IN THE MATTER OF PERSONAL PAYMENT ORDERS, THE QLD/NT DIVISIONAL BRANCH AND THE CFMEUQ

MEMORANDUM OF ADVICE

Introduction and summary of advice

1. I have been briefed to advise the Construction, Forestry and Maritime Employees Union (**CFMEU**) concerning past payments by the Construction, Forestry, Mining & Energy, Industrial Union of Employees (**CFMEUQ**) of "personal payment orders" imposed by courts on officials[1] of the Queensland/Northern Territory Branch of the Construction & General Division of the CFMEU (**Qld/NT Divisional Branch**). The questions for my advice and my short answers are as follows:

   1.1 Whether the CFMEUQ's payments of five identified personal payment orders complied with the terms of the relevant court orders which imposed those personal payment orders;

   The more appropriate question is whether there was a contempt of, rather than non-compliance with, the orders. There was likely no contempt or non-compliance.

   1.2 If not, which payments and why;

   Unnecessary to answer.

   1.3 Whether there is any obligation on the part of the CFMEU or CFMEUQ to notify the relevant court of any noncompliance.

   Unnecessary to answer.

Background

2. The CFMEUQ is a separate juridical entity under the *Industrial Relations Act 2016* (Qld),[2] albeit during the relevant period it was significantly intertwined with the Qld/NT Divisional Branch. More particularly, many officials of the latter were ex officio officials of the former[3] (such that their respective executives were

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[1] The term "official" is used broadly in this advice, to extend to those individual respondents who were the subject of personal payment orders, and regardless of whether they held some elected position in the CFMEU (as opposed to being e.g. an employee organiser, etc.).
[2] See *Re McJannet; ex parte Minister for Employment, Training and Industrial Relations* (1995) 184 CLR 620 at 639.
[3] Rule A37(d) of the CFMEUQ Rules.

comprised of many of the same individuals[4]) and, pursuant to a service agreement between the two entities, it is apparent that in around 2020 the CFMEUQ took over collection of membership subscriptions for "dual members" (who appear to comprise a significant majority of Queensland members of the Qld/NT Divisional Branch[5]), and, in return, funded a significant amount of the operating expenses of the Qld/NT Divisional Branch.[6] It is also apparent that there was a significant transfer of assets from the Qld/NT Divisional Branch to the CFMEUQ at about that time.[7]

3. There are five relevant personal payment orders.[8] Each order carried a penal notice and, leaving aside minor semantic variations which are not presently relevant,[9] they relevantly provided in substantially identical form as follows:

> The [individual union official respondent] must pay the penalties imposed upon them by the orders above personally in that they not, whether before or after payment of the penalty:
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> a. seek to have or encourage the [respondent CFMEU[10]] in any way whatsoever, directly or indirectly, to pay to them or for their financial benefit in any way whatsoever, any money or financial benefit referable to the payment of the penalties, whether in whole or in part; and
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> b. accept or receive from the [respondent CFMEU] in any way whatsoever, any money or financial benefit referable to the payment of the penalties, whether in whole or in part.

4. The CFMEUQ's subsequent payment of the penalties imposed on CFMEU officials was effected by various resolutions of the CFMEUQ executive and were ostensibly made as donations under Rule B70 of the CFMEUQ Rules to relieve members of at least three months' standing of financial distress.

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[4] It is not immediately apparent to me what the degree of "overlap" was in fact, but I proceed on the basis that the CFMEUQ's executive is at least very substantially comprised of Qld/NT Divisional Branch officials.

[5] A consideration of the 31 March 2021 financial report for the Qld/NT Divisional Branch shows that membership subscription income declined from $9,619,954 in the preceding year to $163,918 (and, on the other hand, for the CMFEUQ increased over the same period from $0 to $9,468,094).

[6] Over the same period, the Qld/NT Divisional Branch's employee expenses declined from $6,919,424 to $385,407 (and, on the other hand, for the CFMEUQ increased over the same period from $184,660 to $6,403,750).

[7] The Qld/NT Divisional Branch's net assets declined over the same period from $9,249,437 to $2,704,668 (and, on the other hand, for the CFMEUQ increased over the same period from $12,781,723 to $22,010,983).

[8] *ABCC v CFMMEU **(The Titan Cranes Case)*** [2022] FCA 774; ***FWO v CFMMEU*** [2023] FCA 36; ***FWO v Albert** (No 3)* [2023] FCA 220; *FWO v CFMMEU **(The Bruce Highway Caloundra to Sunshine Upgrade Case)** (No 3)* [2023] FCA 219; *FWO v CFMMEU **(BBQ Case)*** [2023] FedCFamC2G 668.

[9] I note also that, unlike the balance of the orders, the orders in the *Titan Crane Case* appear to have only made 50% of the penalty imposed on the individual official the subject of the personal payment order. I do not view that matter as relevant for the purposes of my advice.

[10] Before the withdrawal of the Mining and Energy Division, then known by the name the Construction, Forestry, Maritime, Mining and Energy Union (or CFMMEU).

Discussion

5. The CFMEUQ executive's resolutions were made following the advice of Hall Payne Lawyers. A significant premise for that advice appears to have been that the CFMEU, not the CFMEUQ, was a party to (and found to be co-contravener in) proceedings in which the personal payment orders were made, and therefore no order was made by those courts which directly bound the CFMEUQ (as distinct from the CFMEU).

6. It is important to note at this point that the personal payment orders imposed direct and immediate obligations on the individual union officials only. The personal payment orders did not, by their terms, impose direct and immediate obligations on the CFMEU.

7. That was in accordance with the High Court's decision in *ABCC v CFMEU*,[11] which held that s 546 of the *Fair Work Act 2009* (Cth) would support orders against a contravener (A) not to seek or accept an indemnity from a co-contravener (B), but would not support imposing a corresponding order directly on B that they not indemnify A.[12] As the plurality also observed (at [132]), the basis for effecting B's "compliance" with a personal payment order which might be imposed on A lies, not in enforcing compliance with the order directly against B, but in the law of contempt, and the principle that persons who are aware of an order ought not act knowingly to interfere with its performance. In that connection, it is well established that a person not directly bound by an order (including a non-party) may be held liable for contempt for conduct which has the effect of frustrating or subverting the purpose of the order.[13]

8. In my view, the Hall Payne Lawyers advice proceeded on a false issue. That the CFMEUQ was not a party to the relevant proceedings in which the personal payment orders were made is beside the point. Neither the CFMEU nor the CFMEUQ were the subject of direct and immediate obligations arising from the personal payment orders in issue: they were all orders which were directed in terms to the relevant individual union official. Whether the CFMEU or the CFMEUQ paid the penalties imposed on the individual, the question in both cases (so far as the payer is concerned) would reduce to whether there had been a contempt in frustrating or subverting the purpose of the order, not whether there had been "non-compliance" with the order as such by the relevant union.

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[11] (2018) 262 CLR 157.

[12] (2018) 262 CLR 157 at [133] per Keane, Nettle and Gordon JJ; see also at [39] per Kiefel CJ.

[13] See generally David Rolph, *Contempt* (2023), at pp 587ff.

9. As to whether there has been such a frustration or subversion of the orders in the instant cases, that, in my view, depends principally on two matters of characterisation.

   9.1 First, do the orders prohibiting the respondent officials from accepting or receiving from the CFMEU "in any way whatsoever" any money or financial benefit encompass, in terms, payment from the CFMEU's related entity, the CFMEUQ?[14]

   9.2 Secondly, and in any event, can the relevant "purpose" of the personal payment orders in these cases be said to extend to preventing "union funds" in a broad sense (which would encompass CFMEUQ funds) from being used to undercut the sting or burden of the personal payment order imposed.

10. As to the ***first*** matter, I consider that the better view is that the personal payment orders did not in terms prevent the individual officials from receiving or accepting payment from the CFMEUQ.

11. First, the personal payment orders in these cases may be contrasted with the form of order imposed by Flick J in *FWBII v Bragdon (No 2)*,[15] which in terms prevented the person the subject of the order from seeking or receiving reimbursement etc. from the union respondents "or any related entity". No such words of extension appear here.

12. Secondly, the words "in any way whatsoever" in subparagraph (b) of the orders here (set out at par 3 above) are best seen as relating to the *form* of benefit or financial accommodation, not as to the CFMEU's connection to its ultimate provenance.

    12.1 That appears consistent with the Full Federal Court's discussion of similar issues, on remitter from the High Court, in *CFMMEU v ABCC (The Non-Indemnification Personal Payment Case)*,[16] a discussion returned to at par 16 below.

    12.2 That is also reinforced by comparing the language of subparagraph (a) of the orders which, in enjoining the individual union official from soliciting money or a financial benefit from the CFMEU, prohibits

[14] I pause to note that, if so, that would be prima facie a contempt of the orders by the individual officials themselves in accepting or receiving such payments. Nevertheless, I understand the request for advice is directed to any "non-compliance" of the CFMEU or CFMEUQ with the personal payment orders, and not of the individual union officials.

[15] [2015] FCA 998, being the first case in which such personal payment orders appear to have been made: *ABCC v CFMEU* (2018) 262 CLR 157 at [131].

[16] (2018) 218 IR 306 at [3]-[4].

doing so "directly or indirectly"; no such relational words of extension appear in subparagraph (b) when considering the payment or conferral of the benefit itself.

13. As to the ***second*** matter, while this is more difficult, I consider the better view is that the relevant "purpose" of the orders did not extend to preventing payment from the CFMEUQ.

14. It may be accepted that the purpose of each of the personal payment orders may be fairly described as directed to preventing CFMEU funds from being used to undercut the sting or burden of the personal payment order imposed on the relevant individual official, and in that context better effecting the principles of both specific and general deterrence.[17] A summary of the courts' reasoning is set out in an annexure to this advice which is supportive of, or at least not inconsistent, with that ostensible purpose.[18]

15. Nevertheless, it seems to me that, by such orders, the courts concerned were not seeking to prevent any connection between the CFMEU and the source of funding.

16. In *The Non-Indemnification Personal Payment Case*, the Full Federal Court made orders in substantially the same form as the personal payment orders at issue here. In dealing with objections to the form of order and what it might entail, it observed as follows (emphases in underline in original; emphasis in italics added):[19]

> The appellants object to the words "or benefit" in (2). The objection is put on the following basis in … the submissions:
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> > 4. The Appellants submit that the words "or benefit" in (2) should be removed from the order. As the Chief Justice observed at the hearing on 25 May 2018, the purpose of the personal payment order sought is to prevent any form of indemnity by the <u>Union</u> from the <u>Union's own funds</u> (T18.25–26). That purpose is achieved by the personal payment order modified in the manner that the Appellants propose.
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> > 5. By contrast, once the word "benefit" is inserted into the second paragraph of the personal payment order, the scope of that order is dramatically increased, and the certainty of that order is dramatically reduced. The word "benefit" has a large and indeterminate meaning. In the second paragraph it is not constrained, as it is in the first paragraph of the order, by the verb "to pay". If the Second Respondent cannot "accept or receive from the Union in any way whatsoever any … benefit referable to payment of the penalties" does that mean that the Union cannot, for example, inform its members of a fundraiser

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[17] *ABCC v CFMEU* (2018) 262 CLR 157 at [32], [87], [116], [125]-[126]; *CFMMEU v ABCC (The Non-Indemnification Personal Payment Case)* (2018) 264 FCR 155 at [46].

[18] As to ascertainment of "purpose" for the purposes of contempt, see Rolph *op. cit.* at 604.

[19] (2018) 218 IR 306 at [3]-[4].

> for the Second Respondent? Does it mean that a fund raising event cannot be held on the Union's premises? The personal payment order becomes one that may be capable of regulating the more general conduct of the Union as opposed to regulating the expenditure of Union funds and the scope of that order is very difficult to ascertain. That is not the order that the Reasons suggest was intended and it is an order that is far more uncertain and contestable than the order proposed by the Appellants.
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> The order should be wide enough to encompass financial or valuable benefit obtained from the use of Union funds. This would prevent Mr Myles receiving or accepting some benefit from the Union (such as a car or some other chattel) which was not money, but referable to the expenditure of Union funds and a valuable financial benefit. *This would avoid any narrowness of effect by limiting the order to money, but also avoid any overly wide meaning preventing the Union from undertaking actions of no financial cost to itself but which might help Mr Myles. The example of the hosting of a fundraising event on union premises would not be caught as long as there was no real contribution of Union funds to Mr Myles, as there might be for instance if Union funds were used to underwrite or contribute to the means of raising funds.* Understood this way we do not consider that the order suffers from any vice. We would, however, add the word "financial" before the word "benefit".

17. By parity of reasoning, it seems to me that the interrelationship between the CFMEUQ and the Qld/NT Divisional Branch is not sufficient. Nor is any (gratis) assistance by Qld/NT Divisional Branch (or its officials) to secure CFMEUQ funds for payment. What matters in terms of offending the purpose of the orders is whether the <u>CFMEU's</u> funds were used to pay or to secure (or underwrite or contribute to) payment.

18. Having reviewed the service agreement and the filed financial statements (for the CFMEUQ and the Qld/NT Divisional Branch) for the relevant period, it does not appear to me that the CFMEU's funds were so used.

    18.1 First, it is apparent that, before the changes effected by the service agreement, the CFMEUQ had its own substantial (albeit smaller) asset base, including significant cash (liquid) assets from which payments (including donations) could theoretically be made. Thus, it could not be said that the donations were "traceable", in any meaningful and immediate sense, to the CFMEU's assets.

    18.2 Secondly, it is not immediately apparent to me that the donations made by the CFMEUQ which were referable to the personal payment orders led to any reimbursement from the CFMEU.

    18.3 Thirdly, there does not appear to be anything in the service agreement that would otherwise have allowed the CFMEUQ to reduce its funding of the Qld/NT Divisional Branch, or otherwise to call on some amount, by reason of, and to recoup, the donations it had made.

19. In sum, it seems to me that the CFMEUQ's donations referable to the personal payment orders did not offend the properly ascertained purpose of those orders. That is also generally consistent with the jealous caution with which the High Court approached the prospect of personal payment orders intruding on a person's or organisation's ability to regulate their own affairs.[20]

Conclusion

20. I refer to my summary of conclusions at par 1 above.

21. None of the above should be construed to express any view about the propriety of the CFMEUQ's making the donations in question, including when measured against the CFMEUQ's Rules. I have not been asked to consider those matters and I have not, in any event, seen documents which might have been relevant to that question, including the particulars of financial distress provided to the CFMEUQ executive on which it acted. I also note that, at first blush, there appears to have been some irregularity in disclosing those donations in the financial report for the CFMEUQ for the year ending 31 March 2023.

Dated: 1 September 2025

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Owen Dixon Chambers West

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[20] (2018) 262 CLR 157 at [133].

Annexure

1. In the *Titan Cranes Case*, Logan J found “mere exposure to personal liability” for the individual official was insufficient and that there should be “some burden or sting in terms of non-indemnification by the union” ([61]-[62]).[21]

2. In *FWO v CFMMEU*, Collier J found that personal payment orders against two of the individual respondents was appropriate to act as a deterrent against further contraventions, as well as a general deterrent, in light of their record of previous contraventions ([46]).

3. In *FWO v Albert*, Collier J found that personal payment orders against two of the individual respondents was appropriate to achieve general and specific deterrence because they both had a record of prior contraventions, they held senior positions in the (then named) CFMMEU, they may apply for an entry permit in the future, their conduct was deliberate, and that one of the individual respondents was now employed by the CFMEUQ did not negate the need for deterrence ([119]-[120]). This latter observation appears to have involved an acceptance of the FWO’s contention that the individual’s having moved from the CFMMEU to the CFMEUQ did not mitigate the need for a personal payment order, as “it would send a message that ‘serial contraveners can escape all liability for their actions simply by moving to a different part of the same organisation’” ([56] (12th dot point)). I do not consider that aspect to affect my overall view about the relevant “purpose” of the orders.

4. In *The Bruce Highway Caloundra to Sunshine Upgrade Case*, Collier J found that personal payment orders against all of the individual respondents was appropriate to act as specific and general deterrence, and in circumstances where, adopting Rares J reasoning from another case, that would be consistent with community expectations and would undermine the rule of law for it to be otherwise ([66]-[69]). There was evidence before Collier J that some of the individuals involved were no longer employed by the CFMMEU but by the CFMEUQ ([9] (last dot point), [35], [38]), and her Honour observed that principles of deterrence may therefore be diminished, but were not rendered irrelevant, by that fact ([35]).

5. In the *BBQ Case*, Judge Vasta found that a personal payment order against one of the individual respondents was appropriate to achieve general and, in particular, specific deterrence, given the official was the Secretary of the Qld/NT Divisional Branch and should therefore have been setting an example, where at

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[21] Justice Logan rejected making a further order which might have prevented the official from crowd funding payment of the penalty, including because it may be difficult to enforce and might prevent e.g. a close relative from providing financial assistance, even if the official was in financial distress.

least one of his contraventions were blatant, and where the deterrent aspect of the penalty must contain the necessary sting or else it will not be an effective deterrent at all ([61]-[66]).