AUSTRALIAN BUILDING AND CONSTRUCTION COMMISIONER v CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION & ANOR (M65/2017)

Court appealed from:	Full Court of the Federal Court of Australia [2016] FCAFC 184
Date of judgment:	21 December 2016
Date special leave granted:	12 May 2017

The appellant brought proceedings in the Federal Court alleging that the first respondent ("the CFMEU") and the second respondent, Joe Myles, an organiser in the employ of the CFMEU, contravened s 348 of the *Fair Work Act* 2009 (Cth) ("the FW Act") on 16 and 17 May 2013 at a construction site in Maribyrnong. On 13 May 2016, Mortimer J ordered the CFMEU and Myles to pay financial penalties. Her Honour further ordered ("Order 13") that "the first respondent must not directly or indirectly indemnify the second respondent 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".

In their appeal to the Full Federal Court (Allsop CJ, North & Jessup JJ) the respondents contended, inter alia, that the court did not have power, under s 545 of the FW Act, to make an order in the terms of Order 13. Section 545 provides as follows:

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

The Court noted that s 545(1) requires the consideration and making of a choice of what is "appropriate" in the exercise of judicial power upon the satisfaction that someone has contravened or proposes to contravene a civil remedy provision. That consideration and choice must have limits. Such a judgment, and any restrictions or limitations on the choice, would be derived from the text and context of the statute, the nature of judicial power and inhering considerations of legal legitimacy.

The Court further noted that the object of the imposition of a penalty under s 546 of the FW Act was deterrence. The order in question here was made against the union in order that the imposition of the penalty against Myles have more "sting". Such an order was plainly relevant to deterrence. Thus, if it were to be concluded that it was not capable of properly being seen as appropriate, considerations leading to that conclusion had to be derived elsewhere and otherwise. Such considerations derived from two sources: one from the terms and structure of the statute; the other from inhering legal considerations. As to the statute, the power to impose the penalty came from s 546. Order 13 was directed to the effect of the penalty. Just as s 545 could not be used to found an order to pay a monetary sum (in addition to the penalty imposed under s 546) so it could not be used to increase the effect of the nominal amount. The source of the power to impose a penalty was, and was only, s 546.

That conclusion was reinforced by another legal consideration. The order purported to order a party to refrain from doing an act which was not said to be unlawful and to control how that party used its own property. Such an imposition on the freedom of a person or organisation to conduct his, her or its own affairs, being intimately bound up with the penalty itself, should find its source of power in clear and express words of the statute. How the statute provides for the regulation of industrial relations was a matter for Parliament. The Court concluded that neither s 545(1) of the Act or s 23 of the FC Act was a source of power for Order 13.

The ground of appeal is:

- The Full Court erred in concluding that the Federal Court lacked the power under both s 545 of the *Fair Work Act* 2009 (Cth) and s 23 of the *Federal Court of Australia Act* 1976 (Cth) to make an order that the First Respondent not indemnify the Second Respondent against the penalties he was ordered to pay under s 546 of the *Fair Work Act* 2009 (Cth) for contravening s 348.