



Hall Payne Lawyers



Attention: Luke Tiley and Dale Blackmore

MEMORANDUM OF ADVICE

RE: PERSONAL PAYMENT ORDERS

Introduction and synopsis

1. Our advice is sought about questions arising from a trend in the Federal Court of Australia to impose personal payment orders on union officials and organisers who have been found to breach the *Fair Work Act 2009* (Cth) and the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth). We have been asked to address the answers to four of the five questions our instructors have raised in a brief dated 2 March 2021. Those questions, and a summary of our answers, are as follows:

Question 1: A personal payment order in its standard format, imposes two obligations on a person. It requires that the union official not seek indemnity from the union and that the union official not accept or receive indemnification from the union. Given the use of the conjunctive ‘and’ in the orders, must a person contravene both obligations to be in breach of the order, rather than just one of the obligations? No—a breach of any obligation is a breach of the order;

Question 2: If a personal payment order prohibits assistance from the CFMMEU, will a person breach the order if she seeks or receives assistance from the CFMMEUQ? No—the State and National organisations are separate entities;

Question 3: If a personal payment order prohibits assistance from the CFMMEU, will a person breach the order if she seeks or receives assistance from another, related entity? Also no—as with the second question, a related entity is nevertheless a separate entity.

Question 4: if a personal payment order prohibits assistance from the CFMMEU, will a person breach the order if she seeks or receives assistance from another, unrelated entity? Again, no—for the same reasons as the answer to questions two and three.

Question 5: counsel's view as to whether there are any other matters that ought to be considered in providing advice of this nature.

2. We set out our reasoning regarding the answers to those questions below. Before setting out that reasoning, we set out some of the principles applicable to the interpretation of court orders. Those principles form the foundation of our analysis.
3. The questions arise from a series of recent cases. In *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non-Indemnification Personal Payment Case) (No 2)* [2018] FCAFC 117 (the “**penalty case**”) the Full Court made orders to give effect to its reasons in *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* (2018) 264 FCR 155; [2018] FCAFC 97 (the “**liability case**”). The Full Court's consideration followed a remittal from the High Court due to its decision in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157; [2018] HCA 3 (the “**personal payment order case**”), where the plurality confirmed that a personal payment order could be made under s 546 of the *Fair Work Act 2009* (Cth).

Interpreting court orders

4. *First*, and importantly, it is the order itself (rather than reasons) which is the “*operative judicial act*.”¹ The distinction is important because different principles are applicable to the interpretation of orders, as against reasons.
5. *Second*, orders are subject to the “*ordinary rules of construction*.”² That is, orders are construed objectively — on their terms, read as a whole.³
6. *Third*, extrinsic material may be regarded if, in construing an order, there is some ambiguity on its face. There are competing intermediate appellate authorities on the

¹ *Driclad Pty Ltd v Federal Commissioner of Taxation* (1968) 121 CLR 45 at 64 per Barwick CJ and Kitto J.
² *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483 at 503 per Windeyer J; *Repatriation Commission v Nation* (1995) 57 FCR 25 at 33 per Beaumont J (Black CJ and Jenkinson J agreeing).
³ *Sandrin v W&M Riggs Mechanical Repairs* [2006] NSWCA 194 at [44] to [45] per Tobias JA (Beazley and Santow JJA agreeing).

question of whether ambiguity is required before recourse to extrinsic material (just as there is controversy over that question in the context of construing contracts). In the Federal Court, the preference seems to be that ambiguity is necessary before recourse to extrinsic material.⁴

Question 1: Two obligations?

7. The first question is:

A personal payment order imposes two obligations on the relevant official and, given the use of 'and' in listing the obligations, it appears that both obligations must be contravened for there to be a breach/contempt of a Court Order, consequently by the use of the conjunctive is the correct position that if a (penalised) official only contravenes one of the obligations that they will not have breached the personal payment order?

8. The answer is 'no'. The use of the conjunctive "and" does not have the effect suggested. An official will breach the order if either obligation is breached. Our reasons for that view are based on an objective interpretation of the standard form of a non-indemnification order.
9. A non-indemnification order might be framed in a number of different ways. However, for present purposes the terms of the order being considered are in this form:

"5. O'Mara [i.e. the union official] pay a penalty of \$12,600 in respect of his contravention of s 47(1) of the BCIP Act.

...

10. O'Mara pay the penalty referred to in order 5 personally in that he not, whether before or after the payment:

(a) seek to have or encourage the CFMMEU in any way whatsoever, directly or indirectly, to pay to him or for his financial benefit in any way whatsoever, any money or financial benefit referable to the payment of the penalty, whether in whole or in part; and

(b) accept or receive from the CFMMEU in any way whatsoever, any money or financial benefit referable to the payment of the penalty, whether in whole or in part."

10. That form of order has two limbs. It seeks to:

(a) prohibit the union official from seeking or requesting payment from the union;

and

- (b) prohibit the union official from accepting or receiving payment of the penalty from the union.
11. And so, the order enjoins the official from encouraging the union to pay his fine. And it enjoins him from accepting such a payment of his fine.
 12. Thus, one could contemplate that a union official might receive an unsolicited payment. That would be prohibited by the second limb. And the order prohibits a union official from seeking such a payment. That would be a breach of the first limb – and it is a breach whether or not the payment was ultimately made in accordance with the request.
 13. In other words, this form of order is directed at prohibiting the official from seeking payment **and** it prohibits the official from accepting a payment.
 14. Viewed in that way, the form of order makes sense. The union official is enjoined from requesting or accepting such a payment.
 15. And, interpreted in that way, this type of order must be seen to be using the word “and” in its literal sense. The union official breaches such an order if he or she seeks payment but does not receive payment. And the union official breaches such an order if he or she does not seek payment but nevertheless accepts payment.
 16. In our view, given the substantive content of this form of non-indemnification order, it would make no sense to interpret the order as requiring both a request and a payment. The order requires that the official not ask for such a payment and that he or she not accept any such payment.

Question 2: CFMMEU or CFMEUQ

17. The second question is:

The Federal Court refers directly to the CFMMEU in the imposition of a personal payment order but does not refer to the CFMEUQ. Will a (penalised) official have breached their personal payment order if they have:

agreeing).

(a) sought to have or encourage the CFMEUQ to pay to him or for his financial benefit in any way whatsoever, any money or financial benefit referable to the payment of the penalty, whether in whole or in part; and

(b) accepted or received from the CFMEUQ in any way whatsoever, any money or financial benefit referable to the payment of the penalty, whether in whole or in part,

18. A state system of industrial registration exists in Queensland, regulated by the *Industrial Relations Act 2016* (Qld) (“**IR Act**”), which runs parallel to the federal system of industrial registration, regulated by the Registered Organisations Act. The consequence of there being two systems is that it is common for a federally registered entity and a state registered entity to represent the same, or a substantially similar, group of members.
19. An organisation registered under either act is a body corporate with a distinct legal personality (s 27 of the Registered Organisations Act and s 611 of the IR Act). Thus, the Construction, Forestry, Maritime, Mining & Energy, Industrial Union of Employees, Queensland (“**CFMEUQ**”) is a separate and distinct entity from the Construction, Forestry Maritime, Mining and Energy Union (“**CFMMEU**”). That the members and office-holders of the CFMEUQ may be sub-sets of the members and office-holders of the CFMMEU is beside the point.
20. With that in mind, it is again useful to consider the typical form of the order, which was first made in the penalty case. The form of that order has not been departed from in any case since then. In the penalty case, the Full Court relevantly ordered:
 9. *The second appellant pay the penalties in paragraphs 4-6 above (**Penalties**) personally in that he not, whether before or after the payment of the Penalties:*
 - (a) seek to have or encourage the [CFMMEU] in any way whatsoever, directly or indirectly, to pay to him or for his 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*
 - (b) accept or receive from the [CFMMEU] in any way whatsoever, any money or financial benefit referable to the payment of the Penalties, whether in whole or in part.*
21. Thus, the order enjoins the second appellant from seeking or accepting payment or money from the CFMMEU. Therefore, the fact of the CFMMEU and CFMEUQ being separate entities means the answer is ‘no’ to both parts of the second question. In other

- words, the second appellant is entitled to seek or accept payment from the CFMEUQ.
22. However, we hasten to add that there may well be significant consequences arising from what many would perceive as the same entity assisting the union official.
 23. For example, the ABCC may allege that the CFMEUQ was in contempt of the order because, in reality, the payment was requested from the CFMMEU and paid by the CFMMEU. The defence of such a claim would depend upon there being evidence that, in fact, both the request was made of the Queensland organisation and that the payment was made by the Queensland organisation.
 24. The existence of common directors and related financial affairs would be likely to raise difficult evidentiary issues.

Question 3: Other entities

25. The third question is:

There exists a number of entities/associations in which relevant officials are members who financially contribute via a membership fee to allow those entities/associations to achieve their objectives, which may include advancing the interests of members by providing financial support. [Such as OCF Ltd] Will a (penalised) official have breached their personal payment order if they are assisted in funding the personal payment order by one of these entities?
26. The separate entity doctrine has the same effect here as with the answer to question 2. It is from the CFMMEU that the relevant official is enjoined from seeking assistance under the form of personal payment order currently used by the Federal Court. An official is therefore not enjoined from seeking assistance from any other legal entity—company or individual. If a union official could ask a friendly aunt to pay the penalty without contravening the order, then he could ask a separate corporate person, such as OCF Ltd, for example.
27. As an aside, it seems the objects of OCF Ltd are not wide enough to permit payment from that entity. But that should not present a problem for two reasons. First, the objects can be amended if desired. And second, the CFMEUQ could provide assistance in any event.

Question 4: Other registered organisations

28. The fourth question is:

Similarly, if a (penalised) official was assisted in funding the personal payment order by an unrelated entity, registered under either the FW(RO)A or the IR Act, will a (penalised) official have breached their personal payment order?

29. For the same reasons as expressed for the second and third question, the answer is 'no'.

Question 5: Other matters

30. We have not been asked to address the fifth question at this stage. Notwithstanding that, we consider it prudent to briefly raise two other topics that ought to be considered in the context of this advice. The *first* topic is the possibility that the ABCC might initiate contempt proceedings. It is easy to envisage that the regulator might be incensed by the non-indemnification order being evaded by an indemnification from the CFMEUQ of what is in substance the same union. However, there may be little that the regulator could do if the evidence was clear that the official did not seek or accept the payment or money from the CFMMEU.
31. The *second*, and related, topic is the political or reputational consequences of having the CFMEUQ assist a person subjected to a personal payment order. Our answers above must be considered in the context of those topics and we would be pleased to address them at our instructors' convenience.
32. We would also be pleased to provide any further advice or consider further questions that arise from this advice.

With Compliments,

PAUL FREEBURN

HAMISH CLIFT

Chambers
28 April 2021