

**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
and
AUSTRALIAN EDUCATION UNION**

First Respondent

Second Respondent

**APPELLANT'S SUBMISSIONS ON COSTS
(Filed pursuant to the Orders of the Court made 7 September 2012)**

1. The Appellant seeks an order that the Respondents and the Minister pay its costs of the appeal.
2. The costs prohibition in s.570 of the *Fair Work Act 2009* (Cth) (**FW Act**) does not apply. The prohibition in s.570 of the FW Act applies only where the court is "*exercising jurisdiction under*" the FW Act.¹
3. In this proceeding, the Court is exercising its appellate jurisdiction under s.73(ii) of the *Commonwealth of Australia Constitution Act 1901* (Cth), consequent upon the grant of leave by order made on 2 September 2011 (AB415). It is not "*exercising jurisdiction under*" the FW Act.² The FW Act does not confer jurisdiction on the High Court of Australia.³

¹ This is a conscious departure from the more generous prohibition in predecessor provisions, which extended to "*matters arising under*" the Act: *Explanatory Memorandum to the Fair Work Bill 2009* (Cth) at [2228]-[2229]. See *Construction Forestry Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645 at 660.3 to 660.8 [42]-[43]. See also *Australasian Meat Industry Employees' Union v Fair Work Australia (No. 2)* [2012] FCAFC 103 at [4] (Jessup and Tracey JJ).

² Compare *Re McJannet; Ex parte the Australian Workers' Union of Employees, Queensland (No.2)* (1997) 189 CLR 654 at 657.3 to 657.5 in which the provision under consideration was also the former s.347 of the *Industrial Relations Act 1988* (Cth)).

³ Jurisdiction is conferred on the Federal Court of Australia (FW Act, s.562) or, in limited circumstances, the Federal Magistrates Court of Australia and some state courts (for example, FW Act, ss.545(1), (2), (3) and (3A)).

Date: 10 September 2012
Filed on behalf of the Appellant
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4. The intervention of the Minister by the grant of leave by the Court,⁴ rather than by right under s.569 of the FW Act, renders the exception to the operation of s.570 in s.569(3) of the FW Act inapplicable.

5. Nevertheless, as a party to the proceeding, upon the grant of leave, the Minister is exposed to the costs consequences of the intervention.

6. There is no reason why costs should not follow the event.

7. The Appellant seeks orders that:

(1) The Respondents pay 85 per cent of the Appellant's costs of the appeal.

(2) The Minister pay 15 per cent of the Appellant's costs of the appeal.

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JUSTIN L BOURKE SC
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DATED: 10 September 2012



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⁴ Leave granted on 29 March 2012, transcript page 68, lines 3040 to 3065.