



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

BETWEEN:

**Productivity Partners Pty Ltd (t/as Captain Cook College) ACN 085 570 547**

First Appellant

**Site Group International Ltd ACN 003 201 910**

Second Appellant

and

**Australian Competition and Consumer Commission**

First Respondent

**Blake Wills**

Second Respondent

**OUTLINE OF ORAL SUBMISSIONS OF THE FIRST RESPONDENT**

## PART I INTERNET PUBLICATION

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1. This outline of oral submissions is in a form suitable for publication on the internet.

## PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

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### Overview of the essential facts of this case (FRS [6]-[22], [37]-[44])

2. Five key facts are relevant when assessing the conduct of the first appellant (the **College**).
3. *First*, the College charged students substantial fees for its courses, which it was able to do because a government scheme – the VET Fee Help Scheme – existed to assist students to pay those fees. Under that scheme, students would obtain loans from the Commonwealth to cover their course fees, and the Commonwealth would pay the loan amounts directly to providers. Students would owe VFH debts if they were enrolled on the census date for a unit of study: FC [24]-[31], [43]-[45] (**CAB 236-237, 242-243**).
4. *Second*, prior to making changes to its enrolment processes in September 2015, the College was aware that the “risks” of misconduct by sales agents and of the enrolment of unwitting or unsuitable students were regularly materialising in its business: PJ [494] (**CAB 132**); FC [58] (**CAB 247-248**), [121] (**CAB 271**). The Outbound Call and campus-driven withdrawal procedures provided important safeguards against these risks: FC [50] (**CAB 145**), [177] (**CAB 292**).
5. *Third*, the purpose of the changes to the College’s enrolment processes was to increase the likelihood of students being enrolled and passing the first census date, thereby encouraging agents to refer students to the College to reverse declining enrolment and profitability: FC [76]-[77] (**CAB 253-254**), [121(c)] (**CAB 271**).
6. *Fourth*, the changes to the enrolment processes had the effect that was intended: they caused the College’s revenue and profits to increase dramatically: PJ [402]-[403] (**CAB 109**); FC [108] (**CAB 266-267**). The facts that: (i) very large numbers of students were being enrolled who were uncontactable and never engaged with their courses; and (ii) those students did not withdraw from their courses, even though their failure to do so meant that they incurred large debts in return for no benefits, provide a strong basis to infer “that large numbers of enrolled students did not understand the obligations being incurred through enrolment, and may not have understood that they had enrolled”: FC [226]-[227] (**CAB 317-318**).
7. *Fifth*, although the College ceased enrolling students on 18 December 2015 because the Commonwealth introduced a cap on loans under the VFH scheme for 2016 (FC [115],

**CAB 268-269**), it continued to claim and retain VFH income in respect of students it had enrolled between September and December 2015 (including \$46m in respect of the 86% of students enrolled in this period who never logged onto the learning management software): PJ [501]-[506] (**CAB 134-136**); FC [198] (**CAB 305-306**).

8. These facts provided the basis for the conclusion of the primary judge and the majority in the Full Court that the College engaged in a system of conduct that can rightly be judged as unconscionable: see in particular PJ [499]-[500] (**CAB 134**); FC [186]-[187] (**CAB 300-301**); note also [185].

### **Section 21 and 22 of the ACL (FRS [25]-[36])**

9. Section 21 of the ACL creates a statutory norm and provides that the assessment of whether that norm has been violated must be undertaken by reference to “all the circumstances”. The factors in s 22(1) of the ACL must be taken into account in evaluating the “totality of the circumstances” “if and to the extent” that these non-exhaustive factors “are applicable in the circumstances”: *ASIC v Kobelt* (2019) 267 CLR 1 (**Vol 5, Tab 32**) at [87]; *Stubbings* (2022) 96 ALJR 271 at [57]-[58] (**Vol 8, Tab 57**).

10. The appellants contend that the Courts below erred in their treatment of factors in s 22(1) that are “absent” in this case: see, eg, AS [23], [34], [48]; AR [4], [10]. Specifically, they contend that, unless the primary judge made an affirmative finding that a factor in s 22(1) is present, the Court must treat that factor as pointing against a finding of unconscionability. That submission overlooks the need to demonstrate that an “absent” factor is relevant to the case of unconscionability that has been alleged.

11. Contrary to AS [23], [34], in this case the factors in s 22(1)(a) and 22(1)(e) were not relevant. Accordingly, no inference arises from the fact that the ACCC did not allege that those factors supported its case.

12. The correct approach in a s 21 case is for the Court to make findings of fact by reference to the contentions advanced and the evidence led by the parties; then to determine which of the factors in s 22(1) are relevant on those facts; and finally to consider whether those factors tend for, against, or are neutral in terms of establishing unconscionability. That is the approach adopted by the majority: FC [213]-[219] (**CAB 313-315**).

### **The seven errors alleged to have been made in characterising the facts (FRS [45]-[56])**

13. **Risk** (s 22(1)(d)): The appellants’ attack on FC [229] (**CAB 318**) pays insufficient regard to the fact that the “risks” of: (i) misconduct by sales agent (including the use of undue

influence and pressure); and (ii) the enrolment of unwitting or unsuitable students, were regularly materialising in the College’s business when the enrolment process changes were made: see [4] above; PJ [494]-[496] (**CAB 132-133**). Further, s 21(3)(a) and (4)(b) provide textual support for the view that, particularly when assessing whether a system is unconscionable, a degree of abstraction or generalisation is required which lends itself to analysis in terms of risk: see *Unique International College Pty Ltd v ACCC* (2018) 266 FCR 631 (**Vol 8, Tab 59**) at [104], [131].

14. **Intention:** In circumstances where the purpose of the enrolment process changes was to increase the number of students who, having been the victims of misconduct at the hand of the College’s agents, would become enrolled and remain enrolled beyond the first census date, it is not determinative (or even significant) that the College did not “intend” that agent misconduct would occur (but rather intended to take advantage of that foreseeable misconduct): FC [176]-[177] (**CAB 292**); PJ [513] (**CAB 137**).
15. **Legitimate interest in securing profits** (s 22(1)(b)) and **conduct of competitors:** the College had no legitimate interest in profiting from unwitting or unsuitable students. Even if its competitors had similar processes (which was not proved), that would not prevent a finding that unconscionable conduct occurred in the “race to the bottom”: FC [224] (**CAB 316-317**); PJ [517] (**CAB 138**).
16. **Understanding of documents** (s 22(1)(c), (i)): There was an “overwhelming inference” that large numbers of students did not understand the obligations that they incurred, or even that they were enrolled: FC [226]-[228] (**CAB 317-318**), [235] (**CAB 320**).
17. There is no substance to the argument that the majority’s findings about “unwitting or unsuitable students” went beyond those of the primary judge: PJ [494]-[497], [500] (**CAB 132-134**); FC [58] (**CAB 248**), [221] (**CAB 315-316**), [242], [245] (**CAB 321-322**).
18. **Compliance with industry regulation** (s 22(1)(g)): There was no evidence of any applicable industry code. Compliance with industry regulation (in a more general sense) does not preclude a finding of unconscionability: FC [189] (**CAB 301-302**). In any case, the College did not comply with Departmental guidance: see FC [189].
19. **Personal responsibility:** no error has been identified in FC [183]-[186] (**CAB 299-300**).

Dated: 7 February 2024

  
Stephen Donaghue

Oren Bigos

Stephanie Patterson

Luca Moretti