.6 (Federal Court of Australia, Industrial Division, Smithers J); *Webb v Nationwide News Pty Limited* (1985) 10 IR 253 at 284.5 (Federal Court of Australia, Wilcox J).

(b) decisions in respect of s.334(6) of the IR Act: *Pryde v Coles Myer Limited* (1990) 33 IR 469 at 471.4 to 471.8 ((Federal Court of Australia, Keely J); *Lawrence v Hobart Coaches Pty Ltd* (1994) 57 IR 218 at 220.3 to 220.4, 221.2 to 221.5, 224.4 to 224.6 (Industrial Relations Court of Australia, Northrop J);

(c) decisions in respect of s.298V of the WR Act (pre-Work Choices): *Greater Dandenong City Council v Australian Municipal, Administrative, Clerical and Services Union* (2001) 112 FCR 232 at 292.3 to 292.6 [219]-[221] (Finkelstein J); *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34 at 88.5 [312]-[313], 89.9 [325], 91.2 [332], 91.9 [338], 92.8 [345], 93.5 to 93.6 [350]-[352]; *TWU v De Vito* (2000) 140 IR 33 at 43.3 [40] (not aware of prohibited reason); *CPSU v Telstra* (2001) 108 IR 207 at 208.8 to 209.1 [7]-[9], compare 210.9 [15] (unusual circumstances, witness not cross-examined); *AWU v John Holland Pty Ltd* (2001) 103 IR 205 at 215.7 to 216.2 [43]-[46]; *Elliott v Kodak Australasia Pty Limited* (2001) 129 IR 251 at 258.2 to 258.7 [29]-[31]; *Maritime Union of Australia v CSL Australia Pty Ltd* [2002] FCA 513; (2002) 113 IR 326 at 342.6 to 342.8 [55]; *United Firefighters Union of Australia v Metropolitan Fire and Emergency Services Board* (2003) 123 IR 86 at 114.2 to 114.3 [97]-[98],

(a) *Pearce v WD Peacock & Co Ltd* (1917) 23 CLR 199 (**Pearce**) at 203.8 to 204.1 (Barton ACJ):

> *"The question was solely as to the reason for the dismissal. 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 ... But the Magistrate was enabled to form a judgment as to the reason for the dismissal not only upon the mere statements of the witnesses, but also upon their demeanour and upon the manner in which they stood the test of cross-examination ... If he believed the evidence for the defence, as he undoubtedly did, it was open to him to come to the conclusion that the statutory onus was discharged. He has come to that conclusion, and I am by no means able to interfere with it."*

(b) *Pearce at* 214.1 (Gavan Duffy and Rich JJ):

> *"The charge against the respondent has not been proved if he has satisfied the onus imposed on him by sec. 9 (4) of the* Commonwealth Conciliation and Arbitration Act 1904-1915, *and if the evidence of Mr. Lord is accepted we think the respondent has satisfied that onus. The Magistrate, having heard the witnesses, accepted Mr. Lord's evidence, and we see no reason for saying that he was wrong in doing so."*

(c) *Bowling* at 612.8 (Gibbs J):

> *"If in the present case evidence had been given by the directors responsible that the employee was dismissed because he was guilty of misconduct or because his work was unsatisfactory, and that in dismissing him they were not influenced by the fact that he was a shop steward or indeed that he was dismissed in spite of that fact, and that evidence had been accepted, the onus would have been discharged."*

(d) *Bowling at* 617.9 (Mason J, with whom Stephens and Jacobs JJ agreed):

116.2 [106]; *CFMEU v Coffs Harbour Hardwoods (Sales) Pty Ltd* [2005] FCA 465 (22 April 2005, Whitlam J) at [19]; compare *Employment Advocate v NUW* (2000) 100 FCR 454 at 488.9 [105];

(d) decisions in respect of s.809 of the WR Act (post-Work Choices): *Seymour v Saint-Gobain Abrasives Pty Ltd* [2006] 161 IR 9 at 27.7 to 27.9 [127]-[130]; *CFMEU v CE Marshall & Sons Pty Ltd* (2007) 160 IR 223 at 239.2 [73]; *Rojas v Esselte Australia Pty Ltd (No 2)* (2008) 177 IR 306 at 322.4 to 324.4 [51]-[60]; and

(e) in respect of s.361 of the FW Act: *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* (2010) 186 FCR 22 at 60.5 to 61.2 [147]-[149], 66.1 to 66.3 [167]-[169].

> *"... a comprehensive expression of the reasons for dismissal and that they were dissociated from the circumstance that the respondent was a shop steward ... could be made if officers of the appellant had said in evidence: "We dismissed him because he was a troublemaker, because he was deliberately disrupting production and setting a bad example and we did so without regard at all to his position as a shop steward", and that evidence had been accepted."*

(e) more recently, the unexceptional application of the subjective test in the unanimous decision in *Harrison v P&T Tube Mills Pty Ltd* [2009] FCAFC 102; (2009) 188 IR 270 at 276.5 to 276.8 [31]-[33] (Ryan, Marshall and Logan JJ).

If an objective test – the majority's test was too narrow – Ground 4(b)

45. Even if the majority was correct to apply a broad objective causation test consistent with *Purvis*, the majority in fact did not do so. The majority simply asked whether the conduct of Barclay was done *"for and on behalf of the AEU"* (majority reasons at [73], AB #). The majority answered that question in the affirmative. The majority accordingly found that this resulted in liability on the employer.

46. In this respect, the majority found that:

> *"[i]f adverse action is taken by an employer in response to conduct of a union, it is* ***impossible*** *for that employer to* ***dissociate or divorce*** *from that conduct its reason for the taking of the adverse action simply by characterising the activity of the union as the activity of its employee."* (emphasis added) (majority reasons at [74], AB#)

47. On this approach, it would be irrelevant what the employer said in evidence. The case was determined by simply characterising the employee's original conduct. This is not how s.346, read with ss.360 and 361, was intended to work. The majority do not apply a broad objective test (if such is the correct test) but a narrow characterisation test.

48. One is left to ask – how could BRIT have successfully defended the application based on the approach of the majority? There would be no utility in Dr Harvey giving evidence as to her innocent state of mind. Her state of mind and reasons for acting would be irrelevant (majority reasons at [72]-[74], AB#). On the approach of the majority, given Barclay's conduct

involved conduct as a union officer, the onus under s.361 could never be discharged (majority reasons at [74], AB#). This interpretation is akin to a strict liability provision.

49. Furthermore, given BRIT's concessions as to adverse action, the case was effectively won when the email of Barclay was tendered, which email confirmed that it was sent by Barclay in his union capacity. The reverse onus provision was unnecessary.

50. The industrial impracticality of the majority's approach is apparent from their conclusion that, despite Barclay engaging in conduct while a current employee of BRIT, if his employer has a basis for complaint, or a legal claim arising out of such conduct, the complaint or claim is to be addressed to the union – not to the individual employee concerned (majority reasons at [73], AB#). Such a requirement cannot be found from the language of the general protection provisions. It has not been recognised by any authority in the past. It is contrary to *Bowling*.

51. The majority's characterisation test of the employee's conduct also fails to recognise, as existed in this case, that the fact that an employee engages in conduct in their capacity as a union officer does not mean that that conduct may not also have implications in their capacity as an employee.

52. Based on the logic of the majority's *"characterisation"* approach, which grants a level of immunity to a union officer in the workplace not recognised in the FW Act (majority reasons at [74]-[78], AB#), even if the employer did not know that the employee was acting in their union capacity, the outcome would have been the same.

Incorrect onus placed on employer – prove dissociated or divorced from the employee's union conduct

53. Furthermore, the majority fell into error in replacing the presumption in s.361 that a decision-maker may discharge by establishing that they did not engage in adverse action for a proscribed reason for a new and more demanding test – the need to establish that the adverse action was not *"dissociate*[d] *or divorce*[d] *from the employee's union conduct"* (majority reasons at [74], AB#).

A proscribed reason must be an operative reason – Ground 4(a)

54. Further, the approach of the majority equates to an onus being imposed upon a respondent to prove that the alleged proscribed reason did not in any way enter into its reasons for taking adverse action. Contrast the approach in *Bowling* at 616.8 (Mason J, with whom Stephens and Jacobs JJ agreed), rejecting as *"extreme"* such an interpretation by Isaacs J in *Pearce* at 205.

55. Rather, the onus imposed on a respondent is to establish that the alleged proscribed reason was not one of the ***"operative or immediate"*** reasons for the adverse action: *Maritime Union of Australia v CSL Australia Pty Ltd* [2002] FCA 513; (2002) 113 IR 326 at [54]-[55], as adopted by the *Explanatory Memorandum to the Fair Work Bill 2009* (Cth) at [1458].[10]

56. The onus is not the requirement to prove that the adverse action was dissociated or divorced from any proscribed reason. This amounts to a potentially impossible onus to discharge. It also does not accord with the language of s.361.

Whether subjective intent decisive or only relevant – the trial Judge's findings on that question not observed by the majority – Ground 4(c)

57. Even if, contrary to the submissions above, an objective causation test is required, the subjective intent of the employer must nevertheless be given due weight. In the face of the observation of the majority that *"the state of mind or subjective intention ... will be centrally relevant, but is not decisive"* (majority reasons at [28], AB#), the majority's treatment of the finding at trial as to the subjective intent of the employer was entirely unsatisfactory and contrary to authority.

58. The trial judge found that the decision-maker *"did not act for any proscribed reasons"* but *"acted for the* [innocent] *reasons which she gave"* (reasons at trial at [54], AB#).

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[10] In the passage in *Maritime Union of Australia v CSL Australia Pty Ltd* [2002] FCA 513; (2002) 113 IR 326 at 342.1 to 342.8 [54]-[55] adopted by the *Explanatory Memorandum to the Fair Work Bill 2009 (C'th)* at [1458], Branson J distinguishes between the *"operative (or immediate) reason"* and the *"cause (or proximate reason)"* for the conduct. This approach followed the majority in *Greater Dandenong City Council v Australian Municipal, Administrative, Clerical and Services Union* (2001) 112 FCR 232 at 276.2 [164] (Merkel J) and 289.2 [209] (Finkelstein J).

59. Despite these unequivocal findings of the trial judge, and the absence of any challenge to those findings on appeal,[11] in a somewhat novel (and erroneous) approach, the majority:

(a) sidelined those findings by setting up a distinction between what an employer may consciously believe is the reason, of which they could give evidence, and what would be their *"unconscious"* reason, for which they could not give evidence (majority reasons at [28], AB#);

(b) treated the trial judge's findings as findings confined to the conscious reasons of the employer, not the unconscious reason (which may be the real and proscribed reason) for the conduct the subject of complaint; and

(c) treated the findings of the trial judge as to the reasons of the decision-maker as merely findings as to how she *had "**chosen** to characterise the conduct of* [Barclay]" (majority reasons at [78], AB#) and what the decision-maker *"**thinks** he or she was actuated by"* (majority reasons at [74], AB#).

60. This is in stark contrast to the trial judge's finding that the innocent reasons proffered by the employer were in fact the **real reasons** that caused the employer to engage in the conduct it did. An appeal court ought not:

(a) circumvent such findings by searching for a person's purported unconscious and proscribed reason; or

(b) speculate on a person's purported *"unconscious"* and proscribed reason without having observed the person firsthand, especially in the face of unequivocal (and unchallenged) findings at trial as to the person's actual innocent and non-proscribed reasons.

61. The majority's approach renders the reverse onus provisions in s.361, for all practical purposes, unworkable. Even if an employer gives evidence on oath to discharge the reverse onus – and, despite being tested in cross-examination demonstrates that their subjective intent involved innocent and not proscribed reasons – such evidence would only go to the conscious

[11] As was observed by Lander J in dissent at [226], AB#.

subjective intent. How is an employer to discharge the onus to prove their "unconscious" subjective intent?

Alternative position – if the majority overturned the factual findings of the trial Judge on the issue of subjective intent – they did so contrary to *Fox v Percy* – Ground 4(d)

62. In the alternative, if the majority did overturn the trial judge's acceptance of Dr Harvey's denial and stated reasons, which is disputed, they did so contrary to (and without regard to) the principles enunciated in *Fox v Percy* (2003) 214 CLR 118 at 128.4 [29].

A trial Judge must be permitted to use a comparator test as a tool of analysis – if that will assist – Ground 5

63. The majority held that, except when the adverse action is confined to discrimination when compared with other employees of the employer, the comparative test of the kind dealt with in *Purvis* at 101.8 [12] (Gleeson CJ), 160.5 to 161.6 [222]-[225] (Gummow, Hayne and Heydon JJ) and 175.6 [273] (Callinan J) was not appropriate (majority reasons at [35]-[36], AB#).

64. The majority so held contrary to *Bowling* at 612.6 (Gibbs J) and 616.7 (Mason J, with whom Stephens and Jacobs JJ agreed). There is no basis upon which to give the phrase *"because of"* a different meaning depending upon which aspect of the definition of *"adverse action"* in s.342 is under consideration. Such a comparison may be an appropriate tool to assist a trial judge to determine whether the adverse action was taken because of a proscribed reason or for some innocent reason.

65. The majority erred in imposing an unqualified prohibition on the use of a comparator in assisting a trial judge's task.

Section 346(a) concerns a union officer's status, not activities – Ground 6

66. The majority erred in concluding that the scope of s.346(a) of the FW Act extends beyond the fact that a person is a member or officer of an industrial association to their activities in that role (majority reasons at [37]-[40], AB#). Such a view is not open on a proper construction of ss.346 and 347.

67. The legislature has chosen to protect specific activities of a union officer discretely in s 346(b). Those activities are further identified in s.347. In such circumstances, there is no basis to construe s.346(a) so that its coverage

trespasses also into the intended areas of s.346(b) and s.347. Such a construction is also supported by *Bowling* at 619.9 to 620.1 (Mason J, with whom Stephens and Jacobs JJ agreed).[12]

PART VII – Applicable statutory provisions

68. The applicable provisions of the *Fair Work Act 2009* (Cth) at the relevant date are set out in the attached schedule. These provisions came into force on 1 July 2009.

69. The applicable provisions are still in force in that form as at the date of this submission.

PART VIII – Orders sought

70. The appeal be allowed.

71. Paragraphs 1, 2 and 3 of the orders of the Full Court of the Federal Court of Australia made on 9 February 2011 be set aside and, in lieu thereof, the appeal from the trial Judge be dismissed.

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[12] See also *Harrison v PT Tube Mills Proprietary Limited* (2009) 181 IR 162 at 236 [298] (Dowsett J) and *Australian Municipal, Administrative Clerical and Services Union v Ansett Australia Ltd* (2000) 175 ALR 173 at [72] (Merkel J), *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2000) 106 FCR 482 at [66] (Kenny J), but contrast *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 IR 165 at [150] (North J), *Australasian Meat Industry Employees Union v G&K O'Connor Pty Ltd* (2000) 100 IR 383 at [37] (Gray J).

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

PART VII – Applicable statutory provisions

Fair Work Act 2009 (Cth)

Chapter 3 – Rights and responsibilities of employees, employers, organisations etc.

Part 3-1 – General protections

342 Meaning of *adverse action*

(1) The following table sets out circumstances in which a person takes ***adverse action*** against another person.

Meaning of adverse action

Item	Column 1 ***Adverse action*** **is taken by ...**	Column 2 **if ...**
1	an employer against an employee	the employer: (a) dismisses the employee; or (b) injures the employee in his or her employment; or (c) alters the position of the employee to the employee's prejudice; or (d) discriminates between the employee and other employees of the employer.

346 Protection

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

(a) is or is not, or was or was not, an officer or member of an industrial association; or

(b) engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of paragraph 347(a) or (b); or

(c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of paragraphs 347(c) to (g).

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

347 Meaning of *engages in industrial activity*

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

(a) becomes or does not become, or remains or ceases to be, an officer or member of an industrial association; or

(b) does, or does not:

(i) become involved in establishing an industrial association; or

(ii) organise or promote a lawful activity for, or on behalf of, an industrial association; or

(iii) encourage, or participate in, a lawful activity organised or promoted by an industrial association; or

(iv) comply with a lawful request made by, or requirement of, an industrial association; or

(v) represent or advance the views, claims or interests of an industrial association; or

(vi) pay a fee (however described) to an industrial association, or to someone in lieu of an industrial association; or

(vii) seek to be represented by an industrial association; or

(c) organises or promotes an unlawful activity for, or on behalf of, an industrial association; or

(d) encourages, or participates in, an unlawful activity organised or promoted by an industrial association; or

(e) complies with an unlawful request made by, or requirement of, an industrial association; or

(f) takes part in industrial action; or

(g) makes a payment:

(i) that, because of Division 9 of Part 3-3 (which deals with payments relating to periods of industrial action), an employer must not pay; or

(ii) to which an employee is not entitled because of that Division.

360 Multiple reasons for action

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

361 Reason for action to be presumed unless proved otherwise

(1) If:

(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b) taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed, in proceedings arising from the application, that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

(2) Subsection (1) does not apply in relation to orders for an interim injunction.