HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	B41/2024
File Title:	Australian Competition and Consumer Commission v. J Hutch
Registry:	Brisbane
Document filed:	J Hutchinson Outline of oral argument (B41/24 and B42/24)
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT

No. B41 of 2024

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

and

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

Construction, Forestry and Maritime Employees Union
Second Respondent

No. B42 of 2024

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

and

Construction, Forestry and Maritime Employees Union
First Respondent

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

OUTLINE OF ORAL SUBMISSIONS OF J HUTCHINSON PTY LTD

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

ACQUIESCENCE TO A THREAT ALONE WILL NOT CONTRAVENE S 45E

1. Unilateral conduct or concerted action does not engage s 45E of the *Competition and Consumer Act 2010* (Cth) (**the Act**). To contravene, an acquiescent party must, expressly or tacitly, by words or action, communicate assent to the threatening party that it will adopt the conduct the subject of the threat. Consensus is required: **HS [28]-[29]**.

2. **Text**: The verb "arrive" (including to "reach" or "enter into": s 4) contemplates mutual interaction of at least two parties, requiring more than an epistemic understanding of a common or similar interest. An understanding must "contain a provision" which was "included" for a proscribed purpose: s 45E(3). There must be sufficient substance to an understanding for it to contain a provision of the required kind.

3. **Context and purpose (HS [36]-[44])**: Section 45E targets collusion between firms and unions to circumvent s 45D. Insofar as s 45E is "directed at situations where a person capitulates in order to avoid loss or damage as a result of threatened industrial action against the target", it selects a specific form of capitulation. The provision performs its complementary function by "ensuring that the prohibition on secondary boycott action is not weakened by collusion between firms and unions": Explanatory Memorandum, Workplace Relations and Other Legislation Amendment Bill 1996 (Cth) [18.30] (**JBA Vol 10, Tab 54, 2904)**.

4. Other provisions in Part IV of the Act (as in force at the relevant time) proscribed unilateral conduct not involving such compacts (e.g., s 45B), or coordinated conduct falling short of a contract, arrangement, or understanding, such as conduct "in concert" (e.g., s 45D). Section 45E eschews these different formulations. Recent amendments confirm that the consensus required in s 45E is different from, and narrower than, the conduct in concert sufficient for s 45D and (since 2017) s 45(1)(c).

5. **Authorities** on s 45E and the concept of "arrangement or understanding" in Part IV of the Act establish the following propositions (**HS [28]-[32]; [45]-[51]**).

6. *First*, there can be no arrangement or understanding without a commitment by one or both parties to act or conduct itself in a particular way. To be party to an arrangement or

understanding, a person would "regard himself as being in some degree under a duty, whether moral or legal, to conduct himself in a particular way": *Re British Basic Slag Ltd's Agreements* [1963] 1 WLR 727, 746-747 (**JBA Vol 9, Tab 45, 2691-2**); approved in *Top Performance Motors Pty Ltd v Ira Berk (Queensland) Pty Ltd* (1975) 24 FLR 286, 291 (**JBA Vol 9, Tab 48, 2774**).

7. *Secondly*, a mere expectation or hope that something might be done or happen, or that a party will act in a particular way, will not constitute an arrangement or understanding; even where engendered by that party: *Apco Service Stations Pty Ltd v ACCC* (2005) 159 FCR 452**,** [45]-[47] (**JBA Vol 8, Tab 33, 2149**). Communication of assent is necessary.

8. The ACCC's contentions require an expansion of the current law, which is properly a matter for Parliament, in light of its tailored interventions on the point to date: **HS [33]-[34]; [52]**. There are additional policy reasons for declining to expand the concept of "understanding": (i) the ACCC's "broad and flexible" construction of "understanding" would extend that concept in s 45E further than it can sensibly reach in cartel or s 45 contexts, introducing undesirable and destabilising incoherence to an important regulation of commerce; (ii) the phenomenon of "industrial muscle" is separately addressed through the industrial law: e.g., *Fair Work Act 2009* (Cth) s 355 (**JBA Vol 2, Tab 4, 141**).

CONSENSUS NOT ESTABLISHED ON THE FACTS

9. There can be no finding of the requisite consensus on the facts as found by the primary judge: **HS [53]-[68]**. Seven features of those factual findings support that proposition.

10. *First*, at no point did Hutchinson, through Mr Meland or Mr Berlese, give the CFMEU any verbal assent that it would terminate, or cease to acquire services from, WPI: **J [13], AB 184; J [61], AB 196**.

11. *Second*, instead of conveying assent to the CFMEU's demand, Hutchinson tried to coordinate with the CFMEU to restore WPI to the site, in apparent rebuff of the CFMEU's demand and defiance of its threat: e.g., **LJ [340(23)], AB 88**.

12. *Third*, as the CFMEU submits, the ACCC's proposition that WPI was excluded from the site after 11 June 2016 finds little support in the evidence: **J[71], AB 199**.

13. *Fourth*, some six weeks elapsed between the CFMEU's 11 June 2016 threat and Hutchinson's 26 July 2016 termination of WPI's subcontract – a period inconsistent with any consensus having been forged on 11 June 2016: **LJ [276], AB 70; [340(33)], AB 91; J [119(33)], AB 199**.

14. *Fifth*, Mr Meland was not aware of any arrangement or understanding that WPI should be excluded from the site: **LJ [340(33)], AB 91; J [119(33)], AB 225; [189]-[193], 253-4**. That conclusion coheres with the absence of any verbal communication of assent by Mr Meland, his statements and actions contrary to the alleged boycott provision, and Hutchinson's delay in terminating WPI.

15. *Sixth*, the primary judge by implication found that the arrangement or understanding had been reached on or about 11 June 2016: **LJ[340(24)], AB 88-9**. As the Full Federal Court observed, the parties, including the ACCC, conducted the appeal to that Court on that basis: **J [75], AB 200-1; [134], AB 230-1; [179(e)], AB 249**. But that, on the facts, precludes Mr Berlese from having arrived at any understanding. The proposition that an understanding "crystallised" at a later time (e.g., in and through termination of WPI's subcontract) is outside the ACCC's case and unavailable here.

16. *Seventh*, there is no finding that WPI's termination was ever communicated by Mr Meland to the CFMEU or Mr Berlese. Mr Meland knew of no arrangement or understanding, and the CFMEU was not told of any adoption of its demands at the time they were made, prior to WPI's termination, or at any time thereafter.

EVEN IF CONSENSUS WERE ESTABLISHED, PROSCRIBED PURPOSE IS NOT

17. To satisfy s 45E(3), the ACCC separately requires a finding of proscribed purpose, which the facts cannot supply: **HS [73]-[75]**.

18. The purposes proscribed by s 45E(3)(a) and (b) are purposes directed to including a provision in an arrangement. They are to be assessed subjectively, must be held by each party to the arrangement, need not be the dominant purpose, but must be a cause of including the provision in the arrangement: *CEPU v ACCC* (2007) 162 FCR 466, [150] [177], [182], [192], [194], [197], (**JBA Vol 8, Tab 38, 2322-7**).

19. Hutchinson can have had such a purpose only through its human agents. Neither of Hutchinson's relevant human agents was asked about their purposes, neither otherwise gave evidence of his purposes, and no finding was made about their purposes.

Dated: 5 December 2024

Name: Ruth Higgins