HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

Productivity Partners Pty Ltd (trading 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

APPELLANTS' SUBMISSIONS

Part I: CERTIFICATION

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

Part II: ISSUES ARISING

2. The appeal raises the following issues. *First*, the correct approach to an alleged contravention of s 21 of the Australian Consumer Law (**ACL**) pleaded other than by reference to the facts or matters identified in s 22 of the ACL, and whether s 21 may be contravened without analysis of the presence or absence of relevant factors identified in s 22 of the ACL. *Second*, whether conduct which decreased but did not remove protections against wrongful conduct of introducers of prospective customers to Productivity Partners (**PP**), wrongful conduct which PP did not intend to occur, constitutes unconscionable conduct within the meaning of s 21 of the ACL. *Third*, the knowledge of Site Group (attributed to it by the knowledge of an employee of Site Group, as to the quality of the conduct, held in breach of s 21 of the ACL) necessary for Site Group to be knowingly concerned in or a party to a contravention of s 21 of the ACL (within the meaning of s 224(1)(e) of the ACL).

Part III: SECTION 78B, *JUDICIARY ACT 1903* (CTH)

3. The Appellants certify that they have considered whether s 78B notices should be given and have concluded that such notice should not be given.

Part IV: JUDGMENTS OF COURTS BELOW

4. The judgment of the Full Court is *Productivity Partners Pty Limited (trading as Captain Cook College) v Australian Competition and Consumer Commission* (2023) 297 FCR 180 (**FJ**).[1] The judgments of the trial judge are *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (trading as Captain Cook College) (No 3)* (2021) 154 ACSR 472 (**TJ**) and *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (trading as Captain Cook College) (No 5)* [2021] FCA 919.

Part V: FACTS

5. PP carried on business providing vocational education and training courses to students (customers in the language of s 22 of the ACL): FJ[3] CAB228. It was a Registered Training Organisation (**RTO**). Consequences of that status included that students who enrolled in the courses it offered were eligible for funding under a Commonwealth scheme described as VET-FEE HELP and its dealings with potential and enrolled students were governed by detailed regulatory provisions: FJ[2] CAB228, [24]-[31] CAB 236-7; TJ[9]-[26] CAB15-9.[2] The effect of the VET-FEE HELP scheme was that the Commonwealth funded the student's course fee by payment of the fee to the RTO and the student incurred a debt (payable as a percentage of income above a base amount) to the Commonwealth equal to 120% of the course fee: FJ[2] CAB228. The course fee was incurred once a student's enrolment passed a "census" date, in effect once part of the period over which the course should have been completed had passed: FJ[28] CAB236. The object of the scheme was to address low rates of participation in vocational education in identified demographic groups: FJ[26] CAB236. The conditions for a student's entitlement to VET-FEE HELP assistance were set out in cl 43 of Sch 1A to the *Higher Education Support Act 2003* (Cth) (**HES Act**), and were not tied to a student's completion or ongoing engagement with the course enrolled in: TJ[14] CAB16.

6. The case against PP accepted by the trial judge was directed to two changes made to its enrolment system on 7 September 2015, and to the periods from 7 September 2015 to 18 December 2015 (in which the enrolment system with those changes was given effect to) and to September 2016 (the period over which PP sought payment from the Commonwealth for to the students enrolled): FJ[4] CAB229.

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[1] References to the Full Court judgment are to the majority judgment of Wigney and O'Bryan JJ except where identified as being to Downes J's dissenting judgment.

[2] *Higher Education Support Act 2003* (Cth), Schedule 1A, *VET Guidelines 2015* (Cth), *Standards for Registered Training Organisations (RTOs) 2015* (Cth).

7. Prior to 7 September 2015 there were known and related risks associated with the VET-FEE HELP scheme: FJ[51]-[57] CAB246-247, summary FJ[58] CAB247. One risk was that "course advisors" (in effect marketing agents or introducers), who marketed vocational education providers to potential students and who recruited students (**agents**), may engage in unethical or careless conduct in recruiting students, with the consequence that students may be enrolled unwillingly or without full knowledge of the obligation they incurred to the Commonwealth (**agent misconduct risk**). PP engaged agents, to market to or recruit potential students: FJ[56] CAB247; those agents were non-exclusive and were utilised by competitors: FJ[387] CAB371 (Downes J). A second risk was that students who lacked sufficient language, literacy or numeracy skills or technology access or skills to undertake the online course enrolled for a course (**unsuitable enrolment risk**). PP offered online courses: FJ[57] CAB247. Those risks were known to the Commonwealth as well as to participants in the industry: FJ[389] CAB371 (Downes J). The Full Court held that the risks were inherent in the scheme: FJ[53] CAB246.

8. In early 2015 changes were made to the regulation of the VET-FEE HELP scheme. The Commonwealth's express object in making those changes was to protect students from the risk of misconduct by agents and providers (described as a "small group"): FJ[65] CAB251. PP complied with the regulatory scheme in force from time to time, including the specific provisions introduced to protect students from the identified risk of misconduct by agents and providers; there was no allegation to the contrary. The relevant department did publish an addendum to an information document for RTOs which expressed an "expectation", in the Frequently Asked Questions section, which PP did not implement: FJ[67] CAB251. That "expectation" was not reflected in the various regulations and rules which expressly regulated the conduct of RTOs, nor in the information provided to students regarding the operation of the scheme: TJ[177] CAB56.

9. Prior to 7 September 2015, PP had several controls in its enrolment system, the object of which was to ameliorate agent misconduct risk and unsuitable enrolment risk. One part of its system was that PP made an "outbound" telephone call to students within 48 hours of submission of the student's enrolment application (**Outbound Call**), which had the benefit that the agent would not be present when the call was made: FJ[47(d)] CAB244. A second was that PP would cancel the enrolment of students who did not make contact with PP, other than in the Outbound Call, prior to the census date (the **Campus Driven Withdrawal Policy**): FJ[48] CAB245. The Campus Driven Withdrawal Policy was only introduced in

November 2014, and neither control was required by the regulatory framework for RTOs: FJ[392], [394] CAB372 (Downes J); TJ[164], [171], [518] CAB53, 55, 138. That policy pre-dated but accorded with the "expectation" referred to in the information document referred to at FJ[67] CAB251. There is no finding that PP's competitors had a policy to the same or similar effect; the trial judge rejected the tender on behalf of PP of some other RTOs' withdrawal policies: TJ[517] CAB138.

10. From April 2015 PP suffered declining enrolments, which were attributed by employees of PP to it losing support from agents and was reported as being due to its convoluted and difficult enrolment processes: FJ[71], [75] CAB252-3. PP's management responded by proposing and, on 7 September 2015, implementing two changes to its system. *First*, PP replaced the Outbound Call with an "inbound call" at the time of the student making an enrolment application which was initiated by the agent (**Inbound Call**): FJ[73] CAB253. *Second*, it removed the Campus Driven Withdrawals Policy: FJ[73] CAB253. Removing those controls had the effect of increasing the risk of students being enrolled in a course for which they were not suited (in the sense described) or without a full understanding of the financial obligation they were undertaking due to agents behaving unethically or carelessly: FJ[76] CAB253. Other controls, including the explanation and disclosures made on the Inbound Call, remained part of the system: FJ[494] CAB395 (Downes J).

11. The Inbound Call is referred to at FJ[84] CAB257 and described in at TJ[290]-[298] CAB84-5.[3] The process was criticised by the Full Court, but involved PP explaining to each prospective student the fees, the student's right to withdraw from the course and that the student had to withdraw before an identified census date to avoid liability for the course fee and the loan costs: FJ[449] CAB384 (Downes J); TJ[295], [296] CAB85. A sample of 50 randomly selected phone recordings assessed by the ACCC evidenced that all sampled students stated or confirmed their personal, contact and course details, that they had completed the pre-enrolment quiz themselves, that they agreed to enrol in the course and that they understood the withdrawal procedure: TJ[301] CAB86. After the changes were made responsible employees of PP retained a discretion to cancel an enrolment: FJ[85]-[86] CAB258-9, which was applied where the behaviour of an agent was found to be inappropriate: FJ[119] CAB270.

[3] The call script which was followed and associated check list is Ex CBD3553-3555 (ABFM 4), D3647-3651 (ABFM 7) and the quiz performed immediately prior to the call contemporaneously is Ex CBD3258-3262 (ABFM 10).

12. After 7 September 2015 enrolments rapidly increased, as did PP's revenue: FJ[87]-[94] CAB259-61. So too did the number of disengaged students: FJ[95]-[103] CAB 261-4. The actual outcome in the sense of proportion of students engaging in and completing the courses was highly unsatisfactory: see table at FJ[108] CAB266; FJ[112] CAB267. That outcome was not known on 7 September 2015, and if knowledge of outcome is necessary to the conduct being unconscionable there has been no identification as to when PP knew sufficient of the consequences for its conduct in implementing the changed system to constitute unconscionable conduct. Returning to the findings, as a consequence of a cap on VET-FEE HELP loans, PP ceased accepting enrolments on 18 December 2015: FJ[113]-[115] CAB268. After that date PP claimed and retained (insofar as paid, TJ[504] CAB135) revenue by the Commonwealth. The litigated significance of PP claiming and retaining revenue was that, had revenue had not been claimed or retained that fact may have ameliorated or cured the unconscionable conduct: FJ[123] CAB272, TJ[507] CAB136.

13. PP did not intend the risk of agent misconduct to eventuate. It had the staff and facilities to provide the education courses offered. It was not conducting a sham business: FJ[176] CAB292. Dishonesty by PP was neither alleged nor established: TJ[512] CAB137.

14. Investigations were undertaken by PP into alleged unethical behaviour by agents. When PP formed a view that an agent's conduct was unethical it reversed the affected enrolments: FJ[119] CAB270. The quality of the investigations was criticised by the trial judge and the majority in the Full Court, but not in the sense of any deliberate shortcoming: FJ[119] CAB270. There were several other controls on the risks, and while deficiencies in those controls were identified by the Full Court (FJ[178] CAB293) the deficiencies were not alleged or held to be deliberate or intended to reduce the effectiveness of the controls.

15. Site Group is the parent company of PP. Mr Blake Wills was the Chief Operating Officer of Site Group, and for a period the acting Chief Executive Officer of PP: FJ[3] CAB228. The case against Site Group was limited to it being responsible for Mr Wills' conduct and knowledge and derivative of his liability as an accessory: FJ[128] CAB274.

The unconscionable conduct found

16. The trial judge and the majority of the Full Court accepted the ACCC's case that, in making and implementing the two system changes, PP engaged in a system of conduct which was unconscionable in contravention of s 21 of the ACL. The case found by the majority of the Full Court is identified in several places. It is set out in five parts FJ[121], [172] CAB270,

289; more concisely at FJ[168], [338] CAB 288, 356. In summary: (a) PP knew the risk of agent misconduct and the risk of enrolling unwitting and unsuitable students, risks which regularly materialised; (b) PP changed its enrolment processes to remove two safeguards that were known to protect students from those risks, acting with a profit maximising motive; and (c) the consequence of that change was that enrolments rapidly escalated and PP claimed revenue in relation to customers who may have been subject of misconduct, or were unsuitable or unwilling. That concept was accepted at trial and by the majority in the Full Court. The case advanced by the ACCC was not directed to the facts and matters identified in s 22 of the ACL (TJ[509]-[510] CAB136), an argument the reasons do not grapple with); nor identified any particular characteristics or vulnerability of the class of potential or actual students (FJ[437]-[438] CAB382 (Downes J)).

17. Both the trial judge and the Full Court rejected PP's arguments that its conduct was not unconscionable because, in summary: (a) the case advanced at trial did not refer to or engage with the factors identified in s 22(1); (b) the risk identified was a risk of unknown extent, and while removing some controls PP acted in accordance with specific regulations applying to VET-FEE HELP; (c) PP did not act dishonestly; and (d) the ACCC's case erroneously directed attention to facts learnt after 7 September 2015, in effect the consequences of implementation of the changes.

Part VI: SUBMISSIONS

Ground 1 – section 22 of the ACL

18. Section 21 of the ACL creates a prohibition on engaging in unconscionable conduct in connection with the actual or possible supply or acquisition of goods and services. That prohibition is not limited to the equitable conception of unconscionable conduct; it is discrete albeit overlapping with it: otherwise s 20(1) and (2) would have no operation. In addition to creating a norm of conduct, s 21 gives content to the quality of conduct to which the norm is directed, identifying that the conduct must be unconscionable in contrast to, for example, unfair. The requisite gravity or departure from acceptable conduct, involving moral judgment, is identified by the legislature's choice of language.[4]

19. Section 22 of the ACL gives further content to the norm by non-exclusively identifying the types of conduct or matters to which s 21 is directed, and the presence or absence of each

[4] *ASIC v* ***Kobelt*** [2019] HCA 18; 267 CLR 1 at [89]-[92] (Gageler J), [120] (Keane J); ***Stubbings*** *v Jams 2 Pty Limited* [2022] HCA 6; 96 ALJR 271 at [58] (Gordon J).

type or conduct or matter in the actual or possible supply or acquisition of goods and services informs the judgement required for a conclusion as to whether conduct is unconscionable in the statutory sense.[5] "[M]ay" in s 22 is conditional, not permissive.[6] The identified types of conduct inform the values which give content to the norm created by s 21 of the ACL,[7] guidance which is critical to defining the normative standard to be applied by the Court.[8] An importance of the types of conduct or matters identified in s 22 is that they tether the required judgement to the statutory concept.[9] That is not to suggest a requirement for formulaic reasoning: cf FJ[219] CAB315, or that each of the factors will always be relevant. Instead, without attention to those factors the assessment of whether conduct is unconscionable may become a high-level instinctive reaction that the legislation sought to avoid.[10]

20. Consideration of an allegation of statutory unconscionable conduct requires the application of the normative standard set by the legislature by reference to s 22.[11] The open textured character of the standard "unconscionable" carries the risk of judicial decision making driven by values of individual judges,[12] while a standard given content by the types of conduct or matters identified in s 22 requires a characterisation of alleged or ascertained conduct against objective factors. The importance of objective content is emphasised as breach of the norm exposes those engaged in trade or commerce to civil penalties. The enumeration of types of conduct or matters identified in s 22 of the ACL performs the function of providing content to the standard, and the absence of an identified relevant criteria (some expressed positively, some negatively and (1)(a) expressed comparatively) necessarily informs the analysis.

21. The methodological error in the trial judgment is it did not undertake that analysis, which in turn led to an erroneous conclusion. The trial judge's analysis, accepting the case advanced by the ACCC, involved ascribing a series of value laden terms to the conduct found: TJ[500] CAB134 based on the intermediate conclusions TJ[493]-[499] CAB132-4. The trial judge did not approach that analysis within the framework required by s 22 of the ACL, the most substantive reference to one of those criteria is at TJ[513] CAB137 responding to one of PP's

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[5] *Kobelt* at [83], [87]-[90] (Gageler J), [120] (Keane J), [154]-[155] (Nettle and Gordon JJ) and [302] (Edelman J); see also **Paterson et al** "Beyond the unwritten law: The limits of statutory unconscionable conduct" (2023) 17 *Journal of Equity* 1 at 20-21.
[6] ***Paciocco** v ANZ Banking Group Limited* [2016] HCA 28; 258 CLR 525 at [189] (Gageler J).
[7] *Kobelt* at [154]-[155] (Nettle and Gordon JJ); *Stubbings* at [57] (Gordon J).
[8] *Kobelt* at [87]-[90], *Stubbings* at 57]-[58]; also FJ[409]-[419] (Downes J).
[9] FJ[423] CAB 379 (Downes J); see also Paterson et al at 20.
[10] *Kobelt* at [302] (Edelman J); as to approach *Kobelt* at [120] (Keane J) and *Stubbings* at [57] (Gordon J).
[11] *Kobelt* at [87] (Gageler J).
[12] See also, TF Bathurst, 'Law as a Reflection of the "Moral Conscience" of Society' (Speech, Opening of Law Term Address, 5 February 2020) at [36], [46].

submissions. The methodological error led the trial judge and Full Court to characterise conduct as unconscionable which: (a) was not the product of an intention that agent misconduct eventuate and led to PP deploying resources to provide the services it promised (FJ[176], [180] CAB292, 295); (b) reduced controls over risk of wrongful behaviour by third parties, although it was not intended that wrongful behaviour to occur; (c) retained controls over that conduct; and (d) only had known consequences after those consequences occurred. That approach led the trial judge and Full Court to engage in an assessment of shortcomings in PP's other controls over risks and evaluating the conduct by a comparison of PP's previous controls instead of those controls required by specific regulation, an analysis which is not tethered to the statutory concept. That analysis finds no foothold in s 22. That is not to say that PP's conduct did not leave it exposed to the consequences of wrongful conduct, as the findings in relation to Consumers A-E demonstrate: FJ[352]-[370] CAB360-5; cf FJ[184] CAB300. The majority in the Full Court should have found error in the trial judge's approach, an error which was not rendered immaterial by the majority's problematic analysis of some factors identified in s 22(1) of the ACL. Downes J's dissent is correct.

22. The analysis of some of the factors in s 22(1) by the majority, by reference to findings of the trial judge, did not remedy the failure at trial to plead and adduce evidence of facts directed to s 22, or the trial judge's failure to approach the analysis of the standard by reference to the statutory criteria. The majority's reasoning is erroneous, which is demonstrated both by identification of the presence and absence enumerated matters in s 22, as well as the conclusion that the conduct found met the statutory concept.

23. **Section 22(1)(a) – relative strengths of the bargaining positions**: The majority did not address this comparative matter in its reasons: FJ[210] CAB312. There was no case at trial of any inequality of bargaining position between PP and its customers, and the competition faced by PP from other providers meant that no assumptions as to bargaining position ought to be made. Further, there was no particular characteristics of the cohort of PP's customers: FJ[437] CAB382 (Downes J); the trial judge found that there was not an over-representation of disadvantaged customers: FJ[438] CAB382. The absence of a disparity in bargaining power is a factor favouring a conclusion that PP's conduct was not unconscionable. That is because the predicate fact to a type of behaviour which may be unconscionable, taking

advantage either deliberately or through the existence of the disparity of bargaining power, was not present: FJ[436], [440] CAB 382, 383 (Downes J).

24. **Section 22(1)(b) – conduct on the part of the supplier requiring customer to comply with conditions not reasonably necessary to protect legitimate interests**: There was no finding by the trial judge that customers were required to comply with conditions of the kind described in s 22(1)(b): FJ[442] CAB383 (Downes J). The correct conclusion is that there was no system of conduct by PP which was not reasonably necessary to protect its legitimate interests.[13] Its interests included being remunerated for services it was engaged to and ready to provide. The majority addressed that omission, but erroneously.

25. *First*, the concern of s 22(1)(b) is with conduct on the part of the supplier by which the consumer is required to comply with the condition, not the condition.[14] The majority's reasoning contains an elision between an enrolment system and a condition imposed on a customer: FJ[220]-[224] CAB315-6.

26. *Second*, the majority separated PP's submissions into "primary" and "further" arguments (FJ[221]-[222] CAB315-6), identifying that the trial judge correctly considered compliance with the regulatory regime in the context of s 22(1)(g) and (h): FJ[220] CAB315. However, to find no error in the trial judge's consideration of that factor (FJ[188]-[190] CAB 301-302), is a different inquiry to that identified in s 22(1)(b). These submissions return to s 22(1)(g).

27. *Third*, the majority erred in finding that the regulatory scheme did not bear upon the question raised by s 22(1)(b): FJ[221] CAB315. PP had a legitimate interest in attracting customers for the purpose of operating its business profitably, in accordance with that scheme: FJ[444] CAB383 (Downes J). The regulatory scheme was amended to address the risk of agent misconduct: FJ[65]-[66] CAB251. Having a system which complied with the regulatory requirements but was competitive was a legitimate interest of PP.

28. *Fourth*, the Full Court's observation that PP had no legitimate interest in enforcing education contracts with students who were unwilling or unsuitable in the sense defined (FJ[221] CAB315) highlights the distinction between a case that *may* establish unconscionable conduct and case upheld by the trial judge. The Full Court's observation was flawed in two important respects. The first is that the conclusion that enrolments of unsuitable or unwilling students were prevalent (FJ[221] CAB315) involves a departure from the findings by the

[13] As to systems, *Stubbings* at [80] (Gordon J).
[14] *Paciacco* at [185], [186] (Gageler J), *Kobelt* at [74] (Gageler J).

trial judge (findings directed to a different point of analsyis), stemming from a definitional distinction adopted by the majority with respect to the term "unsuitable students". The majority defined unsuitable students as those who lacked certain skills: FJ[58] CAB247. The trial judge found that "unsuitable students" included not only those described by the Full Court but also students who would not be contactable, or who would have no or minimal engagement with their online course, or who did not wish to enrol in an online course: TJ[41] CAB23, [495] CAB395. The finding by the trial judge at TJ[496] CAB133 relied on by the majority at FJ[221] CAB315 drew attention particularly to the class of customers who were unwilling or uninterested as opposed to unable; cf the Full Court's conclusion at FJ[242] CAB321 that TJ[495] CAB133 was "framed loosely". On analysis, there were limited findings in respect of unsuitable students as defined at FJ[17], [58] and [221] CAB 234, 247, 315. There was no finding of students' capabilities in a generic sense, which necessarily followed as the case was advance without reference to any characteristic of the students. There was no finding of enrolled students' literacy, numeracy or technology skills, or of access to technology. The highest the trial judge's findings go is to accept Ms Solly's evidence that, at the end of January 2016, she made contact with "*a dozen students at most*" and that the language skills of students in "*some*" instances were not sufficiently developed to be able to comprehend the course materials: TJ[393] CAB107, FJ[99] CAB263. Those findings are not a sufficient basis to conclude that unsuitable students of the kind described by the Full Court, as opposed to disengaged students, were prevalent: cf FJ[221] CAB315.

29. The second difficulty is that insofar as the majority held that PP had no legitimate interest in enforcing education contracts with students who did not enrol willingly, with full knowledge of the obligations incurred, the effect of other findings was that PP did not do so where misconduct was identified. The findings at trial of agent misconduct were based on PP's records, where its investigation revealed unethical behaviour by agents. On those occasions PP reversed the enrolments of affected students: FJ[119] CAB270. Although the ambit of the investigations was criticised, that was not in the sense of deliberate shortcomings. Where unwitting customers were enrolled, the system adopted was designed to address this.

30. **Section 22(1)(c) – whether the customer was able to understand any documents**: There was no finding that customers were unable to understand documents or information provided in connection with their enrolment, including that a debt would be incurred: FJ[448]-[451] CAB384-5 (Downes J). The pre-enrolment quiz each customer was required to complete was in plain terms, identifying that obligation: FJ[449] CAB384 (Downes J). The trial judge held

the Inbound Calls were conducted according to a script: TJ[301] CAB86. In those calls PP confirmed the customer's contact information and conveyed information about the course and the VET-FEE HELP scheme, including the withdrawal procedure: FJ[494](3)] CAB394 (Downes J); TJ[299], [301] CAB85-6. Customers were asked whether they had completed the pre-enrolment quiz themselves, whether they agreed to enrol in the course and whether they understood the withdrawal procedure: TJ[301] CAB 86. PP's system also required agents to provide, and trained them to provide, further information prior to the inbound call: FJ[494](a) and (b) CAB395 (Downes J). No criticism was made of the training. Nor was it part of PP's system to encourage agents to pressure or mislead consumers: FJ[494] CAB395 (Downes J); and the system included terminating agents where misconduct was established FJ[494(4)] CAB395; TJ[426] CAB115. Directing attention to s 22(1)(c), the information provided is inconsistent with a conclusion of unconscionable conduct. The trial judge erroneously gave little weight to the Inbound Call (TJ[301] CAB86) and the other identified elements of the system (TJ[526] CAB 141), and the majority did not refer to them in considering s 22(1)(c): FJ[225]-[227] CAB317. The majority erred by directing attention to TJ[521] CAB139, which was not directed to s 22(1)(c): FJ[226], [227] CAB317. In doing so it relied on the false comparator, in effect postulating that a system without the controls adopted prior to 7 September was an unconscionable system; that comparator was both flawed and did not direct attention to the statutory requirement. The finding that 'something was remiss' at FJ[226]-[227] CAB317 is also an insufficient basis for the conclusion of unconscionable conduct, and conflates later acquired knowledge with an assessment of PP's conduct at the time it was engaged in.

31. **Section 22(1)(d) – undue influence, pressure or unfair tactics**: section 22(1)(d) directs attention to conduct amounting to undue influence, pressure or unfair tactics, not to the risk of conduct of that type: FJ[455]-[456] CAB385 (Downes J) correctly draws the distinction. The absence of conduct by the supplier of the character described is indicative of an absence of unconscionable conduct.[15] Undue influence, pressure or unfair tactics were not pleaded nor proved as having occurred systemically during the relevant period: FJ[453] CAB385 (Downes J). As already identified, the trial judge found that on each occasion PP formed a view that an agent's conduct was unethical it acted to reverse the affected enrolments: FJ[119] CAB270. The only occasion on which PP sought to rely on the enrolment induced

[15] *Kobelt* at [58] (Kiefel CJ and Bell J).

by wrongful conduct was Consumer A. The absence of wrongful conduct or reliance on wrongful conduct described in s 22(1)(d) is inconsistent with an unconscionable system.

32. The protection of customers from risks, not created by PP but inherent in the scheme implemented for reasons of important public policy, has no textual foothold in s 22(1)(d). As Downes J held, the factor identified in s 22(1)(d) is the use or presence of undue influence, pressure or unfair tactics, and no case was pleaded or run to the effect that PP was systematically responsible for conduct of that quality: FJ[453] CAB385. The trial judge did find the risk of conduct of that quality by agents, but that risk is a qualitatively different concept to the fact of the conduct identified in s 22(1)(d): FJ[454]-[468] CAB385-90 (Downes J). The majority's reasoning involving the same elision of risk and the identified conduct (albeit with the hindsight based conclusion of "inevitably" in the third line of FJ[184]) CAB300. That elision is to press analogical reasoning too far because of the qualitative difference between conduct to which s 22(1)(d) is directed and risk of conduct of that character: cf FJ[229] CAB318, also FJ[184]-[186] CAB300.

33. Directing attention to risk instead of the forms of conduct identified in s 22(1)(d) has further difficulty. Section 21 is directed to conduct in trade or commerce. Risk is usually inherent in commercial conduct, and concepts of degree of risk and acceptable degrees of amelioration of risk or protection from risk involve nuanced judgement by those engaged in commerce. Those nuanced and usually fact sensitive judgements are matters for specific legislation or acceptance, usually at a price, through contract. Risk raises questions of commercial judgement, which if later shown in effect to be erroneous ought not to be characterised as unconscionable. So much is demonstrated by the present appeal: (a) PP had in place other precautions designed to prevent agent misconduct, including those identified at FJ[494] CAB395 (Downes J); (b) contemporaneous internal communications showed that PP believed it had implemented a system which complied with the requirements of the VET FEE HELP scheme while taking the necessary precautions to meet the risk: FJ[493] CAB394 (Downes J); TJ [193]-[194], [196], [197], [200], [212]-[213], [244], [245], [332], [333], [335] and [346(1)] CAB60-2, 65, 74, 93 and 96; and its officers believed that the components of the overall system operated effectively to protect consumers: FJ[496] CAB395 (Downes J); TJ[332]-[334], [336] CAB93-4; and (c) PP did not intend the risk to eventuate: FJ[176] CAB292. To err in making the decision to change controls is not to engage in unconscionable conduct.

34. **Section 22(1)(e) – the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent services from a different supplier**: There is no finding that any customer could have acquired services from a different RTO with the benefit of either an Outbound Call policy or a Campus Driven Withdrawal Policy. Other suppliers of similar educational services also utilised the services of agents, who were not engaged exclusively by PP: FJ[387] CAB371 (Downes J). The evidence recited and apparently accepted by the trial judge was to the effect that PP's enrolment system prior to the changes was uncompetitive: TJ[244], [263], [280] and [283] CAB72, 77, 81, 82. In those circumstances the absence of findings that customers could have acquired the services from a different supplier, in effect with better protections, is a reason to conclude that the conduct was not unconscionable when attention is directed to s 22(1)(e).

35. Section 22(1)(e) directs attention to the services offered by other suppliers. It is not an answer to the absence of evidence of competitors providing the protections found to be necessary to point to difficulties in proof of a comparator (FJ[231] CAB319) or to observe, as the trial judge did (TJ[517] CAB138), that other suppliers may have behaved unconscionably. As identified by Downes J, s 22(1)(e) identifies the comparison as relevant: FJ[469]-[477] CAB 390-1.[16] The absence of proof that competitors had controls of the identified type is relevant, pointing to the conclusion that PP's conduct was not unconscionable.

36. **Section 22(1)(g) – the requirements of any industry code**: although the HES Act and VET Guidelines are not an "industry code" as defined, both the majority and Downes J correctly identify that compliance with industry regulation is a relevant consideration in assessing whether behaviour is unconscionable.

37. The majority accepted that neither an Outbound Call nor Campus Driven Withdrawal Policy were required by the regulatory regime, and also that PP had complied with the HES Act and the VET Guidelines: FJ[189] CAB301; also [479] CAB392 (Downes J). The absence of a Campus Driven Withdrawal Policy did not constitute non-compliance, contrary to the trial judge's finding that the abolition of the Campus Driven Withdrawal Policy constituted a barrier to withdrawal: FJ[189]-[190] CAB301-2. The majority emphasised that the fact of compliance does not lead to a conclusion that the conduct is not unconscionable FJ[189] CAB301; TJ[518] CAB138. So much may be accepted as far as that proposition goes. But there are two important matters that do follow. *First*, as compliance with an industry code is

[16] See also *Kobelt* at [123] (Keane J) and *Paciocco* at [290] (Keane J).

expressly referred to in s 22, by analogical reasoning compliance with specific regulation is a significant factor favouring a conclusion that PP's conduct was not unconscionable: FJ[478]-[485] CAB392 (Downes J). The trial judge's analysis was flawed in not giving significant weight to PP's compliance with regulation of the industry in which it traded. *Second*, the 2015 amendments to the VET Guidelines were directed to protecting against the identified risks: FJ[65]-[66] CAB251. The majority placed emphasis on the risks being known, but the significance of that fact was removed or diminished as the risks were expressly addressed by amendments to the VET Guidelines. It was wrong to characterise PP's conduct as unconscionable, in the statutory sense, in that circumstance.

10 38. The majority also placed weight on the "expectation" recorded in one response in a Frequently Asked Questions section in an update to an information booklet for RTOs, to the effect that the Department expected that students who were not contactable would be withdrawn before the first census date. As already identified, there was no evidence of any competitor having a system to the effect of the "expectation", let alone a prevalence of systems for withdrawal of students who could not be contacted or were disengaged. Further, PP addressed the identified risks as required by regulation, and failure to follow an "expectation" expressed in a "FAQ" section of an information booklet, of no statutory effect, is not a sufficient departure from the norms of acceptable commercial behaviour to be against conscience.

20 39. No other industry code (s 22(1)(h)) has been identified as of significance.

40. **Section 22(1)(i) – the extent to which the supplier unreasonably failed to make disclosure**: There is no finding by the trial judge that PP failed to disclose any intended conduct that might affect the interests of customers, in particular the debt that would be incurred if the customer failed to withdraw before the first census date: FJ[487] CAB393 (Downes J). There was no finding that the disclosed information could not be understood by customers: FJ[488] CAB393 (Downes J). Again, those are facts which tend against a conclusion of unconscionable conduct.

41. The majority considered that the trial judge addressed PP's submission in relation to s 22(1)(i) at TJ[514] and [525] CAB137, 141; FJ[233]-[234] CAB319-20. The trial judge's
30 reasons in those paragraphs were directed to a qualitatively different concept. The standard imposed by s 22(1)(i) is disclosure, although caveated in that the statutory fact is an *unreasonable* failure to make disclosure in contrast to a failure simpliciter. The trial judge's reasoning was that the Inbound call "*was not sufficient to protect consumers*": TJ[526]

CAB141. An obligation to protect customers from wrongful conduct by others is qualitatively different to the identified obligation of disclosure of the supplier's intended conduct or risks associated with that conduct. The majority's reasons contain the same error: FJ[233] CAB319. Each of the trial judge and majority applied a standard detached from that identified by s 22 of the ACL. Further, the trial judge and majority's reasoning cannot be supported by analogical reasoning. The relevant fact identified by s 22(1)(i) is directed to disclosure of the supplier's proposed conduct and associated risks, not protection of customers in a more general sense. The trial judge's reasons have a further flaw. PP's proposed course of conduct, charging a student who did not withdraw before the first census date, was disclosed both in the Inbound Call and the pre-enrolment quiz. The trial judge's assessment as to sufficiency of the disclosure to protect customers is not directed to the required standard.

42. Correctly analysed, PP did disclose its proposed conduct, relevantly to charge customers who did not withdraw by the first census date. Approached through the prism of s 22, that conduct points against a finding of a contravention of s 21 of the ACL.

43. **Sections 22(1)(j) and (k) – terms and performance of the contract**: sub-section (j) and (k) have not been identified as relevantly informing the conclusion of breach. There is no finding as to whether terms of the contract between the customer and PP could be amended. But assuming there was little or no prospect of negotiation, the relevant terms for provision of services and payment reflected the statutory requirements. Sub-section (k) only has relevance in identifying that one prospective area of unconscionable conduct, unilateral variation of contractual terms, was not present.

44. **Section 22(1)(l) – the extent to which the supplier and the customer acted in good faith**: The Full Court did not suggest that the trial judge made an assessment as to whether PP acted in good faith; nor did the Full Court undertake that assessment: FJ[236] CAB320; cf the analysis of Downes J at FJ[489]-[496] CAB393-5. Both the trial judge and the Full Court erred in not making an assessment of whether PP was acting in good faith, particularly in the absence of a finding of dishonesty[17] and the finding at FJ[176] CAB292. Downes J was correct to hold that PP did not fail to act in good faith for the reasons identified FJ[492]-[493] CAB394 (also FJ[176] CAB 292). The absence of a finding that PP failed to act in

[17] *Kobelt* at [59] (Kiefel CJ and Bell J), *Paciocco* at [288] (Keane J).

good faith when it was not found to have acted dishonestly, is again a reason to conclude that it did not breach s 21 of the ACL.

45. **Conclusion**: the case accepted by the trial judge was about risk of misconduct by agents or introducers and the removal of two or a range of protections against that conduct. The framework of taking reasonable steps to avoid or minimise risk is well known in the field of negligence and in certain statutory settings, such as occupational health and safety. But avoiding risk to a customer is not readily applicable to characterising conduct as unconscionable. No assessment was made at trial of the allegation of unconscionable conduct by reference to s 22. Section 22 of the ACL is directed to conceptually different facts and matters to a regulation of or amelioration of risk. PP's system and conduct, once viewed through the prism of s 22, did not meet the statutory concept of unconscionable.

46. Each of the trial judge, by not analysing the allegations within the framework of s 22(1), and the majority of the Full Court, in characterising some of the trial judge's findings as in part capable of being placed in that framework (FJ[220] CAB315) but also reasoning in a manner not referrable to that framework, found unconscionable conduct by reference to standards different to that required by the ACL. In doing so, the trial judge and in substance the Full Court accepted the method of alleging and proving a breach of s 21 of the ACL advanced by the ACCC. For the reasons identified, and those identified in Downes J's judgment, that approach was in error both in methodology and result.

Ground 2 – conduct not unconscionable

47. PP's conduct did not constitute unconscionable conduct proscribed by s 21 of the ACL: the conduct was not unconscionable within the meaning of that term informed by s 22, and not so removed from acceptable commercial norms as to contravene s 21.[18]

48. *First*, starting from the framework of s 22 of the ACL, the identified facts and matters demonstrate that the conduct was not unconscionable within the statutory concept. Those facts or matters were either proved and contrary to a finding of unconscionable conduct or were absent, tending against a finding of unconscionable conduct. The conduct was of a different character to that proscribed, as identified in respect of Ground 1.

49. *Second*, the imposition of an obligation to control risk to customers, by steps in addition to the specific regulatory scheme governing the conduct of RTOs, is not an obligation subject of the normative standard prescribed by s 21. There are at least three reasons supporting that

[18] *Kobelt* at [90]-[93] (Gageler J); *Jams 2* at [57]-[58] (Gordon J)

conclusion. One is that the extent of the risk was uncertain, and the risk viewed in hindsight has resulted in a standard removed from unconscionable conduct being applied: compare the Commonwealth's contemporaneously expressed concern as to the behaviour of a small number of operators, FJ[65] CAB251, with the trial judge's identification of risks inherent in the scheme, FJ[50] CAB245, and the majority's view of "moral hazard" and "obvious risk": FJ[53], [56] CAB246-7. The second is that the framework of risk invited the assessment, undertaken by the trial judge and the majority, of how effective PP's other controls of the risks were, and shortcomings in the quality of its response to those risks: for example FJ[234] CAB320 (criticisms of the Inbound Call) and FJ[119] CAB 270 (quality of investigations). Those criticisms contain a value judgment as to an appropriate standard of competence in commercial conduct. The immediate error is that shortcomings in the efficacy of a control and extent of investigations is not a form of analysis readily applicable to the standard of unconscionable conduct. Unconscionability may be a standard associated with a reckless disregard for likely (or sometimes foreseeable) consequences but is not a standard attracted by imperfect systems or carelessness. A third reason is that the risk was not created by PP; the risks were inherent in the regulated scheme in which it carried on business. There are other legal standards which respond to that risk, which are protective of individual rights: prohibitions on misleading or deceptive conduct, prohibitions on unfair contract terms and the specific regulation of RTOs are examples. But the standard of unconscionable conduct is not directed to the type of criticisms identified by the trial judge and the Full Court, nor the circumstance in which PP complied with the specific regulation introduced for the purpose of addressing the identified risks.

50. *Third*, while the rapid increase in the number of disengaged and uncontactable students was a highly unsatisfactory outcome, that outcome was not known when the changes were implemented. The Full Court held that PP was able to provide the courses it offered and did not intend agent misconduct to occur: FJ[176] CAB292. Dishonesty was neither alleged nor found: TJ[512] CAB137. Conduct which is engaged in for reasons which do not include an improper purpose, and which is not dishonest, at least usually is properly described as in good faith, a factor which expressly tends against a finding of unconscionable conduct: s 22(1)(l). Correctly characterised, the case is one in which intention or conduct of the necessary quality to amount to unconscionable conduct was not present.

51. It does not derogate from that proposition to properly acknowledge that the enrolment system can be seen by reference to the consequences to have been inadequate. However, the values

recognised to prevail within contemporary Australian society which are reflected in s 21 of the ACL are not values determined with hindsight, by reference to policies could or perhaps should have been in place to mitigate risks.

52. *Fourth,* the trial judge and majority's conclusion of unconscionable conduct is chronologically flawed. The pleaded case upheld by the trial judge and the Full Court was that PP engaged in unconscionable conduct by making the two changes to its system on 7 September 2015 and implementing the changed system on that date: FJ[200]-[201] CAB307, TJ[500] CAB134. The case advanced at trial relied on events which occurred, and knowledge learnt, after 7 September 2015 yet the finding was that the conduct was unconscionable on and from 7 September. The Full Court explained the trial judge's reasoning at FJ[202]-[203] CAB308-9. There are errors in Full Court's explanation. One is that for a period from 7 September 2015 the actual consequences of the changes were not known, during which time the conduct in reducing controls was of unknown effect, the changes having been made and implemented without colourable intention: FJ[176] CAB 292. Conduct of that quality is not unconscionable. Another is that there is no identified point, during the circa 14 weeks in which the system operated, at which the consequences were known with the result that, to avoid acting unconscionably, PP was obliged to revert to the former system or add new controls. Finally, the segregation of the analysis identified in FJ[202] CAB308 was incomplete, the majority relying on events (and necessarily knowledge of those events) occurring after 7 September 2015 to characterise PP's conduct: for example the final two sentences of FJ[177] CAB292.

53. *Fifth*, there are several other factors inconsistent with unconscionable conduct, identified in Downes J's judgment: (a) the two processes which were changed or removed were perceived to exceed others in the market (FJ[395] CAB372; s 22(1)(e)); (b) after 7 September 2015 PP's systems or controls included continuing to speak to students as part of the enrolment process (FJ[396] CAB372; a list of other controls is FJ[494] CAB395); (c) there was evidence that PP's senior management thought that the controls were effective to protect customers (FJ[496] CAB 395, TJ[333]-[336] CAB93-4, s 22(1)(i)); (d) the class of customers had no particular vulnerability or characteristics (FJ[437]-[438] CAB382, s 22(1)(a) and (d)); (e) PP clearly explained the customer's responsibility to withdraw before census to avoid the cost of the course (FJ[449]-[451] CAB384-5, s 22(1)(c) and (i)); and (f) PP knew of the Commonwealth's response to the identified risks and could reasonably have concluded those responses would alleviate the risks (FJ[492](3)-(4) CAB394, TJ[194] CAB60).

54. None of that is to say the consequences of the changes in PP's enrolment system were satisfactory. The consequences which occurred were not. But the prohibition on unconscionable conduct in s 21 of the ACL is directed to the quality of the conduct of the person in trade or commerce, and to a substantial departure from acceptable commercial conduct. The norm of conduct created by s 21 is given content by s 22 of the ACL, which directs attention to the quality of the conduct not the consequences. Once the standard required by s 21 of the ACL is correctly described, PP's conduct was not unconscionable in the proscribed statutory sense.

Ground 3 – Site Group's accessorial liability

55. Site Group's liability is derivative of Mr Wills' liability because Site Group's only alleged knowledge and conduct was that of Mr Wills: FJ[226] CAB317; TJ[577] CAB153. Three steps of reasoning are involved: (a) that PP contravened s 21 of the ACL; (b) that Mr Wills was knowingly concerned in or a party to PP's breach within the meaning of that term in s 224(1)(e) of the ACL; and (c) that Mr Wills' state of mind and conduct are attributed to PP by s 139B of the *Competition and Consumer Act 2010* (Cth). The first step is subject of grounds 1 and 2, and the third is not in issue in this appeal.

56. The second step largely will be addressed by Mr Wills. Briefly, s 224 of the ACL adopts the legislative form of accessorial liability considered in *Yorke v Lucas*.[19] That form of legislation reflects a legislative choice that the necessary culpability of the accessory is different to that of the primary contravenor. Accessorial liability requires intention, although primary liability may not.[20] The prohibition created by s 21 of the ACL is a prohibition on engaging in unconscionable conduct. Section 224(1)(e) relevantly imposes liability on a person who intentionally participates in the unconscionable conduct. The accessory need not know the prohibition nor conceive of the conduct in the language of the prohibition. For example, the accessory need not conceptualise misleading conduct as misleading if the accessory knows a representation to be untrue or materially incomplete; or need not conceive an agreement between competitors to not compete in a locality as involving a substantial lessening of competition. But the accessory is not liable if they are ignorant of that which gives the conduct the contravening character.[21] It is that distinction the majority erroneously stated was unexplained: FJ[298] CAB337.

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[19] (1984) 158 CLR 661 at 667-670 (plurality) and 677 (Brennan J).
[20] *Yorke v Lucas* at 667, 668-9 (plurality) and 677 (Brennan J).
[21] *Yorke v Lucas* at 677 (Brennan J).

57. Complexity of analysis can be introduced by an allegation that the alleged accessory is an accessory to a contravention of s 21 of the ACL because the wrong may be complex. That complexity is a consequence of unconscionable conduct necessarily having the type of characteristics required by s 22 of the ACL and as being conduct well outside the bounds of proper commercial conduct sufficient to be characterised as unconscionable. Accessorial liability involves knowledge of that essential contravening character of the conduct, even if not conceptualised in those terms. As identified by Mr Wills, the trial judge did not approach the question of accessorial liability by reference to the required intentional involvement in contravening conduct, in the sense of Mr Wills having an appreciation of the contravening character of the conduct: the trial judge consequently did not find Site Group knew the conduct to have characteristics identified in s 22 or to be well outside the bounds of acceptable commercial conduct. Site Group should succeed on ground 3 even if grounds 1 and 2 fail.

Part VII: ORDERS SOUGHT

58. The orders sought are:

(a) Appeal allowed and orders 3, 5, 6 and 7 made by the Full Court be set aside.

(b) PP and Site Group's appeal to the Full Court be allowed, and the first respondent (**ACCC**) be ordered to pay PP and Site Group's costs of the appeal to the Full Court.

(c) Paragraph 19 of the orders made by the trial judge be set aside; the ACCC (applicant at first instance) be ordered to pay the appellants' (PP and Site Group's) costs of the proceedings to date; the question of relief, if any, arising from the matters subject of declarations 4 to 7, 9, 10, 12, 13, 15, 16 and 18 be remitted to the trial judge; and otherwise the proceedings be dismissed.

Part VIII: ESTIMATED HOURS

59. The Appellants estimate that 2.5 hours will be required for oral argument.

Dated: 2 November 2023

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ANNEXURE TO THE APPELLANTS' SUBMISSIONS

Pursuant to paragraph 3 of the Practice Direction No 1 of 2019, the Appellants set out below a list of the particular statutes referred to in its submissions.

1. *Competition and Consumer Act 2010* (Cth) , Sch 2 (Australian Consumer Law) ss 21, 22, 224 – as at 7 September 2015
2. *Higher Education Support Act 2003* (Cth) Sch 1A - as at 7 September 2015
3. *Standards for Registered Training Organisations (RTOs) 2015* (Cth) - version as at 7 September 2015
4. *VET Guidelines 2015* (Cth) - as at 7 September 2015