Australian Competition and Consumer Commission v J Hutchinson Pty Ltd [2022] FCA 98

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| File number(s): |  |
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| Judgment of: | **DOWNES J** |
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| Date of judgment: | 14 February 2022 |
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| Catchwords: | **COMPETITION LAW** – where construction company and union had practice of consulting about proposed subcontractors – where union used consultation process to pressure construction company to engage subcontractors which had an enterprise bargaining agreement which was covered by that union – where construction company engaged subcontractor which did not have such an agreement – where union was not consulted prior to engagement of that subcontractor – where union complained about that engagement – where union threatened industrial action if subcontractor was allowed back on site – where union did not consent to requests by subcontractor to go back on site – where construction company terminated subcontractor and engaged another subcontractor which had an enterprise bargaining agreement and was on list of approved subcontractors – whether engagement of contractor was breach of enterprise bargaining agreement – whether acquisition situation within s 45E(1) *Competition and Consumer Act 2010* (Cth) – whether arrangement or understanding within s 45E(3) *Competition and Consumer Act 2010* (Cth) – whether purpose within s 45E(3) *Competition and Consumer Act 2010* (Cth) – whether union had accessorial liability where the union was a party to the prohibited arrangement or understanding  **INDUSTRIAL LAW** – whether breach of obligation in enterprise bargaining agreement to consult potentially affected employees and their union – where purpose of clause is to protect job security of employees – where potentially affected employees are those whose job security might be affected by the engagement of contractors – where, after such consultation, contractors are required to be engaged on same terms and conditions (or terms no less favourable) than employees – whether breach of obligation by party to enterprise bargaining agreement where contractor engaged by it is required to but fails to make payments into funds for benefit of its employees  **EVIDENCE** – where previous proceedings against the union and a witness resulted in a settlement – where a term of the settlement was that certain allegations of fact and liability would be admitted in defence pursuant to s 191 *Evidence Act 1995* (Cth) – whether admissions made in the defences are a representation of the witness that the facts alleged in the statement of claim are true – whether defences are prior inconsistent statement within meaning of the *Evidence Act 1995* (Cth)  **PRACTICE AND PROCEDURE** – where witness cross-examined on documents without objection – whether objection only taken when documents sought to be tendered affects admissibility of answers given prior to objection being taken – where objection taken after conclusion of cross-examination related to matter of procedure – whether it is unfair to cross-examining party to take procedural objection after conclusion of cross-examination |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) ss 4, 45E, 45EA, 76, 155  *Evidence Act 1995* (Cth) ss 44, 102, 103, 140, 191  *Fair Work (Registered Organisations) Act 2009* (Cth) s 27  *Fair Work Act 2009* (Cth) ss 50, 355, 545, 546  *Workplace Relations and Other Legislation Amendment Bill 1996* (Cth) |
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| Cases cited: | *Australian Competition and Consumer Commission v Air New Zealand Limited* (2014) 319 ALR 388; [2014] FCA 1157  *Australian Competition and Consumer Commission v Baxter Healthcare* (2008) 170 FCR 16; [2008] FCAFC 141  *Australian Competition and Consumer Commission v BlueScope Steel Limited (No 3)* [2021] FCA 1147  *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2008] FCA 678  *Australian Competition and Consumer Commission v IPM Operation and Maintenance Loy Yang Pty Ltd* (2006) 157 FCR 162; [2006] FCA 1777  *Australian Competition and Consumer Commission v Leahy Petroleum* *Pty Ltd* (2007) 160 FCR 321; [2007] FCA 794  *Australian Competition and Consumer Commission v Olex Australia Pty Ltd* [2017] ATPR 42-540; [2017] FCA 222  *Australian Competition and Consumer Commission v Pfizer* (2018) 356 ALR 582; [2018] FCAFC 78  *Australian Competition and Consumer Commission v Pratt (No 3)* (2009) 175 FCR 558; [2009] FCA 407  *Australian Competition and Consumer Commission v Yazaki Corporation (No 2)* (2015) 332 ALR 396; [2015] FCA 1304  *Capic v Ford Motor Company of Australia Pty Ltd* (2021) 154 ACSR 235; [2021] FCA 715  *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466; [2007] FCAFC 132  *L Grollo & Co Pty Ltd v Nu-Statt Decorating Pty Ltd* [1978] FCA 33; (1978) 34 FLR 81  *Norcast S.ár.L v Bradken (No 2)* (2013) 219 FCR 14; [2013] FCA 235  *Tabcorp Holdings Ltd v Victoria* (2016) 328 ALR 375; [2016] HCA 4  *Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd* (1975) 24 FLR 286  *Trade Practices Commission v Email Ltd* (1980) 31 ALR 53  *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536; [2018] FCAFC 131  *Yorke v Lucas* [1985] HCA 65; (1985) 158 CLR 661 |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: |  |
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| Sub-area: |  |
|  |  |
| Number of paragraphs: | 365 |
|  |  |
| Date of last submissions: | 28 October 2021 |
|  |  |
| Date of hearing: | 11 – 13, 15 October 2021 |
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ORDERS

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|  | | QUD 374 of 2020 |
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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant | |
| AND: | J HUTCHINSON PTY LTD ACN 009 778 330  First Respondent  CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION  Second Respondent | |

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| order made by: | DOWNES J |
| DATE OF ORDER: | 14 FEBRUARY 2022 |

THE COURT DECLARES THAT:

1. The first respondent contravened s 45E(3) of the *Competition and Consumer Act 2010* (Cth) by making an arrangement or arriving at an understanding with the second respondent containing a provision to the effect that the first respondent would no longer acquire waterproofing services from Waterproofing Industries Qld Pty Ltd (WPI) at the Southpoint A construction project, and further, that it would terminate its subcontract with WPI, which provision would prevent or hinder the first respondent from acquiring or continuing to acquire services from WPI (boycott provision).
2. By ceasing to acquire waterproofing services from WPI at the Southpoint A construction project and, further, by terminating its subcontract with WPI, the first respondent gave effect to the boycott provision and thereby contravened s 45EA of the *Competition and Consumer Act 2010* (Cth).
3. The second respondent was knowingly concerned in, or party to, the contraventions by the first respondent of ss 45E(3) and 45EA of the *Competition and Consumer Act 2010* (Cth) within the meaning of s 76 of that Act.
4. The second respondent induced the first respondent’s contraventions of ss 45E(3) and 45AE of the *Competition and Consumer Act 2010* (Cth) within the meaning of s 76 of that Act by threatening or implying that there would be conflict with, or industrial action by, the second respondent if the first respondent did not cease using WPI.

**THE COURT ORDERS THAT:**

1. The matter is listed for a case management hearing at 9.00 am AEST 18 February 2022 to enable a timetable to be set for the hearing of further submissions concerning the additional relief sought in the Originating Application.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DOWNES J:

|  |  |
| --- | --- |
| Introduction | [1] |
| Witnesses called by the parties | [15] |
| Mr Meland | [15] |
| Mr Thone | [22] |
| Mr Paez | [26] |
| Mr Berlese | [27] |
| Mr Clarke | [36] |
| Mr Steele | [38] |
| Mr Ezzy | [47] |
| Mr Shenfield | [50] |
| Mr Raymond Hadfield | [52] |
| Mr Charlie Hadfield | [54] |
| ruling on objections to evidence | [56] |
| Standard of proof | [112] |
| Chronology | [116] |
| Events in 2015 | [116] |
| Events in 2016 | [138] |
| Meeting between Mr Meland, Mr Steele and Mr Clarke | [145] |
| Meeting between Mr Steele and Mr Berlese | [153] |
| Issue raised by CFMEU about WPI | [167] |
| Conversation between Mr Meland and Mr Clarke | [184] |
| Mr Meland | [186] |
| Mr Clarke | [198] |
| Conclusion | [207] |
| Conversation between Mr Meland and Mr Raymond Hadfield | [210] |
| Conversation between Mr Meland and Mr Steele | [215] |
| Conversations between WPI and Mr Clarke | [226] |
| Conversation between Mr Thone and Mr Clarke | [233] |
| Conversation between Mr Thone and Mr Meland | [244] |
| Delay caused by exclusion of WPI | [249] |
| Matter is referred to Hutchinson “IR Team” | [255] |
| Further communications between WPI and the CFMEU | [259] |
| Conversation between Mr Meland and Mr Berlese | [261] |
| WPI’s subcontract is terminated | [275] |
| Allegations against Hutchinson | [278] |
| Relevant legislation | [278] |
| Whether acquisition situation | [282] |
| Clause 35.2 of the 2015 EBA | [287] |
| Was there a breach of the obligation to consult within the meaning of clause 35.2 of the 2015 EBA? | [289] |
| Was there a breach of the obligation to pay equivalent rates and entitlements within the meaning of clause 35.2 of the 2015 EBA? | [304] |
| Conclusion | [318] |
| Whether arrangement or understanding | [320] |
| Relevant legal principles | [320] |
| Analysis | [332] |
| Whether proscribed purpose | [341] |
| Whether Hutchinson gave effect to the provision | [350] |
| Conclusion | [351] |
| Allegations against the CFMEU | [354] |
| Relevant legislation | [354] |
| The parties’ submissions | [355] |
| Analysis | [359] |
| Conclusion | [363] |

# Introduction

1. This proceeding concerns alleged anticompetitive conduct in the commercial construction industry in Queensland.
2. The first respondent (**Hutchinson**) is a large, privately owned construction company, delivering projects with an estimated value of $2.5 billion annually. Hutchinson was the head contractor for the Southpoint A construction project located at 269 Grey Street, South Brisbane in Queensland (the **Southpoint project**). The Southpoint project was the design and construction of a residential apartment tower.
3. The second respondent (the **CFMEU**) is a trade union organisation. In 2016, the CFMEU was an organisation for the purposes of s 27 of the *Fair Work (Registered Organisations) Act 2009* (Cth). On 27 March 2018, the CFMEU amalgamated with the Maritime Union of Australia and the Textile, Clothing and Footwear Union of Australia to become the CFMMEU. However, in these reasons, it will be referred to as the CFMEU as it was known in 2016 and as it was referred to by the parties and the witnesses at the trial.
4. Hutchinson was covered by a CFMEU enterprise bargaining agreement which was approved in 2012 (**2012 EBA**) which was replaced by another enterprise bargaining agreement in November 2015 (**2015 EBA**).
5. Relevantly, pursuant to clause 35.2 of the 2015 EBA, Hutchinson was obliged to consult with its employees and the CFMEU about the appointment of subcontractors in certain circumstances where the use of those subcontractors may potentially affect the job security of those employees. Clause 35.2 also provided to the effect that, if, after consultation, a subcontractor was engaged by Hutchinson, the subcontractor and its employees will receive terms and conditions of engagement (or terms no less favourable) as they would receive if they were engaged as employees under the 2015 EBA performing the same work.
6. The parties and the witnesses used the expression “EBA” to describe a CFMEU enterprise bargaining agreement entered into by a contractor or subcontractor. They also used the expression “non-EBA” to describe a situation where a contractor or subcontractor did not have an “EBA”, being one covered by the CFMEU. The evidence shows that such terms were used in 2016, and were understood to have these meanings at that time. I will adopt these expressions in these reasons.
7. Waterproofing Industries Qld Pty Ltd (**WPI**) is a company which entered into a subcontract with Hutchinson on 22 March 2016 to perform certain waterproofing works at the Southpoint project.
8. WPI did not have an EBA and the CFMEU complained that it was not consulted prior to its engagement.
9. Shortly after this, the CFMEU threatened to engage in industrial action if Hutchinson allowed WPI to continue working on the Southpoint project.
10. WPI was excluded from the site from 11 June 2016 and its subcontract was terminated by letter dated 26 July 2016.
11. The Australian Competition and Consumer Commission (**ACCC**) alleges that Hutchinson contravened ss 45E(3) and 45EA of the *Competition and Consumer Act 2010* (Cth) by making, and giving effect to, an arrangement or arriving at an understanding with the CFMEU or one of its officers, described as the **boycott arrangement**, containing the **boycott provision**. The boycott provision is said to have this content: that Hutchinson would terminate a subcontract with, or otherwise cease to acquire services from, WPI at the Southpoint project in 2016.
12. The ACCC also alleges that the CFMEU has accessorial liability with respect to Hutchinson’s contraventions. The ACCC alleges that the CFMEU induced Hutchinson’s contraventions of ss 45E(3) and 45EA of the Act by threatening or implying that there would be conflict with, or industrial action by, the CFMEU if Hutchinson did not cease using WPI. The ACCC also alleges that the CFMEU was, by the same conduct and by being party to the boycott arrangement, knowingly concerned in, or party to, those contraventions for the purposes of s 76 of the Act.
13. A key defence which is raised by the respondents was to the effect that the exclusion of WPI from the site and the termination of the WPI subcontract arose as a result of the unilateral and erroneous belief of Mr Meland, the project manager, that WPI required an EBA by reason of the terms of the 2015 EBA, rather than any unlawful arrangement or understanding between the CFMEU and Hutchinson.
14. For the reasons set out below, the ACCC has established the boycott arrangement containing the boycott provision and that the CFMEU has accessorial liability.

# Witnesses called by the parties

## Mr Meland

1. The ACCC called Mr Peter Meland. Mr Meland is a qualified builder with over 20 years’ experience working in senior roles in the construction industry. Mr Meland was employed by Hutchinson from January 2015 until October 2017. Mr Meland took on the role of project manager for the Southpoint project in April 2015.
2. Prior to these proceedings being commenced, Mr Meland was examined pursuant to s 155(1)(c) of the Act by the ACCC on 4 February 2019, and extracts of the transcript of his sworn evidence given at that examination were admitted into evidence by consent.
3. Mr Meland was a witness who appeared to give genuine, direct and candid answers to the questions asked of him. He made appropriate concessions about his lack of recollection of the precise words used in conversations. As the trial occurred in 2021, it is to be expected that his recollection would be incomplete in some respects.
4. The trial was conducted entirely through Microsoft Teams, and all counsel and witnesses appeared to each other and to the Court through this means. This had the consequence that, on occasion, Mr Meland appeared to either mishear or misunderstand what he was being asked, but it did not appear that he was attempting to avoid answering any questions when this occurred.
5. It was not suggested to Mr Meland that he was giving false evidence because of any dissatisfaction with the manner in which he was terminated by Hutchinson or because of any dislike of the CFMEU. In any event, it did not appear that he was motivated to give such evidence because of these matters.
6. Rather, Mr Meland appeared to give honest evidence of his best recollection of the events which took place in 2016. In particular, his evidence that he was upset because of his conversation with Mr Clarke (the CFMEU delegate) rang true and was compelling. To use his words, it was “Good morning. Bam, hit me with it.”
7. For these reasons, I consider Mr Meland to be a witness of truth.

## Mr Thone

1. The ACCC also called Mr Henk Thone at the trial of this proceeding. Mr Thone has worked in the construction industry since 1971 and has held various senior positions as site manager at four different companies since 1996. Like Mr Meland, Mr Thone is no longer an employee of Hutchinson. Mr Thone has industrial deafness.
2. Mr Thone was the site manager for the Southpoint project and was supervised by Mr Meland. Mr Thone’s role was to be in charge of and manage everything that happened on the building site on a day-to-day basis including managing subcontractors on site.
3. Mr Thone was examined pursuant to s 155(1)(c) of the Act by the ACCC on 3 April 2019, and extracts of the transcript of his sworn evidence given at that examination were admitted into evidence by consent.
4. Mr Thone appeared to be an honest and forthright witness, who readily conceded if he could not recall something. This occurred several times, but is explicable by the lapse of time since 2016. I consider Mr Thone to be a witness of truth.

## Mr Paez

1. Mr Raul Paez and Mr Lindsay Ashton were employees of Hutchinson and were involved in tendering, contract administration, assessing and paying subcontractor claims and preparing costs reports in relation to the Southpoint project. The ACCC examined Mr Paez pursuant to s 155(1)(c) of the Act. This occurred on 24 September 2020. Extracts of the transcript of the sworn evidence of Mr Paez which was given at that examination were admitted into evidence by consent.

## Mr Berlese

1. Hutchinson called Mr John Berlese, who was in 2016 and remains one of its most senior employees. In 2016, Hutchinson’s business activities were conducted by groups designated as ‘teams’ and each team had a ‘team leader’. Mr Berlese held such a role. In his role as team leader, Mr Berlese was responsible for the larger commercial projects undertaken by Hutchinson in South East Queensland. Relevantly, one of the projects under Mr Berlese’s control was the Southpoint project.
2. Mr Berlese reported to Mr Greg Quinn, the managing director of Hutchinson, and Mr Meland, in his role as project manager, reported to Mr Berlese.
3. Mr Berlese was examined pursuant to s 155(1)(c) of the Act by the ACCC on 2 April 2019, and extracts of the transcript of his sworn evidence given at that examination were admitted into evidence by consent.
4. For the following reasons, Mr Berlese was not a reliable witness.
5. When giving evidence at the trial, Mr Berlese did not give direct answers to many questions and not infrequently sought to avoid answering questions, or gave evidence which was inconsistent with answers which he had just given.
6. Mr Berlese also gave evidence which was objectively unbelievable. In particular, he was asked about whether he recalled the CFMEU engaging in a ‘campaign’ against Hutchinson in September 2016 in Brisbane, during which nine of its sites were shut down. He said, “I vaguely recall”. Yet he also conceded that seven of these sites were his sites. Notwithstanding this, he could not recall why they were shut down or the consequences of the shut-down. He could only “vaguely” recall court action coming out of it. He agreed that the issue could have been about the practice of Hutchinson using subcontractors at certain sites that did not have EBAs, but he could not recall.
7. Conduct by the CFMEU which caused seven construction sites under Mr Berlese’s control to be shut down is something which he would be expected to recall as he was the person in charge and these shut-downs would have been a significant problem for him. If these events occurred (and Mr Berlese appeared to accept that they did occur), it would be expected that he would have a better memory of these events, the circumstances around why they occurred and the consequences of them having occurred. For these shut-downs to be compounded by subsequent court proceedings should have only served to cement these facts further in his memory.
8. Having regard to the extreme nature of the events that he was asked about, it is more likely that Mr Berlese could recall better detail around the CFMEU shut-downs in September 2016 but gave the answers which he did in order to avoid damaging the case being brought against his employer, Hutchinson. That he was willing to do this colours all of his evidence.
9. On the other hand, if it is the case that Mr Berlese does not recall or can only “vaguely” recall these significant events which took place in September 2016, then that is still a problem for his credibility. In particular, it casts real doubt on the reliability of Mr Berlese’s evidence about the events which are the subject of this proceeding and which occurred earlier in the same year.

## Mr Clarke

1. The CFMEU called Mr Damon Clarke. In 2016, Mr Clarke was employed by Hutchinson and became the CFMEU delegate on the Southpoint project.
2. For the reasons explained below, I do not accept the evidence of Mr Clarke in all respects.

## Mr Steele

1. The CFMEU called Mr Justin Steele, who affirmed two affidavits in this proceeding. In 2016, Mr Steele was employed by the CFMEU as a union organiser and was responsible for the Southpoint project, amongst other construction projects.
2. Mr Steele was examined pursuant to s 155(1)(c) of the Act by the ACCC on 24 August 2020, and extracts of the transcript of his sworn evidence given at that examination were admitted into evidence by consent.
3. During the trial, Mr Steele was cross-examined by the ACCC about his conduct as a CFMEU organiser in relation to other construction projects in Queensland. No objection was taken to part of that cross-examination, during which Mr Steele was asked about his recollections relating to his attendance at meetings on certain construction sites in 2016.
4. The ACCC asked about one particular project called the “velodrome project”. Using similar terminology to Mr Berlese, Mr Steele could “vaguely” remember the project, he could “vaguely” remember having assembled the workers at that project and having a meeting with them, which meeting he “vaguely” remembered. Mr Steele could not recall that the workers were told something to this effect at this meeting:

Watpac aren’t consulting with the union on subcontractors. There’s a pre-cast contractor on another Watpac project that’s not playing the game. We want all the guys in their factory be members on the correct rate of pay. Watpac’s been using a non-EBA pre-cast company. We don’t stand for this.

1. In 2016, proceedings were brought against Mr Steele personally as well as the CFMEU and others in relation to these and other events alleged to have occurred in 2016. Having regard to the fact that Mr Steele was joined personally as a respondent and that the CFMEU (his employer) was also joined as a respondent by reason of Mr Steele’s alleged conduct, it is more likely that Mr Steele had a better recollection of the meetings attended by him than he was prepared to admit. Alternatively, his poor recollection of the meetings which took place in 2016, and in relation to which proceedings were brought against him, casts doubt on the reliability of his evidence given in this proceeding about events which also occurred in 2016.
2. There was also, in any event, a significant contradiction between Mr Steele’s affidavit evidence and his oral evidence at the trial.
3. By his affidavit evidence, Mr Steele gave this evidence:

I understood that the CFMEU had no lawful right to dictate to Hutchinson Builders who they could engage as sub-contractors. I did not ever do this. I also understood that having an enterprise agreement which the CFMEU was covered by was a not a requirement for subcontractors being engaged on a Hutchinson Builders site. I did not ever demand this.

1. Yet Mr Steele agreed at the trial that, in 2016, the CFMEU relied upon clause 35.2 of the 2015 EBA – *as he understood and as he applied it* – as a basis for “effectively pushing” that Hutchinson ought to retain subcontractors with EBAs.
2. For these reasons and for the further reasons below, Mr Steele was not a reliable witness.

## Mr Ezzy

1. The CFMEU relied upon an affidavit of Mr Dallas Ezzy, the National Relationship Manager of Building Unions Superannuation Scheme (Queensland) (**BUSSQ**), which is an industry superannuation fund. Mr Ezzy was not required for cross-examination.
2. Mr Ezzy gave evidence that WPI was first registered with BUSSQ on 29 June 2011, and has made superannuation contributions periodically for various employees. He also stated that there was an account belonging to Mr Charlie Hadfield which was opened on 15 June 2016 and that no employer contributions have ever been made to this account by WPI. It was an agreed fact between the parties that WPI also made no contributions to another industry superannuation funds called CBUS, which is an acronym for Construction & Building Industry Superannuation Pty Ltd according to the 2015 EBA (**CBUS**).
3. Mr Ezzy stated that part of his role was to monitor compliance by employers (presumably with enterprise agreements and awards) but no detail was provided as to how Mr Ezzy monitored that compliance.

## Mr Shenfield

1. The CFMEU relied upon an affidavit of Mr John Shenfield, the General Manager of the Building Employees Redundancy Trust (**BERT**), Construction Income Protection Queensland Limited (**CIPQ**) and the Building Employees Welfare Trust (**BEWT**) (together the **Funds**). Mr Shenfield was not required for cross-examination.
2. Mr Shenfield’s evidence was that WPI was registered with the Funds from 28 May 2016 until June 2019, and that it made no contributions throughout that period. He also stated that Mr Charlie Hadfield had an account which was opened on 24 February 2012, but that no contributions had been made into his account by WPI.

## Mr Raymond Hadfield

1. Mr Raymond Hadfield was the director of WPI in 2016. Mr Raymond Hadfield was examined pursuant to s 155(1)(c) of the Act by the ACCC on 1 April 2019, and Hutchinson tendered the cover page of the transcript of that examination.
2. No party called Mr Raymond Hadfield and no party sought to tender any extract of the s 155(1)(c) examination.

## Mr Charlie Hadfield

1. Mr Charlie Hadfield is the son of Mr Raymond Hadfield. He performed work on the Southpoint project for WPI in April, May and June 2016. The relationship between Mr Charlie Hadfield and WPI was not established on the evidence, although it could have been an employment relationship. Mr Charlie Hadfield was examined pursuant to s 155(1)(c) of the Act by the ACCC on 7 July 2020, and Hutchinson tendered the cover page of the transcript of that examination.
2. No party called Mr Charlie Hadfield and no party sought to tender any extract of the s 155(1)(c) examination.

# ruling on objections to evidence

1. During the trial, objection was taken to the tender of pleadings in other proceedings filed in this Court in which Mr Steele and the CFMEU were respondents. Objection was also taken to part of the cross-examination of Mr Steele on those pleadings at the trial, which was sought to be enlarged after the trial concluded. These objections were reserved to be determined as part of this judgment. Having regard to the manner in which these objections have evolved, it is necessary to set out what occurred at trial and following the trial.
2. During the cross-examination by the ACCC of Mr Steele at the trial, the following questions were asked and answered without objection by the respondents:

And then I want to just ask you something about the end of your affidavit, if you’ve got that there, paragraph 31?‑‑‑Yes, I’ve got it.

And you see you say in the first sentence:

It has never been my practice to direct that the entire job stop because of an issue with respect to a particular subcontractor.

?‑‑‑Yes.

And then you see the next sentence says:

I understand that the union is not entitled to stop the job if a subcontractor is engaged who does not have an enterprise agreement which covers the union.

?‑‑‑Yes.

And I just want to clarify something about that, which is it’s the case, isn’t it, that in 2016, you understood that the union was not entitled to stop the job if there was a subcontractor who didn’t have an EBA?‑‑‑Yes.

But nevertheless, there were occasions when you did shut down jobs in 2016 because the construction companies were engaging subcontractors without EBAs without having consulted with the CFMEU?‑‑‑Not under my direction.

…

Do you recall in 2016, Mr Steele, having participated in action that was taken by the CFMEU against Watpac?‑‑‑Yes.

And that action involved shutting down a number of job sites of Watpac in Brisbane?‑‑‑Yes.

And the reason that those job sites were shut down was because Watpac was engaging non-EBA contractors without consulting the CFMEU?‑‑‑Not to my knowledge. I wasn’t told the agenda. I was told a direction to go and visit the jobs and get support of the men. No – no agenda was ever given to me in regards to what the issue was.

I see. You – your recollection is that you went and you shut down job sites, but you didn’t know why you were shutting down the job sites; is that right?‑‑‑I’ve – I don’t shut jobs down. The – the men make a vote and make a collective decision, and they – then they walk off the job.

Yes. You went – tell me if we’re agreeing about this?‑‑‑Yes.

…You went to some Watpac job sites in 2016 and you sought to bring about a stop of work on those sites?‑‑‑I brought to the attention of the workers in regards to consultation to the union. The men made a decision to walk off and come back the following day.

1. Mr Steele was then shown a statement of claim in which he was the named second respondent in a proceeding commenced by the Australian Building and Construction Commissioner (**ABCC**) in 2016 in the Federal Court (proceedings QUD831/2016) (**Watpac proceeding**). Other respondents included the CFMEU, which was the sixth respondent. He was also shown a defence filed in the Watpac proceeding which stated that it was filed on his behalf. He said that he never read any of the pleadings.
2. The following questions were asked and answered by Mr Steele by reference to the statement of claim without objection by the respondents:

And I just want to clarify, though, you know that you were a respondent to a proceeding brought by the ABCC in relation to the CFMEUs actions in relation to Watpac in 2016?‑‑‑Yes.

And you know that you were a respondent to a proceeding brought by the ABCC in relation to the CFMEUs actions with respect to Hutchinson in 2016?‑‑‑Yes.

And in each of those proceedings, you know that you ultimately made a number of admissions in the proceedings?‑‑‑Yes.

And you had penalties imposed upon you in each of the proceedings?‑‑‑Must have. I – I don’t know.

You never had to pay them; somebody else paid them?‑‑‑Obviously. Yes.

And in relation to – and then what I will just show you – so this is the statement of claim. I just want to show you the defence. …

Now, you see on the right-hand side of the screen, Mr Steele, there’s a document which is titled the Amended Defence?‑‑‑Yes, I see that.

…

So you will see that’s filed on behalf of the first to third and sixth respondents?‑‑‑Yes.

And you will recall – or you can see on the screen, you’re the second respondent?‑‑‑That’s correct.

And you see that it’s prepared by Luke Tiley of Hall Payne Lawyers?‑‑‑Yes.

And they were the solicitors that were acting for you in this proceeding in relation to the Watpac action. Do you agree?‑‑‑Agree.

And I want to then ask you about some things in relation to what’s dealt with in the Watpac proceeding. So we might just bring up – just have the statement of claim on the screen because I think this will be easier for Mr Steele to read. …

And you see – … paragraphs 18 and 20 of the document. You see this sets out allegations in relation to you and Mr Pauls. Now, just pausing on that Mr Pauls was also an organiser from the CFMEU back in 2016?‑‑‑Yes.

And you see that this sets out allegations that you and Mr Pauls attended the Newstead project site. Do you recall having done that?‑‑‑Yes.

And that at that – when the two of you attended, if you look at paragraph 20, that Mr Pauls said that he wanted to talk to the workers, and when he was asked why, he said it was lack of consultation?‑‑‑I don’t recall.

…And then I want to take you to … page 14 of the statement of claim. And do you recall having attended with Mr Pauls a project called the velodrome project?‑‑‑I vaguely – vaguely remember the velodrome.

Okay. And then if we blow up the bottom of the page, paragraph 48, you will see that there’s [an] allegation about the velodrome project meeting?‑‑‑Yes.

Do you recall having assembled the workers on the velodrome project and had a meeting with them?‑‑‑I vaguely remember. Long time ago.

And do you recall in that meeting encouraging the workers to cease working for the day?‑‑‑I vaguely remember the meeting. I didn’t – I don’t believe I didn’t do any talking there. It wasn’t my building site or construction site to get involved. I was just there as a sidekick with Kurt for that – for that discussion.

Kurt is ‑ ‑ ‑?‑‑‑......

‑ ‑ ‑ Kurt Pauls. Is that right?‑‑‑Yes, the organiser. Yes.

And then if we go over to the next page, do you see at the top of the page there are some particulars – if we just blow that up under the heading Particulars?‑‑‑Okay.

And you see what’s said is that Pauls or you said words to the effect that:

Watpac aren’t consulting with the union on subcontractors. There’s a pre-cast contractor on another Watpac project that’s not playing the game. We want all the guys in their factory be members on the correct rate of pay. Watpac’s been using a non-EBA pre-cast company. We don’t stand for this.

?‑‑‑I don’t – I don’t recall any of that discussion.

You don’t now recall that having occurred?‑‑‑I – I don’t recall the words of that time.

…

Mr Steele, is it the case that you don’t remember any of the words said at any of the meetings that were the subject of this proceeding in relation to the Watpac action?‑‑‑No.

So that is no, as in, you’re agreeing with me; you don’t remember it?‑‑‑I don’t – don’t remember the wordings in the meetings. I just remember being given a direction to go and visit the job sites. And whatever the agenda was, I don’t get told those things.

... If I suggest to you that the reason that these Watpac worksites were attended was because of the CFMEUs concern about Watpac engaging non-EBA subcontractors without consultation, would you agree or disagree with that?‑‑‑My view – I disagree. I only knew about no consultation. I didn’t know nothing about subcontractors.

1. Senior counsel for the ACCC then sought to tender the pleadings in the Watpac proceeding.
2. At this point, senior counsel for Hutchinson objected to the cross-examination as follows:

…Can I object, at least formally at this point? It’s not apparent what the relevance of this cross-examination is. It doesn’t appear to go to credit. It would encounter difficulties under sections 97 and 98 of the Evidence Act if it were going to be relied upon in any way approximate to tendency or coincidence, and it doesn’t bear upon the subject matter of this proceeding. And it may be a matter we will need to make submissions about in closing. So at the moment, I merely formally object on the basis of relevance. And there may need to be an evidentiary ruling confining this evidence later in the proceeding.

1. After this objection was taken, senior counsel for the CFMEU made this submission:

…Can I just add to that in respect of the document that’s sought to be tendered. It’s not clear what the relevance of the document in terms of the tender and what my friend is seeking to prove with it. I think it goes along with my learned friend’s same point, but I applied in respect of the document that’s sought to be tendered as well as the line of questioning.

1. It is self-evident that, prior to these objections being taken, senior counsel for Hutchinson and the CFMEU took a tactical decision not to object to the cross-examination of Mr Steele on the pleadings in the Watpac proceeding. Parties are bound by the manner in which their counsel conduct a trial. If there was to be an objection to the pleadings being shown to Mr Steele and questions being asked of Mr Steele about them, then it should have been made when or shortly after that cross-examination commenced.
2. The evidence given in the passage of the evidence referred to above and prior to the objection being taken, and which appears from pages 250 to 254 of the transcript, was therefore admitted.
3. Following the objections, the line of questioning was permitted to continue on the basis that it was at least relevant to credit in circumstances where it appeared to impugn Mr Steele’s evidence give in this proceeding as to his usual practice.
4. As to this, senior counsel for Hutchinson submitted that:

…your Honour, for my part, I’m content with what your Honour has indicated, that the cross-examination continue, but the objection has been noted.

1. Senior counsel for the ACCC was asked whether the tender of the pleadings was relevant to credit only. This was the exchange which followed:

MR HODGE: No, your Honour. It’s wider than that, and the way in which it’s wider is that the proposition that is put, as we understand it, by the CFMEU at least, and by Mr Steele in his evidence, particularly in paragraph 31, seems to be to the effect that he would not seek to shut a job site down because of a failure to consult over retaining non-EBA contractors and that there was not a concern about retaining non-EBA contractors. And that’s why I’m going to seek to tender both the statement of claim and defence in the Watpac proceeding – and ultimately the reason I’ve sort of stopped at this point is I can’t see that there’s any benefit to the court in me traversing through in detail this statement of claim with Mr Steele where he says he doesn’t remember these things now, and a defence has been filed on his behalf that makes admissions. And the same thing then will apply in relation to the Hutchinson statement of claim, which is – again, it’s a statement of claim. There are admissions that are filed on his behalf in the proceedings, and we will all make submissions about what the significance, if any, of that is.

HER HONOUR: Well, dealing with that last point first, you didn’t actually show him in the defence that he had admitted those allegations. So if you’re going to make a submission that, “Here you are saying in paragraph 31, it has never been my practice X, Y, Z,” which he does say, and then here’s some allegations made against him which have been admitted in a defence, isn’t that inconsistent. I think it’s only fair that be put to him, that those admissions were made, and I don’t think they were, were they?

MR HODGE: No, I haven’t put – you’re right, your Honour. I should take him to the paragraphs in the defence and show him that.

1. No objection was taken by either of the respondents to this proposed course. In particular, no objection was taken on the ground that such a course was procedurally unfair to the witness.
2. Instead, the following exchange then occurred with senior counsel for the respondents:

DR HIGGINS: ‑ ‑ ‑ could I make a final point in that regard, and it may be that my learned friend Mr Hodge has actually already asked this question and it has been answered. I had understood the witness’s answer in respect to 31 to be it wasn’t his practice to direct but he didn’t direct on this site, that someone else did. So it might be that there needs to be a bit of precision about that if there’s to be a credit attacked.

MR DOWLING: And there’s some – yes, the way my learned friend summarised what it is that Mr Steele says at paragraph 31, we would say, is not consistent with what it actually says either. But I will leave that for Mr Hodge to phrase the question. Only one last comment, your Honour. I think my friend said in response to our criticism that – not our criticism, our objection about going to credit, that it was broader than that. Yet from the description, unless I misunderstood it, it seemed to be a credit point only.

HER HONOUR: Having said that though, Mr Dowling, he does rely upon his practice – or usual practice as a basis for saying this didn’t happen – these facts didn’t happen as a matter of fact. So if you can show that, in fact, he did do things as a matter of fact, it might go to showing that the facts underlying this complaint by the ACCC did happen. So I haven’t formed a view about that, but I think what I will do is admit the statement of claim and defence as exhibit 13. I will admit them, in fact, actually, as MFI1 and make a ruling at the end as to whether or not they’re admissible at all and, if they are, on what basis.

1. Further questions were then asked of Mr Steele about the pleadings in the Watpac proceeding. He was taken to particular paragraphs in the statement of claim, including allegations that Mr Steele contravened section 355 of the *Fair Work Act 2009* (Cth) by taking or organising action against Watpac with intent to coerce Watpac to not engage subcontractors that were or are not covered by an enterprise agreement that covered or covers the CFMEU.
2. Mr Steele was then shown the defence which had been filed in which these allegations were admitted. He said he would not know if the amended defence was filed on his instructions to Hall Payne Lawyers.
3. It was put to Mr Steele that these admissions were inconsistent with the proposition that he would not shut down a job because of a failure by a builder to consult with the CFMEU over retaining a non-EBA contractor, to which proposition Mr Steele disagreed.
4. It was also put to Mr Steele that these admissions were inconsistent with the proposition that he would not threaten industrial action because of a failure by a contractor to consult with the CFMEU over retaining non-EBA subcontractors, to which proposition Mr Steele disagreed.
5. Mr Steele was then shown pleadings in another proceeding brought by the ABCC in 2016 in the Federal Court against the CFMEU (as first respondent), Mr Steele (as third respondent) and others (QUD755/2016) (**Hutchinson proceeding**). In particular, Mr Steele was shown a version of a statement of claim filed on behalf of the ABCC and a defence filed on behalf of all of the respondents by Mr Tiley of Hall Payne Lawyers.
6. In the statement of claim in the Hutchinson proceeding, it was alleged that Hutchinson was the principal contractor on nine construction projects in Brisbane, which included Southpoint A. The statement of claim alleged facts which occurred in September 2016 (in relation to Mr Steele).
7. Mr Steele was taken to certain paragraphs of the statement of claim which included allegations that Mr Steele had engaged in certain conduct with the intent to coerce Hutchinson to engage a particular class of independent contractor, namely those covered by an enterprise agreement that also covers the CFMEU. In the defence filed by the respondents in response to this statement of claim, these allegations were admitted. Mr Steele gave evidence that the CFMEU had given instructions to Hall Payne to file the defence on his behalf.
8. At this juncture, senior counsel for the CFMEU raised an objection as to the form of the questions which were being put to Mr Steele as follows:

Your Honour, as I understand the – the reliance upon these documents was to test the proposition in paragraph 31. Now, there was a – the description given in the question immediately before the short adjournment for Mr Steele, in my submission, doesn’t match paragraph 31. Now, if my learned friend is referring to other evidence given rather than paragraph 31, then he should be directing the witness to it. If it’s paragraph 31 that is the subject of the – what’s alleged to be the inconsistency, then paragraph 31 should be put to the witness.

1. Following further submissions by senior counsel for the ACCC, including by reference to paragraph 13 of the first affidavit of Mr Steele, the following exchange occurred:

HER HONOUR: I also think – sorry, as a matter of fairness, if you look at transcript page 237, lines 15 to 18.

MR HODGE: Sorry, your Honour. I’m just bringing that up.

HER HONOUR: That’s all right. Is that something that’s relevant to any inconsistency or not, Mr Hodge? If it’s not, then that’s fine.

MR HODGE: No, no. I think what your Honour says is right, that I should also direct him to that.

HER HONOUR: So you’re going to take him – you’re going to refer back to that question and answer, take him to paragraphs 13 and 31 specifically and then – and one at a time, I suggest.

MR HODGE: Yes.

HER HONOUR: And indicate that what has been admitted in the pleadings is inconsistent with that evidence. Is that the proposed course?

MR HODGE: Yes.

HER HONOUR: All right.

MR HODGE: That’s what I will do, your Honour.

HER HONOUR: All right. Is there any objection to that, Mr Dowling?

MR DOWLING: No, your Honour.

1. No objection was taken by Hutchinson either.
2. In particular, no objection was taken by either of the respondents on the ground that the proposed course was procedurally unfair to the witness.
3. Senior counsel for the ACCC then cross-examined Mr Steele in the way which had been addressed above.
4. The ACCC tendered the pleadings in the Hutchinson proceeding subject to the same objection as to relevance, and on the same basis as the pleadings in the Watpac proceeding.
5. Without objection and following the conclusion of the oral evidence, the CFMEU tendered correspondence between the lawyers acting for the parties in the Watpac proceeding and the Hutchinson proceeding which demonstrated that the versions of the defences which had been filed in those proceedings, and which contained the admissions, were filed in that form pursuant to an agreement reached between the parties to settle aspects of those proceedings relating to liability. The agreement by the respondents in those proceedings to formally admit the allegations in their pleadings was expressed to be made pursuant to s 191 *Evidence Act 1995* (Cth).
6. Relevantly, s 191(1) provides that:

***agreed fact*** means a fact that the parties to a proceeding have agreed is not, for the purposes of the proceeding, to be disputed.

1. By their closing submissions, the ACCC addressed the objections taken by the respondents during the hearing, which were taken on the grounds of relevance. In particular and leaving aside submissions which were later withdrawn, the ACCC submitted that:

Mr Steele’s admissions are relevant to the Court’s assessment of Mr Steele’s purpose and state of mind.

In both the Watpac Proceeding and the Hutchinson Nine Sites Proceeding, Mr Steele made admissions concerning industrial action taken by him relevant to the engagement of non-EBA sub-contractors. The admissions were contained in the defences filed on behalf of Mr Steele; they are inconsistent with his evidence in this proceeding, in particular that he would not shut down a job site or threaten industrial action because of a failure by a builder to consult with the CFMEU over retaining a non-EBA contractor.

In the course of cross-examination, the specific allegations to which Mr Steele admitted in the proceedings were put to him. Mr Steele confirmed that he was a respondent to both proceedings and that he was represented by the solicitors who prepared the pleadings. Mr Steele sought to distance himself from the admissions made in the defences in both the Watpac proceeding and the Nine Sites proceeding by indicating that he did not recall his particular conduct or the content of conversations the subject of the pleadings, or that he was not aware of the any “agenda” for his conduct.

The defences contained admissions of serious contraventions of the FW Act and were signed off by the legal practitioners acting for Mr Steele. It may be inferred that they were filed on his instructions.

The requirement for legal practitioners to put their names to a pleading reflects the duties imposed on barristers and solicitors to be satisfied that the pleading has a proper basis on the factual and legal material available. These duties are now statutorily enshrined in the *Federal Court Rules 2011* (Cth) at rule 16.01. The placing of names and signatures on the defences acted as a voucher that the defences were not mere fiction.

Accordingly, the admissions in the pleadings can be afforded appropriate weight when determining whether Mr Steele’s account in his affidavit should be accepted by the Court.

(footnotes omitted)

1. By its written closing submissions, the CFMEU did not dispute that the pleadings sought to be tendered by the ACCC had been filed in the Watpac and Hutchinson proceedings but opposed their admission into evidence, submitting that the admissions made in the defences were not admissible as either admissions or tendency evidence.
2. In particular, the CFMEU submitted that the defences had been filed following a settlement between the CFMEU and the respective respondents, which settlement required that identified allegations be admitted pursuant to s 191 *Evidence Act*.
3. The CFMEU did not persist with its previous objection to the cross-examination on those pleadings but instead advanced submissions which addressed the answers given by Mr Steele during cross-examination.
4. By its written closing submissions, Hutchinson submitted that:

Mr Steele was cross-examined at length concerning proceedings brought against him and other respondents concerning industrial action taken at sites including Hutchinson sites in September 2016 against appointment of non-EBA subcontractors without consultation. Mr Steele made admissions in those proceedings. **To the extent those admissions were made pursuant to s 191 of the *Evidence Act* (which appears to be the case), they are not admissible in this proceeding and should not have been the subject of cross-examination.** To the extent that evidence of these admissions is adduced as tendency or coincidence evidence to establish that because Mr Steele admitted liability in proceedings concerning action against non-consultation before retention of non-EBA subcontractors he is likely to have engaged in the conduct alleged here, the evidence is inadmissible for the reasons outlined above. **Objection to any such use of the evidence was formally taken when the material was put to Mr Steele.**

(emphasis added)

1. However, as can be seen from the passages from the transcript set out above, an objection was not taken when the “material was put to Mr Steele”; but was taken some time later.
2. Further, apart from the objections taken on the grounds of relevance (which captured potential use as tendency evidence), and as to the form of questions being put to Mr Steele for the purposes of ensuring that the inconsistencies between his evidence and the admissions were drawn to his attention, no other objection was made by the respondents during the course of the cross-examination. The objections as to the manner in which the questions were being asked of Mr Steele was addressed during the hearing and the line of questioning was permitted to continue on the basis that it appeared to be relevant to credit. The ACCC has never sought to rely on the evidence as being tendency evidence.
3. During oral closing submissions, the parties were invited to make further written submissions (limited to five pages) about the identification and admissibility of the transcript of the cross-examination of Mr Steele.
4. By submissions filed on 22 October 2021, the ACCC submitted that the pleadings in the Watpac proceeding and the Hutchinson proceeding, and associated cross-examination on those pleadings, were relevant to Mr Steele’s credibility because, read together, the pleadings were prior inconsistent statements. It was submitted that, by causing the defences to be filed on his behalf, Mr Steele represented that he was content for those proceedings to be resolved and for pecuniary penalties to be imposed on the basis that the admitted allegations against him were true or had been proved. The ACCC submitted that Mr Steele’s conduct supports an inference that he accepted the admitted allegations to be true.
5. It also submitted that Mr Steele’s answers given by reference to the pleadings bears on the assessment of his evidence in these proceedings, and is also relevant for that reason. It submitted that Mr Steele claimed to have a better recollection of the events in these proceedings than the matters for which he was sued in 2016.
6. The overarching question then is – were the admissions which were contained in defences filed on Mr Steele’s behalf in other proceedings a “prior inconsistent statement” by him?
7. The term “prior inconsistent statement” is defined in the Dictionary to the *Evidence Act* as a previous representation that is inconsistent with evidence given by the witness.
8. “Previous representation” (also a defined term) means a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced. “Representation” (also a defined term) includes an express or implied representation (whether oral or in writing) and a representation to be inferred from conduct.
9. Having regard to these statutory definitions, a statement contained in a pleading filed by a lawyer acting for a party is *prima facie* capable of being a representation. Whether such a representation is in fact made is a question of fact having regard to all of the relevant circumstances. Such a conclusion is consistent with the statements of Ryan J in *Australian Competition and Consumer Commission v Pratt (No 3)* (2009) 175 FCR 558; [2009] FCA 407 at [70], [72] and [73] that:

…the *Evidence Act* has been predicated on the view that admissions (or previous representations) contained in pleadings in earlier civil litigation may be admissible in subsequent proceedings against the party on whose behalf the pleadings were filed...

I consider that… the effect of the *Evidence Act* is that pleadings in previous civil proceedings are not necessarily excluded for the purposes of subsequent proceedings from what may be regarded as admissions within the meaning of s 81(1). **Rather, it is a question of fact in the circumstances whether the particular statement in a pleading or analogous document constitutes an admission. The relevant circumstances will include the type of pleading or other document and the terms in which the alleged admission has been expressed**... That I consider to be consistent with the observations of Cockburn CJ in *Richards v Morgan* (1863) 4 B & S 641; 122 ER 600. In a passage, at 661; 607, which has been cited with approval by Rares J in *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd* (2008) 167 FCR 314, at [34], his Lordship said;

It cannot be doubted that a man’s assertions are admissions, whether made in the course of a judicial proceeding or otherwise, and, in the former case, whether he was himself a party to such proceeding or not. It may be given in evidence against him in any suit or action in which the fact so asserted or admitted becomes material to the issue to be determined. And in principle, there can be no difference whether the assertion or admission be made by the party himself who is sought to be affected by it, or by someone employed, directed or invited by him to make the particular statement on his behalf. In like manner, a man who brings forward another for the purposes of asserting or proving some fact on his behalf, whether in a court of justice or elsewhere, must be taken himself to assert the fact that he thus seeks to establish.

I regard that passage as an early recognition that, to be admissible as an admission in the evidentiary sense, the statement in the pleading must, on balance, amount to a positive assertion or acknowledgement of a material fact. A statement in a defence or subsequent pleading that a party “admits” an allegation in a particular paragraph of a statement of claim or subsequent pleading may not always constitute such a positive assertion or acknowledgement. **It may, in its context and other relevant circumstances, signify no more than that the party admitting the allegation is content for the litigation in which it is made to be resolved on the basis that the allegation is true or has been proved. That election may be made for a variety of forensic reasons, including a desire to avoid the costs of contesting the allegation in question or a belief that the party making the admission can succeed on some other issue without disputing the particular allegation**…

(emphasis added)

1. In that case, a defence was filed which contained admissions which had been agreed to be included pursuant to s 191 *Evidence Act*. On the facts of that case, Ryan J concluded that the relevant paragraphs of the pleading in that case did not, as a matter of fact, embody an admission, stating at [90] that:

I have been persuaded to that finding, first, by the fact that the relevant paragraphs have been prefaced by the expression that Pratt “admits” the matters then set out. There is no unqualified assertion of any of those matters as a fact for any purpose beyond that of the proceeding in which the Further Amended Defence was filed.

1. The defence being considered by Ryan J included an express reference to the fact that the admissions were being made for the purposes of the proceeding only, and also referred to the statement of facts having been agreed pursuant to s 191 *Evidence Act*. Ryan J considered that this reinforced his view. By comparison, the defences filed on behalf of Mr Steele contain no such references.
2. In *Capic v Ford Motor Company of Australia Pty Ltd* (2021) 154 ACSR 235; [2021] FCA 715, the ACCC sought to rely on the content of a Statement of Agreed Facts and Admissions tendered in a previous proceeding which had been brought by the ACCC against the same respondent. In that case, Perram J stated at [815] – [817]:

The Respondent submitted that at best this document was evidence of what matters the Australian Competition and Consumer Commission and the Respondent had agreed did not need to be proved in that proceeding. The statement was tendered in that proceeding under s 191 of the *Evidence Act 1995* (Cth)and is certainly evidence of that. **However, it is also evidence from which it could be inferred that statements in the paragraphs were correct. Here the thinking would be that the Respondent would be unlikely to agree as a fact something which was not a fact. Against that, it might be said that the Respondent may have taken the course in the other proceeding of agreeing facts for tactical or pragmatic reasons. Both inferences are open on the paragraphs. I think the former inference more likely than the latter.** I may more confidently draw that inference where the Respondent did not produce a witness to suggest that it was the latter course which was correct: *Jones v Dunkel* (1959) 101 CLR 298 at 308; [1959] ALR 367 per Kitto J, CLR 312 per Menzies J and CLR 319 per Windeyer J; *Manly Council v Byrne* [2004] NSWCA 123 at [51] per Campbell JA, Beazley JA agreeing at [1] and Pearlman AJA agreeing at [2]. However, I would draw the inference even without resort to *Jones v Dunkel*. It merely makes me more confident in the correctness of the inference.

So to hold is not to regard the representations in the statement as ‘previous representations’ for the purposes of Pt 3.2 of the Evidence Act(‘Hearsay’) which, as Ryan J explained in *Australian Competition and Consumer Commission v Pratt (No 3)* 175 FCR 558; [2009] FCA 407 at [83]-[84], they are not. **That is to say, while each representation in the statement is ‘no more than a representation by each party to the proceeding that he, she or it will not dispute the asserted fact in that proceeding’ nonetheless it is open to this Court to infer from the parties’ decision so to eschew such disputation that the asserted fact is true.** As I have said, I draw that inference with greater confidence having regard to the absence of contradictory evidence which it was peculiarly within the Respondent’s power to lead.

While Ryan J also explained at [84] that the representations in such a statement are not ‘admissions’ for the purposes of s 81 of the Evidence Act, nonetheless it is noteworthy that in civil proceedings the rule has long been that ‘formal admissions made by attorneys of both sides at a first trial could be relied on at the second trial after the first verdict had been set aside’: *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd* (2008) 167 FCR 314; [2008] FCA 369 at [18] per Rares J, citing *Doe dem Wetherell v Bird* (1834) 111 ER 63; 7 Car & P 6 at 7 per Lord Denman CJ. In other words, it has never been thought that admitted facts may have vitality only within the four corners of the proceeding in connection with which they were admitted.

(emphasis added)

1. The following matters are relevant in this case:
2. the admissions made in the defences filed on behalf of Mr Steele were bare admissions of allegations made in the ACCC pleadings. Having regard to their content, there was no unqualified assertion in the defences of any of the allegations as a fact for any purpose beyond that of the Watpac proceeding and the Hutchinson proceeding;
3. the defences were filed pursuant to settlements reached through an exchange of correspondence in which it was agreed that the respondents’ admissions of fact and liability would be made pursuant to s 191 *Evidence Act*;
4. some of the allegations which were admitted were allegations of law or allegations of mixed fact and law, which indicates that the admissions were made for tactical or pragmatic reasons for the purposes of those proceedings.
5. Having regard to these matters, the defences filed in the Watpac proceeding and the Hutchinson proceeding do not contain representations by Mr Steele that the allegations made against him in those proceedings were true or had been proved. This has the consequence that they are not previous inconsistent statements by him.
6. The ACCC accepts that, if the pleadings are not admitted into evidence as previous representations of Mr Steele, then the cross-examination of Mr Steele cannot be used as an ancillary means of putting the content of the pleadings into evidence. That cross-examination commences at page 258 of the transcript (following the first objection being taken by the respondents commencing at page 254 line 33) and concludes at page 266 of the transcript. That this evidence should not be admitted appears to be accepted by the ACCC subject to one matter which is addressed below.
7. Further cross-examination on or connected with the pleadings appears from page 269 line 39 to page 272 line 38 of the transcript. Having regard to its submissions, I infer that the ACCC also accepts that this evidence should be excluded if the pleadings are not admitted, subject to the same qualification.
8. The ACCC submitted that, in the event that the pleadings are found not to be representations of Mr Steele:

…the Pleadings should be admitted into evidence subject to a s 136 order that they be admitted as evidence of the matters alleged against Mr Steele and admitted by him in the Watpac Proceeding and Hutchinson Nine Sites Proceeding, but not as proof of the facts alleged. Mr Steele admitted that he was a respondent to the Watpac Proceeding and Hutchinson Nine Sites Proceeding and had penalties imposed on him, but claimed not to have read the pleadings in those proceedings. If the Pleadings are admitted on this basis, the cross-examination would be permissible under s 44(2) of the *Evidence Act*.

Should the Court adopt that approach, it would also be appropriate to make a s 136 order that the quotation of the [Pleadings] as part of the transcript not be admitted as proof of the facts set out in those Pleadings. However, the point that will remain is as to Mr Steele’s credibility having regard to his claimed recollection of the events the subject of this proceeding when compared with his claimed recollection of the events the subject of the Watpac Proceeding and Hutchinson Nine Sites Proceeding, even with the benefit of having his attention drawn to the allegations in those Pleadings.

(footnotes omitted)

1. I decline to adopt the approach proposed by the ACCC. As addressed earlier in these reasons, the credibility of Mr Steele was affected adversely by his inability to recall aspects of events in 2016 about which proceedings had been brought against him during a passage of cross-examination which forms part of the evidence. It does not advance the ACCC’s attack on Mr Steele’s credit much further to admit evidence of additional and similar examples of his lack of recollection of other events in 2016. For this reason, I find that such evidence would not substantially affect the assessment of Mr Steele’s credibility within the meaning of s 103 *Evidence Act*. This has the consequence that this evidence is not admissible by reason of s 102 *Evidence Act*.
2. For these reasons, and taking into account the concessions by the ACCC referred to above, the pleadings in the Watpac proceeding and the Hutchinson proceeding, and associated cross-examination on those pleadings, are not admitted into evidence. That is, the evidence from page 258 to page 266 and from page 269 line 39 to page 272 line 38 of the transcript are not admitted.
3. During oral closing submissions by senior counsel for Hutchinson, it was submitted that the cross-examination of Mr Steele was irregular and passing reference was made to s 44 *Evidence Act*. In written submissions filed following the last day of the trial, Hutchinson and the CFMEU each submitted to the effect that the cross-examination of Mr Steele had been procedurally unfair because of non-compliance with s 44 *Evidence Act*.
4. The respondents therefore sought to advance a new objection to the line of cross-examination after it had concluded. Such an objection should have been advanced during the cross-examination but it was not. This is especially as it was an objection as to the appropriate procedure which should be followed, being something which could have been rectified by the cross-examiner at the time. That the objection was not taken is unfair to the ACCC as the trial was conducted on the basis that, to the extent that objection was taken as to the manner in which the cross-examination was undertaken (namely the content of the questions being asked), that objection was addressed and ceased to be the subject of objection and, otherwise, there was an objection on the grounds of relevance.
5. As part of their submissions containing the objection premised on s 44 *Evidence Act*, the respondents also objected to the evidence given during the cross-examination of Mr Steele which occurred prior to any objection *of any kind* being taken during the trial. That passage of evidence appears at page 250 line 36 to page 254 line 32. That evidence has been admitted. The respondents’ objections have come too late. For the reasons given above, they are rejected. Otherwise, having regard to the rulings above, it is not necessary to address the balance of the respondents’ submissions filed after the trial.

# Standard of proof

1. A contravention of s 45E or s 45EA of the Act is a civil wrong that must be proved on the balance of probabilities in accordance with s 140 *Evidence Act*: see *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466; [2007] FCAFC 132 at [29] (***CEPU v ACCC***).
2. That standard of proof is informed by s 140(2) *Evidence Act*, which requires the Court to take account of the nature of the cause of action, the nature of the subject-matter of the proceeding and the gravity of the matters alleged. As stated by the Full Court in *CEPU v ACCC* at [30] – [31]:

The mandatory considerations which s 140(2) specifies reflect a legislative intention that a court must be mindful of the forensic context in forming an opinion as to its satisfaction about matters in evidence. Ordinarily, the more serious the consequences of what is contested in the litigation, the more a court will have regard to the strength and weakness of evidence before it in coming to a conclusion.

Even though he spoke of the common law position, Dixon J’s classic discussion in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-363 of how the civil standard of proof operates appositely expresses the considerations which s 140(2) of the *Evidence Act* now requires a court to take into account. Dixon J emphasised that when the law requires proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. He pointed out that a mere mechanical comparison of probabilities independent of any belief in its reality, cannot justify the finding of a fact. But he recognised that…:

No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitively developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences...

1. The Full Court in *CEPU v ACCC* concluded at [38] by reference to the facts in that case:

Ultimately, because this is a civil, not criminal, proceeding the civil standard of proof applies. Thus, the ACCC had to establish that the circumstances appearing in the evidence gave rise to a reasonable and definite inference, not merely to conflicting inferences of equal degrees of probability, that Edison and the CEPU had made a contract or arrangement or arrived at an understanding within the meaning of s 45E(3) (*Trustees of the Property of Cummins (a bankrupt) v Cummins* (2006) 227 CLR 278 at [34] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; see too *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5 per Dixon, Williams, Webb, Fullagar and Kitto JJ).

1. In this case, I am reasonably satisfied on the balance of probabilities, having regard to these matters and, in particular, the nature of the cause of action, the nature of the subject-matter of the proceeding and the gravity of the matters alleged, of each of the findings of facts contained in these reasons.

# Chronology

## Events in 2015

1. In his role as project manager, Mr Meland was responsible for tendering, project management plans, managing subcontractors, quality and safety, costs reports and forecasts and ensuring construction milestones were met in relation to the Southpoint project.
2. Mr Meland was appointed project manager of the Southpoint project in 2015 at the request of Mr Berlese.
3. Mr Meland, with the assistance of Mr Ashton, sought tenders for the waterproofing works on the Southpoint project in 2015.
4. Prior to November 2015, Hutchinson was party to the 2012 EBA which had been approved on 10 May 2012.
5. The 2012 EBA contained the following clause which identified circumstances in which Hutchinson would consult with the CFMEU about subcontractors:

**35 EMPLOYMENT SECURITY, STAFFING LEVELS, MODE OF RECRUITMENT AND REPLACEMENT LABOUR**

…

35.2 *Use of Contractors*

If the employer wishes to engage contractors and their employees to perform work in the classifications covered by this agreement, the employer must first consult in good faith with potentially affected employees and their union. Consultation will occur prior to the engagement of sub-contractors for the construction works.

If, after consultation, the employer decides to engage bona fide contractors, these contractors and their employees will receive terms and conditions of engagement (or terms no less favourable) as they would receive if they were engaged as employees under this agreement performing the same work. The use of sham sub-contracting arrangements is a breach of this agreement.

…

1. Mr Berlese, a senior employee of Hutchinson who was the ultimate person who was in charge of the Southpoint project, gave evidence that, in the types of large projects which he undertook, there was always a risk that, if Hutchinson engaged a non-EBA subcontractor, the CFMEU would object. He also said that, in order to reduce the possibility of industrial disputation with the CFMEU, he chose only to use subcontractors that had an EBA.
2. Mr Berlese gave evidence that, for that reason, he had regard to a document entitled ‘CFMEU EBA Companies List’ dated April 2014 (**2014 List**). The list was of subcontractors that had EBAs.
3. The 2014 List bore the CFMEU logo at the top of each page as follows:



1. The 2014 List included a list of nine names under the subheading “WATERPROOFING”. WPI’s name was not included in that list.
2. As to waterproofers which were engaged by Hutchinson to work on its projects, Mr Berlese stated the following during his s 155(1)(c) examination:

MR GIPP: In terms of waterproofers, are you familiar with the waterproofers that have been used by Hutchinsons in the past?

MR BERLESE: Yes. I have been.

…

MR GIPP: And every one of those waterproofing companies have always had union EBAs?

MR BERLESE: Yes. The majority of them have. Yes.

MR GIPP: The majority?

MR BERLESE: Majority.

MR GIPP: When you say majority, who hasn’t had an EBA?

MR BERLESE: I’m assuming. I just used that – sorry, wrong terminology. Yes.

MR GIPP: All right. If they don’t have a union EBA, they don’t actually get on the list. Is that the case?

MR BERLESE: That could be the case. Yes.

MR GIPP: And the reason for that is that you want to reduce the possibility of any industrial disputation with the union?

MR BERLESE: 100 per cent correct.

1. Mr Berlese also gave evidence in his s 155(1)(c) examination that, had he been aware that Mr Meland was seeking tenders from subcontractors which did not have an EBA, he would have intervened because he did not want any potential industrial relations issues.
2. On 1 September 2015, Mr Ashton sent an email to WPI, as well as other companies, which attached a scope of works (waterproofing) for the Southpoint project and invited tenders. Mr Berlese was copied into this email. The scope of works included clause 2.2 which required that the quotation should include due allowances for any relevant industrial instruments of law, for example enterprise agreements including (if applicable at law) superannuation scheme, redundancy scheme, accident/ income protection and any other allowance and payments applicable at law.
3. On 9 September 2015, Mr Ashton sent an email to Mr Berlese advising of the names of the six companies which had been asked to provide a price for the “waterproofing and tanking tender”. The list included WPI.
4. On 13 September 2015, WPI submitted a quotation to Mr Ashton by email in the amount of $600,896 (excluding GST).
5. By email dated 1 October 2015, Mr Ashton requested that WPI revise its price including to exclude certain items. A further email was sent by Mr Ashton to WPI on 16 October 2015 requesting a revision to the price to exclude a further item. Mr Ashton also issued an invitation to Mr Meland, Mr Paez, Mr Raymond Hadfield and Mr Charlie Hadfield to attend a meeting on 21 October 2015 with the subject matter “Waterproofing/ Tanking Tender Review”.
6. On 23 October 2015, WPI issued a revised quotation to Hutchinson which referred to “our meeting dated 21/10/2015” and that “we have reviewed our pricing and made the following changes as per your request”. The revised quotation was for the amount of $336,646 (excluding GST).
7. During 2015, the Southpoint project was likely to have been within the geographical jurisdiction of a union organiser employed by the CFMEU, but that person was not Mr Steele, who did not become the union organiser in relation to this project until 2016. Further, there was no union delegate employed by Hutchinson on the Southpoint project until 2016 when Mr Clarke was appointed.
8. Assuming that clause 35.2 of the 2012 EBA required Hutchinson to consult with the CFMEU before seeking tenders from waterproofing subcontractors in 2015, the evidence is equivocal as to whether such consultation in fact occurred. Mr Steele was not the union organiser in 2015 and the CFMEU did not call the person who was the relevant union organiser in 2015. Mr Meland was uncertain as to whether the CFMEU had only been told about WPI’s engagement after it had occurred, saying “I’m not sure of the timeline” although he conceded that “it could well be the case”.
9. On 9 November 2015, the 2015 EBA was approved. This agreement was entitled the “J HUTCHINSON PTY. LTD. T/A HUTCHINSON BUILDERS AND CFMEU UNION COLLECTIVE AGREEMENT 2015 – 2019”.
10. The 2015 EBA contained a similar version of clause 35 as follows:

**35 EMPLOYMENT SECURITY, STAFFING LEVELS, MODE OF RECRUITMENT AND REPLACEMENT LABOUR**

35.1 The Employer recognises that in certain circumstances the use of contractors and labour hire may affect the job security of Employees covered by this Agreement.

35.2 Use of Contractors

If the Employer wishes to engage contractors and their Employees to perform work in the classifications covered by this Agreement, the Employer must first consult in good faith with potentially affected Employees and their Union. Consultation will occur prior to the engagement of sub-contractors for the construction works.

If, after consultation, the Employer decides to engage bona fide contractors, these contractors and their Employees will receive terms and conditions of engagement (or terms no less favourable) as they would receive if they were engaged as Employees under this Agreement performing the same work. The use of sham sub-contracting arrangements is a breach of this Agreement.

35.3 Supplementary Labour Hire

Where there is need for supplementary labour to meet temporary/peak work requirements, such labour may be accessed from bona fide businesses, including sub-contractors and labour hire companies, following consultation with the Employer Consultative Committee and/or Union(s) party to this Agreement. The Employer shall ensure that any Employees engaged by such businesses and performing work described in the classifications of this Agreement shall receive wages, allowances and conditions not less than those contained in this Agreement.

Supplementary labour is defined as temporary “top up” labour designed to meet short situations such as absences due to sick leave, annual leave, and short time work peaks. The Employer undertakes not to use supplementary labour in any position on site for a period of more than six weeks. Any departure from this maximum period shall require the consent of the Union.

1. The 2015 EBA also contained the following definitions:
2. “BERT” is an acronym for the Building Employees Redundancy Trust ACN 82 010 917 281 as described in the Trust Deed creating the BERT Fund;
3. “BEWT” is an acronym for the Building Employees Welfare Trust. The “BEWT Fund” means the fund established pursuant to a deed between B.E.R.T Pty Limited and James Kristen Peterson. “Trustee of the BEWT Fund” means B.E.R.T Pty Limited or any trustee appointed under the BERT Redundancy Trust Deed;
4. “BUSS(Q)” is an acronym for the Building Unions Superannuation Scheme (Queensland) Pty Ltd. ABN 85 571 332 201;
5. “CBUS” is an acronym for the Construction & Building Industry Superannuation Pty Ltd. ABN 75 493 363 262;
6. “CIPQ” means Construction Income Protection Queensland Ltd (ACN 110 841 962).
7. Relevantly, the 2015 EBA stipulated that certain payments were required to be made to BERT, BEWT and CIPQ in relation to each employee. It was common ground at the hearing of this matter that an employer needed to be registered in order to be able to make such payments.

## Events in 2016

1. On 5 January 2016, an EBA between Spanos (Qld) Pty Limited (**Spanos**) and its employees was approved.
2. On 2 March 2016, a new list of subcontractors which had an EBA (being one covered by the CFMEU) was issued (being one of the lists to which Mr Berlese had regard when appointing subcontractors) (**2016 List**). The 2016 List included Spanos in its list of waterproofers.
3. On 8 March 2016 and following an inquiry from WPI, Mr Ashton sent an email to Mr Raymond Hadfield which stated that, “I want to finalise the tanking/waterproofing package with yourselves”.
4. On 11 March 2016, the formal instrument of agreement was executed by Hutchinson for the Southpoint project. The contract sum payable to Hutchinson in relation to the Southpoint project was $143,780,438 (excluding GST).
5. On 21 March 2016, Mr Ashton sent a proposed subcontract to Mr Raymond Hadfield and Mr Charlie Hadfield by email and asked for their availability to execute it at the Hutchinson office. A meeting was then arranged by Mr Ashton for 9am on 22 March 2016.
6. On 22 March 2016 at 9.37am, Mr Ashton send an email to Mr Thone, Mr John Swift (who was the site safety officer), Mr Meland and Mr Paez and advised that, “Our waterproofing/tanking subcontractor is Waterproofing industries QLD”.
7. WPI was thereby retained to perform the waterproofing and tanking works in accordance with the revised scope of works, at a price of $336,646 (excluding GST). Having regard to the involvement of Mr Ashton and Mr Paez in the tender process as referred to above, the selection of WPI as the preferred waterproofer, and its subsequent engagement, was not a decision made by Mr Meland alone.

## Meeting between Mr Meland, Mr Steele and Mr Clarke

1. It is alleged by the ACCC and admitted by the CFMEU that there was a meeting between Mr Meland, Mr Steele and Mr Clarke in April or May 2016 during the course of which Mr Meland informed Mr Steele and Mr Clarke that Hutchinson had engaged WPI as the waterproofing subcontractor for the Southpoint project.
2. That such a meeting occurred was not challenged by any witness called by Hutchinson, although it submitted that no finding should be made that the meeting occurred because Mr Meland gave no evidence about this meeting and Mr Clarke had no particular recollection of being informed that WPI had been engaged. Notably, Hutchinson did not challenge Mr Steele under cross-examination in relation to the evidence which he gave about the meeting.
3. Under cross-examination, Mr Clarke agreed that it was likely that he would have had a consultation or discussion with Mr Meland and Mr Steele about what was going on with the project when he was elected as delegate. He also agreed that there could have been a discussion with Mr Meland and Mr Steele about WPI being a subcontractor.
4. Mr Steele deposed in his affidavit that the meeting occurred “shortly after Mr Clarke had started at the [Southpoint project]”. According to Mr Clarke’s evidence, he worked for Hutchinson at “the Opera construction site at West End” for about 6 months prior to May 2016. Mr Clarke was the CFMEU delegate at the Opera site. Mr Clarke deposed that he worked “briefly” on the Southpoint project in February or March 2016 but then ceased working there, and did not return to Southpoint project until mid-May 2016. Taking into account the timing of the engagement of WPI on 22 March 2016, Mr Meland’s statement at the meeting that WPI had been engaged (which means the meeting occurred post 22 March), Mr Clarke’s evidence as to when he worked on the Southpoint project and Mr Steele’s evidence as to when the meeting occurred (being shortly after Mr Clarke had started), it is likely that the meeting between Mr Meland, Mr Steele and Mr Clarke occurred in May 2016. Under cross-examination by senior counsel for the ACCC, Mr Steele accepted that it was possible that the meeting occurred in late May 2016, which provides further support for this conclusion.
5. When Mr Steele was informed by Mr Meland that WPI had been signed up by Hutchinson, he was aware that it did not have an EBA. It was his view that Mr Clarke (as the CFMEU delegate) should have been consulted about WPI being engaged before and not after that had occurred. As to what would have happened if the consultation had occurred, Mr Steele gave this evidence in 2019:

MR GIPP: I see, so if the consultation process [had] occurred and Damon for example, Damon Clarke was aware that Peter Meland had suggested that WPI was to be the waterproofer, what would be the CFMEUs response to that through Damon Clarke?

MR STEELE: About WPI?

MR GIPP: Yes.

MR STEELE: Ah might just be normal process and um, mate, obviously sit down and discuss ah an EA with the bloke or moving forward with ah an enterprise Agreement or might ah pass on the relevant subcontractors who are recommended to ah you know, have a chance of tendering the project.

1. In other words, according to Mr Steele, the consultation process was not directed to ensuring job security for Hutchinson’s employees. Rather, it provided the CFMEU with an opportunity to either cause the proposed subcontractor to obtain an EBA or to push for the engagement of subcontractors who had an “EBA” covered by the CFMEU.
2. Under cross-examination during the trial, Mr Steele agreed with the proposition that the CFMEU relied on clause 35.2 of the 2015 EBA, as he understood it and as he applied it, as a basis for effectively pushing that Hutchinson ought to retain subcontractors which had an EBA.
3. This was consistent with evidence given by Mr Steele in his s 155(1)(c) examination:

MR GIPP: And as I understand it, my understanding of the waterproofing industry in South East Queensland is that there are dozens and dozens of waterproofing companies that work in the area, in the industry. Do you - - -[agree with that]?

MR STEELE: Most definitely.

MR GIPP: But the union only has, at least as of October 2015, an EBA with eight companies, and no more?

MR STEELE: Yeah, as I said, mate, if ah, these companies are large enough to take a little bit of a punt on large projects, the other companies, smaller, mate, they would go belly up if they had to pay types of wages and schemes and that. It just doesn't ah, suit their business style.

MR GIPP: So if Peter Meland hadn't have bypassed the union and passed part of the consultation process, WPI would never have got a look in on this site, would it?

MR STEELE: Most probably.

MR GIPP: Well, unless they're on this list, you don't get the job.

MR STEELE: Yeah.

MR GIPP: Isn't that the situation?

MR STEELE: It's not - not always the situation, but large projects, um, these companies get ah, an opportunity to tender the project.

MR GIPP: But in this particular project, Southpoint A Apartments, it's a large job, isn't it?

MR STEELE: Yeah.

MR GIPP: So had Meland not bypassed the union, it's more likely than not that you or Damon Clarke or both of you would have recommended only one of those companies that appear in that list?

MR STEELE: Nine times out of ten would always pass on these contacts to ah, Meland or Hank or, mate, Joey Cassons, who was on Southpoint C.

MR GIPP: And that list of eight only companies is something that is pretty much organised or prepared by Scott Vink as the waterproofing organiser?

MR STEELE: Yeah (indistinct).

## Meeting between Mr Steele and Mr Berlese

1. It is alleged by the ACCC and admitted by the CFMEU that there was a meeting between Mr Steele and Mr Berlese. This meeting is alleged to have occurred shortly after the meeting between Mr Meland, Mr Steele and Mr Clarke referred to above. During the meeting, it is alleged that Mr Steele complained that the CFMEU had not been consulted before WPI was appointed on the Southpoint project.
2. Hutchinson denies that the alleged meeting between Mr Steele and Mr Berlese occurred.
3. The following facts were established by the s 155(1)(c) evidence of Mr Steele.
4. When Mr Meland told Mr Steele about WPI being engaged, Mr Steele knew who they were as he had previous involvement with WPI. Mr Steele had first met Mr Raymond Hadfield in early 2012 when he (Mr Steele) was the union delegate on a project at Portside. According to Mr Steele, concerns had been raised on the Portside project about the non-payment by WPI of superannuation for its employees, these concerns were raised with the builder and the issue was rectified by WPI over a period of time.
5. As referred to above, when Mr Steele was informed by Mr Meland that WPI had been engaged by Hutchinson, he was aware that WPI did not have an EBA.
6. Mr Steele met with Mr Berlese and raised the fact that the CFMEU had not been consulted about the engagement of WPI. This occurred after his meeting with Mr Meland and Mr Clarke. He thought, but was not sure, that Mr Clarke was also present at the meeting with Mr Berlese. Mr Clarke does not recall this meeting but gave evidence during the trial that his memory was “really bad” and even “shocking”.
7. At the meeting with Mr Berlese, Mr Steele raised the fact that WPI did not have an enterprise bargaining agreement covered by the CFMEU. Mr Steele’s evidence was as follows:

MR GIPP: I understand. Did you raise with Berlese the fact that WPI didn't have an Enterprise Agreement with the union?

MR STEELE: I would've thought so, I would've said that for sure.

1. Mr Steele’s view as to whether consultation should have occurred was linked to the fact that WPI did not have an EBA. This was apparent from his evidence as follows:

MR GIPP: Sorry. Mr Steele, there's just one more question arising out of those meetings. We know about the consultation meeting with Peter Meland and you're there with Damon Clarke and then a few days later you met with John Berlese to complain – not to complain, but to raise the possible - - -

MR STEELE: That's exactly right.

MR GIPP: The issue about not having been consulted. Can I ask you this? If you'd ascertained from Peter Meland that yes, the CFMEU had not been consulted but the company that had been given the contract had an EBA, would you still have raised the issue with Berlese?

MR STEELE: Of – of course not. They've got – got an EBA.

1. Mr Steele agreed under cross-examination that he felt that Hutchinson had disrespected the CFMEU by retaining WPI without consultation, and the reason that he felt this way was because WPI did not have an EBA.
2. According to Mr Steele’s first affidavit, Mr Steele identified to Mr Berlese at this meeting that the failure to consult with the CFMEU about the engagement of WPI was a “breach of the Enterprise Agreement”, but this was not something which he referred to in his s 155(1)(c) evidence. However, even if Mr Steele did complain to Mr Berlese that there was a breach of the 2015 EBA, Mr Steele’s position was that the CFMEU had effectively used clause 35.2 as a lever to pressure Hutchinson to use subcontractors which had an EBA.
3. Taking into account all of these matters, it is objectively very likely that Mr Steele complained to Mr Berlese about WPI’s engagement shortly after he was informed about it.
4. Mr Berlese deposed in his affidavit that he did not recall the meeting that is alleged to have taken place between himself and Mr Steele. However, Mr Berlese accepted under cross-examination that it was possible that he had a meeting with Mr Steele in “about June 2016” during which Mr Steele raised a complaint about WPI having been appointed as a subcontractor on the Southpoint project because they were a “non-EBA contractor”. Mr Berlese said that he understood the reference to “non-EBA contractor” to be a reference to a subcontractor which did not have an enterprise bargaining agreement covered by the CFMEU.
5. For these reasons, I find that a meeting occurred between Mr Steele and Mr Berlese during which Mr Steele complained that the CFMEU had not been consulted before WPI was appointed as a subcontractor on the Southpoint project and during which Mr Steele raised with Mr Berlese the fact that WPI did not have an enterprise bargaining agreement covered by the CFMEU.
6. Taking into account my findings as to the timing of the meeting between Mr Meland, Mr Steele and Mr Clarke as well as the evidence of Mr Steele and the concession made by Mr Berlese, I also find that the meeting between Mr Steele and Mr Berlese occurred in either late May 2016 or June 2016.

## Issue raised by CFMEU about WPI

1. In April and May 2016, Mr Charlie Hadfield of WPI attended the Southpoint site. The visitor register for the site shows that he visited the site on 24 April (for 4 ½ hours), 30 April (for one hour), 16 May (for just over two hours) and 17 May 2016 (for one hour). In an email from Mr Charlie Hadfield to Mr Ashton dated 4 May 2016, reference was made to work having commenced on the first lift pit “last week”. Mr Charlie Hadfield also participated in an induction process on 25 May 2016.
2. An invoice was issued by WPI to Hutchinson in May 2016 (which was amended after consultation with Mr Paez) and a further invoice was issued in June 2016. Having regard to the quantum of the invoices, the work which was performed by WPI prior to 11 June 2016 was not significant.
3. The case sought to be advanced by the CFMEU was that, having regard to Mr Clarke’s usual work practices in 2016, it ought to be inferred that Mr Clarke contacted the relevant funds to ascertain if WPI was registered and was paying the correct entitlements to its employees.
4. Mr Clarke described a practice of either telephoning the relevant funds or emailing a form to the funds once a subcontractor was engaged or turned up on the job. He considered that, in 2016, his practice was to telephone the relevant funds and said that he would check whether the subcontractor was “paying that BERT, BEWT, CIPQ, the super, all that sort of thing”.
5. Mr Clarke conceded that he could not recall telephoning the relevant funds to conduct these compliance checks in 2016 in relation to the Southpoint project and there was no documentary evidence (such as a copy of a submitted form or report received) to establish that such checks had been conducted by him in 2016. Mr Clarke did not have any memory of WPI working at the Southpoint project in 2016.
6. As at May 2016, WPI was registered with BUSSQ, and had been since 29 June 2011.
7. By 28 May 2016, WPI was also registered with the Funds, but did not make any contributions to the Funds in May 2016.
8. It is possible that Mr Clarke made an inquiry of the Funds prior to 28 May 2016 and was told that WPI was not registered. Or he made an inquiry of BUSSQ and the Funds after 28 May 2016 but before 1 June 2016 and was informed that no payments had been made by WPI in relation to May 2016.
9. However, even if that is accepted, Mr Clarke gave evidence that, if he was advised that a subcontractor was not registered with the funds, he would let the CFMEU organiser know this and probably also the site manager. Mr Clarke said he would ask the site manager to deal with the subcontractor and to make sure they register for all of the funds. In other words, Hutchinson (and the subcontractor) would be advised of the issue and given an opportunity to rectify the situation.
10. Mr Clarke also gave evidence that, when he came across a situation where a subcontractor was behind in their payments to the funds, he would let the CFMEU organiser know and the site manager know. He said that, “Generally it has gone pretty good, like, sit down and – and you organise a payment plan or whatever, you know, just sort it out and we will go – we will move forward from there”. Again, Hutchinson (and the subcontractor) would be advised of the issue and given an opportunity to rectify the situation.
11. On 1 June 2016, Mr Raymond Hadfield sent an email to Mr Meland, copied to Mr Charlie Hadfield, with the subject “Waterproofing – Southpoint A”, which stated in part:

... Just thought I would touch base with you this morning regarding this matter with the CFMEU. As stated from the initial meeting with Lindsay Ashton, we confirmed we will be paying all our workers EBA rates on this site. This includes site and height allowance, travel allowance, BERT, CIP−Q and Super. We wish to do the right thing by our workers to not cause any drama’s on site with the union. As stated in our email yesterday, any workers going onsite will be financial members of the CFMEU before they are inducted.

If there was a chance to sign an EBA agreement, we would 100% do so. We want to do the right thing by our workers and Hutchinson Builders...

1. This email demonstrates that, by no later than 1 June 2016, an issue had been raised by the CFMEU about the fact that WPI was not registered with the Funds or that it had not made any contributions into the Funds or BUSSQ.
2. Mr Meland wanted to have the issue raised by the CFMEU addressed by WPI. This is apparent from his email dated 7 June 2016 which he sent to Mr Raymond Hadfield and copied to Mr Charlie Hadfield, Mr Thone and Mr Paez and which stated in part:

...How are you going with Bus/Bert/ Cipq? As soon as you are registered and up and running let me know please...

1. On 7 June 2016, Mr Raymond Hadfield sent an email in reply to Mr Meland, copied to Mr Charlie Hadfield, which stated in part:

…My business partner is flying in Friday morning and we will be meeting then to sort this all out. I’ll give you a call Friday once it is all resolved…

1. On 10 June 2016, Mr Meland sent a further email to Mr Raymond Hadfield which stated:

Ray

I need to see this sorted today?

1. By 10 June 2016, WPI was registered with the Funds and was already registered with BUSSQ. It had not made payments into those funds but, consistently with the evidence of Mr Clarke, WPI would be given an opportunity to rectify the situation. There is no evidence that, in this case, there was any urgency imposed upon WPI by the CFMEU to get its payments up to date. Indeed, a situation where a subcontractor was behind in their payments to the funds “has happened a bunch” according to Mr Clarke.
2. Further, Mr Clarke’s evidence was that, if the situation was not rectified after he had raised it with the CFMEU organiser and the site manager, his usual practice was to let Hutchinson know that it was “in breach of its agreement with the CFMEU”. He did not say in his evidence in chief that the usual practice was to exclude the subcontractor from the site (or require Hutchinson to do that).

## Conversation between Mr Meland and Mr Clarke

1. A critical issue in this case is whether, on 11 June 2016, a conversation took place between Mr Meland and Mr Clarke on the site during which Mr Clarke told Mr Meland that the CFMEU would “sit the job down” at the Southpoint project if Hutchinson allowed WPI back on site.
2. By its Amended Response, the CFMEU denied the allegation, pleading to the effect that, in circumstances where Hutchinson was not complying with clause 35.2 of the 2015 EBA by virtue of a subcontractor not paying its workers in accordance with the 2015 EBA, Mr Clarke’s practice was to inform Hutchinson’s representative at the Southpoint project of the non-compliance and seek compliance with the 2015 EBA.

### Mr Meland

1. By his affidavit evidence, Mr Meland stated that he had a conversation with Mr Clarke in the hoist at the Southpoint site on Saturday 11 June 2016 to the following effect:

Damon Clarke: Look, Charlie's been on site and I have direction from the union that the job will stop if he's here. I won't do anything today but if he is back, there will be problems.

Me: Why aren't they allowed on site?

Damon Clarke: They don't have an EBA. I've got strict instructions from Justin to sit the job down if WPI come on site.

Me: Why can't they get an EBA?

1. On 13 June 2016, Mr Meland sent an email to Mr Berlese, copied to Mr Thone, which referred to his conversation with Mr Clarke on 11 June 2016. That email stated as follows:

A further note I don't wish to share with Jamie

I was on site Saturday morning and Damo (CFMEU Delo) approached me about Charlie (WPI) being on site.

He let it go but is under strict instructions from Justin Steele to sit the job down if they come on site.

This is in stark contrast to the Jamie McQueen line of pay parity and all is good????

I believe the main problem with Ray is that he was not registered in BUS, BERT or CIPQ and while he maintained that position, he was never going to get an EBA.

Hopefully it will be better for him having registered.

1. Although the email did not contain all of the elements of the conversation which is deposed to by Mr Meland in his affidavit, it provides strong support for a finding that a conversation occurred between Mr Meland and Mr Clarke of the kind described in Mr Meland’s affidavit. Further, it was not suggested to Mr Meland that he had made up any part of the content of this email, or that it was inaccurate.
2. During his s 155(1)(c) examination, Mr Meland did not refer to his conversation with Mr Clarke. He said that he thought there may have been a veiled threat of industrial action if WPI continued working at the site, which he believed would have come from a union organiser. Mr Meland also gave this evidence:

MR GIPP: But the threat of - the potential or the veiled threat of industrial action was never communicated to you by either Justin Steele or Damon Clark?

MR MELAND: Not by Damon. No. Damon wouldn't do that. He would - he would come at you and warn you and say, "Look, if you" - and I think we did have a discussion where Damon would have said, "Look, if you go ahead with this you're going to have trouble." I'm pretty sure that Justin Steele mentioned to me that there would be issues if we proceeded with Waterproofing Industries.

MR GIPP: And what did you understand those issues would be?

MR MELAND: My understanding was that there would be industrial action. That we would have issues - - -

MR GIPP: Yes.

1. In other words, Mr Meland believed at the time of his s 155(1)(c) examination that the threat of industrial action if WPI continued to be used had come from Mr Steele, and not Mr Clarke. This is inconsistent with the affidavit evidence of Mr Meland concerning his conversation with Mr Clarke.
2. However, Mr Meland was not shown his email dated 13 June 2016 during his s 155(1)(c) examination, and as he no longer worked for Hutchinson, I infer that he no longer had access to the emails sent and received in his Hutchinson email account. Nor was Mr Meland asked any specific questions about the content of that email or the conversation to which it refers.
3. As set out in the extracts of the transcript of the hearing below, Mr Meland gave consistent and forthright evidence about his conversation with Mr Clarke under sustained cross-examination. The direct and unguarded manner in which Mr Meland answered the questions which were put to him during the trial of this proceeding indicated that he was giving evidence of an actual recollection of a conversation with Mr Clarke to the effect deposed to in his affidavit. He made appropriate concessions when he was not confident of the correct answer but otherwise was definitive about what had been conveyed to him.
4. For example, Mr Meland accepted that he could not recall the precise words of conversations which occurred in 2016, but also gave this evidence:

And you agree that the events the subject of this proceeding were fresher in your mind then [in 2019] than they are now?‑‑‑Look, it’s a long time ago, but – I don’t remember all of it. **Key things stick with you, and that’s certainly something that I’ve always had. You don’t remember every conversation, but the ones that really hit you and make you think about it and remember it, I do recall. Not in the greatest clarity, but I know they happened**.

And just focusing again on my question, you agree that the events that are the subject of this proceeding were fresher in your mind in April 2019 than they are now?‑‑‑Look, I’m not sure what that means. I remember them. I remember certain conversations and things that happened now, as I did back then, yes.

(emphasis added)

1. Mr Meland was asked about his affidavit evidence concerning his conversation with Mr Clarke:

Now, you don’t suggest that you specifically recall the words used in this conversation, do you?‑‑‑I – I don’t remember it totally, but **I remember the critical points because I was pretty upset about it when I found out and was told**.

Now, you were asked questions about this matter in your section 155 examination; do you remember that?‑‑‑I probably did, yes.

And do you agree that these events were fresher in your mind in 2019 than they are now?‑‑‑Look, I – **I do recall the conversation and the context of it. Every word spoken, no, I don’t recall it all. But I do know the context of the conversation and purely and simply about WPI not being allowed back on site**.

(emphasis added)

1. Mr Meland was taken through the evidence given in his s 155(1)(c) examination and he was asked about the fact that he had not referred to Mr Clarke saying to him, “They don’t have an EBA. I’ve got strict instructions from Justin Steele to sit down the job if WPI come on site”, but did not back down as can be seen from the following:

You understand that there is nothing to that effect in your section 155 examination transcript, don’t you?‑‑‑I don’t know that it was probably asked directly that way. I’m not sure. **But I remember the conversation and I remember that line because that’s the line that got me pretty upset**.

…

And what I’m suggesting to you is he said that to you, but he did not say to you that WPI don’t have an EBA and because of that they would not be allowed on site?‑‑‑The discussion in my affidavit is correct and true, and that’s what he said to me.

And you understand that the discussion that you gave in your section 155 examination is different?‑‑‑I understand that. It probably didn’t go into as much detail. **That was probably asked a different way. This is specifically what happened in that lift on that day.**

Is anything in your section 155 examination not true, Mr Meland?‑‑‑It’s – that’s – it’s all true. It’s just asked and told a different way. I mean, I was talking about Damon – more about who he was as a person, that he wouldn’t cause industrial action. He is the one that would give you the heads up and say, “Look, you know, this is coming up, this might be an issue.” **Exactly what he told me in the lift that day. He said to me that WPI have got an issue with the EBA and won’t be allowed back on site again**.

(emphasis added)

1. Mr Meland continued to give oral evidence which was consistent with his affidavit evidence as follows:

You see that you attribute certain words to Mr Clarke and then you have yourself saying, “Why aren’t they allowed on site?” And what I would like to suggest to you is you well knew, as at 11 June, that there was a problem with WPI, that it was non-registration with the funds, and that it is not credible that you would have asked Mr Clarke why they were not allowed on the site?‑‑‑I asked him because it was incredulous to me that all of those other things couldn’t just go through and get sorted. That’s where I was. I couldn’t understand why this could not be sorted without all these emails and all this rhetoric and carry on. So that’s where I stood at the time.

And what I’m saying to you is, given that that was your view, you would not have said to him, “Why are they not allowed on the site?” because you knew there was a difficulty with the registrations and you held the views you’ve just expressed?‑‑‑I – like I said, **I thought he could have just kept working, the EBA would have been signed, he would have been registered, and I thought it was all going to happen and it was then, that I found out there that it had gone above Damon, obviously where he said “Justin Steele had said he is going to sit the job down if they come back to site**.”

…

…I – like I said, it wasn’t a long conversation. I got pretty upset, and I was pretty mad about the outcome. So, anyway, I can’t tell you exactly what was said. **I do know the word “sit the job down”**.

(emphasis added)

1. Mr Meland also gave the following evidence under cross-examination:

But you agree it’s possible that you were the one who mentioned the EBA, Mr Meland, don’t you?‑‑‑It could – it could have been me. It could have been Damon. I can’t say for sure. **But the conversation was squarely and clearly about the fact that there was no EBA for them not to come back onto site for the job to be sat down.**

And what I’m suggesting is that it was you who first mentioned the EBA, Mr Meland?‑‑‑Well, it may not have been. I don’t know. As I said, I don’t recall that.

(emphasis added)

### Mr Clarke

1. Mr Clarke denied that he had the conversation with Mr Meland as referred to in Mr Meland’s affidavit. Mr Clarke stated in his affidavit that:

In response to [46] of Mr Meland's affidavit, I deny that I ever said to Mr Meland words to the effect alleged in that paragraph. I never said to anyone that WPI were not allowed on the site because they did not have an EBA. I have no recollection of having had any conversation with Mr Meland about WPI, it is possible that I raised with Mr Meland that WPI were not registered with the funds described above and that Hutchinson was not complying with the Enterprise Agreement as a consequence.

I deny ever receiving instructions from Mr Justin Steele that if WPI came to the site, I was to sit down the entire site.

1. Mr Clarke’s demeanour as a witness was somewhat casual. He did not remember many things about the events of 2016. He volunteered that his memory was “really bad” and even apologised, saying, “My memory is shocking”. Many of his answers demonstrated this such as:

Okay. And it’s the – can I suggest this: that back in 2016, that when you were elected the delegate, Waterproofing Industries had already been contracted by Hutchinson and were already working on the site?‑‑‑Yes. Well, I can’t recollect exact, but ‑ ‑ ‑

And do you remember whether – no, I see. You don’t have any memory at all of Waterproofing Industries having worked at Southpoint A?‑‑‑No, I don’t – I don’t remember them being there.

1. Further, in contrast to the direct language used in his affidavit, Mr Clarke repeatedly gave oral evidence in terms of what “would have” occurred, rather than what had or had not occurred based on his own recollection. He also gave evidence based on facts of which he had become aware after 2016 such as in the following passage:

And do you recall that back in 2016, the union organiser who was responsible for waterproofers was Scott Vink?‑‑‑Yes. Well, I do – like I said in my affidavit, I didn’t remember at the time, but it – it would have been. Yes.

Okay. And just so I understand that, what is it that you don’t remember from the time?‑‑‑I don’t remember any of it, to be honest. It was a busy time. I was on the tools. I remember more the work side than the union side, to be honest. We had to build hoardings, we had to set – we had to set the whole job up in those first few weeks. And I was the main carpenter there, so I was under a lot of pressure at that time.

I understand. And in relation to Scott Vink, have I understood your evidence to be you know now that Scott Vink is the person at the CFMEU who has responsibility for approving EBAs with waterproofers?‑‑‑I know now. Yes.

But you’re saying you can’t remember whether you knew that back in 2016?‑‑‑No, I can’t – no, I can’t recall. No.

1. Mr Clarke initially agreed with the proposition that he would have conveyed Mr Steele’s instruction to Mr Meland if Mr Steele had asked him to do so (which is an unremarkable proposition) but then almost immediately resiled from this answer and gave the unbelievable evidence that he would have laughed at Mr Steele and not carried out his instruction, as follows:

If Mr Steele had given you the instruction back in June 2016 that you were to sit the job down if WPI came back on site, you would have conveyed that instruction to Mr Meland?‑‑‑**I would have – yes, I would have said that to him**.

Yes?‑‑‑I – I just – yes. You know – well, you know, I just can’t see that ever happening. I just really can’t.

I understand. But if that’s the instruction that you had been given ‑ ‑ ‑?‑‑‑Right.

‑ ‑ ‑ you would have passed it on to Mr Meland?‑‑‑I probably would have laughed at Steely if he did say that to me. **I – I don’t think it – no, I – I would just say no**.

You say you wouldn’t have even passed it on to Mr Meland?‑‑‑I would have said – I would have laughed at Steely and said, “What do you mean sit the job down, mate? The boys – the boys won’t sit down for two [blokes]. They’re not going to lose a day’s pay for” – it’s – it’s laughable.

(emphasis added)

1. The evidence that a union delegate would refuse to carry out the instruction of a union organiser because of his own view that it was “laughable” is objectively not credible, and I do not accept it for that reason. More importantly, this was a clumsy and inexplicable shift in position which demonstrated that this witness wanted to give an answer which he thought would assist the CFMEU, rather than giving honest evidence.
2. Mr Clarke also evaded answering questions asked of him. This was particularly apparent in this passage of the cross-examination where Mr Clarke did not actually deny that Mr Steele had in fact given him the relevant instruction:

And Mr Steele gave you an instruction that if WPI came back on site that you were to sit the job down?‑‑‑There’s no way that would have ever happened. No way.

…

Yes. This idea of sitting the job down if WPI came back on site, it didn’t originate with you; it originated with Mr Steele?‑‑‑I couldn’t – I couldn’t imagine Mr Steele ever telling me to do that, not for one or two waterproofers. No way.

1. Mr Clarke did, however, make the following concessions:

And you had a conversation in a hoist with Mr Meland in relation to WPI on about 11 June 2016?‑‑‑Yes. I don’t recall. I don’t recall having that conversation.

It’s possible that you spoke to Mr Meland about WPI?‑‑‑Yes, it’s possible. Yes.

And it’s possible that had happened in a hoist?‑‑‑Yes. It would have, yes.

1. Mr Clarke then volunteered an opinion about the conversation with Mr Meland concerning WPI:

And you know that Mr Meland says that you told him that you had been under instructions from Justin Steele to sit the job down if WPI come back on site?‑‑‑Yes, it wouldn’t have been like that. **It would have been sit the workers – the individual workers that work for WPI. I’ve been instructed to – it would have been – I’ve been instructed to sit them down till all the funds and everything have been sorted out and they get paid accordingly.**

But you don’t actually remember any of this, though; is that right?‑‑‑No. But – but going by how I work and – and – and all the rest of it, that’s how I – it would have been done.

(emphasis added)

1. This differed from Mr Clarke’s affidavit evidence, and the case advanced by the CFMEU in its Amended Response. Such a case was not opened by the CFMEU (being the party which called Mr Clarke as its witness) and it was not something which was put to Mr Meland in cross-examination. If it was, as Mr Clarke put, how he worked, and he had been instructed to sit down the workers that work for WPI and not the entire site until “all the funds and everything have been sorted out and they get paid accordingly”, then such a matter would not have been raised for the first time by him under cross-examination. This provides another significant reason for not accepting Mr Clarke’s evidence. He was not a truthful or careful witness, and I infer that he gave evidence with an agenda of seeking to assist the CFMEU which had called him.

### Conclusion

1. Taking into account these matters, I find that a conversation took place between Mr Meland and Mr Clarke on 11 June 2016 during which Mr Clarke told Mr Meland words to the effect that the CFMEU would “sit the job down” at the Southpoint project if Hutchinson allowed WPI back on site.
2. Further, I find that Mr Clarke would not have said this to Mr Meland unless Mr Steele had given him such instructions. To the extent that Mr Steele denies giving any such instructions to Mr Clarke, and Mr Clarke denies receiving them, I reject their evidence because I do not regard them as reliable witnesses. Further, there would be no reason for Mr Steele to give these instructions to Mr Clarke if he did not intend for Mr Clarke to convey the message to Hutchinson so that WPI would be excluded from the site.
3. Further, I find that Mr Meland and Mr Clarke discussed that the reason that WPI was not allowed back on site was because it did not have an “EBA” (that is, an enterprise bargaining agreement) which was covered by the CFMEU. I make this finding because I accept the evidence of Mr Meland, who I regarded as an honest witness, and I do not accept the evidence of Mr Clarke, who I regarded as having no real recollection of the events in question and was therefore unreliable. Having regard to the changes in his answers and his newly constructed theory about his conversation with Mr Meland, I also consider that, by some of his answers, he sought to assist the CFMEU rather than giving evidence of his genuine recollection of the events in question.

## Conversation between Mr Meland and Mr Raymond Hadfield

1. After his conversation with Mr Clarke, Mr Meland spoke to Mr Raymond Hadfield. During his s 155(1)(c) examination, Mr Meland gave this evidence, which I accept:

I rang Ray. I spoke to Ray and I said we won't be able to continue on the site. I said unless they give you an EBA, I said, we're going to have issues because… I was advised that we won't be able to continue with them and I spoke to Ray and I told him that and-and I said [you] won't be able to do the job unless[they] give you an EBA.

1. Mr Meland also said he had a conversation with Mr Raymond Hadfield to this effect:

Meland: You have to sort this stuff out with the union.

Ray Hadfield: I have been trying to get in contact with the union, the organiser, I'm frustrated, they won't reply I can't get on to them. I can't get an EBA

Meland: You'll have to keep pushing the union to get an EBA.

1. That he had these conversations with Mr Raymond Hadfield was not challenged, and I accept that they occurred.
2. Mr Meland also gave evidence that, at around this time, he decided to “go in to bat with the Union to see if I could help Raymond Hadfield to get an EBA”, and that he informed Mr Raymond Hadfield that he would do this.
3. That Mr Meland was encouraging WPI to get an enterprise bargaining agreement with the CFMEU, and wished to help them to get it, is consistent with an email which he sent to Mr Raymond Hadfield, copied to Mr Charlie Hadfield, Mr Thone and Mr Paez on 13 June 2016 which stated as follows:

Ray

Non [sic] withstanding your advances in registering in BUS, BERT and CIPQ, the following is an anomaly in the pay sheet for Charlie and presumably others in your employ that it applies to.

**The current EBA that you are endeavouring to complete with the CFMEU**, contains the following items you should be aware of.

• Travel $45/Day

• BUS $214/Week

• BERT $100 /Week -Correct

• HA and SA is correct but HA is 0 - 15 in the EBA so no matter where they work, they get it.

• CIPQ $29.60 / week - Correct

• BEWT $13.00 / Week - Need to partake

If your employee works 1 day on a EBA site, he gets paid the EBA rates for the week in respect of BERT and BUS

Please call if you have any questions

(emphasis added)

## Conversation between Mr Meland and Mr Steele

1. Another critical issue in this case is whether Mr Meland and Mr Steele had one or more discussions which included statements by Mr Steele to the effect that Mr Raymond Hadfield “won’t be doing your waterproofing, he won’t be able to get an EBA”, that there would be issues if Hutchinson proceeded with WPI and “Why don’t you use someone like Spanos, they’ve got an EBA?”.
2. Mr Meland gave evidence in his affidavit that:

… A few days after my conversation with Damon Clarke, I raised the issue with Justin Steele in person on the Southpoint project site. I recall that we had a conversation to the following effect:

[Meland]: Why can't Ray get an EBA?

Steele: Ray's a dog, he doesn't pay his men right and he won't be doing your waterproofing, he won't be able to get an EBA.

[Meland]: I've worked with Ray before, and there was once an honest mistake but that was corrected and he does pay his men right.

Steele: Why don't you use someone like Spanos, they've got an EBA, they look after their boys.

1. During his s 155(1)(c) examination, Mr Meland gave this evidence:

…Later on, I had a discussion with an organiser and I-I'm not sure if it was Gibbo or I think it might have been Justin Steele-I'm sure it was Justin and I remember asking him why Waterproofing Industries can't get an EBA and I said he has been trying to get hold of Scott Vink because at that stage I didn't even realise that Scott Vink was in charge of waterproofing. In fact, at that stage -I have such -I have such little interest in them I didn't realise that they had someone for every trade. I thought there was just a couple -like Andrew Sutherland was cranes. I didn't realise that they had one for every trade. I only found that out and -and I spoke to him and said why and I think the response was -the word "dog" was used because he ripped off blokes on a last job and whatever and he was -he wasn't going to get one and I said, "Well, that's just bullshit." I said he didn't rip blokes off and -and I think-I might have had a couple of other discussions with him and then I think it got to the point where it seemed that he wasn't going to get one.

1. As referred to earlier in these reasons, Mr Meland also said that Mr Steele had mentioned to him that there would be issues if Hutchinson proceeded with WPI and that Mr Meland understood that “issues” meant that there would be industrial action.
2. Under cross-examination, Mr Meland said that he could not recall every word of his discussion with Mr Steele, “but the discussion was about an EBA and why [WPI] could not get one” and “that’s why [Mr Steele] suggested other waterproofers that may be able to do the job with an EBA”. Mr Meland said that he was “not here to lie”. He said that, “I just say it how it is, and that was my discussion with Justin Steele”.
3. Mr Steele denied that he had this conversation with Mr Meland and, indeed, denies that he had any conversation with any other person from Hutchinson about the engagement of WPI (other than Mr Berlese).
4. However, that Mr Steele had no such conversation does not seem likely in circumstances where there was a discussion between Mr Clarke and Mr Meland as addressed above, that Mr Meland referred to the instructions as having come from Mr Steele and Mr Meland was attempting to assist WPI to get an EBA so that it could continue to work on the site.
5. Further, taking into account my findings as to Mr Steele’s reliability as a witness and the likelihood that Mr Meland’s conversation with Mr Steele would have been of more importance to Mr Meland than Mr Steele in the circumstances (because Mr Meland had been upset by WPI’s exclusion from the site and was trying to help it get back onto site by getting an EBA). For this reason, this conversation was something which Mr Meland is objectively more likely to remember.
6. For these reasons, I prefer the evidence of Mr Meland over that of Mr Steele in relation to his conversation with Mr Steele concerning WPI.
7. In these circumstances, it is more likely than not that Mr Meland, the project manager for the Southpoint project, spoke to Mr Steele, the union organiser for the Southpoint project, about the exclusion of WPI from the Southpoint site and Mr Meland’s understanding of the reason for that (that is, the need for WPI to obtain an EBA).
8. For these reasons, I find that a conversation occurred between Mr Steele and Mr Meland which included statements by Mr Steele to the effect that Mr Raymond Hadfield “won’t be doing your waterproofing, he won’t be able to get an EBA”, that there would be issues if Hutchinson proceeded with WPI and “Why don’t you use someone like Spanos, they’ve got an EBA?”.

## Conversations between WPI and Mr Clarke

1. On 21 June 2016, Mr Charlie Hadfield sent an email to Mr Meland which stated the following:

As per your last conversation with Ray, the boys are now financial members of the CFMEU and all members of the following CPI-Q, BUSSQ, BEWT and BERT. Ray has had a conversation with Damon Clarke who instructed Ray to call Scott Vink to get a go ahead with work.

Unfortunately, he is not able to be contacted till the 4/07/2016 due to other involvement's. After further conversations with Damon this morning, he instructed us to call Justin Steel again to get a confirmation to work from him. After a number of phone calls, Ray was not able to get in contact with him.

If there’s anything Ray can do further to try and resolve this issue please let him know as we are eager to continue working...

1. The ACCC alleges that this email establishes that there were conversations between Mr Clarke and either or both Mr Raymond Hadfield and Mr Charlie Hadfield during the course of which Mr Clarke said that WPI would need to get approval from either or both Mr Scott Vink and Mr Steele to continue working on the Southpoint project.
2. Mr Clarke did not deny that he had the conversations which are referred to in this email.
3. Hutchinson submits that this email reflects that independent discussions were held between Mr Clarke and Mr Raymond Hadfield and Mr Charlie Hadfield, and that this conversation is one which could have shed substantial light on the concerns which the CFMEU had. It submits that, as Mr Raymond Hadfield and Mr Charlie Hadfield were not called, the Court would be slower to draw the inferences which the ACCC contends.
4. The ACCC submits that what mattered was what was going on between Hutchinson and the CFMEU and if there is an issue about what is going on at this point in time, then the two entities whose power it was in to be able to adduce evidence explaining what the communications were between Hutchinson (particularly its industrial relations department) and the CFMEU are Hutchinson and the CFMEU. I agree.
5. The email dated 21 June 2016 identified what was discussed between the Hadfields and Mr Clarke. There was no suggestion in it that any concerns of the CFMEU were discussed with Mr Clarke, who seemed prepared to allow WPI back on site subject to approval being obtained from others within the CFMEU.
6. Having regard to the terms of the 21 June 2016 email which Mr Clarke did not dispute, I accept that there were conversations between Mr Clarke and either or both Mr Ray Hadfield and Mr Charlie Hadfield as alleged by the ACCC.

## Conversation between Mr Thone and Mr Clarke

1. At or about this time and probably during June 2016, Mr Thone also spoke to Mr Clarke. According to Mr Thone, what prompted this conversation was Mr Thone’s discovery that the CFMEU had an issue with WPI and would not allow the company’s workers on site. That Mr Thone had discovered these matters was not challenged and, as site manager, it would be expected that he would be aware if a subcontractor was not permitted to enter the site.
2. According to Mr Thone’s affidavit, Mr Clarke said to him words to this effect:

WPI are non-EBA. Hutchies should cancel their contract as they are not allowed on site.

1. Mr Thone could not recall any conversation in which Mr Clarke had said that WPI was not paying rates equivalent to “EBA rates” and he did not accept that any conversation with Mr Clarke would have been about that, rather than being about WPI not having an “EBA” with the CFMEU.
2. Mr Thone made appropriate concessions and appeared to be attempting to answer the questions asked of him truthfully and carefully. He agreed that he could not recall the precise words said to him by Mr Clarke. He agreed that, prior to his s 155(1)(c) examination, he was unable to recall the names of the waterproofing companies that were on site at the Southpoint project. He said that he recalled “a waterproofer, but not particularly by name” and he did not recall the name of the waterproofer which had replaced WPI. Mr Thone also agreed that his memories of 2016 were quite limited. However, there were certain core matters about which Mr Thone remained consistent.
3. Under cross-examination, Mr Thone was referred to his evidence in his s 155(1)(c) examination and gave evidence as follows:

You see that Mr Gipp at the top of the page says to you: An issue arose with the CFMEU, Damon Clarke, saying that WPI couldn’t work on site. In fact, Charlie Hadfield and Mark King were actually essentially kicked off site.

Do you see that?‑‑‑Yes, I can see that.

And you say: Mmm. And the questioner says: This is on or about 31 May 2016. Can you recall that occurring? And you say: **I do know that they weren’t allowed back on site.**

Do you see that?‑‑‑Yes. Yes.

And you were asked whether you can recall the reason why the union didn’t want WPI on site?‑‑‑**They didn’t have the EBA.**

And you say: I believe they weren’t on EBA.

Correct?‑‑‑That’s correct.

And you were asked who told you that and you said: **That would have been Damon.**

?‑‑‑Yes.

And the questioner confirms that that’s Damon Clarke, and you agree?‑‑‑Yes.

And you say: Right.

Do you recall how and when that occurred?

And you say: No.

…And Mr Gipp asks you: Was it in person, by phone, on site, off site?

You say: **He probably told me on person – in person, yes?**

?--Yes.

And Mr Gipp says: But you can’t specifically recall the circumstances.

And you say: No. No, honestly I can’t.

?‑‑‑That’s correct.

And that’s correct; you can’t recall the specific circumstances of any discussion with Mr Clarke?‑‑‑**I can’t – I can’t recall the – the time, but definitely he had told me that.**

…

And you were then asked: Were you aware that the union had an issue about WPI not having an EBA at the time, or is this something you found out after the event?

And you say: No, no. Only after the event.

?‑‑‑Yes. **Only after the event, after I was told – been told by Damon Clarke**.

So, sorry, when do you believe you first found out that the union had an issue with WPI being on site?‑‑‑**Damon Clarke informed me of it**.

But you don’t recall when that was; is that correct?‑‑‑Say that again.

You don’t recall when Damon Clarke and you had the conversation you say you had?‑‑‑No, I can’t recall.

So when you say “only after the event”, what is the event you’re referring to?‑‑‑As in, requiring a waterproofer on site.

(emphasis added)

1. The consistencies between Mr Thone’s affidavit evidence in this proceeding and his evidence in the s 155(1)(c) examination are that: in circumstances which were probably in a face to face discussion between Mr Thone and Mr Clarke, at a time after WPI had been excluded from the site, Mr Clarke informed Mr Thone of two things: that WPI was not allowed back on site and the reason was that they did not have an EBA.
2. There was no direct challenge to the evidence that Mr Clarke had told Mr Thone that “Hutchies should cancel their contract”. However, Mr Thone did not refer to Mr Clarke saying this when he was giving evidence during his s 155(1)(c) examination and Mr Thone conceded that he could not recall the precise words of the conversation. I also consider it to be objectively unlikely that a union delegate would suggest to a site manager that the construction company should cancel a subcontract. Taking into account these matters as well as the matters which I am required to consider under s 140(2) *Evidence Act*, I do not accept that Mr Clarke told Mr Thone that “Hutchies should cancel their contract”.
3. By his affidavit, Mr Clarke disputed that he had the alleged conversation with Mr Thone. He also deposed that, “consistent with my usual practice, [any discussion with Mr Thone] would have been to inform him that [WPI] were not registered under the relevant schemes and that Hutchinson was breaching the contractors’ clause by engaging them”.
4. When asked under cross-examination if he had discussed WPI with Mr Thone, Mr Clarke said that he had “no recollection of any of this”, but agreed it was possible that he had such a discussion. In response to the proposition that he told Mr Thone that WPI are “non-EBA”, he said, “Yes, no, wouldn’t have. No definitely”. By these answers, Mr Clarke did not appear to be sure of what the correct answer was to the questions asked of him.
5. Because of his poor recollection and willingness to give speculative answers, I do not accept Mr Clarke’s evidence where it conflicts with that of Mr Thone.
6. Taking into account the consistencies in the evidence of Mr Thone in relation to the core matters as referred to above (with one exception) and that Mr Thone made appropriate concessions and was plainly not pushing any agenda when he gave evidence (unlike Mr Clarke), I find that Mr Thone was told by Mr Clarke words to the effect that WPI was not allowed back on site and that the reason for this was that it did not have an EBA.

## Conversation between Mr Thone and Mr Meland

1. Mr Thone gave evidence that he “also” spoke to Mr Meland about the issue. In his affidavit, Mr Thone said that he spoke to Mr Meland to this effect:

Mr Thone: Is this possible, because there's no law saying you have to be an EBA subcontractor?

Mr Meland: It is out of my hands.

1. Mr Meland did not give evidence that this conversation occurred.
2. The evidence given by Mr Thone was consistent with the evidence given by him during his s 155(1)(c) examination in which he referred to being upset that WPI were not continuing on with the job.
3. It was suggested to Mr Thone that it was Mr Meland who had told Mr Thone that the problem with WPI was that they did not have an “EBA”, to which Mr Thone responded that he could not recall if that was what Mr Meland had said. Mr Thone then agreed that, in this conversation, he was responding to Mr Meland telling him that the problem was that WPI did not have an “EBA”.
4. Even if Mr Meland did describe the problem to Mr Thone in this way, which is not certain having regard to Mr Thone’s initial answer that he could not recall, Mr Thone’s evidence was that he spoke to *both* Mr Clarke and Mr Meland about the issue, namely that WPI did not have an “EBA”. Mr Thone did not resile from this evidence. Further, it is objectively likely that Mr Thone spoke to Mr Meland about WPI’s exclusion from the site and the reasons for that exclusion, especially in circumstances where he wanted waterproofing work to be done.

## Delay caused by exclusion of WPI

1. Although Mr Thone was uncertain as to the timing of these conversations, they appeared to coincide with a period after WPI had been excluded (so post 11 June 2016) and before Spanos was engaged to perform work in July 2016.
2. In particular, Mr Thone gave this evidence:

I considered the fact that WPI was unable to do the waterproofing work on the Southpoint project to be a problem because I had a program of works to meet. I was aware that, under Hutchinson's contract for the Southpoint project, there were monetary penalties in the form of liquidated damages payable by Hutchinson at the end of the project if there were delays.

When I became unable to use WPI on the Southpoint project, there were delays in completing the waterproofing on site. This, in turn, affected the program because scheduled works in the pump room in the basement could not be completed without a waterproofer. The structure could not be backfilled until the waterproofing was done because every area below ground needed to be waterproofed. While there was no waterproofer, work had to be done elsewhere on site, rather than in the basement.

…

At some stage around this time, I told Peter Meland that the schedule was being affected because of the delay with the waterproofers. I spoke to Peter Meland a number of times and said words to the effect that "I need a waterproofer" and "get me the next person on the list".

1. It was Spanos, and not WPI, which performed waterproofing work at the Southpoint project in July 2016. The timing of this work preceded the formal termination of WPI which was notified to WPI on 26 July 2016.
2. That Spanos was engaged to perform work prior to the formal termination of the WPI subcontract provides objective evidence of two matters, namely: that WPI was prevented from performing the work which needed to be undertaken on the Southpoint project in July 2016 (in circumstances where the evidence indicates that WPI was willing and able to perform the work) and that there was waterproofing work which needed to be performed such that it was necessary to engage another waterproofer to perform that work.
3. Under sustained cross-examination, Mr Thone maintained that the exclusion of WPI from the site had caused delays in completing the waterproofing on site. In particular, he gave this evidence, which was consistent with his affidavit evidence:

And I want to suggest to you that the absence of a waterproofer on site made no difference to any of it?‑‑‑Yes, it did. But ‑ ‑ ‑

…

The delay in finishing the basement Structure was caused by the difficulties in the substation?‑‑‑Not particularly. There was other areas that required waterproofing as well.

And what do you say those were, Mr Thone? What do you say were the other areas that needed waterproofing?‑‑‑The pump room.

… The waterproofer was holding up areas that needed to be waterproofed before we back-filled. So they were holding up areas that needed to be constructed, and the substation was one of them. The pump room was another.

Thank you, Mr Thone. And I suggest to you that the absence of a waterproofer did not delay the program of works throughout August 2016?‑‑‑I don’t know about that date, but they did delay. Yes.

…

What I’m suggesting to you there is that your evidence is mistaken and that there was no delay to the program of works in the period of July and August 2016 by reason of the absence of a waterproofer?‑‑‑I don’t know the dates, but there was a delay.

Thank you. And can you now read paragraph 31 of your affidavit, just to yourself. Thank you, Mr Thone. Have you read that? And again, can I suggest to you that your evidence there is mistaken and that there was no effect on the program of works?‑‑‑It delayed the program because I couldn’t get waterproofing done.

1. Having regard to the evidence of Mr Thone, which I accept, there were delays caused to aspects of the work on the Southpoint project because of the exclusion of WPI from the site.

## Matter is referred to Hutchinson “IR Team”

1. In late June 2016, Mr Meland referred the matter to the industrial relations team at Hutchinson. He gave evidence, which I accept because it was not disputed or challenged, that the role of the industrial relations team was to “iron out any issues with the Union on behalf of Hutchinson”. He said that he spoke to Mr Jamie McQueen in the “IR team” because he had not been able to resolve the issue with Mr Steele.
2. On 27 June 2016, Mr Meland sent an email to Mr Raymond Hadfield and Mr Charlie Hadfield which stated the following:

I have put it in the hands of our IR team to resolve, they were in Townsville last week so hopefully we can get some traction today.

1. No witness was called by Hutchinson to challenge the proposition that the matter had been referred to its industrial relations team, and there was no evidence as to what that team did or did not do in relation to the issue, including whether there were any communications with the CFMEU. No explanation was given as to why such evidence was not adduced.
2. The fact that there is no evidence from Hutchinson about what happened after the matter was referred to its industrial relations team leads to an inference that such evidence would not have assisted its defence. After taking into account the matters referred to in s 140(2) *Evidence Act*, I draw that inference: cf *CEPU v ACCC* at [70] and [76].

## Further communications between WPI and the CFMEU

1. On 13 July 2016, Mr Raymond Hadfield sent an email to the CFMEU at queries@qld.cfmeu.asn.au, with the subject line “Waterproofing Industries Qld Pty Ltd – URGENT” and which stated:

Over the last month we have made numerous attempts to get in contact with both Justin Steele and Scott Vink and have been unsuccessful in regards to being forced to stop work at Hutchinson builders Southpoint A construction site.

We have made all necessary steps to get this under control but keep getting pushed aside from department to department. We have made several attempts to get a meeting with Jade Ingham but haven’t herd [sic] back from your office. This is an urgent matter as we are required to do work onsite. All our workers are financial with the CFMEU and all benefits such as BUSS, BERT, Cip-Q etc are paid for.

If you can reply to this ASAP with some information regarding this that would be much appreciated. Also, if you can organise a meeting with Jade Ingham at the earliest possible time to discuss this as it is now having a major impact on work for our client.

1. This email is further support for the conclusion that:
2. WPI had been excluded from the Southpoint site;
3. the CFMEU was party to or involved in that exclusion;
4. the reason that WPI was not permitted to continue working on the site was not connected to the fact that it was not registered with the Funds, because it had been registered since at least 28 May 2016;
5. no-one on behalf of either Hutchinson or the CFMEU had advised WPI that it would be permitted to come back onto the Southpoint site if it made payments to any identified fund;
6. there was a need for waterproofing work to be performed on the Southpoint site as at 13 July 2016.

## Conversation between Mr Meland and Mr Berlese

1. The ACCC alleges that Mr Meland and Mr Berlese had a conversation in about late June or July 2016 during which Mr Berlese said to Mr Meland, in relation to terminating the WPI subcontract, words to the effect of “deal with it”.
2. Hutchinson alleges that the conversation occurred on or about 13 June 2016 (that is, after Mr Meland had emailed Mr Berlese about his conversation with Mr Clarke) and that Mr Berlese said to Mr Meland, “Just be fair. Just deal with it. And whatever you do, I will accept”.
3. Mr Meland gave this evidence in his affidavit in this proceeding:

At some point after my conversation with Justin Steele described [above], I had a conversation with John Berlese and Raul Paez about WPI. I don't remember exactly when this conversation occurred, but to the best of my recollection it was no more than a week before Hutchinson terminated its agreement with WPI.

…

I can't recall the exact words that were said but we discussed terminating WPI. During the course of the conversation, John Berlese said words to the effect of "deal with it", which I interpreted as meaning that I had to get rid of WPI. By this time, I realised that there was no chance of WPI continuing to work on Southpoint project. I did not believe that I had any option other than terminating WPI, otherwise the CFMEU would have shut down the site.

1. During the trial, Mr Meland gave evidence under cross-examination that, although he was not sure exactly when it happened, his conversation with Mr Berlese occurred after his email of 27 June 2016 which stated that he had “put it in the hands of the IR team to resolve”. He said that this was because, when he sent the email of 27 June, he was still trying to get WPI “over the line with an EBA, otherwise [he] wouldn’t have sent the email”.
2. Mr Meland gave evidence that after his conversation with Mr Berlese, he left it with Mr Paez to draft the termination letter and organise a meeting with Mr Raymond Hadfield. This is consistent with the conversation occurring closer in time to the termination than Mr Berlese said. Mr Meland did not recall Mr Berlese using the word “fair”. Mr Meland said that Mr Berlese said to him, “Just deal with it” as he walked off with “his stuff under his arm out of the office”.
3. During his s 155(1)(c) examination, Mr Berlese gave this evidence:

MR BERLESE: First time I’ve been – yes. First time. There were six tenders. We normally – I don’t operate like that. In relation to WPI, yes, Peter and I had a conversation when I received an email going back whenever it was, June or July of 2016, and I said – **I would have indicated to Pete, “Just be fair. Just deal with it. And whatever you do, I will accept,” and I moved on from there.**

MR GIPP: All right. **Were you talking about, “Be fair. Do what you need to do” – this is in terminating WPIs contract?**

MR BERLESE: **If that’s what he needed to do, that’s what he needed to do,** but I didn’t give that direction to actually do that.

MR GIPP: **There is a termination of contract letter which is dated** - - -

…

MR GIPP: - - - **26 July 2016. Can I just show you that.**

…

MR GIPP: Just I’m asking you this in terms of timing as to when you had this discussion with Peter Meland. **Is it around about that time that you said to Peter Meland that, “You do what you’ve got to do. Be fair. But I will leave it up to your discretion”?**

MR BERLESE: **It would have been – and I can’t actually recall the date it was.**  I just recall after this issue has been brought about, I’ve gone back through some after mail – or some emails and seen an email for the very first time that recall the discussion I have back with Peter around about this time, but I can’t assert if it was – it would have been before this date.

MR GIPP: Right. But - - -

MR BERLESE: But the direction was not to terminate the guy.

MR GIPP: Not to terminate.

MR BERLESE: Not to terminate the guy.

MR GIPP: Not to terminate who?

MR BERLESE: WPI.

MR GIPP: All right. So you gave a direction not to terminate the contract?

MR BERLESE: I – no. I didn’t suggest that. No.

MR GIPP: No. So I just – I want to understand what you said.

MR BERLESE: I said just be fair in the dealings.

MR GIPP: Right. So you didn’t tell him to terminate the contract. You didn’t tell him to retain the contract. You left it at Peter Meland’s discretion.

MR BERLESE: Discretion.

(emphasis added)

1. When giving oral evidence at the trial, Mr Berlese’s recollection of the timing of the “deal with it” conversation had improved, saying that the conversation had occurred within 24 to 48 hours of having received the email of 13 June 2016.
2. Like Mr Meland, Mr Berlese agreed that the conversation was a short one, being only 30 seconds to a minute in length. This provides further support for a finding that this conversation occurred closer to the time of the WPI subcontract being terminated.
3. That is because, even on Mr Berlese’s version, he received the 13 June 2016 email which advised Mr Berlese that WPI had been engaged as a subcontractor for the first time (according to him), informed him that there was a threat of industrial disputation on the Southpoint project if that subcontractor came back on site, referred to WPI getting an “EBA” and referred to WPI having registered with the funds, even though it had not been registered previously.
4. In those circumstances, if the “deal with it” conversation between Mr Berlese and Mr Meland occurred shortly after the 13 June 2016 email, one would have expected that they would have spoken for longer than 30 seconds to one minute.
5. Further, the conversation would not have been in the terms as conveyed by Mr Berlese under cross-examination as follows:

So you intended that whatever way that Mr Meland would solve it would have to be something other than the contract with WPI being terminated?‑‑‑Correct.

And can you tell us, then, other than by termination of WPIs contract, had you thought about what the other ways might be that the situation could be resolved?‑‑‑A discussion with Justin Steele that said if you get a resolution about getting WPI to register BUSS, BERT and CIPQ.

…

And I take it you say that in the course of your 30 seconds to a minute conversation with Mr Meland, you say that he never mentioned that there was a problem of WPI not having an EBA with the CFMEU?‑‑‑Correct.

And there was no discussion at all in that 30 seconds to a minute about Waterproofing Industries not having an EBA?‑‑‑Correct.

And you say that before you received this email from Mr Meland on 13 June 2016, you had not heard anything about an issue with Waterproofing Industries being on site at Southpoint?‑‑‑Correct.

And you didn’t even know before receiving this email that Waterproofing Industries was a subcontractor on Southpoint A?‑‑‑Correct.

And you say that after you had this 30 second to one-minute conversation with Mr Meland, you never discussed Waterproofing Industries with Mr Meland again?‑‑‑Correct.

…You say that after you had this 30 second to one-minute conversation with Mr Meland, you never discussed Waterproofing Industries with Mr Steele?‑‑‑No – sorry, correct.

Okay. And after that 30 second to a minute conversation, you didn’t follow up with any employee of Hutchinson to find out what had happened about this issue?‑‑‑No, I didn’t.

And you, as I understand it, didn’t report back or report up to Mr Quinn that there had been a threat of industrial action at the Southpoint A site?‑‑‑Correct.

And you also – tell me if I have understood this correctly. You didn’t discuss with Mr Meland during that 30 second to a minute conversation the nature of the threat that had been made by Mr – I’m sorry, had been conveyed by Mr Clarke to Mr Meland about sitting the job down?‑‑‑No.

…

HER HONOUR: Was that no, as in, you agree, or no, as in, you don’t agree?‑‑‑No, as I agree.

1. Taking into account Mr Berlese’s existing practice of using subcontractors on the 2014 List and 2016 List so as to avoid industrial disputation with the CFMEU, and that he had also likely received a visit from Mr Steele by 13 June 2013 who had complained about the engagement of WPI, it is not credible that Mr Berlese and Mr Meland did not discuss these matters. Nor is it credible that the “deal with it” conversation was the only discussion which they ever had about WPI in the circumstances, especially as Mr Meland gave evidence that they had more than one discussion about WPI, which would be expected.
2. Further, it is unlikely that Mr Meland would have terminated WPI without running it past Mr Berlese. Mr Meland did not reach the point of considering whether to terminate WPI until he had exhausted all attempts to get an EBA for WPI and considered that he had no other options. He had not reached that point in the days immediately after his email of 13 June 2016. Further, both Mr Meland and Mr Berlese agree that after the “deal with it” conversation, they never spoke about WPI again. These matters provides objective support for a finding that the timing of their conversation occurred as stated by Mr Meland.
3. For these reasons, and taking into account that I do not regard Mr Berlese as a witness of truth, I find that Mr Meland and Mr Berlese had a conversation on around 19 July 2016 during which they discussed terminating the WPI subcontract and Mr Berlese said words to the effect of "deal with it".

## WPI’s subcontract is terminated

1. The evidence established, and it was not disputed, that WPI did not provide waterproofing services on the Southpoint project after 11 June 2016 and that Hutchinson had no concerns about the quality of WPI’s work which it had performed prior to that date.
2. There was also no dispute that Hutchinson terminated WPI’s subcontract by letter dated 26 July 2016, which was drafted by Mr Paez and delivered to Mr Raymond Hadfield by Mr Meland at a meeting at which Mr Paez was present.
3. By this time, Spanos had been inducted onto the Southpoint site on 13 July 2016 and had performed waterproofing work on the Southpoint project on 20 July 2016. Spanos also performed waterproofing work on the Southpoint project in August 2016 and September 2016. It submitted a quote dated 23 September 2016 for waterproofing works on the Southpoint project and submitted its first claim to Hutchinson on 25 October 2016.

# Allegations against Hutchinson

## Relevant legislation

1. Section 45E of the Act 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: Explanatory Memorandum to the *Workplace Relations and Other Legislation Amendment Bill 1996* (Cth) at [18.30]. It relevantly prohibits a corporation from making an arrangement or arriving at an understanding with an organisation of employees (or an officer or other person acting on behalf of the organisation) if:
2. the corporation has, in the past three months acquired services from a person; and
3. the arrangement or understanding contains a provision that has the purpose of preventing or hindering the corporation from acquiring or continuing to acquire services from that person.
4. Relevantly, s 45E of the Act provides as follows:

*Situations to which section applies*

(1) This section applies in the following situations:

…

(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.

Note: For the meanings of ***accustomed to supply*** and ***accustomed to acquire***, see subsections (5) and (7).

*…*

*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.

…

*Meaning of* ***accustomed to acquire***

(7) In this section, a reference to a person who has been ***accustomed to acquire*** goods or services from a second person includes (subject to subsection (8)):

(a) a regular acquirer of such goods or services from the second person; or

(b) a person who, when last acquiring such goods or services, acquired them from the second person; or

(c) a person who, at any time during the immediately preceding 3 months, acquired such goods or services from the second person.

1. Subsection 45EA(a) of the Act provides that 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, contravened s 45E(3).
2. The concepts in s 45E of the Act are not defined but bear similarities with other provisions of the Act. When construing s 45E, it is appropriate to have regard to the ordinary principles of statutory construction, informed, but not governed, by decisions on other provisions in the Act which employ similar concepts: see *CEPU v ACCC* at [13]. Where the concepts are used in other provisions within the same suite of statutory provisions of the Act, a consistent meaning should ordinarily be given: see *Tabcorp Holdings Ltd v Victoria* (2016) 328 ALR 375; [2016] HCA 4 at [65].

## Whether acquisition situation

1. Relevantly to this case and having regard to the terms of the legislation, the first issue is whether, during the relevant period in 2016, Hutchinson had been accustomed, or was under an obligation, to acquire services from WPI such that there was an acquisition situation within the meaning of s 45E(1)(b) of the Act.
2. To succeed, the ACCC must establish that there was such an acquisition situation.
3. Hutchinson did not dispute that there was an acquisition situation.
4. However, the CFMEU raised an express dispute that there was an acquisition situation.
5. Its argument hinged upon contentions that:
6. clause 35.2 of the 2015 EBA should be construed in a particular way;
7. section 50 of the *Fair Work Act* provides that a person must not contravene a term of an enterprise agreement;
8. a contravention of s 50 could give rise to orders being made pursuant to ss 545 and 546 of the *Fair Work Act*, including the imposition of a pecuniary penalty;
9. the entry into the WPI subcontract was therefore unlawful, and the WPI subcontract was illegal, because Hutchinson (through Mr Meland) did not consult with the CFMEU about the engagement of WPI;
10. the continued acquisition of services from WPI by Hutchinson was also unlawful because Hutchinson (through Mr Meland) did not ensure that the WPI employees received terms and conditions of engagement (or terms no less favourable) as they would receive if they were engaged as employees under the 2015 EBA;
11. on the proper construction of s 45E of the Act, Hutchinson’s unlawful acquisition of services from WPI does not answer the description of an acquisition of services from WPI within the meaning of s 45E(1) and (7) of the Act.

### Clause 35.2 of the 2015 EBA

1. Clause 35 provided that:

**35 EMPLOYMENT SECURITY, STAFFING LEVELS, MODE OF RECRUITMENT AND REPLACEMENT LABOUR**

35.1 The Employer recognises that in certain circumstances the use of contractors and labour hire may affect the job security of Employees covered by this Agreement.

35.2 Use of Contractors

If the Employer wishes to engage contractors and their Employees to perform work in the classifications covered by this Agreement, the Employer must first consult in good faith with potentially affected Employees and their Union. Consultation will occur prior to the engagement of sub-contractors for the construction works.

If, after consultation, the Employer decides to engage bona fide contractors, these contractors and their Employees will receive terms and conditions of engagement (or terms no less favourable) as they would receive if they were engaged as Employees under this Agreement performing the same work. The use of sham sub-contracting arrangements is a breach of this Agreement.

35.3 Supplementary Labour Hire

Where there is need for supplementary labour to meet temporary/peak work requirements, such labour may be accessed from bona fide businesses, including sub-contractors and labour hire companies, following consultation with the Employer Consultative Committee and/or Union(s) party to this Agreement. The Employer shall ensure that any Employees engaged by such businesses and performing work described in the classifications of this Agreement shall receive wages, allowances and conditions not less than those contained in this Agreement.

Supplementary labour is defined as temporary “top up” labour designed to meet short situations such as absences due to sick leave, annual leave, and short time work peaks. The Employer undertakes not to use supplementary labour in any position on site for a period of more than six weeks. Any departure from this maximum period shall require the consent of the Union.

1. The principles governing the interpretation of enterprise agreements were summarised by the Full Court in *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536; [2018] FCAFC 131 at [197]:

The starting point for interpretation of an enterprise agreement is the ordinary meaning of the words, read as a whole and in context… The interpretation “turns on the language of the particular agreement, understood in the light of its industrial context and purpose”. The words are not to be interpreted in a vacuum divorced from industrial realities; rather, industrial agreements are made for various industries in the light of the customs and working conditions of each, and they are frequently couched in terms intelligible to the parties but without the careful attention to form and draftsmanship that one expects to find in an Act of Parliament. To similar effect, it has been said that the framers of such documents were likely of a “practical bent of mind” and may well have been more concerned with expressing an intention in a way likely to be understood in the relevant industry rather than with legal niceties and jargon, so that a purposive approach to interpretation is appropriate and a narrow or pedantic approach is misplaced.

(citations omitted)

### Was there a breach of the obligation to consult within the meaning of clause 35.2 of the 2015 EBA?

1. The obligation to consult is found in the first paragraph of clause 35.2.
2. Clause 35.1 provides part of the context for the interpretation of clause 35.2, and bears upon the meaning of “potentially affected Employee” in that clause. Having regard to the terms of clause 35.1, if the use of contractors by Hutchinson may *affect* the job security of its employees, then they are *potentially affected* within the meaning of clause 35.2.
3. On a reading of the plain words of clauses 35.1 and 35.2, if Hutchinson wished to engage a contractor to perform work in the classifications covered by the 2015 EBA (which included waterproofers), clause 35.2 required Hutchinson to consult in good faith with its potentially affected employees (being employees whose job security might be affected by that engagement) and the CFMEU (being the Union as defined).
4. As it is alleged that this clause was breached, the question then becomes – who were Hutchinson’s potentially affected employees at the time of or prior to the engagement of WPI within the meaning of clause 35.2?
5. The CFMEU’s position was that potentially affected employees will include:
6. at least the directly employed employees that could do the work that the contractor was engaged to perform;
7. untrained employees who could be trained to do the work;
8. those employees who are likely to work side by side with the contractors and/or rectify their work.
9. However, the CFMEU did not identify any particular Hutchinson employee who was a qualified waterproofer or who could have been trained to be a waterproofer instead of WPI or who was “likely to work side by side” with WPI. Rather, the highest that the evidence rose was that there was a pool of construction workers employed by Hutchinson who did work across various construction sites and which was comprised of carpenters, hoist drivers, apprentices and “peggies” or cleaners. None were qualified waterproofers. It is a matter of speculation as to whether any particular employee could have been trained to be a waterproofer or whether they were, as a matter of fact, likely to work “side by side” with WPI.
10. Hutchinson submitted that the words “potentially affected” in clause 35.2 must be construed in the light of clause 35.1. It submitted that the ordinary meaning of “potentially affected Employees”, read in context, means employees of Hutchinson whose job security may be affected by Hutchinson’s retaining a particular subcontractor.
11. Hutchinson also submitted that only employees who were qualified waterproofers could be “potentially affected Employees”, that is, employees whose job security may be affected by Hutchinson retaining WPI.
12. Hutchinson also submitted that there was no evidence that Hutchinson employed any qualified waterproofers (which was the case). Not only was there an absence of evidence but, having regard to the delay to the performance of the waterproofing work which was caused by WPI’s exclusion from the site, I infer that Hutchinson did not employ any qualified waterproofers.
13. Hutchinson also submitted that the category of “potentially affected Employees” cannot include all employees who could conceivably work alongside a waterproofer. It submitted that to give the concept of “potentially affected Employees” such wide content would deprive the words “potentially affected” of any function.
14. I accept the submissions of Hutchinson. On the CFMEU’s construction, clause 35.2 would be construed as capturing every employee of Hutchinson who could conceivably come onto the site and work beside the hundreds of various subcontractors which would be engaged to work on a project such as the Southpoint project, irrespective of whether their job security was affected by the engagement of each subcontractor.
15. Having regard to the competing submissions, the CFMEU’s construction of “potentially affected” employees in clause 35.2 cannot be accepted. Instead, the construction contended for by Hutchinson is the preferred one as it construes the ordinary meaning of the words of clause 35.2 in context, including by reference to clause 35.1. It is also preferred one because it is apparent that the purpose of clause 35 is to protect the job security of existing employees of Hutchinson. An employee who is not a waterproofer but who performs other tasks is unlikely to have their job security threatened by a qualified waterproofer being engaged.
16. Having regard to the construction of clause 35.2 which I have adopted, and to the evidence adduced at the trial, there were not any “potentially affected Employees” with whom Hutchinson should have consulted before engaging WPI.
17. If there were no “potentially affected Employees”, then there was no obligation to consult the CFMEU prior to the engagement of WPI.
18. Even if there was an obligation to consult the CFMEU in this case and having regard to the findings of fact in these reasons, the evidence is insufficient to conclude that there was no form of consultation in 2015 prior to Mr Steele and Mr Clarke becoming involved with the Southpoint project. This is especially as such consultation did not necessarily require Mr Meland, Mr Steele or Mr Clarke to be involved. This provides a further reason to find that Hutchinson did not breach clause 35.2 by the alleged failure to consult the CFMEU.

### Was there a breach of the obligation to pay equivalent rates and entitlements within the meaning of clause 35.2 of the 2015 EBA?

1. The second obligation alleged to have been breached by Hutchinson is found in the second paragraph of clause 35.2, which is set out above.
2. This paragraph begins with these words:

If, after consultation, the Employer decides to engage bona fide contractors…

1. The reference in this clause to a decision being taken “after consultation” can only be a reference to a decision being made after the consultation which is required with potentially affected employees and their Union as referred to in the first paragraph of clause 35.2. That is the ordinary meaning of the words in the context of a clause which is directed at requiring consultation with employees whose job security may be affected by the use of contractors.
2. The CFMEU submits that the second paragraph within clause 35.2 applies even if there are no potentially affected employees (and presumably no consultation under the first paragraph). However, this submission is not accepted because it is contrary to the opening words of that paragraph, which cannot be ignored.
3. Read as a whole and in context, the clause stipulates a process of consultation in stated circumstances followed by a requirement that if, after that consultation, Hutchinson still wishes to proceed to engage a contractor, the engagement will be on the same terms (in effect) as the employees of Hutchinson receive. Because of this, Hutchinson could not terminate the employment of all existing employees and contract the work out at a lesser and cheaper rate, because that would be prevented by the second paragraph of clause 35.2.
4. In this case, as there were no potentially affected employees and no requirement to consult with those employees and the CFMEU, the second paragraph of clause 35.2 was not engaged. There was therefore no breach of clause 35.2 by Hutchinson.
5. However, even if the second paragraph of clause 35.2 was engaged, Hutchinson complied with it. That is because clause 49(c) of the WPI subcontract stipulated that “where required by [Hutchinson]”, WPI shall “ensure that its employees will receive terms and conditions of engagement (or terms no less favourable) as those employees would receive if they were employees of [Hutchinson] performing the same work”. The evidence at trial indicates that WPI *was* “required by” Hutchinson to discharge this obligation. For example, there was discussion at the meeting on 21 October 2015 at which WPI confirmed that it would be paying its workers “EBA rates on this site” which I infer was in response to the question being asked by someone at that meeting representing Hutchinson. After the WPI subcontract was entered, Mr Meland sent emails to WPI concerning its registration with the relevant funds and about the payments which needed to be made to those funds, being those dated 7 June 2016, 10 June 2016 and 13 June 2016. There is no evidence that Hutchinson was informed by the CFMEU that WPI was not making payments into the required funds.
6. However, the CFMEU did not agree and submitted to the effect that clause 35.2 went further than this and imposed an obligation upon Hutchinson to ensure that the employees of the subcontractor in fact received the benefits pursuant to those terms and conditions, not just that there is a contractual term to that effect in the subcontract. The CFMEU contended that, if the subcontractor did not in fact pay its employees as required, then that was a breach of clause 35.2 by Hutchinson.
7. This submission appears to be founded on paragraph 4(d)(iii)(2) of the Amended Response filed by the CFMEU on 23 September 2021 which states that, contrary to clause 35.2, *Mr Peter Meland* did not ensure that the WPI employees received terms and conditions of engagement (or terms no less favourable) as they would receive if they were engaged as employees under the 2015 EBA.
8. There was a general allegation which did not give fair notice to the other parties of the case which would be advanced by the CFMEU at the trial. In particular and leaving aside the reference to Mr Meland rather than Hutchinson (which causes its own problems), the Amended Response filed by the CFMEU did not identify what Hutchinson should have done, but did not do, to ensure that WPI’s employees in fact received the required benefits and, for that reason, breached clause 35.2. Nor was it made clear that the CFMEU would be contending at trial that, by the mere fact that WPI had not made the payments and nothing more, Hutchinson was in breach of clause 35.2.
9. Had I not been against the CFMEU on its construction of clause 35.2 for the reasons below, it would have been appropriate to refuse to permit the CFMEU to advance this contention having regard to the manner in which the Amended Response was framed.
10. In response to the CFMEU’s submissions as to the proper construction of clause 35.2, Hutchinson submitted that:

The language of cl 35.2 may be contrasted with the language of cl 35.3, which addresses circumstances in which “*there is a need for supplementary labour hire to meet temporary/peak work requirements*”. In those scenarios, the EBA prescribes that “*[t]he Employer shall ensure that any Employees engaged by such businesses and performing work described in the classifications of this Agreement shall receive wages, allowances and conditions not less than those contained in this Agreement*”…

The language of cl 35.2, set alongside the more prescriptive language of cl 35.3, underlines that cl 35.2 is concerned with the “*terms and conditions of engagement*” of subcontractors and their employees, not with what those subcontractors and employees actually receive. Unlike cl 35.3, cl 35.2 does not impose any obligation on the Employer to ensure that subcontractors’ employees receive equal wages, allowances and conditions. The Employer’s obligation rather is to ensure that “*the terms and conditions of engagement of subcontractors and their employees*” are equivalent to those of Hutchinson Employees.

…

The relevant part of cl 35.2 requires no more than this of Hutchinson. The bare fact of a subcontractor’s failing to comply with its obligation in cl 49(c) cannot of itself put Hutchinson in breach of cl 35.2. If the negotiators of the EBA had intended to achieve that effect, the relevant part of cl 35.2 would have imposed an obligation on Hutchinson equivalent in terms to that imposed on Hutchinson under cl 35.3 – that is, cl 35.2 would have provided that Hutchinson “shall ensure” that subcontractors’ employees “shall receive” the same rates and entitlements as they would if employed by Hutchinson. Clause 35.2 does not impose such an obligation, and the juxtaposition of cl 35.2 and cl 35.3 indicates that this drafting was deliberate. Hutchinson’s obligation extended only to ensuring that its subcontractors’ “terms and conditions of engagement” were equivalent to those Hutchinson’s own employees received…

(emphasis in original)

1. I accept the submissions of Hutchinson. Its construction is the preferred one as it construes the ordinary meaning of the words of clause 35.2 in context, including by reference to clause 35.3. A requirement that the contractors and their employees “will receive terms and conditions (or terms no less favourable) of engagement” is a reference to the terms and conditions of the contract of engagement of the contractor. It is not a reference to benefits and payments which would be received pursuant to such terms and conditions, which is how the CFMEU seeks to construe it.
2. For these additional reasons, even if the second paragraph of clause 35.2 applied to the engagement of WPI, Hutchinson complied with it, and the breach as alleged by the CFMEU has not been established.

### Conclusion

1. For these reasons, Hutchinson did not breach clause 35.2 of the 2015 EBA by entering into the WPI subcontract or by performing that subcontract. For that reason, the CFMEU’s contention that entry into and performance of the WPI subcontract was unlawful because it constituted contraventions of the *Fair Work Act* is rejected.
2. Having regard to the findings of fact, there was an acquisition situation within the meaning of s 45E(1)(b) of the Act. That is because Hutchinson had been “accustomed to acquire” services from WPI because Hutchinson had acquired waterproofing services from WPI in the preceding three months (within the meaning of s 45E(7)(c)).

## Whether arrangement or understanding

### Relevant legal principles

1. The CFMEU cited the decision of Gordon J (as her Honour then was) in *Norcast S.ár.L v Bradken (No 2)* (2013) 219 FCR 14; [2013] FCA 235 at [263] which contained this helpful statement of the relevant legal principles in relation to the concept of arrangement or understanding:

The relevant applicable legal principles may be summarised as follows:

1. an arrangement or understanding is apt to describe something less than a binding contract or agreement: *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344 at [75]; see also *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1 (Privy Council) cited with approval in *Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd* (1975) 24 FLR 286 at 290-291; 5 ALR 465 at 469;

2. the elements of an arrangement or understanding are:

2.1 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 an assurance or undertaking that it will act in a certain way which may not be enforceable at law: *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2008] FCA 678 at [10] and the authorities cited;

2.2 a hope or mere expectation that as a matter of fact a party will act in a certain way is not itself sufficient to establish an arrangement or understanding, even if it has been engendered by that party: *ACCC v CFMEU* at [10] and the authorities cited including *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452 at [45] and *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at [79];

2.3 the necessary consensus or meeting of minds need not involve, though it commonly will in fact embody, a reciprocity of obligations: *ACCC v CFMEU* at [10] and the authorities cited;

2.4 in relation to whether or not mutual obligation is a necessary ingredient of an arrangement or understanding, it has been suggested that it is difficult to envisage circumstances that would be an understanding within s 45 of the TPA involving the commitment by one party without some reciprocal obligation by the other party: *Trade Practices Commission v Service Station Association Ltd* (1993) 44 FCR 206 at 230-231 and 238. That statement applies equally to ss 44ZZRJ and 44ZZRK of the CCA;

2.5 an arrangement may be informal as well as unenforceable with the parties free to withdraw from it or to act inconsistently with it, notwithstanding their adoption of it: *Federal Commissioner of Taxation v Lutovi Investments Pty Ltd* (1978) 140 CLR 434 at 444;

3. whether there is a difference between an arrangement and an understanding has not been resolved: *Trade Practices Commission v TNT Management Pty Ltd* (1985) 6 FCR 1 at 22-26 but cf *Australian Competition and Consumer Commission v Australian Medical Association WA Branch Inc* (2003) 199 ALR 423 at 460. However, the concept of an understanding is broad and flexible: cf *L Grollo & Company Pty Ltd v Nu-Statt Decorating Pty Ltd* (1978) 34 FLR 81 at 89 and *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2004) 141 FCR 183 at [54];

4. whether or not an arrangement or understanding has been reached will depend on the view formed of all of the circumstances. **A meeting of minds may be proved by independent facts and from inferences drawn from primary facts including, without limitation, evidence of joint action by the parties in relation to relevant matters, evidence of parallel conduct and evidence of collusion between the parties.** As Isaacs J said in *R v Associated Northern Collieries* (1911) 14 CLR 387 at 400:

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.

See also *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 573-574.

(emphasis added)

1. In *Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd* (1975) 24 FLR 286 at 291, Smithers J observed that:

… Where the minds of the parties are at one that a proposed transaction between them proceeds on the basis of … the adoption of a particular course of conduct, it would seem that there would be an understanding within the meaning of the Act.

1. This statement was cited with approval by Finn J in *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2008] FCA 678 at [10].
2. Just as contractual assent may be inferred from conduct, so too may the adoption or consensual nature of an arrangement or understanding: see*CEPU v ACCC* at [136] (Weinberg, Bennett and Rares JJ) in which the Full Court observed that:

The activities which the Parliament proscribed in s 45E are often likely to be proved by circumstantial rather than direct evidence, given the nature of proceedings where such conduct is in issue… As is often the case in proceedings where a contract, arrangement or understanding (made or arrived at in contravention of a legislative proscription) must be proved, circumstantial evidence is sometimes the only evidence available.

1. An arrangement or understanding which is inferred from conduct is not qualitatively different from one that is proved by direct evidence. The difference is in the method of proof. The nature of a circumstantial case is such that the Court can consider the whole of the evidence in arriving at a decision on any fact or facts: *CEPU v ACCC* at [143] (Weinberg, Bennett and Rares JJ).
2. As stated in *Norcast v Bradken* at [264], “where proof of an arrangement or understanding rests on inferences to be drawn from primary facts, it is not sufficient for the circumstances to give rise to conflicting inferences of equal degrees of probability”.
3. In *Australian Competition and Consumer Commission v Olex Australia Pty Ltd* [2017] ATPR 42-540; [2017] FCA 222 at [478], Beach J observed that:

… as to the question of proof, an inference that an arrangement or understanding existed may be drawn from circumstantial evidence that the conduct of the parties exhibits “a concurrence of time, character, direction and result” (*R v Associated Northern Collieries* (1911) 14 CLR 387 at 400)… the existence of a motive is a matter that can be taken into account in assessing whether an arrangement or understanding was entered into by parties.

1. In *Australian Competition and Consumer Commission v Air New Zealand Limited* (2014) 319 ALR 388; [2014] FCA 1157 at [463], Perram J stated that:

In cases where direct evidence is not available, the proof of a collusive understanding needs must be circumstantial. Pausing there, it is important to note that there is nothing inherently weak about cases based on circumstantial evidence. **In truth, the strength of any particular circumstantial case will be a function of the number of elements of which it consists and the corresponding unlikelihood of those elements happening for reasons other than as a result of the posited collusive behaviour.** Just as with any case of circumstantial evidence, it is forlorn to seek to work out the significance of the individual elements. The circumstantial case’s nature and its strength emerge organically from a consideration of it as a whole. Thus, the onus of proof is to be applied only at the end:*…* however, this does not mean that the court is prevented in the ordinary way from finding particular circumstances proved or not proved. Rather, what is meant is that the question of whether the inference, which it is said should be drawn, is to be asked holistically at the end of the process rather than it being asked whether the inference should be drawn from any individual circumstances.

(emphasis added)

1. In *Australian Competition and Consumer Commission v BlueScope Steel Limited (No 3)* [2021] FCA 1147 at [64], O’Bryan J stated that:

It is well established that the making of an arrangement or the arriving at an understanding may be proved by direct or circumstantial evidence. Direct evidence includes the content of communications passing between the parties to the alleged arrangement or understanding. **Circumstantial evidence includes conduct consistent with the making or acting upon (giving effect to) the alleged arrangement or understanding. A wide range of evidence of communications and conduct may be admissible in proof of an arrangement or understanding. Not all communications need be between the alleged parties to the arrangement or understanding.** As Perram J explained in *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* (2012) 207 FCR 448 (at [25]-[26]):

I do accept the principle invoked by the ACCC, namely: that one may prove an agreement or understanding between a group of people by proving behaviour of individual group members consistent with the existence of the agreement; that such behaviour may include evidence of what members of the group said to each other or even to third parties; and, that this use of conduct as circumstantial evidence of an agreement does not involve a hearsay use of the words used when some or all of the conduct relied upon consists of speech acts. This is straightforward…

(emphasis added)

1. In terms of distinguishing between the two concepts, an “arrangement” connotes a consensual dealing lacking some of the essential elements that would otherwise make it a contract: *Australian Competition and Consumer Commission v Leahy Petroleum* *Pty Ltd* (2007) 160 FCR 321; [2007] FCA 794 at [26]. It need not be legally binding, but it must still involve commitment; that is, it must be at least morally binding: *ACCC v Leahy* at [37]. There must also be at least some express communication between the parties, although what is said may not, for the purposes of the law of contract, amount to offer and acceptance in a contractual sense: *ACCC v Leahy* at [26]; cited with approval in *Australian Competition and Consumer Commission v Yazaki Corporation (No 2)* (2015) 332 ALR 396; [2015] FCA 1304 at [47].
2. The concept of an understanding is “broad and flexible”: *L Grollo & Co Pty Ltd v Nu-Statt Decorating Pty Ltd* [1978] FCA 33; (1978) 34 FLR 81 at 89; *ACCC v Olex* at [477]; *Norcast v Bradken* at [263]; *ACCC v Leahy* at [27]. However broad and flexible an understanding might be, it must be a consensual dealing between parties: *ACCC v Leahy* at [28].
3. Unlike an arrangement, an understanding can be tacit, in the sense that it can be arrived at by each party, either by words or acts, signifying an intention to act in a particular way in relation to a matter of concern to another party. In order to be a consensual dealing, however, an understanding must involve a meeting of minds: *ACCC v Leahy* at [29].

### Analysis

1. The ACCC contended that there was an arrangement or understanding containing a provision to the effect that Hutchinson would terminate the WPI subcontract or, further and alternatively, would no longer acquire waterproofing services from WPI at the Southpoint project. It submitted that the arrangement or understanding contained this provision because it was a matter forming part of the understanding between the parties within the meaning of s 4 of the Act.
2. The ACCC also contended that this arrangement or understanding arose in the context of WPI not having an EBA and a threat by the CFMEU that it would engage in industrial action if Hutchinson allowed WPI to come back onto the site of the Southpoint project. It contended that Hutchinson and the CFMEU understood that the incentive for Hutchinson to exclude WPI was to avoid conflict with, or industrial action by, the CFMEU.
3. In essence, it is submitted by the respondents that the exclusion of WPI from the site was more likely to have arisen in circumstances where the CFMEU delegate (Mr Clarke) discovered that WPI was not registered with the required employee funds and was therefore not otherwise paying its employees their required entitlements, that any issue raised by him and by Mr Steele with Mr Meland and Mr Thone would have been about this matter (which was never rectified) and that WPI was excluded from the site, and its subcontract terminated, because of Mr Meland’s erroneous belief that WPI required an EBA before it could be a subcontractor at the Southpoint project.
4. Considered as a whole, the evidence establishes that Hutchinson and the CFMEU arrived at an arrangement or understanding containing a provision to the effect that Hutchinson would no longer acquire waterproofing services from WPI at the Southpoint project and, further, that the WPI subcontract would be terminated.
5. Such a finding arises from the facts and circumstances below which have “such a concurrence of time, character, direction and result as naturally to lead to the inference that [their] 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”, namely, that Hutchinson would no longer acquire waterproofing services from WPI at the Southpoint project and, further, that the WPI subcontract would be terminated.
6. Having regard to the required standard of proof and for the reasons below, the most probable explanation for the series of facts which occurred is that there was such an arrangement or understanding. Indeed, the case is a compelling one.
7. The facts and circumstances evidence parallel conduct by Hutchinson and the CFMEU by which they 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 that Hutchinson ceased to acquire waterproofing services from WPI and terminated the WPI subcontract. Such parallel conduct can constitute circumstantial evidence from which an arrangement or understanding can be inferred: *Trade Practices Commission v Email Ltd* (1980) 31 ALR 53; *Australian Competition and Consumer Commission v IPM Operation and Maintenance Loy Yang Pty Ltd* (2006) 157 FCR 162; [2006] FCA 1777 at [111].
8. 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 with the end result that Hutchinson would cease to acquire waterproofing services from WPI and, further, that Hutchinson would terminate the WPI subcontract.
9. The following facts demonstrate that there was an arrangement or understanding as alleged by the ACCC:
10. in 2016 when WPI was engaged, Hutchinson was party to the 2015 EBA. Pursuant to clause 35.2 of the 2015 EBA, Hutchinson was obliged to consult with the CFMEU about the appointment of subcontractors in certain circumstances;
11. in 2016, the CFMEU (and Mr Steele) relied upon clause 35.2 of the 2015 EBA as a basis for effectively pushing that Hutchinson ought to retain subcontractors with EBAs;
12. prior to March 2016, a list of subcontractors which had an EBA was in Hutchinson’s possession, being the 2014 List. It bore the CFMEU logo and was a list of subcontractors that had an EBA. It included a list of nine names under the subheading “Waterproofing”. WPI’s name was not included in that list;
13. Mr Berlese was a senior employee of Hutchinson. In the types of large projects which Mr Berlese undertook, he considered that there was a risk that, if Hutchinson engaged a non-EBA subcontractor, the CFMEU would object. In order to reduce the possibility of industrial disputation with the CFMEU, Mr Berlese chose only to use subcontractors that had an EBA. Mr Berlese had some regard to the 2014 List when choosing subcontractors;
14. a tender process was undertaken in 2015 which involved Mr Meland as well as Mr Ashton and Mr Paez. WPI, which did not have an EBA, was invited to tender along with other companies;
15. had Mr Berlese been aware that tenders were being sought from subcontractors which did not have an EBA, he would have intervened because he did not want any potential industrial relations issues with the CFMEU;
16. WPI submitted a quote for the waterproofing work at the Southpoint project which was reduced significantly after a meeting with employees of Hutchinson and the removal of certain items from the scope of work. At that meeting, WPI indicated that it would pay its workers the entitlements required to be paid under the 2015 EBA;
17. Mr Meland believed that subcontractors such as WPI needed to have an EBA on the basis that it was a requirement of the 2015 EBA. Although incorrect, such a belief was consistent with (and likely encouraged by) Mr Berlese’s own conduct in preferring subcontractors that had an EBA;
18. at some stage, Mr Meland informed Mr Raymond Hadfield of WPI that he would need to get an EBA. WPI was willing to get an EBA and took steps to try and get one, but without success;
19. on 2 March 2016, a new list of subcontractors which had an EBA was issued, being the 2016 List. The 2016 List also did not include WPI but now included Spanos in its list of waterproofers. Mr Berlese had some regard to the 2016 List when choosing subcontractors;
20. WPI entered a subcontract with Hutchinson on 22 March 2016 to perform waterproofing work at the Southpoint project;
21. WPI performed some work on the Southpoint site in April and May 2016;
22. Mr Steele and Mr Clarke were informed of the engagement of WPI in May 2016. At that time, Mr Steele knew that WPI did not have an EBA, and had prior involvement with them on another project in which a complaint had been made that WPI had not paid the superannuation entitlements of its employees (although this issue was rectified);
23. there had been no consultation by Hutchinson with Mr Steele, the CFMEU organiser at the Southpoint project, or Mr Clarke, the CFMEU delegate, prior to the engagement of WPI. Mr Steele believed that there had not been any consultation with the CFMEU at all;
24. in the second half of May 2016, being after Mr Clarke commenced work on the Southpoint site, the CFMEU raised an issue concerning WPI, being that it was not registered with all of the required funds for the purposes of paying employee entitlements. By 28 May 2016, WPI was registered with all of the required funds but had not made any contributions;
25. in late May 2016 or June 2016, Mr Steele had a meeting with Mr Berlese during which 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. If it was the case that WPI had an EBA, Mr Steele would not have complained to Mr Berlese;
26. having regard to the matters set out in (2), (3), (4), (6), (10) and (16) above, I infer that the subcontract with WPI would not have been entered by Hutchinson (or WPI retained to perform waterproofing work on the Southpoint site) had the CFMEU been consulted prior to its engagement, even though its tender was the one which was preferred by Mr Meland and Mr Ashton;
27. on 11 June 2016, Mr Clarke, the CFMEU delegate, approached Mr Meland, Hutchinson’s project manager, about WPI being on site. Mr Clarke told Mr Meland that he was under strict instructions from Mr Steele to “sit the job down if WPI come on site”. That is, the CFMEU threatened to engage in industrial action at the Southpoint site if WPI was permitted by Hutchinson to come back onto the Southpoint site;
28. during their conversation on 11 June 2016, Mr Meland and Mr Clarke also discussed that the reason that WPI was not allowed back on site was because it did not have an “EBA” (that is, an enterprise bargaining agreement which was covered by the CFMEU);
29. Mr Meland informed Mr Berlese and Mr Thone, the site manager, of this conversation by email on 13 June 2016. The email informed Mr Berlese and Mr Thone of the threat of industrial action by the CFMEU, being the thing which Mr Berlese had sought to avoid by engaging in a practice of appointing subcontractors which had an EBA;
30. the terms of the 13 June email make plain that it was Mr Meland’s understanding that the main problem for WPI was that it was not going to get an EBA while it remained unregistered with the various funds and “Hopefully it will be better for him having registered”. By this email, Mr Berlese was informed that WPI did not have, but was seeking to obtain, an EBA. Further, the words in the email demonstrate that it was Mr Meland’s view that WPI was being excluded from the site because it did not have an EBA, which is consistent with him having had a discussion with Mr Clarke to that effect;
31. although it became registered with the funds, WPI did not work again on the Southpoint project after 11 June 2016. There is no evidence that anyone from Hutchinson or the CFMEU ever advised WPI that the reason for its continued exclusion from the site was that payments had not been made for the work performed by Mr Charlie Hadfield in April and May 2019. It is apparent from the evidence at the trial, including that set out below, that WPI was keen to resume work. Had the true issue been that payments were outstanding, this is something which could have been conveyed by Mr Steele or Mr Clarke to WPI (or they could have informed Mr Thone or Mr Meland or even Mr Berlese of this and asked for this message to be conveyed) but there is no evidence that this occurred. This is a further indication that the non-registration with the funds and the non-payment into the funds was not the real reason that WPI was not being allowed on the site by Hutchinson and the CFMEU;
32. Mr Meland took steps to assist WPI to obtain an EBA because he believed that, if one was obtained, WPI would be allowed back on site. However, that was his reaction to a situation where WPI was being excluded from the site by the concurrent actions of Hutchinson and the CFMEU. Mr Meland was attempting to find a solution to this problem. He was not the cause of it;
33. as part of attempting to find a solution, Mr Meland spoke to Mr Steele about why WPI could not get an EBA. Mr Steele said words to the effect that, “Ray (referring to the director of WPI) won’t be doing your waterproofing, he won’t be able to get an EBA”. He also said words to the effect, “Why don’t you use someone like Spanos, they’ve got an EBA, they look after their boys”. Mr Steele did not respond and say, for example, “WPI won’t be doing your waterproofing until they pay their employees their entitlements” or “WPI won’t be doing your waterproofing until they are registered with the funds” being something which it would be expected that he would have said if that was the real issue which the CFMEU had. Nor did Mr Steele say, for example, “WPI don’t need to get an EBA. All they need to do is register with the funds and pay their workers properly”. Rather, his statement was a definitive one in circumstances where he knew there was a subcontract with WPI – “WPI won’t be doing your waterproofing”. This statement is a strong indication that there was already an arrangement or understanding between the respondents that Hutchinson would no longer acquire waterproofing services from WPI at the Southpoint project and that, in circumstances where both the CFMEU and Hutchinson knew that WPI had entered a subcontract with WPI, that the WPI subcontract would be terminated;
34. in particular, the statements by Mr Steele to Mr Meland were a “manifestation of mutual consent to carry out a common purpose”, such purpose being that Hutchinson would no longer acquire waterproofing services from WPI at the Southpoint project and would terminate the WPI subcontract. Further, his statements are inconsistent with the CFMEU only having an issue with non-registration with funds or non-payment into those funds;
35. the statement by Mr Steele to the effect that WPI “won’t be able to get an EBA” and “Why don’t you use someone like Spanos, they’ve got an EBA” supports a finding that the motive for the arrangement or understanding between Hutchinson and the CFMEU was to return to a situation where, as a general rule, subcontractors engaged by Hutchinson at the Southpoint project would have an EBA, being something the CFMEU pressured Hutchinson to do and which Hutchinson (through Mr Berlese) did to avoid industrial action;
36. on around 21 June 2016, WPI was informed by Mr Clarke that it needed to call Mr Scott Vink, a CFMEU representative, to “get a go ahead with work”. Mr Vink was not able to be contacted until 4 July 2016 and so Mr Clarke told WPI to speak to Mr Steele to get confirmation from him, but after a number of telephone calls, Mr Steele could not be contacted. Mr Meland was informed of these facts by email. The conduct by the CFMEU (and indirectly by Hutchinson, through Mr Clarke) in requiring WPI to contact Mr Vink and then Mr Steele to enable it to resume work on the site, and then not returning WPI’s calls, is a “manifestation of mutual consent to carry out a common purpose”, such purpose being that Hutchinson would no longer acquire waterproofing services from WPI at the Southpoint project, and would terminate the WPI subcontract. Further, such conduct is inconsistent with the CFMEU having an issue with non-registration with funds or non-payment into those funds, being something which Mr Clarke could have discussed with WPI (or would have discussed with Hutchinson) if that was the real issue, especially if he was the one who had discovered it as the CFMEU contends;
37. Mr Clarke told Mr Thone words to the effect that WPI was not allowed back on site and the reason for this was that it did not have an EBA. Mr Thone also spoke to Mr Meland about the issue of WPI not having an EBA;
38. on around 27 June 2016, Mr Meland referred the matter to the industrial relations team of Hutchinson to resolve. Nothing came of this referral and no evidence was adduced by Hutchinson to show what did happen including whether any contact was made with the CFMEU and what those communications were (which failure was not explained);
39. waterproofing work needed to be performed in the substation area on the Southpoint project in around July 2016. That work was delayed because WPI was not allowed on site. Mr Thone told Mr Meland that he needed a waterproofer. He spoke to him a number of times about this and asked him “get me the next person on the list”. Hutchinson did not arrange for WPI to return to the site. Instead, Spanos was inducted onto the Southpoint site on 13 July 2016 and performed waterproofing work on the Southpoint project on 20 July 2016. Spanos had an EBA and was on the 2016 List;
40. on 13 July 2016 (being the same day that Spanos was inducted), Mr Raymond Hadfield, director of WPI, sent an email to the CFMEU at queries@qld.cfmeu.asn.au, with the subject line “Waterproofing Industries Qld Pty Ltd – URGENT”, and which stated:

Over the last month we have made numerous attempts to get in contact with both Justin Steele and Scott Vink and have been unsuccessful in regards to being forced to stop work at Hutchinson builders Southpoint A construction site.

We have made all necessary steps to get this under control but keep getting pushed aside from department to department. We have made several attempts to get a meeting with Jade Ingham but haven’t herd [sic] back from your office. This is an urgent matter as we are required to do work onsite. All our workers are financial with the CFMEU and all benefits such as BUSS, BERT, Cip-Q etc are paid for.

If you can reply to this ASAP with some information regarding this that would be much appreciated. Also, if you can organise a meeting with Jade Ingham at the earliest possible time to discuss this as it is now having a major impact on work for our client.

1. there was no evidence adduced by the CFMEU that WPI received a response to this email, and its contents demonstrate that WPI was continuing to seek access to the site and the CFMEU was continuing to avoid communicating with WPI. This conduct by the CFMEU is another “manifestation of mutual consent to carry out a common purpose”, such purpose being that Hutchinson would no longer acquire waterproofing services from WPI at the Southpoint project and would terminate the WPI subcontract. Further, such conduct is inconsistent with the CFMEU having an issue with non-registration with funds or non-payment into those funds, being something which the CFMEU would have raised with WPI, or at least Hutchinson, if that was the real issue;
2. on around 19 July 2016, being more than a month after WPI had been excluded from the site, Mr Meland spoke to Mr Berlese about terminating the WPI subcontract. Mr Berlese told him to “deal with it”. There was no resistance by Mr Berlese to terminating the WPI subcontract. Indeed, I infer that Mr Berlese intended that Mr Meland should terminate the WPI subcontract. Hutchinson then terminated WPI’s subcontract by letter dated 26 July 2016. This conduct is “manifestation of mutual consent to carry out a common purpose”, such purpose being that Hutchinson would no longer acquire waterproofing services from WPI at the Southpoint project and would terminate the WPI subcontract. Further, the reason for the delay between the original date of WPI’s exclusion from the site (11 June 2016) and the notification of the termination (26 July 2016) was because Mr Meland was not himself aware of the arrangement or understanding between Hutchinson and the CFMEU and was attempting to assist WPI to return to the site. Such delay does not mean that there was no arrangement or understanding.

## Whether proscribed purpose

1. Section 45E(3)(a) of the Act is directed at arrangements or understandings which contain “a provision included for the purpose, or for purposes including the purpose, of preventing or hindering the first person [in this case, Hutchinson] from acquiring or continuing to acquire such goods or services from the second person [in this case, WPI]”.
2. In *CEPU v ACCC*, the Full Court stated at [181] – [182] that:

… ‘Purpose’ in this context is ‘… the end sought to be accomplished … as distinct from the reason for seeking that end (motive) …’ (*South Sydney* 215 CLR at 563 at [18]; approved in *Rural Press Ltd v Australian Competition and Consumer Competition* (2003) 216 CLR 53 at [66] per Gummow, Hayne and Heydon JJ; Gleeson CJ and Callinan J agreeing at [3] and see per Kirby J at [112]). And, Gleeson CJ noted that the manifest effect of a provision in a contract may be the clearest indication of its purpose. The court has to determine the end the parties had in view: that is, their subjective intentions (*South Sydney* 215 CLR at 563 at [18])…

In our opinion s 45E(3) requires each party to the contract, arrangement or understanding to have had the subjective purpose, which the section proscribes, for including the impugned provision. The opening words of s 45E(3) prohibit the “first person” from making a contract or arrangement or arriving at an understanding of the kind which the section then specifies. But the specification depends upon the bilateral conduct of the parties to include the provision. And because this conduct is bilateral, the subjective purpose with which each of the parties included it must be one they both had. The section is intended to prohibit a combination between the first person and the union (or its officer) who include a provision in a contract, arrangement or understanding with a common purpose of achieving an end of hindering or preventing the first person acquiring services from the second person.

1. The Full Court stated at [194] – [195] that:

…If, as a matter of commonsense, one of the purposes for which a provision is included is proscribed by the section, even if it is not dominant or substantial, it enlivens the operation of the section… The behaviour at which s 45E(3) typically strikes will be where the “first person” succumbs to an abuse of power by an organisation of employees and includes a proscribed provision not wanting to bring about the result, but appreciating that that is the end that will be achieved by doing so.

Nonetheless, as a matter of common sense, a purpose of including the provision will be to achieve that which the union wishes to have achieved, however reluctantly the first person may be acting. A construction of the section which required that the “first person” have an “operative” subjective purpose adds a requirement which the legislation, on its face, does not contain. There is no need for the purpose to be a dominant one. It is sufficient that a purpose exists and it is to achieve one of the ends which the “first person” and the union or its official seeks.

1. As submitted by the ACCC, the purpose of a provision is measured by “the end” or “the effect” that is sought to be achieved through the inclusion of a provision.
2. As submitted by Hutchinson, purpose may be inferred from statements and actions understood in the light of common experience: *Australian Competition and Consumer Commission v Baxter Healthcare* (2008) 170 FCR 16; [2008] FCAFC 141 at [329] (Dowsett J); *Australian Competition and Consumer Commission v Pfizer* (2018) 356 ALR 582; [2018] FCAFC 78 at [470] (Greenwood, Middleton and Foster JJ). Inferences as to subjective purpose may be drawn from the nature of the arrangement, the circumstances in which it was made and its likely effect: *Norcast v Bradken* at [277].
3. Where conduct is part of a wider strategy, the purpose of that strategy can be relevant to determining the purpose of the conduct: *ACCC v Olex* at [494]. In that case, Beach J also observed that:

…one is considering the effect that the parties *sought to achieve*… But a consideration of the circumstances surrounding the relevant arrangement or understanding may inform the application of the subject test. Further, although purpose is determined subjectively, …it can be identified using objective considerations and inferred from circumstantial evidence.

1. In this case, having regard to the factual findings in these reasons, I find that the effect of the provision of the arrangement or understanding between Hutchinson and the CFMEU was that Hutchinson would cease to acquire waterproofing services from WPI, and would terminate the WPI subcontract, and that this was also their subjective purpose of including that provision. That conclusion is reached based upon my findings as to the nature of the arrangement or understanding between the respondents, the circumstances in which it was made and its likely effect.
2. Further, I infer from the factual findings in these reasons, including (in particular) the practices of the respondents in relation to the engagement of subcontractors by Hutchinson which existed prior to the engagement of WPI, that the respondents’ conduct in relation to WPI was part of a wider strategy, the purpose of which was to seek to cause Hutchinson to engage subcontractors which had an EBA on the Southpoint site. That wider strategy, coupled with the fact that WPI was replaced by Spanos (which did have an EBA), reinforces my finding that the end result which was sought to be accomplished by the respondents was that Hutchinson would cease to acquire waterproofing services from WPI, which was a subcontractor which did not have an EBA, and would terminate the WPI subcontract in circumstances where the respondents knew that the subcontract had been entered and termination of that subcontract was the most likely, if not inevitable, result.
3. Such a purpose is a proscribed purpose in that it prevented or hindered Hutchinson from continuing to acquire services from WPI within the meaning of s 45E(3)(a) of the Act.

## Whether Hutchinson gave effect to the provision

1. My factual findings establish that Hutchinson gave effect to the boycott provision in contravention of s 45EA(a) of the Act by ceasing to acquire waterproofing services from WPI at the Southpoint project and by terminating the WPI subcontract.

## Conclusion

1. For these reasons, Hutchinson contravened s 45E of the Act, by making an arrangement or arriving at an understanding with the CFMEU containing a provision to the effect that Hutchinson would no longer acquire waterproofing services from WPI at the Southpoint project and would terminate the WPI subcontract, which provision would prevent or hinder Hutchinson from acquiring or continuing to acquire services from WPI.
2. Further and for these reasons, Hutchinson contravened s 45EA of the Act because, by ceasing to acquire waterproofing services from WPI, and further by terminating the WPI subcontract, it gave effect to the provision of its arrangement or understanding with the CFMEU.
3. The ACCC is therefore entitled to declarations which reflect these findings. I will hear the parties as to the additional relief which should be ordered against Hutchinson as sought by the ACCC in its Originating Application.

# Allegations against the CFMEU

## Relevant legislation

1. Section 76 of the Act enables a penalty to be imposed in certain circumstances including, relevantly to this case, if a court is satisfied that a person has:
2. induced a person, whether by threats or promises or otherwise, to contravene ss 45E(3) and 45EA of the Act; or
3. been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of ss 45E(3) and 45EA of the Act.

## The parties’ submissions

1. The ACCC submits that the CFMEU induced Hutchinson’s contraventions of ss 45E(3) and 45EA of the Act by threatening or implying that there would be conflict with, or industrial action by, the CFMEU if Hutchinson did not cease using WPI.
2. The ACCC also submits that the CFMEU was by the same conduct and by being a party to the boycott arrangement, knowingly concerned in, or party to, those contraventions for the purposes of s 76 of the Act.
3. To succeed, the ACCC must demonstrate that the CFMEU had actual knowledge of the essential facts constituting the contravention: see *Yorke v Lucas* [1985] HCA 65; (1985) 158 CLR 661 at 670 (Mason ACJ, Wilson, Deane and Dawson JJ).
4. Actual knowledge may be established as a matter of inference from the circumstances surrounding the contravention: *ACCC v IPM Operation and Maintenance Loy Yang Pty Ltd* at [219].

## Analysis

1. In light of the factual findings in these reasons, the actual knowledge of the CFMEU of the essential elements of the contraventions by Hutchinson of ss 45E and 45EA of the Act has been established as a matter of inference.
2. The CFMEU resists such a finding because it contends that the evidence does not establish that it knew that it had been a party to an arrangement or understanding “for Hutchinson to terminate WPI’s subcontract”. However, the factual findings demonstrate that the CFMEU knew that the WPI subcontract had been entered and, by its conduct, joined with Hutchinson in preventing WPI from entering the site and performing work pursuant to it. Further, the termination of the WPI subcontract by Hutchinson was the most likely, if not inevitable, culmination of the concurrent conduct engaged in by Hutchinson and the CFMEU as described above. That the CFMEU had such actual knowledge is therefore the overwhelming inference having regard to all of the circumstances.
3. It follows that the CFMEU was knowingly concerned in, or party to the contravention by Hutchinson of ss 45E and 45EA of the Act constituted by its making an arrangement or arriving at an understanding with the CFMEU as alleged by the ACCC.
4. Further, the CFMEU induced Hutchinson’s contraventions of ss 45E(3) and 45EA of the Act by threatening or implying that there would be conflict with, or industrial action by, the CFMEU if Hutchinson did not cease using WPI.

## Conclusion

1. The CFMEU was knowingly concerned in, or party to the contraventions by Hutchinson of ss 45E(3) and 45EA of the Act.
2. Further, the CFMEU induced Hutchinson’s contraventions of ss 45E(3) and 45EA of the Act by threatening or implying that there would be conflict with, or industrial action by, the CFMEU if Hutchinson did not cease using WPI.
3. The ACCC is therefore entitled to declarations which reflect these findings. I will hear the parties as to the additional relief which should be ordered against the CFMEU as sought by the ACCC in its Originating Application.

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| I certify that the preceding three hundred and sixty-five (365) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Downes. |

Associate:

Dated: 14 February 2022