SHOOTING THE REPRESENTATIVE?

INDIVIDUAL PENALTIES FOR INDUSTRIAL ACTION

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Introduction

1. Much industrial action has long been unlawful in Australia and, unless protected by specific statutory provision, attracts liability for damages, compensatory orders or penal sanctions. Frequently, those consequences are visited upon the union that has organised or encouraged its members to take industrial action. In addition, however, liability for damages and penalties may arise for individuals involved in industrial action, whether they be individual employees who participate in the action or union officials involved in its organisation.

2. The imposition of penalties upon individual employees or union officials involved in industrial action is, it almost goes without saying, a fundamental constraint on the exercise of the right to strike. If individual union members or officials are exposed to personal penalties as a result of organising or participating in industrial action, the right to strike, as well as principles of freedom of association and collective action, are undermined. Individuals who take part in industrial action can be personally penalised and their financial circumstances, and those of their families, imperilled.

3. Individual sanctions for industrial action have a controversial history in Australia. Most famously perhaps, the then Secretary of the Australian Tramway & Motor Omnibus Employees' Association, Clarrie O'Shea, was jailed on 15 May 1969. The imprisonment of O'Shea arose as a result of fines imposed on the union with respect to industrial action taken by members of the union in breach of a bans clause in the relevant award. The union, after paying some of the fines on an instalment basis, refused to pay the residue and was subject of enforcement action.

4. O'Shea was summoned to appear before the Industrial Court to produce the financial records of the union and to be examined under oath. He refused. The judge, who happened to be John Kerr, committed O'Shea to prison to be detained until he submitted to producing the records of the union and being examined. The event proved incendiary. In the following days, more than a million workers across Australia went on

strike, often without prompting or authorisation by their unions. A 24 hour general strike took place in Victoria and transport strikes spread around the country.

5. O'Shea was eventually released from jail six days later after a person paid the union's fines. However, the incident and general discontent with the penalties being imposed on trade unions resulted in the provisions in the *Conciliation and Arbitration Act* 1904 (Cth) providing for the imposition of bans clauses in awards and resulting penalties for industrial action falling into disuse. The provisions were subsequently repealed and greater protections included in the legislation to protect against common law claims or penalties arising from industrial action.

6. The movement away from the imposition of penalties for industrial action evident in the 1970s and 1980s reversed during the 1990s and 2000s. The *Fair Work Act* 2009 (Cth) ("the FW Act"), following on from the *Workplace Relations Act* 1996 (Cth), contains an array of penalties able to be applied in circumstances of industrial action. Those provisions can be contravened by individual employees, unions and union officials. A union or a union official may also be deemed to have contravened the FW Act, and subject to penalties, if "involved in" the contraventions of others.

7. There has been an increasing inclination by employers and regulators to seek to have penalties imposed individual union officials and to recover individual penalties. The potential effect of personal penalties has been brought into sharper focus by the recent judgment of the High Court in *Australian Building and Construction Commissioner v Construction, Forestry Mining and Energy Union* [2018] HCA 3 which found that it was possible for the Federal Court to make orders under the FW Act that an individual not be indemnified by the union or any other person and pay a fine personally.

8. The intent of this paper is to provide an overview of the potential for individual penalties to be imposed on the organisers of or participants in industrial action in Australia with particular attention on the FW Act.

Statutory Penalties for Industrial Action

9. The FW Act treats industrial action in broadly three categories. Firstly, protected industrial action, taken in the strictly limited circumstance of enterprise bargaining negotiations and solely for the purpose of advancing claims with respect to a proposed enterprise agreement, is protected from most forms of legal liability which would otherwise be attracted by industrial action. Secondly, some forms of industrial action, although not be protected from common law liability, are not directly subject of sanction under the FW Act. Thirdly, in some circumstances industrial action may constitute a contravention of the FW Act in itself and expose participants to penalties.

10. It is the third category with which this paper is concerned. The circumstances in which industrial action may in itself constitute a contravention of the FW Act include the following.

    (a) Section 417 prohibits employees, unions and officers of unions who are covered by an enterprise agreement from organising or engaging in industrial action until the nominal expiry of the enterprise agreement has passed.

    (b) Sections 418 and 419 requires the Fair Work Commission to make orders that industrial action that is not protected action stop, not occur or not be organised. In the event that such an order is made, a person to whom the order applies must not contravene the order under s 421.

    (c) Section 431 permits the Minister to issue a declaration terminating protected industrial action and, if such a declaration is made, to issue directions to employees or a union to refrain from taking industrial action. A person to whom a direction applies must not contravene the direction under s 434.

    (d) Section 343 prohibits a person from organising or taking any action, including industrial action, against another person with the intent of coercing the person

to exercise or not to exercise a workplace right or exercise a workplace right in a particular way.

11. The penalties applicable to contraventions of the FW Act are set out in s 539. The value of a penalty unit prescribed by the *Crimes Act* 1914 (Cth) increased from $180 to $210 on 1 July 2017 producing corresponding increases in the penalties applied under the FW Act. Relevantly, the penalty for a contravention of each of the provisions referred to above is 60 penalty units (or $12,600) for each contravention for an individual and 300 penalty units (or $63,000) for an organisation.

12. Specific legislation applies in the building and construction industry now known, somewhat euphemistically, as the *Building and Construction Industry (Improving Productivity) Act* 2016 (Cth) ("the BCIIP Act"). The BCIIP Act contains a broader prohibition upon organising or engaging in any industrial action that is not protected action. Section 46 of the BCIIP Act provides that a person must not organise or engage in unlawful industrial action. "Unlawful industrial action" is defined simply as any industrial action that is not protected industrial action. There are also specific prohibitions on picketing and coercion under the BCIIP Act.

13. The available penalties are more substantial under the BCIIP Act. A contravention of s 46 of the BCIIP Act by reason of a person organising or engaging in unlawful industrial action is what is called a "Grade A civil penalty provision". Where a person has contravened a civil penalty provision, a relevant court can impose a pecuniary penalty on the defendant, make an order that defendant pay compensation or any other order the court considers appropriate. The maximum penalty for a "Grade A civil penalty provision" is set in s 81(2) as 1,000 penalty units (or $210,000) for an organisation and 200 penalty units (or $42,000) for an individual.

Individual Employees

14. Individual employees can obviously contravene these provisions by engaging in industrial action in contravention of the Act. For example, an employee who "engages in

industrial action" prior to the nominal expiry of an enterprise agreement which covers the employee will contravene s 417(1). An employee who participates in industrial action where the Commission has made an order that industrial action stop or not occur will contravene s 421(1).

15. Despite the obvious option of so doing, regulators and employers have relatively rarely pursued proceedings seeking the imposition of penalties against individual employees who participate in industrial action. There are some examples which have reached final judgment. In *Hadgkiss v Aldin* [2007] FCA 2068; (2007) 164 FCR 394, the Federal Court imposed penalties of between $7,500 and $9,000 (partially suspended) upon 67 members of the CFMEU who participated in industrial action on a rail construction project in Western Australia.

16. The penalties were imposed for contraventions of s 38 of the then *Building and Construction Industry Improvement Act* 2005 (Cth) and for breaching orders of the Australian Industrial Relations Commission made under s 127 of the *Workplace Relations Act* 1996 (Cth). The individual employees had participated in a strike following the dismissal of a union delegate on the project. The employees took industrial action contrary to the advice of the union and in contravention of orders of the Australian Industrial Relations Commission that industrial action stop.

17. More recently, in *Director of the Fair Work Building Industry Inspectorate v Adams* [2015] FCA 828, the Federal Court found that 76 individual employees had contravened s 417 of the FW Act by not attending for work on 28 February 2013. The proceedings were defended on the basis that the Director had not proved that the failure of the employees to attend for work was industrial in character. Penalties have not yet been imposed in the matter as a result of an unsuccessful appeal in *Adams v Director of the Fair Work Building Industry Inspectorate* [2017] FCAFC 228. Interestingly, the Court found that no contraventions of s 421 of the FW Act had occurred as a result of the failure of the Director to prove the individual employees had been properly served with the order of the Fair Work Commission.

Union Officials

18. Union officials cannot themselves engage in industrial action. It is, of course, possible for a union official to directly contravene certain provisions dealing with industrial action. For example, s 417 of the FW Act directly prohibits an official of an employee organisation from organising industrial action prior to the nominal expiry date of an enterprise agreement that covers the organisation. An order made under s 418 of the FW Act may also prohibit persons from organising industrial action and a breach of such an order would constitute a contravention of s 421.

19. The concept of "organising" industrial action is not defined in the FW Act and relatively few authorities cast light upon what conduct is necessary for an individual to have "organised" industrial action. The term "organise" has been said to at least encompass "acts of positive and intentional conduct bringing about or maintaining, or contributing in a material way to the bringing about or maintenance, of industrial action": *Australian Building and Construction Commissioner v Huddy* [2017] FCA 739 at [147]; *Fair Work Ombudsman v Maritime Union of Australia* [2017] FCA 1363 at[80].

20. The precise extent of conduct that would constitute "organising" industrial action, though, remains unclear. The term "organise" as employed in s 417 of the FW Act requires more than mere presence and would not be satisfied where there a person was a mere "passive observer": *Qantas Airways Ltd v Transport Workers' Union of Australia* [2011] FCA 470; (2011) 211 IR 1 at [373]. It has been also been doubted that a person organises industrial action if the person merely "encourages and enables" that action: *Australian Building and Construction Commissioner v Huddy* [2017] FCA 739 at [71] and [147].

21. However, in *Director of the Fair Work Building Industry Inspectorate v Robinson* [2016] FCA 525; (2016) 241 FCR 338, Charlesworth J observed in relation to conduct which would constitute "organising" industrial action (at [53]):

In reaching my conclusion that the CFMEU committed only one contravention, I have given the word "organise" in s 417 of the FW Act a meaning that encompasses the concept of "marshalling" or "rallying", which may inherently involve a number of discrete acts directed at achieving cohesiveness in a result (in this case, a single episode of industrial action). The CFMEU, as a body corporate, organised one instance of industrial action, albeit through the conduct of two human actors

22. In that matter, three union officials had been involved in distributing flyers advertising union meetings and had conducted meetings of union members at which the officials had proposed that the employees stop work. The officials had taken steps to marshal the employees to take industrial action. *Robinson* and other cases suggest that the requirement that a person "organise" an event may be satisfied if a person associates himself or herself with the conduct of others such that his action can be characterised as "marshalling" or "rallying": *Australian Building and Construction Commissioner v Parker* [2017] FCA 564; (2017) 266 IR 340 at [494].

23. Even if a union official has not organised an instance of industrial action, the official may nonetheless be found to have contravened the FW Act by reason of having been "involved in" contraventions by employees. Section 550 of the FW Act provides for accessorial liability for contraventions of the Act as follows:

550 Involvement in contravention treated in same way as actual contravention

(1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.

*(2) A person is **involved in** a contravention of a civil remedy provision if, and only if, the person:*

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced the contravention, whether by threats or promises or otherwise; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

(d) has conspired with others to effect the contravention.

24. Section 92 of the BCIIP Act makes provision to the same effect. The concept of a person being "involved in" a contravention by another is broad and extends to aiding, abetting, counselling or procuring the contravention, inducing the contravention, being knowingly concerned in or party to the contravention or conspiring with others to effect the contravention. There is overlap between conduct that would constitute "organising" industrial action and conduct that would be counselling, procuring, inducing or conspiring to bring about an instance of industrial action.

25. The category of being "knowingly concerned in or party to the contravention" presents a particularly low threshold. A person may be "knowingly concerned" if he or she engaged in conduct which "implicates or involves him or her" in the contravention so there is a "practical connection" with the contravention (*Qantas Airways Ltd v Transport Workers' Union of Australia* [2011] FCA 470; (2011) 211 IR 1 at [324]-[325]; *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1293 at [111]), has participated in or assented to the contravention (*Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2002] FCA 61; (2002) 117 FCR 588 at [33]-[34]; *Construction, Forestry, Mining and Energy Union v Clarke* [2077] FCAFC 87; (2007) 164 IR 299 at [26]) or has been an intentional participant (*Yorke v Lucas* (1985) 158 CLR 661 at 670).

26. A union official providing assistance to members or conveying a message from members may not necessarily be involved in a contravention by its members: *Construction, Forestry, Mining and Energy Union v Clarke* [2077] FCAFC 87; (2007) 164 IR 299 at [26]; *Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* (2012) 209 FCR 448 at [38]-[39]. In *Clarke*, for example, union organisers attended a meeting of members and counselled against the taking of industrial action. The workers decided to strike nonetheless and the union organisers then communicated

with the employer the reasons for the stoppage. The Full Federal Court rejected the proposition that the organisers could reasonably have been held to have been party to, or concerned in, the withdrawal of labour.

27. However, any association with employees participating in industrial action produces a significant risk of liability. For example, in *Australian Building and Construction Commissioner v Moses* [2017] FCCA 738, the Federal Circuit Court found that a union delegate was "involved in" a contravention when he merely sat silently in a meeting and failed to correct false statements by a union organiser. That conduct was found to constitute aiding the contravention and being knowingly concerned in the contravention by organiser. A union official who mere attends a meeting which results in industrial action is at jeopardy of contravening the FW Act.

Penalty Privilege

28. It is appropriate to address one feature of litigation involving the pursuit of penalties against individuals, namely, penalty privilege. Whilst unions, as bodies corporate, are not entitled to any privilege against self-incrimination, individual respondents to proceedings seeking the imposition of pecuniary penalties are entitled to claim privilege against exposure to penalties.

29. The privilege against exposure to penalties ensures that those who allege criminality or other illegal conduct should prove it: *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [31]. The privilege precludes an individual respondent being required to give discovery or answer interrogatories, to file a defence pleading facts beyond general denials or to file witness statements or affidavits prior to the closure of the prosecutor's case: *Australian Competition and Consumer Commission v FFE Building Services Ltd* (2003) 130 FCR 37 at [14]; *Hadgkiss v Construction, Forestry, Mining and Energy Union* (2005) 146 IR 106 at [12]; *Communications Electrical Electronic Energy Information Postal Plumbing & Allied Services Union of Australia v McKenzie (No 1)* [2009] FCA 649 at [4].

30. Where penalty privilege is claimed, the court will decline "to make any order for the provision of information by an individual respondent without there being any obligation on the respondent to show otherwise than from the nature of the proceedings that there is a real and appreciable risk of self-exposure": *Australian Competition and Consumer Commission v FFE Building Services Ltd* (2003) 130 FCR 37 at [32]; *Australian Securities and Investments Commission v Mining Projects Group Ltd* (2007) 164 FCR 32 at [10]. Any requirement to provide information is necessarily directed at securing the imposition of a penalty against the respondent.

31. Penalty privilege provides some procedural advantages for an individual respondent subject of proceedings with respect to industrial action or other contraventions of industrial laws. However, the benefit should not be overstated. As demonstrated in *Adams v Director of the Fair Work Building Industry Inspectorate* [2017] FCAFC 228, where there is evidence that employees have not attended for work, it will rarely be sufficient for the union and individual employees to merely put the prosecutor to proof and assert that the prosecutor has failed to prove the stoppage constituted industrial action. The privilege does not prevent the drawing of inferences from the evidence.

32. A claim of penalty privilege is not available to corporate entities, including industrial organisations. A union subject of proceedings seeking the imposition of pecuniary penalties can be required to give discovery, answer interrogatories, plead properly to a statement of claim and file witness statements or affidavits prior to trial. This can create obvious practical difficulties in circumstances in which the individuals from whom the union would need to obtain instructions and who the union would wish to call as witnesses are claiming penalty privilege. The courts have generally not released unions from obligations to properly plead to allegations and file evidence merely because individuals may wish to claim penalty privilege.

Non-Indemnification Orders

33. Where penalties are imposed upon individual employees or union officials, there is no general constraint upon the individual being indemnified by the union, or any other person, for the amount of the penalty. So long as the penalty is paid, there can be no further claim against the individual. Some other legislation expressly prohibit persons seeking to be indemnified. Section 77A of the *Competition and Consumer Act* 2010 (Cth) and s 199A of the *Corporations Act* 2001 (Cth) prohibit bodies corporate from indemnifying persons who are ordered to pay penalties under those statutes. No such provision is made in the FW Act or the BCIIP Act.

34. A number of judges of the Federal Court have evidently become frustrated by the persistent contraventions by the CFMEU. Flick J in *Director of the Fair Work Building Industry Inspectorate v Bragdon (No 2)* [2015] FCA 998 and Mortimer J in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436 both imposed orders seeking to prevent officials of the union from seeking to be indemnified, at least by the CFMEU itself, for the amount of penalties they were ordered to pay.

35. In *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436, Mortimer J noted (at [139]-[140]), the Court noted the sheer number and frequency of contraventions by the CFMEU and concluded that the "only available inference is that there is a conscious and deliberate strategy employed by the CFMEU and its officers to engage in disruptive, threatening and abusive behaviour towards employers without regard to the lawfulness of that action, and impervious to the prospect of prosecution and penalties." The Court concluded that the objectives of specific deterrence were reduced to almost the point of disappearance if fines imposed on individuals were simply paid out of union funds.

36. Mortimer J imposed a penalty of $60,000 on the CFMEU and $18,000 on Mr Myles, its official, and ordered that the CFMEU not, directly or indirectly, indemnify him against

the penalties. On appeal, the Full Federal Court found that it was not within the power of the Federal Court, under s 545 of the FW Act or otherwise, to prohibit a person ordered to pay a pecuniary penalty from being indemnified against the liability to pay the penalty. The Court found that s 545(1), which permits the Court to make "any order the court considers appropriate", did not extend to increasing the "sting" of a pecuniary penalty.

37. The High Court disagreed. Although adopting different reasoning to Mortimer J, the majority (Gageler J dissenting) concluded that the Federal Court possessed an implied power arising from the capacity to impose a pecuniary penalty under s 546 to prohibit a person upon whom such a penalty was imposed from seeking or accepting an indemnity. The majority reasoned that the power to make such an order was necessary to protect the deterrent effect of a pecuniary penalty and ensure that the person against whom the order is made cannot avoid the incidence of the penalty. The question of the imposition of a penalty on Mr Myles was remitted to the Federal Court.

38. It remains to be seen how this new power will be exercised in the Federal Court and Federal Circuit Court. On one view, the reasoning of the High Court logically leads to the conclusion that an order prohibiting an individual from seeking an indemnity should be made in every case where a personal penalty is imposed. If the deterrent effect of a penalty requires a court to ensure that the individual upon whom a penalty is imposed actually pay the penalty out of his or her own funds, then such an order should presumably be made in every such case.

39. It is unlikely, however, that such an approach will be adopted. In my view, the Courts are more likely to impose orders prohibiting individuals seeking or accepting indemnity from pecuniary penalties in cases exhibiting some additional feature. Such orders may be limited to cases in which pecuniary penalties imposed in the past are perceived to have been insufficient to change the behaviour of a union or its officials. Some judges of the Federal Court certainly have that view with respect to parts of the CFMEU. Such orders should, in my view, be restricted to such cases.

Conclusion

40. The imposition of pecuniary penalties on individual employees and union officials in case of industrial action falling outside the limited class of protected industrial action represents a significant constraint on the exercise of the right to strike. The potential constraint on the right to strike is only increased by the Courts making orders that individuals have to pay any penalty out of their own funds.