HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

No. B 41 of 2024

BETWEEN: **Australian Competition and Consumer Commission**

Appellant

and

J Hutchinson Pty Ltd (ACN 009 778 330)

First Respondent

Construction, Forestry and Maritime Employees Union

Second Respondent

AND

No. B 42 of 2024

BETWEEN: **Australian Competition and Consumer Commission**

Appellant

and

Construction, Forestry and Maritime Employees Union

First Respondent

J Hutchinson Pty Ltd (ACN 009 778 330)

Second Respondent

APPELLANT'S REPLY

Part I: Certification

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

Part II: Reply submissions

2. ***Whether there is an understanding:*** the question of law on this appeal is whether, 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. Embedded within that question is the issue of the breadth of the statutory word "understanding". The CFMEU submits that those facts can only give rise to an "understanding" if the second person communicates agreement to capitulate before capitulating (see CS[25]). But why that ought be so, or how it is to be reconciled with the analogy from contract law addressed in *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 CLR 424 at 456, is not explained by the CFMEU. All that is said is that it requires evidence that the announcement was offered as consideration for doing the act and the act was done in consideration of the promise inherent in the announcement (CS[60]). But that goes nowhere on the facts as found: **(1)** the CFMEU made a threat and demand directed at Hutchinson, a fact which it disputed at trial and which was found against it (LJ[198]-[209]; CAB53-56). **(2)** it was accepted by the Full Court that Hutchinson succumbed to the CFMEU's threat (J [172], [176]-[177], [187] CAB 245, 247, 252); **(3)** at trial, Hutchinson offered an alternative explanation for WPI's exclusion (that is, other than in response to the CFMEU's threat and demand), that explanation was rejected (LJ[13], [334], [340(22),(24)]; CAB15, 84, 88, 89) and not revived on appeal by the Full Court. In those circumstances, there can be no doubt that CFMEU's threat was made as an inducement (analogous to contractual consideration) to Hutchinson to act and Hutchinson's actions were taken in consequence of that inducement.

3. ***The problematic notion of "commitment":*** Hutchinson takes a different line and refers to the oft-used terms "commitment" (HS[29]) and "moral obligation" (HS[70]) and says these confine the meaning of "understanding". This case illustrates the limited utility of those terms in relation to the statutory words. Hutchinson asserts that there is a "requirement that there be a commitment by at least one party" and that this "is integral and irreducible" (HS[29]). Hutchinson further contends that commitment does not relate to enforceability or irrevocability, such that it must be taken to be something "binding in morals or honour only". But what is the source of a "moral" obligation that is not enforceable? Hutchinson cites *Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd* (1975) 24 FLR 286 at 291 (HS[29]). If that is all that is required, then it was established here: Hutchinson understood

that the CFMEU had undertaken to Hutchinson that it would conduct itself in a certain way (refrain from industrial action) so long as Hutchinson ceased acquiring waterproofing services from WPI. Hutchinson also relies on Diplock LJ's approach in *Re British Basic Slag Ltd's Agreements* [1963] 1 WLR 727 (HS[31]). At 747, Diplock LJ observed that one way an arrangement may be made is where A has made a representation to B which operates as an inducement to B to act in a particular way, and B acts in that particular way. As noted above, here the CFMEU's threat was an inducement for Hutchinson to cease acquiring services from WPI, and Hutchinson ceased so acquiring. The expression "commitment", and references to duties or obligations in morality or honour, may not be inutile in some cases; but they cannot limit the statute and they will be inapt to describe many kinds of informal dealings that are captured by the statutory words "arrangement or understanding". Where parties' actions are co-ordinated through direct or indirect communications, the parties are not engaged in unilateral action; they have an understanding. In those circumstances, whether one party's reliance on the statements of future intent by another party also raises a "moral obligation" is irrelevant and derivative. What is relevant is the conduct of the parties and what this says about whether objectively they have arrived at a common mind.

4. Accepting this does not inappropriately widen the statutory test (c.f. HS[34]-[35]). It does not mean that raising prices or marketing goods "in response to" a competitor's price rise or marketing strategy becomes unlawful (c.f. HS[34]). Hutchinson's suggestion that the ACCC's approach would "criminalise unilateral pricing decisions simply because they were made 'in response to' a competitor's unilateral demand that the market follow its own price increase" (HS[35]) is nonsensical. A pricing decision cannot be both unilateral *and* in response to a competitor's demand. None of Hutchinson's examples explain why "commitment" should be the touchstone for unlawfulness in all cases.

5. ***The statutory scheme:*** Hutchinson suggests that s 45D is the "primary protection" against secondary boycotts and s 45E ought to be relegated to a secondary role as a "check against firms and unions reaching agreements purporting to circumvent the secondary boycott prohibitions in s 45D and 45DA" (HS[38]; [41]; [42]). Sections 45D-45DA and 45E are, however, directed to different fact patterns, which may or may not intersect. Sections 45D and 45DA expressly contemplate the involvement of *four* persons, two of whom act in concert to hinder a third person dealing with a fourth person. Section 45E, by contrast, was introduced to address the facts arising in ***Leon Laidely*** *Pty Ltd v Transport Workers' Union of Australia* (1980) 42 FLR 352: an industrial threat to which a firm has capitulated thus

preventing or hindering it dealing with a third party. That the legislature chose to use the expression "in concert" in s 45D and 45DA, to sections likely to be applied in relation to two members of a union (as the first and second persons), or to the union and one of its members, is not capable of supporting the view that the words used in 45E must involve "commitment". Collusion as contemplated by the legislature can arise even under pain of threat (c.f. HS[43]). See also *Rural Press Ltd v ACCC* (2003) 216 CLR 53 at [29]-[31].

6. ***The proscribed purpose:*** Hutchinson contends that the primary judge did not make a finding that the proscribed purpose was held by at least one party (HS[73]-[75]). Hutchinson is wrong; the primary judge made that finding at LJ[347]-[349] (CAB92-93). The CFMEU asserts that the primary judge erred in making that finding for the reason given by Wigney J at J[77]-[82] (CAB201-203). The joint judgment did not address the issue, and the reasons of a single judge are not the reasons of the Full Court. In any event, Wigney J was incorrect. **(1)** In identifying whether the proscribed purpose was held, the focus is whether the parties "appreciated the end that will be achieved" by including a proscribed provision (*ACCC v* ***CEPU*** (2007) 162 FCR 466 at [194]). The respondents appreciated that by excluding WPI from site, Hutchinson would cease acquiring waterproofing services from it. **(2)** Where there is an *inference* of the proscribed purpose being held, it is not necessary to identify *when* the proscribed provision was included or *by whom* (c.f. CS[77]). **(3)** There was no sound basis for excluding Mr Meland from holding the proscribed purpose simply because he was unaware that acceding to a threat and demand may be an "arrangement or understanding" (c.f. J[80] CAB202; CS[79]).

7. ***The temporal issue:*** Hutchinson and the CFMEU each attempt to explain away the plurality's reasoning at J[112] (CAB218). There is no relevant distinction for the purposes of this case between communication that "precede[s] performance" and that which "precede[s] *merely acquiescent or parallel* conduct" (c.f. HS[77]). Nor is there confusion in the first part of the ACCC's ground of appeal because the joint judgment considered that evidence of <u>later</u> implementation could allow an inference of the existence of an <u>earlier</u> arrangement or understanding (c.f. CS[21]). Whilst the plurality was willing as a matter of *evidence* to infer the existence of an earlier understanding from later implementation, their error was that they required as a matter of *fact* that the implementation be distinct and subsequent to the formation of the understanding.

8. ***WPI was excluded from around 11 June 2016:*** the trial judge found that the exclusion of WPI had occurred from about 11 June 2016 (LJ[10], [340(22)]; CAB15, 88). The joint judgment proceeded on the basis of the findings of fact as found by the primary judge

(J[129], [135]; CAB229, 231). Wigney J alone took a different view that the exclusion occurred in July 2016 (J[71]; CAB199) and the CFMEU seeks to impugn the trial judge's finding (CS[13]) on this basis. However, Wigney J ought not to have overruled the finding of the primary judge. **(1)** There was no dispute that WPI did not perform waterproofing services at Southpoint after 11 June 2016 (J[71]; CAB199-200). **(2)** Mr Thone (a former Hutchinson employee called by the ACCC) gave evidence, about which he was tested in cross-examination, that on "around" 13 June 2016 work on the site was delayed because *"WPI's workers were not allowed on site to complete the work"*: Affidavit of Henk Thone affirmed 9 July 2021 at [25], [33], [34] (ABFM87-88); (Trial, T101.1-20, ASBFM6). The latter evidence was not considered by Wigney J. This was not an issue on which there was a lack or "paucity" of evidence (c.f. J[71]; CAB199-200) justifying appellate review.

9. ***In any event, the precise date of exclusion is irrelevant:*** even if WPI was excluded from the site at a later date, it does not change the *relevant* facts for the purpose of this appeal. From the date of exclusion, Hutchinson succumbed to the CFMEU's threat of industrial action and demand for the exclusion of WPI. Either that is an understanding having the proscribed purpose of preventing acquisition from WPI or it is not, as a matter of law. The express submission of the CFMEU, and implicit submission of Hutchinson, is that it is not open to the ACCC to contend in this Court that if the respondents succeed on their notice of contention, and overturn the factual finding made by the primary judge as to the date of exclusion, that nevertheless there is an understanding: CS[16]-[19] and HS[14]-[15].

10. But why that is so is unclear; there is no unfairness. It is not correct that the ACCC closed its case on the basis that the understanding was made by 11 June 2016, or that it otherwise "wedded" itself to that position (c.f. HS[21]; CS[35], [37]). The Amended Concise Statement at [7] alleged that the "Boycott Arrangement was made or arrived at between about May 2016 and 26 July 2016" (RBFM57-59). The ACCC's closing submissions on appeal at [204] (ASBFM50-51) were in similar terms, as noted by Wigney J: J[74]; Appeal, T76.9-10 (ASBFM64). The submission extracted at HS[19] was made in the context of meeting an argument by Hutchinson that Mr Meland sought to avoid terminating WPI (Trial, T326.14-18) (Hutchinson's Supplementary BFM7). Thus, even if this Court was to prefer the view of Wigney J as to the date of exclusion, there is no unfairness to the respondents in that later date being the point of crystallisation of the understanding. The respondents knew about the temporal range alleged by the ACCC at trial; they challenged the ACCC's witnesses as to when and why WPI was excluded; and as part of their challenge they called witnesses whose evidence was not accepted.

11. ***No independent reasons for exclusion:*** Hutchinson's claim that there were independent reasons for its decision to switch contractors (HS[59]) is an impermissible attempt to re-enliven evidence and submissions rejected at trial: LJ[340(22)] (CAB88).

12. ***Authorities:*** **(1)** Hutchinson misconstrues the relevance of *Leon Laidely* (HS[46]). The case explains the origin of s 45E and the mischief to which the provision is directed. Its relevance is not about the s 45D contravention that was found but rather the facts that did not give rise to a contravention in the absence of s 45E, which were Amoco ceasing to supply Leon Laidely as a consequence of the union's threat of industrial action. **(2)** Hutchinson's submission that there is a relevant distinction between its capitulation in this case and the circumstances in *CEPU*, where "the firm had 'adopted' and become 'committed to complying with' the union's demand" (HS[47]) is fanciful. Contrary to CS[46], the ACCC does not deny that in *CEPU* there were other facts relevant to the finding of an understanding. But it is unclear what principle the CFMEU seek to draw from this: the implication of the final sentence of CS[46] seems to be that the CFMEU contends that had Hutchinson written a letter to the CFMEU agreeing to exclude WPI, before then excluding WPI, this would be an understanding. That is the legal point that is raised by this appeal and the CFMEU's approach reflects the reasoning of the plurality in J[112] (CAB218) which the ACCC challenges. **(3)** In ***Apco*** *Service Station Pty Ltd v ACCC* (2005) 159 FCR 542, there was no threat or demand. Anderson received calls about price increases that were already being implemented. He "was always non-committal about whether he would increase Apco's prices"; he acted differently on different occasions; retailers "did not know whether Apco would match any increase until it did so". Anderson made decisions based on his "commercial interest" and on most occasions, did not follow the price increases: [27], [28], [31], [51], [52]. When the Full Court referred to a lack of commitment on the part of Apco, it was referring to an absence of manifestation of a consensus between Apco and the other parties as to how all of them, including Apco, would behave in the future. The outcome in *Apco* would be unaffected by the approach contended for by the ACCC.

Dated 11 November 2024

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