HIGH COURT OF AUSTRALIA

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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

SUBMISSIONS OF THE CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION

Part I: Certification

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

Part II: Statement of issues

2. This proceeding concerns whether the evidence before the primary judge supported, on the balance of probabilities, an inference that J **Hutchinson** Pty Ltd and the Construction, Forestry and Maritime Employees Union (**CFMEU**) (together**, the respondents**) had made an arrangement, or arrived at an understanding that contained the **boycott provision**, being a *"provision included for the purpose, or purposes including the purpose"* of *"preventing or hindering"* Hutchinson *"from acquiring or continuing to acquire"* waterproofing services from Waterproofing Industries Qld Pty Ltd (**WPI**) at the Southpoint site within the meaning of ss 45E(3) and 45EA of the *Competition and Consumer Act 2010* (Cth) (**CCA**). The primary judge answered "yes" (*ACCC v J Hutchinson Pty Ltd* [2022] FCA 78; 404 ALR 553 (**LJ**)); the Full Court answered "no": *J Hutchinson Pty Ltd v ACCC* [2024] FCAFC 18; 302 FCR 79 (**J**).

3. The first issue is whether the single ground of appeal (Appeal Book (**AB**) 276) accurately captures the basis on which the Full Court set aside the decision of the primary judge. The answer is "no".

4. The second issue is whether the Australian Competition and Consumer Commission (**ACCC**) is correct in asserting that there is a rule of law, or a presumptive mode of reasoning, for the purposes of s 45E(3) that a threat followed by acquiescent conduct equals the making of an arrangement or the arriving at an understanding (absent proof of a commercial reason for the conduct which is wholly independent of the threat).

5. The answer, also, is "no". The enquiry under s 45E(3) always depends upon all the primary facts proven and inferences properly available assessed against the standard of s 140 of the *Evidence Act 1991* (Cth) which, in this case, includes that the matters alleged against the respondents were serious and the consequences likely to flow from a finding they had contravened s 45E were grave: see J [82], **AB 202-203** (Wigney J). Neither authority, nor settled principles of statutory construction, demand that the enquiry be shoehorned into the limiting proposition asserted by the ACCC.

6. The third issue is whether the ACCC has identified error in the reasons by which the Full Court found error in the primary judge's findings that the respondents had made

an arrangement or reached an understanding which included the boycott provision.

7. The answer, yet again, is "no". The ACCC failed to establish that the threat made by the CFMEU on 11 June 2016 lead to a response by Hutchinson on or about that date (which was the date found by the primary judge) in which Hutchinson communicated a "meeting of minds" under which Hutchinson would cease to acquire the services of WPI and further, that it would terminate the WPI subcontract (that is, that it would **boycott WPI**). The Full Court reviewed all the evidence and findings of conduct – both on that date and after that date, up until Hutchinson terminated the services of WPI on 26 July 2016 – and correctly found that it did not evidence an alleged arrangement or understanding being made or reached on or about 11 June. Nor did the ACCC identify any date later than 11 June 2016 on which the alleged arrangement or understanding was made or reached or who made or reached it on either side.

8. The fourth issue is whether each respondent subjectively held the "proscribed purpose". The answer is "no". The ACCC has never squarely identified, let alone proven, which officer or officers of each respondent held the proscribed purpose.

9. The appeal should be dismissed with costs. If the ACCC succeeds on its single ground of appeal, the order it seeks at **AB 277** overreaches. The CFMEU's appeal against penalty has not been determined and must be remitted to the Full Court: **AB 169**, J [87]-[93], **AB 204-206**, [208], **AB 258**.

Part III: Section 78B of the Judiciary Act 1903 (Cth)

10. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

Part IV: Material facts

11. There are several problems with the ACCC's recitation of the facts in its submissions (**AS**) [2], [9]-[17].

12. The first problem is that the ACCC asserts that from on or about 11 June 2016, WPI was *"excluded"* from the site: **AS [2]**. The ACCC asserts that this finding was made by the primary judge and *"formed part of the factual substratum on which the reasoning of the plurality of the Full Court was based"*: **AS [12], [14]**.

13. It is true that the primary judge used the language of *"continued exclusion"* of WPI from the site after 11 June 2016: see LJ [340(22)], **AB 88**. However, as Wigney J in the Full Court correctly analysed at J [14] and [71], **AB 185, 199**, while WPI did not

perform any waterproofing at the Southpoint site after 11 June 2016, the evidence did not support the conclusion that it was *"excluded"* from the site from that date. Rather, it is more accurate to say that WPI did not provide any waterproofing services on the site after 11 June, with the evidence suggesting that no such work was required until some time in July 2016. Indeed, this is what the primary judge found at LJ [340(30)], **AB 90**: the only finding as to a need to perform waterproofing work after 11 June 2016 was work in the substation area on site *"in around July 2016"*. LJ [252], **AB 64**, which notes that work needed to be undertaken in July 2016, is to the same effect.

14. Accordingly, the earliest possible dates upon which it could be suggested that there was any form of "exclusion" of WPI from the site was 13 July 2016 when rival water proofer, Spanos, was inducted on the site; 20 July 2016 when Spanos commenced the waterproofing work; or 26 July 2016 when the WPI subcontract was terminated: see LJ[251]-[252], [277], [340(3), (30)], **AB 64, 70, 90**.

15. As to the joint judgment in the Full Court, the passages cited at **AS [12]** and **[14]** do not represent an adoption of a finding by the primary judge that WPI was "excluded" from the site on and from 11 June 2016. They simply repeat the entirety of the summary findings of the primary judge and then proceed to identify multiple errors in those findings sufficient to allow the appeal. Indeed, when their Honours went on to refer to Hutchinson *"succumbing"* to the ongoing demands and threats of the CFMEU (J [172], [176], [177], [187], **AB 245, 247, 252**) they do not embrace any finding that WPI was *"excluded"* from the site on and from 11 June 2016 or that Hutchinson had *"succumbed"* to the CFMEU's threats and demands from as early as that time.

16. The second problem with the ACCC's summary of the facts at **AS [12]-[14]** is that it omits significant aspects of the facts: see sections (c) and (d) in Part V below. Once all the findings are considered, it becomes clear why the ACCC failed. There was no arrangement or understanding reached on or about 11 June 2016. Indeed, up until the middle of July 2016, efforts were being made by Hutchinson and (to a lesser extent) the CFMEU to enable WPI to carry on work on the site once it was required: see LJ [244]-[249], **AB 63**. That those efforts ultimately were unsuccessful does not retrospectively convert the discussion on 11 June 2016 into one in which an arrangement was made or an understanding was reached, let alone one with the proscribed subjective purpose on each side.

17. The third problem with the ACCC's summary of the facts is that **AS [15]-[17]** incompletely and inaccurately summarise the basis of the primary judge's decision, the case pressed by the ACCC at trial and on appeal, and the findings of the Full Court on appeal: see section (a) in Part V below.

Part V: Argument

(a) Issue 1: the reasons the Full Court interfered with the primary judge's decision

18. The single ground of appeal (**AB 276**) asserts that the Full Court made a finding which can be broken down into two parts: (a) an arrangement or understanding for the purposes of s 45E(3) of the CCA requires communication of assent to an arrangement or understanding that precedes and is distinct from conduct giving effect to the arrangement or understanding; such that (b) Hutchinson succumbing to a threat by the CFMEU and responding by doing what was demanded under the threat of industrial action was insufficient to give rise to an arrangement or understanding. The assertion in the ground of appeal is repeated at **AS [4], [5(2)], [14], [18], [42], [50]**.

19. The key paragraph in the joint judgment which the ACCC cites is J [112], **AB 218**. On analysis, that paragraph does not assert the propositions attributed to it by the ACCC. J [112] sits within a series of paragraphs in which their Honours survey the relevant authorities: J [103]-[114], **AB 211-218**. In particular, the joint judgment refers at J [109], **AB 216-217** to the observations in *ACCC v BlueScope Steel Ltd (No 5)* [2022] FCA 1475 (from which an appeal is currently reserved) at [106]-[108] that an "understanding" involves a common mind (or consensus) as to a particular course to be followed. This requires the persons to have communicated their assent to adopting that course of conduct.

20. At J [111], **AB 217-218** the joint judgment recognised that the primary judge had correctly acknowledged at LJ [329], **AB 83** the need for a communication of assent to the course to be adopted. Down to this point, there could be no objection to what their Honours are saying. Turning to J [112], **AB 218**, the propositions being made can be broken down as follows: (a) merely succumbing to a threat will not, without more, be enough for the purposes of establishing a contravention of s 45E(3)(a); (b) a contravention of s 45E(3)(a), which arises through the making of the arrangement or arriving at the understanding, logically precedes any further contravention of s 45EA by giving effect to the provision of the arrangement or understanding; (c) to make out

a contravention of s 45E(3)(a) a meeting of minds or its equivalent is required; (d) a meeting of minds must be manifested in some kind of communication; and (e) the existence of the relevant communication and the meeting of minds may be inferred if there is a sufficient basis to support the inference.

21. It follows that the first part of the single ground of appeal has confused a point being made about the relationship between ss 45E(3) and 45EA(1). The joint judgment was not saying that conduct in the alleged implementation of the alleged arrangement or understanding can *never* be evidence from which the contravention of s 45E(3)(a) is inferred: contra **AS [17]**, **[18]**. In fact, the joint judgment later said that there *could* be evidence of this character (J [134], **AB 231**), which was why the Full Court proceeded to analyse all the conduct of the respondents after 11 June 2016 to see whether it allowed the inference that the alleged arrangement or understanding had been reached on or about that date: J [179]-[188], **AB 248-252**.

22. What the joint judgement was cautioning at J [112], correctly, was that in a case such as this one where the ACCC alleges contraventions of *both* ss 45E(3) and 45EA, it is critical to keep distinct how the common body of evidence is to be used for the separate alleged contraventions: (a) under s 45E(3), conduct post 11 June 2016 could be used to found an inference of an arrangement or understanding being reached on or about 11 June provided the right question is being asked: how far, if at all, does one or other party doing X at a later date really cast light on whether the two parties had, at the earlier time, reached a consensus that one of them would behave in a particular way? (b) Whereas, under s 45EA, the very same conduct might have a different evidentiary use: provided it has already been established, in light of the whole body of evidence, that the arrangement or understanding had been reached on or around 11 June, the later doing of X might be direct evidence of the *carrying into effect* of the arrangement or understanding which is a necessary element of the separate contravention.

23. As to the second part of the single ground of appeal, one of the points being made at J [112] was that, consistent with all the authorities, the moving party must prove, on all the evidence, that there was a meeting of minds between the alleged contraveners that at least one of them would take a particular course of action.

24. Merely to prove that one party made a threat that it would do X if the other did not do Y, and that the other party at some point in time (here much later) did Y, does not *of*

itself or *necessarily* prove that there has been a meeting of minds that the second party would do Y. There always remain two distinct possibilities, only the second of which is prohibited by s 45E(3): (a) while the threat was *a* reason or *the* reason for the second party acting as it did, the second party made its decision without having bound itself to the first party so to act or (b) in response to the threat, the second party by some means manifested to the first party its assent that it would do as demanded of it.

25. The gravamen of the contravening conduct is not merely the first party *making* the threat, and equally not merely 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 in the manner demanded. It is that which establishes the 'boycott'. The focus must remain on all the facts and conduct of both parties. If the second party *"*succumbed*"* to the threat, to use that term*, when* did it do so relative to the threat? *When* (if at all) did it tell the first party that it was intending to, or had already done so? In *what terms* did it do so?

26. Purportedly drawing upon Issacs J in *R v* ***Associated Northern Collieries*** (1911) 14 CLR 387 at 400, and with reference to the findings and circumstances set out at LJ [340], **AB 85-91**, the primary judge found (at LJ [339], **AB 85**) that *"a consensus was reached between Hutchinson and the CFMEU pursuant to which they committed to a particular course of action, namely that WPI would not be allowed back on to the Southpoint site with the end result that Hutchinson"* would boycott WPI.

27. The primary judge did not make express findings at LJ [340] or elsewhere as to when Hutchinson "succumbed" to any threat by the CFMEU or when it told the CFMEU it intended to succumb to the threat or the terms on which it would do so.

28. The primary judge's error was exposed in the Full Court.

29. The joint judgment carefully examined the factual findings at LJ [340]. It held that the evidence that her Honour relied upon at subparagraphs (25), (27), (32) and (33) as being *"manifestation[s] of mutual consent to carry out a common purpose"* assumed the existence of the arrangement or understanding made or reached on 11 June 2016 to give a malign interpretation to what was said or done by the CFMEU after that date to manifest consent to an arrangement or understanding: J [181], **AB 250**. The joint judgment (at [181]) accepted the respondents' submissions that *"each of these later manifestations were equally explicable as reflecting the CFMEU's unilateral demand*

that Hutchinson cease using WPI to provide waterproofing services, and its determination that this use of WPI would not take place, as they were of reflecting any meeting of the minds as to an arrangement or understanding".

30. The joint judgment explained that the findings at subparagraphs (25), (27) and (32) did not amount to findings that there was assent but were *"at most some measure of corroboration for such a finding already independently reached"* and could not support an inference that the necessary shared state of mind was present when the arrangement or understanding was to have been reached earlier on 11 June 2016: J [183]-[185], **AB 251-252**. As to the finding at subparagraph (33), the joint judgment held that it was directed only to Hutchinson and added nothing to the more critical issue of assent by the CFMEU: J [186], **AB 250**.

31. The joint judgment concluded that the conversation on 11 June 2016 between Mr Clarke, the CFMEU delegate at Hutchinson, and Mr Meland of Hutchinson did not establish any more than unilateral parallel action by Hutchinson in response to threats by the CFMEU and that, taken as a whole, the evidence at subparagraphs (25), (27), (32) and (33) did not advance in any material way the 11 June conversation as a basis for finding that the requisite shared state of mind existed: J [187], **AB 252**.

32. That conclusion is clearly correct, especially having regard to the lack of direct evidence and to the paucity of findings by the primary judge as to (a) when, where and how the arrangement was made or understanding was reached and who made or reached it (J [36]-[38], [63], [77], **AB 189, 196-197, 201**) and (b) whether, when and how Hutchinson communicated to the CFMEU that it had boycotted WPI: see, eg, LJ [340], **AB 85-91** which makes no finding on these matters. It is also consistent with Mr Meland's actions after 11 June; as the Full Court observed when dismissing the ACCC's notices of contention, it makes no sense for Mr Meland to have had any awareness or understanding that the proscribed arrangement or understanding had been made or reached by 11 June to boycott WPI, and then try to get an Enterprise Bargaining Agreement (**EBA**) for WPI after that time: J [192], **AB 254**, see also J [16], [44], [72], **AB 185, 191, 200** (Wigney J).

33. In short, the true basis of the joint judgment's conclusion was that, taking into account what was proved as to the events on the critical date of 11 June 2016 (including the CFMEU's threat and demand), and everything relied upon by the ACCC after that date

(including what later emerged as Hutchinson refusing the services of WPI) the ACCC had failed to prove that there was a meeting of minds on or about 11 June 2016 that Hutchinson would boycott WPI: J [177]-[188], **AB 247-252**.

34. It is equally clear that Wigney J did not make the error imputed by the ACCC. His Honour summarised the primary judge's key findings at J [32]-[38], **AB 187-189** with particular reference to LJ [335]-[340]. Wigney J correctly identified the relevant question at J [54], **AB 194**. At J [57], **AB 194-195** his Honour identified the five aspects of the conduct the ACCC relied upon to establish its case. The first concerned the conduct on 11 June 2016 (including the CFEMU's threat and demand). The remaining four concerned conduct after 11 June in the alleged implementation of the alleged arrangement or understanding (including Hutchinson's alleged succumbing to the CFMEU's threat and demand). His Honour addressed the five aspects at J [60]-[70], **AB 195-199** and found that the ACCC's case failed on the facts.

35. On appeal to the Full Court the ACCC did not argue by way of notice of contention an alternative case for the existence of the arrangement and understanding at some later date: J [134], **AB 231**. On the contrary, it wedded itself to the 11 June 2016 date. If there was to be an argument of error in the Full Court, it would need to address how the Full Court dealt with the post 11 June 2016 events, the whole of them, as evidence or not of an arrangement or understanding made or reached on 11 June 2016. The ACCC does not surmount that task. Most of the post 11 June 2016 events it either ignores or does not examine in their full detail and context. Instead, at a high level of generality and imprecision, it asserts there was threat and demand followed by exclusion of WPI and thus succumbing to the threat and it says that that is sufficient, absent a wholly independent reason for Hutchinson to act as it did: see **AS [50], [59]**.

36. This new case presents numerous problems: (a) it is not clear if the ACCC is shifting from 11 June 2016 to some later date, and if so what that date is; (b) because 'exclusion' and 'succumbing' are asserted at such a high level of generality, the ACCC does not precisely identify when the conduct occurred, who did it, and what precisely it consisted of – was it merely not inviting WPI to come onto the site and do work while WPI was sorting out if it could get an EBA with the CFMEU? Was it on 13 or 20 July 2016, when waterproofing was required and Spanos was given the job not WPI? Was it 26 July 2016 when the formal termination of WPI's subcontract

occurred? This precision is necessary because without it one cannot identify *who* was responsible for including the provision in the arrangement or understanding which will in turn ground the purpose enquiry: see further [75]-[80] below.

37. A further shift may be occurring in the ACCC's case before this Court. If the arrangement or understanding is said to be made by the 'exclusion' or 'succumbing', and that occurred *post* 11 June 2016 on a date to be identified, the post 11 June 2016 events are being used not for an *Associated Northern Collieries* purpose to evidence an 11 June 2016 arrangement or understanding, but instead to evidence an arrangement or understanding made on that later date. That is, they become direct evidence of the arrangement or understanding. To the extent, which is unclear, the ACCC is attempting to run a case at some later point in time, it is too late and cannot be permitted.

38. In any event, mere 'exclusion' or 'succumbing' to a threat cannot constitute the arrangement or understanding unless it was communicated to the CFMEU in a way that manifests consensus. Therefore it becomes necessary, having identified the precise act of exclusion or succumbing, to consider how and when it was communicated to the CFMEU and the CFMEU's response. The ACCC has never done that.

(b) Issue 2: response to the ACCC's substantive contentions of law

39. The ACCC's core contention is as follows (**AS [37]**): *"Where acquiescent conduct is carried out in response to an express communication of a demand for that conduct and a threat if that conduct is not performed, there is sufficient basis to find that a "meeting of minds" has occurred between the parties"*. That contention is subject to one qualification: the *"sufficient basis"* (whether it be understood as a rule of law or a presumptive mode of reasoning) is displaced if there is proof that the acquiescing party had a commercial reason for acting in the manner demanded which is wholly independent of the threat: **AS [37]-[41]**. The core contention derives no support from the many cases cited by the ACCC.

40. The first case is the early decision of Lockhart J in ***Leon Laidley*** *Pty Ltd v TWU* (1980) 42 FLR 352 at 357 and 366: **AS [22]-[23]**. The ACCC asserts that *Leon Laidley* is *"relevant"* because, on the facts, Amoco did no more than succumb to the union's demand and did not separately communicate its assent to that demand.

41. Nothing in *Leon Laidley* supports **AS [37]**. It concerned an interlocutory application to restrain the union from engaging in conduct contrary to an earlier and different

version of the relevant provision, which was then s 45D (which is reproduced at 352-353). Under s 45D, the parties to the contravention were solely the union and its officials; Amoco could not be charged as a primary contravener and was not charged as an accessory. Thus there was no occasion for Lockhart J to explore the manner and extent to which Amoco communicated assent to the union's demand; but, as it happens, Amoco *did* communicate and express assent or agreement to the union's demand that Amoco cease supplying Leon Laidley beyond merely succumbing to it.

42. As to the last point, all of pages 355-358 need to be considered, not simply the single sentence extracted at **AS [23]**. The core facts were that on 15 February 1980 there were a series of meetings between Mr Buck, the Amoco representative, and the officials of the union. The Amoco employees went out on strike and made clear their concern was Amoco supplying fuel to Leon Laidley and its service stations in the metropolitan area: at 355.9-357.2 After various meetings and discussion of proposals, on 18 February 1980, the Amoco employees resolved to remain on strike until 17 April 1980: at 357.5.

43. On 18 February Mr Buck was informed that the employees would remain on strike for the next two months: at 357.7. There was then a further meeting between Mr Buck and the union officials that day at which Mr Buck said: "*Due to a situation beyond our control we will be unable to supply Leon Laidley because of a force majeure, due to a situation which has been created by the union"*: at 357.8. The union official then said "*because of the company's action the men will return to work immediately"*: at 357.9. Employees of Amoco resumed work on 19 February (at 358.2) and Mr Buck informed Leon Laidley *"I am unable to supply you because of force majeure situation created by the union*": at 358.3. This was confirmed by letter that day: at 358.4.

44. Had the facts of *Leon Laidley* arisen under the current s 45E(3), and contra the ACCC's presentation of them, there was an express communication between Amoco and the union on 18 February that evidenced the meeting of minds that was then acted upon by Amoco on 19 February in ceasing supply to Leon Laidley. Amoco did more than succumb to a threat; it told the union in advance of its action that that was exactly what it would do to extract the *quid pro quo* from the union that they would bring an immediate end to the threatened two-month strike.

45. Finally, the ACCC asserts that *"[t]he genesis of [s 45E] was the conduct at issue in Leon Laidley"*: **AS [22]**. To the extent that that submission suggests that s 45E was

directed to the facts of *Leon Laidley*, as presented by the ACCC, it should be rejected as it is not borne out by the part of Hansard upon which the ACCC relies (**AS footnote 16**).

46. The second case is ***CEPU v ACCC*** (2007) 162 FCR 466: see **AS [24]-[26]** and **[36]**. This case also does not stand for the proposition at **AS [37]**. Rather, when regard is had to the reasoning at [147]-[167], the conclusion was that the relevant arrangement or understanding was made or reached by 23 or 24 August 2001 (as pleaded). This conclusion had regard to all the parties' conduct between 9 August 2001, when the union made its demand, and 23 August, when it was resolved that the union would sign a site agreement. Again, the contravention was not established merely by a threat followed by acquiescent conduct. One of the additional relevant factors was the further conduct by the union in signing the site agreement when the principal had already acted as demanded. The factual material also included a letter from the principal to the union expressly communicating its acceptance of the demand on 13 August: [153].

47. Finally on this case, the ACCC's reliance upon what the Court said about the legislative history of s 45E at **AS [24]-[25]** misrepresents what the Full Court said in the passages cited. **AS [24]** distorts [194]. What the Court actually said was:

> The behaviour of which s 45E(3) particular strikes will be where the 'first person' succumbs to an abuse of power by an organisation of employees and includes a proscribed provision not wanting to bring about the result but appreciating that that is the end that will be achieved by doing so.

48. **AS [24]** omits the critical words *"includes a proscribed provision"*. It is not merely the succumbing to the threat; it is succumbing to the threat by including the proscribed provision with appreciation that this is the end that will be achieved by doing so.

49. **AS [25]** goes nowhere. Although the addition of the concepts "arrangement or understanding" may evince a legislative intention to broaden the reach of s 45E, in the same passage in *CEPU v ACCC* cited at AS [25], the Court also referred to the need for a judge to consider all the evidence. And, in the subsequent paragraph ([140]), it rejected the approach of the union in that case of dissecting each piece of evidence rather than considering that evidence in the context of other pieces of evidence in determining whether an "arrangement or understanding" has been made or reached.

50. The third case is ***Rural Press*** *Ltd v ACCC* (2002) 118 FCR 236 and the appeal to the

High Court ((2003) 216 CLR 53): **AS [34]**. That reliance also goes nowhere. The High Court found no error in the Full Court's decision on arrangement or understanding and in its brief remarks on that issue suggested that whether an arrangement or understanding has been made or reached is a fact intensive exercise not to be reduced to the limiting proposition propounded by the ACCC. Notably, in that case, the Court observed that the acquiescing party had communicated its assent to the demand to the other party on a specific date: [34] (Gummow, Hayne and Heydon JJ, with Gleeson CJ and Callinan J agreeing at [2] and Kirby J agreeing at [108]).

51. The fourth case is *Building Workers Industrial Union of Australia v* ***Odco*** *Pty Ltd* (1991) 23 FCR 104: **AS [35]**. The submission at **AS [35]** that *"there was no evidence that CUB expressly or specifically communicated its assent to the union's demand"* in that case is contrary to the indication at 128.1 that there *was* such evidence. This is confirmed by the primary judge's findings in *Odco Pty Ltd v BWIU* (unreported, 24 August 1989, Woodward J) at 147 that the evidence of Mr Byrne, the site manager:

> was that it was generally agreed between CUB and the union representatives that Troubleshooters would not be on site in future. *Oliver [a union official] said that Black [the CUB project manager] told him he would fix the matter up in a day or two and that he, Oliver, had accepted this.* (emphasis added).

52. Moreover, *Odco*, which concerned ss 45D and 45E of the *Trade Practices Act 1975* (Cth), did not challenge that an arrangement or understanding had been made or reached. Rather, the appeal was that the primary judge erred in relation to the inferences which he drew from the primary facts, especially regarding the involvement of particular individuals, as well as the purpose for which acts were done: at 127.4.

53. The fifth case is *Keith Russell Simplicity Funerals Pty Ltd v Cremations Society of Australia (ACT) Ltd* (1982) 57 FLR 472: **AS [39]**. *Keith Russell* was a case in which no contravention was found, even at a prima facie level: at 476. The ACCC seeks to distinguish *Keith Russell* on the ground that there was *"no evidence"* in that case that the union had made a demand or threat to the respondents to which they had capitulated: **AS [39]**. However what Franki J actually said at 476 was: *"There is no evidence that the fourth and fifth respondents have done more than give effect to an ultimatum which they received from the union that its members would not perform tasks upon or in relation to bodies provided for cremation by the applicant*".

54. Thus, contra the ACCC's submissions, *Keith Russell* was a case where demand backed by threat plus 'succumbing' conduct was treated as *not* evidencing an arrangement or understanding being reached or made. Nor does *Keith Russell* support the ACCC's sole qualification to its principle. When Franki J at 476-477 referred to the fourth and fifth respondents as having good *"commercial reasons"* for behaving as demanded of it, those reasons *included* the harm that would follow if the union made good on the threat, rather than being wholly independent of the threat.

55. The sixth case is *ACCC v Construction, Forestry, Mining and Energy Union* [2008] FCA 678: **AS [40]**. Again, it is another case where contravention was *not* found. In addition, the principles set out by Finn J at [10] are entirely consistent with those adopted by the Full Court in this case and do not include any principle per **AS [37]**, whether on its own or with the sole qualification. The passages at [71], [72] and [101] cited by the ACCC illustrate some differences from the facts of the present case.

56. However, in dealing with those different facts, the distinctions drawn by Finn J do not support the proposition at **AS [37]**. Finn J said at [101] that it was not to the point that the union's conduct might have been a but for cause of the second party terminating the services of the third party. What was relevant was an enquiry into the actual decision by the second party and whether it "*resulted from their own evaluation – albeit in pressured circumstances – as the appropriate course to take in the circumstance, having regard to [their] own previous action and inaction, their expectation of likely union responses, their continuing concerns about [a third party's] workforce and the advancement of [their interests]"*.

57. What Finn J did, correctly, was focus on all the facts. The threat by the union may be one fact and may form a part of the second party's decision (*"albeit in pressured circumstances"/ "having regard to … the expectation of likely union responses"*). The ultimate decision of the second party may not be wholly independent of the union's threat. Yet these facts may still be *insufficient* to find the necessary meeting of minds.

58. At [101], Finn J concluded on the facts: *"I am satisfied that the proposed decision was not simply a response as of course to a demand which they understood was intended to, and did, leave no other choice, and which they acquiesced"*. That negative statement indicates that there *might* be a case where the facts are so stark and unequivocal that the correct conclusion *might be* that the acquiescent conduct is *of*

itself a communication of assent to the demand to produce a meeting of the minds. The case before Finn J was not such a case.

59. But before concluding that one is in the territory of such a case, all the facts must be considered: precisely what form did the *"acquiescent conduct"* take? How proximate was it to the demand? When and how (if at all) was it communicated to the first party? What other communications took place between them either when the demand was made or in the intervening period? This approach is also evidenced by Finn J at [105], in a passage ignored by the ACCC. One of the (many) facts which together led to the ACCC's case failing was the timing and terms of the second party informing the union of its action. The second party told the union of the decision to terminate the third party *after* it had been made, and in a manner which reported it as its *independent decision* to fix the overall problem. The term *"independent decision"* is not being used here in the ACCC sense, of being wholly independent of the demand; rather, it simply means it was a decision made by the second party taking into account all relevant factors including the demand (which is lawful) as opposed to a course of action that the second party had *bound itself to the first party to take* (which is not lawful).

60. Finally, the contract cases upon which the ACCC rely do not assist its case. Contrary to **AS [42]-[46]** (see also **AS [30]-[32]**), no anomaly with contract arises in circumstances where the Full Court did not hold that the making or reaching of an arrangement or understanding can never be evidenced by the conduct that gives effect to it. The passage in *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 CLR 424 at 456 referenced at **AS [44]** emphasises the need for evidence showing *"that the statement or announcement which is relied on as a promise was really offered as consideration for the doing of the act, and that the act was really done in consideration of a potential promise inherent in the statement of announcement"*. Similarly, the observations of Isaacs J in *R v Clarke* (1927) 40 CLR 227 at 233-234 at **AS [45]** emphasise the need for such evidence. The Full Court's analysis in this case is not inconsistent with these observations: rather, the Full Court found that the better view was that evidence of that factual substratum was missing.

(c) Issue 3: No error by the Full Court on arrangement or understanding

61. The reasoning of Wigney J is a good introduction to the real factual disputes below, as opposed to the constricted version advanced by the ACCC. At J [57], **AB 194** his

Honour identified the core five strands in the reasoning of the primary judge from which the making or arriving at the arrangement or understanding was found.

62. The first strand is what actually occurred between Mr Clarke and Mr Meland of Hutchinson on 11 June 2016: J [60]-[62], **AB 195-196**. The primary judge refers to the underlying conduct on 11 June 2016 at [340(18)-(19)], **AB 87**. The underlying reasoning is at LJ [194]-[209], **AB 51-56**, with the conclusions at LJ [207]-[209], **AB 55**. Mr Meland's affidavit evidence of the key part of conversation on 11 June 2016 is reproduced at LJ [186], AB 49.[1] That evidence shows that, while Mr Clarke did make a threat to Mr Meland, Mr Meland did not say or do anything to suggest that Hutchinson agreed that it would boycott WPI: J [61], **AB 196**.

63. The ACCC refers at **AS[59]** to the finding that Mr Meland reported the threat to his superior Mr Berlese by email on 13 June 2016: LJ [340(20)], **AB 87**. The email is reproduced at LJ [187], **AB 49** and **ABFM 74**. Nothing in the email records that Mr Meland had assured Mr Clarke on 11 June 2016 that Hutchinson would prevent WPI entering the site. Indeed the last sentence of the email (*"hopefully it will be better for [WPI] having registered"*) was directly inconsistent with Mr Meland having given any such assurance. Mr Meland was proceeding on the basis that WPI should register for superannuation in which event the threat from the CFMEU might dissipate.

64. The ACCC does not address either of these points: cf **AS[59]**. This is a critical failing. The direct evidence about the critical event upon which the alleged arrangement or understanding hinged is inconsistent with its case and is wholly ignored. This also means that if, at some later point, Hutchinson did the thing which the CFMEU had demanded on 11 June 2016, whether that later conduct evidenced an earlier meeting of the minds or was mere unilateral conduct had to be assessed against the fact that when the demand was made Hutchinson did not assent; and to the contrary had indicated it was working to find a way that it would *not* have to act as demanded.

65. The second strand was the statement by Mr Steele of the CFMEU to Mr Meland that Mr Ray Hadfield of WPI *"won't be doing your waterproofing, he won't be able to get an EBA"* (LJ [340(24)], **AB 88**) which the primary judge treated as a strong indication that there was *already* a relevant arrangement or understanding. Her Honour's detailed

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[1] See further the ACCC's book of further materials (**ABFM**) 13.

findings are at LJ [221]-[225], **AB 57-59**. However, there is no finding as to when precisely that statement was made. LJ [216], **AB 57** reproduces Mr Meland's affidavit evidence (**ABFM 15** [54]) as to the conversation, which he puts at *"about a week after the conversation with [Mr] Clarke"* on 11 June 2016 (i.e. 18 June 2016): **ABFM 15** ([55]). LJ [217], **AB 57-58**, however, which reproduces part of Mr Meland's s 155(1)(c) examination, suggests the conversation was after WPI had been trying to contact Mr Vink of the CFMEU to get an EBA, which LJ [340(27)], **AB 89** indicates was between 21 June and 4 July.

66. Apart from the date of the conversation being indeterminate, the affidavit record of it at LJ [216], **AB 57** is inconsistent with Mr Meland having reached an arrangement or understanding on 11 June 2016 that WPI would be excluded from the site. The record is that Mr Meland made a statement to Mr Steele defending WPI to which Mr Steele urged him to consider using Spanos. That exchange is inconsistent with the respondents having made or reached the alleged arrangement or understanding by this indeterminate date. Again the ACCC does not refer to this event in its submissions: cf **AS [59]**. Nor does the ACCC grapple with the reasoning of Wigney J at J [62]-[64], **AB 196** or of the joint judgment at J [182]-[183], **AB 250** on this strand.

67. The third strand is Mr Clarke telling Mr Ray Hadfield to contact Messrs Vink and Steele to get a go ahead with the work but Mr Hadfield being unable to contact them: LJ [226]-[232], [340(24), (27), (32)] **AB 59-60, 88-90**.

68. As Wigney J points out at J [66]-[67], **AB 198**, the evidence of the communication between Mr Clarke and Mr Ray Hadfield was to be found solely in an email sent by Mr Hadfield's son, Charlie, who also worked at WPI. The email is reproduced at LJ [226], **AB 59**, **ABFM 76-77**. The email referred to a communication between Mr Ray Hadfield and Mr Clarke, who had no authority to speak for Hutchinson. Nothing in the email communicated or evidenced that the respondents had made any arrangement or understanding. The email was nothing more than an invitation from Mr Charlie Hadfield to Mr Meland to contact the CFMEU to discuss their difficulties with WPI.

69. Further, even if the email were read as suggesting that the CFMEU may have been unable or unwilling to speak to Mr Ray Hadfield, that did not allow an inference that there had been a meeting of minds between the respondents about boycotting WPI. To the contrary, it suggests that as late as 21 June 2016 Mr Clarke considered there was

still a possibility that WPI could sort out the issues that troubled the CFMEU: J [67], **AB 198**. To like effect, see J [184], **AB 251**. Again, the ACCC does not address these facts or the findings in respect to this strand: cf **AS [59]**.

70. The fourth strand is Mr Berlese of Hutchinson telling Mr Meland to *"deal with it"* some time around 19 July 2016: LJ [340(33)], **AB 91**. Mr Meland's affidavit evidence of this conversation is at LJ [263], **AB 67**, **ABFM 16-17**. The underlying factual findings are at LJ [261]-[274], **AB 66** and the conclusion is at LJ [274], **AB 70**.

71. Wigney J sets out the problems with drawing anything from these findings at J [69]-[70], **AB 198**. *If* the alleged arrangement or understanding was made or reached on or around 11 June 2016 (as found by the primary judge and as advanced by the ACCC), there was no explanation for why it would be over five weeks later that Mr Berlese would be instructing Mr Meland to implement it. Nor did the primary judge identify *when* or *how* Mr Berlese was directly involved in the making of the arrangement or understanding or informed by Mr Meland or some other person that it had been made. Indeed, it was never put to him that he was involved in or knew or any such arrangement or understanding. To similar effect, see J [186], **AB 252**.

72. The ACCC refers to the fourth strand at **AS [59]** but does not address any of the difficulties in drawing anything from it.

73. The fifth strand is that WPI did not perform any waterproofing work after 11 June 2016. There is no detailed submission by the ACCC on how this part of the primary judge's findings helps establish the alleged arrangement or understanding. The matter is fully answered by Wigney J at J [71]-[72], **AB 199**, with which the ACCC does not engage: see also [13]-[15] above. The findings were too indefinite to support a finding of *"exclusion"*: J [71], **AB 199**. In any event the available inference was that Hutchinson did not ask WPI to perform any further work to avoid industrial action, as opposed to having made or reached an arrangement or understanding to boycott WPI.

74. Standing back from the detail, the position on issue 3 is this: (a) the Full Court did not uphold the appeal on the simple basis identified in the single ground of appeal; (b) instead, the Full Court evaluated the whole of the evidence – whether at the date of the alleged arrangement or understanding, 11 June 2016, or arising from the conduct of the parties thereafter up until the WPI subcontract was terminated six weeks later – to ascertain whether the threat from the CFMEU had indeed matured into a consensus or

meeting of minds that Hutchinson would boycott WPI, as opposed to that being a decision taken by Hutchinson in the light of the threat and any other relevant matters; and (c) in the few places where the ACCC does deal with the facts, it does not address the whole of them or the whole of the basis upon which it lost in the Full Court: cf **AS [4], [17], [18], [37], [38], [41], [50], [58]-[59]**.

(d) Issue 4: the respondents did not each subjectively hold the proscribed purpose

75. It is necessary for the ACCC to succeed on the making or arriving at the arrangement or understanding *and* that a relevant officer of each respondent held the proscribed purpose. The primary judge's findings on purpose were opaque and brief: LJ [347]-[349], **AB 92-93**. LJ [342] **AB 91-92** reproduces *CEPU v ACCC* at [181]-[182] where the Court made clear that "*s 45E(3) requires <u>each</u> party to the contract, arrangement or understanding to have to have had the <u>subjective</u> purpose, which the section proscribes, for including the impugned provision"* (emphasis added). Her Honour further observed that *"purpose may be inferred from statements and actions understood in light of common experience"* and that *"[i]nferences as to subjective purpose may be drawn from the nature of the arrangement, the circumstances in which it was made and its likely effect"*: LJ[345], **AB 92**.

76. Apparently applying those principles, and *"having regard to the factual findings in these reasons"*, her Honour concluded that the *"subjective purpose"* of the respondents including the proscribed provision was that Hutchinson would boycott WPI: LJ [347], **AB 92-93**. Her Honour also inferred from *"the factual findings in these reasons"*, that the respondents' conduct (by which her Honour appears to have meant the CFMEU's conduct) in relation to WPI was *"part of a wider strategy, the purpose of which was to seek to cause Hutchinson to engage subcontractors which had an EBA on the Southpoint site"*: LJ [348], **AB 93**.

77. The *"factual findings in these reasons"* appear to be LJ [340], **AB 85-91**. However, notwithstanding that her Honour correctly identified that the purpose of including the proscribed provision is the critical enquiry and that the purpose is subjective, her Honour never identified *when* the proscribed provision was included in the arrangement or understanding and *by whom*. Without having done that, it was not possible for her Honour to have undertaken the proper enquiry. And it was certainly not possible for her Honour to conclude as she did at LJ [347]-[348], **AB 92-93**.

78. Wigney J explained the error at J [77]-[82], **AB 201-202**. His Honour observed that, *even if* it was possible to infer that the respondents had made an arrangement or reached an understanding, the primary judge *also* had to be satisfied, on the balance of probabilities (and taking into account the gravity of the matters alleged) that the respondents had included the proscribed provision for a proscribed purpose: J [77], [82], **AB 201, 202**. His Honour was unable to accept that it was open to the primary judge to draw the inferences as to proscribed purposes that she did and found that "*the equally, if not probable, inference was that Hutchinson had terminated the WPI subcontract simply to avoid any industrial action by the CFMEU"*: J [78], **AB 201**.

79. As to Hutchinson, his Honour found that Mr Meland could not have held the proscribed purpose because he was found not to be aware of any arrangement or understanding: see also J [13], **AB 184**, and J [44], [189]-[192], **AB 191, 253-254** rejecting the ACCC's notice of contention. **AS [58]** suggests the ACCC is challenging that finding, although it is not a ground in its notice of appeal. The only other possible actor was Mr Berlese, but his involvement in the relevant events was limited, and it was never put to him that he had the proscribed purpose: J [80], **AB 202**.[2] As to the CFMEU, Wigney J found that it was never put to Mr Steele or Mr Clarke that they had the proscribed purpose, and the primary judge did not expressly find either of them did.[3] Nor did the primary judge find that anyone else at the CFMEU who was involved in the relevant events had that purpose: J [80], **AB 202**.

80. The ACCC has never squarely addressed the issue of subjective purpose for including the boycott provision; indeed, as the joint judgment observed (J [150], **AB 237**) its case as alleged in the concise statement was not based upon the particular state of knowledge of an individual at either Hutchinson or the CFMEU.[4] Its submissions to this Court on intention (**AS [51]-[59]**) are beside the point: the Full Court did not require there to be mutual subjective states of mind (**AS [56]**) or that each party understand that their conduct and dealings gave rise to an "understanding" that is prohibited by s 45E: **AS [58]**. The majority did not need to descend to this detail because it considered that the ACCC's failure to establish the existence of the

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2 The ACCC's oral submissions in the Full Court on this matter are in the respondents' joint book of further materials (**RBFM**).

3 Their affidavits and cross-examination are in the **RBFM** as are the ACCC's oral submissions in the Full Court on this matter.

4 The pleadings are in the RBFM, as are the ACCC's oral submissions in the Full Court on this matter.

arrangement or understanding necessarily carried with it the failure to make out the proscribed purpose: J [187]-[188], **AB 252**: see further [82] below.

(e) Conclusion

81. The ACCC's submissions leave their appeal in this predicament: (a) it is unclear whether they maintain the case which succeeded before the primary judge and was pressed by the ACCC on appeal below that the relevant arrangement or understanding was made or reached on or about 11 June 2016, or whether they are relying upon some later date, or indeed avoiding identifying any date at all; (b) under the guise of the statement of legal proposition at **AS [37]**, the ACCC refuses to deal with all the factual findings and with the reasons why the Full Court found that it had not proven the arrangement or understanding on the facts; (c) the ACCC's case rests on an imprecise notion of boycotting WPI, or *"succumbing to the threat"*, as completing the arrangement or understanding without identifying precisely when or how the conduct of Hutchinson towards WPI could have manifested the necessary assent to the CFMEU's demand to constitute the contravention; and (d) the ACCC never identifies which of the respondents' officers are said to have acted for the proscribed purpose or the evidence from which the inference of their subjective purpose should be drawn.

Part VI: Notice of contention

82. To the extent that the Full Court has not otherwise found error in the primary judge's finding of proscribed purpose, the Full Court ought to have done so for the reasons given by Wigney J at [77]-[82], **AB 201-203**. If necessary, the CFMEU seeks to rely upon the notice of contention filed with these submissions.

Part VII: Time required for presentation of oral argument

83. The CFMEU understands the ACCC has revised its total estimate for its oral argument to 2.25 hours. The CFMEU estimates its oral argument will take 1-1.25 hours.

Dated: 22 October 2024

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ANNEXURE TO THE SUBMISSIONS OF THE CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION

Pursuant to Practice Direction No. 1 of 2019, the CFMEU sets out below a list of the statutes referred to in these submissions.

No.	Description	Version	Provision(s)
1.	*Competition and Consumer Act 2010* (Cth)	Compilation No 103, Version 10 March 2016 – 30 June 2016	ss 45E, 45EA
2.	*Trade Practices Act 1974* (Cth)	No 51 of 1974 Version 29 May 1980 to 11 June 1981	ss 45D, 45E