HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

No. B 41 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

AND

No. B 42 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

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Internet Publication

This outline of oral submissions is in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

1. **The questions of law.** This case raises the meaning of "understanding" in the CCA:

   (a) is it confined by reference to the language of "commitment" or "moral duty"? AS[28], AS[33].

   (b) must the existence of the understanding precede the conduct giving effect to the understanding? AS[42]-[43].

   (c) should any different meaning, or shade of meaning, be given to the word when it appears in s 45E as compared to other sections of the *Competition and Consumer Act 2010* (Cth) (**CCA**)? AS[26].

   (d) is it to be determined objectively or subjectively? AS[55].

2. **The explanation for exclusion and later termination**. The exclusion from the site of WPI by Hutchinson and later termination of WPI's contract was in response to the threat by the CFMEU that if WPI was allowed on site, the CFMEU would engage in industrial action: AS[14]. Hutchinson advanced a case at trial that there was an alternative explanation for WPI's exclusion: LJ[334], CAB84. That was rejected at trial (LJ[340(22)], CAB88): AR[11].

3. **The "alternative" inference.** Both Wigney J and the plurality below sought to explain the alternative inference they said was available in various ways: see J[78], J[81], J[83] per Wigney J (CAB201, 202, 203); J[172], J[176], J[177], J[187] per Bromwich and Anderson JJ (CAB245, 247, 252). But the essence of all of the explanations is that Hutchinson succumbed to the threat made by the CFMEU: see J[83] per Wigney J and J[177] per Bromwich and Anderson JJ (CAB203, 247). The "alternative" inference is thus not a meaningful factual alternative to the primary inference: AS[38], [41].

4. A meaningful alternative inference may arise where there are facts from which it might be inferred that a party has ceased supplying or acquiring for reasons independent of the threat. However, that inference is not available here where there is no dispute that the CFMEU made a threat and Hutchinson responded by succumbing to it: cf CS[24].

5. **Should the meaning of "understanding" be confined by the concept of a "commitment"?** It has been common for judges at first instance and intermediate appeal to require the identification of a "commitment" or "obligation" as a requisite element of the formation of an "understanding": HS[28]-[29]. These epithets are not necessary nor appropriate constraints on the statutory language: AS[28]-[34]; AR[3]; *Australian Competition and Consumer Commission v BlueScope Steel Limited (No 5)* [2022] FCA 1475 at [106] and [108] (JBA Vol 6, Tab 25). Analogies with the formation of contracts should be approached cautiously: AS[55].

6. An "understanding" can arise from tacit communication and may be informal (indeed, less formal than an arrangement). One way in which an "arrangement" or "understanding" could arise is the manner described by Diplock LJ in *Re British Basic Slag Ltd's Agreements* [1963] 1 WLR 727 at 746-747 (JBA Vol 9, Tab 45): AS[30]-[31]; AR[3]. This kind of understanding does not involve the giving of a formal commitment or the express assumption of an obligation, but nonetheless establishes a meeting of minds between the parties: cf HS[31]-[33].

7. **Must the existence of an understanding precede the giving effect to the understanding?** The plurality below considered that it must: J[112]; J[158] and J[178] (CAB218, 240-241, 247-248); cf HS[76]-[77]; CS[20]-[22]. But this mandates a degree of prescriptiveness to the formation of an understanding that is stricter than that which is required to make a contract (AS[42]-[46]) and is inconsistent with the informality that attends an understanding.

8. **Should a different meaning, or shade of meaning, be given to "understanding" when it appears in s 45E?** The ACCC does not contend that the word "understanding" should have a different meaning when it appears in s 45E as compared with other provisions of Part IV: AS[20]. Rather, the use of the word in s 45E reflects the breadth and flexibility of the term.

9. The use of "arrangement or understanding" in s 45E should be understood as an intention to broaden the reach of the prohibition: *CEPU v ACCC* at [139] (JBA Vol 8, Tab 38); AS[25]. The prohibition is intended to strike at "situations where a person capitulates in order to avoid loss or damage as a result of threatened industrial action against the target": Explanatory Memorandum, Workplace Relations and Other Legislation Amendment Bill 1996 (Cth) at [18.30] (JBA Vol 10, Tab 55); AS[24].

10. It can be accepted that a person capitulating to a threat is not what might be described as a consensual arrangement; but the question is whether it is nevertheless an "understanding". It is, in the ordinary use of that word. It is a meeting of minds about how each is to behave; even if one party will be acting under the pressure of seeking to avoid being damaged by the other.

11. **Should the existence of an understanding in the CCA be determined objectively or subjectively?** The descriptor "meeting of minds" is apt to focus attention on the subjective views of alleged participants. The language used by judges at first instance and at intermediate appellate level further conveys that subjective focus: AS[55]. The preferable view is that the question of whether an understanding has been formed ought to be approached objectively, as in the manner of a contract. This allows for coherence between "contract" at one end of the spectrum, and "understanding" at the other: AS[56].

12. **But even if the question was approached subjectively, it would not affect the outcome in this case**. The primary judge's finding that WPI was excluded (and then terminated) by Hutchinson because Hutchinson capitulated to the threat made by the CFMEU is not in doubt. The CFMEU intended the threat to have the effect demanded; and as Hutchinson excluded and terminated WPI in capitulation to the threat, it follows that Hutchinson itself understood its reason for acting: AS[58]-[59].

13. No relevant witness gave evidence that they understood what was occurring in the language of the statute or as involving a "commitment" or "obligation". Whether a person understands how capitulation to a threat can be characterised does not affect the legal characterisation: AS[57]. If the ACCC is correct that capitulation to a threat gives rise to an understanding, then it follows that the necessary subjective state of mind existed.

14. **The date at which the understanding arose is not significant in this case.** Wigney J was incorrect in his conclusion that exclusion did not occur until July: AR[8]; cf CS[73. But even if his Honour's reasoning was correct, it would not affect the outcome: AR[9]-[10]; cf CS[74]. An understanding is informal, it may not arise in a single day, and it will often be impossible to pinpoint with precision, objectively or subjectively, when it could be said that the parties have had a meeting of minds as to how they will behave in the future. However, it does not follow that a conclusion cannot be reached to the effect that a meeting of the minds has occurred by a certain date.

Dated 5 December 2024 Michael Hodge