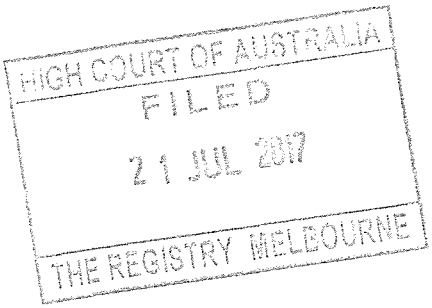
IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M65 OF 2017**

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

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

JOSEPH MYLES
Second Respondent

APPELLANT'S SUBMISSIONS IN REPLY



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PART I PUBLICATION

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

PART II REPLY SUBMISSIONS

Context

2. There is no dispute that the relevant provisions of the FW Act must be read in context and that contextual indicators in a statute may displace the presumption that powers conferred on a court are to be construed liberally [**cf RS at [33]-[41]**]. What is striking, however, is how spare the contextual indicators are which the Respondents marshal in support of their challenge to the non-indemnification order in this case. The Respondents' submissions should be rejected for four reasons.

3. *First*, the Respondents contend, by reference to the Explanatory Memorandum to the Fair Work Bill 2008, that s 545 has a limiting "remedial purpose", and that orders may only be made which are "necessary to address a past contravention" or "to restrain a proposed contravention" [**cf RS at [15]-[16]**]. There are several difficulties with this contention. The limitation is inconsistent with the statutory text; s 545(2)(a) refers to granting an injunction to "prevent, stop or remedy the effects of a contravention", but this sub-section expressly states that it does not limit s 545(1). While the Respondents rely on the Explanatory Memorandum, this Court has frequently warned that extrinsic materials are no substitute for the statutory text.[1] In any case, the text of the Explanatory Memorandum refers to orders the Court considers "appropriate to remedy a contravention", rather than orders "necessary" to address such a contravention.

4. The "remedial" limitation which the Respondents propound is elusive, given that the existence of a remedial purpose ordinarily favours a broad rather than a limiting construction. Further, the propounded limitation is vague and ambiguous; what does it mean to "address" a past contravention? Given that any penalty imposed in respect of such a contravention must be imposed primarily for deterrent purposes, the imposition of such a penalty must "address" the contravention. The same is true of orders that prevent that deterrent purpose from being undermined. Ultimately, while the statutory term "appropriate" is itself open-textured, nothing is to be gained by replacing the statutory term with some other non-statutory gloss such as whether an order is "necessary to address" a contravention.

5. In any event, the non-indemnification order in this case satisfied the Respondents' propounded "remedial" limitation. It addressed the particular circumstances of the contraventions by Mr Myles and the CFMEU, including the collusive nature of the relationship between them and its likely consequences in the future if indemnification by the CFMEU were not proscribed on this occasion [**cf RS at [21]-[22]**]. A pecuniary penalty attempts "to put a price on contravention that is sufficiently high to deter

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1 Eg *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 264-265 [31], [34].

repetition by the contravenor",[2] and in this way it "addresses" the circumstances of the particular contravention; a non-indemnification order shares in this purpose by seeking to ensure that the pecuniary penalty has efficacy in achieving the intended deterrent effect. It assists in deterring both Mr Myles and other officers of the CFMEU, and in this way provides a remedy to those affected by their contravening conduct by encouraging them not to contravene the FW Act again.

6. Indeed, the Respondents criticise the non-indemnification order in part on the basis that it was not "appropriate" because it did not prevent Mr Myles from accessing other sources of funds to pay the pecuniary penalty imposed [**cf RS at [22]**]. The argument implies that the non-indemnification order would have been appropriate but for the fact that the primary judge did not go so far as to order that Mr Myles pay the penalties only from his own funds. The argument is flawed, because an order can be "necessary" to achieve an end (let alone be "appropriate" to that end) without being indispensable [**see AS at [25]**].[3] A non-indemnification order helps to preserve some of the deterrent effect and purpose of the pecuniary penalty, and on that basis can be regarded as "appropriate", even though it will not do so perfectly. That is the true significance of this Court's decision in *Lamb v Cotogno* [**cf RS at [53]**].[4] That case does not support the proposition for which the Respondents cite it [**RS at [53]**].

7. *Second*, the Respondents contend that s 545 "confers a power to make orders in respect of 'a person' who has contravened the FW Act, and does not address third parties" [**RS at [17]**]. That submission puts a gloss on s 545, which does not state that orders may be made "in respect of" a contravenor. Rather, the 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". The statutory text does not require the subject of the orders and the contravenor to be the same person. In any event, the CFMEU is not a "third party". It was a party to the proceeding, it was found to have contravened the FW Act, and the non-indemnification order was justified as having a salutary effect on both Mr Myles and the CFMEU.

8. *Third*, the Respondents refer to a Federal Court decision[5] refusing to "create employment relationships of kinds that have not hitherto existed" in support of the bald statement that "s 545 has limits" [**RS at [17]**]. Of course s 545 has limits, which reside in the term "appropriate". What is "appropriate" depends on the purpose for which an order would be made and its relationship with the statutory scheme, the evidence before the Court and the duty to act judicially. The Federal Court decision relied upon by the Respondents supports the Appellant's position. It is nothing more than an example of a case-by-case assessment of what is "appropriate" in a particular case. It does not demonstrate some implied limitation on the power in s 545 arrived at independently of the evidence and as a matter of abstract statutory interpretation. Hence, the Federal

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2 *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 90 ALJR 113 at 127 [55].

3 See, eg, *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 199-200 [39] (Gleeson CJ); *Thomas v Mowbray* (2007) 233 CLR 307 at 471-472 [489]-[490] (Hayne J).

4 (1987) 164 CLR 1 at 10.

5 *Independent Education Union of Australia v Australian International Academy of Education Inc* [2012] FCA 1512.

Court recognised that a power to create employment relationships might well be exercised, but if so "it must be in extremely rare cases".[6]

9. *Fourth*, the Respondents observe that s 545 could not be exercised to increase a pecuniary penalty imposed under s 546 beyond the statutory maxima set out in s 546 [**RS at [18]-[19]**]. That is true, but irrelevant. The non-indemnification order did not result in either Respondent paying more than the statutory maxima. The fact that s 545 cannot be used to go beyond the statutory maxima in s 546(2) therefore offers no support for the Respondents' ultimate argument. The Respondents' submissions about not "augment[ing]" a pecuniary penalty, or making it "more effective" or "more severe" do not bridge the logical gap between observing that s 546 sets a ceiling on pecuniary penalties and the proposition that there is no power to make a non-indemnification order to preserve the deterrent effect and purpose of a pecuniary penalty of a quantum up to and including that ceiling. Rather, these submissions suffer from the same problems as the Full Court's reasoning, which the Appellant addressed in chief [**AS at [45]-[47]**] and which the Respondents do not address at all. Nor does the reference to *Anthony Hordern* assist the Respondents [**cf RS at [18]**],[7] for the reasons explained by Gummow and Hayne JJ in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom*.[8] The subject matter of the power in s 545 is not the same as the subject matter of the power in s 546, and it could not be said that s 546 is exhaustive either as to the orders to be made once a contravention is found, or as to pecuniary penalties [**see AS at [43]**].

Other statutory regimes

10. The Respondents contend that s 545 should not be construed as empowering the Federal Court to make a non-indemnification order because: (a) other Commonwealth statutes have expressly prohibited entities from indemnifying their officers; and (b) statutes in other countries also contain such express prohibitions. These other statutes are said to be relevant but not decisive [**RS at [25]**]. But even this seemingly modest submission overstates the position.

11. The Appellant has already addressed the topic of these other Commonwealth statutes in his submissions in chief. To those submissions may be added the following observations. These other statutory regimes confirm that stopping a contravenor from being indemnified against a penalty can be an appropriate means to ensure that he or she is deterred from future non-compliance. It is to that end that the Appellant, in submissions before the primary judge, brought these regimes to the primary judge's attention, and it is in this way that the primary judge relied upon them. But the fact that Parliament has adopted a particular course in one statutory regime does not mean that it must thereafter adopt the same course in order to achieve a similar outcome. Other drafting choices or mechanism may be adopted that, for whatever reason, are thought better suited to achieving the same or a similar outcome (including, as here, a regime that would make non-indemnification depend on an order of the Court, rather than a statutory rule that applies in every case). There is no suggestion that the FW Act and

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6 *Independent Education Union of Australia v Australian International Academy of Education Inc* [2012] FCA 1512 at [19] (Gray J).

7 (1932) 47 CLR 1 at 7.

8 (2006) 228 CLR 566 at 589-590 [59]-[61].

the statutes referred to by the Respondents are *in pari materia*. Nor is there anything in the extrinsic materials to suggest that the Parliament had these other statutory regimes in mind when enacting the FW Act, such that the silence in s 545 in relation to non-indemnification can be regarded as containing any negative implication. In those circumstances, there is simply no proper basis to read down s 545 by reference to the simple fact that non-indemnification requirements have been created in a different way in different statutory regimes.

12. As for the Respondents' reliance upon statutory provisions in other countries, that reliance is misplaced for the reasons given by the Court in response to a similar kind of submission made in *Mansfield v The Queen*.[9]

13. In any event, contrary to the Respondents' submissions [**cf RS at [35]-[36]**], the observations in the Canadian case are not "also apt here". In *R v Bata Industries Ltd*,[10] the trial judge fined two directors of Bata Industries Ltd following their conviction for contravening s 75(1) of the *Ontario Water Resources Act*. The trial judge also imposed a "probation order" and financial penalty upon Bata Industries Ltd, and made it a term of that order that the company not indemnify the directors in respect of their fines. The Court of Appeal held that the trial judge did not have the power to impose that condition by reason of the specific terms of s 72 of the *Provincial Offences Act*, being the provision which authorised the making of a probation order against the company in the first place. As a matter of interpretation of that provision, the Court held that "the purpose of the non-indemnification provision of the probation order against Bata must be deterrence and the rehabilitation of Bata" whereas, on the facts of that case, "the main purpose of the indemnification prohibition term of the Bata probation order was to ensure that Marchant and Weston were appropriately punished".[11] It is sufficient to note that the terms of s 545 and its statutory context are very different to the terms and statutory context of s 72 of the *Provincial Offences Act*. But it may also be added that even if this Canadian case had any relevance to the FW Act, which it does not, on the facts before the primary judge the indemnification order cannot be said to serve any purpose collateral to either s 545 itself or s 546. The primary judge found that the non-indemnification order would help to deter both Mr Myles and the CFMEU.

Other points

14. *First*, the Respondents contend that the primary judge "impermissibly construed s 545(1) by reference to desirable policy outcomes" [**RS at [23]**. This is not so. The Respondents mistake her Honour's explanation for why she exercised her discretion to make the non-indemnification order with the separate and anterior task of construing the statutory provision.

15. *Second*, the Respondents' attempt to drive a wedge between s 23 of the FCA Act and s 545 of the FW Act is misguided [**RS at [43]-[44]**]. According to the Respondents, s 545 is tied to the subject matter of remedying a contravention, whereas s 23 is not so tied. Yet the jurisdiction which the Federal Court is exercising is the jurisdiction to

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9 (2012) 247 CLR 86 at 100 [50], 106 [75]-[76].

10 (1995) 25 OR (3d) 321.

11 (1995) 25 OR (3d) 321 at 327.

determine whether a civil remedy provision has been contravened. It is by reference to this jurisdiction that both s 545 and s 23 operate. There is no relevant difference in their subject matter. The Respondents also appear to attempt to distinguish s 545 from s 23 on the basis that s 545 confers power on both the Federal Court and the Federal Circuit Court, whereas s 23 only confers power on a superior court. The point being made is elusive. It is sufficient to recall that s 15 of the *Federal Circuit Court of Australia Act 1999* (Cth) does for the Federal Circuit Court what s 23 of the FCA Act does for the Federal Court.

16. *Third*, paragraphs 46 to 50 of the Respondents' submissions miss the point of the Appellant referring in his submissions in chief to freezing orders and s 298U of the former *Workplace Relations Act 1996* (Cth). The point of referring to these examples is that they demonstrate the error in Allsop CJ's reasoning below that clear statutory language is needed before a court will make an order against a third party. The Respondents have not grappled with that point.

17. *Fourth*, the Respondents submit that the non-indemnification order is not necessary because, once a pecuniary penalty order is made, the Court is indifferent to who pays the order [**RS at [51]**]. However, the point of imposing a pecuniary penalty is "to deter repetition by the contravenor and by others".[12] If a court finds (as the primary judge in this case found) that the CFMEU will cut across this purpose by indemnifying Mr Myles against a pecuniary penalty, there is no reason in principle why the court should settle for the modicum of deterrence that comes with Mr Myles being formally exposed to contempt if the penalty goes unpaid if, by means of a non-indemnification order, the deterrent effect and purpose of the penalty can more meaningfully be preserved.

18. *Fifth*, the Respondent's attempt to identify a common law right or freedom infringed by the non-indemnification order for the purposes of the principle of legality is weak [**cf RS at [56]**]. No common law right or freedom is identified. In so far as they point to two treaties, Australia is not a party to one of them (the European Social Charter), and it is far from clear that the other confers a right on unions to adopt policies to indemnify their officers for unlawful conduct (the Freedom of Association and Protection of the Right to Organise Convention). Finally, the apparent suggestion that the principle of legality requires clear words not just before there will be an abrogation of fundamental rights or freedoms, but also before there can be any "departure from the general system of law", is vague and apt to deprive the principle of legality of any real meaning.

Dated: 20 July 2017

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[12] *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 90 ALJR 113 at 127 [55].