HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

No. B41 of 2024

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

and

J Hutchinson Pty Ltd (ACN 009 778 333)
First Respondent

Construction, Forestry and Maritime Employees Union
Second Respondent

No. B42 of 2024

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

and

Construction, Forestry and Maritime Employees Union
First Respondent

J Hutchinson Pty Ltd (ACN 009 778 333)
Second Respondent

SUBMISSIONS OF J HUTCHINSON PTY LTD

Part I: Certification

1. These submissions are in a form suitable for publication on the Internet.

Part II: Issues

2. Within the meaning of s 45E of the *Competition and Consumer **Act** 2010* (Cth), does a person "make … [an] arrangement, or arrive at an understanding, with an organisation of employees", merely by doing what the organisation demanded, unless the person proves that they had an independent reason for so acting? Or must the ACCC prove that the person and the organisation formed a consensus about what was to be done, constituted by something more than the mere coincidence of demand and conduct, and involving the undertaking by at least one party of a commitment to the other?

3. Does the ACCC in any event fail on the facts of this case because:

   a. it is not established that there was any exclusion of WPI from the Southpoint A site in response to the CFMEU's threat; or

   b. the alleged arrangement or understanding did not contain a provision included for the proscribed purpose?

4. Issue (2) as identified in AS [5] does not truly arise. Although reflecting the only ground of appeal, it does not accurately reflect the basis on which the Full Court set aside the primary judge's decision.

Part III: Notice of constitutional matter

5. Hutchinson considers notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Facts

6. Hutchinson is a large, privately-owned construction company. It was head contractor for the construction of a residential apartment tower in Grey Street, Brisbane (**Southpoint A**): Primary Judgment[1] (**LJ**) [2] (Joint Core Appeal Book (**AB**) 14). The CFMEU, a trade union organisation, representing employees working at Southpoint A, made enterprise bargaining agreements with Hutchinson in 2012 and 2015 (**2015 EBA**): LJ [3]-[4] (AB 14). The 2015 EBA required Hutchinson to consult with the CFMEU about the appointment of subcontractors. It provided that subcontractors and their

[1] *ACCC v J Hutchinson Pty Ltd* [2022] FCA 98; 404 ALR 553 (AB 6-96).

employees must receive terms no less favourable than employees under the 2015 EBA performing the same work: LJ [5] (AB 14).

7. WPI entered into a subcontract with Hutchinson on 22 March 2016 to perform certain waterproofing works at Southpoint A: LJ [340(11)]. WPI did not have an EBA with the CFMEU: LJ [7] (AB 15); Full Court judgment[2] (**J**) [8] (AB 183). WPI performed work at Southpoint A in May and June 2016: LJ [340(12)] (AB 86).

8. In late May or June 2016, the CFMEU raised two issues with Hutchinson concerning WPI. *First*, the CFMEU pointed out to Hutchinson that WPI "was not registered with all of the required funds for the purpose of paying employee entitlements": LJ [340(15)] (AB 87). The 2015 EBA required that subcontractors pay "EBA rates" (LJ [315]-[316] (AB 78-79)), which required both registration with the funds and payments on workers' accounts of amounts owing for work at Southpoint A. Until 21 June 2016, WPI was not registered with all of the required funds.[3] On and from that date it was registered, apparently with retrospective effect from 28 May 2016.[4] To date, WPI has never paid the funds required on account of work done by its worker Charlie Hadfield at Southpoint A.[5] *Secondly*, also in May 2016, the CFMEU, by Mr Steele, "raised the fact that WPI had been retained without the CFMEU being consulted, and also raised the fact that WPI did not have an EBA": LJ [340(16)] (AB 87).

9. On 11 June 2016, when WPI was working at Southpoint A, the CFMEU delegate Mr Clarke approached Mr Meland and threatened to engage in industrial action at the Southpoint A site if WPI was permitted by Hutchinson to come back on site: LJ [340(18)] (AB 87).

10. Nothing Mr Meland said or did in the 11 June 2016 conversation conveyed or was capable of conveying that Hutchinson would terminate its contract with WPI, or would no longer acquire waterproofing services from WPI, or had agreed to do either of those things: J [13], [61] (AB 184, 196). Mr Meland informed Mr Berlese of this conversation by email

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[2] *J Hutchinson Pty Ltd v ACCC* [2024] FCAFC 18; 302 FCR 79 (AB 176-259).

[3] Email BERT Admin Team to Ray Hadfield, 21 June 2016 (Respondents' Joint Book of Further Materials (**RBFM**) 7).

[4] Email BERT Admin Team to Ray Hadfield, 21 June 2016 (RBFM 7).

[5] Affidavit of John Shenfield dated 4 August 2021, [7(a),(c)] (RBFM 22); Affidavit of Dallas Ezzy dated 3 August 2021, [5] (RBFM 19); Letter Tara Thomson to Hall Payne Lawyers, 25 August 2021 (RBFM 31); Letter ACCC to CFMEU, 16 September 2021 (RBFM 35).

on 13 June 2016: LJ [340(20)] (AB 87). Nothing in Mr Meland's report to Mr Berlese suggested that Mr Meland had conveyed to the union that Hutchinson would do, or agreed to do, any of what the union demanded: J [13], [61] (AB 184, 196).

11. It was uncontroversial at trial that WPI did not work again at Southpoint A after 11 June 2016: LJ [340(22)] (AB 87); J [71], [119] (AB 199, 221). However, there was little or no direct evidence concerning WPI's exclusion from the site: J [71] (AB 199). There was no evidence, or any finding, as to how, by whom, or when, that supposed exclusion was effected: J [71] (AB 199). The primary judge found that further waterproofing work needed to be performed at Southpoint A "in around July 2016": LJ [340(30)] (AB 90). As Wigney J noted, the evidence tended to suggest that no waterproofing work was required on the site until sometime in July 2016: J [71] (AB 199).

12. On 13 July 2016, another waterproofing contractor was inducted onto Southpoint A, and on 20 July 2016 that contractor completed some work on site: LJ [340(30)] (AB 90); J [119] (AB 221). On 26 July 2016, some six weeks after the 11 June 2016 conversation between Mr Meland and Mr Clarke, Hutchinson terminated its subcontract with WPI: LJ [276], [340(33)] (AB 70, 91); J [119] (AB 221). A week prior to that event, on around 19 July 2016, Mr Meland and Mr Berlese discussed terminating WPI's subcontract and Mr Berlese told Mr Meland to "deal with it": J [134] (AB 230).

13. Mr Meland at all times "was not himself aware" of any arrangement or understanding between Hutchinson and the CFMEU: LJ [340(33)] (AB 91); J [119(33)], [189]-[193] (AB 225, 253-4)). In the period 11 June 2016 to around 13 July 2016, Mr Meland took steps to assist WPI to obtain an EBA because he believed that, if one was obtained, WPI would be allowed on site: LJ [340(23)] (AB 88).

14. At some time after 11 June 2016, Mr Meland spoke to Mr Steele, who told Mr Meland that "Ray (referring to the director of WPI) won't be doing your waterproofing, he won't be able to get an EBA": LJ [340(24)] (AB 88). The primary judge took this remark to be "a strong indication that there was already an arrangement or understanding between the respondents" in place by this time: LJ [340(24)] (AB 88).

15. The only findings of fact made by the primary judge of any discussion between representatives of Hutchinson and the CFMEU, other than those involving Mr Meland, concerned the discussion between Mr Steele and Mr Berlese in "either late May or June

2016" the subject of LJ [153]-[166] (AB 44-46). That conversation took place before any threat had been made by the union to Hutchinson.

The ACCC's case

16. The ACCC proceeded by Amended Concise Statement. It alleged a "Boycott Arrangement" to have been made "between about May 2016 and 26 July 2016".[6] The allegation was that the arrangement was "made or arrived at through, or alternatively is to be inferred from" various communications occurring between May 2016 and July 2016, and "Hutchinson's conduct in ceasing to acquire waterproofing services from WPI and subsequently terminating the WPI contract as alleged in paragraphs 8 to 10", "in circumstances where Hutchinson had no concerns about the quality of WPI's work and no reason to terminate the WPI contract other than the threat of industrial action by the CFMEU".[7] Paragraph 8 alleged that Hutchinson "ceased acquiring waterproofing services from WPI in or about June 2016". The ACCC alleged that Hutchinson "gave effect" to the Boycott Arrangement by ceasing to acquire waterproofing services from WPI and terminating the subcontract. Notably, the allegation of "ceasing to acquire" waterproofing services was more neutral than the proposition that WPI was "excluded" from Southpoint A.

17. In opening its case, the ACCC clarified the temporal uncertainty of the Amended Concise Statement. It alleged, first, "an express arrangement or understanding" arrived at in four conversations alleged to have occurred between April or May and June 2016, and subsequently found to have occurred between May and 27 June 2016.[8] The ACCC alleged, in the alternative, that the existence of the arrangement or understanding "can be inferred from these four communications together with the other matters identified in paragraph 7 of the amended concise statement *and which have been addressed in the summary of the meetings and communications above*" (emphasis added).[9] The emphasised words referred back to paragraphs [22]-[40] under the heading "Meetings and communications between WPI, Hutchinson and the CFMEU", which detailed interactions up to 13 July 2016, but did not include the termination of the subcontract. In any event,

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[6] Amended Concise Statement, [7] (RBFM 57-59).

[7] Amended Concise Statement, [7(j)] (RBFM 58).

[8] ACCC Written Opening Submissions, [58] (RBFM 50-51).

[9] ACCC Written Opening Submissions, [59] (RBFM 51).

the alternative allegation was *not* that the other matters, including termination of the subcontract, *constituted* the arrangement. The alternative allegation was that the other matters including termination were facts from which the arrangement should be inferred. There was no submission about any "exclusion" of WPI.

18. The ACCC's oral opening was to the effect that the arrangement or understanding "crystallised" when Hutchinson "acceded to the pressure from the union and never brought WPI back on site"; it was an arrangement or understanding "that Hutchinson *will* terminate or cease engaging WPI on the site" (T 11.15-25, Mr Hodge KC).[10]

19. The ACCC closed its case on the basis that the arrangement or understanding was made by 11 June 2016 when Hutchinson "had already ceased having WPI on site" (T 326.15-30, Mr Hodge KC).[11]

The judgments below

20. The primary judge found that Hutchinson and the CFMEU arrived at the alleged arrangement or understanding, containing a provision to the effect that Hutchinson would no longer acquire waterproofing services from WPI at Southpoint A and, further, that the WPI subcontract would be terminated: LJ [335] (AB 84).

21. Her Honour found that the arrangement or understanding had been reached on or about 11 June 2016, and the parties, including the ACCC, conducted the appeal to the Full Court on that basis: J [75], [134], [179(e)] (AB 200, 230, 249).

22. The primary judge was impressed by the facts and circumstances having "such a concurrence of time, character, direction and result as naturally to lead to the inference that [the parties'] separate acts were [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": LJ [336] (AB 84). The "most probable explanation for the series of facts which occurred" was "that there was...an arrangement or understanding" as alleged by the ACCC: LJ [337] (AB 85). The facts and circumstances evidenced parallel conduct by Hutchinson and the CFMEU by which each "took steps to exclude WPI from the site and then either prevented, or took no positive steps to allow, WPI to return to the site with the end result

[10] Hutchinson's Supplementary Book of Further Materials (**HSBFM**), 5.
[11] HSBFM, 7.

that Hutchinson ceased to acquire waterproofing services from WPI and terminated the WPI subcontract.": LJ [338] (AB 85). Her Honour found that the evidence "demonstrates that a consensus was reached between Hutchinson and the CFMEU pursuant to which they committed to a particular course of action, namely that WPI would not be allowed back on to the Southpoint site": LJ [339] (AB 85).

23. Consensus and commitment, in the primary judge's analysis, were necessary facts, not unnecessary distractions.

24. The Full Court reversed the findings. The Full Court held that, on the primary facts as found, two inferences were open, only one of which supported a liability finding. One inference, leading to liability, was that there was a consensual dealing between Hutchinson and the CFMEU amounting to an arrangement or understanding that Hutchinson would not acquire waterproofing services from WPI. But another inference, not leading to liability, was that Hutchinson's actions in acquiring waterproofing services from Spanos and terminating WPI's subcontract, were unilateral actions which, although coincident with the desires or expectations of the CFMEU, did not involve any consensus with the CFMEU about what was to be done: see especially J [133] (AB 230).

25. The dispositive reasoning of the plurality is set out under the heading "Consideration" in J [171]-[188] (AB 244-252). Their Honours acknowledged that the requisite "meeting of minds" is most commonly proved by inference from circumstantial evidence and emphasised the need for the inferred conclusion to be "the most probable": J [171] (AB 244). The plurality, at J [172] (AB 245) (understood together with the point about proof in J [171]), records that the issue was whether the facts of Hutchinson succumbing to threats, so far as they went, "were sufficient to support the inference" of a consensus. J [176] (AB 247)makes clear that the Full Court was not ruling out the possibility that acquiescent conduct *could* in an appropriate case constitute consensus. The issue identified is whether it *did* constitute consensus, in the sense that consensus, rather than unilateral conduct, was the more probable inference. That is reinforced at J [177] (AB 247), where the plurality acknowledged that consensus was "a possible and plausible explanation for what had taken place" but nonetheless was not "the most probable" explanation.

26. J [179] (AB 248) carefully analysed the primary facts from which the primary judge erroneously inferred the existence of the requisite consensus. At J [179(f)], the Full Court held that facts post-dating 11 June 2016 were, at most, a foundation for inferring prior

consensus and not themselves "evidence of the state of mind necessary at the point of formation of the arrangement or understanding". To the extent that the Full Court made any point about needing to identify assent prior to a giving effect, that is because the ACCC conducted the case on the basis that the assent was given around 11 June 2016, and subsequent conduct was evidence supporting an inference as to the prior arrangement, which independently, constituted a giving effect to the arrangement. The temporal and conceptual bifurcation was a function of how the ACCC pleaded and presented its case.

27. In J [182]-[187] (AB 250-252), the plurality considered in detail each of the supposed subsequent manifestations of mutual consent and concluded that they did not prefer the inference that there was consent, as distinct from unilateral demand and unilateral action consistent with the demand.

Part V: Argument

ACCC's construction of s 45E is wrong

28. An arrangement under s 45E is a meeting of minds under which one or both parties assume an obligation or make commitments. An understanding may be less precise and may be tacit. But it nevertheless requires proof that there is, between the parties, "a meeting of minds", or a "common mind" or "consensus"[12] involving "a commitment to act in a particular way".[13] An understanding will usually, but not necessarily, involve some reciprocity of obligation: that is, it may be that only one party and not both assume an obligation or make a commitment.[14]

29. The requirement that there be a commitment by at least one party to act in a particular way is integral and irreducible. That commitment need not be enforceable or irrevocable and may be binding in morals or honour only. But there must be a commitment: no case applying the concept of contract, arrangement or understanding under Australian law has

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[12] *ACCC v* ***BlueScope*** *Steel Limited (No 5)* [2022] FCA 1475 [102]-[108] (O'Bryan J).

[13] *ACCC v* ***Australian Egg Corporation*** *Ltd* (2017) 254 FCR 311 at [95]; *ACCC v* ***Leahy Petroleum*** *Pty Ltd* (2007) 160 FCR 321 at [27] – [28]; *ACCC v* ***Yazaki*** *Corporation (No 2)* [2015] FCA 1304 at [47]; ***Apco*** *Service Stations Pty Ltd v ACCC* (2005) 159 FCR 452 at [45] – [47]; ***Top Performance*** *Motors Pty Ltd v Ira Berk (Qld) Pty Ltd* (1975) 24 FLR 286 at 291; *Trade Practices Commission v* ***Email Ltd*** (1980) 31 ALR 53, 63-64; *Communications, Electronical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v ACCC* (***CEPU v ACCC***) (2007) 162 FCR 466 at [15] and [175]; ***ACCC v Amcor*** *Printing Papers Group Ltd* (2000) 169 ALR 344 at [75]; *ACCC v. CFMEU* at [10] (Finn J).

[14] *ACCC v Amcor* at 360*; Trade Practices Commission v Service Station Association Ltd* (1993) 44 FCR 206 at 230-231; *Email Ltd* at 64.

held otherwise. A mere expectation, as a matter of fact, or a hope that something might be done or happen, or that a party will act in a particular way, is not sufficient to found an arrangement or understanding for the purposes of s 45E, even if it has been engendered by that party.[15] The "something more" that is "required"[16] is that one of the parties to the alleged arrangement "is understood, by the other or others, and intends to be so understood, as undertaking, in the role of a reasonable and conscientious man, to regard himself as being in some degree under a duty, moral or legal, to conduct himself in some particular way, at any rate so long as the other party or parties conduct themselves in the way contemplated by the arrangement".[17] In order to be party to an arrangement or understanding, a person needs to "regard himself as being in some degree under a duty, moral or legal, to conduct himself in some particular way".[18]

30. Thus, in *BlueScope* [2022] FCA 1475, O'Bryan J observed (in the context of alleged cartel conduct) that "assumption of an obligation means no more than the communication of assent to a particular course of conduct proposed by a competitor, where the communication may be by words or conduct": [108]. His Honour was concerned to distinguish the giving of assent to a competitor's proposal from the more defined assumption of an obligation in contract. Those remarks must be read conformably with the Full Court authority (cited by O'Bryan J in the same paragraph) rendering the assuming of an obligation or the giving of an assurance or undertaking as to future conduct as integral to any arrangement or understanding under Pt IV: [108].

31. The decision of the Court of Appeal of England and Wales in *Re British Basic Slag* coheres with this approach. In that case, which concerned the conduct of companies in making commercial arrangements which made no sense but for the conduct of their counterparts in entering the same contracts, Willmer LJ emphasised the creation of "moral obligations or obligations binding in honour" as definitive of an arrangement under s 6 of the *Restrictive Trade Practices Act 1956* (UK). Diplock LJ's emphasis on "inducement" must be read in this context as denoting something like the pressure of a moral obligation

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[15] *Apco* at [45]; *ACCC v* ***IPM Operation*** and *Maintenance Loy Yang Pty Ltd* (2006) 157 FCR 162 [104]-[112]; *ACCC v CFMEU* at [10]; *CC (NSW)* at [141]; ***Rural Press*** *Ltd v ACCC* (2002) 118 FCR 236 at [79].

[16] ***ACCC v CC (NSW)*** *Pty Ltd* (1999) 92 FCR 375 at [141]; *Rural Press* at [79].

[17] *Top Performance* at 291; *ACCC v CFMEU* at [10]; *CC (NSW)* at [141].

[18] *Top Performance* at 291.

or point of honour.[19]

32. The requirement for a consensus or commitment means that there must be at least *some* communication between the parties, even if what is communicated is not enough to amount to offer and acceptance in a contractual sense.[20] In most cases it will be necessary for there to be overt or express action of some kind, because it is practically difficult to reach a consensus without some form of communication.[21]

33. The ACCC's construction obliterates the requirement that at least one party assumes a commitment or obligation to act in a particular way: AS [32], [34], [37].

34. The basal concepts swept aside by the ACCC's construction are not, as the ACCC insinuates (AS [27]), derived from the unduly narrow perspective of decisions concerning cartel provisions. In deploying the statutory concept of a contract, arrangement or understanding, the competition law, in various of its proscriptions, strikes at firms which make illegal *commitments*. Raising prices "in response to" a competitor's price-rise is not illegal. Marketing goods to a particular geographic area "in response to" the circumstance that the firm's competitors market their goods elsewhere is not illegal. Switching sources of supply because it would be profitable or convenient is not illegal, even if it is "in response to" the exertion of industrial muscle that reveals potential cost and inconvenience of not switching. Across various dimensions of commercial activity, competition law strikes at the *commitments* that a firm might make, to raise prices, to divide markets, or to boycott a supplier, and so on.

35. Contrary to AS [20], the ACCC *is* contending for different meanings of "understanding" to be adopted in different provisions of the same legislation. On no other basis could the ACCC's construction not lead to the expansion of, for example, the cartel provisions, by a conception of "understanding" so "broad and flexible" that it 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. The ACCC's "construction" of s 45E is results-driven and would introduce incoherence into

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[19] See, accordingly, *Trade Practices Commission v Nichols Enterprises (No 2)* (1979) 40 FLR 83 at 90; *ACCC v CC (NSW)* at 407.

[20] *Apco* at [45] – [47]; *Leahy Petroleum* at [26] – [27]; *Yazaki* at [47]; *Australian Egg Corporation* at [95].

[21] *ACCC v Air New Zealand Ltd* (2014) 319 ALR 388 at [463(3)]. An understanding can be tacit and may arise without communication, but only *so long as there is a meeting of the minds*: *Leahy Petroleum* at [27] and [28].

the scheme of the CCA.

36. The legislative history of s 45E does not support the ACCC's construction.

37. Section 45E has a specific genesis as a *complementary* provision to prevent circumvention of *other provisions* which directly address the mischief of secondary boycotts.

38. Section 45D is the primary protection against secondary boycotts. It requires only conduct "in concert with" a second person (which the ACCC's scheme of threat and acquiescent response may satisfy), where the relevant action has a purpose or likely effect of causing loss or damage to the boycott target.

10 39. Section 45DA is in identical terms; but requires a purpose or effect of substantially lessening competition.

40. Section 45D has been construed as requiring contemporaneity and community of purpose including a consensual element.[22] As the Harper Review recognised, in comparing Australian law with European regulation of parallel conduct in recommending the introduction of s 45(1)(c), action in concert does not require any assumption of obligation on the part of either actor.[23]

41. The express legislative purpose of s 45E was to "complement" ss 45D and 45DA, "ensuring that the prohibition on secondary boycott action is not weakened by collusion between firms and unions".[24] It does this by "prohibit[ing] a person making an agreement
20 with a union for the purposes of preventing or hindering trade between that person and another person (the target)".

42. Contrary to AS [22]-[25], s 45E is not directed to mere "capitulation" by a firm to union demands. The extrinsic materials to s 45E uniformly address a very specific form of capitulation, namely the making of collusive agreements between unions and firms in substitute for secondary boycott action. Section 45E was not a mechanism for addressing or preventing the use by unions of industrial muscle to coerce firms. It was a mechanism

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[22] *Australasian Meat Industry Employees Union v Meat and Allied Trades Federation of Australia* (1991) 32 FCR 318.

[23] *The Australian Competition and Policy Review* (March 2015) (Harper Review Report), pp. 371-2; Yane Svetiev, *Corones'* ***Competition Law in Australia*** (8th ed, 2024), [7.210]; Explanatory Memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017*, [3.21].

[24] Explanatory Memorandum to the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth), [18.30].

to complement ss 45D and 45DA, to ensure they could not be circumvented by collusive arrangements.

43. Thus, when the passage from the extrinsic materials quoted at AS [24] is read in its full context, it is clear that the "capitulat[ion]" to which it adverts is the "making" of "an agreement", by way of "collusion between firms and unions". Section 45E was enacted as a check against firms and unions reaching agreements purporting to circumvent the secondary boycott prohibitions in s 45D and 45DA. Succumbing to union pressure cannot sensibly be characterised as collusion.

44. Indeed, it is a striking feature of the ACCC's case that the principal wrongdoer is Hutchinson, the *victim* of industrial pressure. The competition law does not seek to penalise firms that make rational commercial decisions to avoid the costs of industrial action. It seeks to penalise firms which form a consensus with a union to boycott a supplier. Outside of the consensual context, it is *industrial law* which regulates the conduct of unions minded to make demands about the use by firms of particular subcontractors: e.g., s 355, *Fair Work Act 2009* (Cth).

45. The authorities applying s 45E and cognate provisions of Pt IV of the Act and their precursors are likewise opposed to the ACCC's contention. None of the cases on which the ACCC relies supports its contention.

46. ***Leon Laidely*** *Pty Ltd v Transport Workers' Union of Australia* (1980) 42 FLR 352 (AS [23]) was a s 45D case, requiring conduct "in concert" and a purpose or effect of harming the target firm. One or both parties committing to a course of conduct is not an integer of s 45D.[25] That the non-communication of "assent" or "agreement" to a course of conduct did not preclude a finding of contravention in *Leon Laidely* lends no support to the ACCC's construction of s 45E. No such assent or agreement (communicated or otherwise) was necessary to prove the applicant's case.

47. Nor does *CEPU v ACCC* (2007) 162 FCR 466 (AS [36]) support the ACCC. In that case, the union demanded that a firm exclude a subcontractor, and threatened to withhold assent to a site agreement (which would have carried significant commercial consequences for the firm) if the firm did not comply. The primary judge held that an arrangement or

[25] *Australasian Meat Industry Employees Union v Meat and Allied Trades Federation of Australia* (1991) 32 FCR 318; Svetiev, *Competition Law in Australia*, [7.210].

understanding must be proved by evidence of a consensus or meeting of minds between the union and the firm, under which one party or both parties committed to a particular course of action: [15]. No issue was taken on appeal with that statement of the law: [15]. The Full Court applied it: [147]-[162]. In *CEPU v ACCC*, threat-laced demand and acquiescence did not suffice to establish an arrangement or understanding. Integral to the Full Court's conclusion that a proscribed arrangement or understanding had been made was that the firm had "adopted" and become "committed to complying with" the union's demand: [60], [89], [147], [162].

48. So too, *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104 (AS [35]) does not support the ACCC. In that case, the union demanded that CUB cease employing "black" labour. The Full Court records the primary judge's undisturbed finding that the union "succeeded in obtaining an assurance that no further Troubleshooters men would be employed at the London Tavern job": 127-8. Again, the commitment or obligation assumed by the firm was integral to the finding that an arrangement or understanding had been made.

49. *Keith Russell Simplicity Funerals Pty Ltd v Cremation Society of Australia (ACT) Limited* (1982) 57 FLR 472 (AS [39]) stands squarely against the ACCC's submissions and must have been wrongly decided if the ACCC's construction is accepted. A union told a crematorium- and chapel-owning firm that its members would not handle bodies delivered by a funeral home which used non-union labour: 476. The firm responded by telling a funeral home, with which it otherwise dealt, that it could not receive that firm's business, citing the union's ban (on any view, a demand that the firm not deal with the funeral home, backed by a threat of industrial action if the firm did not comply) as the reason for this: 476. Franki J held that the facts disclosed no more than a firm responding to the union's demand and threat in such a way as to avoid "a danger to public health and generally a commercially unacceptable position for the respondents": 476. That much without more did not constitute any arrangement or understanding. On the ACCC's now propounded view of the law, Franki J should have found a contravention.

50. Finn J in *ACCC v CFMEU* [2008] FCA 687 (AS [40]) took the applicable principles directly from *CEPU v ACCC*, stating that "for an 'arrangement or understanding' to be found, there must be a 'meeting of the minds' of the parties *under which one or both of them committed to a particular course of action*": [10] (emphasis added). The ACCC appears to have run a case alleging that an agreement arose out of a demand with threat

and acquiescent response: [101]. That case failed at the first hurdle, because Finn J was not satisfied, as a factual matter, that the firm's conduct had in fact been "simply a response as of course to a demand which they understood was intended to, and did, leave no other choice, and in which they acquiesced". Since that factual predicate was not made out, Finn J did not need to consider whether those facts established that the commitment to a particular course of action required by s 45E arose. Again, and contrary to AS [40], the decision stands squarely against the position the ACCC propounds in this appeal.

51. The pricing cases too are uniformly arrayed against the ACCC's appeal. These cases all apply the requirement of a meeting of minds under which one or both parties "assume obligations or give assurances or undertakings that they will act in a particular way".[26] In *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452, the primary judge had found that, despite well-documented parallel fixing of prices by co-located petrol stations and findings of communications of price movements, Apco had not given any commitment to any other party to act in any particular way: [43]. The Full Court held that this was fatal to any claim of contravention of s 45E. Sending price lists to a competitor assisted the competitor to follow the sender's prices if it chose to do so, and to do so more quickly than might otherwise be the case. However, in the absence of any commitment, such communications were not sufficient to give rise to the meeting of minds essential to an arrangement or understanding: [47]. Information conveyed by some dealers to an uncommitted dealer may have been useful in enabling the uncommitted dealer to have his franchisees check competitors' prices, and know when to raise his own prices if he chose to do so. But the absence of any expectation that he would do so precluded any finding of understanding: [44], [53]-[57].

52. The ACCC does not suggest that its case requires any overruling of these authorities. The ACCC does not advance any reason, and there is none, why this Court should overturn long-settled lines of authority about the requisite elements of an arrangement or understanding. Any expansion of s 45E to encompass the kind of conduct at issue here should (if desirable) be achieved not by reinterpretation of "arrangement or understanding" but by legislative intervention.

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[26] *ACCC v Olex Australia Pty Ltd* [2017] ATPR 42-540 at [477]. See also *Apco* at [43]-[47]; *ACCC v CC (NSW)* at [141]; *Rural Press* at [79].

Alternatively, the ACCC fails on the facts

53. The ACCC submits that the requisite consensus or meeting of minds is established where "acquiescent conduct is carried out *in response to* an express communication of a demand for that conduct and a threat if that conduct is not performed" (AS [37]) and that Hutchinson was, in fact, "*specifically acting in response to* a threat" (AS [41]). The ACCC further qualifies its proposition with a proviso that, "[s]o long as there is *no evidence* that the threatened party is giving effect to the proposal for entirely independent reasons, there is no need for 'an inference of assent' beyond succumbing to the threat" (AS [37]) (emphasis added throughout).

54. On the ACCC's formulation, the person performing or directing the response must actually be responding to the demand and threat. To pursue the ACCC's analogy with unilateral contracts (AS [44]-[46]), it is necessary for the ACCC to show that "the act was really done"[27] in response to the threat before it could be said to constitute any consensus. Indeed, the person responding must be cognisant that they are responding to the demand and threat, before any consensus could be established. The notion of "response", contrary to some of the ACCC's submissions, must involve an element of subjective appreciation.

55. The ACCC nowhere specifies what conduct of Hutchinson it relies upon. The ACCC asserts that "the evidence is clear that Hutchinson was specifically acting in response to a threat" (AS [41]) but does not identify supportive findings or evidence, or specify through whom, when, or how, Hutchinson was acting. AS [12] is telling in this connection: WPI's "continued exclusion from the site" is an action without an agent. As Wigney J observed at J [71] (AB 199), there was "little or no direct evidence concerning WPI's exclusion from the site" and the fact that WPI did no work after 11 June 2016 was "not to say … that WPI was excluded from the site" from that date. The ACCC adduced no evidence from WPI: LJ [53], [55] (AB 21). The "paucity of evidence" meant that there were "no definitive or specific findings about how WPI was supposedly excluded from the site, or who was responsible for excluding it, or when that exclusion occurred". The ACCC cross-examined on the basis that, as at mid-June, there was no need for waterproofing at Southpoint A for a month.[28]

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[27] *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424 at 456.

[28] Transcript, 13 October 2021, T 203.40-204.15 (Mr Berlese) (RBFM 127-128).

56. AS [58] asserts that "Mr Meland was aware of the terms of the CFMEU's threat and demand and his actions on behalf of Hutchinson were in response to that threat", but does not specify relevant actions, when, or towards whom, they were taken, or why they should be construed as actions "really done" in response to the CFMEU's threat. It does not grapple at all with the undisturbed finding of fact that Mr Meland at all times "was not himself aware" of any arrangement or understanding between Hutchinson and the CFMEU: LJ [340(33)] (AB 91); J [189]-[193] (AB 253-254).

57. Mr Berlese meanwhile was not found to have taken any part in the events at Southpoint A subsequent to the issue of the CFMEU's demand and threat, other than to have told Mr Meland in a conversation on around 19 July 2016 to "deal with" the WPI situation: J [340(33)] (AB 91). Even if that conduct were a response to the union's demand, it could not be, or contribute to, the making of the arrangement or understanding alleged here. That arrangement had been made – on the primary judge's finding, embraced in the Full Court – by 11 June 2016: J [75] (AB 200); J [134] (AB 230); AS [2].

58. In those circumstances, the ACCC has no findings about the specific nature of WPI's "exclusion" from the site and this Court could not simply assume that WPI was "excluded" by Hutchinson, on or around 11 June 2016, in "specific response to" the CFMEU's threat. Having regard to the way in which the ACCC's case was put at trial, the so-called "exclusion" of WPI was nothing more than Hutchinson not acquiring waterproofing services from WPI. It was a whole month later, on 13 July 2016, that Hutchinson inducted Spanos to conduct further waterproofing works on Southpoint A the following week. WPI's subcontract was terminated on 26 July 2016.

59. Further, the ACCC's own proviso, that there be "no evidence" of independent reasons for the conduct is not met. There *was* evidence of independent reasons for Hutchinson's decision to switch subcontractors, namely, the first of the two complaints raised by the CFMEU with Hutchinson about WPI, concerning registration with funds and payments to workers (see above at [8]). That evidence did not persuade the primary judge: LJ [340(22)] (AB 88) ; J [194]-[200] (AB 254-256).[29] But it is nonetheless "evidence" that would overcome the proviso in the proposition as now formulated by the ACCC.

[29] See also Hutchinson Outline of Submissions dated 21 April 2023, [15]-[41] (RBFM 209-217).

60. If the ACCC's proviso is, in truth, that there be "no proof" of independent reasons, then that is a proviso that would substantially reverse the onus in respect of serious penalty provisions and that finds no foothold in the statutory text. It would be a proviso that removes the requirement for the ACCC to *prove* the existence of an arrangement or understanding by imposing a requirement that the defendant *exclude* that possibility.

61. The ACCC has not established, and cannot establish, that WPI suffered "continuing exclusion" from the Southpoint A site from 11 June 2016. On its own case, there was no need for waterproofing for about a month after that time. Nor can the ACCC establish that any exclusion was "really done" in response to the CFMEU's demand. The factual lacuna is bodily illustrated by the 674 pages of primary evidence that the ACCC has seen necessary to file with its appeal submissions. Quite what this ultimate appellate court is supposed to do with the volumes of affidavits is unclear. What is apparent is that the ACCC does not have the factual findings it needs to succeed, even if the construction of s 45E(3) that it now propounds were to be accepted.

62. Even were this Court willing to infer that the "continuing exclusion" of WPI from Southpoint A was somehow, and by some specific agent, a response to the CFMEU's threat, it would be necessary (even on the ACCC's elastic conception of arrangement or understanding) to establish that the firm, through its human agents, *understood* that responsive step to have been taken as such – that is, in specific response to the union's demand, in a manner progenitive of an actual consensus between union and firm.

63. The ACCC's recourse to the objective theory of contract and associated ideas is a distraction. Of course, it is not required that the mind of the firm appreciate that it is making an illegal arrangement, or that it is arriving at an understanding within the statutory meaning. But there can be no "arrangement or understanding" in the requisite sense unless the mind of the firm knows that a commitment is being made or, even on the ACCC's lower standard, that the action is undertaken to meet the demand. Put another way, the absence of an appreciation of any commitment bespeaks a distinct lack of commitment or, on the ACCC's lower standard, "response".

64. Even now, the ACCC does not specify the agents through whom the firm made or arrived at the supposed understanding.

65. The primary judge found that Mr Meland did *not* understand that any arrangement or understanding had been made. That finding was inevitable having regard to his conduct.

Throughout at least the period 11 June 2016 to 13 July 2016, he was actively seeking to secure WPI's *return* to Southpoint A. That was conduct wholly irreconcilable with any notion that an arrangement or understanding had been arrived at (by threat and acquiescent response or otherwise) between the firm and the union to the effect that WPI should be excluded and terminated. If Mr Meland was not aware of the existence of an arrangement or understanding, he cannot, legally or logically, have made or reached it.

66. Nor did the ACCC adduce any evidence from *its* witness, Mr Meland, about whether WPI was excluded from the site in response to the CFMEU's demand and threat. If this Court were to descend into making factual findings different from those the Full Court made, then it would decline to draw inferences favourable to the ACCC on this topic, in circumstances where the ACCC did not ask its witness, Mr Meland, questions about the matter.[30]

67. As for Mr Berlese, the most that can be said of his state of mind is that he was aware that the CFMEU's demand and threat had been made. No response of any kind for his part was evident until five weeks after that demand was issued, and the arrangement allegedly already struck.

68. What was in Mr Berlese's mind when he gave this direction to Mr Meland on 19 July 2016 was essentially unexplored. The high-point of the ACCC's cross-examination of Mr Berlese in this regard was to put that Mr Berlese "understood that the CFMEU did not want [him] to continue to use WPI at Southpoint A", that Mr Berlese was "going to do what [he] understood the CFMEU wanted", and that Mr Berlese did not wish to "risk industrial disputation".[31] That cross-examination did not put a case that Mr Berlese reached any consensus with or commitment to the CFMEU. That cross-examination also did not put a case that Mr Berlese acted in response to the CFMEU's threat, as distinct from action that coincided with what the CFMEU wanted. Insofar as Mr Berlese's actions were said to be directed to avoiding the risk of industrial disputation, that was commercially rational and consistent with parallel conduct. The ACCC did not suggest otherwise to Mr Berlese.

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[30] *Commercial Union Assurance Co v Ferrcom Pty Ltd* (1991) 22 NSWLR 389; see also J [44] (AB 191).

[31] Transcript, 13 October 2021, T206.21-207.05 (RBFM 130-131).

69. The ACCC seeks to avoid the inevitable consequences of these forensic decisions by submitting that "there is no subjective element" in an arrangement or understanding under s 45E (AS [55]). That submission grossly overextends objective theories of contract and the like.

70. *First*, it is doubtful whether an objective theory of contract should be extended to "arrangements or understandings". The objective theory of contract ensures that the *legal obligations* that attend to contractual relationships arise in an objective manner not entirely dependent on the parties' subjective beliefs. The statutory concepts of "arrangements or understandings" deliberately extend *beyond* contractual relationships attended by *legal obligation*. In their extension, they seek to encompass relationships that are not a matter of legal obligation, but of moral obligation. There is no reason to extend an objective theory to that category of relationship.

71. *Secondly*, even if it be accepted that the existence of an arrangement or understanding, like the existence of a contract, depends on what the actual words and conduct of the parties would reasonably convey to each other, rather than their actual beliefs and intentions,[32] that is just to say that a court will examine the communications between the parties to determine their objective effect. It does not mean that an arrangement arises irrespective or independently of the parties' intentions, determined objectively from their acts and words. The difficulty for the ACCC is not just that Mr Meland and Mr Berlese had no subjective intention; it is that nothing Mr Meland or Mr Berlese did can be objectively characterised as manifesting the requisite intention.

72. The ACCC seeks to meet this more reasonable version of the objective theory at AS [56]-[59] by the mere repetition of the fact of the threat, and the supposed exclusion of WPI "from the date of the threat". For reasons already canvassed, this fails to engage with (the absence of) any detail about the supposed exclusion and whether it was on account of the threat, and Mr Berlese's instruction, which was given weeks after the supposed formation of the arrangement or understanding.

No proscribed purpose

73. Alternatively, even if the facts as found favour an inference that some arrangement or understanding was made between the parties in and through the CFMEU's demand and

[32] *Equuscorp Pty Ltd v Glengallen Pty Ltd* (2004) 218 CLR 471 at [34].

Hutchinson's termination of WPI, it would be necessary separately to infer that one or both parties included the boycott for a purpose of preventing or hindering Hutchinson to continue to acquire services from WPI.

74. A basis to infer that some arrangement or understanding was made (even if one could be made out here) does not equate to a finding as to the *purposes* of either party in making that arrangement or understanding. A finding that the boycott provision was included for a proscribed purpose (cf J [29] (AB 187)) by at least one party, was an integer of the ACCC's case. The primary judge did not make any finding, and the materials before Her Honour did not permit any finding, that any of Mr Meland or Mr Berlese (for Hutchinson) or Mr Steele or Mr Clarke (for the CFMEU) had the proscribed purpose. The ACCC did not seek such findings on appeal to the Full Court.

75. In those circumstances, for substantially the reasons given by Wigney J at J [77]-[82] (AB 201-203), the Full Court should have found that the primary judge erred in finding that s 45E was contravened. Even if an arrangement or understanding could be inferred in all the circumstances, there was no finding and no basis for any finding that that arrangement or understanding contained a provision included for a purpose of excluding WPI.

ACCC's temporal issue does not arise

76. The second issue propounded in AS [5] is whether assent to a proposal can be communicated by conduct that gives effect to the proposal. The ACCC, in the second sentence of AS [18], suggests that the Full Court held that the communication of assent must be "distinct from and precede[] performance of the understanding".

77. The Full Court held no such thing. The Full Court was dealing with the case presented by the ACCC, on which the arrangement or understanding was said to be made or arrived at on 11 June 2016, and "performed" after that date when waterproofing was undertaken in July by Spanos instead of WPI, and when WPI's subcontract was terminated on 26 July 2016. The plurality explained that, where there is apparently only acquiescent or parallel conduct, proof of an arrangement or understanding depends on the existence of some communication of assent. The reasoning was not that the communication must necessarily precede performance; it was that communication must precede *merely acquiescent or parallel* conduct.

78. The issue raised is thus subsumed within the ACCC's first issue, which is to the effect that Hutchinson's conduct was *not* merely acquiescent, but constituted the necessary consensus.

79. No error is disclosed in the Full Court's reasons in any event. The Full Court accepted that communication of assent can be tacit. Consensus is an element of an arrangement or understanding (J [106]-[109] (AB 216)) and consensus requires communication of assent (J [109]-[110] (AB 216), citing *Bluescope* at [108] and [147]). But the quality of that communication is not necessarily exacting. The Full Court accepted Hutchinson's submission that an understanding "can be tacit": J [146]-[147] (AB 235-236).

80. Contrary to AS [42]-[46], the Full Court's reasoning was not that succumbing to threats was always insufficient to give rise to an arrangement or understanding. The Full Court's reasoning was that the requisite consensus for an arrangement or understanding could not necessarily be inferred from conduct constituting a succumbing to threats if that was not the most probable inference. The factual question is always: "Was there an obligation or commitment by one or both parties to a prescribed course of conduct?" The facts as found in the present case could not support an affirmative answer to that question.

Part VI: Notice of Contention

81. The proposed Notice of Contention is sought to be relied on, if necessary, to support the decision of the Full Court for the reasons given by Wigney J at [30]-[86] (AB 187-204) to the extent that those reasons are not seen to be reflected in the reasons of Bromwich and Anderson JJ. It is relied on in particular in relation to paragraphs [73]-[75] above.

Part VII: Estimate of time

82. Hutchinson understands that the ACCC has revised its estimate to 2¼ hours including reply (cf AS [61]). Hutchinson estimates that its oral submissions will require 1 to 1¼ hours.

Dated: 22 October 2024

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ANNEXURE TO HUTCHINSON'S SUBMISSIONS

Pursuant to Practice Direction No 1 of 2019, Hutchinson sets out below a list of the statutes and provisions referred to in its submissions.

No.		Version	Provisions
	Commonwealth statutory provisions		
1.	*Competition and Consumer Act 2010*	As at 30 June 2016 (Compilation No 103, 10 March 2016 – 30 June 2016)	ss 45, 45D, 45DA, 45E
2.	*Fair Work Act 2009*	Current version, which is the same as the version in force in June and July 2016 (Compilations No 26 and 27).	s 355