



HIGH COURT OF AUSTRALIA

2 April 2025

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v J HUTCHINSON PTY LTD & ANOR; AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION & ANOR
[2025] HCA 10

Today, the High Court dismissed appeals from a decision of the Full Court of the Federal Court of Australia concerning an issue as to the nature of an "understanding" as that term is used in Pt IV of the *Competition and Consumer Act 2010* (Cth) ("the Act"), including in ss 45E(3) and 45EA. Section 45E(3) relevantly prohibits a person from arriving at an understanding with an organisation of employees that contains a provision included for the purpose of preventing or hindering the person from acquiring or continuing to acquire goods or services from another person from whom the person has been accustomed, or is under an obligation, to acquire those goods or services. Section 45EA relevantly prohibits a person from giving effect to a provision of an understanding if, because of the provision, the arriving at the understanding by the person contravened s 45E(3).

In March 2016, J Hutchinson Pty Ltd ("Hutchinson") entered into a subcontract for the performance of waterproofing works at a project site. The subcontractor did not have an enterprise agreement with the Construction, Forestry and Maritime Employees Union ("CFMEU"). On 11 June 2016, the CFMEU threatened Hutchinson with industrial action at the project site if the subcontractor was allowed to come back onto the site. Hutchinson reacted to the CFMEU's threat of industrial action by excluding the subcontractor from the site and by terminating the subcontract. At no point did Hutchinson give the CFMEU any verbal or written assent that it would terminate the subcontract or cease to acquire services from the subcontractor.

The Australian Competition and Consumer Commission ("ACCC") alleged, and the Federal Court found, that Hutchinson had contravened ss 45E(3) and 45EA of the Act by making, and giving effect to, an arrangement or arriving at an understanding with the CFMEU containing a provision to the effect that Hutchinson would terminate the subcontract with, or otherwise cease to acquire services from, the subcontractor; and that the CFMEU was knowingly concerned in, or party to, and induced Hutchinson's contraventions of ss 45E(3) and 45EA. The Full Court allowed appeals by Hutchinson and the CFMEU, holding that there was no relevant arrangement or understanding between Hutchinson and the CFMEU. The ACCC appealed to this Court on the basis that there is an "understanding" for the purposes of the Act if one person makes a threat and demand to a second person, and the second person capitulates to that threat and acts as demanded.

A majority of the High Court rejected the ACCC's contention on the basis that arrival at an "understanding" for the purposes of s 45E(3) requires proof of express or tacit communication between the parties of a commitment on the part of one party to do that which the other party has demanded of it. Accordingly, the appeals were dismissed.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.