

## NOTICE OF FILING

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### Details of Filing

Document Lodged: Concise Statement  
File Number: VID567/2022  
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v  
ASHTON RAGGATT MCDUGALL PTY LTD ACN 004 662 962 &  
ANOR  
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



*Sia Lagos*

Dated: 30/09/2022 11:40:55 AM AEST

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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## CONCISE STATEMENT

**FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: VICTORIA  
DIVISION: GENERAL**

**NO VID OF 2022**

### **AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**

Applicant

### **ASHTON RAGGATT MCDUGALL PTY LTD**

**(ACN 004 662 962)**

and others named in the Schedule  
Respondents

#### **A. INTRODUCTION**

1. This proceeding concerns cartel conduct in relation to a request for tender for architectural services released by Charles Darwin University (**CDU**) in September 2020 (the **Second RFT**). The Second RFT was part of the development of a \$250 million campus in Darwin's central business district (**CBD campus**), which was primarily funded by the Commonwealth Government and CDU (through a loan from the Northern Australia Infrastructure Facility).
2. An architecture firm, Ashton Raggatt McDougall Pty Ltd (**ARM**), through its Managing Director, Anthony John Allen (**Allen**), attempted to make arrangements or arrive at understandings with, or to induce the making of arrangements or arriving at understandings by, eight other architecture firms in relation to the Second RFT. Each firm was ARM's competitor. In each case, the arrangement or understanding was that ARM would submit a tender in response, and the other firm would not.

#### **B. IMPORTANT FACTS GIVING RISE TO THE CLAIM**

##### **The CDU two-phase tender process**

3. On 7 May 2019, CDU released a request for tender (T10.2019) for architectural services in relation to the first phase of the development of the CBD campus (the **First RFT**). CDU described this phase as the "Master Plan, Business Case, Concept Plan and Scheme Design Phase". ARM was successful in winning the First RFT.

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Filed on behalf of the Applicant, the Australian Competition and Consumer Commission

File ref: 22000181

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4. From the time that ARM tendered for the First RFT, ARM was aware that the second phase of the CDU project would be subject to a further tender process. ARM contemplated approaching CDU prior to the release of the Second RFT to attempt to persuade CDU to continue with ARM for that phase rather than changing architecture firms, but ultimately did not do so.
5. On 24 September 2020, CDU released the Second RFT (T23.2020) for architectural services in relation to the second phase of the development of the CBD campus. CDU described this phase as comprising the “Design Development, Construction Documentation, Construction and Defect Liability Period phases”. The Second RFT was an open tender.
6. On the morning of 24 September 2020, one of the Founding Directors of ARM emailed Allen, copying other ARM employees. In that email, the Founding Director referred to CDU’s two-phase tender process as a “disgrace” and as “contempt for the profession and to us in particular”. Consistently with these comments of the Founding Director, at all material times Allen has maintained his opposition to two-phase tender processes.

#### **The first email from Allen (ARM)**

7. On 24 September 2020 at approximately 5:04pm, Allen, on behalf of ARM, sent an email to representatives of eight other architecture firms (the **First Allen email**).
8. The First Allen email referred to the Second RFT documents issued earlier that day by CDU, and stated, amongst other things:

The only reason the remaining phases are being tendered separately is because there is a very complex tri-partite funding arrangement involving the federal, territory and local governments, and the University is bound by terms in this funding agreement that require 2 tender processes for the project. Something to do with so called “best value for money”. Most of the CDU people with whom we have been dealing were surprised to learn that this was occurring.

Our request to you is simple. Please do not submit a tender as we are relying very heavily on continuing with this project to keep our practice alive throughout the remainder of this strange and difficult COVID time.

Perhaps this is an issue that we could discuss at a future [Large Practice Forum] meeting.

9. The recipients of the First Allen email were representatives of the following firms: Architectus Australia Pty Ltd (**Architectus**), John Wardle Pty Ltd (**JWA**), Denton Corker Marshall Pty Ltd (**DCM**), Cox Architecture Pty Ltd (**Cox**), Bates Smart Architects Pty Ltd (**Bates Smart**), Hassell Limited (**Hassell**), Newpolis Pty Ltd (**Lyons**) and Woods Bagot

Pty Ltd (**Woods Bagot**) (each, a **Firm**). At this time, each Firm was an architecture firm in Australia that supplied, or was capable of supplying, architecture services.

10. Each of the Firms was, formally or informally, part of the Ambassador Group of the Victorian “Large Practice Forum” (**LPF**). The LPF was facilitated by the Australian Institute of Architects, and provided a forum for large architectural practices to meet and discuss issues relevant to their industry. The Ambassador Group was a subgroup of that forum comprising the largest and most significant firms.

#### **Events between the First Allen email and the retraction of that email**

11. On the afternoon of 25 September 2020, representatives of Architectus and JWA responded separately to Allen by email and confirmed that they would not submit a tender in response to the Second RFT. Allen thanked those representatives by email for their responses.
12. On 29 September 2020 at approximately 12:25pm, Allen, on behalf of ARM, sent a follow-up email to the First Allen email (copying all of the original recipients except for those from Architectus and JWA) (the **Second Allen email**) and stated:

We have received very positive responses from Architectus and JWA. We would greatly appreciate a short note from you to let us know of your intentions either way.

13. Shortly after sending the Second Allen email, Allen received a phone call from a representative of DCM, in which that representative said that DCM was not intending to tender, but noting that the First Allen email may be seen to be collusion.

#### **Allen (ARM) retraction email**

14. On 29 September 2020 at approximately 2:35pm, Allen received an email from a representative of Capital Insight Pty Limited (**Capital Insight**), a consultancy firm which was the project manager for the CBD campus project. Amongst other things, the email expressed concern that ARM may have issued email correspondence to other architectural firms about the Second RFT, and requested that any such email be retracted immediately. The email also stated that if there had been a breach of the Conditions of Tender, several matters may influence subsequent decisions made by CDU, including ARM’s confirmation that it had retracted the email.
15. Shortly afterwards, at approximately 3:16pm, Allen, on behalf of ARM, sent a reply email to the First Allen email, copying all of the original recipients, and stated:

ARM retracts this email and wishes to restore the competitive tendering process for this project. We apologise for any inconvenience this may have caused.

16. Allen then confirmed to the Capital Insight representative that he had retracted the First Allen email.

### **Consequences for ARM**

17. ARM continued working on its bid for the Second RFT and lodged its submission on 5 November 2020. On 9 December 2020, CDU notified ARM by letter that its tender had been excluded from consideration because of the First Allen email, which CDU considered constituted (amongst other things) anti-competitive conduct, unethical conduct and prima facie evidence of conduct which may constitute collusive tendering.

### **C. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT**

18. By the conduct referred to in paragraphs 7, 8, 11 and 12 above, ARM, through the conduct of Allen:
  - 18.1. attempted to make arrangements or arrive at understandings with each Firm containing a cartel provision, and thereby attempted to contravene s 45AJ of the *Competition and Consumer Act 2010* (Cth) (the **Act**), within the meaning of s 76(1)(b) of the Act; or
  - 18.2. attempted to induce each of the Firms to make arrangements or arrive at understandings with ARM containing a cartel provision, and thereby attempted to induce each Firm to contravene s 45AJ of the Act, within the meaning of s 76(1)(d) of the Act.
19. By the conduct referred to in paragraphs 7, 8, 11 and 12 above, Allen attempted to induce each of the Firms to make arrangements or arrive at understandings with ARM containing a cartel provision, and thereby attempted to induce each Firm to contravene s 45AJ of the Act, within the meaning of s 76(1)(d) of the Act. Allen intentionally engaged in that conduct.
20. In each attempted arrangement or understanding referred to in paragraphs 18 and 19 above, the cartel provision was one that had the purpose of ensuring that, in relation to the Second RFT, ARM would bid, but the respective Firm would not, within the meaning of s 45AD(3)(c)(i) of the Act.
21. At all relevant times, ARM was, or was likely to be, in competition with each of the Firms in relation to the supply of architectural services.

**D. ALLEGED HARM**

- 22. Cartel conduct is one of the most serious violations of competition law, and attempts to engage in cartel conduct in public procurement have the potential to cause significant detriment to governments, taxpayers, consumers and businesses.
- 23. The contravening conduct in issue in the present proceeding consisted of attempts to reach and induce collusive arrangements or understandings which had the potential to hinder effective competition in relation to the Second RFT, an open tender process for an architectural project of significant scale involving public funding. The conduct in issue had the potential to cause CDU to pay higher prices, and/or to receive lower quality services, than it otherwise would have in respect of the Second RFT.
- 24. Each of those consequences may have followed from the conduct referred to in paragraphs 7, 8, 11 and 12 above, regardless of Allen's purported retraction of the First Allen email referred to in paragraph 15 above. In addition, there is nothing to suggest that Allen would have retracted his email prior to the close of the Second RFT had he not been requested to do so by Capital Insight, as set out in paragraph 14 above.
- 25. The contravening conduct also had the potential to detrimentally affect the confidence of both CDU and other tenderers participating in the tender process, which may in turn affect confidence in respect of participation in future tender processes.

**E. SUMMARY OF RELIEF SOUGHT FROM THE COURT**

- 26. The Applicant claims the relief against the First and Second Respondents set out in the accompanying originating application, namely declarations, pecuniary penalties, compliance, education and training program orders and costs.

Date: 30 September 2022



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Katrina Close  
AGS lawyer  
for and on behalf of the Australian Government Solicitor  
Solicitor for the Applicant

This Concise Statement was prepared by Elizabeth Bennett SC and Sarah Zeleznikow of counsel.

## Schedule

FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: VICTORIA  
Division: General

No VID of 2022

### Respondents

Second Respondent

Anthony John Allen

Date: 30 September 2022

**CERTIFICATE OF LAWYER**

I, Katrina Close, certify to the Court that, in relation to the Concise Statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 30 September 2022



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Katrina Close  
AGS lawyer  
for and on behalf of the Australian Government Solicitor  
Solicitor for the Applicant