HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT

No. B41 of 2024

BETWEEN: **Australian Competition and Consumer Commission**
Appellant

and

J Hutchinson Pty Ltd (ACN 009 778 330)
First Respondent

Construction, Forestry and Maritime Employees Union
Second Respondent

No. B42 of 2024

BETWEEN: **Australian Competition and Consumer Commission**
Appellant

and

Construction, Forestry and Maritime Employees Union
First Respondent

J Hutchinson Pty Ltd (ACN 009 778 330)
Second Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION

PART I INTERNET PUBLICATION

1. This outline is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

NO RULE OF LAW AS PER THE ACCC'S SUBMISSIONS (AS) [37]

2. Section 45E(3) of the CCA requires a meeting of minds, even if the conduct relied upon for the contravention is or includes conduct which is also said to give effect to the arrangement or understanding and which therefore contravenes s 45EA. **J [112]** (AB 218) is not in error: CFMEU's submissions (**CS**) [20], [23].

3. The gravamen of the contravening conduct in s 45E is not merely the first party making the threat or the second party doing the thing demanded of it by the threat. Contravention is established only by the necessary, additional step that the parties communicated to each other that the second party would behave as demanded. There are no special rules for the category of "threat" and "succumbing". There must always be an enquiry, into all the facts, including as to the terms of the threat, the form of alleged succumbing, how it relates to the threat in time and circumstance, how (if at all) it was communicated to the first party and the response the second party made to it: CS [25], [38].

4. The cases the ACCC relies upon do not support AS [37]: CS [39]-[59]. Nor do the contract cases assist the ACCC: CS [60]. Even there an act will not constitute both formation and performance of a contract without need for further communication unless (a) the offeror has dispensed with the need for communication and (b) the act was done on the faith of, by reference to, or as, the quid pro quo for what moved from the first party: *R v Clarke* (1927) 40 CLR 227 at 233 (JBA 4: 748); *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 CLR 424 at 456-457 (JBA 3: 257-258).

FULL COURT CORRECTLY FOUND ERROR BY THE PRIMARY JUDGE

5. First error: the conduct at the meeting on 11 June 2016 could not of itself evidence the alleged arrangement or understanding: **LJ [207]-[209]** (AB 55-56); **[340(18)], [340(19)]** (AB 87), ABFM 13, **FC [60]-[61]**, **[187]** (AB 196, 252), CS [31]-[32], [62]-[64].

6. Second error: the conduct of neither party nor the communications between them between 11 June 2016 and the ultimate termination of the WPI subcontract in late July 2016 supported the inference, consistent with the high standard applicable to a civil penalty, that an "arrangement" or "understanding" had been made or reached on or shortly after 11 June

2016. None of the matters the primary judge characterised as "manifestation[s] of mutual consent to carry out a common purpose" (such purpose being that Hutchinson would cease to acquire waterproofing services from WPI at the Southpoint project and would terminate the WPI subcontract) could be so characterised. In particular:

(a) The conversation between Mr Steele (CFMEU) and Mr Meland (Hutchinson) in which Mr Steele said: "Ray won't be doing your waterproofing, he won't be able to get an EBA" and "Why don't you use someone like Spanos, they've got an EBA" was nothing more than a reiteration of the CFMEU's threat. The conversation did not include any statement from Mr Meland evidencing that a contravening arrangement or understanding had been made earlier or was now being made: **LJ [340(24)]-[340(25)]** (AB 88-89); **FC [63]-[64], [183]** (AB 196-197, 251), CS [65]-[66]

(b) Mr Clarke (CFMEU) informing WPI that it needed to call Mr Vink (CFMEU) to "get a go ahead with work"; Mr Vink being uncontactable until 4 July; Mr Steele also being uncontactable; and the CFMEU not responding to WPI's email of 13 July was wholly neutral evidence. It did not support an inference that the necessary state of mind was present when the arrangement or understanding was said to have been reached at an earlier point time and was inconsistent with Mr Clarke having the requisite knowledge that a contravening arrangement or understanding existed: **LJ [340(27)], [340(31)], [340(32)]** (AB 90); **FC [65]-[67], [184]-[185]** (AB 197-198, 251-252), CS [67]-[69].

(c) The conversation on 19 July 2016 between Mr Meland and Mr Berlese (Hutchinson) about terminating the WPI contract in which Mr Berlese told Mr Meland to "deal with it" was nothing more than unilateral conduct by Hutchinson and provided no support for the inference of a contravening arrangement or understanding. Critically, there is no evidence, or finding, as to when or how Clarke/Steele learnt of Hutchinson's unilateral decision or what, if anything, they did in response: **LJ [340(33)]** (AB 91); **FC [68]-[69], [186]** (AB 198-199, 252), CS [70]-[72].

ACCC'S CASE BEFORE THIS COURT

7. The ACCC attempts to reconstitute its case, albeit its parameters are inherently slippery:

(a) The ACCC's case slides between defending that the contravening arrangement or understanding was reached or made on 11 June 2016 and postulating that it occurred on some later, but yet still unidentified, date: AR [8]-[10].

(b) Its case rests on an indefinite notion of "exclusion" or "succumbing" the limits of which on the facts were exposed by Wigney J at **FC [71]-[72]** (AB 199). There is "a

paucity of evidence as to how WPI was supposedly excluded from the site, or who was responsible for excluding it, or when that exclusion occurred": **FC [71]** (AB 199), CS [73], [81]. Mr Thone's evidence does not undermine that analysis: AR [9], Thone affidavit and cross-examination (ABFM 87-88, 135; ASBFM 6).

(c) The ACCC ignores most of the facts and the Full Court's reasons for finding error with the primary judge's findings: CS [64], [66], [69], [72], [74], [81].

(d) How the CFMEU's threat, on all the facts, was "exhaustive" (cf AS [37]) and dispensed with any need for communication of acceptance is not explained.

(e) The factual case asserted at AR [3] is not available to the ACCC on how the case was run or fact findings made in either Court below.

NO CONCRETE FINDINGS ON SUBJECTIVE PURPOSE

8. Section 45E(3) requires each party to the arrangement or understanding to have had the subjective purpose, which the section proscribes, for including the impugned provision: **LJ [342]** (AB 91-92); **FC [114], [120]** (AB 218, 225), CS [75]. There are no clear findings from the primary judge as to which officer from each respondent held the proscribed purpose or when, or what evidence is relied upon to make good that purpose: CS [77]-[79].

9. Mr Clarke: As to the events involving him (**LJ [340(19)], [340(27)], [340(28)]**, AB 87, 89-90) not all of the conversations were put to him in cross-examination; no questions were put about his purpose; and he was asked no questions about when or how he learnt that the services of WPI were no longer being required or how he responded: CS [79].

10. Mr Steele: As to the events involving him (**LJ [340(18)], [340(19)], [340(24)], [340(27)], [340(32)]**, AB 87, 88, 89, 90), not all of the conversations were put to him; no questions were put about his purpose; and the most that was obtained was that he would have learnt "eventually" that WPI's services were no longer being required: CS [79].

NO ACCESSORY LIABILITY

11. The principal contraventions failing, the CFMEU could not be liable as an accessory. In any event, the ACCC never sought to establish the necessary predicate that Mr Clarke or Mr Steele knew the essential facts grounding Hutchinson's alleged contraventions.

Justin Gleeson SC **Megan Caristo** **5 December 2024**