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 SUBMISSIONS

Part I: Certification

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

Part II: Statement of issues

2. J Hutchinson Pty Ltd (**Hutchinson**) is a construction company and was, at the relevant time, the head contractor on a construction project in Queensland known as Southpoint

A. The Construction, Forestry and Maritime Employees Union (**CFMEU**) is a trade union organisation. Waterproofing Industries Qld Pty Ltd (**WPI**) is a company which entered into a subcontract with Hutchinson to perform waterproofing works at the Southpoint A project (**Southpoint project**). WPI did not have an enterprise bargaining agreement (**EBA**) with the CFMEU. On 11 June 2016, a representative of the CFMEU said to a representative of Hutchinson words to the effect that the CFMEU would engage in industrial action if Hutchinson allowed WPI to continue working at the Southpoint project. From on or about this date, WPI was excluded from the site. By letter dated 26 July 2016, WPI's subcontract was terminated by Hutchinson.

3. The appellant (**ACCC**) alleged below that Hutchinson contravened s 45E(3)(a) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) by making an arrangement or arriving at an understanding with the CFMEU or one of its officers. The alleged arrangement or understanding contained a provision that Hutchinson would terminate its subcontract with, or otherwise cease to acquire services from, WPI at the Southpoint project. The ACCC also alleged that the CFMEU induced, and was knowingly concerned in, or party to, Hutchinson's contravention of s 45E(3)(a) of the CCA by threatening industrial action if Hutchinson did not cease using WPI.

4. The Full Court accepted that Hutchinson had succumbed to the CFMEU's threat in excluding WPI from the Southpoint project and terminating its subcontract. Notwithstanding, it concluded that there was no arrangement or understanding between Hutchinson and the CFMEU for the purposes of s 45E(3)(a) as it had not been established that the parties had arrived at the requisite "meeting of minds". The Full Court found that for an arrangement or understanding to be formed, assent must be communicated prior to the arrangement or understanding being given effect. It concluded that an equally probable inference to an arrangement or understanding between Hutchinson and the CFMEU in the terms alleged by the ACCC was that Hutchinson had acted unilaterally in succumbing to the CFMEU's threat and demand.

5. The single ground of appeal is that the Full Court erred in finding that 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, so that the second respondent "succumbing to a threat" by the first respondent and doing what was demanded under sanction of the threat was insufficient to give rise to an "arrangement or understanding".

The ground gives rise to two distinct but interrelated issues: (1) Is it sufficient to establish a "meeting of minds" for the purposes of an arrangement or understanding that a person has succumbed to a threat? (2) Can assent to a proposal containing a proscribed provision for the purposes of making an arrangement or arriving at an understanding be communicated by conduct that gives effect to the proposal?

6. The ACCC submits that the answers are: (1) Yes; (2) Yes.

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

7. A notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Citations

10 8. The primary judgment (**LJ**) is *Australian Competition and Consumer Commission v J Hutchinson Pty Ltd* [2022] FCA 98; 404 ALR 553 (Downes J). The judgment of the Full Court (**J**) is *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* [2024] FCAFC 18; 302 FCR 79 (Wigney J, Bromwich and Anderson JJ).

Part V: Relevant facts found or admitted below

9. Hutchinson had an EBA with the CFMEU, which was first approved in 2012 and then replaced by another EBA in 2015.[1]

10. On 22 March 2016, WPI entered into a subcontract with Hutchinson to perform waterproofing works at the Southpoint project.[2] WPI did not have an EBA with the CFMEU at any relevant time.

20 11. On 11 June 2016, a delegate for the CFMEU, Mr Damon Clarke, approached Hutchinson's project manager, Mr Peter Meland, and told him that he, Mr Clarke, was under strict instructions to "sit the job down if WPI come on site". In findings that were not overturned on appeal, the primary judge found that by these words the CFMEU had threatened to engage in industrial action if Hutchinson allowed WPI to continue working on the Southpoint project.[3] By email two days later, Mr Meland informed his team leader, Mr John Berlese, of the conversation.[4]

[1] LJ at [4] (CAB 14).
[2] LJ at [7], [340(11)] (CAB 15, 86); J at [97(7)], [119(11)] (Bromwich and Anderson JJ) (CAB 208, 222).
[3] LJ at [340(18)] (CAB 87); J at [119(18)] (Bromwich and Anderson JJ) (CAB 222).
[4] LJ at [187], [340(20)] (CAB 49, 87); LJ at [119(20)] (Bromwich and Anderson JJ) (CAB 222).

12. From 11 June 2016, WPI did not provide waterproofing services at the Southpoint project.[5] In undisturbed findings, the primary judge concluded that in this period "WPI was keen to resume work."[6] Her Honour characterised WPI's position as "continued exclusion from the site."[7] That characterisation formed part of the factual substratum on which the reasoning of the plurality of the Full Court was based.[8]

13. On or around 19 July 2016, Mr Meland had a conversation with Mr Berlese about WPI in which Mr Berlese told Mr Meland to "deal with it".[9] WPI's subcontract with Hutchinson was terminated by letter dated 26 July 2016 signed by Mr Meland.[10]

14. The plurality accepted that WPI's ongoing exclusion involved Hutchinson "succumbing" to the CFMEU's threat and demand.[11]

15. At first instance, the primary judge held that there was a proscribed arrangement or understanding to which Hutchinson had given effect, and that it had therefore contravened ss 45E(3) and 45EA of the CCA. The primary judge further held that the CFMEU was knowingly concerned in, or party to, Hutchinson's contraventions and induced Hutchinson's contraventions within the meaning of s 76 of the CCA.

16. The primary judge found that the evidence, considered as a whole, established that "Hutchinson and the CFMEU arrived at an arrangement or understanding containing a provision to the effect that Hutchinson would no longer acquire waterproofing services from WPI at the Southpoint project and, further, that the [contract between Hutchinson and WPI] would be terminated."[12]

17. The Full Court set aside those liability findings on appeal. Bromwich and Anderson JJ in their joint judgment,[13] and Wigney J in his separate but concurring judgment,[14] held that "merely" succumbing to the threat of industrial action was insufficient to give rise to an arrangement or understanding.

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[5] LJ at [10], [249], [252], [275], [340(22)] (CAB 15, 63, 64, 70, 88); J at [14], [71] (Wigney J), [119(22)] (Bromwich and Anderson JJ) (CAB 185, 199, 223).
[6] LJ at [340(22)] (CAB 88); J at [119(22)] (Bromwich and Anderson JJ) (CAB 223).
[7] LJ at [340(22)] (CAB 88).
[8] J at [97(13)], [119(22)]; [135], [179] (Bromwich and Anderson JJ) (CAB 208, 223, 231, 248-249).
[9] LJ at [274], [340(33)] (CAB 70, 91); J at [20] (Wigney J), [119(33)] (Bromwich and Anderson JJ) (CAB 186, 225).
[10] LJ at [10], [276], [340(33)] (CAB 15, 70, 91); J at [119(33) (Bromwich and Anderson JJ) (CAB 225).
[11] J at [172], [176]-[177], [187] (Bromwich and Anderson JJ) (CAB 245, 247, 252).
[12] LJ at [335] (CAB 84).
[13] J at [112] (Bromwich and Anderson JJ) (CAB 203, 218).
[14] J at [84] (Wigney J) (CAB 203).

Part VI: Argument

18. The Full Court found that succumbing to a threat can never, on its own, contravene s 45E.[15] For an "understanding" to be formed, there must be communication of assent which is distinct from and precedes performance of the understanding. If the Full Court is correct, s 45E(3) will have limited operation in proscribing the very conduct to which it is directed. Organisations of employees would be able to lawfully coerce corporations into engaging in secondary boycotts so long as the corporation threatened does not communicate assent to the boycott prior to engaging in it.

19. Contrary to the approach adopted by the Full Court, the statutory word "understanding" is broad and ought to be applied flexibly to meet the circumstances proscribed by the provisions of the CCA in which that word is used. In the context of cartel conduct, judicial consideration of the word "understanding" has been influenced by the overwhelmingly consensual nature of the dealings between the parties. This has tended to produce analogies with and borrowings from the doctrine of contract. Section 45E, on the other hand, seeks to address behaviour involving an exercise of power by one party involving threats and demands, and a capitulation by another party to those threats and demands. Such conduct defies being described as consensual.

20. The ACCC does not contend that a different meaning ought to be ascribed to the term "understanding" in the context of s 45E compared to other provisions in Pt IV of the CCA; rather, the specific circumstances to which s 45E is directed draws attention to the breadth and flexibility of the statutory term and the kinds of informal dealings that it captures. In order to avoid circumvention of the legislative intent that such dealings be prohibited, the meaning of the word "understanding" must not be obscured by conceptual artifices imported from doctrines that are both inapposite to the context in which s 45E most often arises and not found in the statutory language itself. The existence of an understanding must be determined objectively from the conduct of the parties, including from dealings between them, that establish a "common mind" as to the course of conduct to be followed by each.

A. The proper construction of s 45E(3)(a)

21. Section 45E(3)(a) relevantly provides that where a person (the **first person**) "has been accustomed, or is under an obligation, to acquire goods or services from another person"

[15] J at [112] (Bromwich and Anderson JJ) (CAB 218).

(the **second person**), the first person "must not make a contract or arrangement, or arrive at an understanding" with an organisation of employees if "the proposed contract, arrangement or understanding contains a provision included for the purpose, or for purposes including the purpose", of "preventing or hindering the first person from acquiring or continuing to acquire such goods or services from the second person".

22. An earlier form of s 45E was introduced into the *Trade Practices Act 1974* (Cth) (**TPA**) by the *Trade Practices (Boycotts) Amendment Act 1980* (Cth), cll 4 and 5. In the second reading speech to the amending bill, the purpose of the provision was identified as guarding against the "sufficient economic power" possessed by trade unions to engage in boycott activity, and the potential abuse of that power by both unions and corporations.[16] The genesis of the provision was the conduct at issue in *Leon Laidely Pty Ltd v Transport Workers' Union of Australia*.[17] In that case, the New South Wales branch of the Transport Workers' Union had engaged in strike action against a supplier of bulk fuel, Amoco, until Amoco ceased supplying to the applicant, who was a distributor of that fuel. Lockhart J described the union's conduct in the following terms:[18]

> *The strike plainly occurred as a means of bringing pressure to bear upon Amoco to cease supplying bulk fuel to the applicant unless and until Amoco's own drivers, and no others, were used to transport the fuel. Once Amoco capitulated, as it did, and refused to supply the applicant, the strike ceased; but with the implied threat that industrial action would revive if Amoco recommenced supply to the applicant in circumstances where the applicant's fuel was delivered by drivers other than employees of Amoco.*

23. Relevantly, at no point did any representative of Amoco communicate an express "assent" or "agreement" to the union's demand that Amoco cease supplying the applicant. Amoco stopped so supplying and informed the union representatives of this fact by stating: "Due to a situation beyond our control we will be unable to supply Leon Laidely because of a force majeure, due to a situation which has been created by the

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[16] Commonwealth, Senate, *Parliamentary Debates* (Hansard) 16 May 1980 at 2397-8.
[17] (1980) 42 FLR 352 (***Leon Laidely***) (Lockhart J). See RV Miller, *Miller's Australian Competition and Consumer Law* (Thomson Reuters, 46th edn2024) at 410, [CCA.45E.20].
[18] *Leon Laidley* at 366.

union".[19] The primary judge, Lockhart J, granted an interlocutory injunction against the union under s 45D, as it then was. The decision was upheld on appeal.[20]

24. In 1994, s 45E was repealed by s 44 of the *Industrial Relations Reform Act 1993* (Cth), with the substance of the provision re-enacted in the *Industrial Relations Act 1988* (Cth). By 1997, however, the provision had been reinstated into the TPA in its current form by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth), Sch 17, Pt 1. The explanatory memorandum to the amending bill made clear that s 45E was directed at secondary industrial boycotts and intended to encompass "situations where a person capitulates in order to avoid loss or damage as a result of threatened industrial action against the target".[21] Consistently, in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission*,[22] the Full Court endorsed a "purposive construction [of s 45E] to restrict abuses of economic power by companies or unions" including "in some common situations to which [the provision] was directed". In language echoing the explanatory memorandum, the Full Court observed that the "behaviour at which s 45E(3) typically strikes will be where the "first person" succumbs to an abuse of power by an organisation of employees".[23] The first person may not want to "bring about the result" but appreciates that is the end that will be achieved by doing so.[24]

25. The Full Court in *CEPU v ACCC* further observed that "[t]he deliberate choice of the concepts of "arrangement or understanding" as criteria, in addition to "agreement", which are proscribed by s 45E, evinces a legislative choice to broaden, rather than narrow, the reach of the section".[25]

B. The meaning of an "understanding" in s 45E(3)

26. The statutory purpose of s 45E must be borne in mind when construing elements of the provision which are common to other parts of the CCA, including the critical element of an "understanding". While it is appropriate to have regard to authorities which have

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[19] *Leon Laidely* at 357.
[20] *Transport Workers Union of Australia v Leon Laidely Pty Ltd* (1980) 43 FLR 168.
[21] Explanatory Memorandum, Workplace Relations and Other Legislation Amendment Bill 1996 (Cth) at [18.30] (emphasis added).
[22] [(2007)162 FCR 466 (***CEPU v ACCC***) at [202] (Weinberg, Bennett and Rares JJ).
[23] *CEPU v ACCC* at [194] (Weinberg, Bennett and Rares JJ) (emphasis added).
[24] *CEPU v ACCC* at [194] (Weinberg, Bennett and Rares JJ).
[25] *CEPU v ACCC* at [139] (Weinberg, Bennett and Rares JJ) (emphasis added).

considered the meaning of that term in other provisions of the CCA, context is also important.[26] Thus, in *CEPU v ACCC,* the Full Court observed:[27]

> *In our opinion s 45E must be construed according to its own terms (Visy Paper Pty Ltd v Australian Competition and Consumer Commission (2003) 216 CLR 1 at [24] per Gleeson CJ, McHugh, Gummow and Hayne JJ). It may be appropriate in considering the operation of the section to have regard to other provisions of the Trade Practices Act which have similar, but not identical wording, in order to ensure that the construction given to s 45E is consistent with the language and purpose of all of the provisions of the Act, to the extent that they are capable of reconciliation (Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 at [69]-[71] per McHugh, Gummow, Kirby and Hayne JJ). The context in which s 45E appears in the Trade Practices Act is Pt IV, which deals with restrictive trade practices. The section is one of a number that seek to regulate the behaviour of persons (including corporations) engaging in certain practices, including some which are calculated to inhibit the acquisition or supply of goods and services in a commercial environment. Each of the principal sections in Pt IV of the Act deals with particular situations, and variants of those situations, and identifies, with precision, the relevant conduct which is regulated by the provision.*

27. Much of the consideration of the meaning of an "understanding" in the CCA has arisen in the context of the cartel provisions in Part IV of the Act. The most common fact scenario in which proscribed conduct arises in that context is where the impugned parties are seeking to bring about a mutually beneficial outcome through a consensual dealing. Even in the absence of any intention to create legal relations, the consensual nature of the factual circumstances attending to cartel conduct raises an obvious analogy with contract. It has thus been observed that in developing the jurisprudence on "understandings", "courts have tended to approach it from the contract end of the CAU spectrum."[28] That approach may produce an unduly narrow conception of an

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[26] *Clyne v Deputy Federal Commissioner of Taxation* (1981) 150 CLR 1 at 15 (Mason J, with whom Aickin J and Wilson J agreed); *Murphy v Farmer* (1988) 165 CLR 19, 26-27 (Deane, Dawson and Gaudron JJ); *Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2015) 257 CLR 544 at [27] (French CJ and Kiefel J), [120] (Keane J).
[27] *CEPU v ACCC* at [178] (Weinberg, Bennett and Rares JJ).
[28] I Tonking, 'Belling the CAU: Finding a Substitute for "Understandings" about Price' (2008) 16 *Competition & Consumer Law Journal* 46 at 59.

"understanding", constraining the statutory language by notions that take formal contractual strictures as their genesis.

28. Borrowing from contract law, the authorities on cartels have frequently referred to a requisite "meeting of minds" or "consensus".[29] The search for the assumptions of "moral obligation" by the parties, usually in the form of express or implied consent, has come to dominate as a substitute for the legal obligations of contract.[30] And, in some instances, the cases have gone so far as to suggest that an "understanding" involves "an element of mutual commitment between two or more parties in the sense that each must have accepted an obligation *qua* the other or others",[31] although doubt has been expressed as to the correctness of that observation.[32]

29. Adherence to concepts arising from the consensus view of contract law has persisted in Pt IV jurisprudence notwithstanding that in contract law "the notion of a 'meeting of minds' and the will theory of contract on which it is premised have been overtaken largely by more contemporary theories of contract – including the 'objective' theory which focuses on the conduct of the parties rather than their subjective intent."[33] The objective theory of contract developed as a critique of the will theory, noting that "[a]greement could not in a practical world be a subjective, mental state. Instead, intention had to be determined as a matter of inference from conduct."[34] The modern concern in contract law is thus with "external manifestation", which is to be judged by "what [the parties] say and do rather than their subjective intentions".[35] More recently, it has been suggested that the foundation of a party's obligations rests on reliance, such that reliance by one party on another's promise may be a sufficient reason for making a promise binding.[36]

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[29] *Australian Competition and Consumer Commission v BlueScope Steel Limited (No 5)* [2022] FCA 1475 (***Bluescope***) at [102(b)] (O'Bryan J).
[30] *Re British Basic Slag Ltd's Agreements* [1963] 1 WLR 727 (***Re British Basic Slag)*** at 739 (Willmer LJ) and 746-747 (Diplock LJ), as later cited and adopted in *Top Performance Motors Pty Ltd v Ira Berk (Queensland) Pty Ltd* (1975) 24 FLR 286 at 291 (Smithers J); *Trade Practices Commission v Nicholas Enterprises Pty Ltd (No 2)* (1979) 40 FLR 83 (***Nicholas Enterprises***) at 89-90 (Fisher J); *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd (No 8)* (1999) 92 FCR 375 (***ACCC v CC)*** at [135]-[141] (Lindgren J).
[31] *Morphett Arms Hotel Pty Ltd v Trade Practices Commission*; *Nicholas Enterprises Pty Ltd* (1980) 30 ALR 88 (***Morphett Arms***) at 91 (Bowen CJ) citing *Nicholas Enterprises* at 89 (Fisher J).
[32] *Morphett Arms* at 91-92 (Bowen CJ).
[33] C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (Cambridge University Press, 2011) at 44, fn 59.
[34] NC Seddon and RA Bigwood, *Cheshire and Fifoot Law of Contract* (LexisNexis Australia, 12th edn, 2022) at [28.6].
[35] JW Carter, *Contract Law in Australia* (LexisNexis Butterworths, 6th edn, 2013)at 9.
[36] NC Seddon and RA Bigwood, *Cheshire and Fifoot Law of Contract* (LexisNexis Australia, 12th edn, 2022) at [28.9].

30. The objective and reliance theories of contract have consonance with the manner which Diplock LJ, addressing the meaning of agreements and arrangements for the purposes of s 6 of the *Restrictive Trade Practices Act 1956* (UK), described one way in which the formation of a "meeting of minds" may arise in *Re British Basic Slag*:[37]

> *...it is sufficient to constitute an arrangement between A and B, if (1) A makes a representation as to his future conduct with the expectation and intention that such conduct on his part will operate as an inducement to B to act in a particular way, (2) such representation is communicated to B, who has knowledge that A so expected and intended, and (3) such representation or A's conduct in fulfilment of it operates as an inducement, whether among other inducements or not, to B to act in that particular way.*

31. Australian cartel cases relying on *Re British Basic Slag* have used language that suggests a requirement to identify subjective intention through a positive finding of an "acceptance of an obligation". Thus, in *Nicholas Enterprises,* Fisher J observed:[38]

> *A significant feature of each of the above passages is the emphasis placed upon the necessity for each of the parties to have communicated with the other, for each to have raised an expectation in the mind of the other, and for each to have accepted an obligation qua the other. These are in my opinion the essential elements of the requisite meeting of minds.*

32. It has since been said that what is required is that at least one party "assume an obligation" or give an "assurance" or "undertaking" that it will act in a certain way.[39] However, this is but one way that an arrangement or understanding could arise. It ought not constrain the broad and flexible statutory term.

33. Hutchinson made a submission below to the effect that the "existence of an arrangement or understanding proscribed by the CCA as alleged by the ACCC is conditional upon a "meeting of minds" by parties to an arrangement where each is understood as assuming at least a moral duty to conduct themselves in a particular way."[40] The use of the language of "moral obligation" or "moral duty" is likely to cause misdirection in explaining what is captured by the statutory word "understanding" when it appears as

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[37] *Re British Basic Slag* at 747 (Diplock LJ).
[38] *Nicholas Enterprises* at 89 (Fisher J) (emphasis added).
[39] *ACCC v CC* at [141] (Lindgren J).
[40] J at [143] (Bromwich and Anderson JJ) (CAB 234).

part of prohibitions on secondary boycotts (which are envisaged as likely to be brought about by threats). This language should not be allowed to "obscure the nature of an understanding and the means and circumstances in which it may be arrived at."[41]

34. Although arrangements and understandings arising in the context of demands and threats are not unknown to the jurisprudence,[42] it has been observed that no consideration has been given in these authorities to the operation of the concept of "consent" in circumstances of compulsion.[43] At least in the factual circumstances to which s 45E is directed it is inapposite to condition any requisite "meeting of minds" upon each party "assuming at least a moral duty to conduct themselves in a particular way."[44] A "meeting of minds" in the context of a threat to which a party capitulates does not involve a consensus between the parties in the sense of the kind of willing agreement referred to in cartel cases, but merely a common mind as to a course of conduct to be followed by each. It may involve "a course of dealings" that makes clear the desired outcome and through which a "meeting of minds" on pursuing the outcome is achieved[45] without satisfying the strictures of an offer and acceptance model often deployed in the analysis of formal agreements.

35. Thus, for example, in *Building Workers Industrial Union of Australia v Odco Pty Ltd*,[46] the respondent, who supplied contract labour to builders in the building industry, alleged that the appellant union had made demands accompanied by threats of "black bans" and other industrial action by employees of the builder clients of the respondent inducing those clients to cease acquiring services from the respondent in contravention of s 45E. On a particular project at Carlton United Breweries (**CUB**), three labourers supplied by the respondent were discovered by union officials at the site. The union officials gave CUB the option of either employing the men directly on wages or sending them from the site. The CUB project manager thereafter directed that the labourers should not be used.[47] But there was no evidence that CUB expressly or specifically communicated its assent to the union's demand; CUB merely gave effect to the union's demand, and by this capitulation the union understood that its demand had been met.

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[41] *BlueScope* at [108] (O'Bryan J).
[42] *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236; *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 (***Rural Press***).
[43] C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (Cambridge University Press, 2011) at 44.
[44] Cf J at [143], accepted at [147] (Bromwich and Anderson JJ) (CAB 234, 236).
[45] *BlueScope* at [146] (O'Bryan J).
[46] (1991) 29 FCR 104 (***Odco***) (Wilcox, Burchett and Ryan JJ).
[47] *Odco* at 128 (Wilcox, Burchett and Ryan JJ).

The trial judge found that an understanding had been arrived at, and that finding was not disturbed on appeal.[48]

36. In *CEPU v ACCC,* the central question for the Full Court was whether a benign heads of agreement entered into between CEPU and Edison, an energy company, contained the extent of the relationship between the parties or whether their relationship was broader than that literally expressed in the document, encompassing an arrangement or understanding for the purposes of s 45E. In finding the latter, the Full Court observed that "[c]ontractual assent may be inferred from conduct" such that the "adoption or consensual nature of an arrangement or understanding can also be inferred from conduct".[49] The Full Court noted that, unlike cases of criminal conspiracy, proof of an arrangement or understanding "need not amount to an agreement or combination",[50] with the former being "looser concepts".[51] Critical to the Full Court's conclusion regarding the existence of an arrangement or understanding was that, following a demand by the union on 9 August 2001, by 10 August, Edison saw itself as having no choice but to accept the demand and one of its senior employees had given instructions to others at Edison to give effect to it.[52] The Court also found that by at least 23 August 2001, and probably earlier, CEPU was aware that Edison was so acting.[53] While the Full Court also accepted that by a draft letter dated 13 August 2001, Edison had likely communicated its acceptance of CEPU's demand by or soon after that date, the Full Court's finding of an arrangement or understanding was not contingent on this single fact.[54] From the whole of the conduct, including that CEPU had given the demand, the Full Court was satisfied that there had been a "meeting of minds" between the parties, notwithstanding that the terms were not reflected in the heads of agreement.[55]

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. A threat which is express and exhaustive of the proposed future conduct of both parties relieves the parties from the need to engage in any further express communication in

[48] *Odco* at 128 (Wilcox, Burchett and Ryan JJ).
[49] *CEPU v ACCC* at [136] (Weinberg, Bennett and Rares JJ).
[50] *CEPU v ACCC* at [139] (Weinberg, Bennett and Rares JJ).
[51] *CEPU v ACCC* at [140] (Weinberg, Bennett and Rares JJ).
[52] *CEPU v ACCC* at [147] (Weinberg, Bennett and Rares JJ).
[53] *CEPU v ACCC* at [147] (Weinberg, Bennett and Rares JJ).
[54] *CEPU v ACCC* at [153] (Weinberg, Bennett and Rares JJ).
[55] *CEPU v ACCC* at [150] (Weinberg, Bennett and Rares JJ).

order to arrive at a mutual state of mind as to the course of dealings that will follow. The threatened party's acquiescent conduct is an element in the course of dealings which is capable of establishing the threatened party's assent and the "common mind". So long as there is no evidence that the threatened party is giving effect to the proposal for entirely independent reasons, there is no need for "an inference of assent" beyond succumbing to the threat.[56]

C. There was no alternative benign inference of a different state of mind

38. The Full Court agreed that, in excluding WPI from the worksite and ultimately terminating its contract, Hutchinson had succumbed (or capitulated) to the CFMEU's threat and had not acted for any other independent commercial reason.[57] Yet the Full Court found that it was at least equally, if not more, probable that Hutchinson had unilaterally succumbed to the CFMEU's threat of industrial action without arriving at or making an arrangement or understanding.[58] No exposition of the meaning of "unilateral" in this context was offered in the reasons, except in the circular sense that it lacks the requisite "meeting of minds" necessary to establish an arrangement or understanding.[59] As that term is understood in the authorities, however, Hutchinson could not have been acting "unilaterally" because it was not acting for any *independent* reason.[60]

39. In *Keith Russell Simplicity Funerals Pty Ltd v Cremation Society of Australia (ACT) Limited*,[61] the respondents had been accustomed to supply chapel and cremation services to the applicant. The union had placed a "ban" on the applicant arising from its use of non-union labour in removing a body from a nursing home. When the applicant approached the respondents to use their services, the respondents responded that they could not accept the booking due to the ban. It was alleged that the respondents had made an arrangement or arrived at an understanding with the Funeral and Allied Industries Union of New South Wales containing a provision that had the purpose of preventing or hindering the respondents from supplying services to the applicant.

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[56] Cf J at [54] (Wigney J), [177] (Bromwich and Anderson JJ) (CAB 194, 247).
[57] J at [83]-[84] (Wigney J) (CAB 203), [141] (Bromwich and Anderson JJ) (CAB 233) and accepted at J [143], [172], [[176]-[177] (Bromwich and Anderson JJ) (CAB 234, 245, 247).
[58] J at [5] (Wigney J), [187] (Bromwich and Anderson JJ) (CAB 183, 252).
[59] J at [152] (Bromwich and Anderson JJ) (CAB 238).
[60] *Australian Competition and Consumer Commission v Olex Australia Pty Ltd* [2017] ATPR 42-540 (***Olex***) at [477] (Beach J).
[61] (1982) 57 FLR 472 (***Keith Russell***) (Franki J).

However, there was no evidence that the union had made a demand or threat to the respondents to which they had capitulated. It was in those circumstances that Franki J found that the respondents had made an independent commercial decision based on consequences they considered inevitable: if they disregarded the ban no services would be provided by the respondent's employees in relation to coffins and bodies supplied by the applicant and this would produce a danger to public health and generally a commercially unacceptable position for the respondents.[62]

40. In *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union,*[63] Bovis Lend Lease Limited (**BLL**), a project management and construction services company, contracted with Bernmar Projects Pty Ltd (**Bernmar**) to supply services at a construction site. It was alleged that the union had entered into an arrangement or understanding with BLL a provision of which was that BLL would terminate Bernmar's contract. However, the evidence did not establish that the union representative had asked BLL do anything specific, saying only to a BLL representative "You'll work it out".[64] Moreover, the primary judge found "that the proposed decision was not simply a response as of course to a demand which [BLL] understood was intended to, and did, leave no other choice, and in which they acquiesced."[65] Instead, BLL had based its decision to terminate Bernmar on a range of considerations and BLL's own evaluation as to what was the appropriate course to take in the circumstances.[66]

41. However, unlike the authorities above, Hutchinson was not acting for an independent reason. The Full Court made no such finding. The evidence of Mr Thone, the site manager for Hutchinson, was to the effect that it was commercially irrational for Hutchinson to exclude WPI from the Southpoint project. Mr Thone deposed that WPI's exclusion from the site was a "problem" because Hutchinson had a "program of works to complete" and there were "monetary penalties in the form of liquidated damages payable by Hutchinson at the end of the project if there were delays".[67] Mr Thone's evidence was that Hutchinson did suffer those delays when he became unable to use

[62] *Keith Russell* at 476-477 (Franki J).
[63] [2008] FCA 678 (***ACCC v CFMEU***) (Finn J).
[64] *ACCC v CFMEU* at [71]-[72] (Finn J).
[65] *ACCC v CFMEU* at [101] (Finn J).
[66] *ACCC v CFMEU* at [101] (Finn J).
[67] LJ at [250] (CAB 63-64).

WPI on the Southpoint project.[68] Moreover, that Mr Meland took steps to assist WPI to obtain an EBA in order to permit WPI back on site[69]provides further support for the proposition that there was no rational commercial motivation for Hutchinson's conduct. The evidence is clear that Hutchinson was specifically acting in response to a threat, containing a proscribed boycott proposal, put to it expressly by the CFMEU. It is difficult to conceive of a circumstance in which there could be a state of mind that may be fairly described as "unilateral" where such a state of mind is formed in direct response to a threat by a counterparty.

D. Assent to an understanding may occur by giving effect to it

42. A further but related issue arises from the plurality's conclusion that the formation of an arrangement or understanding in contravention of s 45E(3)(a) "logically precedes any further contravention by way of giving effect to such an arrangement or understanding contrary to s 45EA(1)(a)."[70] It follows that, according to the majority, conduct that gives effect to an arrangement or understanding cannot also be that which communicates assent to it. If that proposition were correct, the requirements to establish an arrangement or understanding would be more onerous than in contract.

43. The general principle in contract law is that acceptance of an offer does not have the effect of creating a contract until it is communicated to the offeror.[71] A long-established exception to that rule arises in the context of so-called "unilateral" contracts where performance is taken as the implied method of acceptance and "simultaneously effects the double purpose of acceptance and performance".[72] It has been observed that unilateral contracts are a manifestation of the reliance theory of contract.[73]

44. In *Australian Woollen Mills Pty Ltd v The Commonwealth*,[74] this Court commented that the term "unilateral" contract "is open to criticism on the ground that it is unscientific and misleading. There must of necessity be two parties to a contractual obligation. The position in such cases is simply that the consideration on the part of the offeree is

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[68] LJ at [250] (CAB 63-64).
[69] LJ at [340(23)] (CAB 88); J at [119(23)] (Bromwich and Anderson JJ) at (CAB 223).
[70] J at [112] (Bromwich and Anderson JJ) (CAB 218).
[71] *Farmers' Mercantile Union and Chaff Mills Ltd v Coade* (1921) 30 CLR 113 at 118 (Knox CJ); *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 at 1432 (Lord Denning MR).
[72] *R v Clarke* (1927) 40 CLR 227 (***R v Clarke***) at 233 (Isaacs ACJ); *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 at 262 (Lindley LJ).
[73] NC Seddon and RA Bigwood, *Cheshire and Fifoot Law of Contract* (LexisNexis Australia, 12th edn, 2022) at [28.27].
[74] (1954) 92 CLR 424 at 456 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).

completely executed by the doing of the very thing which constitutes acceptance of the offer." Yet even when analysed in this way, it is recognised that acceptance may be communicated by conduct in performance of the contract, such as an offer to buy an offeree's goods accepted by the offeree's conduct in supplying them.[75]

45. In circumstances where the same conduct is sufficient for both acceptance and performance, the fact of the conduct need not be communicated to the offeror so long as it is knowable to them. Thus, in *R v Clarke,* Isaacs J observed that the "method indicated by the offeror may be one which either does or does not involve communication to him of the acceptance in order to form the contract and create the obligation, however, necessary information of the fact may be required before…performance by the offeror, can arise."[76]

46. Where analogous circumstances can give rise to a legally binding contract, it would be anomalous to hold, as the Full Court did, that an arrangement or understanding cannot be assented to by conduct giving effect to it. Moreover, in circumstances where a trade union has an awareness of the conduct giving effect to the arrangement or understanding, it is unnecessary for there to be any separate communication by the first person.

E. Hutchinson engaged in acquiescent not parallel conduct

47. In arriving at the conclusion that succumbing to a threat cannot suffice on its own to establish an arrangement or understanding, the Full Court conflated "acquiescent conduct" with "parallel conduct".[77]

48. Economic theory recognises a continuum of conduct for antitrust purposes ranging from parallel behaviour (or "mere parallelism") involving independent, uncoordinated decision-making which nonetheless results in correlated pricing due to external factors, through to 'agreements', involving what is described as "a hallmark exchange of assurances about future intentions".[78] Mere parallelism does not give rise to antitrust concerns, while 'agreements' have been the central concern of Australian competition law. In between these two extremes are said to be two broad categories of behaviour. The first is commonly referred to as "conscious parallelism" or "oligopolistic

[75] Thomson Reuters, *Australian Law of Contract* (online at 23 September 2024) at [2.710].
[76] *R v Clarke* at 233-234 (Isaacs ACJ).
[77] J at [112] (Bromwich and Anderson JJ) (CAB 218).
[78] C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (Cambridge University Press, 2011) at 40.

interdependence". Such behaviour "gives the appearance of coordination by agreement, but in fact is reflective of the mutual awareness by firms of each other's activities".[79] It generally does not attract antitrust liability. The second category is "tacit collusion". It involves conduct, often in the form of an exchange of market or pricing information, which facilitates coordination between competitors. The classic example involves competitors sending each other price lists.

49. Reflecting the economic concept of "conscious parallelism", the authorities have observed that parallel conduct arises when a party acts in response to conduct by another party, such as in response to a pricing manoeuvre.[80] Australian authorities have also suggested that the existence of parallel conduct may form a part of a matrix of circumstantial evidence that establishes an inference of an arrangement or understanding, but it is not sufficient to do so on its own.[81] Thus, for the purposes of the CCA, it may be inferred from what ostensibly appears to be parallel conduct that the parties have in fact engaged in tacit collusion or formed an agreement.

50. But "acquiescent conduct" to a threat is not capable of being characterised as mere parallelism, conscious parallelism, or even tacit collusion or agreement inferred from seemingly parallel conduct. What sets it apart from all of these categories is that it involves an express communication from the party making the threat. In the factual circumstances of this case, the CFMEU's threat contained a proposal for future conduct by Hutchinson for the purpose proscribed in s45E(3)(a). When Hutchinson succumbed to that threat, there was "a like state of mind on both sides as to the subject of that meeting of the minds."[82]

F. Awareness of an understanding is not required for the requisite state of mind

51. Hutchinson made two submissions below as to subjective intention, both of which appear to have been accepted by the plurality.[83]

52. The first was that the existence of an arrangement or understanding proscribed by the CCA requires that "each party must be subjectively aware of what that person is doing,

[79] C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (Cambridge University Press, 2011) at 40.
[80] *Olex* at [477] (Beach J).
[81] *Norcast S.ár.L v Bradken Ltd (No 2)* (2013) 219 FCR 14 at [263(4)] (Gordon J); *Trade Practices Commission v Email Ltd* (1980) 43 FLR 383 at 386 (Lockhart J); *Olex* at [478] (Beach J).
[82] J at [112] (Bromwich and Anderson JJ) (CAB 218).
[83] J at [147] (Bromwich and Anderson JJ) (CAB 236).

and must understand that they are reaching an understanding."[84] This gives rise to an issue as to what subjective state of mind of the parties, if any, is required for an understanding within the meaning of the statute.

53. The second submission was that the subjective purpose element in s 45E(3) necessitates that the parties know that they are forming an arrangement or understanding.[85] As to this second submission, a person may have an appreciation for "the end that will be achieved"[86] without knowing of the legal implications of seeking to achieve that end. In the present case, s 45E(3)(a) provides that the proscribed purpose is the purpose of "preventing or hindering the first person from acquiring or continuing to acquire…goods or services from the second person". Both Hutchinson and the CFMEU understood that capitulation of Hutchinson to the threat and demand by the CFMEU was to exclude WPI from Hutchinson's site (and so prevent Hutchinson from continuing to acquire services from WPI).

54. As to both the first and second submissions, the Full Court was presumably not intending to suggest that there cannot be an understanding unless the parties know that there is an "understanding" for the purposes of the statute. What then is the subjective knowledge, if any, that is required?

55. An analogy to the law of contract can be drawn with respect to the requirement for an intention to create legal relations. The test of intention for contracts is objective[87] and the uncommunicated subjective intentions or reservations of a party are irrelevant.[88] However, the analogy quickly breaks down. The essence of a contract is "a voluntary assumption of a legally enforceable duty";[89] whereas the premise of an "understanding" is that it involves no legally enforceable duty and there will never be an intention to create legal relations. Hence, there are two questions. The first is as to what is the analogical "intention" element for an "understanding"; the second is whether, if there is such an element, it is to be assessed objectively, as in the case of a contract, or subjectively. The language used by Diplock LJ in *Re British Basic Slag*, referring to the

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[84] J at [143] (Bromwich and Anderson JJ) (CAB 234).
[85] J at [145] (Bromwich and Anderson JJ) (CAB 235).
[86] *CEPU v ACCC* at [194] (Weinberg, Bennett and Rares JJ).
[87] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 178-179 [38] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).
[88] *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 at 105 [25] (Gaudron, McHugh, Hayne and Callinan JJ).
[89] *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 CLR 424 at 457.

"expectation and intention" of a party, suggests some subjective element for a "meeting of minds" in relation to an informal agreement. However, the ACCC submits that there is no subjective element; but even if there was, it would be satisfied in this case.

56. The ACCC submits that this Court should conclude that the existence of an understanding is to be assessed objectively, having regard to whether the conduct and dealings of the parties evidence a "meeting of minds", such that their behaviour and future conduct is referable to their dealings and communications, either express or tacit. It is not necessary or appropriate that an "understanding" would depend upon the existence of mutual subjective states of mind, such that if one party held a subjective state of mind that differed from its communicated position (whether communicated expressly or tacitly) there could be no "understanding" for the purposes of the CCA.

57. Further, even if it was necessary that there be mutual subjective states of mind, it is not necessary that each party understand that their conduct and dealings can be characterised as giving rise to an "understanding", a term that has no legal meaning outside of the statute and which is intended to capture dealings which do not depend upon an intention to create legal obligations. Rather, it is only necessary that each party subjectively understand that it is their dealings and communications, whether express or tacit, that will affect or dictate each party's behaviour and future conduct.

58. The Full Court concluded that because Mr Meland was not aware of an arrangement or understanding "there could have been no meeting of the minds or consensus between Mr Clarke and Mr Meland on 11 June 2016."[90] That conclusion was incorrect. Mr Meland was aware of the terms of the CFMEU's threat and demand and his actions on behalf of Hutchinson were in response to that threat. It does not matter that he did not understand this to be an "understanding".

59. The approach of the plurality places emphasis on part of a single sentence in a lengthy judgment by the primary judge. If the existence of an understanding is to be determined objectively having regard to the parties' dealings and communications with each other, rather than whether they subjectively hold a particular view about the characterisation of their dealings, then it follows that it is irrelevant what subjective state of mind was held by Mr Meland. But even if the existence of an understanding is to be determined subjectively, it could not be doubted that Mr Meland, and Hutchinson, understood that

[90] J at [60] (Wigney J), [137] (Bromwich and Anderson JJ) (CAB 195, 231-232).

Hutchinson was excluding WPI because of the threat and demand by the CFMEU. The effect of the primary judge's undisturbed findings of fact include that: (i) the threat was made to Hutchinson on behalf of the CFMEU by Mr Clarke, who said he had been given instructions by his CFMEU superior, Mr Steele;[91] (ii) the threat was made to Mr Meland who reported it immediately to his superior at Hutchinson, Mr Berlese;[92] (iii) WPI was excluded from the Southpoint site from the date of the threat;[93] and (iv) ultimately, Mr Berlese gave instructions to Mr Meland to "deal with it" and intended by those instructions that Mr Meland would terminate the contract with WPI.[94]

Part VII: Orders sought

60. The appellant seeks the orders set out in the notice of appeal.

Part VIII: Time required for presentation of oral argument

61. The appellant estimates its oral submissions on the notice of appeal will take 2.5 hours in chief and 1 hour in reply.

Dated 24 September 2024

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[91] LJ at [340(18)] (CAB 87); J at [119(18)] (Bromwich and Anderson JJ) (CAB 222).
[92] LJ at [340(20)] (CAB 87); J at [119(20)] (Bromwich and Anderson JJ) (CAB 222).
[93] LJ at [340(22), (33)] (CAB 88, 91); J at [119(22), (33)] (Bromwich and Anderson JJ) (CAB 223, 225).
[94] LJ at [340(33)] (CAB 91); J at [119(33)] (Bromwich and Anderson JJ) (CAB 225).

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Pursuant to *Practice Direction No 1 of 2019,* the appellant sets out below a list of the statutes and provisions referred to in the appellant's submissions.

No.	Description	Version	Provisions
	Commonwealth statutory provisions		
1.	*Competition and Consumer Act 2010* NB: *Compilations dated 10 March 2016 and 1 July 2016 were in force at the relevant times. There were no amendments to the relevant sections between the 10 March 2016 and 1 July 2016 compilations.*	As at 30 June 2016 (Compilation No 103, 10 March 2016 – 30 June 2016)	ss 45E, 45EA, 76
2.	*Industrial Relations Reform Act 1993*	As made (No 98 of 1993)	ss 37, 38, 44
3.	*Industrial Relations Act 1988*	No 86 of 1988 (Version 22 December 1993 – 24 March 1994)	s 163
4.	*Trade Practices Act 1974*	No 51 of 1974 (Version 29 May 1980 – 11 June 1981)	ss 45D, 45E
5.	*Trade Practices (Boycotts) Amendment Act 1980*	As made (No. 73 of 1980)	cl 4, 5
6.	*Workplace Relations and Other Legislation Amendment Act 1996*	As made (No 60 of 1996)	Sch 17, pt 1