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High Court finds Federal Court has power to make a personal payment order against a contravening union official under the *Fair Work Act 2009*

Australian Building and Construction Commissioner v CFMEU and Anor [2018] HCA 3

Background

Pecuniary penalties were imposed by Mortimer J on the CFMEU and one of its officials, Mr Myles, for various contraventions of s 348 of the *Fair Work Act 2009* (Cth) (FW Act). Her Honour also made a non-indemnification order against the CFMEU precluding it from paying the penalties imposed on Myles. Her Honour relied upon s 545 as the source of power to make the non-indemnification order. Mortimer J considered it appropriate to make the order as, without it, the CFMEU and Myles would treat pecuniary penalties as a mere cost of doing business, thereby frustrating the intended deterrent effect of pecuniary penalties. The Full Federal Court held that neither s 545 of the FW Act, nor s 23 of the *Federal Court of Australia Act 1976,* authorised the making of the non-indemnification order.

The ABCC was granted special leave to appeal. Following the hearing of the appeal, the ABCC was granted leave to also rely on s 546 as a source of power to make non-indemnification and personal payment orders. The High Court allowed the ABCC's appeal (by a 4:1 majority) on the basis that s 546 carried with it an implied power to make personal payment orders.

Reasoning of the High Court

Kiefel CJ and the plurality comprising Keane, Nettle and Gordon JJ published separate judgments rejecting s 545, a general ancillary provision, as a source of power to make either non-indemnification orders (against a union) or personal payment orders (against a union official).[1]

However, Kiefel CJ and the plurality held that s 546, the section which specifically permitted the imposition of pecuniary penalties, impliedly authorised the court to make personal payment orders against a contravening union official to facilitate the deterrence objectives of the penalty regime.

The Chief Justice and the plurality held that such an order could take the form of requiring the union official to pay a pecuniary penalty personally and not seek or accept indemnity from a co-contravenor. The plurality stated (Kiefel CJ agreeing):

> [120] It is to take too narrow a view of the purpose of s 546 to regard the provision as being concerned with no more than that an amount of money be paid by someone in discharge of a debt created by order of the court. … It is to take too narrow a view of the extent of the power conferred by s 546 to deny that it extends to the making of orders designed to ensure that a particular person cannot defeat the purpose of an order that the person pay the penalty imposed on him or her.

The plurality specifically rejected problems of enforceability as standing in the way of the making of personal payment orders. Their Honours concluded, for various reasons, that 'the

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1 Section 545 authorises the Court to 'make any order the court considers appropriate if the court is satisfied that a person has contravened … a civil remedy provision'.

task of determining the source of funds actually used to pay pecuniary penalties is unlikely to prove overly burdensome and certainly not insurmountable'.

Gageler J, who comprised the minority, considered that personal payment orders operated to impermissibly increase the punitive effect of a penalty (as opposed to giving it the deterrent effect intended by the Court). The power conferred by s 546 (to impose penalties) was capable of exercise without resort to any implied power, and no question of abuse or frustration of court processes arose.

Kiefel CJ and the plurality did not consider it necessary to determine whether s 23 of the Federal Court Act allowed personal payments orders to be made. Gageler J considered that s 23 was not a source of power for such orders.

Implications

The decision of the High Court has the potential to rehabilitate the deterrent effect of pecuniary penalties under the FW Act and similar penalty regimes in other laws.

The Federal Court has for many years lamented the fact that the CFMEU 'employs a conscious and deliberate strategy to engage in disruptive, threatening and abusive behaviour towards employers without regard to the lawfulness of that action or the prospect of prosecution or penalties. The individuals involved in this conduct are often part of the CFMEU hierarchy and their ongoing behaviour is tolerated, facilitated and encouraged by all levels of the organisation.'[2]

The High Court majority has found that the Federal Court does possess a power to truly deter offenders.

Although the Court found that the FW Act did not authorise an actual non-indemnification order against a union – because s 546 only permitted payment orders to be made against the particular party who committed a contravention – the Court went on to note that service of a penal notice on a union under Rule 41.06 of the *Federal Court Rules 2011* 'would be sufficient to put the CFMEU on notice not only that the personal payment order had been made but also that the CFMEU was prohibited from knowingly interfering with its performance'.

Dynamics on work sites across Australia may well alter in the aftermath of the decision.

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[2] Kiefel CJ's summary of the primary judge's reasoning at [17].