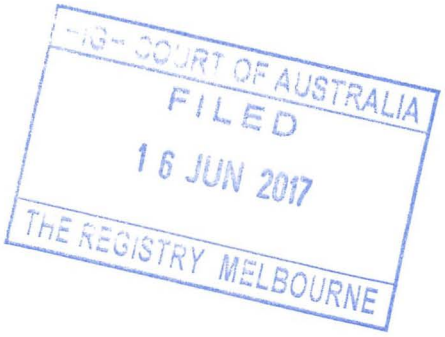
IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M65 OF 2017**

BETWEEN: **AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER**
Appellant

AND: **CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION**
First Respondent

JOSEPH MYLES
Second Respondent

SUBMISSIONS OF THE APPELLANT



Filed on behalf of the Appellant
Prepared by:
Sparke Helmore Lawyers
Level 40, 600 Bourke Street
MELBOURNE VIC 3000

DX: 30959 Stock Exchange
Telephone: (03) 9291 2352
Fax: (03) 03 9291 2399
Ref: Brendan Charles

PART I PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUE

2. This appeal presents one issue for determination. Does s 545(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) empower the Federal Court to order one party who has contravened the FW Act not to indemnify another party in respect of a pecuniary penalty imposed on that party for contravening the FW Act?

PART III SECTION 78B NOTICE

3. The Appellant certifies that it does not consider that any notice need be given under s 78B of the *Judiciary Act 1903* (Cth).

PART IV REPORTS OF DECISIONS BELOW

4. The citation for the judgment of the Full Court of the Federal Court is *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commission* (2016) 341 ALR 383; [2016] FCAFC 184. The judgment of the primary judge (Mortimer J) is not reported; its medium neutral citation [2016] FCA 436.

PART V FACTS

A. THE EVENTS OF MAY 2013

5. The events giving rise to this proceeding occurred at the building site for the Victorian Government's Regional Rail Link construction project.[1] The relevant part of the construction project was to be carried out as a joint venture.[2]

6. In May 2013, the Second Respondent (**Mr Myles**) was a Vice President of the Construction and General Division of the First Respondent (**CFMEU**).[3] The CFMEU wanted a CFMEU delegate on the site,[4] but the joint venturers did not agree.[5]

7. On 16 May 2013, a company had been engaged to deliver 130 cubic metres of wet concrete to the site.[6] Mr Myles and approximately 20 other people arrived at 12 noon

---

1 [2016] FCA 436 at [2].

2 [2016] FCA 436 at [26].

3 [2016] FCA 436 at [30].

4 [2016] FCA 436 at [31].

5 [2016] FCA 436 at [34].

6 [2016] FCA 436 at [36].

and blockaded an entrance to the site.[7] Concrete which had already been poured prior to their arrival was wasted, and concrete which had yet to be poured was spoiled.[8]

8. After the concrete trucks and subcontractors had left, Mr Myles said to an employee of one of the joint venturers: "I'll be back tomorrow to stop the concrete pour ... You won't pour again until you put a delegate on and Ralph Edwards is happy". (Mr Edwards was the President of the Victoria/Tasmania Branch of the Construction and General Division of the CFMEU.[9])

9. On 17 May 2013, Mr Myles returned to the site to see if the previous day's action had had the desired effect.[10] He asked the same employee from the day before whether "the project reconsidered having a delegate on site, because if there was a delegate on site, there would be no more issues, guaranteed". Mr Myles asked "Do you want a war or a delegate?" He went on to say: "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".[11]

B. THE PROCEEDINGS AT FIRST INSTANCE

10. On 21 May 2014, the statutory predecessor to the Appellant commenced proceedings against the Respondents.[12]

11. Before any hearing on liability, the CFMEU and Mr Myles admitted that Mr Myles organised and participated in the blockade on 16 May 2013 and made threats on 16 and 17 May 2013 with the intention of coercing two of the joint venturers to comply with a request to have a union delegate on the site.[13] They admitted that, by reason of that conduct, Mr Myles and through him the CFMEU contravened s 348 of the FW Act.[14] Accordingly, the hearing before the primary judge was limited to the issue of penalties.

12. The primary judge made declarations of contravention and imposed pecuniary penalties on both the CFMEU and Mr Myles. The CFMEU was ordered to pay its penalties to the Commonwealth within 30 days, and Mr Myles was ordered to pay his penalties to the Commonwealth within 90 days.

13. By Order 13, the primary judge ordered that the CFMEU "must not directly or indirectly indemnify [Mr Myles] against the penalties ... 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" (the **non-indemnification order**).

---

7 [2016] FCA 436 at [38]-[39].

8 [2016] FCA 436 at [46]-[47].

9 [2016] FCA 436 at [49]-[50].

10 [2016] FCA 436 at [54].

11 [2016] FCA 436 at [54].

12 [2016] FCA 436 at [2].

13 [2016] FCA 436 at [7].

14 [2016] FCA 436 at [7]. Section 348 provides: "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." A note to that section points out that "This section is a civil remedy provision (see Part 4-1)."

14. In making the non-indemnification order, the primary judge observed that Mr Myles had not shown any reputational concern in relation to the accumulation of court-imposed penalty orders and "he was not concerned about the possibility of bearing personal financial responsibility for the consequences".[15] The primary judge had earlier found that the CFMEU and Mr Myles "well knew the conduct was unlawful, and did not care".[16] Her Honour found that, in these circumstances, "the objectives of specific deterrence are diminished almost to the point of disappearance" unless regard is paid to "how individuals such as Mr Myles may, in reality, be indemnified by their unions for their unlawful conduct".[17] The primary judge added 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".[18] Ensuring that an individual such as Mr Myles was not indemnified by his union "is one of the few mechanisms by which individual behaviour may be changed or affected and the compliance objectives of regulatory schemes advanced".[19]

15. Her Honour also found that the non-indemnification order was "capable of having a deterrent effect on the CFMEU" as "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".[20]

16. Ultimately, the primary judge said that there were three factors supporting the making of the non-indemnification order.[21] The first was the "contumelious disregard" for the law shown by the CFMEU and Mr Myles. The second was "the repeated use of coercive and intimidatory behaviour in order to secure industrial outcomes the CFMEU desires". The third was that penalties had become just another "cost of doing industrial business".

C. THE FULL COURT

17. The CFMEU and Mr Myles appealed against the orders of the primary judge. The first ground of the notice of appeal went to whether the primary judge had the power to make the non-indemnification order. The second and third grounds assumed that such power existed and went to the exercise of that power. The other grounds are irrelevant for present purposes.

18. The Full Court upheld the first ground and, accordingly, allowed the appeal in part and set aside the non-indemnification order. In light of that disposition, the Full Court did not consider grounds 2 and 3.[22]

---

15 [2016] FCA 436 at [190].

16 [2016] FCA 436 at [104].

17 [2016] FCA 436 at [190].

18 [2016] FCA 436 at [190].

19 [2016] FCA 436 at [200].

20 [2016] FCA 436 at [191].

21 [2016] FCA 436 at [196].

22 [2016] FCAFC 184 at [16] (Allsop CJ), [27] (North J), [67] (Jessup J). Jessup J alone considered, and rejected, the third ground: at [71].

19. Between them, Allsop CJ (with whom North J agreed[23]) and Jessup J (with whom Allsop CJ agreed, in addition to adding his own observations), gave the following four reasons for finding that the Federal Court had no power to make the non-indemnification order:

(a) *First*, while the text of s 545(1) of the FW Act referred to orders that the Court considered "appropriate", there are necessarily limits to the orders that a Court can properly make pursuant to that provision.[24]

(b) *Secondly*, in the context of the express specific power in s 546 to impose pecuniary penalties, s 545(1) cannot properly be read as empowering the court to make orders that "increase the effect of the nominal amount"[25] or "strengthen the deterrent effect of a penalty under s 546".[26] Jessup J agreed with the primary judge that a "broad, general power in one section cannot be used as an expedient to step outside the limits implicit in another section dealing in detail with a specific subject",[27] but then applied that reasoning not just to reject the submission that s 545(1) could be used to justify the imposition of penalties in excess of the maxima in s 546(2), but also to hold that it was impermissible to use s 545(1) "as an expedient to improve upon, or to strengthen the efficacy of, the penal outcomes for which the legislature has specifically provided in s 546".[28] For that reason, the Full Court held that s 545(1) does not empower the Court to make a penalty "feel more severe" or "feel higher".[29]

(c) *Thirdly*, any power to make an order which punishes or penalises a person by preventing the indemnification of that person, or which controls how a party makes lawful use of its property, must be found in clear and express words in the statute.[30] Allsop CJ described this as an "aspect of the principle of legality".[31]

(d) *Fourthly*, the legislative history indicates that s 545 does not allow an order prohibiting indemnification, because there was a "strong argument" that the provisions which are the loose antecedents of s 545 would not allow an order to strengthen, to supplement or to improve upon the efficacy of an order of a kind that could have been made under earlier specific provisions.[32] Further, the

---

23 [2016] FCAFC 184 at [26] (North J).

24 [2016] FCAFC 184 at [5], [12] (Allsop CJ).

25 [2016] FCAFC 184 at [11] (Allsop CJ), [58] (Jessup J).

26 [2016] FCAFC 184 at [59] and [60] (Jessup J).

27 [2016] FCAFC 184 at [58], this being an application of the reasoning of Dixon J in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7. See also *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 589-590 [59]-[61].

28 [2016] FCAFC 184 at [58]-[60], [62] (Jessup J). See also at [11] (Allsop CJ).

29 [2016] FCAFC 184 at [10] (Allsop CJ).

30 [2016] FCAFC 184 at [11] (Allsop CJ).

31 [2016] FCAFC 184 at [12] (Allsop CJ).

32 [2016] FCAFC 184 at [44] (Jessup J).

introduction of ss 545 and 546 was a change "of drafting only, and did not reflect any legislative intention to alter the substance of the pre-existing law".[33]

PART VI ARGUMENT

A. INTRODUCTION

20. This appeal presents a confined question. Did s 545(1) of the FW Act empower the Federal Court to order the CFMEU not to indemnify one of its senior officers from a pecuniary penalty order made against that officer, in circumstances where that pecuniary penalty order was made in response to contraventions of the FW Act by both the officer and the CFMEU?

21. That question turns primarily on the construction of the words "any order the court considers appropriate" in s 545(1) of the FW Act. The principles of construction to be applied in resolving that question are familiar. The task begins and ends with the statutory text, read in context.[34] That context includes the general purpose and policy of the provision under consideration,[35] which purpose is to be derived principally from the statutory text.[36] That the relevant power was conferred on a court is, for reasons addressed below, a critical part of that context.

22. It is not necessary in disposing of this appeal for the Court to chart the outer boundaries of the orders that may be "appropriate" under s 545(1) of the FW Act. In particular, it is not necessary to decide whether the Federal Court has any wider power than that just posited, such as power to make a non-indemnification order against persons who were not involved in a contravention, or against persons who are not parties to the proceeding in which the pecuniary penalty is imposed. It is not "irrelevant"[37] that the CFMEU was a party to both the proceeding in which the non-indemnification order was made and the contraventions which were found, because it is those facts that generate the controversy that the Court must quell. The outer boundaries of the power can be left to be considered in a case where they arise.

23. Similarly, in the event that this Court holds that the Federal Court did have power to make the non-indemnification order, it is not necessary for this Court to examine whether the discretion to make that order was properly exercised. That issue was the subject of a separate ground of appeal before the Full Court, which the Court did not reach given its finding in relation to power. If the Full Court erred, the matter should be remitted to the Full Court for the determination of the remaining grounds of appeal.

---

33 [2016] FCAFC 184 at [45] (Jessup J).

34 See, eg, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47-48 [51]; *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39]; *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523 at 539 [47]; *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 at 28 [57]; *Military Rehabilitation and Compensation Commission v May* (2016) 257 CLR 468 at 473 [10].

35 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 at 516 [41].

36 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 389-390 [25]-[26]; *Deal v Father Pius Kodakkathanath* (2016) 258 CLR 281 at 295 [37].

37 Cf [2016] FCAFC 184 at [61] (Jessup J).

24. It is not unknown for courts to make orders preventing a person from doing something which they would otherwise have been lawfully entitled to do. Such orders include, in their own ways and to varying degrees, freezing orders, search orders, costs orders, and suppression orders. A non-indemnification order is another one of that general kind.

B. CONSTRUCTION OF THE FW ACT

Powers of the Federal Court

25. The Federal Court of Australia is a statutory court. As such, all of its powers ultimately derive from statute.[38] In addition to its express statutory powers, the Federal Court, having being created as a superior court of record,[39] has "implied powers"[40] that closely resemble the inherent power of superior courts of unlimited jurisdiction.[41] Such implied powers "are incidental and necessary to the exercise of the jurisdiction or the powers so conferred".[42] "Necessity" in this context should be understood as "identifying a power to make orders which are reasonably required or legally ancillary to the accomplishment of the specific remedies for enforcement provided" in the legislation in question.[43]

26. In addition to these implied powers, s 23 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) relevantly confers on the Federal Court the power to make "orders of such kinds ... as [it] thinks appropriate". That power is of the widest kind. It has been held to empower the Federal Court to make such orders as are necessary to ensure the "effective exercise"[44] of its jurisdiction. To that end, the general language of s 23 has been held to empower the Court to make orders even if they have a dramatic and obvious impact on the rights of individuals (such as, for example, freezing orders and search orders).[45] Those words have also been held to empower the making of orders

---

38 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 211 [140] (McHugh J); *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 630-631 (Toohey J); *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 561 (Toohey J); *DJL v Central Authority* (2000) 201 CLR 226 at 240-241 [25] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

39 *Federal Court of Australia Act 1976* (Cth) s 5(2).

40 See, e.g., *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 618-619 (Wilson and Dawson JJ) and 623-624 (Deane J) preferring this term, in the context of statutory courts, to "inherent" power.

41 See, e.g., *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at 24 [65] (Keane and Nettle JJ).

42 *Parsons v Martin* (1984) 5 FCR 235 at 241, quoted with approval by Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in *DJL v Central Authority* (2000) 201 CLR 226 at 241 [25].

43 *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 452 [51] (Gaudron, Gummow and Callinan JJ).

44 See, e.g., *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1 at 33 [35] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ), 61-62 [127] (Gaudron J), citing *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1301.

45 See, e.g., *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at 24 [64] (Keane and Nettle JJ); *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 393-4 [26] and 405 [56] (Gaudron, McHugh, Gummow and Callinan JJ); *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623 (Deane J, Mason CJ, Wilson and Dawson JJ agreeing), 618-619 (Wilson and Dawson JJ), 639-640 (Gaudron J).

against non-parties, where that is done in the interests of the administration of justice.[46]

27. Section 545(1) substantially mirrors s 23 of the FCA Act in empowering the Federal Court to "make *any order* the court considers *appropriate*" if a person has contravened a civil remedy provision of the FW Act. In construing the word "appropriate" in the context of s 545(1) of the FW Act, it is of critical importance that the word is used in a provision that confers power not just on a court, but on a court which has at its disposal certain implied and statutory powers. Those powers are part of the context in which s 545 is embedded.

28. Contrary to the approach taken by the Full Court of the Federal Court, it is not correct to confine the meaning of the word "appropriate" in s 545(1) of the FW Act by reference to the principle of legality,[47] or to insist upon "clear words"[48] to authorise orders of the above kinds. This Court has frequently emphasised that "[i]t is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words".[49] "Powers conferred on a court are powers which must be exercised judicially and in accordance with legal principle", that being a matter that "tends in favour of the most liberal construction, for it denies the validity of considerations which might limit a grant of power to some different body".[50] As Kirby J put it in *Cardile v LED Builders Pty Ltd*:[51]

> There is a further consideration which extends even more widely the powers of the Federal Court to make orders "appropriate" in relation to matters before it. This is the general principle that statutory provisions, conferring jurisdiction or power on a court, are not construed as subject to any limitation which is not strictly required by their language and purpose.[52] Where a court is endowed with a particular jurisdiction, it enjoys the powers necessary to enable it to act effectively within that jurisdiction. Its powers are not ordinarily construed as restricted to defined and closed categories.[53] This is because of the infinite variety of circumstances which may come before a court and require "appropriate" orders.[54]

---

46 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 400-401 [41]-[42] (Gaudron, McHugh, Gummow and Callinan JJ). See also, eg, *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 192-193 (Mason CJ and Deane J); *Jeffery and Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75.

47 [2016] FCAFC 184 at [12]. See the more detailed discussion of this issue in paragraphs 58 to 64 below.

48 [2016] FCAFC 184 at [11], [12] (Allsop CJ).

49 *Owners of Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) (emphasis added). See also, eg, *CDJ v VAJ* (1998) 197 CLR 172 at 185-186, 200-201; *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424 at 450 [61]; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 361 [178]; *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar* (2008) 237 CLR 66 at 89 [55]; *Weinstock v Beck* (2013) 251 CLR 396 at 419-420 [55]-[56].

50 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205 (Gaudron J). See also *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486 at 492 [10] (Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ).

51 (1999) 198 CLR 380 at 423-424 [110].

52 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 191, 205; cf *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1 at 57-58 (Gaudron J).

53 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 639 (Gaudron J).

54 *Mercedes Benz AG v Leiduck* [1996] 1 AC 284 at 308 (Lord Nicholls, dissenting).

29. The Full Court made no reference to the above principle in its reasons, and their Honours' reasoning is entirely inconsistent with it.

30. The Full Court further erred by giving a narrow construction to s 545(1) in part to address its concern that, if the Court did have power to make a non-indemnification order, that power might be used to prevent indemnification of a union official by all sorts of third parties, from friends and relatives to banks and financial institutions.[55] That reasoning involved error, because a conferral of power on a court is not to be narrowed for fear of "extreme examples and distorting possibilities".[56] As Gleeson CJ observed in *Forge v Australian Securities and Investments Commission*, "[p]ossible abuse of power is rarely a convincing reason for denying its existence".[57] To similar effect, Mason and Deane JJ explained in *Knight v FP Special Assets Ltd* that:[58]

> The inevitable answer to arguments directed to limiting curial jurisdiction based on the supposition that the jurisdiction might lend itself to abuse is that the court will and should develop principles governing the exercise of the discretion which will ensure that the jurisdiction is not exercised in such a way as to give rise to abuse.

31. In the same vein, Gaudron J explained in *Patton v Buchanan Borehole Collieries Pty Ltd* that:[59]

> A general discretionary power which, if exercised one way rather than another, might, in certain circumstances, involve an injustice, should not be approached on the basis that Parliament intended that it not extend to any circumstance in which injustice might, conceivably, occur. Rather, it should be approached on the basis that it was intended that it be exercised for the ends of justice and in accordance with legal principle.

32. Consistently with the above, in *PT Bayan Resources TBK v BCBC Singapore Pte Ltd*, French CJ, Kiefel, Bell, Gageler and Gordon JJ observed that "[s]uch issues of principle or degree as might arise in the working out of those criteria [for the exercise of an inherent power to make freezing orders] go to the exercise of that inherent power, not to its existence".[60]

33. The above passages illustrate that, in an appropriate case, principles might be developed to guide courts in making non-indemnification orders with respect to, for example, innocent parties and third parties. However, as the order in issue in this appeal did not concern such parties, that issue does not presently arise.

---

55 [2016] FCAFC 184 at [13] (Allsop CJ), [61] (Jessup J).

56 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 [32]; *Western Australia v Commonwealth* (1975) 134 CLR 201 at 271 (Mason J), 275 (Jacobs J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 380-381 [87]-[88]. See also *Egan v Willis* (1998) 195 CLR 424 at 505 [160] (Kirby J).

57 (2006) 228 CLR 45 at 69 [46].

58 (1992) 174 CLR 178 at 185. Dawson J made the same point at 203, stating that "[t]he circumstances in which it would be appropriate to award costs to a non-party would necessarily be confined, but that is a question of discretion, not jurisdiction."

59 (1993) 178 CLR 14 at 23.

60 (2015) 258 CLR 1 at 1 [50]. See also at 27-28 [76] (Keane and Nettle JJ).

34. There is a further check on potential abuse that may be noted. It is not to be doubted that s 545(1) must be exercised judicially in accordance with usual court process. An aspect of judicial process is that an order will not ordinarily be made which affects an individual unless that individual has been provided with an opportunity to be heard.[61] There is nothing to suggest that the Federal Court would proceed in any different fashion when exercising power under this section, and if it did so this could be corrected on appeal.

Power to make non-indemnification order

35. For the above reasons, the power conferred by s 545(1) is not confined by reference to matters that are not required by its terms or the context in which it appears.

36. Returning then to the text of s 545(1), the expression "any order the court considers appropriate" is one of great width.[62] The language used is appropriate to equip the court with a broad power that it may exercise following a finding of contravention of the FW Act. That is not to deny that the word "appropriate" is a word of limitation. It constrains the Federal Court to some extent, including because a Court could not properly find that it was appropriate to make a particular order without first having regard to such matters as the purpose for which the order would be made (and its relationship with the statutory scheme), the evidence before the Court, and the duty to act judicially.

37. The breadth of s 545(1) is confirmed by s 545(2), which emphasises that the grant of power in s 545(1) equips relevant courts with the power to make orders responding to, or remedying, contraventions of a civil remedy provision. Depending on the nature of a contravention, the response or remedy might, for example, seek to unwind the past effects of a contravention by awarding compensation for loss suffered because of the contravention (s 545(2)(b)), or it might seek to stop a contravention or proposed contravention in the future (s 545(2)(a)). But s 545(2) expressly states that the illustrative list of orders in that subsection does not limit the generality of the power conferred by s 545(1).

38. Whatever other content it may have, the language of s 545(1) is apt to empower the Federal Court to make any order that the Court considers appropriate to render its exercise of jurisdiction effective. In that operation, the power is analogous to s 23 of the FCA Act in empowering the making of freezing or search orders so as to ensure that a subsequent exercise of jurisdiction is not defeated (discussed above), or to make such

---

61 See *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 203 (Dawson J).

62 See *Port Kembla Coal Terminal Ltd v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 99 at [279], [281], [282] (Jessup J); *Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* (2011) 193 FCR 526 at 592 [421] (Barker J); *Fair Work Ombudsman v Skilled Offshore (Australia) Pty Ltd* [2015] FCA 275 at [156] (Gilmour J); *Dafallah v Fair Work Commission* (2014) 225 FCR 559 at 595 [148], 596 [157] (Mortimer J); *Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd [No 3]* [2012] FCA 697 at [186] (Katzmann J). See also *Woodside Burrup Pty Ltd v Construction, Forestry, Mining and Energy Union* (2011) 220 FCR 551 at 574 [155] (Gilmour J).

other orders as "are reasonably required or legally ancillary to the accomplishment of the specific remedies for enforcement provided" in the legislation in question.[63]

39. The exercise of jurisdiction to which the power to make the non-indemnification order related was the jurisdiction conferred by s 546(1) of the FW Act, which empowers certain courts, including the Federal Court, 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". That jurisdiction extends to making findings of contravention against individual officers, and to making orders imposing pecuniary penalties on those individual officers, for in s 546(2) of the FW Act the Parliament has specified different maximum penalties for individuals and bodies corporate.

40. This Court has emphasised that "the purpose of a civil penalty ... is primarily if not wholly protective in promoting the public interest in compliance".[64] The object of imposing such a penalty is "to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act".[65] This is true both for organisations and individuals.[66] However, there are a number of additional reasons why a court may conclude that it is appropriate to penalise an individual, rather than the organisation or entity that the individual represents. Those reasons include that:

(a) an individual is not to be excused from liability for a contravention simply because he or she engages in a contravention together with, or on behalf of, a body corporate;[67]

(b) where an offender has a history of contraventions, the need for personal deterrence may require the imposition of penalties on that offender personally in order to achieve compliance with the legislative regime;[68]

(c) pecuniary penalties directed towards individuals may reflect high community standards expected of those office holders;[69]

---

63 *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 452 [51] (Gaudron, Gummow and Callinan JJ).

64 *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 90 ALJR 113 at [55].

65 *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 90 ALJR 113 at [55].

66 In the context of individuals, one major purpose of the imposition of penalties is "personal deterrence" – that is deterrence of the *particular* individual offender: see *Tasmanian Spastics Association, Re; ASIC v Nandan* (1997) 23 ACSR 743 at 752 (Merkel J); *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at [93]; *Leighton Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union* (2006) 164 IR 375 at [74]; *Draffin v Construction, Forestry, Mining and Energy Union* (2009) 189 IR 145 at [89]; *Alfred v Construction, Forestry, Mining and Energy Union* [2011] FCA 556 at [89]–[91].

67 *Australian Prudential Regulation Authority v Holloway* (2000) 35 ACSR 276 at [27] and [28] (Mansfield J). See also *Commissioner of Taxation v Arnold* (2015) 100 ATR 529 at [216].

68 *R v McInerney* (1986) 42 SASR 111 at 113 (King CJ), cited in *Director of the Fair Work Building Industry Inspectorate v Stephenson* [2014] FCA 1432 at [78] (White J); *Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)* [2017] FCA 557 at [564] (Katzmann J).

69 *ASIC v Vizard* (2005) 145 FCR 57 at [33] (Finklestein J).

(d) in some circumstances, penalising a body corporate will merely indirectly affect third parties (such as shareholders of a company or members of a union), meaning that the most effective penalties may be directed towards responsible individuals in that organisation.[70]

41. Those principles informed the learned primary judge's decision to impose a pecuniary penalty on Mr Myles rather than the CFMEU alone.

42. The Full Court construed s 546 as limiting the amplitude of s 545 otherwise than in respect of the maximum penalties which may be imposed. Specifically, both Allsop CJ and Jessup J construed s 546 as an exhaustive code on the judicial imposition of a penalty for contravention of a civil remedy provision.[71] According to Allsop CJ, a non-indemnification order "is intimately bound up with the penalty and the amount of the penalty", as it is "directed to the effect of the penalty".[72] According to Jessup J, the effect of a non-indemnification order is "to add to the penal outcome authorised by [s 546]", and the Court cannot "devise for itself a more effective deterrent than that for which the statute provides".[73]

43. Contrary to that reasoning, s 546 is not an exhaustive code on pecuniary penalty orders which abstracts from s 545 (or any other source) the power to make orders touching upon a pecuniary penalty order (including, where considered appropriate, a non-indemnification order).

(a) It is clear from the terms of ss 545 and 546 that the Federal Court may make orders under either or both of them in respect of the same contravention. Indeed, s 546(5) expressly provides: "To avoid doubt, a court may make a pecuniary penalty order in addition to one or more orders under section 545". Further, other provisions of the FW Act expressly clarify the kinds of orders which can and cannot be made in the exercise of power under s 545.[74] The absence of any such provision in s 546 indicates that s 545 was intended to operate in conjunction with s 546 in accordance with the full breadth of its terms. Consistently with that submission (but inconsistently with the Full Court's approach), s 545 has been utilised in the past to make orders to suspend or defer the time for payment of a pecuniary penalty.[75]

---

70 *Australian Securities and Investments Commission, Re Chemeq Ltd v Chemeq Ltd* (2006) 58 ACSR 169 at [98] (French CJ).

71 [2016] FCAFC 184 at [11] (Allsop CJ), [60] (Jessup J).

72 [2016] FCAFC 184 at [11] (Allsop CJ).

73 [2016] FCAFC 184 at [60] (Jessup J).

74 FW Act, ss 530(5), 785(5). The Explanatory Memorandum to the Fair Work Bill 2008 (Cth) at 320 [2100] and 424 [2810] states in respect of each of these provisions that they "clarif[y] the orders that may be made".

75 See *Director of the Fair Work Building Industry Inspectorate v Ellen* [2016] FCA 1395 at [41] (Tracey J); *United Group Resources Pty Ltd v Calabro [No 7]* (2012) 203 FCR 247 at 263 [19] (McKerracher J). Cf *Fair Work Ombudsman v W.K.O. Pty Ltd* [2012] FCA 1129 at [108]-[110] (Barker J) (evidently sourcing the power in s 546 itself). In relation to similar language in the *Building and Construction Industry Improvement Act 2005* (Cth), see *Hadgkiss v Aldin* (2007) 164 FCR 394 at 407-408 [70], 414 [108]-[110] (Gilmour J).

(b) Section 564 likewise denies that s 546 is an exhaustive code with respect to pecuniary penalties. That section provides that nothing in the FW Act limits the Federal Court's powers under s 23 of the FCA Act. As already noted, s 545(1) substantially mirrors s 23 of the FCA Act, meaning that an implied limitation on s 545(1) would be pointless, and should not therefore be inferred, unless it also limited s 23. The Explanatory Memorandum to the Bill that became the FW Act states, in relation to s 564: "[t]he clause is intended to address authorities which have held that federal industrial laws exhaustively contain the remedies available to enforce those laws".[76]

44. Contrary to the reasoning of the Full Court, the non-indemnification does not have the effect of making a pecuniary penalty order that is imposed by the Court "more severe". Accordingly, while it is no doubt true that an order under s 545(1) could not increase a pecuniary penalty above the limits set by s 546(2),[77] the non-indemnification order does not have that effect. It neither increased the penalty imposed beyond the limits set in s 546(2), nor itself imposed any pecuniary penalty at all.

45. The proposition that a non-indemnification order increases the severity of a penalty begs an important question which the Full Court never grappled with – an increase, compared to what? The non-indemnification order did not result in Mr Myles paying more than the stipulated maximum for each of his contraventions ($10,200[78]). Nor did it result in the CFMEU paying more than the stipulated maximum for each of its contraventions ($51,000[79]).

46. Rather than increasing the severity of a penalty, the effect of the non-indemnification order is to prevent the effect of the order from being made less severe than the Court had determined was appropriate. Particularly where a non-indemnification order is made against a party that is itself a contravener, such an order prevents the parties from re-allocating responsibility for a contravention as between themselves, in a manner inconsistent with the allocation of responsibility determined by the Court in applying the principles summarised above. A non-indemnification order increases the prospect that each contravener will pay the amount that the Court had determined was appropriate as a result of its contravention of the FW Act. Without such an order, the findings of fact made by the primary judge demonstrated that the practical effect of the order to impose a particular penalty on the CFMEU, and a separate penalty on Mr Myles, would have been effectively indistinguishable from an order to impose a single higher penalty on the CFMEU.[80]

47. Plainly enough, if the Court had considered it appropriate to impose such a penalty on the CFMEU alone, it could have done so (up to the maximum prescribed penalty). Rather than take that course, the primary judge deliberately allocated responsibility between the CFMEU and Mr Myles.[81] That was entirely consistent with the legislative

---

76 Explanatory Memorandum, Fair Work Bill 2008 (Cth) at 336 [2213].

77 Cf *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 (Gavan Duffy CJ and Dixon J).

78 [2016] FCA 436 at [19] (Mortimer J).

79 [2016] FCA 436 at [19] (Mortimer J).

80 [2016] FCA 436 at [190]-[191] (Mortimer J); see also the first sentence of [196].

81 [2016] FCA 436 at [157] (Mortimer J).

scheme. But in order to render that decision effective, the non-indemnification order was required. That order was appropriate, as its effect was to prevent the CFMEU from defeating the purpose of Orders 9 and 10 (being the pecuniary penalties imposed on Mr Myles). The undisturbed finding of the learned primary judge was that, absent the non-indemnification order, the penalty imposed by the Court under s 546 on Mr Myles would be ineffective as a deterrent, because any penalty imposed on him would have no severity for him at all.[82]

48. In this respect, there is some analogy with the refusal of common law courts to enforce certain contracts of indemnity or insurance against the consequences of unlawful conduct as contrary to public policy.[83] The basis for the principle is that "if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom".[84] Whatever the limits of this principle,[85] that some contracts will be unenforceable on this basis illustrates that the involvement of the courts in determining whether one party is permitted to indemnify another against a penalty is not foreign to the common law or the exercise of judicial power.

49. A further example is to be found in proceedings for contempt concerning the Australian Building Construction Employees' and Builders Labourers' Federation and its officers.[86] A majority of the High Court held (in an application for special leave which was referred to the Full Bench) that it was not "erroneous for the Federal Court to take into account as one of the reasons for imposing a sentence of imprisonment instead of a fine the fact that the court thought that the applicant would not pay a fine out of his own funds".[87] The majority explained that, "[i]f the court comes to the conclusion that a person convicted of contempt of court will not personally suffer or be deterred by a fine, that is a matter which it may consider in imposing sentence".[88]

50. Similarly, in regulatory schemes in which one of the principal purposes is deterrence, if imposition of a penalty has proved inadequate to prevent continued contraventions, courts have sometimes resorted to alternative means of securing compliance with the law. One example of such an alternative means is the grant of an injunction to restrain breaches of the criminal law. While such injunctions are granted only in exceptional circumstances, a factor tending towards their grant is that "an offence is frequently repeated in disregard of a, usually, inadequate penalty",[89] such that without the

---

82 [2016] FCA 436 at [190] (Mortimer J).

83 See generally *Adamson v Jarvis* (1827) 4 Bing 66 at 73 [130 ER 693 at 696]; *Beresford v Royal Insurance Co Ltd* [1938] AC 586; *Fire and All Risks Insurance Co Ltd v Powell* [1966] VR 513.

84 *Burrows v Rhodes & Jameson* [1899] 1 QB 816 at 828 (Kennedy J).

85 See generally John Birds, Ben Lynch and Simon Milnes, *MacGillivray on Insurance Law* (13th ed, 2015) at [14-045]-[14-046]; Kenneth Sutton, *Insurance Law in Australia* (3rd ed, 1999) at [14.2]-[14.22].

86 See *Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 43 ALR 189; *Gallagher v Durack* (1983) 152 CLR 238.

87 *Gallagher v Durack* (1983) 152 CLR 238 at 245 (Gibbs CJ, Mason, Wilson and Brennan JJ).

88 *Gallagher v Durack* (1983) 152 CLR 238 at 245 (Gibbs CJ, Mason, Wilson and Brennan JJ).

89 *Gouriet v Union of Post Office Workers* [1978] AC 435 at 481 (Lord Wilberforce); see also at 491 (Viscount Dilhorne), 500 (Lord Diplock), 519 (Lord Fraser).

imposition of the injunction the offender will continue to deliberately and flagrantly flout the law.[90] Without the additional order, the penalty for contravening the law becomes simply the price of doing business, which is plainly unacceptable.

51. For the above reasons, it is not correct to describe an order designed to prevent circumvention of the penalty set by the Court as making the penalty "more severe". Instead, such an order fits within the genus of orders that are made in order to "prevent the abuse or frustration of [a court's] process".[91] It was, as the learned primary judge explained, "needed to ensure the effective exercise of the jurisdiction invoked"[92] to impose pecuniary penalties. Power conferred in terms that are relevantly indistinguishable to that conferred by s 545(1) has long been held sufficient to support orders of that kind.

Context and purpose

52. The above submission is confirmed by the statutory context and the purpose of the FW Act.

53. One of the purposes of the FW Act as a whole is to "provid[e] effective compliance mechanisms" in relation to the norms of conduct that are created by that Act (s 3(e)). The FW Act pursues that purpose in part through Part 4-1 (which includes s 545), which "establishes a single compliance framework for the new workplace relations system".[93] As McKerracher J observed in *United Group Resources Pty Ltd v Calabro [No 7]*, "the purpose necessarily implicit in Ch 4" is "to enable courts to enforce applicable industrial standards with outcomes that are fair and just".[94] A construction of s 545(1) that extends to supporting non-indemnification orders would advance that purpose,[95] in cases where such an order is necessary in order to prevent the deterrent effect of a pecuniary penalty order from being dissipated.

54. The extrinsic material that accompanied the enactment of s 545 likewise supports a broad construction of the section. Thus:

    (a) the Second Reading speech stated that "[t]he courts will have new and more

---

90 See also *Stafford Borough Council v Elkenford Ltd* [1977] 1 WLR 324 at 330 (Bridge LJ); *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1984] AC 754 at 776-777 (Lord Templeman); *Attorney-General v Harris* [1961] 1 QB 74, 91-92 (Sellers LJ), 93-95 (Pearce LJ); *Attorney-General v Sharp* [1931] 1 Ch 121. This line of UK cases has been recognised and applied in Australia: *Commonwealth v John Fairfaix & Sons Ltd* (1980) 147 CLR 39, 49-50 (Mason J); *Attorney-General v Huber* (1971) 2 SASR 142 at 178-181 (Walters J), 193-199 (Wells J); *Peek v New South Wales Egg Corp* (1986) 6 NSWLR 1 at 4-5 (Kirby P); *Brisbane City Council v Georgeray Contracting Pty Ltd* (1995) 79 A Crim R 265 at 270-272.

91 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623; *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at 18 [43], 20 [48]-[49], 24 [64]-[65]. See also paragraph 38 above.

92 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1 at 33 [35]; *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at 25 [66].

93 Explanatory Memorandum, Fair Work Bill 2008 (Cth) at 324 [2120].

94 (2012) 203 FCR 247 at 263 [19] (McKerracher J).

95 Such an interpretation is therefore to be preferred over other interpretations that do not advance that purpose: *Acts Interpretation Act 1901* (Cth) s 15AA (as at 25 June 2009: see FW Act, s 40A).

effective powers to deal with any breaches of the Act and entitlements, including the power to make 'any order they consider appropriate' to remedy a breach as well as injunctions to restrain breaches";[96]

(b) the Explanatory Memorandum stated that an integral element of the "single, accessible compliance framework"[97] created by the FW Act was "the ability of the Fair Work Divisions of the Federal Court or the Federal Magistrates Court to make any order considered appropriate to remedy a contravention".[98]

55. A matter which received some attention in the courts below was the relevance of other statutory regimes which counteract attempts by an entity to indemnify (and sometimes to insure) an officer of the entity against fines or penalties. For example, s 77A of the *Competition and Consumer Act 2010* (Cth) prohibit a body corporate from indemnifying a person against a civil liability incurred as an officer of that body corporate, and s 199A(2)(b) of the *Corporations Act 2001* (Cth) prohibits a company from indemnifying a person against pecuniary penalties incurred as an officer or auditor of the company. There are other examples of statutory provisions of these kinds.[99]

56. Jessup J considered that these regimes "contribute nothing to the task of construing s 545(1) of the FW Act".[100] However, the primary judge relied on those regimes not as assisting in the construction of s 545, but as supporting the notion that non-indemnification can be seen as a rational and "appropriate" means of advancing the purposes of general and specific deterrence.[101]

57. The fact that the Parliament has, in some contexts, specifically prohibited indemnification does not provide any basis for construing s 545 so as not to support a non-indemnification order.[102] These other (quite different) statutes have their own distinct histories,[103] and they operate in radically different ways from s 545. In particular, they automatically render indemnification arrangements void or unenforceable in all cases to which they apply.[104] The fact that Parliament has, in different legislation, enacted a rule against indemnification that applies automatically in all cases does not provide any basis to read down a broad power conferred on a court to

---

96 Commonwealth, *Parliamentary Debates*, 25 November 2008 at 11196 (Acting Prime Minister Julia Gillard).

97 Explanatory Memorandum, Fair Work Bill 2008 (Cth) at 324 [2121].

98 Explanatory Memorandum, Fair Work Bill 2008 (Cth) at iii.

99 See *Australian Securities and Investments Commission Act 2001* (Cth) s 12GBD; *Native Title Act 1993* (Cth) s 203EB(2); *Superannuation Industry (Supervision) Act 1993* (Cth) s 56. See also *National Consumer Credit Protection Act 2009* (Cth) s 192. While now repealed, see *Managed Investments Act 1998* (Cth) S 601JF.

100 [2016] FCAFC 184 at [57] (Jessup J).

101 [2016] FCA 436 at [168], [200].

102 See similarly *CDJ v VAJ [No 2]* (1998) 197 CLR 172 at 234 [186] (Kirby J).

103 See generally Perry Herzfeld, "Still a troublesome area: Legislative and common law restrictions on indemnity and insurance arrangements effected by companies on behalf of officers and employees" (2009) 27 *Company and Securities Law Journal* 267.

104 The provisions of the *Corporations Act 2001* (Cth) and the *Competition and Consumer Act 2010* (Cth), for example, are directed to preventing companies from indemnifying officers against particular kinds of wrongdoing

make appropriate orders, such that the Court cannot prevent indemnification in circumstances where the court decides that is warranted.

Irrelevance of principle of legality

58. Allsop CJ held that clear statutory language is needed before a court will construe legislation so as to empower the court either to order a third party "not to do an act not said to be unlawful" or to impose (or indeed, increase) a punishment on an individual.[105] "[T]hese considerations", the Chief Justice suggested, "can be seen as an aspect of the principle of legality".[106] There are several difficulties with this reasoning.

59. ***First***, the suggestion that clear statutory language is needed before a court will be empowered to make orders that restrict the liberty of action of other parties, or even third parties, is inconsistent with the settled law discussed in paragraph 28 above concerning the proper approach to the interpretation of legislation that confers power on a court. That Parliament has chosen to leave the determination of propriety to the *courts* on a case by case basis acting judicially answers the concerns about inadvertent intrusions which underpin this principle.[107] Ultimately, as Earl Loreburn LC observed in *Hyman v Rose*, "[i]t is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by statute to the Court where the conditions are not based upon statutory enactment at all".[108]

60. The point is illustrated by *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3), where the Court held that s 298U of the Workplace Relations Act 1996* (Cth), which provided that "In respect of conduct in contravention of this Part, the Court may, if the Court considers it appropriate in all the circumstances of the case, make one or more of the following orders ... " empowered the Court to make an order against a person who had not contravened the Act. It stated::

> Given that an application is "in respect of" contravening conduct and that the Court is empowered to make any order it thinks necessary to remedy the effects of the conduct, the order may be made against persons other than the person who has engaged in the contravening conduct.[109]

---

105 [2016] FCAFC 184 at [12]

106 [2016] FCAFC 184 at [12]. See also at [11].

107 Cf *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 230 [56] (French CJ); *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 316 (Toohey and Gummow JJ).

108 [1912] AC 623 at 631. See also *Delph Singh v Karbowsky* (1914) 18 CLR 197 at 204, 206 (Isaacs and Rich JJ); *Eather v The King* (1914) 19 CLR 409 at 420 (Isaacs J); *King v Commercial Bank of Australia Ltd* (1920) 28 CLR 289 at 292-293 (Rich J); *Patton v Buchanan Borehole Collieries Pty Ltd* (1993) 178 CLR 14 at 23-24 (Gaudron J); *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 290 (Gaudron J); *Papakosmas v The Queen* (1999) 196 CLR 297 at 327 [96] (McHugh J); *Burrell v The Queen* (2008) 238 CLR 218 at 243 [102] (Kirby J); *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 506 [75] (Kirby and Callinan JJ); *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 605 [30] (Gaudron J).

109 (1998) 195 CLR 1 at 28 [26] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ). See also at 57 [112]-[113] (Gaudron J).

61. ***Second***, the fundamental right that is said to engage the principle of legality is not clearly identified. The general law has never recognised a person as having a fundamental right or freedom to arrange their affairs to render meaningless exercises of judicial power directed to securing their adherence to a legal standard breached by them. The "legality" principle is oddly named, and achieves a manifestly odd outcome, if it applies to prevent a court from making orders to ensure that unlawful conduct is not treated as a mere "cost of doing business".

PART VII APPLICABLE STATUTORY PROVISIONS

62. The relevant statutory provisions are set out in Annexure A.

PART VIII ORDERS SOUGHT

63. The Appellant seeks the following orders:

    1. Appeal allowed.

    2. Orders 1 and 2 of the orders made by the Full Court of the Federal Court on 21 December 2016 be set aside.

    3. The matter be remitted to the Full Court of the Federal Court for the determination of the Respondents' remaining grounds of appeal to that Court.

64. In accordance with the condition imposed on the grant of special leave, the Appellant does not seek its costs.

PART IX ESTIMATE OF TIME

65. The Appellant estimates that he requires 1.5 hours to present his oral argument, with 15 minutes in reply.

Dated: 16 June 2017

.....

Stephen Donaghue
Solicitor-General of the Commonwealth
T: 02 6141 4139 **F:** 02 6141 4149
E: stephen.donaghue@ag.gov.au

Tom Howe
T: 02 6253 7415 **F:** 02 6253 7384
E: tom.howe@ags.gov.au

Christopher Tran
T: 03 9225 7458 **F:** 03 9225 8395
E: christopher.tran@vicbar.com.au

Definitions

(3) In this section:

contravention of subparagraph 45(2)(a)(i) or (b)(i) includes conduct referred to in paragraph 76(1)(b), (c), (d), (e) or (f) that relates to a contravention of subparagraph 45(2)(a)(i) or (b)(i).

proceedings means proceedings instituted under:

(a) this Part or section 163A; or

(b) section 21 or 23 of the *Federal Court of Australia Act 1976*; or

(c) section 39B of the *Judiciary Act 1903*.

77 Civil action for recovery of pecuniary penalties

(1) The Commission may institute a proceeding in the Court for the recovery on behalf of the Commonwealth of a pecuniary penalty referred to in section 76.

(2) A proceeding under subsection (1) may be commenced within 6 years after the contravention.

77A Indemnification of officers

(1) A body corporate (the ***first body***), or a body corporate related to the first body, must not indemnify a person (whether by agreement or by making a payment and whether directly or through an interposed entity) against any of the following liabilities incurred as an officer of the first body:

(a) a civil liability;

(b) legal costs incurred in defending or resisting proceedings in which the person is found to have such a liability.

Penalty: 25 penalty units.

(2) For the purposes of subsection (1), the outcome of proceedings is the outcome of the proceedings and any appeal in relation to the proceedings.

Definitions

(3) In this section:

civil liability means a liability to pay a pecuniary penalty under section 76 for a contravention of a provision of Part IV or Part V.

officer has the same meaning as in the *Corporations Act 2001*.

77B Certain indemnities not authorised and certain documents void

(1) Section 77A does not authorise anything that would otherwise be unlawful.

(2) Anything that purports to indemnify a person against a liability is void to the extent that it contravenes section 77A.

77C Application of section 77A to a person other than a body corporate

If, as a result of the operation of Part 2.4 of the *Criminal Code*, a person other than a body corporate is:

(a) convicted of an offence (the ***relevant offence***) against subsection 77A(1) of this Act; or

(b) convicted of an offence (the ***relevant offence***) against section 11.4 of the *Criminal Code* in relation to an offence referred to in subsection 77A(1) of this Act;

the relevant offence is taken to be punishable on conviction by a fine not exceeding 5 penalty units.

78 Criminal proceedings not to be brought for contraventions of Part IV

Criminal proceedings do not lie against a person by reason only that the person:

(a) has contravened a provision of Part IV (other than section 44ZZRF or 44ZZRG); or

(b) has attempted to contravene such a provision;

Part 2D.2—Restrictions on indemnities, insurance and termination payments

Division 1—Indemnities and insurance for officers and auditors

199A Indemnification and exemption of officer or auditor

Exemptions not allowed

(1) A company or a related body corporate must not exempt a person (whether directly or through an interposed entity) from a liability to the company incurred as an officer or auditor of the company.

When indemnity for liability (other than for legal costs) not allowed

(2) A company or a related body corporate must not indemnify a person (whether by agreement or by making a payment and whether directly or through an interposed entity) against any of the following liabilities incurred as an officer or auditor of the company:

(a) a liability owed to the company or a related body corporate;

(b) a liability for a pecuniary penalty order under section 1317G or a compensation order under section 961M, 1317H, 1317HA or 1317HB;

(c) a liability that is owed to someone other than the company or a related body corporate and did not arise out of conduct in good faith.

This subsection does not apply to a liability for legal costs.

When indemnity for legal costs not allowed

(3) A company or related body corporate must not indemnify a person (whether by agreement or by making a payment and whether directly or through an interposed entity) against legal costs

incurred in defending an action for a liability incurred as an officer or auditor of the company if the costs are incurred:

(a) in defending or resisting proceedings in which the person is found to have a liability for which they could not be indemnified under subsection (2); or

(b) in defending or resisting criminal proceedings in which the person is found guilty; or

(c) in defending or resisting proceedings brought by ASIC or a liquidator for a court order if the grounds for making the order are found by the court to have been established; or

(d) in connection with proceedings for relief to the person under this Act in which the Court denies the relief.

Paragraph (c) does not apply to costs incurred in responding to actions taken by ASIC or a liquidator as part of an investigation before commencing proceedings for the court order.

Note 1: Paragraph (c)—This includes proceedings by ASIC for an order under section 206C, 206D, 206E or 206EAA (disqualification), section 232 (oppression), section 961M, 1317E, 1317G, 1317H, 1317HA or 1317HB (civil penalties) or section 1324 (injunction).

Note 2: The company may be able to give the person a loan or advance in respect of the legal costs (see section 212).

(4) For the purposes of subsection (3), the outcome of proceedings is the outcome of the proceedings and any appeal in relation to the proceedings.

199B Insurance premiums for certain liabilities of director, secretary, other officer or auditor

(1) A company or a related body corporate must not pay, or agree to pay, a premium for a contract insuring a person who is or has been an officer or auditor of the company against a liability (other than one for legal costs) arising out of:

(a) conduct involving a wilful breach of duty in relation to the company; or

(b) a contravention of section 182 or 183.

protected action ballot, the application must specify the name of the person.

Note: The protected action ballot agent will be the Australian Electoral Commission unless the FWC specifies another person in the protected action ballot order as the protected action ballot agent (see subsection 443(4)).

(5) A group of employees specified under paragraph (3)(a) is taken to include only employees who:

(a) will be covered by the proposed enterprise agreement; and

(b) either:

(i) are represented by a bargaining representative who is an applicant for the protected action ballot order; or

(ii) are bargaining representatives for themselves but are members of an employee organisation that is an applicant for the protected action ballot order.

Documents to accompany application

(6) The application must be accompanied by any documents and other information prescribed by the regulations.

438 Restriction on when application may be made

(1) If one or more enterprise agreements cover the employees who will be covered by the proposed enterprise agreement, an application for a protected action ballot order must not be made earlier than 30 days before the nominal expiry date of the enterprise agreement, or the latest nominal expiry date of those enterprise agreements (as the case may be).

(2) To avoid doubt, making an application for a protected action ballot order does not constitute organising industrial action.

439 Joint applications

Without limiting section 609, the procedural rules may provide for the following:

Division 2—Notification and consultation relating to certain dismissals

Subdivision A—Requirement to notify Centrelink

530 Employer to notify Centrelink of certain proposed dismissals

(1) If an employer decides to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons, the employer must give a written notice about the proposed dismissals to the Chief Executive Officer of the Commonwealth Services Delivery Agency (Centrelink).

(2) The notice must be in the form (if any) prescribed by the regulations and set out:
  (a) the reasons for the dismissals; and
  (b) the number and categories of employees likely to be affected; and
  (c) the time when, or the period over which, the employer intends to carry out the dismissals.

(3) The notice must be given:
  (a) as soon as practicable after making the decision; and
  (b) before dismissing an employee in accordance with the decision.

(4) The employer must not dismiss an employee in accordance with the decision unless the employer has complied with this section.

  Note: This subsection is a civil remedy provision (see Part 4-1).

(5) The orders that may be made under subsection 545(1) in relation to a contravention of subsection (4) of this section:
  (a) include an order requiring the employer not to dismiss the employees in accordance with the decision, except as permitted by the order; but

(b) do not include an order granting an injunction.

Subdivision B—Failure to notify or consult registered employee associations

531 FWC may make orders where failure to notify or consult registered employee associations about dismissals

(1) The FWC may make an order under subsection 532(1) if it is satisfied that:

(a) an employer has decided to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons; and

(b) the employer has not complied with subsection (2) (which deals with notifying relevant registered employee associations) or subsection (3) (which deals with consulting relevant registered employee associations); and

(c) the employer could reasonably be expected to have known, when he or she made the decision, that one or more of the employees were members of a registered employee association.

Notifying relevant registered employee associations

(2) An employer complies with this subsection if:

(a) the employer notifies each registered employee association of which any of the employees was a member, and that was entitled to represent the industrial interests of that member, of the following:

(i) the proposed dismissals and the reasons for them;

(ii) the number and categories of employees likely to be affected;

(iii) the time when, or the period over which, the employer intends to carry out the dismissals; and

(b) the notice is given:

(i) as soon as practicable after making the decision; and

Subdivision B—Orders

545 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.

Note 1: For the court's power to make pecuniary penalty orders, see section 546.

Note 2: For limitations on orders in relation to costs, see section 570.

Note 3: The Federal Court and the Federal Circuit Court may grant injunctions in relation to industrial action under subsections 417(3) and 421(3).

Note 4: There are limitations on orders that can be made in relation to contraventions of subsection 65(5), 76(4), 463(1) or 463(2) (which deal with reasonable business grounds and protected action ballot orders) (see subsections 44(2), 463(3) and 745(2)).

(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.

Eligible State or Territory courts

(3) An eligible State or Territory court may order an employer to pay an amount to, or on behalf of, an employee of the employer if the court is satisfied that:

(a) the employer was required to pay the amount under this Act or a fair work instrument; and

(b) the employer has contravened a civil remedy provision by failing to pay the amount.

Note 1: For the court's power to make pecuniary penalty orders, see section 546.

Note 2: For limitations on orders in relation to costs, see section 570.

(3A) An eligible State or Territory court may order an outworker entity to pay an amount to, or on behalf of, an outworker if the court is satisfied that:

(a) the outworker entity was required to pay the amount under a modern award; and

(b) the outworker entity has contravened a civil remedy provision by failing to pay the amount.

Note 1: For the court's power to make pecuniary penalty orders, see section 546.

Note 2: For limitations on orders in relation to costs, see section 570.

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.

Time limit for orders in relation to underpayments

(5) A court must not make an order under this section in relation to an underpayment that relates to a period that is more than 6 years before the proceedings concerned commenced.

546 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.

Note: Pecuniary penalty orders cannot be made in relation to conduct that contravenes a term of a modern award, a national minimum wage order or an enterprise agreement only because of the retrospective effect of a determination (see subsections 167(3) and 298(2)).

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.

547 Interest up to judgment

(1) This section applies to an order (other than a pecuniary penalty order) under this Division in relation to an amount that a person was required to pay to, or on behalf of, another person under this Act or a fair work instrument.

(2) In making the order the court must, on application, include an amount of interest in the sum ordered, unless good cause is shown to the contrary.

(j) the High Court remits a matter arising under this Act to the Federal Court.

564 No limitation on Federal Court's powers

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*.

565 Appeals from eligible State or Territory courts

Appeals from original decisions of eligible State or Territory courts

(1) An appeal lies to the Federal Court from a decision of an eligible State or Territory court exercising jurisdiction under this Act.

(1A) No appeal lies from a decision of an eligible State or Territory court exercising jurisdiction under this Act, except:

(a) if the court was exercising summary jurisdiction—an appeal, to that court or another eligible State or Territory court of the same State or Territory, as provided for by a law of that State or Territory; or

(b) in any case—an appeal as provided for by subsection (1).

Appeals from appellate decisions of eligible State or Territory courts

(1B) An appeal lies to the Federal Court from a decision of an eligible State or Territory court made on appeal from a decision that:

(a) was a decision of that court or another eligible State or Territory court of the same State or Territory; and

(b) was made in the exercise of jurisdiction under this Act.

(1C) No appeal lies from a decision to which subsection (1B) applies, except an appeal as provided for by that subsection.

Division 3—Notification and consultation requirements relating to certain terminations of employment

Subdivision A—Object of this Division

784 Object of this Division

The object of this Division is to give effect, or further effect, to:

(a) the ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer, done at Geneva on 22 June 1982 ([1994] ATS 4); and

(b) the Termination of Employment Recommendation, 1982 (Recommendation No. R166) which the General Conference of the ILO adopted on 22 June 1982.

Note 1: In 2009, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

Note 2: In 2009, the text of a Recommendation adopted by the General Conference of the ILO was accessible through the ILO website (www.ilo.org).

Subdivision B—Requirement to notify Centrelink

785 Employer to notify Centrelink of certain proposed terminations

(1) If an employer decides to terminate the employment of 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons, the employer must give a written notice about the proposed terminations to the Chief Executive Officer of the Commonwealth Services Delivery Agency (Centrelink).

(2) The notice must be in the form (if any) prescribed by the regulations and set out:

(a) the reasons for the terminations; and

(b) the number and categories of employees likely to be affected; and

(c) the time when, or the period over which, the employer intends to carry out the terminations.

(3) The notice must be given:

(a) as soon as practicable after making the decision; and

(b) before terminating an employee's employment in accordance with the decision.

(4) The employer must not terminate an employee's employment in accordance with the decision unless the employer has complied with this section.

Note: This subsection is a civil remedy provision (see Part 4-1).

(5) The orders that may be made under subsection 545(1) in relation to a contravention of subsection (4) of this section:

(a) include an order requiring the employer not to terminate the employment of employees in accordance with the decision, except as permitted by the order; but

(b) do not include an order granting an injunction.

Subdivision C—Failure to notify or consult registered employee associations

786 FWC may make orders where failure to notify or consult registered employee associations about terminations

(1) The FWC may make an order under subsection 787(1) if it is satisfied that:

(a) an employer has decided to terminate the employment of 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons; and

(b) the employer has not complied with subsection (2) (which deals with notifying relevant registered employee

(ii) the legal arguments in relation to the matter can be dealt with adequately by written submissions.

(3) This section does not limit subsections 20(4) and (6).

21 Declarations of right

(1) The Court may, in civil proceedings in relation to a matter in which it has original jurisdiction, make binding declarations of right, whether or not any consequential relief is or could be claimed.

(2) A suit is not open to objection on the ground that a declaratory order only is sought.

22 Determination of matter completely and finally

The Court shall, in every matter before the Court, grant, either absolutely or on such terms and conditions as the Court thinks just, all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by him or her in the matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters avoided.

23 Making of orders and issue of writs

The Court has power, 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.