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

RESPONDENTS' SUBMISSIONS

PART I: PUBLICATION

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

PART II: ISSUE

2. The question for determination is whether, in circumstances where person A is ordered to pay a penalty with respect to a contravention of the *Fair Work Act 2009* (Cth) (**FW Act**), the Federal Court has power pursuant to s 545(1) of the FW Act to make an order which prohibits person B from indemnifying person A in respect of the payment of that penalty (a **non-indemnification order**). In particular, the question is whether the trial judge had power pursuant to s 545(1) to make a non-indemnification order which had the effect of prohibiting the First Respondent (**the union**) from paying a penalty imposed upon the Second Respondent (**Myles**).

3. The Respondents submit, and a Full Court of the Federal Court has found, that neither s 545(1) of the FW Act, nor s 23 of the *Federal Court of Australia Act 1976* (Cth) (the **FC Act**) confer power on the Court to make a non-indemnification order of the kind made by her Honour.

4. The Appellant seeks to confine the issue for determination to the narrow question whether s 545(1) of the FW Act empowers the Federal Court to order one party who has contravened the FW Act not to indemnify another party who is found to

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have contravened the Act in the same proceedings.[1] But this approach erroneously conflates the question of whether the Court possesses the power to make a non-indemnification order at all with the question whether such an order is appropriate to be made in a particular case.

PART III: SECTION 78B NOTICE

5. The Respondents certify that they do not consider that any notice need be given under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: FACTS

6. The Appellant's description of the events of May 2013 is correct, however a number of matters in relation to the proceedings at first instance require more detailed exposition.

7. Contrary to the suggestion made in the Appellant's Submissions,[2] the trial judge was not faced with a choice as to whether to impose a penalty on both respondents, or to simply impose a penalty on the union alone, which her Honour resolved by determining to "allocate responsibility" as between the two. Rather, the trial judge having found that Myles had contravened s 348 of the FW Act, s 363 of the FW Act operated so as to deem both the action taken by Myles and his state of mind to be the actions and the state of mind of the union. As a result, the union was also found to have contravened s 348.[3] Accordingly, her Honour made declarations and imposed penalties on both respondents.

8. The trial judge then embraced a suggestion by the prosecuting authority to make an order based upon the legislative prohibition found in the *Corporations Act 2001* (Cth) (**Corporations Act**) and the *Competition and Consumer Act 2010* (Cth) (**Competition Act**),[4] and determined to make a non-indemnification order which prohibited the union from paying the penalty imposed on Myles. The order was said to be appropriate under s 545 because it would advance the purposes of specific and general deterrence.[5] Her Honour described the non-indemnification order as being likely to achieve specific deterrence in respect of Myles because it

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1 Appellant's submissions at [2], [20], [22], [23], [30], [33] and [46].
2 Appellant's submissions at [46], [47]
3 *DFWBII v CFMEU (No 2)* [2016] FCA 436 (**Primary reasons**) at [65].
4 Primary reasons at [166]-[168].
5 Primary reasons at [168], [189], [190], [191], [196], [201].

would preclude the union from providing Myles with the money to pay the penalty, and this would deprive Myles of the "comfort and convenience" of union money, and "involve more time and effort for Mr Myles".[6] Of course, as her Honour noted, the order could not in fact ensure that Myles himself paid the penalty", as he was not by its terms precluded from raising funds from sources other than the union, and remained free to accept donations or contributions from relatives, friends or colleagues.[7]

9. The trial judge also intended the non-indemnification order to promote deterrence with respect to the union because, said her Honour, the order may, "cause those responsible for decision-making within the union to think about the penalties to which their own officials may be exposed when they consider engaging in conduct which may be unlawful".[8] Thus, an express purpose of the order was to effect deterrence of the union and its officials (other than Myles), by seeking to affect future decision-making in relation to allocation of union funds.

PART V: APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

10. The Appellant's statement of applicable constitutional provisions, statutes and regulations is correct, except to say that it is necessary to add s 539 of the FW Act to complete the relevant penalty provisions. The relevant statutory provisions are set out in Annexure A.

PART VI: ARGUMENT

11. The Respondents submit that the word "appropriate" where it appears in s 545(1) of the FW Act is to be construed by reference to its purpose and context, including the fact that the power is one exercised only where a person or entity has been found to have contravened a civil penalty provision. When s 545(1) is read in context, it is clear that the Court does not possess power to make an order that prohibits access to one source of funds for the purpose of payment of a penalty.

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6 Primary reasons at [202].

7 Primary reasons at [161], [190], [195], [202].

8 Primary reasons at [191].

12. Second, the Respondents submit that the absence of an express conferral of power on the Court to make non-indemnification orders tends against a construction of s 545 (1) which includes power to make orders of such a type because:

    a. where the Parliament has determined to prohibit indemnification regimes or insurance policies which immunise against payment of penalties, it has done so explicitly and by specifying the circumstances in which such a prohibition attaches; and

    b. non-indemnification orders are neither necessary to protect the exercise of the Court's jurisdiction to impose penalties for contraventions of the FW Act, nor part of the established armoury of the Federal Court to protect the efficacy of its processes.

Correct construction of s 545

13. Statutory provisions must be construed by reference to their text, purpose and context.[9] According to its terms, s 545(1) of the FW Act is to be construed as conferring a power on the Court to make appropriate orders, "if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision".

14. Such orders (as is made clear in s 545(2)) include an order granting an injunction, or interim injunction, to "prevent, stop or remedy the effects of a contravention", an order awarding compensation "for loss that a person has suffered because of the contravention", or an order for "reinstatement", which, it cannot be doubted, would only be appropriate to be made where reinstatement was necessary to address a contravention.

15. The extrinsic materials confirm that the correct construction of s 545(1) of the FW Act is one directed at the section's remedial purpose. As the Explanatory Memorandum to the Fair Work Bill states:[10]

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9 *Project Blue Sky v ABA* (1997) 194 CLR 335 at 381-382 [69]-[70] (McHugh, Gummow, Kirby and Hayne JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39].

10 Explanatory Memorandum to the Fair Work Bill 2008 at [2150] (emphasis added). See also Commonwealth, *Parliamentary Debates*, 25 November 2008 at 11196 (Acting Prime Minister Julia Gillard).

> Sub-clause 545(1) provides that the Fair Work Divisions of the Federal Court and the Federal Magistrates' Court can make any orders they consider appropriate to *remedy* a contravention of a civil remedy provision.

16. The terms of s 545 therefore provide that the power is limited to orders that are necessary to address a past contravention or in order to restrain a proposed contravention. That is the subject matter of s 545.

17. Two other matters may be noted about s 545. First, the section confers a power to make orders in respect of "a person" who has contravened the FW Act, and does not address third parties. Second, s 545 has limits. For example, while reinstatement may be ordered to remedy a contravention, the Court has refused to "create employment relationships of kinds that have not hitherto existed" pursuant to s 545.[11]

18. Section 545 must also be read in its statutory context. The adjacent provision, s 546, provides the power to impose penalties for contraventions of the FW Act. It was important to the analysis of Allsop CJ and Jessup J below that s 546 of the FW Act is the sole repository of the Court's power to impose a penalty, and that the Court's power to do so is constrained by the maxima set out in s 546(2). As a result, their Honours held that s 545(1) could not be used to permit the imposition of penalties in excess of the maxima set by s 546(2).[12] This cannot be doubted.

19. The statutory context therefore provides that s 545(1), as a power to make orders to address a past contravention or restrain a proposed contravention, must be read as subject to the express limits in relation to the imposition of penalties provided for in s 546. This is nothing other than an orthodox application of the *Anthony Hordern* principle.[13]

20. That being the scope of s 545(1), properly construed, it becomes necessary to consider whether a non-indemnification order is capable of being regarded as an order necessary to remedy a past contravention or to restrain a proposed contravention, and which also does not augment the imposition of any penalty provided for in s 546.

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11 *Independent Education Union of Australia v Australian International Academy of Education Inc* [2012] FCA 1512 at [17].

12 *CFMEU v ABCC* [2016] FCAFC 184 (**Appeal reasons**) at [11] (Allsop CJ), [58], [59] (Jessup J).

13 *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).

21. It is submitted that in circumstances where person A is ordered to pay a penalty in respect of a contravention, an order which prohibits person B from indemnifying person A against the payment of that penalty, is not an order which is capable of being regarded as directed at remedying the contravention by person A.

22. First, a non-indemnification order does not address the circumstances of the particular contravention committed by person A. The order is not even apt to ensure that person A will personally pay the penalty imposed (as sources of finance other than person B are left unaffected).[14]

23. Further, it is apparent that the non-indemnification order made at first instance in these proceedings was directed to a broader circumstance that apparently troubled the trial judge, namely the perception that the union's internal decision-making as to how to allocate funds was providing its officials with an "unjustifiable protection"[15] from the consequences of contravening conduct.[16] An avowed purpose of the trial judge in fashioning a non-indemnification order was to address the perceived failure of the past penalties imposed on the union and its officers to adequately deter contraventions of the FW Act. By so doing, her Honour impermissibly construed s 545(1) by reference to desirable policy outcomes.[17] As Jessup J cautioned below, it is not for the Court to "devise for itself a more effective deterrent than that for which the statute provides".[18]

24. When s 545(1) is read having regard to its text and context, it is clear that it does not confer a power on the Court to make an order which prohibits access to one source of funds for the purpose of payment of a penalty, much less to do so for the purpose of rendering the penalty imposed one which is "more severe".[19]

Express statutory provisions in relation to non-indemnification

25. There is a further reason that s 545 should not be construed as conferring a power to make a non-indemnification order. It is relevant (although of course not

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14 As was recognized by her Honour in the Primary reasons at [202].

15 See paragraph [27] below.

16 Primary reasons at [90].

17 The error in that approach is that identified by four members of this Court in *AEU v Department of Education* (2012) 248 CLR 1 at 14 [28] (French CJ, Hayne, Kiefel and Bell JJ).

18 Appeal reasons at [60]. See also the observation of Jessup J in *Director of Fair Work Building Industry Inspectorate v CFMEU (the Yarra's Edge Case)* [2016] FCA 772 at [57].

19 Appeal reasons at [10]-[11] (Allsop CJ), [59]-[60] (Jessup J).

decisive) that the FW Act does not contain any express prohibition on indemnification (by unions or corporate employers) with respect to civil penalties imposed under the Act. That absence is significant because where the Parliament has determined to depart from the general law and to prohibit indemnification regimes or insurance policies that immunise against payment of penalties, it has done so explicitly and by specifying the circumstances in which such a prohibition attaches. This is evident from the following examples.

Australian provisions

26. Two examples of such provisions are s 199A of the Corporations Act and s 77A of the Competition Act. Notably, neither s 199A nor s 77A confer power on the Court to determine that any particular corporate officer upon whom a penalty is imposed ought not be indemnified by the company. Rather, those provisions render certain indemnification arrangements unlawful and deem them to be void.

27. Section 199A has its origins in decisions of the Court of Chancery in the early 20th century. At that time, it was common for articles of association to indemnify directors against all loss incurred in the course of their duties, except for those arising through dishonesty.[20] To address the concern that this provided a "quite unjustifiable protection to directors" it was recommended that the general law should include a legislative prohibition on indemnification for liability for negligence or a breach of duty or breach of trust.[21] This was implemented in s 152 of the *Companies Act 1929* (UK), which provided the model for indemnification prohibition provisions in State and then Commonwealth legislation in Australia.[22] Those provisions have been the subject of much criticism, reform and refinement by the legislature over the past century.[23]

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20 *In re Brazilian Rubber Plantations and Estates Limited* [1910] 1 Ch 425; *Re City Equitable Fire Insurance Co* [1925] 1 Ch 407; *Eastland Technology v Whisson* (2005) 223 ALR 123, 127 [19] and *Whitlam v NRMA* (2006) 202 FLR 153 at 166 [45].

21 *Company Law Amendment Committee Report* (UK) (1925-1926) at [46].

22 Section 132 *Companies Act 1936* (NSW); s 152 *Companies Act 1938* (Vic); s 160 *Companies Act 1931* (Qld); s 157 *Companies Act 1943* (WA); *Companies Act 1981* (Cth) s 237; *Corporations Act 1989* (Cth) s 241.

23 Companies and Securities Law Review Committee, *Company Directors and Officers: Indemnification, Relief and Insurance* (1989) Discussion Paper No. 9; Companies and Securities Law Review Committee, *Company Directors and Officers: Indemnification, Relief and Insurance* (1990) Discussion Paper No. 10; Companies and Securities Advisory Committee, *Report on Company Directors and Officers: Indemnification, Relief and Insurance* (1992) 1; Explanatory Memorandum to

28. Section 77A had its genesis in the *Review of the Competition Provisions in the Trade Practices Act Review Report* (2003). There, it was observed that the *Commerce Act 1986* (NZ) prohibited a corporation from indemnifying a director against liability for payment of a pecuniary penalty imposed for price fixing.[24] The Report recommended "there should be similar provision in our Act, but that it should extend to indirect as well as direct indemnification and should apply generally to pecuniary penalties imposed for breaches of Part IV".[25] That recommendation was implemented by the introduction of s 77A by the *Trade Practices Legislation Amendment Act 2006* (Cth).[26]

10 29. Sections 199A and 77A attach to "officers," a term which is confined in its operation to directors, secretaries or those who are otherwise a directing mind of the corporation.[27] The legislative extension of that prohibition in the Corporations Act to employees in 1991 was much criticised and ultimately repealed by the legislature in 1994.[28] If, as appears to be assumed by the Appellant (and the trial judge), s 545(1) of the FW Act extends to a power in the Court to make a non-indemnification order in respect of any union employee or official, no matter how low that official's position in the hierarchy or how distant their position from the union's 'directing mind', then such a power goes well beyond the scope of the statutory regimes upon which her Honour drew at first instance.

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the Corporate Law Reform Bill 1993 (Cth) at [41], [417], *Whitlam v NRMA* (2006) 202 FLR 153 at 168 [51]; *Corporate Law Economic Reform Program Act 1999* (Cth) at pp 23-24.

24 *Trade Practices Act Review Committee Report*, Ch 10, "Penalties and Other Remedies" (2003). The ALRC Report *Compliance with the Trade Practices Act* (No. 68) (2003) recommended at [10.34] that s 241 of the *Corporations Act 1989* (Cth) apply to contraventions of Part IV and V of the *Trade Practices Act 1974* (Cth) for reasons including specific deterrence of individuals. This was not referred to in the Explanatory Memorandum to the Trade Practices Legislation Amendment Bill (No.1) 2005 that introduced s 77A in 2006.

25 *Trade Practices Act Review Committee Report*, Ch 10, "Penalties and Other Remedies" (2003), p 161.

26 The Explanatory Memorandum to the *Trade Practices Legislation Amendment Bill (No. 1)* 2005 at [49] said that the provision was "consistent with the prohibition in section 199A of the *Corporations Act*".

27 See the Dictionary to the Corporations Act; the definition is picked up in s 77A of the Competition Act.

28 *ASIC v Citigroup* (2007) 160 FCR 35 at 99-101 [485]-[496] (Jacobson J); Companies and Securities Advisory Committee *Report on Company Directors and Officers: Indemnification, Relief and Insurance* (1992) at pp 1 and 5; for the removal of employees from that provision see Schedule 3, Item 3 of the *Corporate Law Reform Act 1994* (Cth) which amended the definition of officer in s 241(4) by omitting the phrase "or employee." Section 241 was repealed in 2000 when s 199A was enacted. The current definition of "officer" in s 9 was introduced by Schedule 3, Item 112 of the *Corporate Law Economic Reform Program Act 1999* (Cth).

30. Two other Commonwealth Acts contain provisions similar to s 199A and s 77A: s 203EB of the *Native Title Act 1993* (Cth) and s12GBD of the *Australian Securities and Investments Commission Act 2001* (Cth). Those provisions have not received judicial consideration.

31. For completeness it is noted that the Court has not ever divined the existence of an implied power in other federal Acts that impose penalties on individuals and corporations to prohibit indemnification of individuals found to have contravened those Acts.[29] Indeed, the Court has not even discerned the existence of a general policy against indemnification in the *Competition and Consumer Act,* in which s 77A is found.[30]

Express prohibitions on indemnification in other jurisdictions

United Kingdom

32. Section 15 of the *Trade Union and Labour Relations (Consolidation) Act* 1992 (UK) expressly prohibits the application of the property of trade unions towards the indemnification of union officials in relation to penalties imposed for offences or for contempt of court.[31] The section was introduced following debate in relation to the decision in *Drake v Morgan*[32] where an application to restrain a union from indemnifying members in respect of offences in connection with a picket was refused.[33]

33. It is noted that s 15 has been found by the International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations to be inconsistent with aspects of the right to freedom of association enshrined in

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29 See, for example, the *Work Health and Safety Act 2011* (Cth), *Migration Act 1958* (Cth), *Therapeutic Goods Act 1989* (Cth), *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), *Water Act 2007* (Cth), *Income Tax Assessment Act 1997* (Cth) and *Tax Agent Services Act 2009* (Cth).

30 *ACCC v Dateline Imports (No 2)* [2014] FCA 1222 at [92]-[95]. There, the respondent had been indemnified (in part) by the supplier of the goods with respect to which misleading and deceptive advertisements were published. Rangiah J was concerned with the question whether the indemnification by the supplier was relevant to the fixing of an appropriate penalty to be imposed on Dateline. There is no suggestion in his Honour's reasons that the capacity of Dateline to benefit from the indemnification was inappropriate. However, it was taken into account on the question of capacity to pay.

31 In that section, 'penalty' is defined so as to include orders requiring officials to pay compensation.

32 [1978] ICR 56 at 60-61 (Forbes J).

33 See also *Thomas v NUM* [1986] ICR 886 at 927-928 (Scott J) and the commentary in Painter and Holmes, *Cases and Materials on Employment Law* (2008) 705-706.

Article 5 of the European Social Charter and Article 3 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), both of which protect the internal administration of unions from interference by public authorities.[34]

New Zealand

34. Section 29 of the *Health and Safety at Work Act 2015* (NZ) renders it unlawful to enter into insurance policies that provide indemnification against payment of a fine for contravention of occupational health and safety laws. Similar provisions have existed in New Zealand since 1992.[35] Likewise, s 142V of the *Employment Relations Act 2000* (NZ) prohibits entry into insurance policies that indemnify employers against a liability to pay a pecuniary penalty under that Act.[36]

Canada

35. The issue has arisen in a different context in Canada. In *R v Bata Industries Limited*[37], Bata Limited and two of the company's directors were convicted of offences under the Ontario Water Resources Act RSO 980 c 361. The trial judge imposed fines on the three defendants and made a probation order binding on the corporate entity, a condition of which prohibited the company from indemnifying the two directors.

36. The non-indemnification order made in *Bata* has been described as "a contrivance."[38] The Ontario Court of Appeal overturned that condition in the probation order. Osborne JA (delivering the judgment of the Court) described the purpose of the probation order as being to ensure that the individuals "personally bore the burden of paying the fines imposed upon them".[39] Indeed, his Honour described the probation order as motivated by a collateral purpose, namely "to

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34 See ILO, 79th Session, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4A) (1992); European Committee of Social Rights, Conclusions, XVIII-1 (vol 2) (2006), pp 813, 815.

35 See also the predecessor provisions, namely ss 50(1)(b) and 56I of the *Health and Safety in Employment Act* 1992 (NZ). See by way of further example, s 174K of the *Road Traffic Act* 1971 (SA).

36 Inserted on 1 April 2016 by s 19 of the *Employment Relations Amendment Act 2016* (NZ).

37 (1992) 9 OR (3d) 329.

38 Bowal, "Expensive Day at the Office: Can Corporations Indemnify their Agents who Suffer Personal Liability for Regulatory Offences?" (1995) 45 *University of Toronto Law Journal* 247 at 259.

39 *R v Bata Industries Ltd* (1995) 25 OR (3d) 321 (***Bata***) at 328.

ensure that two parties not subject to the probation order were punished by receiving no indemnification in respect of their fines".[40] The observation with respect to collateral purpose is also apt here. The non-indemnification order made by the trial judge was ostensibly directed at restraining the union with respect to expenditure of its funds. However, a stated purpose of the order was to limit Myles' capacity to raise funds to pay his penalty.

Conclusion on non-indemnification provisions

37. It is submitted that the absence of any statutory non-indemnification provision in the FW Act[41] confirms the construction that is reached by reference to the text and context of the FW Act, namely that s 545(1) does not confer a power on the Court to make a non-indemnification order.

Analysis of the Appellant's Submissions

Shin Kobe Maru presumption

38. The Appellant's Submissions rely heavily on the general presumption that statutory provisions conferring powers on courts should be broadly construed.[42] It is submitted that the Appellant's contention that all powers conferred on a court must be given their most liberal construction, subject only to express words of limitation, goes too far.

39. Prior to the exercise of a power, its scope must be ascertained. To paraphrase the reasons of Jessup J below, to assume that any order made by the Court will be appropriate, is not to come to grips with what is "appropriate".[43] In construing such provisions, context continues to be relevant.[44] This is unsurprising. The

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40 *Bata* at 322. Osborne JA also regarded as significant that s 136 of the *Ontario Business Corporations Act* specified the circumstances in which, with Court approval, a corporation may indemnify an officer or director of a corporation against costs and judgments referable to civil, criminal and administrative actions: *Bata* at 329.

41 The *Fair Work Registered Organisations Act 2009* (Cth) is also silent on the topic of indemnification of union officials.

42 Appellant's submissions at [27]-[28], [34]. See also *Owners of Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421.

43 Appeal reasons at [54] (Jessup J).

44 *Pelechowski v Registrar, C of A (NSW)* (1999) 198 CLR 435 (***Pelechowski***) at 449 [41] (Gaudron, Gummow and Callinan JJ); *CDJ v VAJ* (1998) 197 CLR 172 at 185-186 [53] (Gaudron J).

principles of statutory construction are well settled.[45] The relevance of context in the modern approach to statutory construction cannot be doubted.[46]

40. As Gaudron, Gummow and Callinan JJ said in *Pelechowski v Registrar, C of A (NSW)*[47] in respect of a provision conferring power on the District Court of New South Wales, "[t]he power granted by s 46(1) is not confined by reference to matters not required by its terms or the context in which its appears. But it is necessary to construe those terms and to consider the context".[48]

41. There, it was held that the power conferred by s 46(1) of the *District Court Act 1973* (NSW) included power to grant an injunction as ancillary to the court's jurisdiction to hear and dispose of claims for damages or invasions of legal rights. But it was held that an order directed at the preservation of assets of a judgment debtor was neither within the scope of s 46(1), nor capable of being supported by reference to the implied powers of the District Court.[49]

Erroneous analogy with s 23 of the FC Act

42. The Appellant contends that s 545 of the FW Act substantially mirrors s 23 of the FC Act, and that as a result, s 545(1) should be construed in a manner that is apt to empower the Court to make any order the Court considers appropriate to "render its exercise of jurisdiction effective".[50] There are a number of difficulties associated with this proposed approach to construing s 545(1).

43. First, this approach pays insufficient regard to the text of s 545(1). "Appropriate" is not a word that implies breadth. Rather, its meaning is inherently susceptible to context. The essential context is that "appropriate" orders are only to be made, as stated in s 545(1), "if the Court is satisfied that a person has contravened, or

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45 *Project Blue Sky v ABA* (1997) 194 CLR 335 at 381-382 [69]-[70] (McHugh, Gummow, Kirby and Hayne JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39].

46 *K & S Lake City Freighters Pty Ltd v Gordon and Gotch Ltd* (1985) 157 CLR 309 at 315; *ICAC v Cunneen* (2015) 256 CLR 1 at 29 [59] (French CJ, Hayne, Kiefel and Nettle JJ).

47 (1999) 198 CLR 435 at 449 [41] (emphasis added).

48 See also *Jackson v Sterling Industries Ltd* (1987) 162 CLR 332 at 626 (***Jackson***); *Pelechowski* at 452 [53]-[54]; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 (***Cardile***) at 407 [62] in which the impugned court orders were found to be beyond power.

49 *Pelechowski* at 449-450 [41], [44]-[47], 452 [52]-[54].

50 Appellant's submissions at [25]-[27], [38].

proposes to contravene, a civil remedy provision". The Appellant's analogy with s 23 of the FC Act does not have regard to the particular subject matter of s 545.

44. Second, the Appellant's construction has no regard to the different context in which s 545(1) of the FW Act and s 23 of the FC Act operate. The FC Act creates the Federal Court, a superior statutory court, and confers on it certain powers. Section 22, for example, is "a 'Judicature Act' provision".[51] Section 23, "arms the court with power to make all kinds of orders and to issue all kinds of writs as may be appropriate".[52] In contrast, the FW Act confers jurisdiction and powers on the Federal Court (and the Federal Circuit Court and eligible State and Territory courts) with respect to the regulation of constitutional corporations and unions in the context of workplace relations. What is "appropriate" in the context of a general grant of power to a superior court created by the FC Act will not necessarily be "appropriate" under the rubric of the FW Act.

45. Third, the Appellant claims that if the deterrent effect of an order is diminished because a third party contributes to the payment of a penalty imposed on a contravener, the court's jurisdiction will not be effectively exercised. However, even if s 545 were to be given the same construction as s 23, the Appellant fails to sufficiently interrogate the circumstances in which a non-indemnification order will be necessary for the "effective exercise" of the Court's jurisdiction.

46. The Appellant's Submissions in this respect rely on decisions in which it has been confirmed that the Federal Court has power to make freezing orders to prevent disposal of assets by a defendant.[53] Caution should be exercised in drawing analogies with freezing orders in light of the criticism of the doctrinal origins of Mareva orders.[54] However, it is accepted that the jurisprudence in relation to s 23 of the FC Act has developed by means including consideration by the Court of

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51 *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 (***Thomson***) at 161 (Gibbs CJ, Stephen, Mason and Wilson JJ).

52 *Thomson* at 161 (Gibbs CJ, Stephen, Mason and Wilson JJ).

53 *Jackson*, *Cardile* and *Pelechowski*.

54 The English authorities now treat Mareva orders as lacking any firm doctrinal foundation, and as best regarded as a special exception to the general law: *Cardile* at 393 [25], see also 396-397 [34], 401 [42]; *Mercedes Benz AG v Leiduck* [1996] AC 284 at 301; Meagher, Gummow and Lehane *Equity: Doctrines and Remedies* (1992, 3rd edition) at [2185]-[2186], [2193].

analogous orders made by courts with inherent powers.[55] As superior courts possess inherent power to grant a freezing order to ensure the effective exercise of judicial power,[56] it has been recognised that s 23 of the FC Act confers the same powers on the Federal Court.[57]

47. But there is no analogy between a non-indemnification order and freezing orders or search orders made to ensure a subsequent exercise of jurisdiction by the Court is not defeated.[58] The non-indemnification order made by the trial judge does not fit within the genus of orders traditionally made in order to prevent abuse or frustration of the court's processes, such as freezing orders, search orders, costs orders and suppression orders.[59] Indeed, her Honour's order was the first of its kind.[60]

48. The Appellant's Submissions also rely on dicta from *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*[61] (the ***MUA Case***). However this does not assist the Appellant either. There, remedies were sought pursuant to Part XA of the *Workplace Relations Act 1996* (Cth) (**WR Act**) and with respect to the tort of conspiracy. As the High Court noted, the final relief sought included orders that would undo the re-organisation of the corporate group, and place the stevedoring business back in the hands of the employer companies. While s 298U of the WR Act provided a source of power with respect to the alleged contraventions of that Act, the Court's power to grant interlocutory relief in respect of the tortious causes of action was derived from s 23 of the FC Act.[62]

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55 Although of course the outer limits of orders of that kind must be confined to the identification of 'proper cases': *Cardile* at 393 [25]-[26] (Gaudron, McHugh, Gummow and Callinan JJ).

56 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at 24 [64], [66].

57 *Jackson*, *Cardile* and *Pelechowski.*

58 Cf Appellant's submissions at [38]

59 Appellant's submissions at [24], [51].

60 Applications for orders in similar terms were refused in each of: *Director of Fair Work Building Industry Inspectorate v CFMEU* [2015] FCA 1173 (*Mitcham Rail Case*) at [37]-[39] (Jessup J); *Director of Fair Work Building Industry Inspectorate v CFMEU* [2016] FCA 772 (*Yarra's Edge Case*) at [53]-[57] (Jessup J); *Director of Fair Work Building Industry Inspectorate v Bolton (No 2)* [2016] FCA 817 at [53]-[54] (Collier J). An order for personal payment was made in *Director of Fair Work Building Industry Inspectorate v Bragdon (No 2)* [2015] FCA 998 but did not survive an appeal (*Bragdon v Director of Fair Work Building Industry Inspectorate* (2016) 242 FCR 46 at [83]-[93]).

61 (1998) 195 CLR 1 (***MUA Case***). Appellant's submissions [26] and fn 44.

62 *MUA Case* at [30], [33].

49. The trial judge's interlocutory orders were upheld in the *MUA Case* on the basis that they were both necessary to ensure the Court's effective exercise of the powers to grant remedies conferred by s 298U of the WR Act and apt to ensure the efficacy of the Court's exercise of power. The orders made by his Honour were also, of course, consistent with an orthodox approach to grants of interlocutory injunctive relief and analogous with orders made by courts with inherent jurisdiction.

50. It was in this context that this Court in the *MUA Case* referred to *Jackson v Sterling*[63] and Deane J's observation[64] that a power to prevent the abuse or frustration of a court's process should be accepted "as an established part of the armoury of a court of law and equity".[65] Thus, it was clear that the Federal Court had jurisdiction to make such interlocutory orders as were necessary to, "ensure the effective exercise of the jurisdiction invoked."[66] In similar vein, Gaudron J referred to the power of the Federal Court to make "jurisdiction protection" orders under s 23 of the FC Act.[67]

51. In the *MUA Case* and in proceedings where freezing orders are made, the regard had to the "effective exercise" of the Court's jurisdiction is concerned with the frustration of the Court's processes or the protection of the subject matter of the proceeding. But here, the proceeding is concluded. The Court has found the contravention by Myles proven and has made an order imposing upon him a penalty which must be paid. The character of a penalty or fine is an obligation to pay money imposed by a court that is paid into consolidated revenue.[68] The effective exercise of the Court's jurisdiction with respect to imposition of penalties for contravention of the FW Act is not impeded by a third party contributing funds to the payment of a penalty. Protection of the integrity of the Court's processes requires only that the penalty be paid, and that any failure to do so be visited upon the contravener. This is achieved by reason of the fact that it is Myles who is exposed to conviction for contempt if the penalty imposed upon him

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63 (1987) 162 CLR 332.
64 *Jackson* at 625.
65 *MUA Case* at [35].
66 *MUA Case* at [35].
67 *MUA Case* at [127]-[129].
68 *Brittain v Mansour* [2013] VSC 50 at [40] (Dixon J).

goes unpaid. As the Full Court of the Federal Court observed in *Bragdon v Director of Fair Work Building Industry Inspectorate*:[69]

> ... the deterrent aspect of industrial penalties is not removed (even if it might be eroded) by the prospect that the penalty will ultimately be paid, or reimbursed, by a union. The individual wrongdoer is the person liable in law for the payment of a penalty, and to the consequences for non-payment.

52. Here, the trial judge did not, in any event, seek to justify the non-indemnification order by reference to effective exercise of the Court's jurisdiction. This is not surprising. It is difficult to see how a non-indemnification order could be necessary for the effective exercise of a court's jurisdiction to impose penalties. Indeed, it has been held that the sentencing discretion will miscarry when the court has regard to source of funds in determining the appropriate penalty.[70] While it is a well-established principle of sentencing that a sentencing court ought to have regard to the capacity of a defendant to pay as a mitigating factor,[71] the prospect that someone other than the defendant might pay a penalty has not been recognized as an *aggravating* factor liable to be relied upon in order to increase the penalty imposed on a contravener.

53. That the source of funds used to meet a financial obligation is irrelevant to the integrity of the court's processes has been confirmed in other contexts. This Court observed in *Lamb v Cotogno*[72] (in the case of a person insured against an award of exemplary damages) that the fact that a defendant may not personally pay an award of exemplary damages leaves its deterrent effect "undiminished" and noted that the order remained one that served to mark the court's condemnation of the behaviour.

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69 (2016) 242 FCR 46 at 64 [91] (the Court). See also the observations of Jessup J in *Director v CFMEU (Mitcham Rail Case)* [2015] FCA 1173 at [37]-[38] and in *Director v CFMEU (Yarra's Edge Case)* [2016] FCA 772 at [56]-[57]. See further the discussion in O'Malley "Fines, Risks and Damages: Money Sanctions and Justice in Control Societies" (2010) 21 *Current Issues in Criminal Justice* 365 at 366.

70 *Hinch v Attorney-General (Vic)* [1987] VR 721 at 730-731 (Young CJ), 748, 749, 751 (Kaye J); *R v Thompson* (1998) WAR 219 at 225 (Malcolm J), 225 (Wallace J agreeing), 226 (Walsh J agreeing). See Niel's Case, 1965 as discussed in Thomas, *Principles of Sentencing* (1970, 2nd ed) 222; see Samuels, "The Fine: The Principles" [1970] Crim LR 201, 209 and the cases cited in fn 32 thereto. See further the discussion in D Bein "Payment of a Fine by a Person Other than the Defendant: Law and Policy" (1974) 9 *Israel Law Review* 325 at 333 to 335, 342, 344.

71 See for example s 16C of the *Crimes Act 1914* (Cth).

72 (1987) 164 CLR 1 at 10. The High Court refused leave to re-open this issue in *Gray v MAC* (1998) 196 CLR 1 at 12-13 [32]-[37].

Principle of legality

54. Below, Allsop CJ observed that the ordering of a party not to do an act which is not unlawful, in order to increase the effect or the impact of the imposition of a penalty on another person, is a power one would expect only to find expressed in clear words. This was described by his Honour as an aspect of the principle of legality.[73]

55. The Appellant contends that the principle of legality is not relevant to the task of construction of the word "appropriate" in s 545(1) of the FW Act[74] and that the general law has never recognized 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 standard breached by them."[75] The Appellant goes on to contend that it would be odd if the principle applied so as to prevent the Court from making orders to ensure that unlawful conduct is not treated "as a mere 'cost of doing business'".[76]

56. But the principle of legality is intended to protect individuals from abrogation of fundamental rights, other than in the presence of express words.[77] The principle of legality also protects against construction of legislation that would involve a departure from the general system of law. To that extent, the application of the principle tends against any construction of s 545(1) of the FW Act that would import a power in the Court to restrain the union from managing its assets and funds in a manner that is not unlawful.[78] Further, to the extent that the "cost of doing business" is affected by the maximum penalty available to be imposed for any particular contravention of the FW Act, this is of course a question for Parliament.

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73 Appeal reasons at [12]-[13] (Allsop CJ).

74 Appellant's submissions at [27]-[28].

75 Appellant submissions at [61].

76 Appellant's submissions at [61].

77 *Lee v NSWCC* (2013) 251 CLR 196 at 310 [313] (Keane and Gageler JJ); *Coco v The Queen* (1994) 179 CLR 426 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

78 That right is enshrined in Article 5 of the European Social Charter and Article 3 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

Common law analogies

57. The Appellants assert that there is "some analogy" here with the refusal of common law courts to enforce certain contracts of indemnity or insurance.[79] It is accepted that it may be contrary to public policy to enforce a contractual right of indemnity with respect to the insured's own illegal conduct.[80] But the question of enforcement or recovery does not arise here, and any attempt to enforce payment by the union of a penalty imposed on one of its members or officials would fall to be determined according to its own facts.[81]

58. In support of the proposition that the courts have involved themselves in determining whether one party is permitted to indemnify another against a penalty, the Appellant's Submissions also rely on *Gallagher v Durack* (***Gallagher***).[82] That special leave application arose out of a Federal Court appeal that concerned remarks in contempt of court made against the background of the earlier decision in *Australian Building Construction Employees and Builders' Labourers' Federation v Minister of State for Industrial Relations* (***BLF Case***).[83]

59. The *BLF Case* was an appeal from the decision of Keely J to sentence Gallagher to imprisonment and make an order requiring the BLF to pay a fine of $15,000 by "an agent properly authorized in writing by the Federation." This form of order was not directed at the prospect of indemnification by the union of its officials. Rather, it was fashioned in response to evidence of a speech delivered by Gallagher in which he had implied that the BLF intended to prevail upon employers to contribute to any fine imposed.

60. *Gallagher* concerns a distinct contempt of court, arising from subsequent comments made following the hearing of Gallagher's successful appeal against

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79 Appellant's submissions at [48].

80 See *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35 at 38 (Denning LJ); *Strongman v Sincock* [1955] 2 QB 528 at 535 (Denning LJ); *Fire and All Risks Insurance Co Ltd v Powell* [1966] VR 513.

81 See *Stevens v Keogh* (1946) 72 CLR 1, where the payment by the Police Association of New South Wales of the legal costs associated with a libel action brought by a member against the Commissioner of Police was held not to be ultra vires the Association's rules.

82 (1983) 152 CLR 238 at 245 (***Gallagher***). See the Appellant's submissions at [49].

83 (1982) 43 ALR 189 at 214 (Evatt and Deane JJ). This decision was relied on by the primary judge in support of her Honour's finding that it was appropriate to make a non-indemnification order: Primary reasons at [182]-[187]. But as Jessup J noted, no such support can be gleaned from the decision: see Appeal reasons at [65].

the order of imprisonment.[84] In respect of those comments, Gallagher was sentenced to three months' imprisonment. It was against this background that the plurality on the special leave application in *Gallagher* said that the Federal Court had not been in error in so far as it had taken into account as one of the reasons for imposing a sentence of imprisonment on Gallagher the fact that it thought "the applicant would not pay a fine out of his own funds".[85] The High Court was clearly cognizant of the original question that had troubled Keely J, namely the suggestion that the BLF intended to prevail upon employers to contribute to any fines imposed. In circumstances where Gallagher had not explained the comments in his original speech, the High Court refused to grant special leave to appeal.[86]

61. It is submitted that *Gallagher* provides no authority for the general proposition that the question whether one party is permitted to indemnify another against a penalty is a question "not foreign to the common law or the exercise of judicial power".[87]

Disposition

62. The Respondents agree that if this Court concludes that the Federal Court does have the power to make non-indemnification orders, the proceeding ought be remitted to the Full Court of the Federal Court for the determination of Ground 2 of the appeal.[88]

PART VII: TIME FOR ORAL ARGUMENT

63. The Respondents estimate that they will require 2 hours for oral argument.

Dated: 7 July 2017

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84 *Gallagher* at 244 (Gibbs CJ, Mason, Wilson, Brennan JJ).
85 *Gallagher* at 245 (Gibbs CJ, Mason, Wilson, Brennan JJ).
86 *Gallagher* at 245 (Gibbs CJ, Mason, Wilson, Brennan JJ).
87 Appellant's submissions at [48].
88 Appellant's submissions at [23].