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Details of Filing

Document Lodged: Concise Statement
File Number: QUD374/2020
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v J HUTCHINSON PTY LTD (ACN 009 778 330) & ANOR
Registry: QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 4/12/2020 9:08:33 AM AEST

A handwritten signature in blue ink that reads 'Sia Lagos'.

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: QUEENSLAND
DIVISION: GENERAL**

NO QUD ### OF 2020

**AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION**

Applicant

**J HUTCHINSON PTY LTD (ACN 009 778 330)
and another referred to in the Schedule**

Respondents

A. INTRODUCTION

1. This proceeding concerns an arrangement made between the First Respondent (**Hutchinson**) and the Second Respondent (**CFMMEU**) for Hutchinson to terminate the services of an independent subcontractor it had contracted with because the subcontractor did not have an enterprise agreement covered by the CFMMEU (**CFMMEU EBA**). Hutchinson did this to avoid conflict with, or industrial action by, the CFMMEU at the project site. Hutchinson contravened the *Competition and Consumer Act 2010* (Cth) (**the CCA**) by making and giving effect to the arrangement and the CFMMEU induced or was knowingly concerned in the contravention.

B. IMPORTANT FACTS GIVING RISE TO THE CLAIM

2. On 1 September 2015, **Hutchinson** sought tenders for waterproofing works for a project described as the Southpoint Apartments – Stage A (**Southpoint Project**).
3. Waterproofing Industries Qld Pty Ltd (**WPI**) was selected as the preferred tenderer and entered into a contract to supply waterproofing services to Hutchinson for the Southpoint Project on or about 22 March 2016 (**WPI Contract**). WPI commenced work on the Southpoint Project on or about 29 April 2016, and supplied services to Hutchinson pursuant to the WPI Contract from about 29 April 2016 until about June 2016.

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

File ref: 19000339

Prepared by: Chris Steger

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4. The CFMMEU is an organisation of employees registered pursuant to the *Fair Work (Registered Organisations) Act 2009* (Cth). Shortly after WPI began supplying services under the WPI Contract, the CFMMEU informed Hutchinson to the effect that it would not permit WPI to work on the Southpoint Project in circumstances where WPI did not have a CFMMEU EBA. The CFMMEU threatened to engage in industrial action if Hutchinson allowed WPI to continue working on the Southpoint Project.
5. Hutchinson made an arrangement or arriving at understanding with the CFMMEU or one of its officials (the **Boycott Arrangement**) containing a provision (the **Boycott Provision**) to the effect that Hutchinson would terminate the WPI Contract and further, or alternatively, would no longer acquire waterproofing services from WPI at the Southpoint Project.
6. Hutchinson and the CFMMEU understood that the incentive for Hutchinson to make this arrangement was to avoid conflict with, or industrial action by, the CFMMEU.
7. The Boycott Arrangement was made or arrived at between about May 2016 and 26 July 2016. It was made or arrived at through, or alternatively is to be inferred from:
 - (a) a meeting between Peter **Meland** (the Hutchinson project manager responsible for the Southpoint Project), Justin **Steele** (the CFMMEU Organiser responsible for the Southpoint Project) and Damon **Clarke** (the CFMMEU delegate for the Southpoint Project) in April or May 2016, during the course of which, Meland informed Steele and Clarke that Hutchinson had engaged WPI as the waterproofing subcontractor for the Southpoint Project;
 - (b) a meeting between Steele and John **Berlese** (a Hutchinson Team Leader, and Meland's immediate superior) shortly after the meeting referred to in subparagraph 7(a), during which Steele complained that the CFMMEU had not been consulted before WPI was appointed as a subcontractor on the Southpoint Project;
 - (c) a conversation between Charlie Hadfield (a contractor engaged by WPI) and a representative of the CFMMEU and/or Hutchinson, during which Charlie Hadfield was directed to stop working and was told that WPI would not be allowed to work on the Southpoint Project because it did not have a CFMMEU EBA;
 - (d) a conversation or conversations between Meland and Ray Hadfield (a director of WPI), during which Meland told Ray Hadfield that:
 - i. Hutchinson had "problems" with the CFMMEU;
 - ii. the CFMMEU would not let WPI work on the Southpoint Project;
 - iii. WPI would not be able to continue working on the project unless it obtained a CFMMEU EBA; and
 - iv. Meland would try to get WPI a CFMMEU EBA;

- (e) an email from Ray Hadfield to Meland dated 1 June 2016, which stated:
- ...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 dramas 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...
- (f) an email from Meland to Ray Hadfield dated 7 June 2016 (sent in reply to the email in subparagraph 7(e)) in which Meland said:
- ...How are you going with Bus / Bort/ Cipq? As soon as you are registered and up and running let me know please...
- (g) an email from Meland to Ray Hadfield dated 10 June 2016, which forwarded the email referred to in subparagraph 7(f) and said “*I need to see this sorted today?*”
- (h) a conversation between Meland and Clarke on 11 June 2016 during which, Clarke told Meland that the CFMMEU would “sit the job down” at the Southpoint Project if Hutchinson allowed WPI back on site;
- (i) an email from Meland to Berlese dated 13 June 2016, which said:
- ... I was on site Saturday morning and Damo (CFMEU Delo) [i.e. Clarke] 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...
- (j) conversations between Clarke and Ray Hadfield and/or Charlie Hadfield during the course of which Clarke said that WPI would need approval from Scott Vink (the CFMMEU organiser responsible for the waterproofing trade) and/or Steele to continue working on the Southpoint Project, as recorded in an email from Charlie Hadfield to Meland dated 21 June 2016, which stated:
- ...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 theres anything Ray can do further to try and resolve this issue please let him know as we are eager to continue working...
- (k) a conversation or conversations between Meland and Steele during which:
- i. Steele said words to the effect that Ray Hadfield “...*won't be doing your waterproofing, he won't be able to get an EBA*”;

- ii. Steele said that there would be “issues” if Hutchinson proceeded with WPI; and
 - iii. Steele said words to the effect of “*Why don’t you use someone like Spanos, they’ve got an EBA...*”;
- (l) an email from Meland to Charlie Hadfield and Ray Hadfield dated 27 June 2016 in which Meland stated that he had “*put it [i.e. the issue] in the hands of our IR team to resolve*”; and
 - (m) Hutchinson’s conduct in ceasing to acquire waterproofing services from WPI and subsequently terminating the WPI contract as alleged in paragraphs 8 to 10 below.
8. Hutchinson ceased acquiring waterproofing services from WPI in or about June 2016. As a consequence, work on the Southpoint Project was delayed.
 9. In or around July 2016, Hutchinson contacted Spanos (QLD) Pty Ltd (**Spanos**) (a waterproofing company that had a CFMMEU EBA) to see whether Spanos could start working on the Southpoint Project the next day. A representative of Spanos was inducted on the Southpoint Project on or about 13 July 2016 and Spanos carried out waterproofing work on the Southpoint Project thereafter.
 10. On 26 July 2016, Hutchinson terminated the WPI Contract, pursuant to the ‘termination for convenience clause’, by a letter signed by Meland.

C. SUMMARY OF RELIEF SOUGHT FROM THE COURT

11. The applicant seeks the relief set out in the accompanying originating application which includes declarations, pecuniary penalties, injunctions and costs as against Hutchinson and the CFMMEU, in addition to adverse publicity orders against the CFMMEU.

D. PRIMARY LEGAL GROUNDS FOR RELIEF SOUGHT

12. Hutchinson contravened s 45E(3) of the CCA by making the Boycott Arrangement because it contained the Boycott Provision.
13. Hutchinson gave effect to the Boycott Provision, and thereby contravened s 45EA of the CCA, by ceasing to acquire waterproofing services from WPI (as alleged in paragraph 8 above) and terminating the WPI Contract (as alleged in paragraph 10 above).
14. The CFMMEU induced Hutchinson’s contraventions of ss 45E(3) and 45EA of the CCA by threatening or implying that there would be conflict with, or industrial action by, the CFMMEU if Hutchinson did not cease using WPI. Further or in the alternative, CFMMEU 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 CCA. The CFMMEU had the requisite knowledge through one or both of Steele and Clarke.

E. ALLEGED HARM

15. As a result of the conduct of Hutchinson and the CFMMEU, WPI was unable to complete the WPI Contract and therefore WPI suffered loss to its revenue.
16. Conduct of the kind alleged in this concise statement interferes with the normal functioning of the competitive process and thereby causes harm to the public. That loss or damage cannot be quantified.

Date: 3 December 2020

Signed by: 

Chris Steger, Senior Executive Lawyer,
Australian Government Solicitor

Lawyer for the Applicant

This Concise Statement was prepared by Chris Steger of AGS, and settled by Michael Hodge QC.

CERTIFICATE OF LAWYER

I Christopher Michael Steger certify to the Court that, in relation to the concise statement filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 3 December 2020



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Christopher Michael Steger AGS lawyer
for and on behalf of the Australian Government Solicitor
Solicitor for the Plaintiff

SCHEDULE

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

NO QUD ### OF 2020

Respondents

Second respondent: **CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION**

Date: 3 December 2020