HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, NETTLE AND GORDON JJ

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER — APPELLANT

AND

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION & ANOR — RESPONDENTS

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union
[2018] HCA 3
14 February 2018
M65/2017

ORDER

1. *Leave is granted for the appellant to amend the notice of appeal in the manner set out in the proposed amended notice of appeal exhibited to the affidavit of Brendan Charles dated 10 November 2017.*

2. *The appellant pay the first and second respondents' costs of, and incidental to, the application to amend the notice of appeal.*

3. *Appeal allowed.*

4. *Set aside order 2 of the orders made by the Full Court of the Federal Court of Australia on 21 December 2016 and, in its place, order that orders 7 to 13 of Mortimer J made on 13 May 2016 be set aside.*

5. *Remit the matter to the Full Court of the Federal Court of Australia for the re-imposition of penalties according to law.*

On appeal from the Federal Court of Australia

Representation

T M Howe QC with C J Tran for the appellant (instructed by Sparke Helmore)

R M Doyle SC with J D Watson for the respondents (instructed by Slater & Gordon)

CATCHWORDS

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union

Industrial law – Pecuniary penalties – Where union official contravened civil remedy provision of *Fair Work Act* 2009 (Cth) – Where union contravened civil remedy provision through union official's conduct – Where s 546 of *Fair Work Act* provides court can order person to pay pecuniary penalty – Where s 545(1) of *Fair Work Act* provides court can make any order it considers appropriate if satisfied person contravened, or proposes to contravene, civil remedy provision – Where pecuniary penalties imposed on both union official and union – Whether s 545(1) or s 546 of *Fair Work Act* or s 23 of *Federal Court of Australia Act* 1976 (Cth) empowers court to order that union not indemnify union official against pecuniary penalty – Whether s 545(1) or s 546 of *Fair Work Act* or s 23 of *Federal Court of Australia Act* empowers court to order that union official not seek or accept indemnity or contribution from union in respect of pecuniary penalty.

Words and phrases – "appropriate", "*Bragdon* order", "civil remedy provision", "deterrence", "implied power", "legally ancillary", "non-indemnification order", "pecuniary penalty", "penal outcome", "penal purpose", "person other than the contravener", "personal payment order", "reasonably required".

Fair Work Act 2009 (Cth), ss 545, 546, 564.
Federal Court of Australia Act 1976 (Cth), s 23.

1 KIEFEL CJ. Proceedings were brought in the Federal Court by the statutory predecessor to the Australian Building and Construction Commissioner ("the ABCC") against the first respondent, the Construction, Forestry, Mining and Energy Union ("the CFMEU"), and the second respondent, Mr Joseph Myles, who was a Vice President of the Construction and General Division of the CFMEU at the relevant time, for contraventions of s 348 of the *Fair Work Act* 2009 (Cth) ("the FWA"). Section 348 prohibits the taking or organising of action against another person, or threatening to take or organise action, with the intention of coercing a person to engage in industrial activity.

2 The conduct in question was directed by Mr Myles to a representative of the joint venturers of a large construction project for the Victorian Government. Mr Myles demanded that there be a CFMEU delegate on the site. There was no dispute that this constituted a demand that the joint venturers engage in industrial activity within the meaning of s 347. The joint venturers did not agree that this was necessary, as there was a delegate of another industrial organisation, which was a party to the existing Enterprise Agreement, already on site. Mr Myles then organised and participated in a blockade of an entrance to the site which prevented wet concrete being delivered with the result that large quantities of it were spoiled, and concrete which had previously been poured was wasted. He threatened to again blockade the entrance the following day if the CFMEU was not permitted to have a delegate on site.

3 Shortly before the hearing of the charges against them was due to commence, the CFMEU and Mr Myles admitted the conduct in question had taken place with the intention of coercing the joint venturers to comply with Mr Myles' demands. They admitted that Mr Myles, and through him the CFMEU[1], contravened s 348.

4 The primary judge, Mortimer J, made declarations of contravention and imposed pecuniary penalties on both the CFMEU and Mr Myles[2]. Section 348 is a "civil remedy provision" of the FWA[3] for which a maximum penalty is provided in the event of contravention[4]. At the time of the contravening conduct in May 2013, the maximum penalty that could be imposed for each contravention on the CFMEU was $51,000, and the maximum penalty that could be imposed for each contravention on Mr Myles was $10,200. The CFMEU and Mr Myles

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1 See *Fair Work Act* 2009 (Cth), s 363(1)(b).

2 *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436.

3 *Fair Work Act* 2009 (Cth), ss 539(1), 539(2).

4 *Fair Work Act* 2009 (Cth), s 539(2).

were each found to have engaged in three contraventions of s 348 of the FWA. The primary judge ordered that the CFMEU pay total pecuniary penalties of $60,000 to be paid within 30 days and Mr Myles $18,000 to be paid within 90 days.

5 The initial question on this appeal concerns the further order which her Honour made, which the parties on the appeal referred to as the "non-indemnification order". It is in these terms:

> "The first respondent must not directly or indirectly indemnify the second respondent against the penalties in paragraphs 9 and 10 above in whole or in part, whether by agreement, or by making a payment to the Commonwealth, or by making any other payment or reimbursement, or howsoever otherwise."

6 The primary judge identified the source of the power to make the order as s 545(1) of the FWA[5]. The Full Court of the Federal Court (Allsop CJ, North and Jessup JJ) allowed the appeal brought by the CFMEU and Mr Myles, holding that neither s 545(1) nor s 23 of the *Federal Court of Australia Act* 1976 (Cth) ("the FCAA") provides the necessary power[6].

7 An application by the ABCC, made subsequent to the hearing of this appeal, to amend the Notice of Appeal directs attention to s 546(1) as the source of a power to make an order which might achieve the deterrent effect upon both Mr Myles and the CFMEU contemplated by the primary judge. Unlike the non-indemnification order, an order of this kind (a "personal payment order") would be directed only to Mr Myles and would prohibit him from seeking indemnification from the CFMEU with respect to payment of the penalty.

Provisions of the FWA

8 Section 23 of the FCAA may be put to one side for present purposes. Section 546(1) of the FWA provides that the Federal Court, and other eligible State or Territory courts:

> "… may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision."

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5 *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436 at [201].

6 *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* (2016) 247 FCR 339 at 343 [15], 345 [26], 355 [66].

9 As mentioned, s 348 is a civil remedy provision.

10 Section 546(2) provides that the pecuniary penalty made under s 546(1) must not, in the case of an individual, be more than the maximum allowed under s 539(2), or, in the case of a body corporate, five times the maximum allowed under s 539(2). The court may order that the pecuniary penalty, or part of it, be paid to the Commonwealth or a particular organisation or person[7] and it may be recovered as a debt due to that person[8]. Section 546(5) provides:

> "To avoid doubt, a court may make a pecuniary penalty order in addition to one or more orders under section 545."

11 Section 545(1) provides:

> "The Federal Court … may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision."

12 Section 545(2) provides:

> "Without limiting subsection (1), orders the Federal Court … may make include the following:
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> (a) an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention;
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> (b) an order awarding compensation for loss that a person has suffered because of the contravention;
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> (c) an order for reinstatement of a person."

13 Section 545(4) provides that a court may make an order under s 545 on its own initiative, or upon application to it.

14 Section 564 provides:

> "To avoid doubt, nothing in this Act limits the Federal Court's powers under section 21, 22 or 23 of the *Federal Court of Australia Act 1976*."

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7 *Fair Work Act* 2009 (Cth), s 546(3).

8 *Fair Work Act* 2009 (Cth), s 546(4).

The primary judge's reasoning

The imposition of penalties

15 In considering matters relating to penalty, the primary judge referred to a number of factors. Chief amongst them were the history of contraventions by the CFMEU and Mr Myles, and the role of deterrence, both general and specific, in fixing a penalty[9].

16 In relation to general deterrence, the primary judge said that, in fixing a penalty, the court must "make[] it clear to [the contravener] … that the cost of courting a risk of contravention … cannot be regarded as [an] acceptable cost of doing business"[10]. However, general deterrence did not loom as large as specific deterrence in her Honour's reasons.

17 The CFMEU and Mr Myles submitted to the primary judge that it was impermissible, in fixing a penalty, to reason that previous penalties had been ineffective[11]. Her Honour rejected that submission. Her Honour inferred that the CFMEU employs a conscious and deliberate strategy to engage in disruptive, threatening and abusive behaviour towards employers without regard to the lawfulness of that action or the prospect of prosecution or penalties. The individuals involved in this conduct are often part of the CFMEU hierarchy and their ongoing behaviour is tolerated, facilitated and encouraged by all levels of the organisation. Her Honour considered that penalties needed to be fixed so as to provide specific deterrence to the CFMEU and to Mr Myles, and observed that this would be his fifth set of contraventions[12].

18 There can be no doubt that the primary judge was applying s 546 in determining the penalties to be imposed on each of the CFMEU and Mr Myles, but her Honour did not resort to that section in making the non-indemnification order.

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9 *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436 at [128].

10 *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436 at [133], quoting *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249 at 266 [68].

11 *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436 at [137].

12 *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436 at [144]-[145].

The non-indemnification order

19 In addition to an order prohibiting the CFMEU from paying the penalty ordered against Mr Myles, the ABCC sought an order requiring Mr Myles to pay the penalty from his own funds, but her Honour declined to do so[13], leaving him free to seek the funds from sources other than the CFMEU. The prohibition was directed only to the CFMEU. Her Honour did not take the course of prohibiting Mr Myles from receiving monies from the CFMEU in order to pay the penalty. It would appear that although an order of this kind was initially sought, her Honour was encouraged by the ABCC to conclude that a non-indemnification order would be more appropriate.

20 The primary judge considered the history of contraventions by the CFMEU and Mr Myles and the role of deterrence in the imposition of penalties in determining to make the non-indemnification order against the CFMEU. Her Honour said that the history of contraventions showed that it was appropriate to make "some kind of additional order" so as to give "real effect to the principles of specific deterrence"[14]. Her Honour found that the CFMEU and Mr Myles had engaged in conduct on the understanding that any penalties imposed would be paid for from funds held by the CFMEU which had been received from its members or alternatively from public funds. If Mr Myles was indemnified, the object of specific deterrence would be "diminished almost to the point of disappearance", her Honour said[15]. On the other hand, a non-indemnification order would cause the CFMEU to think about the penalties to which its officials might be exposed and Mr Myles to think about his exposure, thereby achieving a deterrent effect with respect to both contraveners[16].

21 The primary judge rejected the submission that s 546(1) was the only relevant source of power "in relation to *payment* of penalties for contraventions" and that the more general power in s 545(1) did not extend to orders of the kind in question[17]. Her Honour considered s 545(1) to be a wide power which may

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13 *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436 at [164]-[165].

14 *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436 at [196].

15 *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436 at [190].

16 *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436 at [191].

17 *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436 at [173] (emphasis added).

support a range of orders, so long as those orders are consistent with the relevant purpose of that power[18].

Section 545(1) and the non-indemnification order

22 It cannot be doubted that s 546(1) is the sole source of the power for the Federal Court to make an order that a person pay a pecuniary penalty when that person has contravened a civil remedy provision. The specific grant of power in s 546(1) involves a denial of a power to do the same thing in the same case free from the conditions and the qualification prescribed by the provision[19]. The primary judge's reasons do not suggest that her Honour regarded s 545(1) as containing a power to penalise; rather, her Honour considered it might be used in aid of, and to reinforce, the penalty imposed under s 546(1).

23 Section 545(1) is not directed to the subject of penalties. By its terms, its sphere of operation is circumscribed. The express terms of s 545(1) permit the Federal Court only to make orders which it considers to be "appropriate" in the circumstance where it is satisfied that a person has contravened or proposes to contravene a civil remedy provision. The Court is therefore restricted to making the kinds of orders which are capable of properly being seen as appropriate to be made by the Court in the exercise of its jurisdiction. The ABCC's reliance on the principle that a power conferred on a court should not be construed by reference to unexpressed limitations[20] is misplaced.

24 The terms of s 545(2) do not suggest that s 545(1) should be read more widely. Its opening words, "[w]ithout limiting subsection (1)", go no further than to ensure that s 545(1) is not read down in light of the specific orders set out in s 545(2) as examples of what orders may be made under s 545(1)[21]. In stating that "orders the Federal Court … may make include the following", s 545(2) is to be read as conferring power to make orders of the kinds specified whether or not orders of those kinds would always or sometimes fall within the scope of s 545(1). Section 545(2) is not cast as an amplification of the power conferred

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18 *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436 at [176].

19 *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 8; [1932] HCA 9.

20 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; [1994] HCA 54. See also *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205; [1992] HCA 28.

21 *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 679-680; [1979] HCA 26.

by s 545(1). Section 545(2) cannot be read as if it commenced, "The orders the Federal Court may make under subsection (1) include, but are not limited to, the following".

25 The terms of s 545(2) provide the context for the kinds of orders which may be made under s 545(1). The examples given in s 545(2) are directed to preventing contraventions or addressing or remedying the effects of a contravention, including compensating victims of a contravention. A non-indemnification order is not an order of these kinds. It is addressed to the penalty made in s 546(1).

26 The presence of s 546(5) and s 545(4)(a) does not illuminate the scope of the power conferred by s 545(1). Section 546(5) means no more than it says: that "a court may make a pecuniary penalty order in addition to one or more orders under section 545". That a court can act on its initiative, as s 545(4)(a) provides, adds nothing to the power with which it is provided.

27 The ABCC sought to draw an analogy between a freezing order and a non-indemnification order. However, the purpose of a freezing order is in no way comparable to an order of the kind here in question. The purpose of a freezing order is to prevent a defendant from disposing of his or her assets. It is the paradigm example of an order which is intended to prevent the frustration of the court's processes[22]. It is granted to facilitate the process of execution or enforcement of a prospective money judgment[23] and to protect the integrity of the court's processes once they have been set in motion[24]. Similarly, an asset preservation order might properly restrain dealings by judgment debtors with their property for such period as would allow a judgment creditor to move promptly to execution[25].

28 A non-indemnification order cannot be said to be necessary for the enforcement of a pecuniary penalty order. The process for enforcement of a pecuniary penalty order under the Act is recovery of the amount of the pecuniary

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22 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at 18 [43]; [2015] HCA 36, quoting *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 32 [35]; [1998] HCA 30.

23 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at 19 [46].

24 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 393 [25]; [1999] HCA 18, referring to *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 391; [1997] HCA 33.

25 *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 452 [52]; [1999] HCA 19.

penalty as a debt. It cannot be said to render the process of enforcement more efficacious, given that it denies the person the subject of the pecuniary penalty order a potential source of funds to pay it. A purpose to enhance a pecuniary penalty order by making its effects felt more severely may be consonant with the power given by s 546(1) but it is not the purpose with which s 545(1) is concerned.

29 The ABCC submitted that without the order the penalty is ineffective as a deterrent because it has no severity for Mr Myles and the penalty would be indistinguishable from a single high penalty. Without the order, the penalty is simply the price of doing business, as the primary judge had found[26] again. It may be observed that these submissions are directed to the efficacy of the penalty rather than the court's processes or the enforcement of its orders.

30 Section 545(1) of the FWA does not provide a general power to add to or enhance the effect of other remedies or orders such as a pecuniary penalty order. In *Pelechowski v Registrar, Court of Appeal (NSW)*[27], Gaudron, Gummow and Callinan JJ, after observing that an asset preservation order for a short period might have been considered reasonably required in aid of execution, explained that the effect of an order made under the court's inherent power which restrained the judgment debtors altogether from selling their only asset was to give the judgment creditor additional security and could not be regarded as reasonably required for execution. In *Jackson v Sterling Industries Ltd*[28], Deane J said that the purpose of an order for the preservation of assets is not to create security for the plaintiff but to prevent the defendant from frustrating the processes of the court. Likewise, the power given under s 545(1) is not to add to the penalty made under s 546(1).

31 The primary judge was minded to make the non-indemnification order because her Honour considered that it was consistent with the purpose of a pecuniary penalty order that it have a stronger deterrent effect. Her Honour said that the "effectiveness of an exercise of judicial power to impose penalties is significantly impaired where the reality is that the contravener is likely to be entirely indemnified from the consequences of the order"[29].

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26 *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436 at [142], [196].

27 (1999) 198 CLR 435 at 452 [53]-[54].

28 (1987) 162 CLR 612 at 625; [1987] HCA 23.

29 *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436 at [190].

32 The power to which her Honour refers is, of course, that arising under s 546(1). Deterrence is undoubtedly a purpose of a pecuniary penalty order made under s 546(1), but it is not a purpose of s 545(1).

33 Accepting that s 545(1) is not the source of a power to make an order designed to achieve the effects of which the primary judge spoke, because such an order is neither appropriate nor necessary in the context of s 545(1), attention is then directed to s 546(1) and to the application by the ABCC to amend the Notice of Appeal to rely upon it.

The application for leave to amend

34 In submissions in reply on the hearing of this appeal the ABCC suggested that if the primary judge had been wrong about the source of the power to make the non-indemnification order residing in s 545(1), the order could nevertheless be justified by reference to s 546(1). A suite of incidental powers attaches to s 546(1). These powers might include a power to make a non-indemnification order if it was necessary to achieve the deterrent effect which is the principal concern of the provision, it was submitted.

35 The Notice of Appeal to this Court raised no issue concerning s 546(1). In these circumstances it is understandable that the CFMEU and Mr Myles did not seek to respond to the ABCC's argument. Following the hearing of the appeal, the Court sought further submissions from the parties. The ABCC's further submissions were accompanied by an application to amend the Notice of Appeal to rely upon s 546(1) as a source of power. The order which it was said could be made under s 546(1) was an order that Mr Myles not seek or receive indemnification from the CFMEU, which is to say a personal payment order.

36 It is not doubted that this Court may entertain the question concerning s 546(1), being seized of the entire matter on appeal[30]. In the present case the arguments on the appeal addressed both s 545(1) and s 546(1). The different purpose of each sub-section, their operation and their relationship to each other were fully ventilated at the hearing.

37 The question whether a personal payment order could be made under s 546(1) is a question of law. The CFMEU and Mr Myles accept that they would not have adduced any different evidence if the issue had been raised by the Notice of Appeal. They do not point to any real prejudice. The question whether there is a source of power within the FWA for an order of the kind in question is

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30 *Gipp v The Queen* (1998) 194 CLR 106 at 116 [23]; [1998] HCA 21.

an important one, which has produced differences of view in the Federal Court[31] and which should be resolved.

38 In these circumstances there should be a grant of leave to amend on condition that the ABCC pay the CFMEU's and Mr Myles' costs which have been occasioned by it and by the further submissions.

Section 546(1) – a necessary implication?

39 Unlike s 545(1), s 546(1) contains an express conferral of jurisdiction with respect to the making of a pecuniary penalty order. It is expressed as a power to order "a person to pay" a pecuniary penalty that the court considers is appropriate in the event of contravention. As the CFMEU and Mr Myles observe, s 546(1) is directed only to a contravener. It would therefore not support a non-indemnification order of the kind made by the primary judge against the CFMEU, because it is directed to a third party. The question then is whether it could support a personal payment order directed only to Mr Myles.

40 Every court possesses jurisdiction arising by implication, upon the principle that a grant of power carries with it everything necessary for its exercise[32]. The term "necessary" in connection with the implied power is to be understood as identifying a power to make orders which are reasonably required or legally necessary to the accomplishment of what is specifically provided to be done by the statute[33].

41 The question here is whether the express power given by s 546(1) to require that a person pay a penalty carries with it a power to ensure that Mr Myles' penalty not be paid by the CFMEU in order that the effect of the penalty to a much greater extent be felt by him. It is difficult to see how that could not be seen as necessary to the exercise of the power given by s 546(1), particularly when regard is had to its principal, if not its only, purpose.

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31 *Director of the Fair Work Building Industry Inspectorate v Bragdon (No 2)* [2015] FCA 998; *Bragdon v Director of the Fair Work Building Industry Inspectorate* (2016) 242 FCR 46; *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2015) 254 IR 200; *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Mitcham Rail Case)* [2015] FCA 1173; *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Yarra's Edge Case)* [2016] FCA 772.

32 *Grassby v The Queen* (1989) 168 CLR 1 at 16-17; [1989] HCA 45.

33 *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 452 [51].

42 In *The Commonwealth v Director, Fair Work Building Industry Inspectorate*[34] it was said that what is sought to be achieved by a pecuniary penalty order is to put a price on future contravention that is sufficiently high to deter repetition by the contravener and others who may be tempted to contravene the FWA[35]. The findings of the primary judge leave no doubt that the only way that deterrence might be achieved is to make the payment by Mr Myles a reality for him and for the CFMEU.

43 The CFMEU and Mr Myles accept that the purpose of a pecuniary penalty order is to effect deterrence. They seek to distinguish between it being a purpose of the legislature's conferral of the power on the Federal Court, but not a power that the Court is to exercise. That is to say, the Court does not possess a power to deter offenders. On this view a power to make a personal payment order does not inhere in the power to make a pecuniary penalty order. It would therefore be necessary that the Parliament expressly confer a power to make an order for personal payment of a penalty. But this argument does not address the question whether such a power may be implied.

44 It may be accepted that s 546(1) would not carry with it an implied power to make an order of a different kind from a pecuniary penalty order, for example a community service order, or otherwise add to the quantum of the maximum penalty which is provided for in the FWA. A personal payment order adds only to the effect which is felt by a contravener: the penalty ordered remains the same. It brings home to that person the reality of a pecuniary penalty which is critical to the attainment of the deterrent effect which is the very point of the penalty. It seeks to accomplish the purpose for which the power is given by s 546(1) within the limits of what is necessary to its effective exercise.

45 The CFMEU and Mr Myles refer to other statutory provisions, such as s 77A of the *Competition and Consumer Act* 2010 (Cth) and s 199A of the *Corporations Act* 2001 (Cth), which expressly prohibit bodies corporate from indemnifying persons who are ordered to pay penalties under those statutes. The relevance of these provisions, it is said, is that it is not readily to be inferred that a similar, unexpressed power is given by s 546(1). To the contrary, it is to be expected that any similar kind of order would be expressly provided for.

46 The prohibitions in the statutes mentioned reflect a policy which the legislature has determined should be applied universally. It is not suggested that such a policy is to be found in s 546(1). These statutory provisions do not

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34 (2015) 258 CLR 482; [2015] HCA 46.

35 *The Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at 506 [55], quoting *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076 at 52,152.

provide assistance in determining the question of construction with respect to s 546(1), as to whether a power may be implied in order to render a pecuniary penalty order effective.

47 One of the concerns which has been expressed concerning the making of orders of the kind in question is that there may be problems with enforcement[36]. The concern may be well founded. There may be problems with enforcement of pecuniary penalty orders themselves, given in particular that s 571 provides that imprisonment cannot be a consequence of a failure to pay. A concern about enforcement in a particular case cannot prevent the courts from the proper exercise of their power to make a pecuniary penalty order and it cannot operate as a restriction on the implied power.

48 Concerns about practical difficulties in inferior courts punishing for contempt are largely irrelevant to the question of construction concerning the implied power. It may be that if the prohibition in a personal payment order made by a lower court is flagrantly breached, contempt proceedings would need to be brought in a superior court, because inferior courts lack that jurisdiction. This is not an uncommon occurrence. It does not furnish a proper basis for concluding that the power to make such an order is not necessary.

Conclusion and orders

49 The power to make a pecuniary penalty order given by s 546(1) carries with it a power to make the person the subject of such an order pay the penalty personally. Section 545(1) is not a source of a power to make a non-indemnification order. It is not necessary to further consider s 23 of the FCAA.

50 I agree with the orders proposed by Keane, Nettle and Gordon JJ for the reasons given by their Honours.

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36 See eg *Bragdon v Director of the Fair Work Building Industry Inspectorate* (2016) 242 FCR 46 at 62-63 [87]-[88].

51 GAGELER J. The reasoning of Kiefel CJ and of Keane, Nettle and Gordon JJ persuades me that neither s 545(1) of the *Fair Work Act* 2009 (Cth) nor s 23 of the *Federal Court of Australia Act* 1976 (Cth) is a source of power to prohibit one person from indemnifying another person who has been ordered to pay a pecuniary penalty under s 546(1) of the *Fair Work Act*. What follows are my reasons for being equally persuaded that s 546(1) is not a source of power to prohibit that other person from being indemnified.

52 Power to prohibit a person who has been ordered to pay a pecuniary penalty from being indemnified can inhere in s 546(1) only if that power can be "derived by implication" from the sub-section's express conferral of power, on application, to order a person "to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision". The implication is sought to be founded on the principle of construction that an express conferral of power carries with it all that is reasonably necessary to ensure its effective exercise[37].

53 Application of that principle to the construction of a statute has traditionally been approached with restraint where the ancillary power sought to be justified is restrictive of liberty and where the express power to which that ancillary power is sought to be appended is not incapable of exercise without it[38]. The principle is stretched too far, in my opinion, when it is sought to be applied to imply an ancillary power to make an order having the purpose and effect of increasing, beyond that which would exist in the absence of the ancillary order, the punitive impact of the penal order for which the statute conferring the primary power makes express provision.

54 No analogy is to be drawn, in my opinion, between the power conferred by s 546(1) of the *Fair Work Act* on the Federal Court, in common with the Federal Circuit Court and with every superior and inferior State and Territory court which meets the broad definition in s 12 of the Act of an "eligible State or Territory court", and the power conferred on the Federal Court, which is constituted as a superior court of record, by s 31 of the *Federal Court of*

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37 *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 451-452 [50]; [1999] HCA 19, quoting *Grassby v The Queen* (1989) 168 CLR 1 at 16-17; [1989] HCA 45. See also *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7; [1972] HCA 34.

38 *The Trolly, Draymen and Carters Union of Sydney and Suburbs v The Master Carriers Association of NSW* (1905) 2 CLR 509 at 523-524; [1905] HCA 20, quoting *Fenton v Hampton* (1858) 11 Moo PC 347 at 360 [14 ER 727 at 732]. See also *Transport Workers' Union of New South Wales v Australian Industrial Relations Commission* (2008) 166 FCR 108 at 127-128 [37]-[38].

Australia Act "to punish contempts"[39]. Unlike the power to punish for contempt, the power to order payment of a pecuniary penalty is not in any meaningful sense "at large"[40]. At stake when a person who has been ordered to pay a pecuniary penalty seeks or accepts reimbursement from another person is not the dignity of the court which made the order. Nor is any question raised as to abuse or frustration of court processes.

55 True it is that a court imposing a pecuniary penalty is engaged in setting a "price on contravention"[41]. The price, however, is not the court's price but the legislature's. The price is heavily regulated: it is capped by s 546(2); it is recoverable only under s 546(4) as a debt due to the person referred to in s 546(3) to whom it has been ordered to be paid; and, by force of s 571, no court (including a court of a State or Territory) can order a person who fails to pay to serve a sentence of imprisonment. Having ordered a person to pay the amount of pecuniary penalty which the court considers appropriate within the cap imposed by s 546(2), a court has no obvious mandate to extend or add to the statutory incidents of the order it has made by fashioning a further order prohibiting the person who has been ordered to pay the pecuniary penalty from being indemnified by another person so as to make the price more keenly felt.

56 An implied statutory power that inheres in an express conferral of statutory power might be expected at a minimum to cohere with the statutory scheme of which that conferral forms part. Because that is so, problems of enforcing such an ancillary order consistently with the statutory scheme also tell against implication of the power to make it.

57 In the event of breach, an ancillary order prohibiting a person ordered to pay a pecuniary penalty from being indemnified by another person could be enforced against the person ordered to pay the pecuniary penalty only in a proceeding for contempt of court. Yet not every court empowered to make a pecuniary penalty order under s 546(1) would have power to punish contempt of that nature. Many eligible State or Territory courts, given that they are inferior courts, would not. For those courts which would have power to punish contempt of that nature, imposition of punishment would be problematic. Imposition of a fine would have the effect of requiring compulsory payment by the person of a

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39 Cf *Australian Building Construction Employees' and Builders Labourers' Federation v Minister of State for Industrial Relations* (1982) 43 ALR 189 at 214.

40 *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 484 [147].

41 *The Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at 506 [55]; [2015] HCA 46, quoting *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076 at 52,152.

pecuniary amount which would be additional to the amount of the pecuniary penalty already imposed under s 546(1) and capped by s 546(2), and would raise in a State or Territory court further problems of to whom the fine would be required to be paid and of how non-payment of the fine would be enforced. Imprisoning for the contempt would run counter to the spirit if not the letter of s 571.

58 Finally, the ambit of what can be characterised by a process of statutory implication as being reasonably necessary to ensure the effective exercise of the power conferred by s 546(1) must be affected by the contextual consideration that the power of the Federal Court and the Federal Circuit Court to make an order under that sub-section is cumulative on the power conferred on each of those courts by s 545(1) to "make any order the court considers appropriate if the court is satisfied that a person has contravened ... a civil remedy provision". If a power to add to "the sting" of a pecuniary penalty order cannot be found in the express and expansive terms of s 545(1), there is good reason to hesitate before discerning such a power to exist by implication in the precise and narrowly focused terms of s 546(1). Adopting as my own the words of Jessup J, with whom Allsop CJ and North J relevantly agreed, in the decision under appeal[42]:

> "I appreciate that the perception which occupies the other side of the coin, as it were, is that, absent [some form of non-indemnification] order, the effectiveness of the deterrent intended by the terms of s 546 might be reduced, ultimately to vanishing point. But the legislature must be taken to have set the limits of the deterrent orders which would be available to the court, with such inherent limitations as they had. In my view, it is not within the power of the court, under s 545(1) or otherwise, to devise for itself a more effective deterrent than that for which the statute provides."

59 I would dismiss the appeal.

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42 (2016) 247 FCR 339 at 354 [60].

60 KEANE, NETTLE AND GORDON JJ. The question for determination in this appeal was initially whether s 545(1) of the *Fair Work Act* 2009 (Cth) empowers a judge to order that a union shall not indemnify a union official against a pecuniary penalty imposed on that union official under s 546 of the *Fair Work Act*. For the reasons which follow, that question should be answered no.

61 After the hearing, however, the parties were invited to provide submissions on the correct construction of s 546 of the *Fair Work Act* and, in particular, whether it was open to the appellant, the Australian Building and Construction Commissioner ("the ABCC"), now to contend that there is implied power in s 546 to order that such a union official not seek or accept indemnity or contribution from the union in respect of a pecuniary penalty imposed on the union official.

62 The ABCC should be granted leave to amend the notice of appeal to raise that issue. As the respondents accepted, the amendment raises a question of statutory construction which would not have led to different evidence being adduced in the proceedings below had the argument been relied upon earlier.

63 It is true, as the respondents submitted, that the ABCC sought a personal payment order at first instance but subsequently abandoned that submission in favour of a non-indemnification order. But, as will become apparent, the near inseverability of the issues underlying the limits of the power under s 545(1) as argued in this case and whether there is power to order under s 546 that a union official not seek or accept indemnity from the union in respect of a pecuniary penalty imposed on that union official points strongly towards the grant of leave. The fact that the respondents opened up the possibility that there is power within s 546 to make orders that facilitate the performance of an order made under that provision, and that the nature of the power conferred by s 546 was in the end crucial to the parties' oral and written submissions, further emphasises the desirability of considering both grounds together.

64 There is implied power in s 546 to order 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. And, as these reasons will explain, there is no unfairness to the respondents in permitting that issue now to be raised and determined. Whether it is appropriate to make such an order against the second respondent ("Myles") will be a matter for the Full Court of the Federal Court to determine on remitter when the penalty imposition discretion is exercised afresh.

Relevant statutory provisions

65 Section 348 of the *Fair Work Act* provides that a person must not organise or take, or threaten to organise or take, any action against another person with

intent to coerce the other person or a third person to engage in industrial activity. "Industrial activity" is defined by s 347 as including compliance with a lawful request made by, or requirement of, an industrial association. Section 348 is a "civil remedy provision".

66 Section 546 of the *Fair Work Act* relevantly provides that:

"**Pecuniary penalty orders**

(1) The Federal Court, the Federal Circuit Court or an eligible State or Territory court may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision.

...

Determining amount of pecuniary penalty

(2) The pecuniary penalty must not be more than:

(a) if the person is an individual—the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2); or

(b) if the person is a body corporate—5 times the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2).

Payment of penalty

(3) The court may order that the pecuniary penalty, or a part of the penalty, be paid to:

(a) the Commonwealth; or

(b) a particular organisation; or

(c) a particular person.

Recovery of penalty

(4) The pecuniary penalty may be recovered as a debt due to the person to whom the penalty is payable.

No limitation on orders

(5) To avoid doubt, a court may make a pecuniary penalty order in addition to one or more orders under section 545."

67 Section 545 of the *Fair Work Act* relevantly provides that:

"**Orders that can be made by particular courts**

Federal Court and Federal Circuit Court

(1) The Federal Court or the Federal Circuit Court may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision.

...

(2) Without limiting subsection (1), orders the Federal Court or Federal Circuit Court may make include the following:

(a) an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention;

(b) an order awarding compensation for loss that a person has suffered because of the contravention;

(c) an order for reinstatement of a person.

...

When orders may be made

(4) A court may make an order under this section:

(a) on its own initiative, during proceedings before the court; or

(b) on application."

68 Section 564 of the *Fair Work Act* provides that nothing in the *Fair Work Act* limits the Federal Court's powers under s 21, 22 or 23 of the *Federal Court of Australia Act* 1976 (Cth).

69 Section 21 of the *Federal Court of Australia Act* empowers the Federal Court to make binding declarations of right in civil proceedings in relation to

matters in which it has original jurisdiction. Section 22 confers on the Federal Court power to grant all remedies to which it appears a party is entitled in order that all matters in controversy between the parties may be completely and finally determined. Section 23 empowers the Federal Court, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue or direct the issue of writs of such kinds as the Court thinks appropriate.

The facts

70 The events giving rise to these proceedings took place at a construction site for the City to Maribyrnong River Project Package B ("the Package B Project"), which is part of the Victorian Government's Regional Rail Link Project, at Josephs Road in Footscray, Victoria ("the Site"). The Package B Project was being undertaken by an alliance of the Secretary of the Department of Transport, V/Line Pty Ltd, Metro Trains Melbourne Pty Ltd, AECOM Australia Pty Ltd, GHD Pty Ltd, John Holland Pty Ltd ("John Holland"), Abigroup Contractors Pty Ltd ("Abigroup") and Coleman Rail Pty Ltd ("Coleman Rail"). The construction work was being carried out in accordance with a joint venture agreement between John Holland, Abigroup and Coleman Rail. The workforce was made up of labour provided by several major contractors as well as various subcontractors. At the time of the events in issue, there were 71 John Holland employees, 15 Abigroup employees and 12 Coleman Rail employees performing building work on the Package B Project. The terms and conditions of employment of the John Holland and Abigroup employees were governed by a single enterprise agreement made under the *Fair Work Act*: the Abigroup, John Holland and the Australian Workers' Union Regional Rail Link Southern Cross Station to Footscray Junction Project 2012-2015.

71 In May 2013, Myles was a Vice President of the Construction and General Division of the first respondent ("the CFMEU"). After the commencement of the Package B Project in or around 2012, Myles made frequent visits to the Site wherein he made repeated requests of Dennis Summerfield, an employee of John Holland and the General Superintendent at the Site, to "put a CFMEU delegate on the Site". The requests included words to the effect of: "I need a CFMEU delegate on the Site" and "when am I going to get a delegate?". Summerfield responded to each request in terms to the effect that there was no need for a CFMEU delegate because The Australian Workers' Union ("AWU") was party to the relevant enterprise agreement and there was an AWU delegate on the Site.

72 Myles' requests that there be a CFMEU delegate on the Site were lawful requests made by, or a requirement of, the CFMEU within the terms of s 347(b)(iv) of the *Fair Work Act* such that action organised or taken with intent

to coerce compliance with those requests was in contravention of s 348. The joint venture was lawfully entitled to refuse those requests.

73 As part of the Package B Project, John Holland and Abigroup had scheduled for 16 May 2013 the construction of a deflection wall along a section of track on the Site; engaged Boral Resources (Vic) Pty Ltd ("Boral Concrete") to supply 130 cubic metres of wet concrete for the construction of the wall, to be delivered by concrete mixer trucks arriving at approximately ten-minute intervals over a period of three to four hours at the rate of between five and seven cubic metres per truck load; and engaged and scheduled subcontractors ICPS Melb Pty Ltd ("ICPS") and Summit Concrete Pumping Pty Ltd ("Summit") to pump the wet concrete to be delivered by Boral Concrete, and Clifton Formwork (Vic) Pty Ltd ("Clifton Formwork") to construct the formwork and vibrate the concrete being poured.

74 At approximately 7:00am on 16 May 2013, five employees of Clifton Formwork arrived at the Site and began preparation of the deflection wall formwork. Between 8:30am and 9:00am, those employees were joined by four employees of Summit and four employees of ICPS with two concrete boom pumps to pump the concrete to the deflection wall structure. The first Boral Concrete truck arrived at the Site at about 11:20am and commenced to pour concrete. By approximately 11:50am, four Boral Concrete trucks had delivered approximately 24.4 of the 130 cubic metres of concrete that it was intended would be poured that day.

75 At approximately 12:00 noon, Myles and some 20 associates, wearing black hooded jumpers with "CFMEU" emblazoned on the front and back or, in some cases, fluorescent vests bearing the names of various contractors, arrived in about nine separate vehicles at the Josephs Road entrance gate to the Site and parked their vehicles next to each other across the width of the road outside the entrance gate so as to block vehicular access to the Site. They then stood around the vehicles on the road.

76 Summerfield called Robert Currie, the Abigroup Human Resources/Industrial Relations Manager, and Robert Maroney, the Abigroup Human Resources Advisor, and informed them that Myles and his associates were blockading the concrete pour. Summerfield then approached Myles and asked him what he was doing. Myles replied with words to the effect of: "we've lost our keys and are waiting for the [Royal Automobile Club of Victoria]".

77 Currie and Maroney arrived at the Site shortly after 12:00 noon and observed the blockade. At around 12:20pm Currie called the police, who arrived a short time later. A sergeant of police spoke to Myles, who said that he and his companions would "be there for about an hour". By around that time, four

additional Boral Concrete trucks with deliveries of wet concrete had been dispatched to the Site and were parked along Josephs Road. Because of the blockade, they were unable to gain access to the Site and to the pumping equipment necessary to unload their concrete. The police, however, did not assist: they made no arrests and took no other action to alleviate the blockade.

78 At around 12:30pm, Summerfield spoke to Myles again. In substance, Myles said: "I haven't got a delegate on site to protect my members so I'm blocking the road". Summerfield responded that there was an AWU delegate and that there was no need for a CFMEU delegate as the Site was "under an AWU Agreement". Myles replied: "I will only remove the blockade if you stop the pour and pack the concrete pumps up".

79 At about 12:45pm, a senior sergeant of police arrived at the Site and, after speaking to Summerfield, approached the blockade and spoke to Myles. Myles told the senior sergeant that he and his companions would not leave the Site until they had disrupted the concrete pour for the day and that the car blockade of the Site would continue until the concrete trucks and concrete pumper had left the area. Yet, once again, despite the apparent criminality of the blockade[43], the police took no further action.

80 By about 1:30pm, the wet concrete in the four waiting Boral Concrete trucks (amounting to approximately 24.4 cubic metres) had started to spoil and could no longer be used. Those trucks were sent away from the Site and proceeded to a facility where the concrete could be dumped. By 2:15pm, Summerfield had cancelled the remainder of the concrete deliveries for the day and the pumping crews were instructed to pack up and leave the Site. All other work associated with the pour had to be abandoned. Since the pour could not be completed, the 24.4 cubic metres of concrete that had been poured before the blockade began was entirely wasted and later had to be demolished and disposed of.

81 At about 2:30pm, after all of the concrete mixer trucks and pumping equipment had left the Site, Myles called out to Summerfield with 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 and Ralph Edwards is happy". Ralph Edwards was the President of the Victoria/Tasmania Branch of the Construction

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43 See *McFadzean v Construction, Forestry, Mining and Energy Union* (2007) 20 VR 250 at 281-283 [119]-[126]; *Summary Offences Act* 1966 (Vic), ss 4(e), 5, 52(1A); Freckelton and Andrewartha, *Indictable Offences in Victoria*, 5th ed (2010) at 954 [194.10]-[194.40].

and General Division of the CFMEU. Myles and his associates then gathered in a huddle, shook hands, posed for a photograph with a red CFMEU flag and left the Site in their vehicles.

82 On 17 May 2013, Myles returned to the Site and spoke to Summerfield and Maroney. In substance, Myles asked: "Has the project reconsidered having a delegate on site, because if there was a delegate on site, there would be no more issues, guaranteed?" Summerfield responded: "No, we haven't considered a delegate and won't be having one". Myles asked: "Do you want a war or a delegate?", to which Summerfield answered: "Nobody wants a war". Myles replied: "Well if you don't want to put a delegate on then we will have one. I'll be back tomorrow to stop the concrete pour".

The proceedings at first instance

83 On 21 May 2014, the Director of the Fair Work Building Industry Inspectorate (being the statutory predecessor of the ABCC) instituted proceedings in the Federal Court against Myles and the CFMEU alleging contraventions of s 348 of the *Fair Work Act* constituted of the blockade of the Site led by Myles on 16 May 2013 and the threats to organise a further blockade made by Myles on 16 and 17 May 2013[44]. Prior to the hearing, Myles and the CFMEU admitted that Myles had organised and participated in the blockade on 16 May 2013 and made the threats on 16 and 17 May 2013 with the intention of coercing John Holland and Abigroup to comply with the request that there be a CFMEU delegate on the Site. Each of them further admitted that, by that conduct, Myles, and through him the CFMEU, contravened s 348 of the *Fair Work Act*[45].

84 The hearing before the primary judge (Mortimer J) thus proceeded as a plea in relation to penalty. Based on agreed facts, her Honour found that the offending conduct was deliberate and knowingly unlawful[46]. The CFMEU and its controlling minds were found to be indifferent as to whether the conduct they organised against employers was lawful or unlawful, and Myles was found not to care that his conduct was unlawful as long as it served the industrial purposes he sought to advance. Neither Myles nor the CFMEU showed any remorse.

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44 *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436 at [1]-[2].

45 *Director v CFMEU (No 2)* [2016] FCA 436 at [7], [9].

46 *Director v CFMEU (No 2)* [2016] FCA 436 at [103]-[104], [108]-[109].

85 The primary judge further found[47] that Myles and the CFMEU had repeatedly engaged in similar conduct. Between 1999 and 2015, the CFMEU was shown to have committed 106 separate contraventions of industrial laws and, in 2015 alone, there were ten decisions of the Federal Court which involved findings of contraventions by the CFMEU in relation to conduct occurring between 2012 and 2014. The Victoria/Tasmania Branch of the Construction and General Division of the CFMEU had been involved in 23 separate proceedings involving proved contraventions dating back to 2004, and, in 2015, there had been four such proceedings relating to conduct between 2012 and 2014. Additionally, there had been four separate sets of proceedings in which orders had been made against Myles, the first in 2013 and the most recent in 2015. Three of those proceedings related to conduct that occurred in Queensland and the most recent concerned conduct that occurred in Victoria. As her Honour held, the evidence demonstrated a continuing attitude of disobedience to the law manifested by conduct having common features of abuse of industrial power and the use of whatever means were considered likely to achieve outcomes favourable to the CFMEU[48].

86 The primary judge further found[49] that it was apparent from the CFMEU's financial statements as at 31 December 2014 that the Victoria/Tasmania Branch of the Construction and General Division of the CFMEU had net assets of almost $59 million, including more than $14 million in cash and cash equivalents, and a net operating surplus for the financial year ending 31 December 2014 of almost $3 million. In light of that evidence, her Honour found[50] that Myles and the CFMEU had engaged in the contravening conduct in the belief that any penalties that were imposed would be satisfied from funds which the CFMEU received from members and, to an extent of $8 million for the financial year ending 31 December 2014, from "operating grant receipts" paid from public funds. Her Honour considered[51] that that compounded their disregard for the law, because Myles and the CFMEU viewed the latter's large asset and income base as providing a "suitable cushion from the tangible effects of any unlawful behaviour". Her Honour concluded[52] that there was a conscious and deliberate

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47 *Director v CFMEU (No 2)* [2016] FCA 436 at [108], [118]-[120].

48 *Director v CFMEU (No 2)* [2016] FCA 436 at [140].

49 *Director v CFMEU (No 2)* [2016] FCA 436 at [111].

50 *Director v CFMEU (No 2)* [2016] FCA 436 at [112]-[113].

51 *Director v CFMEU (No 2)* [2016] FCA 436 at [113].

52 *Director v CFMEU (No 2)* [2016] FCA 436 at [140].

strategy on the part of the CFMEU and its officers to engage in disruptive, threatening and abusive behaviour towards employers, without regard to the lawfulness of their actions, in the belief that they were impervious to the effects of prosecution and penalties.

87 As the primary judge stated[53], the principal consideration in the imposition of penalties for contravention of civil remedy provisions is deterrence, both specific and general; more particularly, the objective is to put a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene[54]. In this case, given the CFMEU's antecedents, the primary judge considered[55] that penalties needed to be fixed with particular reference to providing specific deterrence against further contraventions by the CFMEU. As the primary judge further observed[56], however, although considerations of specific deterrence are properly applicable to the CFMEU, in a practical sense they need to be directed to those who hold office in the organisation and make decisions about the industrial action taken or organised by the CFMEU. In the result, the primary judge made declarations of contravention and imposed pecuniary penalties on Myles totalling $18,000 to be paid to the Commonwealth within 90 days, and penalties totalling $60,000 on the CFMEU to be paid to the Commonwealth within 30 days.

88 Finally, the primary judge went on to consider[57], and ultimately acceded to, an application by the ABCC for a further order pursuant to s 545(1) of the *Fair Work Act* that the CFMEU not directly or indirectly howsoever indemnify Myles against the penalties imposed on him ("the non-indemnification order"). Her Honour reasoned[58] that the non-indemnification order might cause Myles to

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53 *Director v CFMEU (No 2)* [2016] FCA 436 at [131]-[132].

54 *The Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at 506 [55] per French CJ, Kiefel, Bell, Nettle and Gordon JJ (Keane J agreeing at 513 [79]); [2015] HCA 46, citing *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076 at 52,152.

55 *Director v CFMEU (No 2)* [2016] FCA 436 at [144].

56 *Director v CFMEU (No 2)* [2016] FCA 436 at [143].

57 *Director v CFMEU (No 2)* [2016] FCA 436 at [164]-[165]. Cf *Director of the Fair Work Building Industry Inspectorate v Bragdon (No 2)* [2015] FCA 998 at [23]-[27].

58 *Director v CFMEU (No 2)* [2016] FCA 436 at [190]-[191].

think more carefully about his actions in the future. Although it would not preclude him from raising funds from sources other than the CFMEU, her Honour observed[59] that the need to raise funds from other sources was likely to involve more time and effort and thereby cause Myles to think more carefully again about the consequences of his transgressions. Her Honour further reasoned[60] that the non-indemnification order was likely also to deter the CFMEU from committing further contraventions of the *Fair Work Act* through the agency of Myles, because, as her Honour put it:

> "if indemnification of officials or other agents of the CFMEU for unlawful industrial action may be prevented by court orders, those responsible for decision making in the union may have cause to think about the penalties to which their own officials may be exposed when they consider engaging in conduct that may be unlawful. Such orders are also capable of having a general deterrent effect on other individuals and unions for the same reason."

The proceedings before the Full Court of the Federal Court

89 Myles and the CFMEU appealed to the Full Court of the Federal Court on several grounds, including that the penalty imposed on Myles was manifestly excessive. The Full Court (Allsop CJ, North and Jessup JJ)[61] upheld two grounds of appeal: (1) that the primary judge had no power under s 545(1) to make the non-indemnification order (Ground 1); and (2) that the primary judge had denied Myles and the CFMEU procedural fairness by deciding that penalties might or would be paid from funds derived from "the public purse" (Ground 4).

90 Allsop CJ (with whom North J relevantly agreed) reasoned[62] that, although the non-indemnification order was relevant to deterrence, the aim of the order was impermissibly to aid the force and effect of the imposed penalty. His Honour held that such an imposition on the freedom of a person or organisation to conduct his, her or its own otherwise lawful dealings with property must find

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59 *Director v CFMEU (No 2)* [2016] FCA 436 at [202].

60 *Director v CFMEU (No 2)* [2016] FCA 436 at [191].

61 *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* (2016) 247 FCR 339.

62 *CFMEU v ABCC* (2016) 247 FCR 339 at 342 [11] (North J relevantly agreeing at 345 [26]).

its source of power in clear and express statutory language. Allsop CJ added[63] that, if it were open under s 545(1) to make a non-indemnification order of the kind made by the primary judge, there would be nothing to prevent other such orders, such as that a bank not lend money to a contravener to assist with the payment of a penalty, or that family or friends not assist a contravener with the payment of a penalty. His Honour considered that intrusions of that kind into the lives of people doing what is otherwise lawful would again require a clear statutory source of authority.

91 Jessup J largely based his reasoning on the legislative antecedents of s 545(1), particularly s 807(1) of the *Workplace Relations Act* 1996 (Cth) as amended by the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth)[64]. His Honour considered[65] that there would have been a "strong argument" in relation to s 807(1)(c) that "as a pure matter of grammatical construction, the power to make any *other* order" for which it provided could not have been used "to strengthen, to supplement or to improve upon the efficacy of an order of a kind that was, or could have been, made under the specific provisions" of s 807(1)(a) or (b). Jessup J observed[66] that, by contrast, the power now afforded by s 545(1) appears as a free-standing power, and that the change to such an apparently free-standing power was part of a wholesale rationalisation of the powers to impose pecuniary penalties in relation to contraventions of civil remedy provisions. But his Honour concluded that, since the change in form had not been the subject of commentary in the parliamentary materials, it was inescapable that the change was one only of drafting and not reflective of a legislative intent to alter the substance of the pre-existing law.

92 Jessup J then turned to the decision of Flick J in *Director of the Fair Work Building Industry Inspectorate v Bragdon (No 2)*[67], to which the primary judge had referred, and disagreed with Flick J's conclusion that s 545(1) supplemented the power to impose a pecuniary penalty given under s 546[68]. His Honour stated that Flick J's reasoning was question begging. Jessup J concluded that, since the

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63 *CFMEU v ABCC* (2016) 247 FCR 339 at 342-343 [13].

64 *CFMEU v ABCC* (2016) 247 FCR 339 at 348-349 [41]-[43].

65 *CFMEU v ABCC* (2016) 247 FCR 339 at 349 [44].

66 *CFMEU v ABCC* (2016) 247 FCR 339 at 349 [45].

67 [2015] FCA 998 at [24].

68 *CFMEU v ABCC* (2016) 247 FCR 339 at 352-353 [54]-[55], 354 [60].

power given expressly by s 546 is limited to requiring a person to pay a stipulated penalty, and since the effect of a non-indemnification order of the kind made by the primary judge would be "to add to the penal outcome authorised by the section", it should be concluded that such an order was beyond the limits of the orders effecting deterrence which the Parliament had determined should be available to the courts.

The appellant's contentions

93 At the outset of the ABCC's submissions, counsel emphasised that the question in issue in the appeal was whether s 545(1) empowers a judge to make a non-indemnification order against a party who stands before the judge to be penalised for a proven breach of a civil remedy provision. There was no question as to whether s 545(1) would empower a judge to make such an order against a person who is not a party to the proceeding. Consequently, in counsel's submission, problems of the kind to which Allsop CJ referred, as to whether orders could be made, for example, against a bank prohibiting a loan being extended to a contravener to assist with payment of a pecuniary penalty, or against friends or family in similar terms, plainly did not fall to be decided.

94 Secondly, the ABCC contended that empowering provisions like s 545(1) are not ordinarily to be construed as restricted to defined and closed categories of powers[69], and thus it is inappropriate to read a provision like s 545(1) by drawing implications or imposing limitations which are not found in the express terms of the text[70]. Nor is the conferral of power to be narrowed for fear of "extreme examples and distorting possibilities"[71]. Rather, courts may and should develop

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69 See *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 639 per Gaudron J; [1987] HCA 23; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 423-424 [110] per Kirby J; [1999] HCA 18.

70 See *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; [1994] HCA 54; *CDJ v VAJ* (1998) 197 CLR 172 at 185-186 [53] per Gaudron J; [1998] HCA 67; *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424 at 450 [61] per Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ; [2004] HCA 28; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 361 [178] per Gummow, Hayne, Heydon and Kiefel JJ; [2009] HCA 25; *Weinstock v Beck* (2013) 251 CLR 396 at 419-420 [55]-[56] per Hayne, Crennan and Kiefel JJ; [2013] HCA 14.

71 See generally *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 [32] per Gleeson CJ, Gummow and Hayne JJ; [2003] HCA 72.

principles governing the exercise of the relevant power to ensure that it is not exercised in a way that would constitute an abuse[72].

95 Thirdly, the ABCC argued, contrary to the Full Court's reasoning, s 546 is plainly not an exhaustive code with respect to pecuniary penalty orders that abstracts from s 545(1) the power to make orders touching upon or concerning a pecuniary penalty. In the ABCC's submission, inasmuch as s 564 of the *Fair Work Act* provides that nothing in the Act limits the court's powers under s 23 of the *Federal Court of Australia Act*, s 564 makes plain that s 546 is not an exclusive code as to penalty.

96 Fourthly, the ABCC submitted, contrary to the Full Court's reasoning, the non-indemnification order did not make the pecuniary penalty imposed on Myles any more severe. Rather it ensured that Myles bore the pecuniary penalty which the primary judge intended that he should bear, and it prevented Myles and the CFMEU from reallocating as between themselves the relative burden of responsibility in a manner calculated to frustrate the primary judge's intended allocation. At times, this argument was also located at a higher level of abstraction: it was submitted that, given the longstanding pattern of defiant behaviour by the CFMEU, the non-indemnification order was necessary to protect the standing and authority of the court.

97 Alternatively, it was contended both in reply and in the ABCC's further written submissions, if it were not open to make the non-indemnification order under s 545(1), it was open to do so under s 546.

The respondents' contentions

98 Myles and the CFMEU argued that to assume or submit that the power conferred by s 545(1) is wide is to fail to grapple with the extent of its width. And, in that respect, it was submitted, it is telling that the Parliament had not included in the *Fair Work Act* a provision akin to s 77A of the *Competition and Consumer Act* 2010 (Cth) or s 199A(2)(b) of the *Corporations Act* 2001 (Cth), which expressly prohibit persons being indemnified against pecuniary penalty orders. If Parliament had intended to impose any restriction on indemnity against civil penalties, it was submitted, the *Fair Work Act* would surely have included a provision like those mentioned. It was also contended that the extrinsic

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72 See *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 185 per Mason CJ and Deane J, 203 per Dawson J; [1992] HCA 28. See also *Patton v Buchanan Borehole Collieries Pty Ltd* (1993) 178 CLR 14 at 23 per Gaudron J; [1993] HCA 23.

materials[73] leave no doubt that s 545(1) is directed to that section's remedial purposes, and that an order that B not indemnify A in respect of a pecuniary penalty imposed on A in respect of a contravention cannot logically be conceived of as directed to remedying the contravention by A. More particularly it was submitted that, in the context of s 545(1), "appropriate" should be interpreted, by reference to the case law concerning s 23 of the *Federal Court of Australia Act*, as meaning necessary to render the exercise of the court's jurisdiction effective.

99 It was contended that, although the power conferred by s 545(1) is a power to make any order the court considers appropriate where a person has contravened a civil remedy provision of the *Fair Work Act*, the power must be construed as subject to the express limits of s 546. To do otherwise would depart from an orthodox application of the *Anthony Hordern* principle[74]. Counsel also invoked the decision of the Court of Appeal for Ontario in *R v Bata Industries Ltd*[75], in which it was held that a condition of a probation order imposed on a company that it not indemnify its directors against the penalty imposed on them was directed to restraining the company expending its funds and thus motivated by an improper purpose. It was submitted that, by analogy, the order that the CFMEU not indemnify Myles against the pecuniary penalty imposed on him should be seen as underlain by an improper purpose of limiting Myles' capacity to raise funds to pay the penalty.

100 Additionally, it was contended that prohibiting the CFMEU from indemnifying Myles against the pecuniary penalty imposed on him was not necessary to ensure that the deterrent effect of the penalty was accomplished. Counsel referred to observations of this Court in *Lamb v Cotogno*[76] that the fact that a defendant may not be personally liable to pay exemplary damages does not necessarily diminish the deterrent effect of the damages. It was submitted that *mutatis mutandis* the same applies to the pecuniary penalty imposed on Myles. Alternatively, it was contended on the basis of the decision in *Hinch v Attorney-General*[77] that it was not open to take into account in setting the amount

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73 See, for example, Australia, House of Representatives, Fair Work Bill 2008, Explanatory Memorandum at 329 [2150].

74 See *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 per Gavan Duffy CJ and Dixon J; [1932] HCA 9.

75 (1995) 25 OR (3d) 321 at 328.

76 (1987) 164 CLR 1 at 9-10; [1987] HCA 47.

77 [1987] VR 721 at 730-731 per Young CJ, 748, 749, 751 per Kaye J.

of a pecuniary penalty the source from which the penalty would or might likely be paid and, therefore, it was not open to add to a penalty by way of an order which precludes the indemnification of a contravener against the amount imposed.

101 It was submitted, consistently with the reasoning of Allsop CJ in the Full Court, that clear words are required to empower a court to make orders against persons restraining them from doing what is otherwise lawful, and that the principle of legality protects departure from fundamental rights and from "the general system of law" including, relevantly, as it relates to otherwise lawful asset management.

102 Finally, it was contended that the clear words of s 546 precluded orders binding persons other than a contravener – and, therefore, would not support a non-indemnification order – and, likewise, that s 546 would not support an order that a contravener not seek or accept indemnity: for such would not be facilitative or otherwise directed to the effective exercise of power under s 546.

The correct construction of s 545(1)

(i) Preventative, remedial and compensatory orders

103 As Jessup J observed[78] in the Full Court, it assists in the construction of s 545(1) to have regard to its legislative history. But the starting point of the process must be the text of s 545(1) read in the context of the *Fair Work Act* as a whole and, in particular, in light of s 546[79]. So approached, the first and most immediate point of significance is the breadth of the terms in which s 545(1) empowers the court to make *any order the court considers appropriate*. What is "appropriate" for the purpose of s 545(1) falls to be determined in light of the purpose of the section and is not to be artificially limited. As the ABCC submitted, such broad terms of empowerment[80] are constrained only by

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78 *CFMEU v ABCC* (2016) 247 FCR 339 at 347-349 [38]-[45].

79 See *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 31 [4] per French CJ, 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 41; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 388-389 [23]-[24] per French CJ and Hayne J, 411-412 [88] per Kiefel J; [2012] HCA 56.

80 See generally *Port Kembla Coal Terminal Ltd v Construction, Forestry, Mining and Energy Union* (2016) 248 FCR 18 at 98-99 [279]-[283] per Jessup J.

limitations that are strictly required by the language and purpose of the section[81]. To adopt and adapt the language of Flick J in *Transport Workers' Union of Australia, NSW Branch v No Fuss Liquid Waste Pty Ltd*[82], the object and purpose of the power under s 545(1) is quite separate and distinct from that of the power under s 546 to order that a contravener pay a pecuniary penalty.

104 The second point of significance is contextual, and it points the other way. It will be observed that all of the example orders listed in s 545(2) are directed to preventing the occurrence of an apprehended contravention, remedying the effects of a committed contravention or compensating victims of a contravention for the consequences of the contravention. None of the example orders is penal. That suggests that the types of orders that may be regarded as "appropriate" within the meaning of s 545(1) are limited to preventative, remedial or compensatory orders, or at least do not include penal orders.

105 The third point dovetails with the second. As was earlier set out, the chapeau to s 545(2) expressly provides that the sub-section does not limit s 545(1). Standing alone, that could be taken to mean that s 545(2) does not in any way limit the scope of s 545(1). If so, it would permit of the possibility that s 545(1) extends to "appropriate" penal orders, notwithstanding that the example orders in s 545(2) are not penal. But, read in the context of s 545 as a whole, and particularly in light of the absence from s 545 of any explicit or apparently implicit suggestion of a penal purpose, the stipulation that s 545(2) does not limit s 545(1) presents as more likely to mean that the preventative, remedial and compensatory orders instanced in s 545(2) do not limit the range of preventative, remedial and compensatory orders open to be made under s 545(1)[83].

106 The fourth point is also contextual and it augments the third. Critically, the only form of penal order to which the *Fair Work Act* specifically refers is a

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81 See *Shin Kobe Maru* (1994) 181 CLR 404 at 421; *CDJ v VAJ* (1998) 197 CLR 172 at 185-186 [53] per Gaudron J; *Andar Transport* (2004) 217 CLR 424 at 450 [61] per Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ; *Campbell v Backoffice Investments* (2009) 238 CLR 304 at 361 [178] per Gummow, Hayne, Heydon and Kiefel JJ; *Weinstock v Beck* (2013) 251 CLR 396 at 419-420 [55]-[56] per Hayne, Crennan and Kiefel JJ. See, for example, *Knight v FP Special Assets* (1992) 174 CLR 178 at 192-193 per Mason CJ and Deane J; *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75 at 91-92 [24] per French CJ, Gummow, Hayne and Crennan JJ, cf at 121 [101] per Heydon J; [2009] HCA 43.

82 [2011] FCA 982 at [41].

83 See and compare *TWU v No Fuss Liquid Waste* [2011] FCA 982 at [43]-[44], [47].

pecuniary penalty order; and s 546 is the only provision of the *Fair Work Act* that expressly provides for the imposition of pecuniary penalty orders. That strongly implies that s 546 is the sole repository of the power to make penal orders and, in turn, that provides powerful support for the conclusion that orders appropriately made under s 545(1) are limited to preventative, remedial and compensatory orders.

107 The fifth point draws on the historical context to which Jessup J referred. As his Honour observed[84], given the legislative antecedents of s 545(1), it is less than likely that the expression "any order the court considers appropriate" was designed radically to alter the preventative, remedial and compensatory nature of the power for which the legislative antecedents of s 545(1) had long provided by introducing a power to make penal orders[85]. And as Jessup J also observed[86], it is significant that there is no mention in the extrinsic materials of any such intention. Seen, therefore, against the background of the provision's legislative history, it presents as more probable that the purpose of conferring a free-standing power to make any order considered to be "appropriate" was to delimit the scope of preventative, remedial and compensatory orders open to be made under that provision. That observation also provides support for the conclusion that s 546 is the sole repository of the power to make penal orders.

108 The sixth point concerns the stipulation in s 546(5) that, to avoid doubt, a court may make a pecuniary penalty order in addition to one or more orders made under s 545. Ex facie that stipulation is equivocal. But, contrary to the ABCC's submissions, on closer examination it does not suggest that s 545(1) enables the making of penal orders. As authority shows[87], the purpose and effect of s 546(5) is to make clear that a court may impose a pecuniary penalty under s 546 notwithstanding that it may also have made, or proposes to make, preventative, remedial and compensatory orders under s 545.

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84 *CFMEU v ABCC* (2016) 247 FCR 339 at 349 [44]-[45].

85 Cf *Independent Education Union of Australia v Australian International Academy of Education Inc* [2012] FCA 1512 at [15].

86 *CFMEU v ABCC* (2016) 247 FCR 339 at 349 [45].

87 See *Sayed v Construction, Forestry, Mining and Energy Union* (2016) 239 FCR 336 at 346 [58], 354 [105]. See, for example, *Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd (No 2)* (2011) 205 IR 465 at 470 [21]-[22]; *Mayberry v Kijani Investments Pty Ltd* (2011) 215 IR 404 at 408 [20].

109 The final consideration is s 564 of the *Fair Work Act*. Section 23 of the *Federal Court of Australia Act* empowers the Federal Court to make such orders as it considers "appropriate" to be made in the exercise of its jurisdiction and powers, as an incident of the general grant to it as a superior court of law and equity of the jurisdiction to deal with such matters[88]. The power conferred by s 23 extends to making orders necessary to ensure the effective exercise of the determination of a matter[89] and orders reasonably required or legally ancillary to ensuring that the court's order is effective according to its tenor. But the power conferred by s 23 does not extend to making penal orders. Consequently, the fact that s 564 provides that nothing in the *Fair Work Act* limits the orders that may be made under s 23 of the *Federal Court of Australia Act* does not suggest that the power conferred by s 545(1) extends to making penal orders. Rather, s 564 serves to make clear that the range of preventative, remedial and compensatory orders which may be made under s 545 does not, by implication, restrict the range of non-penal orders open to be made under s 23.

110 In the result, despite the breadth of the power conferred by s 545(1), it should be concluded that it is limited to making appropriate preventative, remedial and compensatory orders and as such does not include a power to make penal orders.

(ii) Nature of a non-indemnification order

111 The question then is whether a non-indemnification order of the kind in issue is a preventative, remedial or compensatory order within the ambit of s 545(1) or whether it is to be conceived of as penal and thus beyond the ambit of the power conferred by that provision.

112 As the ABCC submitted, the non-indemnification order did not increase the penalty imposed on Myles. It was and remains a penalty of $18,000. Nor did it increase the penalty imposed on the CFMEU, which was and remains a penalty of $60,000. And, although the non-indemnification order was calculated to deter Myles and, through him, the CFMEU from committing further contraventions of the civil remedy provisions of the *Fair Work Act*[90], the fact that an order is

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88 *Jackson v Sterling Industries* (1987) 162 CLR 612 at 622-624 per Deane J.

89 *Jackson v Sterling Industries* (1987) 162 CLR 612 at 623, 625 per Deane J; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 32-33 [35] per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 30.

90 *Director v CFMEU (No 2)* [2016] FCA 436 at [190]-[191].

designed to deter future contraventions does not necessarily make it a penal order. For example, an order that an employer submit its employment records to regular auditing might be calculated to deter the employer from committing contraventions of civil remedy provisions prohibiting the underpayment of employee entitlements[91]. But it could not be regarded as a penal order. Likewise, the fact that an order "touches upon" a pecuniary penalty does not necessarily mean that it is a penal order. For example, an asset preservation order may be designed to ensure that funds are available to meet a pecuniary penalty order but it could not itself be regarded as a penal order.

113 By contrast, however, a non-indemnification order of the kind in issue not only is directly connected to the pecuniary penalty order in respect of which it is made, but also serves to maintain the sting or burden of the pecuniary penalty order by prohibiting a pass-through of liability. In those respects, it is as much a penal order as an order that a pecuniary penalty be paid on terms, or that a pecuniary penalty be suspended pending compliance with an undertaking to desist from further contravention, or that a pecuniary penalty be payable only in the event of a failure to comply with an undertaking, or that a pecuniary penalty shall become payable only upon the happening of an identified event.

114 There are a number of cases in the Federal Court and the Federal Circuit Court (and in the latter's predecessor) in which orders as to the terms and conditions on which pecuniary penalties are payable, or which had the effect of suspending the operation of pecuniary penalty orders, were purportedly made under s 545(1)[92]. As will be explained, those orders are better conceived of as sustained by power implicit in s 546 to do what is reasonably required for, or legally ancillary to, the accomplishment of the specific remedy of pecuniary penalties for which s 546 provides[93]. Since s 545 is confined to preventative, remedial and compensatory orders, it does not support the making of a non-indemnification order in respect of a pecuniary penalty because such an order is properly understood as a penal order. Likewise, despite the breadth of s 23 of the *Federal Court of Australia Act*, given that s 23 does not extend to making penal

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91 See, for example, *Fair Work Act*, ss 44, 293, 305, 323, 325, 328.

92 See, for example, *United Group Resources Pty Ltd v Calabro (No 7)* (2012) 203 FCR 247 at 262-263 [18]-[19]; *Construction, Forestry, Mining and Energy Union v CSR Ltd* [2012] FMCA 983 at [1]; *Director of the Fair Work Building Industry Inspectorate v Ellen* [2016] FCA 1395 at [41].

93 See, for example, *Fair Work Ombudsman v W.K.O. Pty Ltd* [2012] FCA 1129 at [110]. See generally *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 452 [51] per Gaudron, Gummow and Callinan JJ; [1999] HCA 19.

orders, it will not support the making of a non-indemnification order in respect of a pecuniary penalty.

Implied power under s 546

(i) The extent of the power

115 Section 546 expressly confers power on the court to make an order that a person pay a pecuniary penalty. From that express conferral of power arises an implied power to make such other orders as are necessary for or facilitative of the type of orders expressly provided for[94]. For the reasons that follow, that implied power under s 546 includes power to make an order that a contravener pay a pecuniary penalty personally and not seek or accept indemnity from a co-contravener, otherwise known as a "personal payment order".

116 As has been observed, the principal object of an order that a person pay a pecuniary penalty under s 546 is deterrence: specific deterrence of the contravener and, by his or her example, general deterrence of other would-be contraveners[95]. According to orthodox sentencing conceptions[96] as they apply to the imposition of civil pecuniary penalties[97], specific deterrence inheres in the sting or burden which the penalty imposes on the contravener. Other things being equal, it is assumed that the greater the sting or burden of the penalty, the more likely it will be that the contravener will seek to avoid the risk of subjection to further penalties and thus the more likely it will be that the contravener is deterred from further contraventions; likewise, the more potent will be the example that the penalty sets for other would-be contraveners and therefore the greater the penalty's general deterrent effect. Conversely, the less the sting or

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94 See *Grassby v The Queen* (1989) 168 CLR 1 at 16-17 per Dawson J (Mason CJ, Brennan J and Toohey J agreeing at 4, 21, Deane J relevantly agreeing at 5); [1989] HCA 45; *Pelechowski* (1999) 198 CLR 435 at 451-452 [50]-[51] per Gaudron, Gummow and Callinan JJ.

95 *Commonwealth v Director* (2015) 258 CLR 482 at 506 [55] per French CJ, Kiefel, Bell, Nettle and Gordon JJ (Keane J agreeing at 513 [79]).

96 See generally *R v Williscroft* [1975] VR 292 at 298-299 per Adam and Crockett JJ; *Ryan v The Queen* (2001) 206 CLR 267 at 281-282 [43] per McHugh J; [2001] HCA 21; Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria*, 3rd ed (2014) at 250-257 [3.100].

97 See generally *Commonwealth v Director* (2015) 258 CLR 482 at 505-506 [52]-[55] per French CJ, Kiefel, Bell, Nettle and Gordon JJ (Keane J agreeing at 513 [79]).

burden that a penalty imposes on a contravener, the less likely it will be that the contravener is deterred from further contraventions and the less the general deterrent effect of the penalty. Ultimately, if a penalty is devoid of sting or burden, it may not have much, if any, specific or general deterrent effect, and so it will be unlikely, or at least less likely, to achieve the specific and general deterrent effects that are the raison d'être of its imposition.

117 The idea that *Lamb v Cotogno* implies the contrary is misplaced. To acknowledge that a deterrent effect of exemplary damages exists despite the fact that a defendant may be insured against them is to recognise that the quantum of exemplary damages, as opposed to the fact of their personal payment, provides a measure of the court's disapproval of the defendant's conduct. That is one object of an award of exemplary damages[98]. But it is facile to suppose that the context of exemplary damages says much, if anything at all, as to the specific and general deterrent effects of pecuniary penalty orders, which, it is accepted, are closely related to the sting or burden that such orders impose on the contravener.

118 Certainly, the power expressly conferred by s 546 is limited to making an order that a person "pay a pecuniary penalty". But, as has been observed, the express grant of power carries with it implied power to do everything necessary for the effective exercise of the power to impose a pecuniary penalty; and thus implied power to make such further orders as are reasonably required for, or legally ancillary to, the accomplishment of the deterrent effect that the penalty is calculated to achieve[99]. Thus, for example, as counsel for Myles and the CFMEU rightly conceded, where a contravener is subjected to a pecuniary penalty, s 546 imports an implied power to accomplish the effect which the penalty is calculated to achieve by ordering, say, that the penalty be paid on terms; or paid conditionally upon a specified occurrence; or paid in default of compliance with an identified requirement.

119 Parity of reasoning dictates that s 546 also imports implied power to achieve the effect which a pecuniary penalty is calculated to achieve by ordering

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98 See *Lamb v Cotogno* (1987) 164 CLR 1 at 7-10; *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 7-8 [14]-[16], 9 [22], 12-13 [32]-[34] per Gleeson CJ, McHugh, Gummow and Hayne JJ, 29 [87], 35 [101] per Kirby J; [1998] HCA 70; *New South Wales v Ibbett* (2006) 229 CLR 638 at 648-649 [35], [38]-[39]; [2006] HCA 57.

99 See *Grassby* (1989) 168 CLR 1 at 16-17 per Dawson J (Mason CJ, Brennan J and Toohey J agreeing at 4, 21, Deane J relevantly agreeing at 5); *Pelechowski* (1999) 198 CLR 435 at 451-452 [50]-[51] per Gaudron, Gummow and Callinan JJ.

that a contravener pay the penalty personally; or where, as here, joint contraveners are ordered to pay pecuniary penalties in respect of certain contraventions – each according to his, her or its relative share of responsibility for the contravention – implied power to achieve the relative degrees of sting or burden determined by the judge by ordering that neither contravener seek or accept indemnity or contribution from the other. The implied power to make a personal payment order is closely analogous to the court's power to order a contemnor to pay a fine personally[100], and an order that joint contraveners not indemnify each other in respect of the penalties imposed on each of them is essentially similar.

120 Given that s 546 expressly empowers the court to order a specific person to pay a pecuniary penalty, it is no stretch to accept that there is power in s 546 to make orders designed to ensure that the person against whom the order is made cannot avoid the incidence of the penalty. It is to take too narrow a view of the purpose of s 546 to regard the provision as being concerned with no more than that an amount of money be paid by someone in discharge of a debt created by order of the court. Section 546 is not about the creation and collection of debts; it is about penalising a contravention of the law. It is to take too narrow a view of the extent of the power conferred by s 546 to deny that it extends to the making of orders designed to ensure that a particular person cannot defeat the purpose of an order that the person pay the penalty imposed on him or her.

121 Myles and the CFMEU contended that it could not be reasoned by analogy with the court's power to punish for contempt that the court has implied power under s 546 to make a personal payment order prohibiting a contravener from seeking or accepting indemnity in respect of a pecuniary penalty. Counsel for Myles and the CFMEU invoked an observation of Jessup J in the Full Court[101], in relation to s 545(1), that the power to punish for contempt is different because in the case of contempt the court is:

> "exercising its jurisdiction, as a superior court of record, to punish for contempt, and to do so effectively. It [is] not concerned with the extent of the power given by a specific statutory provision, as we are here".

122 That argument should be rejected. In *Australian Building Construction Employees' and Builders Labourers' Federation v Minister of State for Industrial*

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100 See and compare *Australian Building Construction Employees' and Builders Labourers' Federation v Minister of State for Industrial Relations* (1982) 43 ALR 189 at 214 per Evatt and Deane JJ.

101 *CFMEU v ABCC* (2016) 247 FCR 339 at 355 [65].

Relations[102], the power to punish for contempt was the statutory power accorded to the Federal Court by s 31 of the *Federal Court of Australia Act*: a power analogous to that possessed by the High Court to make an order that is just[103]. The trial judge in that case (Keely J) determined that the punishment that was just in relation to the Federation was a fine of $15,000. To make the punishment effective, his Honour further ordered that the Federation pay the fine personally or by an agent properly authorised in writing. On appeal to the Full Court, Evatt and Deane JJ saw no reason to interfere with the further order and observed that it could well serve as a model in the future[104]. The considerations that apply in this case, although different, are logically comparable. The power to impose a pecuniary penalty under s 546 is a statutory power to impose such penalty as is considered to be just. The penalty that the primary judge considered to be just in Myles' case was a pecuniary penalty of $18,000. As has been explained, s 546 imports an implied power to make such further orders as are reasonably required for, or legally ancillary to, the accomplishment of the effect that the pecuniary penalty is calculated to achieve. In this case, the primary judge considered that, in order to accomplish the deterrent effect which the penalty of $18,000 was calculated to achieve, it was necessary to order that Myles not be indemnified by the CFMEU in respect of that penalty. Accordingly, although it was not the course her Honour took, it would have been open to the primary judge in exercise of the power conferred by s 546 to make a personal payment order prohibiting Myles from seeking or receiving indemnity from the CFMEU.

123 Myles and the CFMEU argued to the contrary that s 546 does not authorise the making of such an order because, in the language of Jessup J in the Full Court in the context of the power under s 545(1), such an order "add[s] to the penal outcome authorised by the section"[105]. That argument takes the matter no further. The "penal outcome authorised" by s 546 is that a contravener pay a pecuniary penalty. An order that a contravener must not seek or receive indemnity from his or her co-contravener in respect of a pecuniary penalty adds nothing to that penal outcome. To the contrary, it assists in accomplishing the calculated level of sting or burden of the pecuniary penalty and thereby assists in achieving the penal outcome authorised by the section. For the same reason,

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102 (1982) 43 ALR 189.

103 See *Judiciary Act* 1903 (Cth), s 24; *Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (No 7)* (2015) 235 FCR 563 at 566 [8].

104 *Australian Building Construction Employees' and Builders Labourers' Federation v Minister of State for Industrial Relations* (1982) 43 ALR 189 at 214.

105 *CFMEU v ABCC* (2016) 247 FCR 339 at 354 [60].

Myles and the CFMEU gain little support from the decision in *Hinch*. At base, *Hinch* was a decision that, regardless of whether the appellant was liable to be indemnified in respect of the fine imposed on him for contempt, the sentencing judge should not have imposed a greater fine than the nature and gravity of the contempt dictated. Arguably, it may follow that a judge imposing a pecuniary penalty order would be precluded from imposing a penalty greater than the nature and gravity of the contravention dictated in light of the personal circumstances of the contravener for the reason that the contravener may or would likely be indemnified against the penalty. But whether or not that is the case, the decision in *Hinch* in no way denies the efficacy of a personal payment order pursuant to s 546 of the *Fair Work Act* prohibiting a contravener on whom a pecuniary penalty of appropriate quantum is imposed from seeking or accepting indemnity from another party. So to order does not increase the penalty; it assists in its accomplishment.

124 It may also be said that an order to ensure that Myles not seek or receive indemnity from the CFMEU does not render the pecuniary penalty order less efficacious by reason of it making it less likely that Myles would pay the penalty than if he were free to seek the assistance of the CFMEU. There was no suggestion that Myles would be unable to pay his penalty if he were denied the assistance of the CFMEU.

125 Myles and the CFMEU submitted that so to reason is to confuse the power to make a pecuniary penalty order with the purpose of the order, and that there is no implied power in s 546 or elsewhere in the *Fair Work Act* to make orders for achieving the purpose of a pecuniary penalty order as opposed to making orders for the attainment of the pecuniary penalty order per se. As will be observed, however, that contention is opposed to the concession that counsel for Myles and the CFMEU rightly made that s 546 imports implied power to accomplish the payment of the pecuniary penalty fixed by the court by ordering that the penalty be paid on terms, or conditionally upon a specified occurrence, or in default of compliance with an identified requirement. And to repeat, there is no difference in principle between that kind of process and one of accomplishing the calculated level of sting or burden of a pecuniary penalty order by making a further order that the contravener pay the pecuniary penalty personally or not seek or accept indemnity or contribution from a co-contravener. Admittedly, the former has the effect of ameliorating the prima facie measure of sting or burden and the latter assists in the prevention of its amelioration. But the latter no more inflates the level of sting or burden beyond the level authorised by the statute than the former diminishes it. In each case, the exercise is one of accomplishing the level of sting or burden which the court determines is necessary to be imposed, and thus in each case the exercise is one of doing what is necessary to accomplish the specific remedy of a pecuniary penalty order calculated to achieve the appropriate degree of specific and general deterrence.

126 Contrary also to the submissions of Myles and the CFMEU, there is nothing in the decision of the Ontario Court of Appeal in *Bata Industries* which suggests the contrary. The problem with the probation order in that case was that the order was required to be structured according to what was necessary for the punishment, deterrence and rehabilitation of the company. In fact, the order was formulated according to what the sentencing judge considered to be necessary for the punishment, deterrence and rehabilitation of the directors of the company whom the company was ordered not to indemnify[106]. It followed, as was held by the Court of Appeal, that the order was motivated by an improper purpose. By contrast, there is no suggestion of improper purpose in this case. Ex hypothesi, the purpose of an order that Myles not seek or recover indemnity from the CFMEU in respect of the pecuniary penalty imposed on him would be to ensure that the level of sting or burden that the primary judge determined should fall on Myles would in truth fall on Myles rather than being reallocated by way of pass-through to the CFMEU.

127 Myles and the CFMEU contended that, given that s 77A of the *Competition and Consumer Act* and s 199A of the *Corporations Act* expressly prohibit companies and bodies corporate from indemnifying persons against specified penalties imposed under those Acts[107], it is not to be supposed that something similar was capable of being achieved by means of discretionary order simply by the word "appropriate" in s 545(1) or, extending this reasoning to s 546, by the power implicit in s 546 to do what is necessary for the effective exercise of accomplishing the specific remedy of a pecuniary penalty order. More particularly, it was submitted that, although the *Competition and Consumer Act*, the *Corporations Act* and the *Fair Work Act* may not all be *in pari materia*[108], the penalty regime under each is relevantly similar and hence, since the Parliament determined that it was necessary to provide expressly in the *Competition and Consumer Act* and the *Corporations Act* for the prohibition of indemnity against penalties, it should be concluded a similar express prohibition in the *Fair Work Act* would be necessary to achieve the same result.

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106 *Bata Industries* (1995) 25 OR (3d) 321 at 328-329.

107 See also *Native Title Act* 1993 (Cth), s 203EB; *Australian Securities and Investments Commission Act* 2001 (Cth), s 12GBD.

108 See generally *Lennon v Gibson & Howes Ltd* (1919) 26 CLR 285 at 287; [1919] AC 709 at 711-712; *Federal Commissioner of Taxation v ICI Australia Ltd* (1972) 127 CLR 529 at 541-542; [1972] HCA 75; Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at 128-129 [3.36].

128 That argument must also be rejected. Express prohibitions of the kind comprised in s 77A of the *Competition and Consumer Act* and s 199A of the *Corporations Act* are grounded in policy considerations applicable in all cases falling within the ambit of those sections regardless of the circumstances. Such provisions thus apply whether or not it is considered that it is otherwise necessary or desirable that indemnity be prohibited. For that reason, as Jessup J observed[109] in the Full Court, provisions like s 77A of the *Competition and Consumer Act* and s 199A of the *Corporations Act* contribute nothing to the task of construing the power to make appropriate orders under s 545(1), which are dependent upon the particular circumstances of each case. *A fortiori*, they contribute nothing to the task of determining the scope of the power implicit in s 546 to accomplish the specific remedy imposed by a pecuniary penalty order according to the circumstances of each case.

129 It should be concluded that there would have been power under s 546 for the primary judge to make a personal payment order on terms that Myles not seek or accept indemnity from the CFMEU in respect of the pecuniary penalty imposed on Myles.

(ii) Section 23 of the Federal Court of Australia Act

130 As has been observed, because s 23 of the *Federal Court of Australia Act* does not extend to making penal orders, it will not support the making of a non-indemnification order. Whether s 23 would support the making of a personal payment order was not the subject of detailed submissions, and, for the present, need not be decided. It is enough for the disposition of this appeal that s 546 is sufficient in itself to sustain a personal payment order. Whether s 23 would go as far or any farther is better left to be considered when and if the issue arises.

(iii) Problems of enforcement

131 It is necessary then to say something more about cases in the Federal Court and the Federal Circuit Court in which it has been ordered, or where a party has applied for an order, purportedly under s 545(1)[110], that a contravener

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109 *CFMEU v ABCC* (2016) 247 FCR 339 at 353 [57].

110 See *Bragdon (No 2)* [2015] FCA 998; *Bragdon v Director of the Fair Work Building Industry Inspectorate* (2016) 242 FCR 46. See also *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1173 at [35]-[39]; *Director v CFMEU (No 2)* [2016] FCA 436 at [161].

pay a pecuniary penalty personally and not seek indemnity or contribution from other contraveners. Such orders are customarily referred to as *Bragdon* orders after the name of the first case in which they appear to have been made[111]. As has now been explained, s 545(1) is confined to preventative, remedial and compensatory orders and it does not support the making of *Bragdon* orders. The power to make *Bragdon* orders resides in s 546. More pertinently for present purposes, however, such orders have sometimes been criticised as creating special problems of enforcement, including by exposing vexed questions of identifying the source of funds used for payment[112]. These are legitimate concerns. There is no point in a court making orders that cannot be enforced[113], and, if orders do go unenforced, the lack of enforcement is likely to detract from the prestige of the court and, ultimately, the efficacy of its processes[114]. Even so, it should not be thought that difficulties of enforcement are necessarily determinative. Ordinarily, it is to be assumed that a contravener who is ordered not to seek or accept indemnity or contribution from a co-contravener in relation to a pecuniary penalty will abide by the order rather than risk detection and punishment for contempt. It is also to be remembered that union officials who aid, abet, counsel or procure one of their number to contravene such an order may themselves be found guilty of contempt[115]. And, as will be explained, this process may be facilitated by use of a penal notice. Consequently, it is not a precondition of the making of *Bragdon* orders that the court be positively satisfied of their practical enforceability[116]. Furthermore, in a case of this kind, in which the ABCC is the industry regulator with the statutory function of enforcing the *Fair Work Act* and orders made under it, the court may proceed with a degree

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111 *Bragdon (No 2)* [2015] FCA 998.

112 *Director v CFMEU* [2015] FCA 1173 at [37]-[38]; *Bragdon* (2016) 242 FCR 46 at 62-63 [87]-[88].

113 See generally *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282 at 298 per Dixon J (Gavan Duffy CJ agreeing at 290); [1931] HCA 15; *Patrick Stevedores v MUA* (1998) 195 CLR 1 at 46 [78] per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ.

114 See *Bank of Western Australia v Ocean Trawlers Pty Ltd* (1995) 13 WAR 407 at 436; *Pelechowski* (1999) 198 CLR 435 at 485 [149] per Kirby J.

115 See generally *CCOM Pty Ltd v Jiejing Pty Ltd* (1992) 36 FCR 524 at 530-531; *Chan v Chen (No 2)* [2007] VSC 24 at [38]-[39].

116 See and compare *Patrick Stevedores v MUA* (1998) 195 CLR 1 at 46-47 [78]-[79] per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ.

of confidence that the ABCC will be jealous to protect the efficacy of any such orders and therefore astute to detect and institute contempt proceedings for their contravention[117]. It is also to be remembered that discovery is available against an incorporated trade union in contempt proceedings[118]. At all events, where, as here, a union official who has contravened the *Fair Work Act* is closely and conspicuously linked to the union from whom he or she might be ordered not to seek or accept indemnity or contribution, and the union is a co-contravener well-known to the court for its contumacious disregard of court orders, the task of determining the source of funds actually used to pay pecuniary penalties is unlikely to prove overly burdensome and certainly not insurmountable.

(iv) Penal notice

132 Rule 41.06 of the Federal Court Rules 2011 (Cth) relevantly provides that, where an order requires a person not to do an act or thing, and the consequences of failing to comply with that order may be committal, sequestration or punishment for contempt, the order must carry an endorsement that the person to be served with the order will be liable to imprisonment, sequestration of property or punishment for contempt if the person disobeys the order (a "penal notice"). If a personal payment order were made against Myles, it would require him not to seek or accept indemnity from the CFMEU in respect of the pecuniary penalty imposed on him. Such an order would be required to carry a penal notice, which, pursuant to r 41.07 of the Federal Court Rules, would have to be served on Myles, and which the judge could also order be served on the CFMEU as the entity from whom Myles would be prohibited from seeking or receiving indemnity. Service of the penal notice on the CFMEU would be sufficient to put the CFMEU on notice not only that the personal payment order had been made but also that the CFMEU was prohibited from knowingly interfering with its performance.

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117 See *Commonwealth v Director* (2015) 258 CLR 482 at 508 [60] per French CJ, Kiefel, Bell, Nettle and Gordon JJ (Keane J agreeing at 513 [79]). See and compare *Public Guardian (Qld) v Beasley (No 2)* (2015) 302 FLR 103 at 105 [11], 114 [63], 116 [78] per May J, 119 [100] per Austin J (Strickland J generally agreeing with May J and Austin J at 118 [93]).

118 *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375 at 390 [47] per French CJ, Kiefel, Bell, Gageler and Keane JJ, 398-399 [75] per Nettle J; [2015] HCA 21.

A non-indemnification order under s 546

133 Finally, it remains to explain why, notwithstanding that it would have been open to make a personal payment order under s 546 on terms that Myles not seek or accept indemnity from the CFMEU, it was not open under s 546 to order that the CFMEU not indemnify Myles. The reason is that an order of the former kind would be made against the party subjected to the pecuniary penalty and thus would fall naturally within the ambit of the implied power – incidental to the express power to impose the pecuniary penalty – to do what is reasonably required for, or legally ancillary to, the accomplishment of the specific remedy of the pecuniary penalty. By contrast, an order of the latter kind would be made against a party other than the party subjected to the pecuniary penalty and thus could not properly be regarded as an exercise of an incident of the power to impose a pecuniary penalty on the contravener. More particularly, under s 546, the only person on whom the court may impose a pecuniary penalty for a contravention of the *Fair Work Act* is the contravener. Likewise, the power implicit in s 546 to do what is necessary to accomplish the specific remedy of a pecuniary penalty order is a power to make orders against the contravener. The *Fair Work Act* does not expressly or otherwise authorise the imposition of a pecuniary penalty on anyone other than the relevant contravener. For the same reason, the *Fair Work Act* cannot be taken impliedly to authorise the making of an order against a person other than the contravener for the purpose of accomplishing a pecuniary penalty imposed on the contravener. As Allsop CJ remarked[119] in the Full Court in relation to whether there is a power to make a non-indemnification order under s 545(1), a non-indemnification order constitutes an imposition on the freedom of a person or organisation to conduct his, her or its own affairs and is intimately bound up with a pecuniary penalty which the person could not lawfully be ordered to pay. Hence, as his Honour concluded, such a power would need to find its source in clear and express words of the statute or, it should be added, would need to appear necessarily to be implicit in an express grant of power. There is no such power, express or implied, in s 546 or otherwise within the *Fair Work Act*.

Disposition of the appeal

134 For the reasons which have been given, the Full Court was correct, in effect, in holding that the primary judge had no power to make the non-indemnification order. It is not in issue that the Full Court was also correct in holding that the primary judge denied Myles and the CFMEU procedural fairness in relation to the question of whether the penalty was to be paid partially

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119 *CFMEU v ABCC* (2016) 247 FCR 339 at 342 [11].

out of public funds. But, in these circumstances, it was not correct for the Full Court to order, as their Honours did, merely that the non-indemnification order be set aside, with the remainder of the primary judge's orders left extant. The amount of the pecuniary penalty and the non-indemnification order were distinct but interlinked elements of the one single penalty[120], and, as such, they were so much integrated that the primary judge's error in relation to one was necessarily productive of error in the other. The penalty imposition discretion thus miscarried[121] and, accordingly, the matter must now be remitted to the Full Court for the penalty imposition discretion to be exercised afresh.

135 To that end, it will be necessary to keep in mind before the Full Court that, because it would have been open to the primary judge as part of the imposition of penalty under s 546 to make a personal payment order against Myles on terms that Myles not seek or accept indemnity from the CFMEU in respect of the pecuniary penalty imposed on Myles, it is similarly open to the Full Court to make such an order as part of the re-imposition of penalty. Of course, whether it is considered appropriate to make such an order will be a matter for the Full Court to determine in the exercise of their Honours' discretion. It will be necessary, too, for the Full Court to hear and consider what Myles and the CFMEU wish to submit in relation to the question of payment of penalties out of public funds.

Orders

136 The ABCC should be granted leave to amend the notice of appeal in the manner set out in the proposed amended notice of appeal exhibited to the affidavit of Brendan Charles dated 10 November 2017. Myles and the CFMEU submitted that, if such leave were granted, leave should be conditional on the ABCC paying Myles' and the CFMEU's costs in responding to the application. Given that the ABCC agreed not to oppose such a costs order, and that the issue of a personal payment order was ventilated and ostensibly concluded at first instance, the ABCC should pay Myles' and the CFMEU's costs of, and incidental to, the application to amend the notice of appeal in accordance with s 570(2)(b) of the *Fair Work Act*. There will otherwise be no order as to costs. Special leave to appeal was granted on the condition that the ABCC not seek an order for costs of the appeal.

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120 See and compare *Crump v New South Wales* (2012) 247 CLR 1 at 16-17 [28] per French CJ; [2012] HCA 20.

121 See and compare *Bugmy v The Queen* (1990) 169 CLR 525 at 536-537, 539 per Dawson, Toohey and Gaudron JJ; [1990] HCA 18.

Keane J
Nettle J
Gordon J

137 In the result, it should be ordered that the appeal to this Court be allowed. Order 2 of the orders made by the Full Court, which set aside the non-indemnification order, should be set aside. In lieu of Order 2, it should be ordered that Orders 7 to 13 of the orders made by the primary judge be set aside. The matter should be remitted to the Full Court for the re-imposition of penalties according to law.