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

RESPONDENTS' SUBMISSIONS

Part I – Publication on the internet

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

Part II - Statement of the issue

2. The critical issue in this appeal is what is required for a person who takes adverse action against another person to "prove otherwise" within the meaning of s.361 of the Fair Work Act 2009 ("the FWA") where it is alleged that the adverse action has been taken against the other person because the other person was an officer or member of an industrial association or has engaged in industrial activity within the meaning of s.347(b)(iii) or (v) of the FWA: see s.346(a) and (b) of the FWA.

Part III – Notice under the *Judiciary Act*

3. The respondents have considered whether a notice should be given in compliance with s 78B of the *Judiciary Act* 1903 (Cth). No notice is required.

Part IV – Statement of additional material facts

4. In addition to the narrative statement of facts provided by the appellant, the following facts are material. Tracey J found at [9] (AB #) that on 2 February

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2010 Dr Harvey, the Chief Executive Officer of the appellant, gave Mr Barclay a letter that stated in relevant part:

"disciplinary action may be warranted because of:

- the manner in which you have raised the allegation, via a broadly distributed email;
- your actions in not reporting the instances of alleged improper conduct directly to your manager or me to enable us to take appropriate action; and
- your refusal or failure to provide particulars of the allegations when asked to do so by your manager."

5. The trial judge also stated at [42] (AB #) that Mr Barclay "had the right (and probably the duty) to discuss workplace issues of concern to members with those members and to advise them" and that he "was also bound to respect confidences." Those findings were not challenged on appeal and are not challenged in this court. The majority drew a series of inferences or identified additional facts, none of which are challenged in this appeal:

(a) In sending the email of 29 January 2010 ("the email")[1] Mr Barclay was acting in his capacity as a union officer and not in his capacity as an employee. His role as an officer included ascertaining the concerns of members and communicating with members about issues of interest or concern to them. In sending the email, Mr Barclay was representing or advancing the views of the second respondent ("the AEU"). He was also encouraging or participating in a lawful activity organised or promoted by the AEU.[2]

(b) Mr Barclay retained the confidences of members who imparted concerns to him. He did not report those concerns to the employer. He refused to provide the employer with the names of the union members who had approached him. In doing so he was acting in his capacity as a union officer and not in his capacity as an employee. In retaining the confidences of members Mr Barclay was advancing the interests of the AEU and participating in a lawful activity organised or promoted by the AEU.[3]

Part V – Applicable statutory provisions

6. The appellant's statement of applicable statutory provisions is accepted.

Part VI – Statement of Argument

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[1] The terms of the email are reproduced in the majority reasons at paragraphs [42] (AB#)

[2] Reasons of Gray and Bromberg JJ in *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 ("majority reasons") at paragraphs [59]-[60], (AB#) [63]-[65] (AB#) and [73] (AB#).

[3] Majority reasons at paragraphs [64], (AB#) [65] (AB#) and [73] (AB#)

Grounds of Appeal 2, 3 and 4 (b)-(c)

7. The critical issue in this appeal is what is required for a person who takes adverse action against another person to "prove otherwise" within the meaning of s.361 of the FWA where it is alleged that the adverse action has been taken against the other person because the other person was an officer or member of an industrial association or has engaged in industrial activity within the meaning of s.347(b)(iii) or (v) of the FWA: see FWA s.346(a) and (b).

8. The appellant misstates the critical issue by claiming that it is whether a person has taken adverse action because of a proscribed reason under Part 3-1 ("the general protection provisions") of the FWA is "answered by the application of a subjective test or an objective test".[4] The appellant has conceded that the appellant took adverse action against Mr Barclay within the meaning of s.342 of the FWA by:

   (a) suspending him from duty;

   (b) suspending his internet access; and

   (c) excluding him from the appellant's premises.[5]

9. It was, therefore, incumbent on the appellant to prove that each of those adverse actions was taken otherwise than for a reason that included the reason that Mr Barclay was an officer of the AEU or had encouraged or participated in a lawful activity organised or promoted by the AEU or had represented or advanced the views of the AEU: s 346 (a) and (b), s.347 (b)(iii) and (v).

10. The need for the appellant to disprove the taking of the adverse action for one of the alleged proscribed reasons arises from the terms of s.360 of the FWA which stipulates that:

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

11. None of the relevant sections imposes the application of a "subjective test" or an "objective test". Nor is any such distinction to be found in the language of the legislation. Section 346 postulates, relevantly, only an inquiry into whether the actor has taken adverse action against the other person <u>because</u> the other person possessed a specified characteristic in relation to an industrial association or had engaged or proposed to engage in industrial activity within the meaning of s.347(a) or (b).

12. Nor is the rebuttable presumption erected by s.361 of the FWA confined to the subjective state of mind of the actor, at least as far as it is raised by an allegation that the actor took adverse action "for a particular reason". Different

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[4] Appellant's written submissions paragraphs 2 and 31

[5] Paragraph [46] (AB#) of the reasons of Tracey J

considerations may apply where the allegation invokes, e.g. s.348 by asserting the taking of the action with the particular "intent to coerce the other person, or a third person, to engage in industrial activity."

13. The construction of s.346 for which the respondents contend, i.e. that the word "because" connotes more than one reason, and the resultant complex is not confined to the subjective intent of the decision-maker, is reinforced by the presence in the FWA, immediately before s.361, of s.360. That section expressly acknowledges that action may be taken for more than one reason or for a multiplicity of reasons. Significantly, in light of the language of s.361, s.360 does not go on to say that "a person takes action with a particular intent if the intents with which the action is taken include that intent". That difference reinforces the view that "intent" is limited to something solely referable to the mental processes of the actor whereas s.360 contemplates that action may be taken for several reasons or "causes", not all "subjective" or confined to the mental processes of the actor.

14. At the time when *General Motors-Holden's Pty Ltd v Bowling* (1976) 51 ALJR 235; 12 ALR 605 (*"Bowling"*) was decided, the predecessor of s.346 of the FWA was s.5(1) of the *Conciliation and Arbitration Act* 1904 which relevantly provided:

> *"An employer shall not dismiss an employee or injure him in his employment, or alter his position to his prejudice, by reason of the circumstance that the employee –*
>
> *(a) is or has been, or proposes to become, an officer, delegate or member of an organization ...*
>
> *...(f) being an officer, delegate or member of an organization has done, or proposes to do an act or thing which is lawful for the purpose of furthering or protecting the industrial interests of the organization or its members, being an act or thing done within the limits of authority expressly conferred on him by the organization in accordance with the rules of the organization."*

15. The equivalent in the *Conciliation and Arbitration Act* of s. 361 of the FWA was s.5(4) which provided:

> *"In any proceeding for an offence against this section, if all the facts and circumstances constituting the offence, other than the reasons for the defendant's action, are proved it shall be upon the defendant to prove that he was not actuated by the reason alleged in the charge."*

16. There was in the *Conciliation and Arbitration Act,* as in force in 1976, no counterpart of s.360 of the FWA. Nevertheless, in *Bowling,* Mason J, with whom Stephen and Jacobs JJ agreed, held at 241 (ALR at 616) that, for the purposes of s.5(1), an employer would be actuated by a particular reason or

circumstances if that reason or circumstance were "a substantial and operative factor" influencing him to take the proscribed action. The sub-section was not speaking of the sole or predominant reason actuating the employer. See also at 242 (ALR at 619) where Mason J observed:

> *"It was suggested that even if the appellant's management had regard to the respondent's position as a shop steward in dismissing him, that was not enough to bring the case within s 5(1)(a). The short answer to this suggestion is that s 5(1) does not proscribe the circumstances which it lists as the sole or predominant reasons for dismissal. It is sufficient if the circumstance is a substantial and operative factor. And it does not cease to be such a factor because it is coupled with other circumstances or because regard is had to it in association with other circumstances not mentioned in the section."*

His Honour thus construed the legislation as impliedly recognising, as s.360 of the FWA now does expressly, that there may be more than one reason or cause of an employer's taking a proscribed action.

17. A provision similar to s.360 of the FWA first appeared in 1996 as s.298K of the *Workplace Relations Act*. In 2006 it became, without any significant change, s.792 of the *Workplace Relations Act*. The suggestion at paragraph [1458] of the Explanatory Memorandum quoted at footnote 4 to [30] (AB#) of the appellant's written submissions that the language of s.360 of the FWA has been interpreted to mean that the reason for a proscribed action "must be an operative or immediate reason" is not supported by anything in the reasoning of the High Court in *Bowling* or in any of the successive formulations of the section itself. It is difficult to understand what the gloss "immediate" means if it is intended to add anything to the concept of "substantial and operative factor" approved by Mason J in *Bowling*.

18. That was the concept applied by Branson J in *Maritime Union of Australia v CSL Australia Pty Ltd* (2002) 113 IR 326. In that case, her Honour treated "immediate" as synonymous with "operative" but observed at [54] that:

> *"it seems to me, this distinction [between the operative (or immediate) reason and the cause (or proximate) reason] may in many cases be easier to articulate than to draw, especially in respect of a statutory provision that recognises the possibility of a number of reasons having a causal connection with conduct".*

Her Honour went on at [55] to conclude:

> *"I am satisfied that the Company has proved on the balance of probabilities that the operative or immediate reason (or perhaps reasons) for the conduct of the Company with which this proceeding is concerned was Mr Jones' desire that each of the CSL Pacific and CSL Yarra should have the flexibility to trade as part of the CSL*

International fleet not only on the Australian coast but elsewhere in a cost effective way."

19. In *Bowling*, Mason J accepted, at 241 (ALR at 617), that the principal reason for the dismissal was that the appellant employer considered Bowling to be a troublemaker who had deliberately disrupted production. Nevertheless, his Honour went on to say:

> *"Even so, this finding does not carry the appellant the whole distance."*

20. In the next paragraph, His Honour continued:

> *"It is to my mind a very considerable leap forward to say that this finding in itself is a comprehensive expression of the reasons for dismissal and that they were dissociated from the circumstances that the respondent was a shop steward." (emphasis added).*

21. After illustrating how the necessary dissociation might have been proved by adducing evidence from the decision-makers, Mason J concluded, in the same paragraph:

> *"Once it is said that the appellant dismissed him 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. Although the activities in question did not fall within his responsibilities as a shop steward his office gave him a status in the work force and a capacity to lead or influence other employees, a circumstance of which the appellant could not have been unaware. It would be mere surmise or speculation, unsupported by evidence, to suppose that the appellant's management, if concerned as to the bad example he was setting, divorced that consideration from the circumstance that he was a shop steward."* (ALJR at 241; ALR at 617).

22. Those observations can be paraphrased to apply with equal force to the undisputed facts of the present case. Once it is said that adverse action was taken against Mr Barclay because he disseminated the offending email, it is not easy to say, without more, that this had nothing to do with his being an officer of the AEU or encouraging or participating in a lawful activity organised or promoted on its behalf or representing or advancing its views, claims or interests. Mr Barclay's status as Sub-Branch President was manifest on the face of the email; the email was addressed and confined to all members of the AEU employed by the respondent; it purported to relay concerns expressed by several members and it advised members to contact the AEU seeking support and advice. In the light of these features, it beggars belief that, in taking adverse action against Mr Barclay because he disseminated the email, Dr Harvey dissociated that consideration from the circumstance that he was the

Sub-Branch President of the AEU communicating by means of the email with its members.

23. As Mason J observed in *Bowling* at 242 (ALR at 619):

> *"We are left, then, with a reason for the dismissal which does not exclude the possibility that it was associated with the circumstance that the respondent was a shop steward. If this was no more than a slender possibility the circumstance might be discarded as one which was not a substantial and operative factor in the dismissal. However, I have already said enough to indicate why the possibility cannot be so regarded – the respondent's office as a shop steward endowed him with a special capacity to influence others and was therefore not easily dissociated from his ability to set an example to others."*

24. The notion of causation which informs s.346 of the FWA does not depend on the application either of a purely subjective test, as the appellant contends at [31] (AB#) of its written submissions, or of a purely objective test which is said at [34] (AB#) of the same submissions to be inapplicable. Rather, the enquiry is, as Mason J held in *Bowling* at 241 (ALR at 617), whether the employer has shown, on the evidence, that in taking adverse action it was not actuated by a proscribed consideration set out in s.346(a) or (b). The employer will not achieve this objective "unless the evidence establishes the real reason for the [adverse action] ... and that it lies outside the ambit of [s.346(a) and (b)]". (emphasis added).

25. As discussed at paragraphs 9 and 10 of this submission the "real reason" for adverse action may comprise a complex or multiplicity of reasons or factors, some of them "subjective" in the sense that they refer to an intention, belief or other state of mind of the actor and others of which are objective in the sense that they refer to extrinsically ascertainable facts which comprise the context in which the action was taken. However, the necessary enquiry to ascertain the real reason is objective. It involves asking whether a hypothetical reasonable observer would conclude that the employer had demonstrated that the real reason for the adverse action was dissociated from any of the proscribed reasons listed in s.346(a) and (b).

26. It follows that the majority of the Full Court in the present case was correct when it concluded, [(2011) 191 FCR 212 at [34] (AB#)]:

> *"For instance, an employee is not protected by s 346 (in conjunction with s 347(b)(ii)) where the activity promoted for or on behalf of an industrial association is not a lawful activity. However, it is not necessary that the subjective belief held by the person accused of the adverse action about such a fact should correlate with the legal conclusion as to the existence or non-existence of that fact. Thus a contravention of s 346 (in conjunction with s 347(b)(ii)) may occur where the activity promoted by the employee was lawful, but where*

> *the employer taking the adverse action held a subjective belief that it was not. In such a case, a failure by the employer to establish that the real reason for the taking of the adverse action was dissociated from the circumstance that the employee was promoting a lawful activity for or on behalf of an industrial association will result in a finding of contravention, irrespective of the employer's subjective belief that the activity was unlawful. The 'connection' between the adverse action and the industrial activity will be sufficiently made out in those circumstances: see the Explanatory Memorandum at para 1400."*

27. Even an erroneous subjective belief on the part of an employer may discharge the onus imposed by s.361. Thus a mistaken belief that an employee has stolen money from the employer will discharge the onus if the employer persuades the court that the adverse action was taken solely because the employee was believed to be a thief and had nothing to do with the fact that he or she was also a shop steward. In that case, the employer will satisfy the requirement of dissociation identified by Mason J in *Bowling* (ALJR at 241; ALR at 617).

28. In some cases, in order to see whether the reverse onus has been discharged in respect of the reason or cause of the adverse action, it will be necessary to ask more than one question. Thus, if an employer credibly asserts that adverse action was taken because an employee was late for work, a court may have to ask why he was late for work. If the answer suggested by direct evidence or preferable inference is that he was late because he was discharging some duty or function as a shop steward, the employer will not have discharged the onus of dissociating the adverse action from one of the proscribed reasons in s.346. That was all that the majority in the Full Court meant when it postulated a need for the decision – maker to establish that the adverse action was "dissociated or divorced from the employee's union conduct." Contrary to the assertion in [30] and [61] of the appellant's submissions, that was not a new test but a restatement of the test enunciated by Mason J in *Bowling*. The causal inquiry which has to be undertaken is of the kind identified by HLA Hart and T Honore, *Causation in the Law*, 2nd Ed (1985) where the learned authors conclude at 44:

> *"A deliberate human act is therefore most often a barrier and a goal in tracing back causes in such inquiries: it is often something **through** which we do not trace the cause of a later event and something **to** which we do trace the cause through intervening events of other kinds. In these respects a human action which is not voluntary is on a par with other abnormal occurrences: sometimes but not always we trace causes through them and sometimes but not always we trace effects to them through other causes." (original emphasis)*

29. In the present case Mr Barclay's status as the Sub-Branch President of the AEU and his actions taken in that capacity were prima facie things through which the taking of the adverse action was to be traced to the decision taken by Dr Harvey. It was the appellant's failure to exclude that tracing as the preferable

inference that led to it not discharging the reverse onus. It would have been otherwise had Mr Barclay been caught stealing money from the appellant. There would have been no prima facie connection between that conduct and his status as an AEU official or any activity undertaken by him on its behalf. Consequently, had Dr Harvey been believed in asserting that the theft had been the sole reason for the adverse action, the reverse onus would have been discharged.

30. In the present case, neither Tracey J at first instance, nor Lander J who dissented in the Full Court, asked the second question: why did Mr Barclay send the email? Had that question been asked, the answer given at paragraph 22 above would have been obvious, as it was to Gray and Bromberg JJ in the Full Court.

31. Tracey J misstated the test when he observed, at [25] (AB#) of his reasons "If they [the decision-makers] were believed the onus was satisfied." As the respondents have submitted, the enquiry does not always end with a finding that the decision-maker's assertion of what he or she believed was the reason for the adverse action is credible. As here, the assertion itself may raise a further question which has to be answered favourably to the decision-maker before the onus of dissociating the adverse action from a proscribed reason will be discharged.

32. Contrary to what was imputed to them by Tracey J at [27] (AB#) of the reasons at first instance, the respondents do not contend that the presence in s.346 of the word "because" has "had the effect of rendering irrelevant the reasons given by an employer for taking action against an employee". Rather, the authorities support the conclusions that the reasons asserted by the employer are part of the facts to be evaluated in identifying, consistently with *Bowling*, the real reasons for the adverse action. The ultimate question is whether the employer has discharged the onus of dissociating all the real reasons from each of the reasons proscribed by s.346. Tracey J was led to mistake the ultimate question because he treated as conclusively probative evidence from the decision-maker explaining the adverse action which evidence was no more than relevant. His Honour said at [34] (AB#) of his reasons

> *"In answering this question evidence from the decision maker which explains why the adverse action was taken will be relevant. If it supports the view that the reason was innocent and that evidence is accepted the employer will have a good defence."*

33. Tracey J's failure to ask what we have called the second question, why did Mr Barclay send the email? infected his findings of fact at [51] to [55] (AB#) of the reasons at first instance. The relevant findings are all cast in terms of "denials" by Dr Harvey. There is no affirmative finding, focused on the email itself, that Dr Harvey did not know or believe that Mr Barclay had sent it in his capacity as an AEU official and in furtherance of the interests of AEU and its members.

34. Lander J who dissented in the Full Court was guilty of the same error as Tracey J. His Honour said, (2011) 191 FCR 212 at [197] (AB#):

> *"In any case, where it is alleged that a person took adverse action for any of the particular reasons identified in s 340(1)(a) or s 346, the inquiry must be as to why the person who is said to have contravened the section took the action. That must mean that the Court has to inquire into the subjective intention of the alleged contravenor. A person's reasons for taking adverse action cannot be ascertained by employing an objective test. Those reasons can only be identified by reference to the person's own intentions."*

The inquiry does not end with the identification of the actor's own subjective intentions. The evidence, as a whole, must exclude, as an operative cause of the adverse action, any of the proscribed reasons.

35. Like Tracey J, Lander J erred in concluding that, if the decision-maker gives evidence and is believed, then the onus is satisfied. Lander J said at [198] (AB#) of the reasons of the Full Court:

> *"The alleged contravenor will, if it is alleged that he or she took action for an impugned reason, need to give evidence to escape a finding of contravention that the adverse action was taken for a reason other than that alleged. If the alleged contravenor is believed by the Court as to why the adverse action was taken, the proceeding will fail. If, of course, the alleged contravenor is not believed and the Court finds that the adverse action was taken for the particular reason alleged, the Court will find a contravention. The Court however will not consider the alleged contravenor's evidence in a vacuum before deciding whether the evidence should be accepted. Like in any case the evidence will be considered with all the other evidence in the case. But if in the end the evidence is accepted, then the alleged contravenor will have discharged the onus thrust upon him or her by s 361."*

The decision-maker does not identify the real cause of the adverse action if he or she credibly asserts, as here, "I took the action solely because I was offended by the email." The identification of the real cause has to take account of the terms of the email, the context in which it was sent and what made it offensive to the decision-maker.

36. If when he said at [197] (AB#) of his reasons that "the inquiry must be as to why the person who is said to have contravened the section took the action", Lander J meant only that the inquiry must be as to what was the real cause of the adverse action, the proposition is unexceptionable. However, the proposition does not entail, as Lander J seems to suggest, that the Court has to inquire into only "the subjective intention of the alleged contravenor." The alleged contravener has to exclude any operative causal connection, whether subjective or objective, between the adverse action and each of the reasons proscribed by s.346(a) and (b).

37. The same error permeates [199] (AB#) of Lander J's reasons where His Honour says:

> *"In the end, the question for the Court is what was the reason for the person to take the adverse action. The subjective intention of the alleged contravenor if accepted by the Court to be the actual intention will be determinative."*

Contrary to his Honour's view, that construction is not consistent with the reasoning of the High Court in *Purvis v. State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92. In that case, Gummow, Hayne and Heydon JJ expressly drew attention, at [234] to arguments which "sought to draw distinctions between the motive of the discriminator, the purpose of the conduct and the effect of the conduct, and between objective and subjective criteria of operation." Their Honours then went on to observe at [236]:

> *"For present purposes, it is enough to say that we doubt that distinctions between motive, purpose or effect will greatly assist the resolution of any problem about whether treatment occurred or was proposed 'because of' disability. Rather, the central question will always be – why was the aggrieved person treated as he or she was? If the aggrieved person was treated less favourably was it 'because of', 'by reason of', that person's disability? Motive, purpose, effect may all bear on that question. But it would be a mistake to treat those words as substitutes for the statutory expression 'because of'."*

38. The respondents submit that their Honours endorsed the proposition that in legislation like the present whether action was taken "because of" a particular reason is a question on which motive, purpose and effect will all have a bearing but none of them will be determinative. See also per Gleeson CJ at [13] where his Honour identified the relevant sections as being "concerned with the lawfulness of the conduct of the school authority and with the true basis of the decision of the principal to suspend and later expel the pupil." (emphasis added). It is obvious from what follows that his Honour did not regard the principal's subjective intention as solely determinative of the true basis, or real cause, of the decision.

39. The judgment of the Full Court of the Federal Court in *Harrison v P & T Tube Mills Pty Ltd* (2009) 188 IR 270 is not inconsistent with the contentions advanced on behalf of the respondents in this case. In *P & T Tube Mills* the union delegate had worn a union sticker on his neck in defiance of a ban by the employer on the wearing of stickers of any kind. The decision-maker gave evidence which was accepted that he had not been influenced by the delegate's union membership when he made the decision to take adverse action against the delegate. The implication from that evidence was that any employee who had worn a sticker of any kind would have been treated in the same way. The majority in the present case, contrary to what is argued at [65] of the appellant's submissions, did not impose an unqualified prohibition on that kind of implied

use of a comparator. It simply recognised that no relevant comparator, i.e. an employee who was not an AEU official, was available on the facts because nobody but an AEU official could have sent the email. In the present case there was no general ban on the dissemination of emails within the workplace so the adverse action could not be explained as a consequence of disobedience or misconduct dissociated from union membership.

40. It is incorrect to contend, as the appellant does at [45] to [49] (AB#) of its submissions that it was impossible, on the approach of the majority of the Full Court, for the employer to discharge the reverse onus by adducing evidence of Dr Harvey's "innocent state of mind". What was required as indicated above was acceptance of evidence by Dr Harvey that she was unaware of Mr Barclay's status as an AEU officer and that he had sent the email on its behalf. Dr Harvey failed to give evidence to that effect. She in the terms used by Gray and Bromberg JJ at [74] (AB#) "simply [characterised] the activity of the union as the activity of [Mr Barclay]". Dr Harvey's state of mind was not irrelevant and it would have been conclusive had she advanced a cause for the adverse action such as theft, dissociated from Mr Barclay's status and activity as Sub-Branch President or had she been able to persuade the Court that she was unaware of Mr Barclay's status and the fact that the email was sent on behalf of the AEU.

Operative reasons: Ground of appeal 4 (a)

41. The majority correctly identified that the prohibited reason must be an operative reason: [30] and [33] (AB#). They applied this test: paragraphs [73]-[78] (AB#).

Ground of appeal 4 (d)

42. The majority did not overturn the finding of the trial judge and ground 4 (d) of appeal does not arise.

Use of comparators: Ground of appeal 5

43. There are four reasons why this ground should be rejected. First, the point is hypothetical. There was no conduct alleged against Mr Barclay as an employee which might be compared with conduct of other employees. The trial judge did not determine the reason for the adverse action by reference to a comparator.

44. Secondly, *Purvis v State of New South Wales,* relied on by the appellant, concerned s 5 of the *Disability Discrimination Act* 1992 (Cth), set out at [186] of that judgment. That section expressly required that both a comparative test be satisfied and a causative link be proved. The need for a causative link and the comparative test raise two separate issues under that legislation.[6] There is no

[6] *Purvis v State of New South Wales* (2003) 217 CLR 92 at [8] and [231]

comparator defined in the FWA. The FWA does not in terms require the drawing of such a comparison, except, perhaps, in cases in which the adverse action consists of "(discriminating) between the employee and other employees of the employer": s 342 (1) item 1 (d). No such adverse action was alleged in this case.

45. Thirdly, it is not clear what kind of comparison should be drawn and with whom. There are at least eleven statutes that establish general anti-discrimination schemes enacted by the Commonwealth or in the various States and Territories. Each imposes a slightly different statutory test for what is usually termed "direct discrimination" and each requires a comparison to be drawn.[7]

46. Fourthly, the passages from *Bowling* relied on by the appellant concern the discharge of the evidentiary onus.[8] They do not require the use of comparators and are in any event distinguishable. Unlike the circumstances considered in *Bowling*, all of the relevant conduct of Mr Barclay was conduct as a delegate, not as an employee.[9] One of the purposes of the general protection provisions is to protect employees who engage in an industrial activity or exercise a workplace right.[10]

The scope of s 346 (a): Ground 6

47. This ground cannot avail the appellant. The majority in the Full Court held that the appellant had not disproved that it took the adverse action because Mr Barclay had been engaging in industrial activity referred to in ss 347(b)(iii) and (v).[11] It was not necessary to determine, as well, whether the activities also came within s 346 (a).

48. The conclusion that s 346 (a) provides protection for officers in relation to activities carried out as an incident of holding their office is supported by the purpose of s 346 (a).[12]

49. The appellants argue that the scope of the protection afforded by s 346 (a) should be read down by reference to the protection conferred by s 346 (b). The

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[7] Section 5 of the Sex Discrimination Act 1984 (Cth), section 9 of the Racial Discrimination Act 1975 (Cth), section 5 of the Disability Discrimination Act 1992 (Cth), section 14 of the Age Discrimination Act (Cth) 2004, section 8 of the Discrimination Act (ACT) 1991, sections 7, 24, 38B, 39, 49B, 49T, 49XG, 49XYA of the Anti-Discrimination Act 1977 (NSW), sections 19(1) and 20 (2) of the Anti-Discrimination Act (NT), section 10 of the Anti-Discrimination Act (Qld) 1991, sections 29, 51, 66, 85A, 85T of the Equal Opportunity Act 1984 (SA), section 14 of the Anti-Discrimination Act 1998 (Tas), section 7 of the Equal Opportunity Act 2000 (Vic), sections 8-10A of the Equal Opportunity Act 1984 (WA)

[8] *General Motors Holden Pty Ltd v Bowling* (1976) 51 ALJR 235 at 239 and 241; 12 ALR 605 at 612 and 616

[9] The findings of the trial judge are found in paragraph [1] (AB#) and [4] (AB#). The further findings of the majority are contained in [50] (AB#), [51] (AB#), [59]-[60] (AB#), [63]-[65] (AB#) and [73] (AB#).

[10] Sections 340 (1) (ii), 341, 346 (b) and 347 (b) and paragraphs 51-56 below

[11] Majority reasons at [63], [64], [65] (AB#) and [73] (AB#)

[12] Majority reasons at [14] to [22] (AB#), [37] - [40] (AB#): see paragraphs 51-56 below

legislative history of s 346 (a) and (b) does not support that interpretation. The history of those provisions from 1904 to 2003 is charted by North J in *Australasian Meat Industry Employees' Union v Belandra Pty Ltd.* His Honour was there considering the effect of s 298L(1)(a) (which reflected 346 (a) of the FWA) and s 298L(1)(f), (g) (i) and (n) (which are broadly re-enacted in 346 (b) and 347 (b) of the FWA). North J concluded:

> *'It follows from the history of s 298L(1) that Parliament intended s 298L(1)(a) to cover conduct taken against employees because they had taken action as members of a union, and because a union had taken action as an incident of that employee's membership of a union. It did not intend to limit s 298L(1)(a) by reference to s 298L(1)(f), (g) (i) and (n). Rather, those subsections duplicated, in part, the provision of s 298L(1)(a) for specific historical reasons concerning the introduction of each of those subsections.'*[13]

50. The legislative changes after 2003 do not derogate from this conclusion. In 2006 s 793 (1) substantially replicated the grounds contained in the former s 298L. In 2009 the FWA included ss 346 and 347 in their current form. Those provisions, as stated in paragraph [1336] of the Explanatory Memorandum, "are intended to rationalise, but not diminish, existing protections. In some cases, providing general, more rationalised protections has expanded their scope."

The facilitative purpose of sections 346 and 347

51. The appellant argues that a subjective test should be used. That test would fail to give effect to the legislative purposes of ss 346 and 347. When interpreting the protections in s 346 the Court should seek to give effect to the purposes of the provision. Protective and remedial legislation should be construed broadly. Legislation concerning human rights and giving effect to Australia's international obligations should be construed, where possible, as recognising those obligations:

> *"The principle that particular statutory provisions must be read in light of their purpose was said in* Waters v Public Transport Corporation[14] *to be of particular significance in the case of legislation which protects or enforces human rights. In construing such legislation 'the courts have a special responsibility to take account of and give effect to the statutory purpose'. It is generally accepted that there is a rule of construction that beneficial and remedial legislation is to be given a 'fair, large and liberal' interpretation."*[15]

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[13] *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 IR 165 at [134]-[150]

[14] *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359

[15] AB v Western Australia [2011] HCA 42 at [24] per French CJ, Gummow, Hayne, Kiefel and Bell JJ referring to *IW v City of Perth* (1997) 191 CLR 1 at 12, 39 and 58: see also *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287,

52. Section 346 gives effect to Australia's international obligations: ss 3 (a) and (e) of the FWA. Australia's international obligations concerning freedom of association are contained in:

(a) Article 8 of the *International Covenant on Economic, Social and Cultural Rights.*[16]

(b) Article 22 of the International Covenant on Civil and Political Rights. [17]

(c) Articles 2 and 11 of the International Labour Organisation's Freedom of Association and Protection of the Rights to Organise Convention.[18]

(d) Article 2 (b) of the International Labour Organisation's Right to Organise and Collectively Bargain Convention.[19]

(e) Article 1 of the International Labour Organisation's *Workers' Representatives Convention* 1971.[20]

53. Under these international instruments the right to freedom of association includes the right to be represented by a union and the right to participate in legitimate union activities.[21] Sections 346 (a) and 347 give effect to these provisions.

54. One purpose of the general protection provisions in Part 3-1 of the FWA is to protect representatives from victimisation as the result of the representatives' activities on behalf of a union. An aim is to "remove fear of [adverse action] by an employer against an employee taking union office and performing the functions of that office"[22] and to "ensure the threat of dismissal or discriminatory treatment cannot be used by an employer to destroy or frustrate an employee's right to join an industrial association and to take an active role in

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[16] *International Covenant on Economic, Social and Cultural Rights,* opened for signature 16 December 1966, 993 UNTS 3, (entered into force 3 January 1976), ratified by Australia on 10 November 1975

[17] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976), ratified by Australia on August 13, 1980

[18] *Freedom of Association and Protection of the Rights to Organise Convention* 1948, opened for signature 17 July 1948, 68 UNTS 17 (entered into force 4 July 1950); ratified by Australia on February 28, 1973

[19] *Right to Organise and Collective Bargaining Convention* 1949, opened for signature 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951), ratified by Australia on February 28 1973

[20] *Workers' Representatives Convention* 1971, opened for signature June 23 1971, 883 UNTS 111 (entered into force June 30 1973) ratified by Australia on 26 February 1993: "Workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements."

[21] ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO,* Geneva, International Labour Office, Fifth (revised) edition, 2006 at paragraphs 770, 771, 780 and 800

[22] *Bowling v General Motors-Holden Pty Ltd* (1975) 8 ALR 197 at 210

that association to promote industrial interests of both the employee and the association."[23]

55. Sections 346 and 347 also have a further, facilitative purpose. Historically unions have played a central role under the conciliation and arbitration system. This central role is retained under the current Act. The focus on enterprise bargaining and the decentralisation of Australian industrial relations since 1993 has shifted the principal responsibility for settling disputes and agreeing about conditions to the enterprise level. This focus continues under the FWA: see ss 3 (f) and 171 (a) of the FWA. As a consequence, representatives at the enterprise level now play an active role in the industrial relations system.[24] Part 3-1 facilitates the role of unions and their representatives in the workplace.[25]

56. The ability of representatives to play an active role at the enterprise level is central to the effective functioning of the scheme established by the Act. A purpose of Part 3-1 is to ensure representatives are free to participate in industrial activities and to exercise workplace rights. Representatives need to be able to make demands, negotiate claims, resolve grievances and represent members in negotiations. Section 346 plays a central role in facilitating those functions. The subjective test advanced by the appellant would fail to give effect to the legislative purposes of ss 346 and 347. A representative engaging in industrial activities, or exercising a workplace right, could not be sure that he or she was protected from adverse action. On the appellant's construction the scope of the protection would be determined by how the employer subjectively characterised the employee's conduct.

The respondents' position in summary

57. The construction of the relevant sections for which the respondents contend preserves the full effect of the reverse onus which s.361 casts on the decision-maker. It recognises that the onus is not to be discharged by acceptance by the court on a purely subjective characterisation by the decision-maker of the cause of the adverse action. If such a characterisation is advanced, it is necessary to ask the next question to test whether the decision-maker has established the requisite dissociation between the characterisation and each of the proscribed reasons. In some cases, like a credible assertion of theft by a representative, the next question virtually answers itself. At the other end of the spectrum are cases like *Bowling* (the troublemaking shop steward) and the present where the

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[23] *Davids Distribution Pty Ltd v National Union of Workers* (1999) 165 ALR 550 at 583 per Wilcox and Cooper JJ

[24] Australasian Meat Industry Employees' Union v Belandra Pty Ltd [2003] FCA 910; (2003) 126 IR 165 at [113]-[133], especially at [126] and [133],

[25] *Pearce v WD Peacock & Co Ltd* (1917) 23 CLR 199 at 205, referred to approvingly in *General Motors Holden Pty Ltd v Bowling* (1976) 51 ALJR 235 at 241; 12 ALR 605 at 616, *Bowling v General Motors-Holden Pty Ltd* (1975) 8 ALR 197 at 210, *Davids Distribution Pty Ltd v National Union of Workers* (1999) 165 ALR 550 at 583

answer to the next question suggests, or does not affirmatively exclude, an association between the offending conduct, the holding of a union office and industrial activities.

Part VII – Notice of Contention

58. Dr Harvey denied she acted for a prohibited reason and Tracey J found at [54] (AB#) that Dr Harvey "acted for the reasons which she gave". When assessing the credibility of the evidence of Dr Harvey, Tracey J failed to appreciate the weight and bearing of established circumstances. Those circumstances were:

(a) Mr Barclay was the Sub-Branch President of the AEU.

(b) Mr Barclay "(in) his union capacity … forwarded an e-mail to members of the AEU employed by BRIT…"[26] In sending the email, Mr Barclay was representing or advancing the views of the AEU. He was also encouraging or participating in a lawful activity organised or promoted by the AEU.[27]

(c) The fact that Mr Barclay was sending the email in his capacity as the Sub-Branch President was clear on the face of the email. It was sent over his signature as "President BRIT AEU Sub-Branch". It was addressed and confined to AEU members. The subject line of the email was "AEU – A note of caution". It purported to relay concerns expressed by several "members" and it advised members to "contact the AEU" seeking support and advice.[28]

(d) One of the reasons Dr Harvey gave for the adverse action was because of "the manner in which (Mr Barclay) raised the allegation, via a broadly distributed email."[29]

(e) Mr Barclay "had the right (and probably the duty) to discuss workplace issues of concern to members with those members and to advise them about how the issues should be resolved. He was also bound to respect confidences."[30] In his capacity as an officer Mr Barclay received certain complaints from members.[31] The members sought that he keep their

[26] Paragraph [1] (AB#) of the reasons of Tracey J
[27] Majority reasons at paragraphs [59] – [60], (AB#) [63] (AB#), [65] (AB#) and [73] (AB#).
[28] Paragraph [4] (AB#) of the reasons of Tracey J
[29] Letter to Greg Barclay: paragraph [8] (AB#) of the reasons of Tracey J.
[30] Paragraph [42] (AB#) of the reasons of Tracey J
[31] This evidence was unchallenged: Affidavit of Greg Barclay, paragraph 40 (AB#). It appears that the Court accepted this evidence: Paragraphs [38]-[39] (AB#) of the reasons of Tracey J

complaints confidential.[32] Mr Barclay kept their confidences, as he was bound to do as an officer.[33]

(f) One of the reasons for the adverse action was that Mr Barclay had failed report the members' complaints to management.[34]

(g) Mr Barclay was asked by members not to reveal to management the names of the members who made the complaints.[35] Mr Barclay was asked by his line manager, Mr Eckett, for the names of members who made the complaints.[36] Mr Barclay refused to provide the names sought. Mr Barclay informed management that his refusal was "because they were union members and did not wish the fact of their membership to become known to management."[37] Mr Eckett told Dr Harvey, that Mr Barclay had 'declined to provide him (Mr Eckett) with the names of his informants because they were union members and did not wish the fact of their membership to become known to management.'[38]

(h) One of the reasons Dr Harvey gave for the adverse action was that Mr Barclay had refused or failed "to provide particulars of the allegations when asked to do so by (his) manager".[39]

59. Each of the acts of Mr Barclay that formed the basis for the reasons for the adverse action – sending the email, the failure to raise matters with management and failing to tell management of the names of the members -

[32] This evidence was unchallenged: Affidavit of Greg Barclay, Paragraph 47 (b), (AB#). It appears that the Court accepted this evidence: Paragraphs [38]-[39] (AB#) of the reasons of Tracey J

[33] Paragraphs [39] (AB#) and [42] (AB#) of the reasons of Tracey J. This evidence is based on the Affidavit of Greg Barclay, Paragraph 9 (AB#) and the Affidavit of Brian Henderson, paragraph 5 (AB#).

[34] Paragraphs [49] (AB#), [51] (AB#) and [54] (AB#) of the reasons of Tracey J

[35] This evidence was unchallenged: Affidavit of Greg Barclay, Paragraph 47 (b) (AB#). It appears that the Court accepted this evidence: paragraphs [38] (AB#) and [39] (AB#) of the reasons of Tracey J

[36] Paragraph [7] (AB#) of the reasons of Tracey J

[37] Paragraph [7] (AB#) of the reasons of Tracey J

[38] Paragraph [7] (AB#) of the reasons of Tracey J

[39] Letter to Greg Barclay: paragraph [8] (AB#) of the reasons of Tracey J

were acts done by Mr Barclay in his capacity as an officer. None of those actions could have been taken had Mr Barclay not been an officer of the AEU.

60. The findings of Tracey J that Dr Harvey acted for the reasons that she gave was incorrect and not supported by the evidence.

Dated 26 October 2011

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