



## HIGH COURT OF AUSTRALIA

14 February 2018

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER v CONSTRUCTION,  
FORESTRY, MINING AND ENERGY UNION & ANOR  
[2018] HCA 3

Today, the High Court, by majority, allowed an appeal from a decision of the Full Court of the Federal Court of Australia, regarding whether a judge has power to order either that a union not indemnify a union official against a pecuniary penalty imposed on that union official ("non-indemnification order") or that a union official not seek or accept indemnity or contribution from the union in respect of a pecuniary penalty imposed on the union official ("personal payment order").

The second respondent ("Myles") was an officer of the first respondent ("the CFMEU"). In 2013, Myles and some 20 associates carried out a blockade that disrupted a concrete pour at a construction site with the intention of coercing compliance with Myles' requests that there be a CFMEU delegate on the site. At the end of the blockade, Myles called out to the General Superintendent of the site words to the effect of: "I'll be back tomorrow to stop the concrete pour" and: "You won't pour again until you put a delegate on". The following day, Myles returned to the site and told the General Superintendent: "[I]f you don't want to put a delegate on then we will have [a war]."

Proceedings were instituted against the respondents in the Federal Court. The respondents admitted to contravening s 348 of the *Fair Work Act 2009* (Cth) ("the FWA"), and the hearing before the primary judge proceeded in relation to penalty only. The primary judge ordered that, under s 546 of the FWA, Myles pay pecuniary penalties of \$18,000 and the CFMEU pay pecuniary penalties of \$60,000. The primary judge also made a non-indemnification order, pursuant to s 545(1) of the FWA. The respondents appealed to the Full Court, which held that the primary judge had no power under s 545(1) to make the non-indemnification order since such an order would "add to the penal outcome" authorised by s 546 and there was no clear and express power to do so.

By grant of special leave, the appellant appealed to the High Court on the question whether s 545(1) of the FWA or s 23 of the *Federal Court of Australia Act 1976* (Cth) empowers a judge to make a non-indemnification order. Following the hearing, the appellant was granted leave to amend the notice of appeal to raise the question whether s 546 of the FWA empowers a judge to make a non-indemnification or personal payment order. The Court unanimously held that neither s 545(1) nor s 23 empowers a judge to make a non-indemnification order: such an order is penal and is beyond the scope of those sections. The Court also held unanimously that s 546 could not support a non-indemnification order, with the plurality holding that an order directed at someone other than the party subject to the pecuniary penalty is not authorised by that section. By majority, however, the Court held that a personal payment order could be made under s 546; the power to make such an order was within the implied power to make such orders as are reasonably required for, or legally ancillary to, the accomplishment of the effect that the pecuniary penalty is calculated to achieve. The appeal was allowed and the matter remitted to the Full Court for the imposition of penalties.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*