

# HIGH COURT OF AUSTRALIA

GAGELER CJ,  
EDELMAN, STEWARD, GLEESON AND BEECH-JONES JJ

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## **Matter No B41/2024**

AUSTRALIAN COMPETITION AND CONSUMER  
COMMISSION

APPELLANT

AND

J HUTCHINSON PTY LTD & ANOR

RESPONDENTS

## **Matter No B42/2024**

AUSTRALIAN COMPETITION AND CONSUMER  
COMMISSION

APPELLANT

AND

CONSTRUCTION, FORESTRY AND MARITIME  
EMPLOYEES UNION & ANOR

RESPONDENTS

*Australian Competition and Consumer Commission v J Hutchinson Pty Ltd  
Australian Competition and Consumer Commission v Construction,  
Forestry and Maritime Employees Union*

[2025] HCA 10

*Date of Hearing: 5 December 2024*

*Date of Judgment: 2 April 2025*

B41/2024 & B42/2024

## **ORDER**

### **Matter No B41/2024:**

*Appeal dismissed with costs.*



**Matter No B42/2024:**

*Appeal dismissed with costs.*

On appeal from the Federal Court of Australia

**Representation**

M R Hodge KC with A R Nicholas and S J Chordia for the appellant in both matters (instructed by Australian Government Solicitor)

R C A Higgins SC with B K Lim and T M Rogan for the first respondent in B41/2024 and the second respondent in B42/2024 (instructed by Gadens Lawyers)

J T Gleeson SC and M F Caristo for the first respondent in B42/2024 and the second respondent in B41/2024 (instructed by Hall Payne Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **Australian Competition and Consumer Commission v J Hutchinson Pty Ltd Australian Competition and Consumer Commission v Construction, Forestry and Maritime Employees Union**

Competition and consumer law – *Competition and Consumer Act 2010* (Cth) – Restrictive trade practices – Prohibition of contracts, arrangements, or understandings affecting the supply or acquisition of goods – Where head contractor succumbed to threat from union and terminated subcontract without any verbal (or written) assent being communicated to union – Whether sufficient to give rise to "understanding" in context of ss 45E(3) and 45EA of *Competition and Consumer Act* that head contractor succumbed to union's threat of industrial action by doing what was demanded under sanction of that threat.

Words and phrases – "acceptance", "acquisition situation", "arrangement", "arrangement or understanding", "arriving at an understanding", "assent", "communication", "communication of acceptance", "communication of assent", "consensus", "contract, arrangement or understanding", "express or tacit communication", "giving effect to an understanding", "implied promise", "implied request", "inducement", "making a contract", "making an arrangement", "manifestations of mutual consent", "meeting of minds", "offer", "performance", "proscribed purpose", "reciprocity", "secondary boycott", "threat", "threat of industrial action", "unilateral contracts".

*Competition and Consumer Act 2010* (Cth), ss 45E, 45EA, 76.



## Introduction

1           These appeals raise 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"). The issue arises in the context of interpreting and applying ss 45E(3) and 45EA of the Act. Section 45E(3) relevantly prohibits a person from making a contract or arrangement, or 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. The prohibition is "directed at situations where a person capitulates in order to avoid loss or damage as a result of threatened industrial action" and "complements" ss 45D and 45DA by "ensuring that the prohibition on secondary boycott action is not weakened by collusion between firms and unions".<sup>1</sup> Section 45EA relevantly prohibits a person from giving effect to a provision of a contract, arrangement or understanding if, because of the provision, the making of the contract or arrangement, or the arriving at the understanding, by the person contravened s 45E(3).

2           A Full Court of the Federal Court of Australia (Wigney, Bromwich and Anderson JJ) unanimously allowed appeals from declarations and orders made by the primary judge (Downes J), who had found that: (1) J Hutchinson Pty Ltd ("Hutchinson"), a construction company, had contravened s 45E(3) by making an arrangement or arriving at an understanding with the Construction, Forestry and Maritime Employees Union ("the CFMEU") containing a provision to the effect that Hutchinson would: (a) no longer acquire waterproofing services from Waterproofing Industries Qld Pty Ltd ("the subcontractor"), and (b) terminate the subcontract by which those services had been acquired; (2) Hutchinson also contravened s 45EA of the Act by giving effect to that provision of the arrangement or understanding; and (3) the CFMEU was knowingly concerned in, or party to, and induced Hutchinson's contraventions of ss 45E(3) and 45EA. The primary judge imposed pecuniary penalties on Hutchinson of \$300,000 in respect of each of its two contraventions and a penalty of \$750,000 on the CFMEU in respect of its conduct in being knowingly concerned in, or party to, and inducing Hutchinson's contraventions.

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1     Australia, House of Representatives, *Workplace Relations and Other Legislation Amendment Bill 1996*, Explanatory Memorandum at [18.30].

3 The appellant, the Australian Competition and Consumer Commission ("the ACCC"), contends that, contrary to the reasoning of the Full Court,<sup>2</sup> it was sufficient to give rise to an understanding for the purposes of s 45E(3) that Hutchinson succumbed to the CFMEU's threat of industrial action, responding by doing what was demanded under sanction of that threat.

4 For the following reasons, the contention of the ACCC must be rejected. A person who succumbs to a threat of industrial action by doing what is demanded under sanction of the threat, without express or tacit communication of a commitment to do so, does not arrive at an understanding with the person who makes the threat for the purposes of s 45E(3) (and s 45EA) of the Act. It follows that the appeals must be dismissed.

### **Facts and procedural history**

5 Hutchinson was the head contractor on a construction project in Queensland known as Southpoint A. In March 2016, Hutchinson entered into a subcontract for the performance of waterproofing works at the project site. An enterprise bargaining agreement between Hutchinson and the CFMEU obliged Hutchinson to consult with the CFMEU about the appointment of subcontractors in certain circumstances, and the CFMEU had previously urged Hutchinson to retain subcontractors with enterprise bargaining agreements. The subcontractor did not have an enterprise bargaining agreement with the CFMEU. The subcontractor performed work at the project site in April and May 2016.

6 On 11 June 2016, a CFMEU representative said to Hutchinson's project manager for the project site that the CFMEU would "sit the job down" if the subcontractor was allowed back on site.<sup>3</sup> That is, 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 by letter dated 26 July 2016.

7 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

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2 *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 98-99 [84], 111-112 [112].

3 *Australian Competition and Consumer Commission v J Hutchinson Pty Ltd* (2022) 404 ALR 553 at 613 [340(18)].

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subcontractor.<sup>4</sup> To the contrary, prior to termination of the subcontract, Hutchinson's project manager tried to assist the subcontractor to obtain an enterprise bargaining agreement because he believed that, if one was obtained, the subcontractor would be "allowed back on site".<sup>5</sup>

*Primary proceeding*

8 In 2020, the ACCC brought civil penalty proceedings against Hutchinson and the CFMEU seeking declarations and orders which included those to the effect made by the primary judge. In opening to the primary judge, the ACCC contended that an arrangement or understanding between Hutchinson and the CFMEU was evidenced by two meetings between representatives of Hutchinson and the CFMEU; the conversation during which the threat described above was conveyed; and a subsequent conversation in which a CFMEU representative told Hutchinson's project manager that the subcontractor would not be doing the waterproofing on the project site. Alternatively, the ACCC contended that an understanding could be inferred from these communications together with certain other matters. Those other matters included Hutchinson's conduct in ceasing to acquire waterproofing services from the subcontractor and subsequently terminating the subcontract in circumstances where Hutchinson had no concerns with the quality of the subcontractor's work and no reason to terminate the subcontract other than the threat of industrial action by the CFMEU.

9 In its closing submissions to the primary judge, the ACCC made an additional contention, that the arrangement or understanding "arose out of" the 11 June 2016 threat that the CFMEU would "sit the job down" if the subcontractor was allowed back on site, reinforced by certain later statements, and was made or arrived at when Hutchinson responded to that "inducement", including by terminating the subcontract on 26 July 2016.

10 The primary judge found that the subcontractor was excluded from the site from 11 June 2016.<sup>6</sup> Her Honour further found that Hutchinson and the CFMEU made an arrangement or arrived at an understanding containing a provision to the effect that Hutchinson would terminate the subcontract with, or otherwise cease to

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4 *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 84 [13], 93 [61], 128 [149].

5 *Australian Competition and Consumer Commission v J Hutchinson Pty Ltd* (2022) 404 ALR 553 at 613 [340(23)].

6 *Australian Competition and Consumer Commission v J Hutchinson Pty Ltd* (2022) 404 ALR 553 at 557 [10], 613 [340(22)].

acquire waterproofing services from, the subcontractor in 2016 ("the termination provision").<sup>7</sup> That finding was based upon an inference as to a "consensus" reached between Hutchinson and the CFMEU drawn from 33 primary facts, matters and circumstances over the period from early 2016 to 26 July 2016, when the subcontract was terminated.<sup>8</sup> The primary facts included the 11 June 2016 threat, as well as other meetings and conversations, emails, Hutchinson's conduct in ceasing to acquire waterproofing services from the subcontractor in or about June 2016 and the subsequent termination of the subcontract.

11 The primary judge adopted the process of reasoning explained by Isaacs J in *R v Associated Northern Collieries*<sup>9</sup> to find by inference a combination,<sup>10</sup> as follows:

"Community of purpose may be proved by independent facts, but it need not be. If the other defendant is shown to be committing other acts, tending to the same end, then though primarily each set of acts is attributable to the person whose acts they are, and to him alone, there may be such a concurrence of time, character, direction and result as naturally to lead to the inference that these separate acts were the outcome of pre-concert, or some mutual contemporaneous engagement, or that they were themselves the manifestations of mutual consent to carry out a common purpose, thus forming as well as evidencing a combination to effect the one object towards which the separate acts are found to converge."

12 Her Honour's repeated references to "manifestations of mutual consent", a phrase drawn from the passage set out above, demonstrate that the case accepted by the primary judge did not involve an understanding constituted by Hutchinson's conduct when Hutchinson responded to the CFMEU's threat.

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7 *Australian Competition and Consumer Commission v J Hutchinson Pty Ltd* (2022) 404 ALR 553 at 557 [11], [14].

8 *Australian Competition and Consumer Commission v J Hutchinson Pty Ltd* (2022) 404 ALR 553 at 611-616 [335]-[340].

9 (1911) 14 CLR 387 at 400, quoted with approval by this Court in *Ahern v The Queen* (1988) 165 CLR 87 at 94.

10 That is, that the two parties were associated for the prohibited purpose of restraining inter-state trade and commerce in coal to the detriment of the public.

*Full Court's reasons*

13 Bromwich and Anderson JJ recorded that the primary judge found the arrangement or understanding to have been reached on or about 11 June 2016, and that the timing of the existence of the arrangement or understanding was not challenged by the ACCC.<sup>11</sup> Wigney J proceeded on a similar basis.<sup>12</sup>

14 The Full Court was correct to understand the primary judge's reasons in this way. Her Honour did not explicitly state when the arrangement was made or the understanding arrived at. However, her Honour identified a conversation a few days after 11 June 2016 in which a CFMEU representative told Hutchinson's project manager that the subcontractor "won't be doing your waterproofing"<sup>13</sup> as the "manifestation of mutual consent to carry out a common purpose".<sup>14</sup> This finding necessarily implies that the relevant arrangement or understanding had been reached no later than a few days after 11 June 2016.<sup>15</sup> It is similarly implicit, in the primary judge's findings as to when and how the arrangement or understanding was made or arrived at, that her Honour rejected the case put in the ACCC's closing submissions that the arrangement or understanding was made or arrived at by Hutchinson's conduct in terminating the subcontract on 26 July 2016.

15 Wigney J found that it was not open to the primary judge to infer the alleged arrangement or understanding. There was, as his Honour summarised his view, "insufficient evidence to support an inference that there had been any relevant meeting of minds or consensus between Hutchinson and the CFMEU, and insufficient evidence that Hutchinson had communicated its assent that it would terminate the [subcontract], or that it considered that it was under any obligation

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11 *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 123 [134].

12 *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 96-97 [75].

13 *Australian Competition and Consumer Commission v J Hutchinson Pty Ltd* (2022) 404 ALR 553 at 614 [340(24)].

14 *Australian Competition and Consumer Commission v J Hutchinson Pty Ltd* (2022) 404 ALR 553 at 614-616 [340(25), (27), (32), (33)].

15 *Australian Competition and Consumer Commission v J Hutchinson Pty Ltd* (2022) 404 ALR 553 at 614 [340(24)].

or duty to terminate the [subcontract] as a result of its dealings with the CFMEU".<sup>16</sup> His Honour then rejected a contention that he perceived the ACCC to have made that, by succumbing to the CFMEU's threats and terminating the contract, Hutchinson "both reached a consensus with the CFMEU and communicated its assent in that regard".<sup>17</sup> Among other reasons for its rejection, Wigney J considered that the contention was entirely inconsistent with the primary judge's findings about when the arrangement or understanding was made or arrived at.<sup>18</sup> Wigney J added that, even if it was possible to infer the existence of an arrangement or understanding, the evidence did not support an inference that the termination provision was included in the arrangement or understanding for a proscribed purpose.<sup>19</sup> His Honour considered that "the equally, if not more probable, inference was that Hutchinson's purpose in terminating the contract was simply to avoid any, or any ongoing, industrial action by the CFMEU".<sup>20</sup>

16 Bromwich and Anderson JJ recorded the ACCC to have submitted that "[b]ecause Hutchinson succumbed to threats from CFMEU ... it follows that it can be inferred that there is an arrangement or understanding".<sup>21</sup> Their Honours rejected that submission, saying:<sup>22</sup>

"[E]ven when the act or omission sought to be achieved, being the subject matter of the putative arrangement or understanding, is arrived at by a unilateral demand and the party to whom it is directed succumbs, that capitulation can be with or without the indispensable meeting of the minds

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16 *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 96 [73].

17 *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 96 [74].

18 *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 96-97 [75].

19 *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 97 [77].

20 *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 97 [78]. See also 98 [81].

21 *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 127 [148].

22 *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 129 [152]. See also 134 [172], 136 [176]-[177].

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by the communication of assent. If either is equally likely, no arrangement or understanding is established."

17 For their Honours, the primary judge's findings of "manifestations of mutual consent to carry out a common purpose" did not "take what occurred beyond Hutchinson merely succumbing to threats by the CFMEU".<sup>23</sup> It followed that the primary judge's finding of the existence of the alleged arrangement or understanding could not stand.<sup>24</sup>

*The ACCC's case in this Court*

18 By its single ground of appeal to this Court, the ACCC seeks to snatch victory from the jaws of its defeat in the Full Court by seizing on the availability of the inference, identified by Wigney J<sup>25</sup> and not inconsistent with the reasons of Bromwich and Anderson JJ, that Hutchinson terminated the subcontract for no reason other than to avoid industrial action by the CFMEU. No longer contending that Hutchinson made an arrangement with the CFMEU,<sup>26</sup> the ACCC contends that the inference is sufficient to establish that Hutchinson arrived at an understanding with the CFMEU. The ACCC finds that contention on the proposition that "if one person makes a threat and demand to a second person, and the second person capitulates to that threat and acts as demanded, what has arisen is an 'understanding' for the purposes of the Act". The proposition is too broad.

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23 *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 140 [187].

24 *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 140 [188].

25 *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 91 [52].

26 *cf J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 126 [142(f)], 127-128 [148].

### Arriving at an understanding

19 The collocation of the words "contract, arrangement or understanding"<sup>27</sup> in Pt IV of the Act refers to "a spectrum of consensual dealings"<sup>28</sup> between parties in which the words "arrangement" and "understanding" each describe something less than a legally binding contract.<sup>29</sup> Sections 45E(3) and 45EA, amongst other provisions within Pt IV, distinguish between contracts and arrangements, which are "made", and understandings, which are "arrived at". Equally, however, they make clear: that a contract, arrangement or understanding is made or arrived at by a person "with" one or more other persons; that an understanding no less than a contract or arrangement must "contain a provision" that is "included" for a proscribed purpose; and that such a provision is something to which such a person "must not give effect". The words "arrive at", in relation to an understanding, are defined in s 4(1) of the Act to include "reach or enter into".

20 Like an arrangement, an understanding may be informal as well as unenforceable, so that a person may be free to withdraw from it or to act inconsistently with it, notwithstanding their adoption of it.<sup>30</sup> Further, for one person to arrive at an understanding or make an arrangement with another person which is of sufficient substance to be characterised as containing a provision to which one or other of them is prohibited from giving effect necessarily involves interaction between them by which one expressly or tacitly communicates by words or conduct to the other a commitment to act or refrain from acting in a

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27 As it appears in s 45E(3) as well as in ss 45AC, 45AD, 45AF, 45AG, 45AH, 45AJ, 45AK, 45AL, 45AN, 45AO, 45AP, 45AQ, 45AR, 45AS, 45AT, 45AU and 45 of the *Competition and Consumer Act 2010* (Cth) in its current form.

28 *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321 at 331 [24]; see also *Australian Competition and Consumer Commission v BlueScope Steel Ltd [No 5]* [2022] FCA 1475 at [106].

29 *Norcast S.ár.L v Bradken Ltd [No 2]* (2013) 219 FCR 14 at 78 [263(1)], citing *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344 at 360 [75], *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1 at 7; [1958] AC 450 at 465 and *Top Performance Motors Pty Ltd v Ira Berk (Queensland) Pty Ltd* (1975) 5 ALR 465 at 469.

30 *Federal Commissioner of Taxation v Lutovi Investments Pty Ltd* (1978) 140 CLR 434 at 444.

particular way. For an understanding to be arrived at, there must at least to that extent be a "consensus" or a "meeting of the minds".<sup>31</sup>

21 There is no doubt that an understanding may be arrived at where one person, following receipt of a demand accompanied by a threat from another person, communicates by words or conduct to the person who made the threat a commitment to do what has been demanded. An example of such a case is *Rural Press Ltd v Australian Competition and Consumer Commission*,<sup>32</sup> where, on the extensive findings of fact by the primary judge in that case,<sup>33</sup> that was the nature of the arrangement accepted by this Court to have been made and which applies equally to an understanding.

22 On the other hand, an understanding is not, without more, arrived at where one person unilaterally decides to act in a particular way in response to conduct of another, even if that conduct involves the making of a demand accompanied by a threat.<sup>34</sup>

23 That is perhaps to say no more than that there is no special category of understandings that are arrived at because of a threat or, more specifically, a threat of industrial action. The act of a person succumbing to a threat does not, without more, amount to arrival at an understanding to do what is demanded. The act may

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31 *Norcast S.ár.L v Bradken Ltd [No 2]* (2013) 219 FCR 14 at 78 [263(2.1)]. See also *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466 at 476 [15]; *Australian Competition and Consumer Commission v Australian Egg Corporation Ltd* (2017) 254 FCR 311 at 330 [95]; *Australian Competition and Consumer Commission v BlueScope Steel Ltd [No 5]* [2022] FCA 1475 at [102(b)].

32 (2003) 216 CLR 53 at 68 [30].

33 *Australian Competition and Consumer Commission v Rural Press Ltd* (2001) ATPR ¶41-804 at 42,718-42,728 [5]-[72], 42,730-42,733 [81]-[90]; *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 259-260 [84].

34 See, eg, *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2008] FCA 678 at [101]; *Keith Russell Simplicity Funerals Pty Ltd v Cremation Society of Australia (ACT) Ltd* (1982) 40 ALR 125 at 128-129.

be explicable as a rational, commercial response to the threat rather than a form of collusive behaviour aimed at achieving a proscribed purpose.

24 Properly understood, the reasoning in *In re British Basic Slag Ltd's Application*<sup>35</sup> does not affect this analysis. In that case, the English Court of Appeal considered the meaning of "arrangement" in s 6(3) of the *Restrictive Trade Practices Act 1956* (UK). In a frequently cited passage,<sup>36</sup> Diplock LJ adopted the primary judge's statement that "all that is required ... to constitute an arrangement not enforceable in law is that the parties to it shall have communicated with one another in some way, and that as a result of the communication each has intentionally aroused in the other an expectation that he will act in a certain way". Diplock LJ went on to state that:<sup>37</sup>

"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".

25 This expression of what is required for an arrangement may be treated as applicable to an understanding,<sup>38</sup> provided that Diplock LJ's statement is understood in its context. That context involved the member companies of a common marketing organisation for the sale of fertilisers including basic slag. The relevant representations of future conduct involved offers to accept certain restrictions: there was no suggestion that Diplock LJ's statement could apply to a representation as to future conduct in the nature of a threat, which is the opposite of an offer.

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35 [1963] 1 WLR 727; [1963] 2 All ER 807.

36 *In re British Basic Slag Ltd's Application* [1963] 1 WLR 727 at 747; [1963] 2 All ER 807 at 819.

37 *In re British Basic Slag Ltd's Application* [1963] 1 WLR 727 at 747; [1963] 2 All ER 807 at 819.

38 cf *Top Performance Motors Pty Ltd v Ira Berk (Queensland) Pty Ltd* (1975) 5 ALR 465 at 469-470.

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### **Disposition of the appeals**

26           On the facts found and not challenged by the ACCC in this Court, the Full Court was correct to conclude that there was no understanding between Hutchinson and the CFMEU for the purposes of ss 45E(3) and 45EA of the Act in the absence of any proof of communication, express or tacit, between them by which the parties reached a common mind. Once it is accepted that arrival at an understanding 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, the ACCC's contention that the understanding was formed by Hutchinson's conduct in terminating the subcontract to avoid industrial action must be rejected.

### **Conclusion**

27           The appeals must be dismissed. Costs should follow the event.

EDELMAN J.

**The issue in these appeals: reciprocity in contracts, arrangements, and understandings**

28 A company engages a waterproofing subcontractor to perform work on a building site. The waterproofing subcontractor does not have an enterprise agreement ("EA", also known as an enterprise bargaining agreement). A union delegate who was employed by the company tells the company employee responsible for subcontracting that the union will engage in industrial action if the waterproofing subcontractor comes onto the site. The remarks by the union delegate are, essentially, a demand that the company prevent the subcontractor from coming onto the site, coupled with a threat of industrial action if the company does not do so. After a delay in which the company unsuccessfully attempts to assist the subcontractor to negotiate and to obtain an EA with the union, the company terminates the waterproofer's subcontract. The reason for the termination is to avoid the union's threat. But neither the termination, nor the reason for it, is communicated to the union.

29 In an action for contravention brought by the appellant, the Australian Competition and Consumer Commission ("the ACCC"), the primary judge in the Federal Court of Australia held that: (i) the company contravened s 45E(3)(a) and s 45EA of the *Competition and Consumer Act 2010* (Cth), which proscribe making particular contracts or arrangements, or arriving at particular understandings (s 45E(3)(a)), and giving effect to such contracts, arrangements or understandings (s 45EA); and (ii) the union was knowingly concerned in, or party to, and induced, those contraventions, within the meaning of s 76 of the *Competition and Consumer Act*.

30 The primary judge found that this contravention occurred at around the time of the union's demand. The Full Court of the Federal Court of Australia unanimously allowed appeals by the company and the union, concluding that the company and the union had not made a contract or arrangement and had not arrived at an understanding. The central question for this Court is whether there was a contract, arrangement or understanding between the company and the union (with the ACCC's submissions before this Court focusing upon an "understanding").

31 A contract, arrangement or understanding requires reciprocity in the sense of reciprocal conduct between two or more people. A reciprocal understanding would have arisen if the union delegate had expressly or impliedly conveyed that no response need be communicated to the union so that it would have been sufficient to satisfy the union's demand if no member of the union were to see the waterproofer come onto the site again. The ACCC bore the onus of proving, by findings of primary fact or the drawing of inferences from the circumstances, that the requirement of communication of assent had been dispensed with.

32 There might have been a strong case for such an inference (that the requirement of communication of assent had been dispensed with) based upon the communication by the union delegate to the company employee. But at the conclusion of his oral submissions in reply in this Court, senior counsel for the ACCC properly conceded that the ACCC had not at any stage made any submissions or run any case that the union had dispensed with any requirement of communication of a response by the company. The case for the ACCC was run in a clear and otherwise compelling manner but the absence of any claim that the union had expressly or impliedly dispensed with the need for communication of assent by the company to the union's demand meant that proof of the necessary reciprocity to establish a contract, arrangement or understanding was lacking.

33 The appeals must be dismissed.

### **The facts in outline**

34 J Hutchinson Pty Ltd ("Hutchinson") was the head contractor of a large construction project in Brisbane. Hutchinson was party to an EA which required it to consult with its employees and the Construction, Forestry and Maritime Employees Union ("the CFMEU") about the appointment of subcontractors in certain circumstances. The CFMEU wanted Hutchinson to appoint subcontractors which had EAs that covered the CFMEU. When choosing subcontractors, it was Hutchinson's practice to have "some regard" to two lists of names of subcontractors with EAs, which had been issued by the CFMEU in 2014 and 2016. The 2014 list bore the CFMEU logo.

35 In March 2016, Hutchinson entered into a subcontract with a waterproofing subcontractor, Waterproofing Industries Qld Pty Ltd ("WPI"), to acquire waterproofing services on the construction project. WPI did not have an EA and it was not on the CFMEU lists of waterproofing subcontractors held by Hutchinson. The CFMEU had not been consulted by Hutchinson before the engagement of WPI, as the terms of Hutchinson's EA required. The primary judge inferred that if the CFMEU had been consulted, then Hutchinson would not have entered into a subcontract with WPI.

36 WPI performed some work on the site in April and May 2016. On 11 June 2016, Mr Clarke, who was a union delegate for the CFMEU (and who was also employed by Hutchinson), spoke with Mr Meland, who was a Hutchinson employee responsible for managing subcontractors. Mr Clarke told Mr Meland that Mr Clarke had been instructed by Mr Steele, who was a CFMEU organiser, to "sit the job down if WPI come on site". Mr Clarke explained to Mr Meland that the threat of CFMEU industrial action was being made because WPI did not have an EA.

37 There was some dispute in this Court about the characterisation of the conduct of Hutchinson after this meeting. The most accurate characterisation,

expressed by Wigney J in the Full Court, is that although WPI did not provide waterproofing services at Hutchinson's project after 11 June 2016, WPI was not, at that time, excluded from the project. Rather, there was no need for waterproofing work to be performed until July 2016.<sup>39</sup>

38 During June 2016, Mr Meland assisted WPI in an endeavour to help WPI to obtain an EA. Mr Meland spoke with Mr Hadfield, the director of WPI, and urged WPI to work with the CFMEU to get an EA. Mr Meland also referred the issue to Hutchinson's industrial relations team. Mr Meland also spoke with Mr Steele about the reasons that WPI could not get an EA. Mr Steele told Mr Meland that WPI would not be able to get an EA (which covered the CFMEU) and that "[WPI] won't be doing your waterproofing". There was no finding that Mr Meland agreed with Mr Steele or that Mr Meland said anything to indicate that the subcontract with WPI would be terminated.

39 In the ensuing period, WPI was told by Mr Clarke that it needed approval from Mr Vink, the person at the CFMEU with responsibility for approving EAs with waterproofers and who had apparently prepared the CFMEU lists. When Mr Vink was unavailable, WPI was told by Mr Clarke to speak with Mr Steele to get a "confirmation to work". On 13 July 2016, another waterproofer was inducted onsite and commenced waterproofing work from 20 July 2016. Also on 13 July 2016, WPI sent an email to the CFMEU complaining about being unable to get in touch with Mr Vink or Mr Steele and describing the urgency "as we are required to do work onsite".

40 On 26 July 2016, following an earlier discussion with a senior employee of Hutchinson, Mr Meland delivered a letter, on behalf of Hutchinson, to WPI terminating WPI's subcontract with Hutchinson.

### **Sections 45E(3) and 45EA of the *Competition and Consumer Act***

41 Part IV of the *Competition and Consumer Act* is concerned with restrictive trade practices. The provisions with which these appeals are concerned fall within Div 2 of Pt IV, namely ss 45E(3)(a) and 45EA. Section 45E includes, relevantly, a prohibition imposed upon an acquirer of services who has been accustomed or obliged to acquire services from a supplier. The acquirer of services must not "make a contract or arrangement, or arrive at an understanding" with a trade union ("an organisation of employees" or "an officer of such an organisation"), or with a person who represents such an organisation or officer, that contains a provision included for a purpose of preventing or hindering the acquirer from acquiring or continuing to acquire services from the supplier.

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39 *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 84-85 [14], 95 [71].

42 The text of s 45E(3)(a) is as follows:

*"Prohibition in an acquisition situation*

(3) In an acquisition situation, the first person [a person who 'has been accustomed, or is under an obligation, to acquire goods or services' from a second person<sup>40</sup>] must not make a contract or arrangement, or arrive at an understanding, with an organisation of employees, an officer of such an organisation or a person acting for and on behalf of such an officer or organisation, if the proposed contract, arrangement or understanding contains a provision included for the purpose, or for purposes including the purpose, of:

(a) preventing or hindering the first person from acquiring or continuing to acquire such goods or services from the second person".

43 Section 45EA, the other provision which Hutchinson was found by the primary judge to have contravened, and to which contravention the CFMEU was found to be a party or accessory within s 76, relevantly contains the following:

**"Provisions contravening section 45E not to be given effect**

A person must not give effect to a provision of a contract, arrangement or understanding if, because of the provision, the making of the contract or arrangement, or the arriving at the understanding, by the person:

(a) contravened subsection 45E(2) or (3)".

**Contract, arrangement or understanding**

44 There was no challenge on these appeals to the finding of the primary judge, not disturbed by the Full Court, that a "provision" of the demand by the CFMEU on 11 June 2016 was for the purpose of preventing Hutchinson from continuing to acquire services from WPI. There was also no challenge on these appeals to the irresistible inference drawn by Wigney J, consistent with the findings of the primary judge,<sup>41</sup> that the only reason Hutchinson terminated the subcontract with WPI was due to the threat of industrial action by the CFMEU.<sup>42</sup> The issue was

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40 *Competition and Consumer Act*, s 45E(1)(b).

41 *Australian Competition and Consumer Commission v J Hutchinson Pty Ltd* (2022) 404 ALR 553 at 614 [340(26)], 617 [347], 618 [351].

42 *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 91 [52], 97 [78], 98 [83].

whether that provision formed part of a contract, arrangement or understanding. The submissions of the ACCC in this Court focused upon the notion of an "understanding".

45 The expression "make a contract or arrangement, or enter into an understanding" appeared in s 45(2) of the *Trade Practices Act 1974* (Cth) when that Act was first passed, although it replaced an earlier expression "make a contract, or engage in or be a party to a combination or conspiracy" from a version of the Bill, introduced in 1973, that had ultimately lapsed.<sup>43</sup> There does not appear to have been any intention of altering the scope of the provision by replacing the concepts of "combination" and "conspiracy" with "arrangement" and "understanding". As Mr Ellicott (the former Solicitor-General of the Commonwealth and later Attorney-General of the Commonwealth) said during the parliamentary debates concerning the *Trade Practices Bill*, one of the origins of the legislation was the *Sherman Act*<sup>44</sup> in the United States.<sup>45</sup> The earlier reference to "combination" and "conspiracy" had been drawn from the *Sherman Act*,<sup>46</sup> and "combinations" had been described by the Supreme Court of the United States, in terms that resonate with the expression ultimately adopted by the Commonwealth Parliament, as "ordinarily characterized by an express or implied agreement or understanding".<sup>47</sup> So too, in *R v Associated Northern Collieries*,<sup>48</sup> Isaacs J had referred interchangeably throughout his judgment to "combination", "conspiracy", "arrangement", and "understanding".

46 The notion of reciprocity involved in a "contract", "arrangement" or "understanding", like a "combination" or "conspiracy", reflects the same concern as the requirement of acting "in concert" in the related proscription in Pt IV, Div 2 of the restrictive trade practice (subject to exceptions<sup>49</sup>) where a first and second

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43 See *Trade Practices Bill 1973* (Cth), cl 45(2), *Trade Practices Bill 1974* (Cth), cl 45(2) and Australia, Senate, *Parliamentary Debates* (Hansard), 27 September 1973 at 1016.

44 15 USC §§1-7.

45 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 24 July 1974 at 569.

46 15 USC §1.

47 *Eastern Railroad Presidents Conference v Noerr Motor Freight Inc* (1961) 365 US 127 at 136.

48 (1911) 14 CLR 387.

49 *Competition and Consumer Act*, s 45DD or where, under s 45D or s 45DA, the supplier is the employer of the first or second person.

person, acting in concert for a relevant purpose and with a relevant effect or likely effect, engage in conduct that hinders or prevents a supplier from supplying services to an acquirer of the services.<sup>50</sup>

### Reciprocity in contracts, arrangements, and understandings

47 The simplest and clearest example of a contract between two people which could contain a provision with a prohibited purpose arises where each person promises to do something in exchange for the other's promise. But a contract at common law, the concept of which is adopted by s 45E of the *Competition and Consumer Act*, is not confined to such instances of bilateral promises. A contract can also be formed by a "unilateral" promise in exchange for some performance (including abstaining from some act) by another. Such cases, commonly described as "unilateral contracts", will only arise if the promise involves a request for some performance in exchange; otherwise, it is a "mere gratuitous undertaking".<sup>51</sup> As Holmes explained in 1881, the "root of the whole matter" is reciprocity.<sup>52</sup> The performance must be requested by the offeror and the performance by the offeree must conform to the terms of the offer.

48 The concepts of an "arrangement" and an "understanding" in s 45E of the *Competition and Consumer Act* are broader than the concept of a contract. As explained below, an arrangement or understanding can be made or arrived at even if no binding contract is made. Nevertheless, the concepts of arrangements and understandings still connote reciprocity. The element of reciprocity is reinforced by references in s 45E(3) to "mak[ing]" an arrangement, and "arriv[ing]" at an understanding (defined as including "reach or enter into"<sup>53</sup>), "with" another person. As Lockhart J said in *Trade Practices Commission v Email Ltd*,<sup>54</sup> "[u]nless there is reciprocity of commitment I do not readily see why the parties would come to an arrangement or understanding ... I see no point in an arrangement bare of reciprocity." This is also what was meant by Gibbs and Mason JJ (with whom Murphy J agreed<sup>55</sup>) when they said in *Federal Commissioner of Taxation v Lutovi*

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50 See *Competition and Consumer Act*, ss 45D, 45DA.

51 Smith, "Unilateral Contracts and Consideration" (1953) 69 *Law Quarterly Review* 99 at 101.

52 Holmes, *The Common Law* (1881) at 293-294. See *R v Clarke* (1927) 40 CLR 227 at 236.

53 *Competition and Consumer Act*, s 4(1) (definition of "arrive at").

54 (1980) 31 ALR 53 at 66.

55 (1978) 140 CLR 434 at 453.

*Investments Pty Ltd*<sup>56</sup> that, although an "arrangement" need not be a formal commitment or enforceable, it "should be consensual, and ... there should be some adoption of it".<sup>57</sup> As explained below, reciprocity requires that if one party makes an undertaking to another with a request for some performance by the other then, unless dispensed with by the undertaking party, the other party must communicate assent in the sense of informing the first party that the requested performance has been or will be undertaken.

*"Unilateral" contracts and reciprocity*

49 The description of a contract as "unilateral" is "misleading".<sup>58</sup> Every contract requires reciprocity, in the sense of a "quid pro quo". Hence, the mere promise by A to B that A will pay \$1,000 to B upon B's arrival in Sydney will not establish a contract when B arrives in Sydney. A contract would only be established if circumstances were proved by B that established: (i) the promise was properly to be interpreted as in exchange for B travelling to Sydney; (ii) B would be objectively understood as having performed the act of travelling to Sydney in exchange for that promise; and (iii) "the doing of the act [of travel to Sydney] was at once the acceptance of an offer and the providing of an executed consideration".<sup>59</sup>

50 A decision of this Court concerning such so-called "unilateral" contracts upon which the parties focused in this case is *R v Clarke*.<sup>60</sup> The Executive Government of Western Australia offered £1,000 for information that led to the arrest and conviction of anyone for the murders of two police officers. Mr Clarke provided information without which a conviction that was obtained for the murders would not have been probable. Mr Clarke provided that information exclusively for the purpose of clearing himself from a false charge of murder.

51 This Court unanimously held that Mr Clarke was not entitled to the reward.<sup>61</sup> The decision in *R v Clarke* turned upon whether Mr Clarke's

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56 (1978) 140 CLR 434.

57 (1978) 140 CLR 434 at 444.

58 *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 CLR 424 at 456.

59 *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 CLR 424 at 457. See also Smith, "Unilateral Contracts and Consideration" (1953) 69 *Law Quarterly Review* 99. Compare Goodhart, "A Short Replication" (1953) 69 *Law Quarterly Review* 106.

60 (1927) 40 CLR 227.

61 *R v Clarke* (1927) 40 CLR 227 at 237, 242, 245.

performance had occurred as a response to the offer. Each member of the Court held that it had not. Although some of the discussion can be taken to suggest that Mr Clarke needed to have had a subjective intention of responding to the offer in order to obtain the reward,<sup>62</sup> the better understanding (consistent with the objective theory of contract<sup>63</sup>) is that Mr Clarke's performance was not "in reference to"<sup>64</sup> the reward but was an act that, objectively understood, was engaged in solely for the "totally distinct object"<sup>65</sup> of clearing himself from a charge of murder. It was not "made to appear" that Mr Clarke's performance "was really done in consideration" of the promised reward.<sup>66</sup> By contrast, for example, the conduct of Mrs Carlill in using the carbolic smoke ball, after the offer of a reward was brought to her attention, was objectively referable to that offer.<sup>67</sup> Whether or not Mrs Carlill was subjectively induced to purchase the smoke ball by the offer of the reward or by a (perhaps prophetic<sup>68</sup>) desire to prevent influenza, or both, was irrelevant.<sup>69</sup>

52 The presently important point arising from *R v Clarke* is that all members of the Court held that in a "unilateral contract" the promisor could waive the requirement of communication that the offer had been accepted before a contract could be formed. As Isaacs A-CJ explained, by reference to the requirement for acceptance, "the offeror may always prescribe the method of acceptance",<sup>70</sup> and that prescription may include expressly or impliedly waiving the requirement for

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62 (1927) 40 CLR 227 at 239, 242, 244.

63 See *Taylor v Johnson* (1983) 151 CLR 422 at 429. See also *Realestate.com.au Pty Ltd v Hardingham* (2022) 277 CLR 115 at 147 [83] and the authorities cited there.

64 (1927) 40 CLR 227 at 236, citing *Fitch v Snedaker* (1868) 38 NY 248 at 249.

65 (1927) 40 CLR 227 at 235.

66 *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 CLR 424 at 456.

67 Simpson, "Quackery and Contract Law: The Case of the Carbolic Smoke Ball" (1985) 14 *Journal of Legal Studies* 345 at 356, 357, 359.

68 Her ultimate cause of death at 96 years old, more than half a century after first taking the carbolic smoke ball, was influenza: Simpson, "Quackery and Contract Law: The Case of the Carbolic Smoke Ball" (1985) 14 *Journal of Legal Studies* 345 at 389.

69 *Carlill v Carbolic Smoke Ball Co* [1892] 2 QB 484 at 489 fn 2. See *Williams v Carwardine* (1833) 4 B & Ad 621 [110 ER 590].

70 (1927) 40 CLR 227 at 233.

communication of acceptance.<sup>71</sup> If the need for communication of acceptance is waived then the offer will usually be objectively understood to mean that acceptance will occur at the time that the performance in reference to the offer begins (even if the offeree has not fulfilled the contractual condition for the reward at that stage) rather than, as Bowen LJ thought in *Carlill v Carbolic Smoke Ball Co*,<sup>72</sup> when the performance is completed and the condition for the reward is fulfilled.

53 Although an offeror can dispense with any need for notification of acceptance, the general principle or "ordinary rule" (albeit inaccurately expressed in subjective terms) is that "an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart".<sup>73</sup> It has been said that "clear language" is expected before the terms of an offer will be taken to have dispensed with the need for communication of acceptance.<sup>74</sup> But there are some circumstances where such dispensation will be easily inferred. The reward cases are one example. In a case involving a promise of a reward by A to B in exchange for some performance by B, it will usually be the case that the commencement of the performance by B "is the implied method of acceptance, and it simultaneously effects the double purpose of acceptance and performance".<sup>75</sup> The same may be true in some cases involving an implied promise by A to refrain from threatened conduct in exchange for demanded performance by B. In every instance, all the circumstances will need to be considered to determine whether the person making the offer has expressly or impliedly intimated that "performance of the condition is a sufficient acceptance without notification".<sup>76</sup> In such circumstances, "the same act is at once sufficient for both acceptance and performance".<sup>77</sup>

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71 (1927) 40 CLR 227 at 233-234, citing *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 at 262-263. See also at 269. See further *Attrill v Dresdner Kleinwort Ltd* [2013] 3 All ER 607 at 628 [98].

72 [1893] 1 QB 256 at 268. Compare Simpson, "Quackery and Contract Law: The Case of the Carbolic Smoke Ball" (1985) 14 *Journal of Legal Studies* 345 at 378-379.

73 *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 at 269.

74 *Latec Finance Pty Ltd v Knight* [1969] 2 NSW 79 at 81, referring to *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 at 1432; [1966] 3 All ER 128 at 131.

75 *R v Clarke* (1927) 40 CLR 227 at 233.

76 *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 at 270. See also *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666 at 691.

77 *R v Clarke* (1927) 40 CLR 227 at 234.

*"Unilateral" arrangements and understandings and reciprocity*

54 The terms "arrangement" and "understanding" in s 45E of the *Competition and Consumer Act* are not defined. They bear their ordinary and common meaning. In *Newton v Federal Commissioner of Taxation*,<sup>78</sup> Lord Denning, giving the advice of the Privy Council, said that the word "arrangement" is "apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons". So too, in *Hughes v Western Australian Cricket Association (Inc)*,<sup>79</sup> Toohey J referred to the tendency in decisions to "treat arrangement and understanding as synonymous, being something less than a binding contract or agreement".

55 Like the terms "combination" and "conspiracy", although the ordinary or common usage of the interchangeable terms "arrangement" and "understanding" does not require an enforceable obligation, those terms require reciprocity in the sense of some "moral"<sup>80</sup> obligation that arises where each of two (or more) people has "intentionally aroused in the other an expectation that [they] will act in a certain way".<sup>81</sup> Reciprocity will not be satisfied by a mere unilateral undertaking. Thus, in *Norcast S.ár.L v Bradken Ltd [No 2]*,<sup>82</sup> Gordon J said that an arrangement or understanding required "evidence of a consensus or meeting of the minds of the parties, under which one party or both of them must assume an obligation or give

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78 (1958) 98 CLR 1 at 7; [1958] AC 450 at 465. See also *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd* (1999) 92 FCR 375 at 406 [135] and *Norcast S.ár.L v Bradken Ltd [No 2]* (2013) 219 FCR 14 at 78 [263(1)] and the cases cited there.

79 (1986) 19 FCR 10 at 32. See also *Norcast S.ár.L v Bradken Ltd [No 2]* (2013) 219 FCR 14 at 78 [263(1)].

80 See *In re British Basic Slag Ltd's Application* [1963] 1 WLR 727 at 739, 746; [1963] 2 All ER 807 at 814, 819.

81 See *In re British Basic Slag Ltd's Application* [1963] 1 WLR 727 at 747; [1963] 2 All ER 807 at 819, quoting *In re British Basic Slag Ltd's Application* [1962] 1 WLR 986 at 995; [1962] 3 All ER 247 at 255.

82 (2013) 219 FCR 14 at 78 [263(2.1)]. See also *Top Performance Motors Pty Ltd v Ira Berk (Queensland) Pty Ltd* (1975) 5 ALR 465 at 469; *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344 at 360 [75]; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466 at 476 [15], 512 [175]; *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2008] FCA 678 at [10].

an assurance or undertaking that it will act in a certain way which may not be enforceable at law".

56 The repeated reference in the cases to "consensus" or a "meeting of the minds" must be understood as a reference to the objective concept of reciprocity rather than any concept based upon the subjective thoughts of either or both of the parties. This objective concept of reciprocity applies in the same way for contracts, arrangements, and understandings. As with contracts, reciprocity generally requires communication between the parties of the reciprocal nature of their undertakings or performance. Also like instances of contract, without communication from both parties reciprocity will only exist if one party dispenses with the need for such communication from the other. Hence, in a situation where a unilateral undertaking is made by one party with a request for some performance by the other, a communication that the requested performance has been or will be undertaken will be necessary unless the party making the unilateral undertaking expressly or impliedly dispenses with any need for that communication.

57 The ACCC relied upon the reasoning of Diplock LJ in *In re British Basic Slag Ltd's Application*,<sup>83</sup> in which he gave an example of a unilateral undertaking that would amount to an "arrangement":

"[I]t is sufficient to constitute an arrangement between A and B, if (1) A makes a representation as to [their] future conduct with the expectation and intention that such conduct on [their] 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."

58 In this example, it appears to have been assumed by Diplock LJ that A's conduct has implied that an arrangement will arise if B acts in a particular way, with such arrangement being intended by A and B (objectively determined), even without B communicating their assent to A. The example should not be understood as connoting that an arrangement or understanding can be reached without the requirement of such communication being expressly or impliedly dispensed with by A. Indeed, shortly before giving this example, Diplock LJ said that an arrangement "involves a meeting of minds" and "mutuality".<sup>84</sup> As senior counsel for the ACCC ultimately, and aptly, put the point, Diplock LJ's example is "really no more than [an explanation that] if one part[y] says to the other party, I will do something if you will do something, and the other party agrees to do that thing, ...

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83 [1963] 1 WLR 727 at 747; [1963] 2 All ER 807 at 819.

84 *In re British Basic Slag Ltd's Application* [1963] 1 WLR 727 at 746-747; [1963] 2 All ER 807 at 819.

they have each then assumed a moral obligation or a duty [in] honour ... to do that thing".

59 As with "unilateral contracts", if A's conduct has implied that an understanding will arise from B performing requested action without any communication of assent to A, then an understanding will be reached once B acts in that way, with B's action being objectively referable to A's request. Once again, "the same act is at once sufficient for both acceptance and performance".<sup>85</sup> In terms of s 45E(3) and s 45EA of the *Competition and Consumer Act*, in these circumstances the same act of B in performing the implied request made by A will involve both making an arrangement or arriving at an understanding within s 45E(3) and also giving effect to the arrangement or understanding within s 45EA.

### **A long-established example of the requirement of reciprocity in arrangements and understandings**

60 Senior counsel for the CFMEU relied upon a decision of the Federal Court which provides a neat illustration of the principles discussed above. In *Keith Russell Simplicity Funerals Pty Ltd v Cremation Society of Australia (ACT) Ltd*,<sup>86</sup> a funeral provider which was accustomed to acquire chapel and cremation services from some of the respondents was told by those respondents that those services would not be supplied because the relevant union had placed a ban on supplying services to the funeral provider due to its use of non-union labour. The relevant respondents had been the subject of an "ultimatum" from the union threatening industrial action unless the respondents complied with the demand from the union to cease supplying services to the funeral provider.

61 The funeral provider sought an interlocutory injunction alleging a contravention of s 45E(1) of the *Trade Practices Act 1974* (Cth) on the basis that an arrangement or understanding had been reached between the union and the relevant respondents which contained a provision that had the purpose of preventing or hindering the supply of those services to the funeral provider. The respondents argued that they had not made an arrangement or arrived at an understanding. Although the version of s 45E considered by Franki J was not in precisely the same terms as that which was in force at the time of the events in this case,<sup>87</sup> the prohibitions are relevantly the same. Relevantly, the former prohibition

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85 *R v Clarke* (1927) 40 CLR 227 at 234.

86 (1982) 40 ALR 125.

87 See *Industrial Relations Reform Act 1993* (Cth), s 44; *Workplace Relations and Other Legislation Amendment Act 1996* (Cth), Sch 17, item 1.

contained in s 45E(1) applied to the making or arriving at of a contract, arrangement or understanding.<sup>88</sup>

62 Franki J held that the funeral provider had not established a prima facie case of a proscribed arrangement or understanding, saying that there was no evidence that the relevant respondents had "done more than give effect to an ultimatum which they received from the union" and that "the respondents have simply responded in a commercial way to a union ban".<sup>89</sup> In other words, there was no evidence that the union ultimatum had dispensed with any need for communication of assent from the respondents so that merely complying with the ultimatum did not establish an arrangement or an understanding.

63 The decision in *Keith Russell Simplicity Funerals Pty Ltd v Cremation Society of Australia (ACT) Ltd* has stood, unchallenged, for more than 40 years. In other cases, there may be issues about: (i) whether, in all the circumstances, communication of assent had been dispensed with; or (ii) the extent of the communication of assent required, with perhaps even a "mild assurance" being sufficient in some cases.<sup>90</sup> But, in the 40 years since *Keith Russell Simplicity Funerals Pty Ltd v Cremation Society of Australia (ACT) Ltd* was decided, it has not been doubted that unless communication of assent is dispensed with by the party making the offer, request or demand, the communication of assent by the recipient of an offer, request or demand is required in order to establish an arrangement or understanding. The reasoning developed in *Keith Russell Simplicity Funerals Pty Ltd v Cremation Society of Australia (ACT) Ltd* applies, in the same way, to the circumstances of this case.

### **The ACCC did not prove reciprocity**

64 The starting point in any case involving an allegation of an arrangement or understanding is to identify the point at which the arrangement or understanding is said to have been reached. It can immediately be accepted that the threat made by the CFMEU on 11 June 2016 constituted: (i) an implied promise not to engage in industrial action due to WPI's presence on the site if Hutchinson were to exclude WPI from the site; and (ii) an implied request for Hutchinson to prevent WPI from performing any services. But on or around 11 June 2016 there was no objective assent by Hutchinson to that request or demand. Nor was there any performance

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88 See *Trade Practices (Boycotts) Amendment Act 1980* (Cth), s 5.

89 *Keith Russell Simplicity Funerals Pty Ltd v Cremation Society of Australia (ACT) Ltd* (1982) 40 ALR 125 at 128, 129.

90 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 259 [84]. See also on appeal *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at 68 [29], 70 [34].

by Hutchinson which was referable to the request or demand. There was, therefore, no reciprocity from Hutchinson.

65 Contrary to the reasoning of the primary judge, the statement made by Mr Steele to Mr Meland, a few days after the initial threat of industrial action was made on 11 June 2016, that "[WPI] won't be doing your waterproofing" was neither a "strong indication that there was already an arrangement or understanding", nor a "'manifestation of mutual consent to carry out a common purpose', such purpose being that Hutchinson would no longer acquire waterproofing services from WPI".<sup>91</sup> To the contrary, after 11 June 2016, Hutchinson, by Mr Meland, attempted to assist WPI to obtain an EA so that Hutchinson could continue to acquire waterproofing services from WPI.

66 Since, on or around 11 June 2016, Hutchinson had neither reached a consensus with the CFMEU that Hutchinson would be prevented from acquiring services from WPI, nor performed acts which were referable to the CFMEU's demand, the ACCC needed to rely upon a submission, inconsistent with the findings of the primary judge, that the arrangement or understanding to prevent Hutchinson from acquiring services from WPI was established some time after 11 June 2016 and "[u]p to and including 26 July [2016]", when Hutchinson terminated the subcontract with WPI. In effect, the submission of the ACCC was that, as soon as Hutchinson had taken steps which were consistent with the CFMEU demand, an arrangement or understanding was reached without the need for any further communication between Hutchinson and the CFMEU.

67 The CFMEU objected to this submission, asserting prejudice by the running of a new case of the ACCC that could have been the subject of evidence at trial.<sup>92</sup> The CFMEU pointed to issues that could have been addressed at trial concerning the requirement in s 45E(3)(a) of the *Competition and Consumer Act* for a common purpose of Hutchinson and the CFMEU that Hutchinson be prevented from acquiring services from WPI to be established. If an arrangement or understanding were reached on 11 June 2016, then the common purpose of Hutchinson and the CFMEU would have been that attributed to those parties by the purposes of Mr Meland and Mr Clarke. Although the ACCC's Amended Concise Statement did allege that an arrangement or understanding was made or arrived at between about May 2016 and 26 July 2016, the ACCC did not run any case based upon systems intentionality or a purpose that could be deduced from corporate

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91 *Australian Competition and Consumer Commission v J Hutchinson Pty Ltd* (2022) 404 ALR 553 at 614 [340(24)-(25)], referring to *R v Associated Northern Collieries* (1911) 14 CLR 387 at 400.

92 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8; *Water Board v Moustakas* (1988) 180 CLR 491 at 497.

systems.<sup>93</sup> Therefore, there was a live, but unexplored, issue of the individual or individuals who held the proscribed purpose to be attributed to Hutchinson at the unspecified time between 11 June 2016 and 26 July 2016.

68 Unlike the statutory question of whether a contract, arrangement or understanding has been made or arrived at, which is determined objectively, the inquiry required by s 45E as to the purpose of a provision of a contract, arrangement or understanding (as distinct from the motives for pursuing that purpose<sup>94</sup>) is determined by the subjective purpose of a relevant individual, at least outside any case involving a systemic purpose of a corporation.<sup>95</sup> Had a particular individual been identified by the ACCC as holding a proscribed purpose, there may have been a strong case that at least one proscribed subjective purpose existed, with the non-exclusive nature of that purpose being supported by s 45E(3)(a), which only requires that the proscribed purpose be one of the purposes of the impugned provision of a contract, arrangement or understanding. The identification of the relevant individuals, and their purposes, on 26 July 2016 might have established that the CFMEU in requesting the exclusion of WPI, and Hutchinson in terminating the subcontract with WPI, had, for whatever motive, the ultimate object of preventing Hutchinson from acquiring WPI's services.

69 It is, however, ultimately unnecessary to consider these issues of subjective purpose or the extent of any prejudice to Hutchinson and the CFMEU that would be occasioned by consideration in this Court of the submission by the ACCC that a contract, arrangement or understanding had been made or arrived at some time between 11 June 2016 and 26 July 2016. Even assuming that there was some relevant officer of each of Hutchinson and the CFMEU who subjectively held the proscribed purpose at the relevant time between 11 June 2016 and 26 July 2016, the ACCC did not establish that the CFMEU had expressly or impliedly dispensed with the requirement of communication of assent by Hutchinson to the CFMEU's

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93 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2024) 98 ALJR 1021 at 1047-1048 [108]-[110], 1069 [243]; 419 ALR 30 at 61-62, 91. See generally Bant, "Systems Intentionality: Theory and Practice", in Bant (ed), *The Culpable Corporate Mind* (2023) 183.

94 *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2008] FCA 678 at [10]. See also *Automotive Invest Pty Ltd v Federal Commissioner of Taxation* (2024) 98 ALJR 1245 at 1265 [110]; 419 ALR 324 at 351.

95 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466 at 513-514 [181]; *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2008] FCA 678 at [10].

27.

demand that Hutchinson no longer acquire waterproofing services from WPI. Without running a case concerning such dispensation, the lack of any communication of assent meant that the necessary reciprocity to establish a contract, arrangement or understanding, within s 45E(3)(a) and s 45EA of the *Competition and Consumer Act*, was absent.

### **Conclusion**

70 The result of this case might have been different if s 45E(3) and s 45EA had proscribed unilateral conduct arising from an "undertaking", "demand" or "threat", all of which can arise without any proof of reciprocity. But the history, text, and context of s 45E(3) and s 45EA make clear that an arrangement or understanding, like a contract or a combination or conspiracy, requires reciprocity. Without communication of assent to the party making an offer, request or demand, no contract, arrangement or understanding can be formed with the other party unless the party making the offer, request or demand expressly or impliedly dispenses with the need for such communication.

71 So too, the result of this case might have been different if the ACCC had established that, during the conversation on 11 June 2016 between Mr Clarke and Mr Meland, Mr Clarke had dispensed with the need for Mr Meland to communicate the assent of Hutchinson to the CFMEU, so that an arrangement or understanding would have been formed by Hutchinson terminating WPI's subcontract in a manner objectively referable to the demand by the CFMEU. But the ACCC did not run such a case and made no submissions to that effect.

72 I agree with Gageler CJ, Gleeson and Beech-Jones JJ that the appeals should be dismissed with costs.

73 STEWARD J. This case concerns an important provision of the *Competition and Consumer Act 2010* (Cth) ("the CC Act") designed to prevent secondary boycotts. With great respect to the majority, their Honours' decision renders that provision inutile. The provision is s 45E.

74 It is not in dispute that the Construction, Forestry and Maritime Employees Union ("the CFMEU") threatened the developer J Hutchinson Pty Ltd ("Hutchinson") with industrial carnage if it continued to use a particular sub-contractor, Waterproofing Industries Qld Pty Ltd ("WPI"). The language used to threaten Hutchinson might have been aptly used in a vintage comedy. Mr Clarke, the CFMEU delegate, said to Mr Meland, Hutchinson's project manager, on 11 June 2016 that the CFMEU would "sit the job down if WPI come on site". Thereafter, WPI did not come on site and did not provide waterproofing services for the project. And on 26 July 2016, Hutchinson terminated WPI's contract. The Full Court of the Federal Court of Australia found, and it was not thereafter disputed, that Hutchinson had succumbed to the CFMEU's threat. To succumb is to capitulate. Hutchinson had no other reason for so acting.

75 The current form of s 45E became law in 1997 with the introduction of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth); it is directed at a particular form of secondary boycotting.<sup>96</sup> The Explanatory Memorandum to the *Workplace Relations and Other Legislation Amendment Bill 1996* (Cth) described the function and purpose of the new s 45E in these terms:<sup>97</sup>

"New section 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."

76 The original s 45E, enacted in 1980,<sup>98</sup> was specifically introduced in response to a threat posed by "collusion between companies and unions" to the provisions of the *Trade Practices Act 1974* (Cth) which had originally targeted secondary boycotts.<sup>99</sup> Parliament in 1980 recognised that such "abuses" arose from the "sufficient economic power" of trade unions.<sup>100</sup>

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96 Section 45E of the *Trade Practices Act 1974* (Cth).

97 Australia, House of Representatives, *Workplace Relations and Other Legislation Amendment Bill 1996*, Explanatory Memorandum at 186 [18.30].

98 *Trade Practices (Boycotts) Amendment Act 1980* (Cth), s 5.

99 Australia, Senate, *Parliamentary Debates* (Hansard), 16 May 1980 at 2397.

100 Australia, Senate, *Parliamentary Debates* (Hansard), 16 May 1980 at 2398.

77 Even though Hutchinson had indeed capitulated to the CFMEU's threat to avoid having its site subject to industrial loss or damage, the Full Court decided that s 45E did not apply. With very great respect, the result is troubling. For the reasons which follow, these appeals must be allowed.

78 I otherwise gratefully adopt the description of the facts and the procedural history set out in the reasons of Gageler CJ, Gleeson and Beech-Jones JJ.

### Section 45E

79 Section 45E relevantly provides:

*"Situations to which section applies*

(1) This section applies in the following situations:

- (a) a ***supply situation***—in this situation, a person (the ***first person***) has been accustomed, or is under an obligation, to supply goods or services to another person (the ***second person***); or
- (b) an ***acquisition situation***—in this situation, a person (the ***first person***) has been accustomed, or is under an obligation, to acquire goods or services from another person (the ***second person***).

Despite paragraphs (a) and (b), this section does not apply unless the first or second person is a corporation or both of them are corporations.

...

*Prohibition in an acquisition situation*

- (3) In an acquisition situation, the first person must not make a contract or arrangement, or arrive at an understanding, with an organisation of employees, an officer of such an organisation or a person acting for and on behalf of such an officer or organisation, if the proposed contract, arrangement or understanding contains a provision included for the purpose, or for purposes including the purpose, of:
  - (a) preventing or hindering the first person from acquiring or continuing to acquire such goods or services from the second person; or

- (b) preventing or hindering the first person from acquiring or continuing to acquire such goods or services from the second person, except subject to a condition:
  - (i) that is not a condition to which the acquisition of such goods or services by the first person from the second person has previously been subject because of a provision in a contract between those persons; and
  - (ii) that is about the persons to whom, the manner in which or the terms on which the second person may supply any goods or services."

### **The ground of appeal**

80 The Australian Competition and Consumer Commission ("the ACCC") had one ground of appeal. It was as follows:

"The Full Court erred in finding that an 'arrangement or understanding' for the purposes of s 45E(3) of the [CC Act] 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 [Hutchinson] 'succumbing to a threat' by the [CFMEU] and responding by doing what was demanded under sanction of the threat of industrial action was insufficient to give rise to an 'arrangement or understanding'."

81 During oral argument, this ground seemingly narrowed to a reliance only upon the word "understanding". For the reasons given below, nothing turns in these appeals upon any perceived difference in meaning between the words "arrangement" and "understanding".

### **"Arrangement" or "understanding"**

82 Section 45E relevantly applies when a person, here Hutchinson, makes a "contract" or "arrangement" or arrives at "an understanding" with an organisation of employees, here the CFMEU, which contains a provision included for the purpose of, or purposes including, preventing or hindering the first person (Hutchinson) from continuing to acquire services from a second person (WPI). The issue for determination is what is required for there to exist an "arrangement" or "understanding". These words have no necessary or fixed meaning. Their meaning is to be determined in accordance with statutory purpose and context. In the context of s 45E, they mean no more than a decided course of conduct.

83 Hutchinson, the CFMEU, and the Full Federal Court were all of the view that an arrangement or understanding required a "meeting of minds" and a

"manifestation of mutual consent"<sup>101</sup> to some course of conduct. With great respect, that is not correct in the particular context of s 45E.

84 In different statutory contexts, making an arrangement or arriving at an understanding may require a meeting of minds. Thus, the references in s 45 of the CC Act to an "understanding" and to an "arrangement" do connote a "meeting of minds", the "arousing [of] expectations", or the giving of "an assurance".<sup>102</sup> That is because s 45 is concerned with the presence of a common mind or consensus between a corporation and another to engage in prohibited cartel conduct. Such conduct is in furtherance of what is actively sought to be achieved by both parties. It is something both parties want.

85 This approach, and the cartel cases which adopt it, have no application to s 45E. That is because the outcome of any arrangement or understanding the subject of that provision is invariably not what one counterparty wants. Here, WPI was Hutchinson's preferred sub-contractor. Absent the CFMEU's threat, Hutchinson would have continued to use WPI. It did not do so because it succumbed or capitulated to the CFMEU's threat. That result involved no meeting of minds or consensus; rather it was the product of precisely the type of intimidation that s 45E is concerned to prohibit. A search for any true meeting of minds in the context of s 45E is simply misconceived. Rather, the search should be to ascertain whether a party has been induced to change its preferred course of action by reason of the action of an organisation of employees. That is the type of arrangement or understanding which s 45E concerns.

86 In that respect, the ACCC's reliance on the following celebrated passage of Diplock LJ's reasons in *British Basic Slag Ltd v Registrar of Restrictive Trading Agreements*<sup>103</sup> is apt:

"[I]t is sufficient to constitute an arrangement between A and B, if (1) A makes a representation as to [their] future conduct with the expectation and intention that such conduct on [their] 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

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**101** *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 90 [47], 104-105 [104], citing *Australian Competition and Consumer Commission v J Hutchinson Pty Ltd* (2022) 404 ALR 553 at 607 [320] and *R v Associated Northern Collieries* (1911) 14 CLR 387 at 400.

**102** *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd* (1999) 92 FCR 375 at 408 [141]; *Australian Competition and Consumer Commission v BlueScope Steel Ltd [No 5]* [2022] FCA 1475 at [102(b)]-[102(c)], [108].

**103** [1963] 1 WLR 727 at 747; [1963] 2 All ER 807 at 819.

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."

87 The word "inducement" in the foregoing passage is fitting to refer to the intended effect of a threat, and to a person acting to avoid such a threat being carried out. No part of Diplock LJ's reasoning involved the need for any communication of assent or agreement to give in to such a threat.

88 It is true that Diplock LJ also reasoned that for an arrangement to exist, the parties must consider themselves to be "in some degree under a duty, whether moral or legal, to conduct [themselves] in a particular way or not to conduct [themselves] in a particular way as the case may be".<sup>104</sup> In the Full Federal Court, Bromwich and Anderson JJ were similarly of the view that some form of "commitment" is required for an arrangement to be made or for an understanding to be arrived at.<sup>105</sup>

89 With respect, that conclusion is not consistent with authority of this Court. *Federal Commissioner of Taxation v Lutovi Investments Pty Ltd*<sup>106</sup> concerned whether an "arrangement" existed of a particular kind for the purposes of former s 44(2D) of the *Income Tax Assessment Act 1936* (Cth). Neither the terms of that provision, nor the factual circumstances in that case, need to be recited. It stands for two propositions, each of which is important for the purposes of s 45E. The first is that an arrangement may exist without commitment. Gibbs and Mason JJ (with whom Murphy J agreed) thus said:<sup>107</sup>

"It is, however, necessary that an arrangement should be consensual, and that there should be some adoption of it. But in our view it is not essential that the parties are committed to it or are bound to support it. An arrangement may be informal as well as unenforceable and the parties may be free to withdraw from it or to act inconsistently with it, notwithstanding their adoption of it."

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104 *British Basic Slag Ltd v Registrar of Restrictive Trading Agreements* [1963] 1 WLR 727 at 746; [1963] 2 All ER 807 at 819.

105 *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 122 [128].

106 (1978) 140 CLR 434.

107 *Federal Commissioner of Taxation v Lutovi Investments Pty Ltd* (1978) 140 CLR 434 at 444.

90 The second is that a court may infer the adoption of an arrangement from the conduct of the parties and no more. Gibbs and Mason JJ (with whom Murphy J agreed) said:<sup>108</sup>

"But what of an arrangement which is implied or inferred from the circumstances or the conduct of the parties? Is it excluded? We do not think so."

91 Of course, neither *British Basic Slag* nor *Lutovi* controls the meaning of the words "arrangement" or "understanding" as they appear in s 45E. Words like these have an almost "chameleon-like quality"<sup>109</sup> and their exact meaning depends upon their immediate statutory context. But each decision which interprets those words is illustrative of the breadth of meaning they may command.

92 In the context of s 45E, with its evident purpose of preventing corporations from succumbing to threats of industrial action which disturb existing obligations or arrangements for the supply or acquisition of goods or services, the making of such a threat and a change thereafter in a course of conduct in response to that threat is capable of evidencing an arrangement that had been made or an understanding that had been reached. In addition, and in such circumstances, it is also open to a court to infer that the change in conduct is a "provision" of that arrangement or understanding for the purposes of s 45E(3), and further that a purpose of the inclusion of that provision is one of the impugned purposes identified in s 45E(3)(a) and (b).

93 It is otherwise unrealistic in this field to expect the parties to verbalise, record or evidence their illegal conduct in some way. It is also unrealistic to search for a form of words whereby the blackmailed corporation somehow assents to the course of conduct sought to be secured through threats.

#### **Full Court's reasoning on "arrangement" and "understanding"**

94 With very great respect, Bromwich and Anderson JJ in the Full Federal Court made two inter-related errors. The first is that there needed to be some communication from Hutchinson, expressly made or otherwise inferred, in order for there to be an "arrangement" or "understanding". The second is that because

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108 *Federal Commissioner of Taxation v Lutovi Investments Pty Ltd* (1978) 140 CLR 434 at 443.

109 *Federal Commissioner of Taxation v Scully* (2000) 201 CLR 148 at 177 [59], quoting *Technical Products Pty Ltd v State Government Insurance Office (Queensland)* (1989) 167 CLR 45 at 47.

Hutchinson "unilaterally" succumbed to the CFMEU's threats, s 45E was not engaged.

95 The first error is found in the following passage, which should be set out in full:<sup>110</sup>

"[M]erely succumbing to a threat will not, without more, be enough for the purposes of establishing a contravention of s 45E(3)(a), which logically precedes any further contravention by way of giving effect to such an arrangement or understanding contrary to s 45EA(1)(a); a meeting of minds or its equivalent is still required. In order for minds to meet, there must be knowledge or awareness or a like state of mind on both sides as to the subject of that meeting of the minds. Logically, that must be manifested in some kind of communication, the existence of which may be inferred if a sufficient basis exists to support that inference. The need for such a communication is most obvious when what is relied upon is otherwise no more than parallel or acquiescent conduct, which can never suffice on its own. The communication of assent to a course of conduct to be adopted by one or more parties to the agreement or understanding completes the arrangement or understanding upon that assent being communicated."

96 For the reasons set out above, it is wrong in the specific context of s 45E to require there to have been a meeting of minds which involved the communication of assent to a course of conduct. The conduct against which s 45E is directed is prohibited. A corporation wishing to comply with a union threat in defiance of this law is unlikely to do anything more than perform the act of compliance. It is that act of compliance with the threat which should be sufficient to trigger an application of s 45E. To require more than this would make little sense having regard to s 45E's manifest function and purpose.

97 The second error was to find that the evidence only supported "the parallel of the CFMEU [not] wanting the subcontract with WPI to continue, and Hutchinson *unilaterally* succumbing to that outcome" (emphasis added).<sup>111</sup> That was also the view of Wigney J. His Honour said:<sup>112</sup>

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110 *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 111-112 [112].

111 *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 124 [140].

112 *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 98-99 [84] (emphasis in original).

"A corporation which merely succumbs to threats of industrial action by a union by, relevantly, unilaterally terminating a subcontract, does not by that action alone contravene s 45E of the [CC Act]. A corporation which succumbs to threats of industrial action by a union only contravenes s 45E if it succumbs to the threats *and* makes a contract or arrangement, or arrives at an understanding, with the union which contains a provision included for the purpose of, relevantly, terminating the subcontract and thereby preventing or hindering itself from acquiring the services of the subcontractor".

98 It is, with very profound regret, difficult to understand what is meant here by the reference to unilateral action. Naturally, it may be assumed that Hutchinson made its own mind up in deciding that it was better to terminate WPI's contract than be subject to industrial mayhem. It did not thereby subjugate itself to the will of the CFMEU. But such action, even if it might be described as a rational, commercial response to a threat, does not refute the presence of an arrangement or understanding in the sense described above and in the particular statutory context of s 45E. The fact is Hutchinson succumbed to that threat, and there was no other reason for sacking WPI.

99 Nor, and again with great respect, does s 45E mandate that when a corporation is induced to change its plans, and acts instead concordantly with a union threat to terminate an existing contractual arrangement with a third party, there is a need for any additional element before s 45E can apply. So described, that is the very arrangement or understanding. To repeat the passage from the Explanatory Memorandum, 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".<sup>113</sup> As a matter of legislative policy there is no justification for the imposition of some additional component before the provision can apply.

### **Timing and Associated Northern Collieries**

100 It should be accepted that the arrangement or understanding here was made or arrived at when Hutchinson terminated WPI's contract on 26 July 2016. Attempts made by Hutchinson before that date to make WPI more attractive to the CFMEU, by, for example, taking steps to assist WPI to enter into an enterprise bargaining agreement, are not inconsistent with that conclusion.

101 The foregoing was said not to have been the conclusion of the primary judge. It was suggested that before the Full Federal Court the parties assumed that the primary judge had found that the arrangement had been entered into on 11 June

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113 Australia, House of Representatives, *Workplace Relations and Other Legislation Amendment Bill 1996*, Explanatory Memorandum at 186 [18.30].

2016, some weeks before WPI's contract was terminated. An examination of her Honour's reasons does not necessarily bear this out. In any event, the ACCC maintained that its case was never so limited. It pointed out that in its opening written submissions before the primary judge, it alleged that the arrangement had been made or arrived at "between about May 2016 and 26 July 2016".

102 The CFMEU then asserted that the primary judge did not decide this matter on the basis that the arrangement or understanding was completed, made or arrived at by the sacking of WPI. So much should be accepted. It was said that the primary judge instead applied reasoning that was analogous to the following well-known passage from the judgment of Isaacs J in *R v Associated Northern Collieries*:<sup>114</sup>

"Community of purpose may be proved by independent facts, but it need not be. If the other defendant is shown to be committing other acts, tending to the same end, then though primarily each set of acts is attributable to the person whose acts they are, and to [that person] alone, there may be such a concurrence of time, character, direction and result as naturally to lead to the inference that these separate acts were the outcome of pre-concert, or some mutual contemporaneous engagement, or that they were themselves the manifestations of mutual consent to carry out a common purpose, thus forming as well as evidencing a combination to effect the one object towards which the separate acts are found to converge."

103 It is unnecessary to resolve these quibbles. The possibility that the arrangement or understanding comprised the making of the threat and then the succumbing to it by the termination of WPI was self-evident on the facts of this case. That may not have been the way it was presented to the primary judge; it may not have been the way the primary judge decided the case; but putting it in that way before this Court could not have prejudiced either Hutchinson or the CFMEU. They accepted that the threat had been made and that Hutchinson had capitulated by sacking WPI. In the light of Diplock LJ's reasoning in *British Basic Slag*, it beggars belief that these parties were not apprised of the possibility that these two events might be joined up to comprise one arrangement or understanding. Neither Hutchinson nor the CFMEU identified any substantive prejudice to its ability to meet the case put by the ACCC to this Court.

104 The same observation may be made about the issue of timing. Naturally, the ACCC kept its options very open at the beginning of the trial. As an external regulator, which was not a party to the alleged arrangement or understanding, that was the appropriate course to take. That is especially apt in the context of s 45E; the exact nature of the alleged arrangement or understanding may be difficult to discern, especially if the parties to the impugned arrangement or understanding

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114 (1911) 14 CLR 387 at 400.

have not said much about it. Sophisticated parties to these types of arrangements do not usually leave behind a bright trail which is easy to follow.

105 Where, as in these circumstances, both the threat and the capitulation are accepted by the parties, the ACCC's case should not be permitted to be defeated because it could not always say with precision what had happened, or because, as its understanding of the evidence developed, it refined its case. If by doing so, Hutchinson and the CFMEU had thereby been prejudiced in some way, different considerations might have arisen.

### **Wigney J and the notice of contention**

106 Hutchinson and the CFMEU relied on notices of contention that invoked the reasons of Wigney J at [30] to [86] "to the extent that those reasons are not otherwise reflected in the reasons of Bromwich and Anderson JJ".

107 Wigney J reasoned in essentially the same way as Bromwich and Anderson JJ. His Honour was not satisfied that there was sufficient evidence of an arrangement or understanding that had been entered into by Hutchinson and the CFMEU. Wigney J juxtaposed the act of succumbing to a threat with the existence of such an arrangement or understanding, as if they were different things. For the reasons given above, and with very great respect, that is not how s 45E was intended to operate. Thus, his Honour said:<sup>115</sup>

"[T]he fact that WPI did not do any further waterproofing on the Southpoint project was equally explicable on the basis that the CFMEU had threatened industrial action if WPI performed any further work on the project. The available inference is that Hutchinson did not ask WPI to perform any further work on the project because it wanted to avoid that industrial action. That inference is at least equally available, if not more probable, than the competing or conflicting inference that Hutchinson and the CFMEU had made an arrangement, or arrived at an understanding, concerning the termination of WPI's contract."

108 Wigney J also reasoned that some form of communication of assent, whether express or implied, was needed to evidence the existence of an arrangement or understanding. This is illustrated by his Honour's consideration of the meeting on 11 June 2016 between a representative of the CFMEU (Mr Clarke)

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115 *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 96 [72].

and a representative of Hutchinson (Mr Meland) when the threat of industrial action was conveyed. Wigney J reasoned:<sup>116</sup>

"[I]t is abundantly clear that Mr Meland said nothing and did nothing during his conversation with Mr Clarke to suggest that Hutchinson would terminate WPI's contract, or that Hutchinson considered itself bound in some way to terminate WPI's contract. There was no consensus or meeting of minds during that conversation. Mr Clarke's statement was simply a unilateral statement of what the CFMEU would do if WPI returned to the site."

109 With great respect, in the world of prohibited industrial behaviour, it is somewhat fanciful to expect that Mr Meland would have communicated some form of assent in the way suggested by Wigney J. He no doubt kept quiet and perhaps did so intentionally. He certainly did not put anything in writing to confirm Hutchinson's capitulation to the CFMEU.

110 In that respect, I note that in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [No 2]* Mortimer J (as her Honour then was) described the union's misconduct as being part of "a deliberate and calculated strategy by the CFMEU to engage in whatever action, and make whatever threats, it wishes, without regard to the law, and then, once a prosecution is brought, to seek to negotiate its way into a position in which the penalties for its actions can be tolerated as the price of doing its industrial business".<sup>117</sup>

111 It should be inferred that the CFMEU, and those who act in accordance with its threats, do not advertise their impugned dealings. Nor should it be assumed that Mr Meland, and Hutchinson, succumbed to the CFMEU's threat immediately on 11 June 2016. But eventually they did do so and that is sufficient.

### **Disposition**

112 The ACCC's sole ground of appeal must be upheld. These appeals should be allowed with costs. Paragraphs three to five of the orders of the Full Court of the Federal Court of Australia dated 29 February 2024 should be set aside and in their place it should be ordered that the appeals be dismissed with costs.

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<sup>116</sup> *J Hutchinson Pty Ltd v Australian Competition and Consumer Commission* (2024) 302 FCR 79 at 93 [61].

<sup>117</sup> [2016] FCA 436 at [142].

