

# ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



## AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER V CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION [2018] HCA 3

High Court of Australia, Kiefel CJ, Gageler, Keane, Nettle Gordon JJ, 14 February 2018

Discussion of 'non-indemnification' order of an employee by their employer for pecuniary penalties.

**Key words:** Penalties, High Court of Australia, Pecuniary penalties, Personal payment Order, non-indemnification order, employees, implied powers.

1. This case involved contraventions of the *Fair Work Act 2009* (Cth) (*FWA*) by the CFMEU (the union) and one of its officials. An official of the union coerced a construction joint venture company to comply with certain of his demands relating to union representation on a construction site. This was admitted by the union and the official to be a contravention of section 348 of the *FWA*.
2. The primary judge, Mortimer J, made declarations of contravention and imposed pecuniary penalties on both the CFMEU and the official, Mr Myles. Section 348 is a civil remedy provision of the *FWA* for which a maximum penalty is provided in the event of contravention. 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 were each found to have engaged in three contraventions of section 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. Her Honour also made a 'non-indemnification' order based on section 545(1) of the *FWA* i.e. the union was not to indemnify Myles for his contraventions. Subsequently, the full Federal Court allowed an appeal against the non-indemnification order.
3. The non-indemnification order was the subject of this appeal. Section 545(1) of the *FWA* 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.
4. However, the High Court, in considering the non-indemnification order, held that section 545(1) did not empower the making of a non-indemnification order. Its purposes were confined to preventative, remedial and compensatory orders (at [114]). Section 546 of the *FWA*, on the other hand, expressly conferred power on the court to make an order that a person pay a pecuniary penalty. From that express conferral of power, the High Court held

that there arises an implied power to make such other orders as are necessary for, or facilitative of, the type of orders expressly provided for. That implied power under section 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. This was termed a 'personal payment order'.

5. The principal object of section 546 of the *FWA* was deterrence (at [116]):

According to orthodox sentencing conceptions as they apply to the imposition of civil pecuniary penalties, 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 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.

6. Therefore, Her Honour at first instance was incorrect to impose a non-indemnification order under section 545(1). The correct section to impose such an order under would have been section 546. The matter was remitted to the Full Federal Court for reconsideration with the High Court saying (at [134]-[135]):

The penalty imposition discretion thus miscarried and, accordingly, the matter must now be remitted to the Full Court for the penalty imposition discretion to be exercised afresh. 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.

7. The High Court also said that whilst it would have been open to the court to make a personal payment order under section 546 on terms that Myles not seek or accept indemnity from the CFMEU, it was not open under section 546 to order that the CFMEU not indemnify Myles (at [133]):

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 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*.

8. The Full Federal Court will now reconsider the matter, and may, as suggested by the High Court, impose a personal payment order on Myles.

## IMPLICATIONS



There should be consideration given to whether or not a personal order could be made against a senior executive or corporate officer, including directors of charity companies, under other Australian regulatory laws. These laws could include environmental protection, work health and safety, and the corporation's law, all of which contain civil penalty provisions. This could effectively prevent an employer or insurer from paying for a regulatory fine or penalty sought by one of Australia's corporate regulators against an individual.

Division 180 of the *ACNC Act* provides that the directors of a charity or trustees of a charity (whether incorporated or unincorporated) as jointly and severally liable as the charity to pay monetary penalties. As these are administrative penalties (not court imposed sanctions) it is unlikely that there arises an implied power to make such other orders as are necessary, such as a power to make an order that a contravener pay a pecuniary penalty personally and not seek or accept indemnity from a co-contravener.

## VIEW THE CASE



This case may be viewed at: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA//2018/3.html>

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