HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 21 Dec 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S116/2023
File Title:	Wills v. Australian Competition and Consumer Commission &
Registry:	Sydney
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	21 Dec 2023

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. 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 and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **Blake Wills**
Appellant

and

Australian Competition and Consumer Commission
First Respondent

Productivity Partners Pty Ltd (trading as Captain Cook College) ACN 085 570 547
Second Respondent

Site Group International Limited ACN 003 201 910
Third Respondent

APPELLANT'S REPLY

Part I: Publication

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

Part II: Argument

Knowledge requirement

2. At the heart of the ACCC's submissions is a contention that accessorial liability cannot depend on a subjective determination, subjective judgment or an evaluative judgment ([2.1], [21], [28], [29], [33], [34], [37], [39] First Respondent's Submissions (**RS**)).

3. This is an unprincipled qualification to the true principle: an accessory to a crime, or a relevant contravention, must have actual knowledge of each essential element. The task of identifying essential elements is a familiar one, and an accessory must actually know each of those elements. Of course, if a particular matter is *not* an essential element (for example, that driving is culpable), then it is not necessary for an accessory to know that (cf RS [21], [32]). Actual knowledge in this context includes wilful blindness,[1] a species of actual knowledge that law and equity equate to subjective knowledge.[2]

---

[1] See, for example, *Giorgianni* at 482 and 487-488 per Gibbs CJ. Thus, the ability of an accessory to convince themselves of a particular matter does not insulate them from liability (cf [35] RS).
[2] See, for example, *Macquarie Bank v Sixty-Fourth Throne Pty Ltd* (1998) 3 VR 133 at 143 per Tagdell JA.

4. The point made by the New South Wales Court of Appeal in *Anchorage Capital Master Offshore Ltd v Sparkes* [2023] NSWCA 88 (***Anchorage***) at [330] is that accessorial liability is not imposed where a person has access to data that would, if analysed, establish an essential element[3]; an accessory must *know* each essential element. While the nature of the essential elements may differ (cf [34] RS), the position is identical in criminal law and for other statutory contraventions. For example,[4] an essential element of a crime may be that a primary offender has a particular state of mind. If so, an accessory must actually know that the principal has the requisite state of mind.[5] Criminal law insists on actual knowledge, which is consistent with its focus on subjective fault.[6]

10 5. The ACCC submits that requiring actual knowledge of the essential elements would allow the morally obtuse to avoid liability (RS [34]-[35]). The problem with that submission is that it purports to rewrite the standard for accessorial liability. The accessory must know the essential elements. If an essential element of the primary contravention is immorality then the accessory must know of that immorality. There is no principled basis for refashioning the standard for accessorial liability in the case of unconscionable conduct based on the likelihood or otherwise of a person being or being proved to be an accessory to such a contravention. This is the same error of principle that was made by Heerey J in *Coggin v Telstar Finance Company (Q) Pty Ltd* [2006] FCA 191 and the majority in the Full Court below. The standard for knowledge of an accessory to be applied is the same
20 in different contexts.[7]

6. The ACCC seems to found its approach conceptually in a purported distinction between "facts" and "an evaluation of facts", and submits that accessorial liability is concerned only with knowledge of facts ([29] RS), and that the falsity of a representation is a "fact"[8] but that conduct being unconscionable or predatory is not ([39] RS). This is purportedly on the basis that the latter requires a judgment. There is no support for the suggested distinction in the authorities.[9]

---

[3] The ACCC appears to accept the correctness of this proposition (RS [27(d)]).
[4] See, by way of further examples, paragraph 27 and footnote 17 of Mr Wills' submissions in chief.
[5] *Giorgianni* at 481 per Gibbs CJ; at 503 per Wilson, Deane and Dawson JJ. See also *R v Bainbridge* [1960] 1 QB 129; *Danishyar v R* [2023] NSWCCA 300.
[6] Davies, *Accessory Liability*, 2015 at pages 77 to 78.
[7] See paragraphs 29 to 33 of Mr Wills' submissions in chief.
[8] That may be doubted: see footnote 16 of Mr Wills' submissions in chief.
[9] In *Yorke v Lucas* (1985) 158 CLR 661, Mason ACJ, Wilson, Deane and Dawson JJ referred to "essential matters" (at 667) and "essential facts" (at 670) and thereafter expressly adopted "essential elements" (at 670 – see the penultimate paragraph commencing "*In our view* ..."). Brennan J did not draw a distinction between

7. The ACCC's proposed distinction between "facts" and "an evaluation of facts" is unsustainable and meaningless. For example, to *know* that a representation about financial performance is false, evaluation is necessary: to have compared the fact of the content of the representation – which might be express or implied – with the fact of the true state of affairs. An even more complicated evaluation may be required if the representation is about a future matter, because the misleading nature of the conduct arises from an absence of reasonable grounds. Whether it is necessary to have performed this evaluation is the point upon which intermediate appellate courts have divided in the context of misleading or deceptive conduct. The correct approach is the one taken by the New South Wales Court of Appeal in *Anchorage*. One cannot discard an essential element of a primary contravention on the basis that it may require some evaluation before a person can know of that essential element.

8. The position for which the ACCC contends on this appeal would be wholly unworkable and would have broad adverse implications across the statute book (cf [17], [31] RS). The ACCC's approach would introduce a new debate in respect of every essential element: is it a fact (in which case an accessory must know it), or does it require a judgment (in which case it can be disregarded for the purposes of accessorial liability)? In a misleading or deceptive conduct case, is an absence of reasonable grounds a fact, or does it require an evaluation? Where a misleading or deceptive conduct case depends on conduct that is *likely to mislead or deceive*, is that a fact or does it require a judgment?

9. There is no support for such an approach in the authorities (in Australia or elsewhere), or as a matter of principle. It raises the prospect of *different* standards for accessorial liability in respect of *different* statutory provisions. It may even require a *different* standard for contraventions of the *same* provision[10].

10. An essential element of unconscionable conduct is that it is against conscience. An accessory must know of that essential element. There is, quite properly, no submission that Mr Wills knew that the conduct of Productivity Partners was predatory or otherwise

---

essential facts or matters in his separate judgment (see 674 and 676). The same is true of the judgments of the High Court in *Giorgianni v R* (1985) 156 CLR 473. The phrases "essential elements", "essential matters", and "essential facts" were all used: per Gibbs CJ at 477 (fact), 479 (fact), 479 (element), 481 (matters), 482 (circumstances), 482 (matters), 486 (fact), 488 (fact); per Mason J at 490 (element), 494 (facts; matters), 495 (facts); per Wilson, Deane and Dawson at 500 (matters), 503 (facts), 504 (facts), 505 (facts) and 508 (matters).

[10] If, for example, falsity of a representation is a fact, but an absence of reasonable grounds requires a judgment.

against conscience. It follows that unless the ACCC's re-writing of the standard for accessorial liability is accepted, Mr Wills' appeal ought be allowed.

ACCC's notice of contention

11. The ACCC contends that that the majority in the Full Court erred in finding that Mr Wills did not have the requisite knowledge until 20 November 2015, and that the Court ought to find that Mr Wills had such knowledge from 7 September 2015. This contention is only relevant in the event that the Court concludes that actual knowledge of the essential element of unconscionability is not required.

12. The ACCC's notice of contention rests on the submission that Mr Wills must have known on 7 September 2015 that (a) the outbound call procedure, and (b) the campus driven withdrawal process were important safeguards to protect students – by reason of discussions in December 2014 and February 2015 relating to the enrolment processes of CCC and its co-provider, Sero Learning Pty Limited (see RS [45]). The primary judge expressly referred to those discussions, and concluded immediately thereafter that they did not establish Mr Wills was aware that the poor conversion rate was because a high proportion of students were uncontactable and therefore subject to a campus driven withdrawal (see CAB 82; PJ [282], which refers to CAB 59; PJ [188]).

13. On 13 September 2015, Mr Wills did not say he "was putting" enrolment processes under the microscope (RS [10]), but that seven areas of the business, including enrolment processes, "would need to be" put under the microscope (CAB 91; PJ [325]), though it was not said by whom and there is no finding that Mr Wills did so. In any event, as the primary judge found, that suggests Mr Wills had not examined those matters by 13 September 2015 (CAB 91; PJ [325]). No doubt that informed the majority's finding that Mr Wills did not have the requisite knowledge as at 7 September 2015 (CAB 360; FC [340]).

Participation requirement

14. At RS [48], the ACCC misrepresents the majority in the Full Court's reliance on pre-20 November 2015 conduct. The ACCC quote the words "provide the backdrop" from the majority's reasons at FC [286] (CAB 337) to characterise the majority's reference to conduct from April 2015 to September 2015. But what the majority was referring to as providing "the backdrop" in FC [286] (CAB 337) was the "foregoing matters" which they had just recited; they then say that this is the backdrop to "the decisions" and "[t]hose

decisions, which involved Mr Wills, were as follows". The majority then sets out at FC [287]-[292] (CAB 337-339) five decisions from April 2015 to September 2015. This was not "backdrop"; as FC [293] (CAB 339) makes explicit, it was on the basis of those decisions that the majority considered Mr Wills was "concerned" in the contravening conduct.

15. The ACCC also now purports before this Court to further re-write its case on participation of Mr Wills. At RS [49], the ACCC submits that Mr Wills as acting CEO "adjusted the details of the enrolment process". The ACCC cites PJ [401] (CAB 109) for that proposition: that is a paragraph of the primary judgment in which it is said that the College stopped enrolling students on 18 December 2015 and Mr Wills explained in correspondence to a recruitment organisation that this was because there were enough students who would reach census dates. That is not part of the pleaded case, not part of the new participation case found by the majority in the Full Court, and not in any event participation in the contravening conduct which is founded on enrolling students (as opposed to ceasing to accept enrolments).

16. In *Rural Press*, Mr McAuliffe's positive conduct was "instrumental in the making of the arrangement".[11] The difficulty for the ACCC is that it pleaded a particular case that was, in the relevant period, based on Mr Wills attending meetings but not positive conduct of Mr Wills. While the ACCC continues to submit otherwise (RS [47]-[50]), in reality the only conduct identified after that date is the mere holding of an office, or matters that arise by reason of holding office: "overseeing", or having "responsibility" or "authority" for aspects of the business.[12]

Dated: 21 December 2023

.....
Michael Hodge
(02) 9151 2094
hodge@newchambers.com.au

.....
Conor Bannan
(02) 8029 6244
cbannan@12thfloor.com.au

Counsel for the Appellant

[11] *ACCC v Rural Press* (2002) 118 FCR 236; [2002] FCAFC at [162] per Whitlam, Sackville & Gyles JJ. Mr McAuliffe spoke directly to Rural Press' competitor in order to seek the arrangement ([31], [36], [45]).
[12] See paragraphs [6], [10], [12], [49] (oversight or "watchful eye"); [6], [12] (responsibility); [6], [9] (authority); [4], [6] (holding of office such as "Chief Operating Officer"; "chair"; "facilitator") of the ACCC's submissions dated 30 November 2023 (First Respondent's submissions dated 30 November 2023 (**RS**)).

ANNEXURE TO THE APPELLANT'S REPLY

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, the Appellant sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in its submissions in reply.

No	Description	Version date	Provisions
Commonwealth statutory provisions			
1.	*Competition and Consumer Act 2010* (Cth), Schedule 2 (Australian Consumer Law)	As at 7 September 2015 (Compilation No. 100, 1 July 2015 - 24 February 2016)	ss 18, 21