

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

Matter No S118/2023

PRODUCTIVITY PARTNERS PTY LTD (TRADING
AS CAPTAIN COOK COLLEGE) & ANOR APPELLANTS

AND

AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION & ANOR RESPONDENTS

Matter No S116/2023

BLAKE WILLS APPELLANT

AND

AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION & ORS RESPONDENTS

*Productivity Partners Pty Ltd v Australian Competition and Consumer
Commission*

Wills v Australian Competition and Consumer Commission

[2024] HCA 27

Date of Hearing: 7 & 8 February 2024

Date of Judgment: 14 August 2024

S118/2023 & S116/2023

ORDER

In each matter:

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

J C Giles SC with R B Davies for the appellants in S118/2023 and the second and third respondents in S116/2023 (instructed by MinterEllison)

M R Hodge KC with C E Bannan for the appellant in S116/2023 and the second respondent in S118/2023 (instructed by HWL Ebsworth Lawyers)

S P Donaghue KC, Solicitor-General of the Commonwealth, and O Bigos KC with S A C Patterson and L G Moretti for the first respondent in both matters (instructed by Johnson Winter Slattery)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Productivity Partners Pty Ltd v Australian Competition and Consumer Commission

Wills v Australian Competition and Consumer Commission

Trade practices – Consumer protection – Unconscionable conduct – Where s 21 of *Australian Consumer Law* ("ACL") relevantly provided that persons must not, in trade or commerce, in connection with supply of services, "engage in conduct that is, in all the circumstances, unconscionable" – Where s 224(1) of ACL relevantly provided that Court may order person to pay pecuniary penalty when that person "knowingly concerned in, or party to, the contravention" of provisions including s 21 – Where Productivity Partners Pty Ltd ("College") offered vocational education and training ("VET") courses funded through Commonwealth loan program – Where College altered enrolment process to remove safeguards ameliorating known risks of unwitting or unsuitable persons becoming and remaining enrolled at date on which VET fees became claimable by College from Commonwealth – Where Mr Wills was Chief Operating Officer of parent company of College and, for part of relevant period, acting Chief Executive Officer of College – Whether College engaged in unconscionable conduct in contravention of s 21 of ACL – Whether Mr Wills knowingly concerned in or party to that contravention.

Words and phrases – "accessorial liability", "community expectations", "community standards", "conscience", "corporate systems liability", "ecclesiastical", "essential elements", "essential facts", "essential matters", "intentionally participated", "involved", "knowingly concerned", "moral obloquy", "normative standard", "offensive to conscience", "sharp practice", "societal norms of acceptable commercial behaviour", "unconscionable conduct", "values of Australian common law".

Competition and Consumer Act 2010 (Cth), s 139B, Sch 2 (*Australian Consumer Law*), ss 21, 22, 224(1).

Overview

1 These appeals concern the application of the proscription against unconscionable conduct in s 21 of the *Australian Consumer Law*¹ ("the ACL") to a corporation offering and providing online vocational education and training ("VET") funded through a Commonwealth scheme known as the Vocational Education and Training Fee Higher Education Loan Program ("the VFH scheme"). Through the VFH scheme, the Commonwealth assisted people to fund their VET by paying an eligible person's tuition fees ("VET fees") directly to a registered training organisation which was a "VET provider" on the basis that the person would incur a debt to the Commonwealth, in the amount of the VET fees plus a 20% "loan fee" ("VFH debt"), which the person would be required to repay to the Commonwealth over time through the tax system once the person earned above a specified threshold.

2 Productivity Partners Pty Ltd trading as Captain Cook College ("the College") was a VET provider that offered, relevantly, online VET courses. Site Group International Ltd ("Site") acquired the College in 2014. Blake Wills was the Chief Operating Officer of Site and, between November 2015 and January 2016, acting Chief Executive Officer ("CEO") of the College.

3 The Australian Competition and Consumer Commission ("the ACCC") alleged that the College engaged in a system of conduct, or a pattern of behaviour, in respect of persons who enrolled in the College's online courses that was, in all the circumstances, unconscionable in contravention of s 21 of the ACL. The principally relevant conduct was that, during the period from 7 September 2015 to 18 December 2015 (called "the impugned enrolment period"), the College changed its process for enrolment by removing two system controls which had previously ameliorated known risks of unwitting or unsuitable persons becoming enrolled and remaining enrolled at the date on which VET fees became claimable by the College from the Commonwealth in respect of their enrolment under the VFH scheme. The principally relevant circumstances were that the College claimed VET fees from the Commonwealth under the VFH scheme in respect of people enrolled in the impugned enrolment period with the consequence that, given the structure of the VFH scheme, those people incurred a VFH debt to the Commonwealth in the amount of the VET fees paid plus the 20% "loan fee".

4 The ACCC further alleged that Mr Wills was knowingly concerned in the College's contravention of s 21 of the ACL by operation of s 224(1)(e) of the ACL (which relevantly enables a penalty for a contravention to be imposed on a person

1 *Competition and Consumer Act 2010* (Cth), s 131(1) and Sch 2 ("ACL").

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who "has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision") and that Site was in turn knowingly concerned in the College's contravention by operation of s 139B of the *Competition and Consumer Act 2010* (Cth) (which provides for certain conduct of directors, employees or agents of bodies corporate to be taken to have been engaged in also by the body corporate).

Courts below

5 The primary judge in the Federal Court of Australia, Stewart J, found that the College had engaged in a system of conduct, or a pattern of behaviour, in respect of people who were enrolled in online courses in the impugned enrolment period which was, in all the circumstances, unconscionable in contravention of s 21 of the ACL and that Mr Wills, and through him Site, were knowingly concerned in the College's systemic unconscionable conduct and therefore also liable for that conduct.²

6 On appeal to the Full Court of the Federal Court of Australia, the majority, Wigney and O'Bryan JJ, agreed with the primary judge and concluded that the appeals should be dismissed other than in one relevant respect concerning the date from which Mr Wills (and, through him, Site) was knowingly concerned in the College's contravention of s 21 of the ACL. The primary judge had found that date to be 7 September 2015. The majority in the Full Court found that date to be 20 November 2015, being the date on which Mr Wills became the acting CEO of the College. Downes J, in dissent in the appeals to the Full Court, would have allowed the appeals of the College and Site, and of Mr Wills.³ In these reasons, the majority in the Full Court will be referred to as the Full Court.

The appeals

7 This Court granted special leave to appeal both to the College and Site ("the Productivity Partners appeal") and separately to Mr Wills ("the Wills appeal").

8 In the Productivity Partners appeal, there are two principal grounds of appeal. The first is that the Full Court erred in upholding the finding of the primary judge that the College engaged in unconscionable conduct within the meaning of s 21 of the ACL without the primary judge having made adequate reference to matters listed in s 22 of the ACL, being matters to which s 22 provides a court

2 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College) [No 3]* (2021) 154 ACSR 472.

3 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180.

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"may have regard" for the purpose of determining whether a person has contravened s 21. The second is that the Full Court erred in holding that the College's conduct, in removing the two system controls and operating an enrolment system without those controls, constituted unconscionable conduct in contravention of s 21 of the ACL in the absence of an intention that the risks ameliorated by those controls eventuate. There is also a third ground of appeal in the Productivity Partners appeal relating to Site's liability (through Mr Wills) which is wholly consequential on the outcome of the Wills appeal.

9 In the Wills appeal, there are also two principal grounds of appeal. The first is that the Full Court erred in finding that Mr Wills had the requisite knowledge to be knowingly concerned in the College's contravention of s 21 of the ACL in the absence of any finding that Mr Wills knew that the College's conduct involved taking advantage of consumers or was otherwise against conscience. The second is that the Full Court erred in finding that Mr Wills satisfied the participation element for accessorial liability by his conduct before he had knowledge of the essential matters making up the contravention (being from 20 November 2015 as found by the Full Court) and by his continued holding of positions of authority, but no identified positive acts, after he had the requisite knowledge. Mr Wills also added a third, derivative, ground of appeal that he could not be liable if the College itself had not contravened s 21 of the ACL.

10 By notice of contention in each appeal, the ACCC contends that the Full Court erred in holding that Mr Wills (and through him, Site) was knowingly concerned in the College's contravention of s 21 from 20 November 2015 only, and not from the earlier date of 7 September 2015. It will be apparent that the second ground of appeal in the Wills appeal cannot be maintained if the ACCC succeeds in that contention.

Summary of conclusions

11 In respect of the Productivity Partners appeal, the findings of the primary judge either not challenged or undisturbed on appeal to the Full Court amply support the conclusion of the Full Court that the College had engaged in a system of conduct, or a pattern of behaviour, in respect of people who were enrolled in online courses in the impugned enrolment period that was, in all the circumstances, unconscionable in contravention of s 21 of the ACL throughout the impugned conduct period (the period from 7 September 2015 to September 2016, during which the College claimed and retained VFH revenue derived from students enrolled during the impugned enrolment period). Section 22 of the ACL does not require a court to evaluate the impugned conduct by reference to the presence or absence of the circumstances that provision specifies irrespective of the relevance of those circumstances to the impugned conduct or to the cases as put by the parties to the court. The second substantive ground of appeal, as will be explained,

depends on an incomplete and therefore inaccurate characterisation of the salient facts.

12 In respect of the Wills appeal, it was not necessary for Mr Wills to know that the impugned conduct was unconscionable for him to be found to have been knowingly concerned in the College's contravention of s 21 of the ACL. The question whether conduct is unconscionable or not is one of characterisation, not fact. To be knowingly concerned in the contravention of s 21 of the ACL it was necessary only that it be proved that Mr Wills knew the essential matters which together made up the conduct ultimately characterised by the primary judge and the Full Court as unconscionable, not that he knew that the conduct could, let alone would, be so characterised.

13 As will also be explained, the only error by the Full Court was in overturning the primary judge's finding that Mr Wills was knowingly concerned in the contravention of s 21 of the ACL from 7 September 2015. There was no error in the primary judge's finding to that effect and, accordingly, no basis for the Full Court to overturn that finding.

14 We turn now to a summary of the relevant findings of fact below, none of which were challenged in the appeals. We also note in this context that Mr Wills was available to but did not give evidence in the hearing before the primary judge.

The VFH scheme

15 The VFH scheme operated under the *Higher Education Support Act 2003* (Cth). In 2012 the scheme was amended with the aim of broadening the demographic of students who qualified for assistance for the express purpose of addressing low participation rates from identified demographic groups – including Indigenous Australians, people from non-English-speaking backgrounds, persons with a disability, people from regional and remote areas, people from low socio-economic backgrounds, and people not currently engaged in employment.

16 A person's entitlement to loan funding under the VFH scheme was conditional on (amongst other things) being enrolled in a VET unit of study, remaining enrolled in that unit of study at the end of the relevant "census date", and completing a request for Commonwealth assistance form on or before the census date. The "census date" for a VET unit of study was the date determined by the VET provider to be the last date on which a person enrolled could withdraw without incurring any VFH debt to the Commonwealth. The College's courses would generally have several census dates, with the tuition fees (and the related VFH debt) being proportionally allocated across those dates.

17 An enrolled person incurred a VFH debt to the Commonwealth immediately after a census date. Because the Commonwealth may have paid the VET fees

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before that date, a VET provider was required to repay any VET fees paid in respect of a VET unit of study if the enrolled person withdrew on or before the relevant census date. An enrolled person could therefore withdraw from a VET unit of study on or before the first census date without incurring any financial liability to the VET provider or to the Commonwealth.

18 The Full Court fairly described the VFH scheme as involving a "moral hazard" insofar as the VET provider received the benefit but did not bear the cost of enrolling persons who did not have a proper understanding of the obligation to pay the course fees or a realistic capacity to complete the course in which they enrolled.⁴

19 As the primary judge put it, the VFH scheme "gave rise to an obvious risk, being the risk of unsuitable or otherwise insufficiently interested or committed [persons] being too easily or casually, or unconscionably or deceptively, signed up as students, progressing through their census dates thereby incurring debts to the Commonwealth and the VET provider being paid its tuition fees, and the [enrolled persons] not otherwise engaging with the course in any meaningful way or receiving any meaningful benefit".⁵

20 As the Full Court put it, persons "might be enrolled in circumstances where they had no or limited understanding of the obligations they were incurring because there was no immediate financial impact for them, and in circumstances where they were not capable of undertaking the course for which they were enrolled".⁶

21 These risks and problems were known publicly through Senate inquiries and media reports and privately by the College and Site before 7 September 2015.

Management of the College

22 The College obtained approval to offer units of study through the VFH scheme on 30 March 2012. Site acquired the shares in the College in 2014.

23 As at mid-2015, the College represented a substantial proportion of Site's consolidated revenue and profits. The financial performance of the College was

4 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 198 [53].

5 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College) [No 3]* (2021) 154 ACSR 472 at 481 [22].

6 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 199 [54].

very significant to the performance of Site overall, and the performance of the College would have been of key concern to Mr Wills.

- 24 An Advisory Board for the College was established in May 2014. Mr Wills was a member. The charter of the Advisory Board included a "mission", amongst other things, to plan strategic initiatives, to identify and analyse growth opportunities, and to agree on opportunities to be pursued. The key areas of reporting and responsibility for the Advisory Board included financial and operational performance as well as sales and marketing. The charter also said that:

"The Chief Executive Officer has primary responsibility to the Board for the affairs of the Business.

The Board appoints the Chief Executive Officer to manage the business on behalf of it and shareholders and must delegate sufficient powers to allow him to manage effectively. The Chief Executive Officer must carry out the objectives of the Board in accordance with its instructions, and report to the Board all matters the Chief Executive Officer considers to be material to the affairs of the Company."

- 25 Meetings of the Advisory Board occurred monthly from July 2015. Typically, Mr Wills chaired and "facilitated" these meetings, which the senior management of the College attended.

The College's business model

- 26 The College offered the following online courses during the relevant period: Diploma of Business, Diploma of Project Management, Diploma of Information Technology, and Diploma of Human Resources Management. These courses had between two and four units of study each. Each unit of study had a census date, being the deadline for the person enrolled to withdraw from the course without incurring any liability under the VFH scheme. An enrolled person would pass their census date and incur a debt for a unit of study two weeks after the commencement of that unit of study. The course fees meant that the financial obligation assumed by enrolling in one of the College's online VET units of study and incurring a debt was substantial, with course fees ranging, at times during the impugned enrolment period, from a total of \$13,000 to \$20,000.

- 27 The College used marketing and sales agents, referred to by it as "course advisors" ("CAs"), to "recruit" persons to enrol in online courses the College offered. Before Site acquired the College, approximately 80% of people enrolled in courses offered by the College had been recruited by the College's then sole marketing and sales agent. After Site acquired the College, the College also contracted with other marketing and sales agents. In each case, "the commission

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structures were such as to strongly incentivise the agents to recruit students and ensure that they passed at least their first census date and incurred VFH debts".⁷

28 Those aspects of the College's business model compounded the risks known to be inherent in the VFH scheme in two critical respects.

29 First, the College's outsourcing of the recruitment of students to marketing and sales agents remunerated on a commission basis upon the student passing a census date meant that the "College was vulnerable to an obvious risk that its agents might pursue commission revenue in an unethical manner: agents might seek to recruit persons who were unsuitable to undertake the online courses of study offered by the College (for example, having insufficient language, literacy or numeracy skills or no access to a computer) or might engage in misleading conduct about the financial obligations that would be incurred by the student".⁸ This was referred to by the primary judge and the Full Court as the "CA misconduct risk".

30 Second, the "College provided its courses through an online campus. This meant that the College had no face to face contact with students and only dealt with students online or via telephone. Dealing with students in that manner increased the difficulty of guarding against the risk of students being misled or unsuitable students being enrolled. That problem was known to the College and its senior managers."⁹ This was referred to by the primary judge and the Full Court as the "unsuitable enrolment risk".

31 The primary judge found, and the Full Court accepted, that key personnel at the College, and Mr Wills at Site, were aware of both the CA misconduct risk and the unsuitable enrolment risk.

The College's system controls

32 Before the changes made during the impugned enrolment period, the College ameliorated the CA misconduct risk and the unsuitable enrolment risk by two system controls.

7 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 195 [42].

8 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 199 [56].

9 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 199 [57].

33 The first of the system controls was an outbound quality assurance ("QA") call undertaken by an admissions officer at the College as part of the enrolment process. The QA call would generally occur 48 hours after the person had submitted an enrolment application form and a pre-enrolment quiz provided to them by a CA, such that the CA would not be present at the time of the call. The purpose of the call was to ensure that the person understood the commitment they were making under the VFH scheme and to identify any reasons that suggested the person may not have the ability to undertake the course.

34 The second of the system controls was a process, known as a "campus driven withdrawal", in accordance with which the online attendance of an enrolled person would be monitored by a student support officer or campus administrator in the first weeks of study and, if a person was not engaged online and remained uncontactable during that period, they would be withdrawn before the first census date.

Changes to system controls during the impugned enrolment period

35 From April 2015 the College experienced declining enrolments, with the College's marketing and sales agents reporting to the College that its enrolment processes were "convoluted and difficult".¹⁰ The obvious inference, which the primary judge drew, was that "the College's enrolment process was adversely affecting the agents' commission revenue – the agents would not receive any commission unless the student passed the first census date and would not receive their whole commission unless the student passed the second census date".¹¹

36 Driven by "sales and marketing objectives",¹² the College's management – and Mr Wills, who was involved in its management – responded by adopting two changes to the College's system controls. These changes were implemented on 7 September 2015.

37 First, the College ceased making outbound QA calls and instead allowed CAs to initiate inbound QA calls to an admissions officer of the College at the time

10 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 203 [71].

11 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 204 [76].

12 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 204 [76].

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the person was being enrolled, such that the CA would be present at the time of the call. Second, the College ceased campus driven withdrawals.

38 The positive effects of the changes on the College's declining enrolments and consequential deteriorating financial position were dramatic and rapid. The College went from having just a few hundred people in total to a few hundred joining every week. The College's financial results, circulated to Mr Wills, showed the College's VFH revenue to have increased by 255% from August to September 2015. Revenue for the month of December 2015 was more than 5000% greater than the average for July and August 2015.

39 The negative effects of the changes on the number of unsuitable persons enrolled were also dramatic and rapid. The primary judge found that in the six months from January to June 2015, there was not a single person who was enrolled in the College and who progressed through at least one census and incurred a VFH debt with whom the College had had no contact after the initial QA call. In contrast, in the 11-month period from July 2015 to May 2016, there were 1859 people who progressed through at least one census and incurred a VFH debt with whom the College had had no contact after the initial QA call.

40 Subsequent analysis of the College's records comparing the period from 1 November 2014 to 6 September 2015 (approximately ten months) and the period from 7 September to 18 December 2015 (approximately three months) yielded these results:¹³

	Description	Earlier Period	Relevant Period
(1)	Length of the period	10 months	3 months
(2)	No. of course enrolments	1,316	7,324
(3)	No. of enrolments through C1	806	6,032
(4)	% of enrolments through C1 (i.e., conversion rate)	61.25%	82.36%
(5)	% of enrolments withdrawn before C1 (i.e., attrition rate)	38.75%	17.64%

13 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 214-215 [107]-[108].

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(6)	Tuition fees claimed (and not refunded, re-credited or reversed)	\$7,403,000	\$54,165,875
(7)	% of enrolments through at least C1 with no LMS [learning management system] log in	27.9%	86.5%
(8)	Tuition fees claimed (and not refunded, re-credited or reversed) in respect of enrolments through at least C1 with no LMS log in	\$1,999,313	\$46,136,459
(9)	% of enrolments through at least C1 who did not complete any unit of competency	81.9%	98.9%
(10)	Tuition fees claimed (and not refunded, re-credited or reversed) in respect of enrolments through at least C1 who did not complete any unit of competency	\$5,650,375	\$49,579,168
(11)	% of enrolments through at least C1 who did not complete the course	93.2%	99.7%
(12)	Tuition fees claimed (and not refunded, re-credited or reversed) in respect of enrolments through at least C1 who did not complete the course	\$7,078,250	\$50,063,293

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The primary judge's unchallenged finding was that the two changes to the enrolment and withdrawal processes substantially caused these dramatic changes. The Full Court's unchallenged findings included that the results from the earlier period: (a) reflected poorly on the practices of the College's agents; (b) exposed that many of the persons enrolled were "not 'suitable', in the sense that they either had no interest in undertaking the course for which they were enrolled or had no capability to do so whether as a result of a lack of language, literacy and numeracy skills or technology skills or access";¹⁴ and (c) exposed that of those enrolled persons who passed through the first census date (and incurred a VFH debt), about 82% did not complete any unit of competency and about 93% did not complete the course. In the second, and impugned, period, the Full Court's unchallenged findings included that: (a) the number of enrolments increased by a factor of about 20; (b) the percentage of enrolled persons who withdrew or were withdrawn prior

14 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 215 [112].

to the first census date reduced to about 20%; and (c) the percentages of enrolled persons who passed through the first census date (and incurred a VFH debt) and who never accessed the learning management system, who did not complete any unit of competency and who did not complete the course were, respectively, about 87%, 99% and almost 100%.

Government VFH loan cap

42 On 1 December 2015, the Commonwealth announced a cap on the total VFH loans existing VET providers would be able to issue in 2016.

43 The Department of Education and Training informed Mr Cook on 18 December 2015 that the cap for the College for 2016 would be \$16,818,413. The consequence was that the College could not enrol any new students in 2016. The College ceased enrolling students in its online courses on 18 December 2015.

44 However, the College continued to claim VFH revenue from the Commonwealth, in respect of the persons enrolled between 7 September and 18 December 2015, until September 2016. By the College claiming the VFH revenue, the enrolled person incurred the corresponding debt (plus the 20% loan fee) to the Commonwealth.

Unchallenged conclusions below

45 The primary judge concluded that allowing persons who could not be contacted by the College to remain enrolled beyond the first census date so that the College could claim the VFH revenue from the Commonwealth "was to act against conscience; it was a sharp practice that was manifestly unfair to such [persons]; it was driven by avarice without regard to the interests of such [persons]; it preyed on their vulnerability (being their being prey to CA misconduct, their unsuitability or their uncontactability)".¹⁵

46 The Full Court rejected the challenge to these conclusions, saying:¹⁶

"We reject the appellants' further submission that the primary judge's findings do not demonstrate that the College took advantage of the risk of agent misconduct. The findings demonstrate precisely that, and that is what the primary judge found (at PJ [500]). The risks and problems associated

15 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 571 [500].

16 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 235 [177].

with the VFH scheme and the College's use of agents to recruit students were known to the College. There could not be a more powerful demonstration of the risks and problems than the fact that, prior to the enrolment process changes, about 50% of enrolled students withdrew or were withdrawn before the first census date. This was not merely a theoretical risk; it was a manifest problem. It was plain that the College's agents had been recruiting large numbers of students who did not understand what they were committing to. The College knew that the outbound QA call enrolment procedure and the campus driven withdrawal procedure provided important safeguards against that problem. The catalyst for the College to change its enrolment process and remove those safeguards was the fact that agents were increasingly referring students to VET providers other than the College because they were unhappy with the College's enrolment process, and the College's revenue was declining as a result. The College changed its enrolment process in consultation with its agents to placate its agents. It removed the two safeguards for students with the result that more students would pass through the first census, incurring a VFH debt, and agents would receive more commission. This gave agents the incentive to refer more students to the College. The result was that the College's revenue experienced an exponential increase, brought about by the combined effect of an increased number of students enrolling and a much higher proportion of those students passing the first census. In changing its enrolment process, the College took advantage of the known risks and problems of the VFH scheme and its recruitment system to gain a financial benefit for itself to the disadvantage of persons who enrolled in circumstances where the person did not do so willingly and with full knowledge of the obligation being incurred (the VFH debt) or where the person was unsuitable for enrolment because they lacked sufficient language, literacy or numeracy skills or technology skills or access."

The Full Court noted the email from Mr Cook to, amongst others, Mr Wills on 20 September 2015 saying that there was "already a very robust and rigorous agent selection, on boarding and monitoring process" and that the College was "taking what we believe are the necessary precautions". The Full Court also noted the precautions on which the College relied to defend its conduct, being: (a) contractual obligations in its contracts that required agents to carry out sales fairly, providing accurate information to prospective students; (b) an agent induction and on-boarding process comprised of a training presentation and a knowledge quiz aimed at training agents to act appropriately; (c) maintaining a student complaints register, agent issues and complaints register and CA monitoring log to address agent misconduct; (d) speaking directly to prospective students during the inbound QA call to confirm their contact details and provide information, including withdrawal information, and ascertaining whether prospective students completed the required pre-enrolment questions; (e) a system for admissions officers to flag concerns about a QA call or student, so that

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enrolment was not processed until the concern was resolved; (f) terminating relationships with marketing partners or individual agents when misconduct had been established; and (g) reversing enrolments or reimbursing students' VFH debts in cases in which the College thought CA misconduct had occurred.

48 The Full Court observed, however, that none of these matters, individually or together, were "sufficient to protect students and there was no evidence from the corporate respondents to support any finding that any officer on behalf of the corporate respondents believed that these components operated effectively to protect students".¹⁷ The Full Court concluded that:¹⁸

"the College could not have had any basis for a belief that the elements of its business systems [on which it relied] would materially reduce the risk, which arose from the unethical or careless conduct of recruitment agents and which regularly materialised, of persons being enrolled in the online campus in circumstances where the person does not do so willingly and with full knowledge of the obligation being incurred or where the person is unsuitable for enrolment because they lack sufficient language, literacy or numeracy skills or technology skills or access. Rather, the elements of its business systems that were proven to have materially reduced that risk were the outbound QA call and particularly the campus driven withdrawal process. Under financial pressure brought about by agents bypassing the College because of its more stringent enrolment processes, the College removed those elements of its system."

49 Overall, the Full Court concluded that "the effect of the College's decision to change its enrolment process ... foreseeably, indeed inevitably, inflicted harm on students" and that before 7 September 2015 the College and Mr Wills were "well aware" of the "risk of unwitting or unsuitable students being enrolled in their courses, and the need to take steps to mitigate that risk" as, before that date, the "problem of unwitting and unsuitable students being enrolled at the College was prevalent".¹⁹ The College acted upon the enrolment process changes and took full advantage of the changes and, in so doing, "took advantage of the students who were enrolled as a result of agent misconduct or who were unsuitable for enrolment

17 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 235-236 [178].

18 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 237 [179].

19 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 241 [184], 255 [227].

by maintaining their enrolment and claiming VFH revenue from the Commonwealth".²⁰

The Productivity Partners appeal

The meaning and application of the statutory provisions

50 The College proposed in oral submissions that, as a matter of the proper construction of the statutory provisions, s 22 must limit the scope of s 21 of the ACL. The submission is unsustainable in the face of the clear language of ss 21 and 22.

51 Section 21(1), to the extent relevant, provides that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person engage in "conduct that is, in all the circumstances, unconscionable". Section 21(3)(a) provides that, for the purpose of determining whether a person has contravened s 21(1), a court "must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention". By corollary, for the purpose of determining whether conduct in which a person has engaged is unconscionable, a court can have regard to circumstances that were reasonably foreseeable at the time of the alleged contravention. Section 21(4) relevantly provides that it "is the intention of the Parliament that: (a) this section is not limited by the unwritten law relating to unconscionable conduct; and (b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour".

52 Section 22(1) provides as follows (noting those paragraphs on which the College particularly relied):

"Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the *supplier*) has contravened section 21 in connection with the supply or possible supply of goods or services to a person (the *customer*), the court may have regard to:

- (a) the relative strengths of the bargaining positions of the supplier and the customer; and
- (b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not

20 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 246 [198].

15.

reasonably necessary for the protection of the legitimate interests of the supplier; and

- (c) whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services; and
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and
- (e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier; and
- ...
- (g) the requirements of any applicable industry code; and
- ...
- (i) the extent to which the supplier unreasonably failed to disclose to the customer:
 - (i) any intended conduct of the supplier that might affect the interests of the customer; and
 - (ii) any risks to the customer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the customer); and
- ...
- (l) the extent to which the supplier and the customer acted in good faith."

53 Faced with the opening words to s 22(1) ("[w]ithout limiting the matters to which the court may have regard for the purpose ..."), the College retreated in oral argument to the conventional observation that s 22 gives guidance to the content of the norm established by s 21,²¹ but sought to elevate that guidance so that the

21 eg, *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at 37 [83], 38 [87], 49 [120], 60-61 [154]-[155], 105 [302]; *Stubbings v Jams 2 Pty Ltd* (2022) 276 CLR 1 at 26-27 [57]-[58].

presence or absence of each matter specified in s 22(1)(a)-(l) constituted, in and of itself, a mandatory relevant consideration to be weighed in the circumstances of every case.

54 The College's gloss on the conditional operation of the word "may" in s 22(1) ("... the court may have regard to ...") disregards five key aspects of the provisions.

55 First, while the word "may" in s 22(1) ("... the court may have regard to ...") is to be understood as a conditional and not a permissive expression²² – meaning that the "court must take into account each of the considerations identified in [s 22(1)] if and to the extent that they apply in the circumstances"²³ – that is not the same as the presence or absence of each matter in s 22(1)(a)-(l) being, in and of itself, a mandatory relevant consideration irrespective of the circumstances.

56 Second, the matters in s 22(1)(a)-(l) are non-exhaustive. As such, they embody "the values and norms recognised by the statute" by reference to which "each matter must be judged" to the extent that it "appl[ies] in the circumstances".²⁴

57 Third, it is the totality of the circumstances relevant to the conduct being considered (as required by s 21(1)) which dictates if any matter in s 22(1)(a)-(l) is applicable. If applicable, that matter must be considered. If not applicable, the matter need not be considered (subject, of course, to a judge's duty to give reasons addressing any substantial argument put during the hearing, a principle not raised in the present appeals).

58 Fourth, and confirmatory of this understanding of the provisions, is that the matters in s 22(1)(a)-(l) are of a nature that may or may not be engaged in any given circumstances (for example, that there is no applicable industry code in a given case as specified in s 22(1)(g), in the ordinary course, would disclose nothing beyond that fact and therefore nothing capable of being weighed in the overall evaluation). This explains why the correct approach to s 22(1)(a)-(l) is that the

22 *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 at 587 [189], 620 [294].

23 *Stubbings v Jams 2 Pty Ltd* (2022) 276 CLR 1 at 26 [57].

24 *Stubbings v Jams 2 Pty Ltd* (2022) 276 CLR 1 at 26 [57].

matters specified must be considered "if and to the extent that they apply in the circumstances".²⁵

59 Fifth, and as the ACCC submitted, the legislature intended s 21 to be applied within the adversarial paradigm of curial proceedings in Australia. Within that paradigm, as the Full Court observed:²⁶

"it is a fundamental principle that a party is bound by the party's conduct of the case below. The parties define the issues to be determined at trial and, in a case brought under s 21 of the ACL, identify by evidence and submissions the matters that the parties contend are relevant to the determination of the case and should be taken into account, including by reference to the matters enumerated in s 22(1). There is no appellable error if a judge fails to take into account a fact or matter that neither party placed reliance upon at trial. In its submissions on this appeal, the appellants failed to identify any submission put to the primary judge with respect to the matters enumerated in s 22(1) that the primary judge failed to take into account."

60 That the presence or absence of each matter in s 22(1) is not a mandatory relevant consideration to be weighed by a court in every case, irrespective of the circumstances, does not mean that the required evaluation involves nothing more than, as the College put it, an "instinctive reaction that the legislation sought to avoid". The normative standard set by s 21(1) is tethered to the statutory language of "unconscionability". While that term is not defined in the legislation and, in its statutory conception, is "more broad-ranging than the equitable principles",²⁷ it expresses "a normative standard of conscience which is permeated with accepted and acceptable community standards",²⁸ and conduct is not to be denounced by a court as unconscionable unless it is "outside societal norms of acceptable commercial behaviour [so] as to warrant condemnation as conduct that is offensive to conscience".²⁹ The items listed in s 22(1)(a)-(l) are matters that the legislation

25 *Stubbings v Jams 2 Pty Ltd* (2022) 276 CLR 1 at 26 [57], referring to *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at 38 [87], 49 [120], 60-61 [154]-[155], 105 [302].

26 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 253 [218].

27 *Stubbings v Jams 2 Pty Ltd* (2022) 276 CLR 1 at 26 [56]. See ACL, s 21(4)(a).

28 *Stubbings v Jams 2 Pty Ltd* (2022) 276 CLR 1 at 26 [57].

29 *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at 40 [92]. See also *Stubbings v Jams 2 Pty Ltd* (2022) 276 CLR 1 at 26-27 [58].

requires to be considered, in the overall evaluation of the totality of the circumstances to be undertaken for the purpose of s 21(1), if and to the extent those matters are applicable. This is why both "close attention to the statute and the values derived from it, as well as from the unwritten law"³⁰ and "close consideration of the facts"³¹ are necessary.

No error in primary judge's approach to s 21(1) by reason of s 22(1)(a)-(l)

61 As the Full Court said, the primary judge's reasons are "lengthy and careful".³² The primary judge closely considered the statutory provisions and the need for a "precise examination of the particular facts"³³ on the basis that "unconscionability is a serious allegation; it is sufficient to warrant censure for the purposes of deterrence by the imposition of a civil penalty; and, being penal in character, tends against too loose or diffuse a construction".³⁴ In undertaking the evaluation, the primary judge also recognised that "it is the system as a whole as constituted by, potentially, many inter-related integers that is to be assessed".³⁵

62 Further, the primary judge was cognisant of and expressly referred to the College's submission that its conduct did not "have the requisite character of being unconscionable by reference to societal norms of acceptable commercial behaviour or the statutory criteria in s 22(1)".³⁶ The primary judge rejected that

30 *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at 60 [153].

31 *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at 74 [217].

32 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 186 [8].

33 *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113 at 118, quoted in *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 492 [70].

34 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 492 [69].

35 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 494 [77].

36 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 572 [509].

submission, correctly explaining numerous factors directly relevant to the matters in s 21 and s 22(1)(a)-(l) including:

- (1) While the fact that no dishonesty was alleged is a relevant factor, "the absence of dishonesty does not mean that the conduct was not unconscionable".³⁷
- (2) It was "not so easy to accept the notion that there was an absence of undue influence, pressure or unfair tactics" given that the College knew its agents "might use undue influence, pressure or unfair tactics on unsuspecting consumers, and indeed the evidence bore out that that form of CA misconduct risk materialised from time to time" and yet the College removed the two key safeguards in any event.³⁸
- (3) While "there is nothing inherently unconscionable about selling an online course by telephone", it was the College's system as a whole, in all of the known and reasonably foreseeable circumstances at the time of the impugned conduct, which was important.³⁹
- (4) It could not be inferred that the College's campus driven withdrawals policy was "consistent with the withdrawal policy of every other VET provider in Australia"⁴⁰ and, in any event, "just because everyone is rorting a poorly designed and/or administered scheme does not mean that no one's rorting is unconscionable".⁴¹
- (5) While the VET Guidelines did not mandate that each VET provider have a campus driven withdrawals policy, and "if particular conduct is not against the rules that may be relevant in the evaluative judgement with regard to

37 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 573 [512].

38 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 573 [513].

39 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 573 [514]-[515]. See ACL, s 21(3)(a).

40 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 574 [516]-[517].

41 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 574 [517].

unconscionability",⁴² it is not determinative. In any event, the VET Guidelines proscribed any "barriers to withdrawal" and abolishing campus driven withdrawals introduced a barrier to withdrawal in the sense that an absence of awareness by a person that they have been enrolled or that they can withdraw constitutes a barrier to withdrawal. In all probability, most persons who had not engaged with the College online and were uncontactable by the College (meaning "numerous telephone calls and emails go unanswered") were likely not to have been aware that they were enrolled.⁴³ For these people, it is wrong to say that the abolition of campus driven withdrawals did not, in practice, introduce any barriers to withdrawal.

- (6) People's personal responsibility and autonomy must be recognised, as "we are indeed free to make our own bad decisions", but the conclusion of unconscionability in this case "no more undermines notions of personal responsibility and autonomy than what Parliament requires by way of offering protection against a particular type of conduct, namely that which is in all the circumstances unconscionable".⁴⁴
- (7) Given that "the pursuit ... for [one's] own advantage is an omnipresent feature of legitimate commerce", the profit-maximisation purpose of the College (and Site) said little about the quality of the conduct as unconscionable or not, but it was not irrelevant. For example, had the College acted intending to protect people from misconduct by agents, but misjudged how to do so leading to adverse effects, "the situation would have been quite different".⁴⁵
- (8) The College's systems included numerous elements that existed before and after the process changes, but the dichotomy between the period before and after 7 September 2015 was not false as the College undertook the changes specifically aimed at reversing the trend of declining market share, knowing "that there was a greater likelihood that unsuitable students would be

42 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 574 [518].

43 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 574 [519].

44 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 575 [521].

45 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 575 [522].

21.

enrolled and that they would progress to census without being withdrawn".⁴⁶

- (9) While there were contractual terms requiring the College's agents to act promptly and honestly, and they received training in that respect, "it was known that there was a risk that they would not act as required".⁴⁷
- (10) The case did not depend on a "false comparator" between the College's processes before and after 7 September 2015 (rather than, as the College argued was the correct approach, a consideration of the College's processes after 7 September 2015 evaluated against societal norms of acceptable commercial behaviour).⁴⁸ Rather, the "fact that the system was changed in material respects and the reasons for those changes, as well as the knowledge and understanding of the [C]ollege as to their predicted and subsequently realised effects, are all part of the relevant circumstances to be taken into account when making the ultimate evaluation".⁴⁹
- (11) Knowledge, intention, and reasonable foreseeability of consequences are all relevant to the required evaluation of the conduct, and consideration of them does not "expand statutory unconscionability into the territory of tort and fiduciary duties".⁵⁰

63

These aspects of the primary judge's analysis expose his Honour's close attention to the values underlying the statutory provisions, including s 22(1)(b), (c), (d), (e), (g), (i), and (l) and the obligation to consider all of the relevant circumstances. The primary judge did not need to cross-refer to each paragraph of s 22(1) to demonstrate that the entirety of his reasons involved a careful application of the provisions to the relevant facts in a manner consistent with authority. The

46 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 576 [526].

47 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 576 [527].

48 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 577 [529].

49 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 577 [530].

50 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 578 [533].

"subject-matter, scope and purpose"⁵¹ of the statutory provisions do not support the contention that the primary judge had to state the matters in s 22(1)(a)-(l) which were inapplicable and give weight to their absence. Further, and as the ACCC put it, the absence of a finding against the College (for example, no finding that it did not act in good faith), in the context of the case as put to the primary judge, cannot be converted into a default finding in favour of the College.

64 For these reasons, the College's first ground of appeal must be rejected.

Risk and intention

65 The College contended that the primary judge and the Full Court erred by acting on the mistaken premise that ss 21 and 22 of the ACL are directed to the protection of people from risk. The contention was that a change to a system that increases a risk that misconduct will not be detected does not contravene s 21(1) of the ACL, at least absent an intention that the misconduct occur. The College supported this contention by pointing to s 22(1)(i)(ii) as the only matter in s 22(1)(a)-(l) referring to the concept of risk.

66 The contention is wrong in principle. It ignores the corollary of s 21(3)(a) that, for the purpose of determining whether conduct in which a person has engaged is unconscionable, regard can be had to circumstances that were reasonably foreseeable at the time of the conduct. An increase in a risk of misconduct being undetected that was reasonably foreseeable at the time of the conduct in question can be considered in determining whether conduct is unconscionable without need for any intention that the misconduct occur.

67 The contention, moreover, is disconnected from the facts. The ordinary meaning of "risk" is a possibility. The two risks in this case – CA misconduct and unsuitable enrolment – were not mere possibilities of the College's business of offering online VET courses. CA misconduct to procure enrolments, and associated unsuitable enrolments, were known to be "manifest", "common-place" and "prevalent" occurrences.⁵² These things occurred, and were known to occur, as an ordinary part of the College's business of offering online VET courses despite the measures the College took to minimise them occurring. They were circumstances endemic to the College's online VET courses against which the College had found it necessary to take action which reduced, but did not eradicate, CA misconduct and unsuitable enrolment. Those endemic circumstances,

51 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40.

52 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 189 [17], 232 [168], 236 [178], 254 [221], 255 [227], 256 [229], 259 [245], 279 [323(b)].

moreover, involved the known fact of real harm to the persons who were enrolled, and who remained enrolled beyond a census date, being the incurrence of the person's VFH debt to the Commonwealth. The case was not one, as the College would have it, of a mere risk involved in a commercial judgment, later shown to be erroneous.

68 The line between, on the one hand, the College intending that its agents commit misconduct to entice people to enrol in its online courses (and intending that unsuitable people be enrolled in its online courses), and, on the other hand, intending to increase the number of enrolled persons who remained enrolled beyond the first census date in order to increase the College's VFH revenue in the context of agent misconduct in enrolling people and unsuitable people being enrolled, is real. But the existence of that line does not negate the force of the findings of the Courts below that the College intended to regain its market share and took advantage of the people who were enrolled as a result of agent misconduct, or who were unsuitable for enrolment, by maintaining their enrolment and claiming VFH revenue from the Commonwealth.⁵³

69 For these reasons, the College's second ground of appeal must be rejected.

The Wills appeal

70 Section 224(1)(e) of the ACL provides that if a court is satisfied that a person has been "in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person" of a provision of, relevantly, Pt 2-2 (which includes s 21), the court may impose a pecuniary penalty in respect of each act or omission by the person to which the section applies, as the court determines to be appropriate. The primary judge concluded that Mr Wills was knowingly concerned in the unconscionable system of conduct or pattern of behaviour of the College from 7 September 2015.⁵⁴ The Full Court concluded that Mr Wills was knowingly concerned in the unconscionable system of conduct or pattern of behaviour of the College from 20 November 2015.⁵⁵

53 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College) [No 3]* (2021) 154 ACSR 472 at 571 [500], 575 [521]; *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 235 [177], 242 [189].

54 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College) [No 3]* (2021) 154 ACSR 472 at 608 [761]-[763].

55 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 189 [16(c)].

Knowledge that conduct was unconscionable not required

71 Mr Wills founded his argument for his first ground of appeal on the proposition that, for a person to be knowingly concerned in another person's contravention of s 21(1) of the ACL, the person must know that the other person's conduct has the character of being unconscionable. The proposition was said to derive from *Giorgianni v The Queen*⁵⁶ and *Yorke v Lucas*.⁵⁷ Mr Wills' argument was that, although the ACCC did not have to prove that Mr Wills subjectively believed the College's conduct was unconscionable, it had to prove that he knew that the conduct had "the character that means it is against conscience". This, Mr Wills said, the ACCC did not plead and made no attempt to prove.

72 Mr Wills' foundational proposition is irreconcilable with the reasoning in *Giorgianni* and *Yorke v Lucas* and is indistinguishable from a proposition rejected in *Rural Press Ltd v Australian Competition and Consumer Commission*,⁵⁸ which was not sought to be re-opened.

73 In *Giorgianni* the offence was driving in a manner dangerous to the public. Section 351 of the *Crimes Act 1900* (NSW) provided that a person who, relevantly, procured the commission of the offence may be indicted, convicted and punished as a principal offender. It was alleged that the defendant, *Giorgianni*, procured the driver to drive the truck with defective brakes and, thereby, to drive in a manner dangerous to the public.⁵⁹ The trial judge had summed up to the jury by reference to what the defendant knew or ought to have known.⁶⁰ Gibbs CJ concluded that:⁶¹

"No one may be convicted of aiding, abetting, counselling or procuring the commission of an offence unless, knowing all the essential facts which made what was done a crime, he intentionally aided, abetted, counselled or procured the acts of the principal offender. Wilful blindness ... is treated as equivalent to knowledge but neither negligence nor recklessness is sufficient."

56 (1985) 156 CLR 473.

57 (1985) 158 CLR 661.

58 (2003) 216 CLR 53.

59 (1985) 156 CLR 473 at 475.

60 (1985) 156 CLR 473 at 476.

61 (1985) 156 CLR 473 at 487-488.

74 Mason J said that "knowledge of all the essential facts giving rise to the dangerous driving is necessary to constitute commission of the offence on the part of [the defendant]", wilful blindness being sufficient to constitute knowledge.⁶²

75 Wilson, Deane and Dawson JJ said that what was required was "knowledge of the essential matters which went to make up the offences of culpable driving on the occasion in question, whether or not [the defendant] knew that those matters amounted to a crime".⁶³ This is because "[i]ntent is required and it is an intent which must be based upon knowledge or belief of the necessary facts".⁶⁴ Accordingly, it "is necessary to distinguish between knowledge of or belief in the existence of facts which constitute a criminal offence and knowledge or belief that those facts are made a criminal offence under the law", knowledge of the law never being required to establish liability under s 351 of the *Crimes Act*.⁶⁵

76 It followed that, for the defendant in *Giorgianni* to be liable as an accessory, it had to be proved that the defendant knew the brakes were defective and could fail in which event the driving of the vehicle would be dangerous and that the defendant procured his employee to drive the truck in that known defective condition. It did not have to be proved that the defendant knew that, if the brakes failed, the driving of the truck in that defective condition would be capable of being or in fact characterised as driving "in a manner dangerous to the public" (as per the offence provision).

77 This accorded with the approach in, amongst other cases, *R v Robert Millar (Contractors) Ltd*⁶⁶ and *R v Glennan*,⁶⁷ both of which are referred to in *Giorgianni*.⁶⁸ In *Robert Millar* the required knowledge to be guilty of procuring death by dangerous driving was knowledge that the tyre was dangerous and therefore created a serious risk to other road users.⁶⁹ In *R v Glennan*, to be an accessory to the commission of the offence of driving with more than the

62 (1985) 156 CLR 473 at 495.

63 (1985) 156 CLR 473 at 500.

64 (1985) 156 CLR 473 at 507.

65 (1985) 156 CLR 473 at 506.

66 [1970] 2 QB 54.

67 [1970] 2 NSW 421.

68 eg *Giorgianni v The Queen* (1985) 156 CLR 473 at 482, 486-487.

69 [1970] 2 QB 54 at 72.

prescribed quantity of alcohol present in the blood, the defendant did not need to know the concentration of alcohol in the driver's blood. Rather, what had to be proved in that regard was that the defendant knew how much alcohol the driver had consumed and encouraged or permitted the person to drive in that known circumstance.⁷⁰

78 In *Yorke v Lucas*, the contravention was engaging in conduct that was misleading or deceptive or likely to mislead or deceive. In that case, the reasoning in *Giorgianni* was applied to the aiding and abetting provision. Mason A-CJ, Wilson, Deane and Dawson JJ said that Lucas, who had communicated the false statements about the business's turnover, "lacked the knowledge necessary to form the required intent".⁷¹ The contravening conduct was the making of false representations, but the fact that Lucas had made the representations did not make him liable as "he had no knowledge of their falsity and could not for that reason be said to have intentionally participated in the contravention".⁷² Their Honours confirmed further that there "can be no question that a person cannot be knowingly concerned in a contravention unless he has knowledge of the essential facts constituting the contravention".⁷³

79 The proposition rejected in *Rural Press* was that accessorial liability in respect of a contravention of a proscription of certain anti-competitive conduct depended on proof of knowledge that the conduct was anti-competitive in the required sense.⁷⁴ Gummow, Hayne and Heydon JJ said that:⁷⁵

"In the end the argument was only that McAuliffe and Law [managers at Rural Press] 'did not know that the principal's conduct was engaged in for the purpose or had the likely effect of substantially lessening competition ... in the market as defined'. It is wholly unrealistic to seek to characterise knowledge of circumstances in that way. Only a handful of lawyers think or speak in that fashion, and then only at a late stage of analysis of any particular problem. In order to know the essential facts, and thus satisfy s 75B(1) of the [*Trade Practices Act 1974* (Cth)] and like provisions, it is

70 [1970] 2 NSW 421 at 426.

71 (1985) 158 CLR 661 at 667.

72 (1985) 158 CLR 661 at 667-668.

73 (1985) 158 CLR 661 at 670.

74 (2003) 216 CLR 53 at 57-58.

75 (2003) 216 CLR 53 at 74 [48] (footnote omitted).

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not necessary to know that those facts are capable of characterisation in the language of the statute."

80 It followed that what had been proved sufficed. Law's and McAuliffe's knowledge that the circulation of the *River News* in the Mannum area competed with the circulation of the *Standard* in that area and their intention that this competition "should come to an end"⁷⁶ meant that each knew the essential elements constituting the contraventions whether or not they knew that "the purpose or effect of the arrangement was substantially to reduce competition in the market ultimately identified in the judgment".⁷⁷

81 The reasoning in *Anchorage Capital Master Offshore Ltd v Sparkes*⁷⁸ does not advance the first ground of Mr Wills' appeal. In that case, in the context of the prohibition on conduct that is misleading or deceptive, the Court of Appeal of the Supreme Court of New South Wales (Ward P, Brereton JA and Griffiths A-JA) referred to the "longstanding controversy as to whether, in order to incur liability as an accessory, knowledge that the representation is false is required (the narrow view), or knowledge of facts which would have falsified the representation if they had been adverted to suffices (the wider view)", noting "authorities supportive of both views".⁷⁹ Their Honours held that, as the case of misleading or deceptive conduct involved a false representation, a person could not be knowingly concerned in that conduct without knowing that the representation was false.⁸⁰ Knowledge of other facts from which it could be inferred or deduced that the representation was false, short of wilful blindness, did not suffice.⁸¹

82 The relevant distinction is not between facts and the law. Nor is it between objective facts and evaluative facts. It is between the essential matters constituting the contravention (be they facts, circumstances, or states of mind) and the character, quality, nature, or status of those matters for the purpose of the

76 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 281 [155].

77 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 284 [163].

78 (2023) 111 NSWLR 304.

79 (2023) 111 NSWLR 304 at 360 [329].

80 (2023) 111 NSWLR 304 at 365 [342]-[343].

81 (2023) 111 NSWLR 304 at 359-360 [329]-[330].

characterisation of the conduct the statute requires. For accessory liability, knowledge of the former is required but knowledge of the latter is not.

83 This is why the Court of Appeal of the Supreme Court of New South Wales was right in *Anchorage Capital* to conclude that the alleged accessories had to know that the representation was false and the circumstances in which the representation was made. But in saying that "[w]here the contravention is the prohibition on engaging in misleading or deceptive conduct, one can be 'knowingly concerned' in it only if one knows that the conduct is misleading or deceptive",⁸² their Honours are not to be misunderstood as saying that the person had to know that the conduct (the false representation) was capable of being, or would be characterised as, misleading or deceptive or as conduct proscribed by s 18 of the ACL. In context, it is apparent that their Honours meant only that the person had to know the representation was false (mere knowledge of facts from which a person might have deduced or inferred falsity being insufficient) and the circumstances in which the representation was made. Knowledge of the potential or actual character, quality, nature, or status of the conduct as misleading or deceptive for the purposes of the statutory prohibitions against such conduct was not required.

84 For these reasons, Mr Wills' first ground of appeal must be rejected. It also follows that the third consequential ground of appeal in the Productivity Partners appeal relating to Site's liability (through Mr Wills) must be rejected.

Time from which Mr Wills had required knowledge

85 Mr Wills' second ground of appeal (which depends on the Full Court finding that Mr Wills only had the requisite knowledge to be knowingly concerned in the College's contravention from 20 November 2015 onwards) cannot be maintained if the ACCC's notice of contention (that the Full Court erred in so finding and that the primary judge was correct that Mr Wills had the requisite knowledge from 7 September 2015 onwards) is upheld. As such, the ACCC's notice of contention should be determined first.

86 The Full Court correctly identified that the language used in s 224(1)(e) of the ACL, of a person "in any way, directly or indirectly, knowingly concerned in, or party to, the contravention" is "not confined to a person who physically or practically undertakes the unlawful conduct, but extends to a person who is in a position of authority and expressly or implicitly approves or assents to the unlawful conduct".⁸³ It also observed the relevant fact that Mr Wills chose not to give

82 (2023) 111 NSWLR 304 at 360 [330].

83 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 266 [279].

evidence and that the primary judge inferred as a result that Mr Wills' evidence would not have assisted his case.⁸⁴

87 The Full Court agreed with the primary judge that from 7 September 2015 Mr Wills knew: (a) of the CA misconduct risk; (b) of the unsuitable enrolment risk; (c) of the implementation of the enrolment process changes (the abolishment of the outbound QA call and campus driven withdrawal processes); (d) that those changes were being made to reverse the College's declining enrolments and conversion rate; and (e) that the changes would likely lead to a substantial increase in the number of students who became enrolled in an online course, in the number and proportion of students who passed at least the first census, and in the revenue of the College.⁸⁵

88 The Full Court considered, however, that Mr Wills was only "knowingly" concerned in the College's contraventions from 20 November 2015 and not from 7 September 2015 because the primary judge's findings did not "support a conclusion that, as at 7 September 2015, Mr Wills had a sufficient awareness of the extent to which the outbound QA call procedure and the campus driven withdrawal process were important safeguards to protect the interests of students who were enrolled unwittingly or who were unsuitable for the course in which they were enrolled".⁸⁶ The Full Court said further that "[c]ertainly, it can be inferred that Mr Wills had some awareness of that fact by virtue of the Sero campus investigation. However, we consider that to be an insufficient basis to infer that Mr Wills had a real appreciation, as at 7 September 2015, of the full consequences of the changes."⁸⁷ The "Sero campus" was an online campus managed by a third party, Sero Learning Pty Ltd, on behalf of the College, which had been the subject of an investigation by the College in November 2014. That investigation revealed that about 85% of Sero's enrolled students were passing through their first census date without ever having accessed the online learning management system because, as recognised within the College, the Sero campus was "not doing campus driven withdrawal and just processing through census regardless".

84 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 267 [281].

85 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 287 [339].

86 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 287 [340].

87 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 287 [340].

89 The Full Court's conclusion about Mr Wills' insufficient awareness of the "full consequences of the changes" imposes too high a bar on his knowing participation in the College's contraventions and, in any event, does not accurately reflect the full import of the primary judge's findings in the context of Mr Wills' choice not to give evidence. Mr Wills did not need to know the "full consequences of the changes" as those "full consequences" (at least in the sense of the number of unsuitable students enrolled and remaining enrolled at the first census date and thereby incurring a VFH debt) were not essential to the contravention.

90 Moreover, the primary judge had found that as at 7 September 2015 Mr Wills was aware that: (a) the abolishment of the outbound QA call and campus driven withdrawals would remove mechanisms to mitigate the CA misconduct risk;⁸⁸ and (b) these changes "would likely lead to the process changes results".⁸⁹ The "process changes results", in this context, means the vast increase in the number of people being enrolled and remaining enrolled at the first census date without the College being able to contact them.⁹⁰ So much is apparent from the primary judge's other findings that:

- (1) In December 2014 Mr Wills had been party to a "thorough discussion" about the Sero investigation, which showed that 84.7% of people enrolled in the Sero campus were remaining enrolled at the first census date for the course and incurring a VFH debt whilst being uncontactable by the College and never having accessed the online system, a circumstance which the College's own "rigorous QA process" would not have permitted to occur.⁹¹
- (2) Mr Wills was "well aware that there was an ongoing risk of CA misconduct and that that misconduct could significantly harm the interests of substantial numbers of consumers ... deceived or confused into enrolling".⁹² While the primary judge does not specify a date for this awareness, the evidence of

88 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 583 [564].

89 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 583 [565].

90 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 283 [327].

91 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 512 [182], 513 [184]-[185].

92 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 517 [204].

Mr Wills' involvement in the College's business before 7 September 2015, which immediately precedes this observation, does not permit an inference of such awareness only after that date. This inference is also confirmed by the next relevant finding.

- (3) "The evidence identified above demonstrates that during the earlier period the college was well aware of the risk of unsuitable students being enrolled in their courses, and the need to take steps to mitigate that risk. [Mr] Wills was also aware of this risk from, at least, the discussion of the report in the Advisory Board on 12 May 2015, circulation of the Senate inquiry report by him on 16 June 2015, or Mr Coward [Site's quality and compliance manager] emailing Mr Wills about the internal audit in August 2015."⁹³

91 The primary judge's conclusion that it was not "established on the evidence that Mr Wills was necessarily aware that the poor conversion rate was because of the high proportion of students who were uncontactable and who were therefore subject to campus driven withdrawal"⁹⁴ did not undermine the force of these other findings. Nor did it undermine the force of the Full Court's own observation that Mr Wills was actively involved in management and oversight of the College from his role on the Advisory Board established in May 2014, and in its meetings from July 2015, and the Full Court's reference to the unchallenged findings below that Mr Wills was "a key driver of changes at the College to improve its financial performance and while he was not the architect of the enrolment process changes, the relevant decisions were reported to him and he oversaw their implementation ... and was a participant in key aspects of it".⁹⁵

92 In circumstances where Mr Wills chose not to give evidence, it is not possible to reconcile the Full Court's acceptance of what Mr Wills did know as at 7 September 2015 – including that "the changes would likely lead to a substantial increase in the number of students who became enrolled in an online course, in the number and proportion of students who passed at least the first census and in the

93 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 519 [220]. See also 518 [213].

94 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College)* [No 3] (2021) 154 ACSR 472 at 520 [223].

95 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 221 [127].

revenue of the College"⁹⁶ and that the changes were "being made to reverse the College's declining enrolments and conversion rate"⁹⁷ – with its conclusion that as at that date he had insufficient knowledge of the "extent to which the outbound QA call procedure and the campus driven withdrawal process were important safeguards" against agent misconduct and unsuitable enrolments.⁹⁸

93 Mr Wills' knowledge before 7 September 2015 of the CA misconduct risk and the risk and fact of unsuitable enrolments causing a high percentage of people enrolled at the Sero campus to incur a VFH debt without being contactable by Sero or once engaging with their unit of study, together with his intention that the College's barriers to enrolled persons remaining enrolled at the first census date had to be removed to increase falling enrolments and VFH revenue of the College, were more than sufficient to establish that he was knowingly concerned in the College's contravention of s 21 of the ACL from 7 September 2015.

94 For these reasons, the ACCC succeeds in its notice of contention and Mr Wills' second ground of appeal must be rejected. It also follows that Mr Wills' third and derivative ground of appeal is rejected.

Orders

95 As the orders of the Full Court setting aside the relevant declarations of the primary judge were based on matters other than the Full Court's view that Mr Wills was not knowingly concerned in the College's contravention of s 21 of the ACL until 20 November 2015,⁹⁹ it is sufficient to order that both appeals be dismissed with costs.

96 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 283 [327].

97 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 287 [339].

98 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 287 [340].

99 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 188-189 [16].

- 96 GORDON J. These appeals raise two important, and related, matters. The first addresses why the system of conduct or pattern of behaviour engaged in by Productivity Partners Pty Ltd ("the College") was in all the circumstances unconscionable contrary to s 21 of the *Australian Consumer Law*¹⁰⁰ ("the ACL"). The second addresses why Mr Wills – and, through him, Site Group International Limited ("Site") – was knowingly concerned in that contravention from 7 September 2015.

Statutory framework

- 97 Section 21(1) of the ACL prohibits persons from engaging "in conduct that is, in all the circumstances, unconscionable", in connection with, relevantly, the supply of services to a person in trade or commerce. "Unconscionable" is not defined in the ACL. It is not limited by the unwritten law relating to unconscionable conduct,¹⁰¹ a reference to the equitable doctrine of unconscionable conduct.¹⁰² "The statutory conception of unconscionability is more broad-ranging than the equitable principles; it does something more".¹⁰³ So, for example, the prohibition can apply "to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour".¹⁰⁴
- 98 "[T]he courts must give effect to what Parliament has enacted" in s 21(1).¹⁰⁵ That provision "prescribe[s] [the] normative standard of conduct" that "[t]he court needs to administer".¹⁰⁶ Section 21(1), like equity, directs courts to assess unconscionability – to administer a normative standard of conduct – "in all the

100 *Competition and Consumer Act 2010* (Cth), Sch 2.

101 ACL, s 21(4)(a).

102 *Stubbings v Jams 2 Pty Ltd* (2022) 276 CLR 1 at 26 [56].

103 *Stubbings* (2022) 276 CLR 1 at 26 [56]. See also *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at 37 [83], 38-39 [87]-[89], 56 [144], 102 [295].

104 ACL, s 21(4)(b). See also *Australian Securities and Investments Commission Act 2001* (Cth) ("ASIC Act"), s 12CB(1)(a) read with s 12CB(4)(b).

105 *Kobelt* (2019) 267 CLR 1 at 49 [119].

106 *Kobelt* (2019) 267 CLR 1 at 38 [87]. See also *Good Living Company Pty Ltd v Kingsmede Pty Ltd* (2021) 284 FCR 424 at 429 [8].

circumstances".¹⁰⁷ The court "must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention".¹⁰⁸ By implication, the court "may have regard to circumstances that were reasonably foreseeable" at the time.¹⁰⁹

99 Section 22(1) states that "[w]ithout limiting the matters to which the court may have regard for the purpose of determining whether a person ... has contravened section 21 ... the court may have regard to" various factors enumerated in that sub-section. While the s 22 factors are "mandatorily to be taken into account" when "determining the statutory question posed by" s 21(1),¹¹⁰ that is only "if and to the extent that they apply in the circumstances".¹¹¹

100 The s 22 factors are non-exhaustive. They provide "express guidance as to the *norms and values* that are relevant" to, and inform the meaning of, "unconscionable" in s 21(1) and its practical operation.¹¹² These norms and values include "certainty in commercial transactions, honesty, the absence of trickery or sharp practice, fairness when dealing with customers, the faithful performance of bargains and promises freely made" and the protection of the vulnerable.¹¹³

101 As was explained in *Stubbings v Jams 2 Pty Ltd*,¹¹⁴ the s 22 factors "assist in 'setting a framework for the values that lie behind the notion of conscience

107 *Kobelt* (2019) 267 CLR 1 at 38 [87], 39 [89], 60 [154]. See also *Stubbings* (2022) 276 CLR 1 at 26 [57]; *Good Living* (2021) 284 FCR 424 at 429 [8].

108 ACL, s 21(3)(a).

109 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 226 [155].

110 *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 at 587 [189]. See also *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421 at 439 [72]; *Australian Competition and Consumer Commission v Medibank Private Ltd* (2018) 267 FCR 544 at 608 [252].

111 *Stubbings* (2022) 276 CLR 1 at 26 [57]. See also *Kobelt* (2019) 267 CLR 1 at 38 [87], 49 [120], 60-61 [154]-[155], 104-105 [302].

112 *Kobelt* (2019) 267 CLR 1 at 60 [154], quoting *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 270 [279] (emphasis added). See also *Stubbings* (2022) 276 CLR 1 at 26 [57].

113 *Kobelt* (2019) 267 CLR 1 at 17 [14], citing *Paciocco* (2015) 236 FCR 199 at 274 [296].

114 (2022) 276 CLR 1 at 26 [57].

identified in [s 21]". The s 22 factors "assist in evaluating whether the conduct in question is 'outside societal norms of acceptable commercial behaviour [so] as to warrant condemnation as conduct that is offensive to conscience'".¹¹⁵

102 The ACL does not require a plaintiff in every case to "plead and adduce evidence of facts directed to" the factors in s 22(1). Nor is there warrant for construing the factors in s 22 as "statutory criteria" that set the metes and bounds within which the normative standard prescribed by s 21(1) is to be applied. Neither the text or context of ss 21 and 22 of the ACL, nor the authorities that have considered those provisions, provide any support for that approach.

103 To treat the matters in s 22 as a mandatory set of factors to be applied mechanistically when analysing whether s 21 has been contravened would be contrary to the text of the ACL. It would impermissibly limit the court's capacity to consider the totality of the circumstances that might render a particular person's conduct, system of conduct or pattern of behaviour unconscionable. Those circumstances "include",¹¹⁶ but are expressly not limited to, the s 22 factors. The appellants' construction of ss 21(1) and 22(1) is irreconcilable with the text of those sub-sections.

104 Unconscionability has been described as "a normative standard of conscience which is permeated with accepted and acceptable community standards".¹¹⁷ But, as we know, values, norms and community expectations can develop and change over time: "[c]ustomary morality develops 'silently and unconsciously from one age to another', shaping law and legal values".¹¹⁸ Indeed, standards from earlier times can be, in some respects, rougher and, in other respects, more fastidious. Different standards of commercial morality apply in other lands.¹¹⁹

105 The legal norm of conduct created by s 21 should not be confused with the factual evaluation of its satisfaction. The factual context – the totality of the

115 *Stubbings* (2022) 276 CLR 1 at 26-27 [58].

116 *Good Living* (2021) 284 FCR 424 at 429 [8].

117 *Stubbings* (2022) 276 CLR 1 at 26 [57].

118 Cardozo, *The Nature of the Judicial Process* (1921) at 104-105, cited in *Paciocco* (2015) 236 FCR 199 at 265 [258], citing *Paciocco v Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249 at 309 [285], which in turn cited *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* (2013) ATPR ¶42-447 at 43,463 [23].

119 *Paciocco* (2015) 236 FCR 199 at 275 [301], citing *Harry v Kreutziger* (1978) 95 DLR (3d) 231.

circumstances – is vital to understand "what, in any case, is required to be done or not done to satisfy the normative standard".¹²⁰ The court makes an evaluative judgment as to whether conduct is, in all the circumstances, unconscionable. This evaluative judgment is not confined to or arrived at by the "mere balancing" of the factors identified in s 22(1).¹²¹ Nor should it be approached mechanistically by way "of deductive reasoning predicated upon the presence or absence of fixed elements or fixed rules".¹²² Such an approach is the antithesis of the mode of analysis engaged in by Courts of Equity,¹²³ which has been recognised as the appropriate mode of analysis where a court is performing the task of determining whether a statutory prohibition against unconscionable conduct has been contravened.¹²⁴ Assessing statutory unconscionability "calls for a precise examination of the particular facts".¹²⁵ It requires a comprehensive view that "looks to every connected circumstance that ought to influence [the court's] determination upon the real justice of the case".¹²⁶

Systemic unconscionability

106 Something more should be said about the fact that the prohibition can apply "to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour".¹²⁷ Section 21(4)(b) makes clear that "the focus of the provisions is on conduct that may be said to offend against good conscience", rather than the specific "characteristics of any possible 'victim' of the conduct (though these may

120 *Paciocco* (2015) 236 FCR 199 at 273 [290].

121 See, eg, *Kobelt* (2019) 267 CLR 1 at 43 [101], 59 [153].

122 *Kobelt* (2019) 267 CLR 1 at 59 [153], quoting *Paciocco* (2015) 236 FCR 199 at 276 [304]. See also *Ali v Australian Competition and Consumer Commission* (2021) 394 ALR 227 at 305 [299].

123 *Jenyns v Public Curator (Q)* (1953) 90 CLR 113 at 119, quoting *The "Juliana"* (1822) 2 Dods 504 at 521 [165 ER 1560 at 1567]. See also *Kobelt* (2019) 267 CLR 1 at 49 [120], 58-59 [150].

124 See, eg, *Kobelt* (2019) 267 CLR 1 at 58-59 [150].

125 *Jenyns* (1953) 90 CLR 113 at 118.

126 *Jenyns* (1953) 90 CLR 113 at 119, quoting *The "Juliana"* (1822) 2 Dods 504 at 521 [165 ER 1560 at 1567], quoted in *Kobelt* (2019) 267 CLR 1 at 58-59 [150]. See also *Productivity Partners* (2023) 297 FCR 180 at 190 [20].

127 ACL, s 21(4)(b). See also ASIC Act, s 12CB(1)(a) read with s 12CB(4)(b).

be relevant to the assessment of the conduct)".¹²⁸ Because a specific person need not be identified, "special disadvantage of an individual is not a necessary component of the prohibition".¹²⁹ Importantly, in "remov[ing] the necessity for revealed disadvantage to any particular individual",¹³⁰ the focus is less on a "particular event" or transaction, and more on "an abstraction o[r] a generalisation as to method or structure" of the contravener's activities.¹³¹

107 As many of the s 22 factors presuppose the existence of a particular individual and transaction, the concept of systemic unconscionability in s 21(4)(b) invokes a de-individualised mode of analysis.¹³² The text of s 21(4)(b) reinforces the view that the s 22 factors provide a framework for the values that lie behind the notion of conscience identified in s 21 and not a mandatory set of factors to be applied in every case.

108 The focus on the "method or structure"¹³³ of the contravener's activities in addressing the statutory prohibition is important. Section 21(4)(b) refers to a "system of conduct" or "pattern of behaviour". A "system of conduct" connotes "an internal method of working" or a plan of procedure.¹³⁴ Such a system may develop organically as a practice, operate at a level of policy or be a combination of practice and policy.¹³⁵ Corporations "think" and act through systems.

128 See Australia, House of Representatives, *Competition and Consumer Legislation Amendment Bill 2011*, Explanatory Memorandum at 21 [2.21], which is cited in *Kobelt* (2019) 267 CLR 1 at 78 [232]. See also *Kobelt* (2019) 267 CLR 1 at 56 [143]; *Stubbings* (2022) 276 CLR 1 at 25-26 [55].

129 *Stubbings* (2022) 276 CLR 1 at 26 [55], citing *Kobelt* (2019) 267 CLR 1 at 78 [232], 101 [293].

130 *Unique International College Pty Ltd v Australian Competition and Consumer Commission* (2018) 266 FCR 631 at 654 [104].

131 *Unique* (2018) 266 FCR 631 at 654 [104]. See also *Stubbings* (2022) 276 CLR 1 at 26 [55].

132 See, eg, *Paciocco* (2015) 236 FCR 199 at 275 [299], 278 [309]; *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (in liq) (formerly Advanced Medical Institute Pty Ltd)* [2015] FCA 368 at [942].

133 *Unique* (2018) 266 FCR 631 at 654 [104].

134 *Stubbings* (2022) 276 CLR 1 at 25-26 [55]. See also *Kobelt* (2019) 267 CLR 1 at 56 [143], citing *Unique* (2018) 266 FCR 631 at 654 [104].

135 Bant, "Systems Intentionality: Theory and Practice", in Bant (ed), *The Culpable Corporate Mind* (2023) 183 at 190-195.

Systems are inherently purposive. Systems are objectively designed to achieve certain ends;¹³⁶ they coordinate and connect steps and processes to an end. Knowledge of certain matters is often implicit in a system – for example, that a predatory business model will only be profitable if a certain class of vulnerable customer exists and is successfully exploited.¹³⁷

109 As Professor Bant has explained, a corporate system can be understood as a manifestation of corporate intentionality.¹³⁸ That is, "corporations *manifest* their intentions through the systems of conduct that they adopt and operate, both in the sense that any system *reveals* the corporate intention and in the sense that it *embodies* or *instantiates* that intention".¹³⁹ And to better understand the characteristics of a system of conduct, it is often useful to reflect on related concepts such as practices, processes or methods, policies and patterns of behaviour. A "pattern of behaviour" or conduct has been said to connote the external, observable repetition of events.¹⁴⁰ It may signify a sequence of events on which a prediction of successive or future events may be based.¹⁴¹ In the context of the ACL, that is unsurprising. As we have seen, the court may have regard to circumstances that were "reasonably foreseeable" at the time.¹⁴²

110 Evidence of a system of conduct can be both internal and external to the corporation. Internally it may include employee testimony, internal scripts, remuneration or promotion criteria, complaint processes and scripts, audit outcomes, and default settings on automated programs. Externally it may include patterns of harm to an identified class of customer, communications, incentives

136 Bant, "Systems Intentionality: Theory and Practice", in Bant (ed), *The Culpable Corporate Mind* (2023) 183 at 187.

137 See, eg, *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132 at 140 [33], 142 [40].

138 Bant, "Systems Intentionality: Theory and Practice", in Bant (ed), *The Culpable Corporate Mind* (2023) 183 at 196-207.

139 Bant, "Systems Intentionality: Theory and Practice", in Bant (ed), *The Culpable Corporate Mind* (2023) 183 at 187 (emphasis in original).

140 *Stubbings* (2022) 276 CLR 1 at 25-26 [55]. See also *Kobelt* (2019) 267 CLR 1 at 56 [143], citing *Unique* (2018) 266 FCR 631 at 654 [104]. See also Bant, "Systems Intentionality: Theory and Practice", in Bant (ed), *The Culpable Corporate Mind* (2023) 183 at 199.

141 Bant, "Systems Intentionality: Theory and Practice", in Bant (ed), *The Culpable Corporate Mind* (2023) 183 at 191.

142 See [98] above.

and disincentives provided to a target market, and user experiences. Those lists are not exhaustive. In determining whether an identified system of conduct is unconscionable contrary to s 21 of the ACL, identification, assessment and characterisation of the system of conduct is, by reference to the totality of the circumstances, both internal and external to the corporation.

111 As will be seen in this case, the College's system was designed (or rather a system of controls was dismantled) to achieve a particular end. The College dismantled a system of controls it knew minimised exploitation of students and did so to increase the College's profit. The Court can and should infer that the College intended this end from the design of its system.

VFH scheme

112 It is necessary to say something at the outset about the VET FEE-HELP ("VFH") scheme – the Vocational Education and Training Fee Higher Education Loan Program – which formed the critical backdrop to the alleged unconscionable conduct on the part of the College. The VFH scheme was administered by the Commonwealth Department of Education and Training ("the Department"). Established by the *Higher Education Support Act 2003* (Cth), the scheme provided for the Commonwealth to pay, in full, tuition fees for any approved course, on the basis that the amounts paid would be treated as a loan to the student, such loan to be repayable through the taxation system once the student earned above a specified income threshold (at the time set at approximately \$54,000). The scheme was designed to be a pathway into further higher education. In 2012, amendments were made to the scheme to broaden the demographics of students who qualified for assistance. This was for the express purpose of addressing low participation rates from identified demographic backgrounds including Indigenous Australians, people from non-English-speaking backgrounds, with disability, from regional and remote areas, or from low socio-economic backgrounds, and people not currently employed.

113 Under the scheme, a person's entitlement to VFH assistance was conditional, relevantly, on being enrolled in a vocational education and training ("VET") unit and remaining enrolled at the end of the relevant census date; and completing a request for Commonwealth assistance form on or before that date. VET providers, of which the College was one, were required to determine a "census date" for each unit of study in accordance with the VET Guidelines made by the Minister. At the relevant time, the VET Guidelines provided that the census date must not occur less than 20 per cent of the way between the VET unit of study commencing and the completion date.

114 The scheme provided for the Commonwealth to lend the student the amount of the VFH assistance and pay the loaned amount direct to the education provider in discharge of the student's liability to pay their VET tuition fee for the unit of study. If the Commonwealth made such a payment, the amount of the student's

VFH debt was 120 per cent of the tuition fee because there was a 20 per cent "loan fee". The VFH debt was incurred immediately after the census date for the unit of study.

115 A VET provider was required to repay any VET tuition fees paid by a student for a VET unit of study if the student withdrew on or before the census date. Thus, a student could withdraw from a VET unit of study on or before the census date without incurring any financial liability to the VET provider or to the Commonwealth.

116 The College carried on a business providing VET courses to students (or "customers" in the language of s 22 of the ACL). Site is the parent company of the College. The College was a Registered Training Organisation. Consequences of that status included that students who enrolled in its courses were eligible for Commonwealth fee assistance or a Commonwealth loan under the VFH scheme. These appeals concerned the College's online campus.

College's enrolment process changes

117 Prior to 7 September 2015, the College's enrolment process for its online campus comprised, amongst other things, an outbound quality assurance ("QA") call and a campus driven withdrawal process. The outbound QA call was made by the College's admissions officers to prospective students, generally 48 hours after they had submitted their enrolment documents. The call was guided by a short script and involved checking, amongst other things, the student's understanding of the costs of the course and their liability to the Commonwealth under the VFH scheme, as well as their suitability for enrolment. The "campus driven withdrawal process" was an online mechanism by which the College monitored student engagement during the first weeks of study and withdrew any students who were not contactable during that period before their census date.

118 On 7 September 2015, the College altered this process. First, it replaced the outbound QA call with an inbound QA call, which was initiated by and conducted in the presence of the course advisor who had recruited the student. Second, it abolished the campus driven withdrawal process.

119 These measures mitigated two known risks that were arising within the VFH sector and the College's own business at the time. The first was the risk that "course advisors" (in effect marketing agents or introducers), who marketed VET providers to potential students and who recruited students for study, might engage in unethical or careless conduct in recruiting students, with the consequence that students might be enrolled unwillingly or without full knowledge of the financial obligation they would be incurring to the Commonwealth ("the CA Misconduct Risk"). At all relevant times in the lead-up to and during the impugned conduct

period,¹⁴³ the College engaged course advisors to market to and recruit potential students; those course advisors were non-exclusive and were utilised by competitors. As at August 2015, more than 90 per cent of enrolments at the College were sourced via course advisors. Course advisors received a commission of 20 per cent of the applicable course fee when students passed their census dates. The primary judge found that these commission structures strongly incentivised course advisors to recruit students and ensure that they passed at least their first census dates and incurred VFH debts.

120 The second risk was the risk that students who lacked sufficient language, literacy or numeracy skills or technology access or skills to undertake the online course enrolled for a course (and thus incurred VFH debts) ("the Unsuitable Enrolment Risk"). This risk was particularly pronounced in the context of the College's online campus, as the College had no face-to-face contact with students and only dealt with students online or via telephone.

121 The Full Court held that these risks were inherent in the scheme. As the majority of the Full Court explained, both categories of risk concerned persons being enrolled in online courses where they did not do so willingly and with full knowledge of the VFH debt being incurred, or where they were unsuitable for enrolment because they lacked sufficient skills (referred to collectively as "unwitting or unsuitable students").

College's unconscionable conduct

122 The majority of the Full Court relevantly concluded that for the impugned conduct period – between 7 September 2015 and September 2016:¹⁴⁴

"[H]aving conducted a close review of the evidence and the reasons of the primary judge, we find no error in the primary judge's reasoning and conclusions. In our view, the College's conduct should be condemned as unconscionable. The College knew of *the risk and prevalence of misconduct by recruitment agents and the enrolment at the College's online campus of unwitting or unsuitable students*. Despite that knowledge, at the behest of agents and in the pursuit of increased enrolments (and the resulting VFH revenue), the College altered its enrolment processes in a manner that weakened its existing safeguards against the occurrence of agent misconduct and against the enrolment of *unwitting or unsuitable students*. It was entirely foreseeable that the College's conduct would result in large numbers of students being enrolled in the online campus in circumstances where the student did not do so willingly and with full

143 The period between 7 September 2015 and September 2016.

144 *Productivity Partners* (2023) 297 FCR 180 at 189 [17] (emphasis added).

knowledge of the obligation being incurred (the VFH debt) or where the student was unsuitable for enrolment because they lacked sufficient language, literacy or numeracy skills or technology skills or access. What was entirely foreseeable came to pass, to the enrichment of the College and the harm to thousands of persons who should never have been enrolled at the College's online campus."

123 The College sought to overturn the Full Court's finding of unconscionable conduct on two bases. The first was to contend that the primary judge was required to address, mechanistically, each of the s 22 factors. As explained above, that approach is contrary to the text, context and purpose of ss 21 and 22 of the ACL. That appeal ground must fail.

124 The College's second basis of attack was to contend that the Full Court erred in holding that the College's conduct, in removing the system controls or safeguards and operating an enrolment system without those controls, in the *absence of an intention* that the risks ameliorated by those controls would eventuate, was unconscionable conduct in contravention of s 21 of the ACL. That is, the College submitted that the finding that the College's system of conduct was unconscionable was not open in the absence of an intention on the part of the College that the risks would materialise and, in particular, that course advisor misconduct would occur. It was not sufficient that the changes to the enrolment system increased the risk that that misconduct would go undetected. That ground also fails.

Significance of risk

125 The College in effect submitted that it cannot be unconscionable, within the meaning of s 21, to fail to protect customers from risks – or, put more accurately, to remove system controls that protect customers from those risks – in circumstances where: the extent of the risks was uncertain; the consequences of removing the system controls – namely, the rapid increase in the number of unwitting or unsuitable students – were not known when the changes were implemented; and the risks were not created by the College or its enrolment system but were inherent in the VFH scheme. That is because (the argument continued) it involves the court making "a value judgment as to an appropriate standard of competence in commercial conduct" in the context of risk management, which is inappropriate because unconscionability is "not a standard attracted by imperfect systems or carelessness".

126 The College mischaracterises the role that risk played in the case alleged and found against the College.

Knowledge of risks

127 Prior to 7 September 2015, the CA Misconduct Risk and the Unsuitable Enrolment Risk were not mere possibilities whose likely consequences were unknown and whose significance could only be assessed in hindsight. The College knew that these risks were regularly materialising in, and were a manifest problem for, the VFH sector at large *and* in its own business. It also knew of the need to take steps to mitigate those risks. There were external and internal indicators of the identified risks, of which the College was aware.

128 In relation to the CA Misconduct Risk, the College knew that course advisors across the industry, including those acting for its own business, were engaging in unethical practices to recruit students. The College's own complaints registers and other records identified numerous instances of course advisor misconduct. Between 2014 and 2016, the College recorded more than 200 complaints on its registers. The College's internal documents referred to media reporting (from October 2014, February 2015 and September 2015) on unethical behaviour by course advisors in the industry.

129 In relation to the Unsuitable Enrolment Risk, the results of an audit of the Sero online campus ("the Sero Audit") – which were discussed at internal meetings in December 2014 and February 2015 – recorded very high rates of disengaged students being enrolled. The College had an agreement with Sero Learning Pty Ltd ("Sero") whereby Sero was appointed as a "co-provider" to deliver the College's online courses. The Sero online campus had no campus driven withdrawal process and no mechanism for assessing whether course advisors were recruiting unwitting or unsuitable students. Under this enrolment system, 85 per cent of Sero's students who passed through their census date and thereby incurred a VFH debt never accessed the online learning management system.

130 That the Unsuitable Enrolment Risk was also "prevalent"¹⁴⁵ and "manifest"¹⁴⁶ at the College was made clear by the College's own withdrawal data collated in May 2015: about 50 per cent of students being recruited by course advisors and enrolled in the College's online campus were being withdrawn prior to first census, largely due to the campus driven withdrawal process. A Senate inquiry into "Operation, regulation and funding of private [VET] providers in Australia" ("the Senate inquiry"), which addressed issues relevant to both risks, was discussed at Advisory Board meetings of the College in May and June 2015.

131 The College's internal reports and communications prior to September 2015 also frequently emphasised the risks posed by course advisor misconduct and the

145 *Productivity Partners* (2023) 297 FCR 180 at 254 [221], 255 [227].

146 *Productivity Partners* (2023) 297 FCR 180 at 235 [177].

importance of ensuring students understood the debt that they were incurring, and that their courses were suitable for them (having regard to matters such as language, literacy and numeracy skills). For example, the minutes of a meeting of the "Distance Campus Management and Leadership Team" on 13 May 2015 recorded that there was discussion about whether the College was "enrolling the wrong students to start with" and that it was necessary to "make [the] LLN [language, literacy and numeracy] quiz 'agent proof' so [that the agents] are not doing [the quiz] for the student[s]". Significantly, internal documents of the College also referred to the important role that the College's existing enrolment processes – in particular, the outbound QA call and campus driven withdrawal process – played in testing those matters without the involvement (and potential distorting influence) of course advisors. Indeed, upon learning of the proposed enrolment system changes, the College's Corporate Services Manager wrote to Mr Cook (the College's Chief Executive Officer ("CEO")) on 18 August 2015, stressing the importance of maintaining a rigorous QA process "to support the onboarding of students who are ABLE and WILLING to do the course" and of retaining campus driven withdrawals for students unable to be contacted by the College.¹⁴⁷

Knowledge of outcomes

132 The College is correct that the *actual* outcomes of the enrolment process changes were not known, or knowable, as at 7 September 2015, but that is no bar to a finding of unconscionability. The College knew that its existing processes – namely, the outbound QA call and the campus driven withdrawal mechanism – "provided important safeguards against the 'CA misconduct risk' and 'unsuitable enrolment risk'". These measures not only were necessary but were effective in protecting the interests of students who were enrolled unwittingly or who were unsuitable for the course in which they were enrolled, as the Sero Audit and May 2015 withdrawal data made clear.

133 The corollary is that it was equally clear to the College that removing those safeguards would result in a much larger proportion of unwitting or unsuitable students remaining enrolled through first census and thereby incurring VFH debts without receiving any corresponding benefit, including students who were uncontactable, otherwise unable to engage with their courses, or victims of course advisor misconduct. So much was acknowledged by Mr Cook in explaining the Sero Audit findings at the 15 December 2014 meeting. Those findings, he suggested, reflected the fact that the Sero campus had not been doing campus driven withdrawals and had been "just processing [students] through census regardless". This was contrasted with the College's own "rigorous QA process" with its "[c]entralised QA point with the Admissions Team" (and campus driven

147 *Productivity Partners* (2023) 297 FCR 180 at 204-205 [77] (emphasis in original).

withdrawal process), which meant that such students would never have been put through its enrolment process.

134 It was precisely because these two system controls or safeguards were, and were known to be, so effective that the College considered their removal to be necessary in order to "streamline[] [the] enrolment process" and thereby reverse declining enrolments and revenue and "regain market share".¹⁴⁸ Put another way, the College decided to remove those safeguards because they were "impediments"¹⁴⁹ or "unnecessary barriers" to prospective students becoming enrolled,¹⁵⁰ "pass[ing] through [c]ensus" dates,¹⁵¹ and thus incurring the VFH debts that were the trigger for revenue earned by the College and its course advisors (via commissions). The corollary is that the College removed those safeguards in circumstances where it *knew* or ought to have known that the consequent anticipated increase in revenue and profit would come at the expense of unwitting or unsuitable students incurring significant debts to the Commonwealth and would be extracted by the College even though those students would gain no benefit whatsoever from their enrolment. In other words, the College designed and adopted a system of enrolment geared towards "profit maximisation" that was necessarily, and inevitably, adverse to, and at the expense of, student interests.

135 As a result of these enrolment process changes, there were "dramatic and sharp" increases both in the College's enrolments and corresponding revenue, and also in the number and proportion of unengaged and uncontactable students.¹⁵² Revenue and profit increased from \$326,125 and \$138,458 respectively in August 2015, to \$18.9 million and \$1.7 million respectively in December 2015. Withdrawals of students prior to the first census date (which between January and August 2015 had been, on average, about 50 per cent of enrolled students) declined to 29 per cent by September 2015 and to 24 per cent by October 2015. And 86.5 per cent of the approximately 6,000 students who enrolled during the

148 *Productivity Partners* (2023) 297 FCR 180 at 206 [82(c)].

149 *Productivity Partners* (2023) 297 FCR 180 at 204 [76].

150 *Productivity Partners* (2023) 297 FCR 180 at 206 [82(f)], quoting directly from a slide deck presented at an internal meeting at the College on 19 August 2015, which was attended by the College's CEO, Mr Cook, but not Mr Wills.

151 *Productivity Partners* (2023) 297 FCR 180 at 206 [82(f)], quoting directly from a slide deck presented at an internal meeting at the College on 19 August 2015, which was attended by the College's CEO, Mr Cook, but not Mr Wills.

152 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd* (2021) 154 ACSR 472 at 569 [490].

impugned enrolment period¹⁵³ and passed through the first census never accessed the online learning management system; 98.9 per cent of these students did not complete a single unit of their course; and 99.7 per cent did not complete their course.

136 These were not consequences that properly could be said to have been unknown to the College until they occurred. On the contrary, they were foreseeable and foreseen – indeed anticipated and intended – consequences of the enrolment process changes. The College "made the decision to change its enrolment process in order to increase revenue, knowing the foreseeable and likely consequences of its decision and the harm that would be occasioned students".¹⁵⁴ The court may have regard to circumstances that were foreseeable at the relevant time.¹⁵⁵ Here, the consequences – the outcomes – of the enrolment process changes were "foreseeab[e], indeed inevitabl[e]".¹⁵⁶

Source of risk

137 The College's contention that it did not create the risks because those risks were inherent in the VFH scheme does not assist the College. The factual context – the totality of the circumstances – is vital to understand what, in any case, is required to be done or not done to satisfy the normative standard.¹⁵⁷

138 It may be accepted that the structure of the VFH scheme provided an environment that created the risks. But the risks were not unavoidable features of the VFH scheme. As has been explained, they were exacerbated by the way the College chose to conduct its business: by the use of course advisors to recruit students on a commission-based model, and the offering of courses online with limited to no face-to-face contact with students.

139 Moreover, and no less significantly, seeking to tie the source of the risk to the VFH scheme is irrelevant in circumstances where, as outlined above, the College deliberately removed controls that protected students from those risks so as to maximise profits, and then proceeded to claim and retain VFH income "in respect of students who may have been the victims of CA misconduct, were unwitting students or unsuitable for enrolment, should not have been enrolled and who would gain no benefit whatsoever from their enrolment". Indeed, over

153 The period between 7 September 2015 and 18 December 2015.

154 *Productivity Partners* (2023) 297 FCR 180 at 242 [187].

155 ACL, s 21(3)(a).

156 *Productivity Partners* (2023) 297 FCR 180 at 241 [184].

157 *Paciocco* (2015) 236 FCR 199 at 273 [290].

\$46 million was claimed from the Commonwealth in respect of students enrolled in the impugned enrolment period who never accessed the online learning management system.

140 As the primary judge found, by setting up an enrolment system that was likely to (and in practice did) result in large numbers of unwitting or unsuitable students enrolling and incurring VFH debts, and then claiming and retaining VFH revenue in respect of those students, the College was "driven by avarice without regard to the interests" of such students to engage in a system of conduct that was "against conscience". Its conduct could properly be characterised as a "sharp practice" that was "manifestly unfair" to the (thousands of) unwitting or unsuitable students it allowed to progress through census and incur VFH debts. The College took advantage of the unwitting or unsuitable students it enrolled by maintaining their enrolments and claiming the resulting VFH revenue.

141 In an appropriate case, a court may properly consider a supplier's failure to protect customers from a risk created by its business model, which it is aware of, and from which it benefits, when assessing unconscionability. Systemic unconscionability is not focussed on "the characteristics of a particular person, or the effect of the impugned conduct on that person".¹⁵⁸ Here, the College's system of conduct – the removal of two system controls or safeguards – for the purpose of profit maximisation is in all the circumstances unconscionable. That is precisely the type of conduct that the statutory prohibition proscribes.

Relevance of intention

142 The College repeatedly contended that it did not *intend* the CA Misconduct Risk to eventuate. That contention is not sustainable in light of the unchallenged findings of fact and s 21 of the ACL.

143 As has been stated, the courts below found that the College knew that the enrolment process changes it was making would increase the number of students who, having been the victim of course advisor misconduct (at the hands of the College's course advisors), would incur VFH debts (and thus suffer financial repercussions) as a result. The enrolment process changes *needed* to have that effect in order to remedy the fact that "the College's [existing] enrolment process was adversely affecting the [course advisors'] commission revenue", which needed to be fixed to "regain market share". As earlier explained, systems are objectively designed to achieve certain ends; they are hence revealing of, and give effect to, corporate intention.¹⁵⁹ Here, the College's system was designed (or rather a system

158 See Australia, House of Representatives, *Competition and Consumer Legislation Amendment Bill 2011*, Explanatory Memorandum at 22 [2.24].

159 See [108]-[110] above.

of controls was dismantled) to achieve a particular end: removing controls on the enrolment of unwitting or unsuitable students in order to reduce the attrition rate of students prior to census and thereby increase revenue. Having designed its system in such a way, and foreseen the "inevitable consequence" of its actions, it may be inferred that the College "mean[t] to produce" that end.¹⁶⁰ And it did.

144 The primary judge and the Full Court correctly determined that the system of conduct was, in all the circumstances, unconscionable in contravention of s 21(1) of the ACL.

Accessorial liability

145 Section 224 of the ACL, headed "Pecuniary penalties", relevantly provides in sub-s (1)(e) that "[i]f a court is satisfied that a person ... has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of [s 21¹⁶¹] ... the court may order the person to pay to the Commonwealth, State or Territory, as the case may be, such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the court determines to be appropriate".

146 To be knowingly concerned in a contravention of the statutory prohibition against unconscionable conduct, an accessory must: (1) "intentionally participate" in conduct¹⁶² that "implicate[s] or involve[s]" them in the primary contravention¹⁶³ – that is, they must have "assented to"¹⁶⁴ or "become associated with" the conduct that amounts to the primary contravention;¹⁶⁵ and (2) have

160 See *Smith v The Queen* (2017) 259 CLR 291 at 319-320 [57]. See also *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 372 [26]-[27], citing *Zaburoni v The Queen* (2016) 256 CLR 482 at 490 [14]-[15].

161 Section 224 applies to breaches of: Pt 2-2; Pt 3-1; s 66(2); Div 2 of Pt 3-2 (other than s 85); Div 3 of Pt 3-2 (other than s 96(2)); s 100(1), (3); s 101(3)-(4); s 102(2); s 103(2); s 106(1)-(3), (5); s 107(1)-(2); s 118(1)-(3), (5); s 119(1)-(2); s 125(4); s 127(1)-(2); s 128(2), (6); s 131(1); s 132(1); s 136(1)-(3); s 137(1)-(2); s 221(1); s 222(1).

162 *Yorke v Lucas* (1985) 158 CLR 661 at 667, 676; *Giorgianni v The Queen* (1985) 156 CLR 473 at 482, 487-488, 500.

163 *R v Tannous* (1987) 10 NSWLR 303 at 307-308, quoting *Ashbury v Reid* [1961] WAR 49 at 51.

164 *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at 74 [48].

165 *Tannous* (1987) 10 NSWLR 303 at 308.

"knowledge of the essential facts constituting the contravention",¹⁶⁶ meaning "all the essential facts or circumstances which must be established ... in order to show" that the primary contravention was committed.¹⁶⁷

147 Mr Wills submitted that to be liable as a person who is "directly or indirectly, knowingly concerned in, or party to, the contravention", the accessory must know that "the conduct of the primary contravenor has the character or essential quality that renders the conduct unconscionable, whether described as predation, victimisation, exploitation or something else". That is, an accessory must subjectively know that the primary contravener's conduct is "unconscionable" at law or must know that it is "contrary to the ordinary standards of commercial people". It is necessary to address each identified form of argument to explain why the submission is rejected.

148 The first argument is contrary to "the longstanding principle that it is not necessary for a person to 'recognize' the contravention as such, or explicitly to think about the relevant legislation that their actions may contravene".¹⁶⁸ As was stated in *Rural Press Ltd v Australian Competition and Consumer Commission*,¹⁶⁹ "[i]n order to know the essential facts ... it is not necessary to know that those facts are capable of characterisation in the language of the statute".¹⁷⁰ Likewise, one can be guilty of a crime without knowing that it is a crime.¹⁷¹ As the plurality in *Giorgianni v The Queen* stated,¹⁷² an alleged accessory "need not recognize the criminal offence as such, but [their] participation must be intentionally aimed at the commission of the acts which constitute it".¹⁷³

166 *Yorke* (1985) 158 CLR 661 at 670. See also *Giorgianni* (1985) 156 CLR 473 at 482, 500.

167 *Stokes* (1990) 51 A Crim R 25 at 37-38, citing *Giorgianni* (1985) 156 CLR 473 at 487-488, 494, 500, 504-505, 506-507.

168 *Rafferty v Madgwicks* (2012) 203 FCR 1 at 63 [254], citing *Giorgianni* (1985) 156 CLR 473 at 506 and *Yorke* (1985) 158 CLR 661 at 676.

169 (2003) 216 CLR 53.

170 *Rural Press* (2003) 216 CLR 53 at 74 [48].

171 *Giorgianni* (1985) 156 CLR 473 at 500, 506. See also *McCarthy* (1993) 71 A Crim R 395 at 409; *R v Buckett* (1995) 132 ALR 669 at 677; *Johnson v Youden* [1950] 1 KB 544 at 546-547; *Thomas v Lindop* [1950] 1 All ER 966 at 968.

172 (1985) 156 CLR 473.

173 *Giorgianni* (1985) 156 CLR 473 at 506.

149 Put in different terms, unconscionability in s 21 of the ACL is a conclusion based on, or characterisation of, the totality of the circumstances established on the evidence; it is not a subjective element that is required to be separately proved. In that respect, *Giorgianni* is instructive. In that case, dangerousness, unlike unconscionability, was a required element.¹⁷⁴ While "dangerousness" requires an evaluative judgment, it is ultimately an evaluation about the existence of facts, as distinct from a normative judgment about those facts. This is to be distinguished from concepts such as "unconscionability". In the present case, all that was necessary to show was that Mr Wills had knowledge of all the essential facts or circumstances which were established to show that the primary contravention was committed by the College, and that he participated in that contravention. He was not required to know that the College's conduct was "unconscionable" at law.

150 That necessarily leads to the second identified argument – that an accessory must subjectively know that the primary contravener's conduct is "contrary to ordinary standards of commercial people". The concept of unconscionability is not at large. As has been stated, it is "a statutory norm of conduct",¹⁷⁵ requiring "an evaluation of business behaviour (conduct in trade or commerce) in light of the values and norms recognised by the statute".¹⁷⁶ If the basis of accessorial liability is subjective knowledge that the conduct contravenes that norm, logically that belief must relate to the concept of unconscionability, as embodied in the statutory norm. It would make no sense to require an accessory to know or believe that the conduct is unconscionable according to a different or general sense, where that different or general sense is not an essential element of the contravention alleged. Put another way, it is internally contradictory to say that you need knowledge of the essential elements of the statutory offence, and that unconscionability is an essential element of that offence, but then to substitute knowledge of the statutory norm with knowledge of social values and norms.

151 And such an approach is unworkable. It raises more questions than it answers, namely: what are the applicable standards or norms? Whose standards? How are they to be identified? And what must be shown to establish breach? Here, "[t]he problem of indeterminacy is addressed by *close attention to the statute and the values derived from it*, as well as from the unwritten law".¹⁷⁷ A conclusion that

174 *Giorgianni* (1985) 156 CLR 473 at 476, 479, 482, 496.

175 *Kobelt* (2019) 267 CLR 1 at 50 [122]; see also 27 [47], 31 [60], 34 [74].

176 *Kobelt* (2019) 267 CLR 1 at 59 [153]. See also *Paciocco* (2015) 236 FCR 199 at 274 [296], 276 [304].

177 *Kobelt* (2019) 267 CLR 1 at 59-60 [153] (emphasis added). See also *Paciocco* (2015) 236 FCR 199 at 274 [296], 276 [304].

certain conduct is unconscionable within the meaning of s 21 cannot be arrived at by deduction from factual premises alone; it requires "the evaluation of facts by reference to ... values and norms recognised by the statute".¹⁷⁸ As has been stated, "unconscionability" is not a question of fact but, rather, is a question of legal characterisation of certain facts and circumstances based on a normative judgment.

152 The same is true for "misleading or deceptive" in the predecessor to s 18 of the ACL. In *Yorke v Lucas*, in relation to what was then s 52 of the *Trade Practices Act 1974* (Cth), Mason A-CJ, Wilson, Deane and Dawson JJ held that "a person will be guilty of the offences of aiding and abetting or counselling and procuring the commission of an offence only if [they] intentionally participate[] in it. To form the requisite intent [they] must have knowledge of the essential matters which go to make up the offence whether or not [they] know[] that those matters amount to a crime."¹⁷⁹ Mr Wills, however, sought to make much of another passage in *Yorke*, in which their Honours held that:¹⁸⁰

"A contravention of s 52 involves conduct which is misleading or deceptive or likely to mislead or deceive and the conduct relied upon in this case consisted of the making of false representations. Whilst Lucas was aware of the representations – indeed they were made by him – *he had no knowledge of their falsity and could not for that reason be said to have intentionally participated in the contravention.*"

153 In the context of misleading or deceptive conduct, "the falsity of a representation", properly understood, is a question of fact,¹⁸¹ and is hence an essential matter that must be proven for the purposes of establishing principal liability and then the liability of an accessory.¹⁸² This is to be distinguished from knowledge that the false representation bears the character of being "misleading or deceptive" within the meaning of the statutory provision, which is a question of legal characterisation based on a normative judgment. As correctly held in *Anchorage Capital Master Offshore Ltd v Sparkes*, "knowledge of the legal

178 *Kobelt* (2019) 267 CLR 1 at 78 [234] (emphasis added). See also 41 [97]; *Paciocco* (2015) 236 FCR 199 at 276 [304], [306], 296 [405].

179 (1985) 158 CLR 661 at 667.

180 *Yorke* (1985) 158 CLR 661 at 667-668 (emphasis added).

181 *Anchorage Capital Master Offshore Ltd v Sparkes* (2023) 111 NSWLR 304 at 363 [335(1)].

182 See, eg, *Quinlivan v Australian Competition and Consumer Commission* (2004) 160 FCR 1 at 4-5 [10]; *Stewart v White* (2011) 284 ALR 432 at 440-441 [36]-[39]; *The Uniting Church in Australia Property Trust (Vic) v Ian Hartley Architects Pty Ltd* [2022] VSC 233 at [104]-[105].

characterisation of the conduct as contravening conduct" is not required for the purposes of accessorial liability.¹⁸³

154 For those reasons, in order to establish that a person was "knowingly concerned" in a contravention of s 21 of the ACL, it is sufficient that the person knew the facts and circumstances which rendered the primary contravener's conduct unconscionable. It is unnecessary to prove that the person subjectively determined that the primary contravener's conduct was "unconscionable" or against conscience.

Mr Wills' accessorial liability

155 The primary judge found that Mr Wills had knowledge from 7 September 2015 of the essential facts and circumstances that rendered the College's conduct unconscionable and thus found that Mr Wills was knowingly concerned in, or party to, the College's unconscionable conduct from 7 September 2015. As the primary judge stated:¹⁸⁴

"In short, the college ran a system of recruitment, enrolment and progression through census dates of students which enabled the college to pocket vast sums of money, effectively from students, via the VFH scheme, in return for which the college had to deliver nothing to very substantial numbers of students. *That was well known to Mr Wills. Moreover, he was very much associated with it and was a participant in key aspects of it.*

On that basis, I am satisfied that Mr Wills was knowingly concerned in the unconscionable system or pattern of conduct of the college."

156 The majority of the Full Court identified four "essential matters" which together rendered the College's conduct unconscionable:¹⁸⁵

- (1) "the College knew of the risks of agent misconduct and unwitting and unsuitable students being enrolled";
- (2) "the College knew that the outbound QA call procedure and the campus driven withdrawal process were important safeguards to protect the interests of students who were enrolled unwittingly or who were unsuitable for the course in which they were enrolled";

¹⁸³ *Anchorage Capital* (2023) 111 NSWLR 304 at 364 [338].

¹⁸⁴ *Productivity Partners* (2021) 154 ACSR 472 at 584-585 [575]-[576] (emphasis added).

¹⁸⁵ *Productivity Partners* (2023) 297 FCR 180 at 286-287 [338].

53.

- (3) "to counter declining enrolment and declining revenue, brought about by agents referring students to other VET providers, the College implemented the enrolment process changes (the so-called profit maximising purpose) knowing that it increased the risk of the enrolment of unwitting and unsuitable students (which was already occurring regularly at the College)"; and
- (4) "the College knew, or ought to have been aware, of the immediate consequences of the changes, which was to escalate the numbers of students who were enrolled unwittingly or who were unsuitable for the course in which they were enrolled".

157 The majority of the Full Court accepted that Mr Wills had knowledge of all but the second essential matter. Their Honours stated:¹⁸⁶

"[W]e do not consider that the primary judge's findings support a conclusion that, as at 7 September 2015, Mr Wills had a sufficient awareness of the extent to which the outbound QA call procedure and the campus driven withdrawal process were important safeguards to protect the interests of students who were enrolled unwittingly or who were unsuitable ... This is an important fact that rendered the College's conduct unconscionable. Certainly, it can be inferred that Mr Wills had some awareness of that fact by virtue of the Sero campus investigation. However, we consider that to be an insufficient basis to infer that Mr Wills had a real appreciation, as at 7 September 2015, of the full consequences of the changes."

158 That is, the majority of the Full Court did not accept that Mr Wills had knowledge of the importance of the two safeguards prior to 20 November 2015, the date he commenced as acting CEO of the College, but rather found that Mr Wills first became knowingly concerned on 20 November 2015.

159 That finding was challenged by the notice of contention of the Australian Competition and Consumer Commission ("the ACCC"). The ACCC submitted that the Full Court understated the impact of the Sero Audit findings (which were not challenged in the Full Court) and overlooked the other matters Mr Wills knew by 7 September 2015, all of which were findings not disturbed by the Full Court. The ACCC's submission should be accepted.

160 In short, the majority of the Full Court accepted that the College knew in late 2014, as a result of the Sero Audit, what would occur in the absence of the two safeguards (the outbound QA call and campus driven withdrawal process). Mr Wills was informed of those audit findings on at least three occasions between 14 December 2014 and 15 February 2015 and hence acquired this knowledge long

186 *Productivity Partners* (2023) 297 FCR 180 at 287 [340].

before 7 September 2015, including at the 15 December 2014 meeting at which a comparison was made between Sero's enrolment system (and the problems arising with that system) and the College's enrolment system, which comprised the "rigorous QA process" (notably, the outbound QA call) and the campus driven withdrawal mechanism.¹⁸⁷

161 This being so, the majority of the Full Court's finding that Mr Wills had insufficient knowledge of the importance of the controls or safeguards as at 7 September 2015 cannot stand. The Sero Audit made clear what would occur in the absence of those safeguards.¹⁸⁸ The majority did not address why the Sero Audit findings were insufficient or in what way the primary judge had overstated their significance. Nor did the majority point to any other reason why Mr Wills' knowledge of this matter was insufficient as at 7 September 2015.

162 Mr Wills submitted that the ACCC's notice of contention should fail because the primary judge found that:¹⁸⁹

"It is not established on the evidence that Mr Wills was necessarily aware that the poor conversion rate [rate of enrolled students passing through first census and incurring a VFH debt] was because of the high proportion of students who were uncontactable and who were therefore subject to campus driven withdrawal."

That is, the primary judge held that it was not shown that Mr Wills knew that the campus driven withdrawal process was causing a high attrition rate of enrolled students prior to its removal. That does not assist Mr Wills because he knew, from the Sero Audit, what would happen if that safeguard was removed. It does not matter that he did not precisely know or appreciate its positive impact on conversion rates under the College's existing enrolment system. In other words, his lack of knowledge of the positive scenario – that campus driven withdrawals suppress the proportion of students who remain enrolled past their census date (the "conversion rate") – does not answer or detract from his knowledge from the Sero Audit of the negative scenario – that the absence of that safeguard drives up conversion rates.

163 Mr Wills' involvement in the contravening conduct of the College may be considered under four sub-headings: his role in the College; his knowledge of the CA Misconduct Risk and the Unsuitable Enrolment Risk; his involvement in and knowledge of the enrolment process changes; and his knowledge of the effects of

187 See [129] and [133] above. See also [169]-[170] below.

188 See [129] and [133] above. See also [169]-[170] below.

189 *Productivity Partners* (2021) 154 ACSR 472 at 520 [223].

those changes. To explain Mr Wills' involvement in the College's contravening conduct from 7 September 2015, it is necessary to address the relevant facts in some detail. Except where noted, each fact is an unchallenged finding of the primary judge adopted by the majority of the Full Court.

Mr Wills' role in College

164 At all relevant times, Mr Wills had "considerable authority" over the College and its senior management and played "a significant role" in the College's decision-making.¹⁹⁰ Mr Wills was the Chief Operating Officer ("COO") of Site – the corporate owner of the College – and Mr Cook reported directly to him. In his capacity as COO, Mr Wills sat on the College's Advisory Board (established in May 2014 with the stated intention that it would meet monthly). The Advisory Board had oversight of and accountability for all key financial and operational aspects of the College's business, including VET FEE-HELP Reporting and "Student Grievances"; compliance, including VFH compliance and "Relevant Metrics (Completion Rates/Quality Indicators/Feedback)"; and sales and marketing, including "External Student Recruitment Performance" and "Sales Funnel (Client Contracts & Student Enrolments)". From July 2015, management meetings of the College ("Management Meetings") occurred monthly. The minutes disclose that they were typically chaired and "facilitated" by Mr Wills.

165 The College represented a substantial proportion of Site's revenue and profit (budgeted at 39 per cent and 61 per cent respectively in 2016), and its financial performance would have been of key concern to Mr Wills. In his capacity as COO, Mr Wills closely monitored the financial performance of each business unit, including the College, calling for reports from each within 48 hours of receipt of the monthly financial reports. From April 2015, Mr Wills received reports from Mr Cook and Mr Dawson, Site's Chief Financial Officer, showing a decline in enrolments and revenue at the College.

166 The close management supervision exercised by Mr Wills over the business of the College was acknowledged in two internal documents of Site. In late September 2015, Site's CEO reported to Site's board, including Mr Wills, that Site management had pressured the College into accepting changes to its enrolment process. On 26 October 2015, Mr Wills circulated his COO report for the November meeting to the Site board, recording that in August 2015, due to the College's perceived poor financial performance, Site's management had undertaken an "urgent review" of the College's business performance and had reduced its autonomy.

190 *Productivity Partners* (2023) 297 FCR 180 at 267 [283].

Mr Wills' knowledge of CA Misconduct Risk and Unsuitable Enrolment Risk

167 By September 2015, Mr Wills knew of the CA Misconduct Risk and the
Unsuitable Enrolment Risk, and of the importance of the College's existing
safeguards (in particular the campus driven withdrawal process) in mitigating
those risks

168 An important source of Mr Wills' knowledge was the meetings on 15 and
17 December 2014 and 18 February 2015, at which the results of the Sero Audit
were discussed. Mr Wills was the meeting facilitator at the second and third
meetings.

169 At the 15 December 2014 meeting, Mr Cook explained that the Sero campus
had not been doing campus driven withdrawals and had been "just processing
through census regardless". He also pointed out that the College's own "rigorous
QA process" with its "centralised QA point with the Admissions Team" meant that
such students would never have been put through its enrolment process.

170 A report on the Sero Audit, discussed at the second meeting two days later
on 17 December 2014, identified that Sero had no campus driven withdrawal
process and no mechanism for assessing whether course advisors were recruiting
unwitting or unsuitable students; and further, that the proportion of Sero's students
that passed their census date without ever accessing the online learning
management system was four times higher than the College's (84 per cent vs
21 per cent).

171 Mr Wills also knew about the two risks because he sent or received regular
communications relating to the two issues. Several examples were identified by
the primary judge. On 26 February 2015, a Site employee sent an email to
Mr Wills, amongst others, attaching a report about a VET provider (referred to as
"CAG") on the *7.30 Report*. Mr Wills replied to all the addressees saying that the
report "emphasises the requirement to follow up any misdemeanours or
indiscretions of CAs with rigour and haste".

172 Papers circulated on 12 May 2015 for a meeting of the Advisory Board the
following day, which Mr Wills attended, reported that "one of our staff members"
had made a submission to the Senate inquiry, but that the College was not
mentioned or referred to in the submission. The minutes reflect that that issue was
then discussed at the meeting. It is significant that on 16 June 2015, Mr Wills
circulated a set of board papers for an Advisory Board meeting which attached the
second interim report of the Senate inquiry, which documented "aggressive
marketing techniques" used by VET providers and their "brokers". The primary
judge found that this indicated that the attention of Mr Wills was being drawn to
the problems and risks of course advisor misconduct. The primary judge also found
that the Senate inquiry had been a topic of discussion at Advisory Board meetings
prior to circulation of the second interim report.

173 On 20 July 2015, Mr Wills' COO report to the Site board recorded, in relation to the College, that the Assistant Minister had continued "to introduce a number of changes to the operation of the VFH industry including improved student disclosure and capability to withdraw prior to census (which some providers hinder)".

174 On 20 August 2015, an internal report sent by Mr Cook to Mr Wills, amongst others, noted "intense media scrutiny of the [VET] sector" in late 2014 and early 2015 and that "unscrupulous behaviour" by co-providers and course advisors had required a focus on "consumer protection, quality control and identity verification". In August 2015, Mr Wills reported on a review of the College's competitors, and in relation to the issue of "Strong Sales Culture" concluded:¹⁹¹

"Current State: Underperforming. While a strong sales culture exists within our Internal Sales Team, 3rd Party Agents, and our most profitable campuses, there remains some sections of the business where a strong sales culture is lacking. This can be attributed in part to the events of 2014/early 2015 where additional controls were [sic] mandated by the regulator, intense media scrutiny of the sector was occurring, and *unscrupulous behaviour by 3rd party co-providers and sales agents required a focus on consumer protection, quality control and identity verification.*"

Mr Wills' involvement in and knowledge of enrolment process changes

175 Mr Wills was a "key driver" of the changes to the College's enrolment process. He was the chair and "facilitator" of the Management Meeting on 19 August 2015 at which the proposed changes were discussed.

176 It is necessary to revisit the findings about the events of 18 and 19 August 2015. The meeting papers circulated to Mr Wills, amongst others, on 18 August 2015, ahead of the 19 August meeting, detailed that the College had been receiving feedback from its course advisors regarding its existing enrolment process, and that "[n]umbers are slow, conversion rate is low due to the enrolment process". The papers then detailed the two proposed enrolment process changes – being the (1) replacement of the outbound QA call with an inbound QA call, and (2) abolition of the campus driven withdrawal process – and indicated that "[r]ollout of the new enrolment process [would] commence 4th September".

177 Later on 18 August 2015, Mr Cook sent the College's monthly report for July to Mr Wills, which reiterated the same messages: that revenue was below expectations due to lack of enrolments from course advisors; that course advisors had provided feedback concerning the College's existing enrolment process; and that that feedback was being fed into a revised enrolment process which was

191 *Productivity Partners* (2023) 297 FCR 180 at 207 [83] (emphasis added).

scheduled to commence on 4 September 2015. The report described the revised enrolment process as a strategy to increase revenue and mitigate the risk to revenue.

178 At the Management Meeting on 19 August 2015, it was minuted that Mr Wills observed that the College's competitors had, amongst other listed advantages, a "better admissions process" and advised that "we are in a declining state, [that] needs to be changed". With respect to Mr Cook's CEO report, the minutes recorded that Mr Cook "advised we are getting feedback from [CAs] that our enrolment process is too complex and slowing down conversions significantly. Currently in the process to streamline the process with a rollout date of 4th September."

179 Mr Wills was therefore aware of the "essential elements" of the enrolment process changes – being the shift from outbound QA calls to inbound QA calls in the presence of a course advisor, and the abolition of the campus driven withdrawal process – and of the financial drivers behind those changes. Indeed, on 20 August 2015, Mr Cook circulated a further report to Mr Wills reiterating the same points made in the August meeting papers and confirming that the "[r]evised enrolment process" would commence on 4 September 2015. The report identified that in July 2015 the College had recorded a profit of only 14 per cent of the budgeted amount and that that "situation has prompted Productivity Partners Management to undertake an urgent review of our operations in an attempt to turn around the developing trend of underperformance". The report also referred to Mr Wills' August 2015 review of the College's competitors¹⁹² and recorded, in relation to the theme of "Excellent Sales/Admission Process", that "[c]urrent review of enrolment process underway to ensure we are competitive in marketplace yet remain compliant". Further, from 20 to 24 August 2015, Mr Wills was copied in on discussions about the details of changes to the enrolment portal and the pre-enrolment quiz.

180 Not only did he know of the changes being proposed, and the reasons why, but Mr Wills "supported the changes that were being proposed".¹⁹³ As the majority of the Full Court stated in relation to the Management Meeting held on 19 August 2015 and surrounding events:¹⁹⁴

"While the primary judge found that no decision was taken at the [19 August 2015] meeting to adopt the enrolment process changes, his Honour also found that there was a common understanding, or expectation,

192 See [174] above.

193 *Productivity Partners* (2023) 297 FCR 180 at 269 [290].

194 *Productivity Partners* (2023) 297 FCR 180 at 269 [290] (emphasis added).

of the attendees at the meeting that, subject to further details still to be worked on, the enrolment process changes would be implemented (PJ [259]). In our view, *the evidence as a whole, including particularly the minutes concerning Mr Wills's COO Report, show that Mr Wills supported the changes that were being proposed*. That is highly significant given Mr Wills's role in the organisation, described earlier, whereby Mr Cook reported to Mr Wills."

181 Mr Wills also knew that the changes were meant "to enable consumers to be enrolled as students more quickly and easily" at the time that they were recruited by course advisors, and to "ensure that they passed through census in greater numbers by abolishing a significant contribution to attrition, namely campus driven withdrawals".

182 The history of the events since June 2015 were set out in a report Mr Wills circulated to the Site board on 26 October 2015. Mr Wills stated that there had been "substantially more active management involvement and practices in [the] College since June this year when business performance had commenced deteriorating", which was "driving performance for a strong second-quarter". Mr Wills referred to the urgent review that had been undertaken in August 2015,¹⁹⁵ as a result of which "the degree of autonomy in this business unit [ie, the College] [from Site] has been reduced and integration prioritised".

Mr Wills' knowledge of effects of changes

183 On 13 September 2015, Mr Wills stated that he was putting the enrolment process changes "under the microscope". In advance of taking over as acting CEO, he said he would exercise a "continued watchful eye over [the College's] operations".

184 By no later than 14 September 2015, Mr Wills was aware that the enrolment process changes had been implemented by the College on 7 September 2015, and, soon after, learnt that those changes were having a net positive impact on "sales volumes" and enrolments. On 15 September 2015, Mr Cook reported to Mr Wills that applications for enrolment in the week 7-13 September 2015 had increased dramatically, "showing early signs of recovery". In his CEO report for the Management Meeting on 16 September 2015, which Mr Wills attended, Mr Cook reported that "the new enrolment process along with the update to the withdrawal policy should see CA numbers and student numbers increase". The minutes of the meeting recorded that Mr Cook advised that "the new enrolment system is working well, it presents well, increased headcount and have re-recruited old CAs" and that

195 See [174] and [179] above.

he believed that the financial position was "about to pick up, with Khaled [the College's Partnerships Manager] talking with our agents".

185 Mr Wills was aware of the "dramatic turnaround" in the College's financial position, which resulted from equally dramatic enrolment increases (and corresponding increases in disengaged students). On 14 October 2015, Mr Dawson circulated the College's September financial results to Mr Cook and Mr Wills, which showed that the online campus VFH income exceeded the budget by 133 per cent and EBITDA (that is, earnings before interest, taxes, depreciation and amortization, which is a proxy for profit) exceeded the budget by 137 per cent.

186 Mr Wills received the papers for and attended the Management Meetings on 21 October 2015 and 18 November 2015. At each of those meetings, the changes to the enrolment process, and the effect of those changes on numbers of course advisors and students (and the resulting increase in VFH revenue) were the subject of reporting. Further, other employees at the 21 October 2015 meeting raised the fact that many students were not engaging with the online learning management system.

187 On 3 November 2015, the Site board considered a report prepared by, amongst others, Mr Wills, which recorded that the conversion rate had significantly improved and reported that the College's budgeted revenue for the second quarter was \$10 million, notwithstanding that the actual revenue in the first quarter had been only \$3.257 million. The primary judge held that this reflected "the confidence that there was that the changed enrolment and withdrawal processes would bring about vastly improved financial performance".

188 Documents sent to, and prepared at the request of, Mr Wills in November 2015 indicated that the College expected significant numbers of enrolled students to remain uncontactable and estimated that only 20 per cent of students would engage. By that time, Mr Wills was aware that the conversion rate had increased from about 50 per cent before the enrolment process changes to about 76 per cent in October. This implied "that increased numbers of unsuitable students were being enrolled". He also knew from his own figures that less than 20 per cent of students logged in to the online learning management system by week seven.

Mr Wills' involvement in College's unconscionable conduct

189 In summary, Mr Wills was involved in the unconscionable conduct of the College through his management and oversight of the College at all material times, particularly his roles on the Advisory Board and in the Management Meetings, and as acting CEO from 20 November 2015 to 20 January 2016. During 2015, Mr Wills had increasing involvement in the College's affairs. He was a "key driver" of changes at the College to improve its financial performance and while he was not the architect of the enrolment process changes, the relevant decisions

were reported to him and he oversaw their implementation; he was associated with the decisions and was a participant in key aspects of the changes.

190 Prior to the impugned conduct period, Mr Wills was aware of the plan to implement the enrolment process changes (the removal of the outbound QA call and the campus driven withdrawal process) and then the implementation of those changes. He was aware of the profit maximising purpose in respect of those changes. He was also aware of the CA Misconduct Risk and the Unsuitable Enrolment Risk, and that the outbound QA call and the campus driven withdrawal process provided means by which the College could mitigate these risks, such that the changes (abolishing those mechanisms) would necessarily reduce the College's ability to mitigate those risks.

191 In September 2015, during the impugned enrolment period, Mr Wills was putting the changes that had been introduced "under the microscope", he was aware that increased enrolments and hence revenue were beginning to show, and the ongoing risk of course advisor misconduct had been brought to his attention. In October 2015, Mr Wills continued to be "involved across all areas of the [C]ollege's operation", the dramatic increase in enrolments and hence income had become apparent, and he became aware that the Department had published a guideline stating the Department's expectation that, if students could not be contacted and/or they had not participated in the unit before the census date, a VET provider would cancel the enrolment to avoid the student incurring a VFH debt. By November 2015, Mr Wills had such confidence in the improved enrolment and financial position of the College that he (with others at Site) set the College's budgeted revenue for the second quarter at \$10 million, notwithstanding that revenue in the first quarter had been only \$3.257 million. He was also aware that the conversion rate had increased from a little over 50 per cent to about 76 per cent in October, and he knew that the ratio of active students might be as low as 20 per cent of the total number of students and that less than 20 per cent of students logged in to the online learning management system by week seven.

192 As acting CEO of the College from 20 November 2015 to 20 January 2016, Mr Wills knew that the College ceased enrolling students for 2016 but continued to claim VFH revenue in respect of students who had enrolled during the impugned enrolment period. By February 2016, Mr Wills was aware that as many as 55 per cent of students who had passed through the first census and incurred a VFH debt were uncontactable and had not engaged with the College. By May 2016, Mr Wills knew that more than 50 per cent of students were not contactable, only seven per cent of students were logging in to the online learning management system and 77 per cent of students were not engaging with their courses.

193 The primary judge was correct to find that Mr Wills had knowledge from 7 September 2015 of the essential facts and circumstances that rendered the College's conduct unconscionable and thus that Mr Wills was knowingly

concerned in, or party to, the College's unconscionable conduct from 7 September 2015.

Site's involvement

194 By reason of Mr Wills' knowledge and conduct being attributable to Site, Site was knowingly concerned in, or a party to, the College's contravention of s 21, pursuant to s 139B of the *Competition and Consumer Act 2010* (Cth). Site did not challenge the factual findings by which the primary judge concluded, for the purposes of s 139B of the *Competition and Consumer Act*, that Mr Wills' state of mind and conduct was attributable to Site. The College's third appeal ground fails.

Conclusion and orders

195 I agree with Gageler CJ and Jagot J that both appeals should be dismissed with costs.

EDELMAN J.

Introduction and outline of the two major issues for civil and criminal law

196 Productivity Partners Pty Ltd ("the College"), the first appellant in one of these appeals, is the subsidiary of the second appellant in that appeal, Site Group International Ltd ("Site"). Before the primary judge in the Federal Court of Australia, whose decision was largely upheld by a majority of the Full Court, the Australian Competition and Consumer Commission ("the ACCC") established that the College had engaged in conduct which was unconscionable contrary to s 21 of the *Australian Consumer Law*.¹⁹⁶ The essence of the College's unconscionable conduct was that in supplying vocational education and training courses, the College removed two system controls which protected students from misconduct by agents of the College and from enrolment in courses for which the students were unsuitable. The removal of these system controls meant that many students incurred substantial debts for courses which they would never even commence. That outcome was a means to the College's end of increasing profitability.

197 The appellant in the other appeal before this Court ("the Wills appeal") is Mr Wills, the Chief Operating Officer of Site and Acting Chief Executive Officer of the College for part of the relevant period after the system controls were removed. The primary judge and the majority of the Full Court found that Mr Wills was, in broad terms, knowingly concerned in the College's contravention and an accessory to that contravention.

198 These two appeals raise fundamental issues concerning: (i) the scope of a corporation's liability based upon its systems rather than attribution of the actions or mental states of any natural person to the corporation; and (ii) the nature and principles concerning accessory liability. These are civil appeals. But the principles concerned have far-reaching consequences through both civil and criminal law in these two areas.

199 As to systems liability, one of the traditional means of holding a corporation liable has been based on the attribution to the corporation of the actions of the natural persons that are its agents.¹⁹⁷ But the heuristic of the "actions" and "intentions" of a corporation is not confined to the attributed actions of natural persons. A corporation might also be treated as having acted or as having an intention based upon its systems, that is, its policies, procedures or patterns of conduct.

196 *Competition and Consumer Act 2010* (Cth), Sch 2.

197 See *CCIG Investments Pty Ltd v Schokman* (2023) 97 ALJR 551 at 561-562 [48]-[53]; 410 ALR 479 at 490-491.

200 The novelty of corporate systems liability is that a corporation can be treated as having acted, and as having intentions, without those actions having been taken, or those intentions held, by any individual natural person. The primary judge, and the majority of the Full Court, were correct to conclude that the College had acted unconscionably based upon its systems, in particular the removal of two system controls which protected students from misconduct by agents of the College and from enrolment in courses for which the students were unsuitable. The removal of those two system controls adapted the College's system of enrolments for what can be taken to be the purpose, or end, of increased profitability. The College, by that adaptation of its system of enrolments, can be taken to have intended to achieve its purpose by an increase in agent misconduct leading to student enrolments and an increase in the enrolment of "unsuitable" students. That system was unconscionable conduct within s 21 of the *Australian Consumer Law*.

201 As to accessory liability, an intention to participate in the conduct that amounts to the essence of a primary offence or contravention is a central requirement that must be satisfied before liability for one person's offence or contravention can be attributed to another as accessory. Without a requirement of intention, manufacturers of kitchen knives could generally be liable for murder and manufacturers of ski masks could generally be liable for burglary. The requirement of intention requires knowledge of the relevant facts needed to establish that intention. But what facts or circumstances must be known?

202 Consider an example adapted from the facts of *Giorgianni v The Queen*.¹⁹⁸ An employee drives a truck with the brakes improperly secured. Earlier that day, the employer had noticed wiring holding together the components of the brake system but, thinking the wire to be irregular but having little mechanical knowledge, the employer thought nothing more of it and directed the employee to drive the truck. The employee is involved in an accident where a number of people are killed, and the employer is charged with being an accessory to the crime of causing death by driving a vehicle in a "manner dangerous to the public". Is it sufficient, in ascending degrees of knowledge and belief: (i) That the employer noticed the wiring on the brakes? (ii) That the employer knew that the wiring on the brakes was irregular? (iii) That the employer knew that the wiring on the brakes was irregular and that "the brakes on the vehicle were probably (or possibly) defective"¹⁹⁹ but did not know of a real risk of harm to the public from that probable defect? (iv) That the employer knew that the wiring of the brakes was irregular and believed that the irregularity presented a real risk of harm to the public if the truck was driven? (v) That the employer knew that the wiring of the brakes was irregular and believed that the irregularity presented a real risk of harm to the public if the truck was driven, and subjectively considered this risk to be "dangerous" either by

¹⁹⁸ (1985) 156 CLR 473.

¹⁹⁹ *Giorgianni v The Queen* (1985) 156 CLR 473 at 506.

reference to the employer's own system of values or beliefs or by reference to what the employer considered to be the social norms of dangerousness?

203 Although this Court did not need to take the step of clarifying that dangerous driving involves driving that, in short, presents a real risk of harm to the public beyond the ordinary driving risk,²⁰⁰ the unequivocal answer given in the dispositive reasoning of at least three of the five members of this Court in *Giorgianni* was that the minimum sufficient degree of knowledge and belief is (iv).²⁰¹ No application was made in the Wills appeal to reopen that reasoning or the cases which have since followed it. None should be entertained. The submissions of Mr Wills asserting that he should not have been held to be an accessory because he did not know that the College's conduct was unconscionable must be rejected. From the matters known to Mr Wills, and from his involvement with the removal of the two system controls, Mr Wills intended to participate in the essential conduct that was the unconscionable conduct of the College. The primary judge was correct to conclude that Mr Wills was an accessory to the College's unconscionable conduct and, for the reasons that follow, the Full Court was correct to affirm this finding.

The facts and background in outline

Dramatis personae

204 The College carried on a business supplying its customers, who were students, with vocational education and training courses. The courses with which these appeals are concerned were online courses offered by the College. Site is the parent company of the College, having acquired the College in 2014.

205 The appellant in the Wills appeal is Mr Wills. From around November 2010 until October 2017, Mr Wills was the Chief Operating Officer of Site. From May 2014, Mr Wills was a member of an advisory board for the College which had oversight over and accountability for all key financial and operational aspects of the College's business. From July 2015, Mr Wills typically chaired and facilitated management meetings which were attended by senior management of the College. From November 2015 until January 2016, Mr Wills was the Acting Chief Executive Officer of the College. When Mr Wills took on the position of Acting

200 See *Jiminez v The Queen* (1992) 173 CLR 572 at 579; *King v The Queen* (2012) 245 CLR 588 at 606 [39], 609 [46]. See also *McBride v The Queen* (1966) 115 CLR 44 at 49-50.

201 (1985) 156 CLR 473 at 508 (rejecting the Crown submission recorded at 506).

Chief Executive Officer of the College in November 2015, that was done as a "means of asserting Site's oversight of the College".²⁰²

206 Mr Cook was the Chief Executive Officer of the College from 1 May 2014 until February 2017 and had overall responsibility for the management and operations of the College. Mr Cook reported to Mr Wills. Although Mr Cook was central to the litigation, he was not a party because, shortly before trial, he admitted the allegations of the ACCC that the College had engaged in a system of conduct in the relevant period in respect of persons enrolled in online courses that was unconscionable in contravention of s 21 of the *Australian Consumer Law*, and that he was knowingly concerned in that contravening conduct.

The impugned conduct of the College

207 From 2012, the College was authorised to provide its courses, including the online courses which are the subject of these appeals, under a Commonwealth scheme described as the VFH Scheme (the Vocational Education and Training Fee Higher Education Loan Program). Under the VFH Scheme, the Commonwealth paid the College the fee for any student who met the eligibility criteria for entitlement to VFH assistance, which included completing a request for Commonwealth assistance form. In turn, those students incurred a debt to the Commonwealth, repayable through the taxation system, of 120 per cent of the fee paid to the College by the Commonwealth. The debt was incurred immediately after the "census date" for a unit of study. The census date was the last date that a student could withdraw from a unit of study without incurring a debt to the Commonwealth. For the units of study that comprised the online courses that are the subject of these appeals, the College set that date at two weeks after the commencement of the unit of study.

208 The payments by students to the Commonwealth, and by the Commonwealth to the College, were not conditional upon completion of the course by the students. Nor were they even conditional upon engagement by the students with the course. Issues of potential adverse selection arose because the College was in a position of having access to greater information than the students. And the VFH Scheme also gave rise to a moral hazard.²⁰³ A provider like the College would receive the fee for provision of the service to a student from the Commonwealth, provided that certain enrolment paperwork was completed by or on behalf of the student. From the perspective of the financial interests of the College, this reduced the need to take measures to ensure that funded students were

202 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd* [No 3] (2021) 154 ACSR 472 at 585 [581].

203 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 198 [53].

committed to the course, understood the obligation to pay fees, and therefore were less likely to default.

209 The moral hazard was enhanced by the role of agents of the College, described as "course advisers", some of whom were engaged by external marketing agencies. After 31 July 2014, the College entered agreements with marketing agencies by which the agents of the College were paid commission for students who were recruited to courses supplied by the College, provided that the students passed the census date and incurred VFH debts.

210 In its pleading, the ACCC identified two overlapping types of risk that arose from the College's business model. The first, described as "agent misconduct risk", was the risk of unethical actions by agents in the recruitment process such as pressuring students to enrol, making false or misleading statements, offering inducements (such as free laptops), and completing documents and answering questions on behalf of an applicant. The second, described as "unsuitable enrolment risk", was the risk of persons being enrolled despite a lack of willingness or ability (due to insufficient language, literacy or numeracy skills) to undertake the course.

211 All the key personnel at the College were aware of both types of risk. The agent misconduct risk "regularly materialised".²⁰⁴ The complaints register at the College recorded numerous instances of agent misconduct. Internal College documents described media reporting of unethical behaviour of agents in the industry and referred to particular agent misconduct issues for the online courses as "blatant", or described the main reason for 50 per cent attrition rates as "[m]isleading info—most thought course was 12 months".

212 In the period leading up to September 2015, the College mitigated the two types of risk by two system controls. The first system control was an outbound quality assurance call. The College would make an outbound call in the absence of the agent in which the College would seek to ensure that: (i) the student was "genuine"; (ii) the student understood their obligations under the VFH Scheme; and (iii) the student was suitable for enrolment in their nominated course.

213 The second system control was a campus-led withdrawal process by which students would be withdrawn prior to the census date if they did not attend the first week online and were not contactable by the College after at least nine attempts in three weeks. The campus-led withdrawal control was an important protection. As at May 2015, 50 per cent of students were withdrawn prior to the census date, with

204 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd* [No 3] (2021) 154 ACSR 472 at 569 [494].

a significant proportion of withdrawals occurring via the campus-led withdrawal process.

214 Around 27 November 2014, a report into the College's online courses was prepared by a co-provider of those courses, Sero Learning Pty Ltd ("the Sero report"). The Sero report identified issues for Sero including: the need for Sero to monitor its marketing agents concerning the information that they provided to potential students; that Sero was progressing students past their first census date without proper contact; and that 84.7 per cent of Sero's students had passed the first census date but never accessed the online learning management system. The Sero report was discussed in meetings of senior College staff in December 2014 and February 2015 and the College and advisory board were aware of the importance of the two College system controls (which Sero did not have) in ensuring that unsuitable students were not enrolled or, if enrolled, were withdrawn prior to incurring a VFH debt.

215 By around August 2015, internal College documents showed that the key officers at the College, including Mr Wills, had become aware that College agents were unhappy with the College's enrolment process and that College revenue had declined. The two system controls were known to be "impediments to a prospective student being enrolled and passing [the] first census [date]".²⁰⁵ The removal of those impediments was understood to increase the likelihood of agents receiving their commission, increase the enrolment of students, and therefore improve the profitability of the College.

216 On 7 September 2015, the College abolished both system controls. The outbound quality assurance call, made in the absence of the agent to mitigate effects of agent misconduct, was replaced by an "inbound" call (generally in the presence of the agent) which consisted principally of closed ("yes/no") questions and reading scripted information without analysis of any enrolment documents in advance. And the campus-led withdrawal process was removed and was not replaced with any other control. The system controls had protected students but also reduced the commission of agents and the revenue received from the VFH Scheme. The system controls were removed for sales and marketing reasons. As the majority of the Full Court concluded, the protections were removed "for the purpose of profit maximisation substantially driven by budget expectations set by Site".²⁰⁶

205 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 204 [76].

206 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 218 [121(c)].

217 The abolition of the two system controls did not remove all protection from the students. The inbound call provided some transparency about fees. And the College retained processes to investigate allegations of agent misconduct. But, as the College properly acknowledged in oral submissions in this Court, those reduced protections exposed unsuitable students to enrolment and exposed students to agent misconduct, as occurred in the five examples—"Customers A through E"—provided by the ACCC at trial.

218 Following the 7 September 2015 changes, the income earned by the College from the VFH Scheme increased from \$326,125 in August 2015 to approximately \$18.9 million in December 2015. Consistently with this increase in income, withdrawals prior to census date declined from around 50 per cent of enrolled students between January and August 2015 to 29 per cent of enrolled students in September 2015 and 24 per cent in October 2015.

219 That decrease in online course withdrawals was directly correlated with the increased enrolment of unsuitable students. The percentage of students who had passed the census date but did not complete a single unit of study increased from 81.9 per cent prior to 7 September 2015 to 98.9 per cent subsequently. Between October 2015 and January 2016, a student support officer was only able to contact about 10 per cent of approximately 400 to 500 students allocated to her: telephone calls were not answered; emails bounced back; one email address was used for multiple students; and she was told not to contact a significant number of students who were enrolled from the town of Mullumbimby.

The College's impugned conduct comes to an end

220 On 1 December 2015, the Commonwealth government announced that a cap would be imposed on the total loans to students that a provider would be able to create in 2016 under the VFH Scheme. On 18 December 2015, the College was informed of its cap for 2016. The College had already exceeded that cap. Consequently, on 18 December 2015, the College ceased enrolling students for its online courses.

221 Although the College did not enrol any further students, the College continued to claim VFH revenue from the Commonwealth up to and including September 2016 in respect of students who had been enrolled between 7 September 2015 and 18 December 2015.

The allegations and the decisions of the primary judge and the Full Court

222 The ACCC brought proceedings alleging that the College had engaged in a system of conduct which was unconscionable in contravention of s 21 of the *Australian Consumer Law*. The ACCC also alleged that Mr Cook, Mr Wills and Site were knowingly concerned in, or parties to, the College's contravention within the meaning of s 224(1)(e) and s 2 of the *Australian Consumer Law*.

223 The conduct of the College was divided by the ACCC into two periods. The first period, "the impugned enrolment period", was between 7 September 2015 and 18 December 2015. The second period, "the impugned conduct period", was between 7 September 2015 and September 2016. The difference between the periods was that although the College stopped enrolling students on 18 December 2015, it continued to receive revenue from the Commonwealth, with respect to students who were enrolled during the impugned enrolment period, until September 2016. The ACCC alleged that this amounted to continuing unconscionable conduct.

224 In the Federal Court of Australia, the primary judge found, in a conclusion upheld by the Full Court, that the College had acted unconscionably within the application of "unconscionable conduct" in s 21 of the *Australian Consumer Law*. The College "took advantage" of students who had enrolled as a result of agent misconduct or who were unsuitable for their chosen course of study.²⁰⁷ The College:²⁰⁸

"well knew that its dramatic increase in revenue and turnaround in profits was substantially built on VFH revenue in respect of students who may have been the victims of [agent] misconduct, were unsuitable for enrolment, should not have been enrolled and who would gain no benefit whatsoever from their enrolment, yet who incurred very substantial debts to the Commonwealth as a result of their enrolment".

225 The primary judge held, again in a conclusion upheld by the Full Court, that Mr Wills was knowingly concerned in the College's unconscionable conduct. As the majority of the Full Court explained, Mr Wills "was a key driver of changes at the College to improve its financial performance and while he was not the architect of the enrolment process changes, the relevant decisions were reported to him and he oversaw their implementation".²⁰⁹

226 Mr Wills' responsibility, his role and his awareness of the system changes is explained in more detail later in these reasons. But perhaps the single most important finding of fact by the primary judge in this respect is that Mr Wills chaired and facilitated the management meeting on 19 August 2015 where the common understanding emerged that the enrolment changes would be

207 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd* [No 3] (2021) 154 ACSR 472 at 571 [500].

208 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd* [No 3] (2021) 154 ACSR 472 at 571 [499].

209 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 221 [127].

implemented. Mr Wills was aware of the detail and effect of the changes, and participated in them, before 20 November 2015, which was the date from which he became Acting Chief Executive Officer of the College, and the date from which the majority of the Full Court (incorrectly) held that Mr Wills was knowingly concerned with the unconscionable conduct of the College.

227 The primary judge concluded that Mr Wills' knowledge and conduct could be attributed to Site under s 139B of the *Competition and Consumer Act 2010* (Cth). There was no challenge to that conclusion on appeal to the Full Court, or in this Court. Site's liability is therefore wholly dependent upon Mr Wills' liability.

Unconscionable conduct and systems liability: the College's appeal

The College's grounds of appeal

228 The College's appeal to this Court was essentially based upon two related arguments. First, it was submitted that the primary judge and the majority of the Full Court considered the proscription on unconscionable conduct in s 21 of the *Australian Consumer Law* without express reference to the presence or absence of all the relevant factors in s 22. Secondly, it was submitted that the removal by the College of the two system controls was not unconscionable conduct. The College submitted that "[u]nconscionability 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" and that, at least absent intention that the risk will occur, the "[p]rotection of potential customers from risk is not the type of conception to which ss 21 and ... 22 are directed". The first argument requires explanation of the operation of s 21 and its relationship with s 22. The second argument requires consideration of the nature of liability based on the operation of a system and the risks that it creates.

Unconscionable conduct under s 21 of the Australian Consumer Law

229 Section 21(1) of the *Australian Consumer Law* relevantly provides that "[a] person must not, in trade or commerce, in connection with: (a) the supply or possible supply of goods or services to a person ... engage in conduct that is, in all the circumstances, unconscionable".

230 As the College correctly submitted in oral submissions, and as s 21(4)(a) provides, the concept of unconscionable conduct in s 21 goes beyond the equitable concept of unconscionable conduct which is applied in s 20. The legislative history of s 21 (and its predecessor in the *Trade Practices Act 1974* (Cth)) reveals an

intention to remove the equitable requirements of special disadvantage and a taking advantage of that special disadvantage.²¹⁰

231 The legislative proscription by reference to "conscience" contains layers of uncertainty. Conscience, from the Latin *conscientia*, denoting a holding of knowledge,²¹¹ has shades of meaning generally related to a subjective recognition of the moral and ethical qualities of action. Locke described conscience as "nothing else but our own opinion ... of our own actions".²¹² But Parliament must be taken to have contemplated an assessment of whether conduct is unconscionable by reference to objective standards rather than to a judge's personal or subjective opinions. Nor is there any indication that the objective standard of assessment should involve a judge's best guess, or a survey of the empirical evidence, as to the standards of a community, even if such monolithic standards can be taken to exist in a plural society. "Compassion will not, on the one hand, nor inconvenience on the other, be to decide; but the law".²¹³

232 The assessment of an objective standard of conscience must instead import an evaluation of the extent of departure from principles of interpersonal morality as reflected in the values of Australian common law and statute. It is only in that sense that those values are the values of the Australian community. The cornucopia of values in Australian common law and statute was expressed extrajudicially by Allsop CJ as including:²¹⁴

"[T]he deep and abiding requirement of honesty in behaviour; a rejection of trickery or sharp practice; fairness when dealing with consumers; the central importance of the faithful performance of bargains and promises freely made; the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage; a recognition that inequality of bargaining power can (but not always) be used in a way that is contrary to fair dealing or conscience; the importance of a reasonable degree of certainty in commercial transactions; the reversibility of enrichments unjustly received;

210 See *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at 94-102 [279]-[295].

211 *The Oxford English Dictionary*, 2nd ed (1989), vol 3 at 754, "conscience".

212 Fraser (ed), *An Essay Concerning Human Understanding by John Locke* (1894), vol 1 at 71.

213 *Somerset v Stewart* (1772) Lofft 1 at 17 [98 ER 499 at 509].

214 Allsop, "Conscience, Fair-Dealing and Commerce: Parliaments and the Courts" (2017) 91 *Australian Law Journal* 820 at 839.

the importance of behaviour in a business and consumer context that exhibits good faith and fair dealing; and the conduct of an equitable and certain judicial system that is not a harbour for idiosyncratic or personal moral judgment and exercise of power and discretion based thereon."

233 The difficulty with the application of the values of Australian common law and statute is that they apply at such a high level of generality, and can point in so many different directions, that the concept of unconscionability has been said to be no more useful than the category of "small brown bird" to an ornithologist.²¹⁵ In one recent case,²¹⁶ three members of this Court considered conduct to be unconscionable where it involved a system of exploitation of illiterate and innumerate Aboriginal customers involving sales on credit at up to three times market value, without any proper accounting, with requirements of tied purchasing and the surrender of the customer's bank card and personal identification number.²¹⁷ But four members of this Court considered that this exploitation of vulnerable persons from another culture took on a different perspective of conscience because, among other things, it was said that the conduct: was "appropriate" according to other cultures and values;²¹⁸ was "a convenient way of managing money";²¹⁹ "suited the interests" of those vulnerable persons "and their families having regard to their own preferences and distinctive cultural practices";²²⁰ and took place in a remote Aboriginal community where onerous terms were more "acceptable".²²¹

234 Section 22 of the *Australian Consumer Law* does not codify the values of Australian statute and common law, nor does it resolve such difficulties in

215 *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421 at 442 [86], quoting Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 *University of Western Australia Law Review* 1 at 16.

216 *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1.

217 *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at 85-86 [260], 107 [313].

218 *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at 35 [78].

219 *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at 13 [3].

220 *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at 46 [110].

221 *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at 51 [127].

application. Rather, it articulates a list of wide-ranging matters to consider when applying these values, including: the terms and conditions of the supply (ss 22(1)(b), 22(1)(e), 22(1)(j), 22(1)(k)); discrimination, undue influence, pressure, unfair tactics and the extent of good faith towards customers by the supplier (ss 22(1)(d), 22(1)(f), 22(1)(l)); conduct of the parties in connection with their relationship, difference in bargaining power and ability to negotiate (ss 22(1)(a), 22(1)(j)); the contents of any industry code (ss 22(1)(g), 22(1)(h)); and the ability of a customer to understand documents and the extent of any unreasonable failure of the supplier to disclose (ss 22(1)(c), 22(1)(i)).

235 In applying the relevant values of Australian common law and statute, all matters and circumstances enunciated in s 22 that are potentially relevant must be considered.²²² So too must any other circumstance that potentially bears upon standards of trade and commerce be considered.²²³ Otherwise, the assessment of conscience will have proceeded by reference only to a subset of the relevant values. However, contrary to the submissions of the College, the need for all relevant matters to be considered does not require an assumption that all matters weigh in favour of a supplier unless shown otherwise.

Systems liability

236 A corporation is a construct. It does not have a natural existence in the real world. The notion of a company "doing something" is a heuristic which helps to understand legal rules for corporate liability. Usually, the description of a company as having performed some act, or having held some intention, means that there is someone whose act or intention, under the legal rules of attribution, would count as the act or intention of the company.²²⁴ These legal rules depend upon context or statutory interpretation but they generally require the identification of a person whose act or intention will count as the act or intention of the company.²²⁵

237 But not always. There is an alternative path to treating a corporation as having performed an action or having an intention which does not involve attribution of the action or intention of a single natural person. That alternative path recognises a corporation as having "acted" or as having an "intention" where

222 *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 at 587 [189].

223 *Competition and Consumer Act 2010* (Cth), Sch 2, s 22(1).

224 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 507.

225 *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421 at 446-447 [101]-[105], 449 [112].

a system has been built with the authority of senior persons controlling the company such that the actions of automated processes, or of one or more natural persons, can be properly attributed to the corporation to the extent that they arise out of that system.²²⁶ The point is that actions and intentions are attributed to the corporation directly from its systems rather than from any natural person.

238 This concept of systems liability is recognised by s 21(4)(b) of the *Australian Consumer Law*, which has the effect that statutory unconscionable conduct can apply "to a system of conduct or pattern of behaviour". As Professor Bant has explained of legislative innovations akin to s 21(4)(b), "corporations develop their own character and values and should be treated as actors in our society in their own right". Their intentions "may be identified from decisions and choices that are communicated through corporate policy".²²⁷

239 The concept of systems liability, such as that in s 21(4)(b), has been described as group agency.²²⁸ Dr Leow has rightly observed that group agency is a concept that "has intuitive appeal. In law and in ordinary life, it is observable that statements about groups are often not straightforwardly reducible to statements about the aggregate of their members."²²⁹ Just as a team playing a game "cannot be reduced to the personal acts of the players"²³⁰—a behind can be scored by the Fremantle Dockers if the ball was rushed through the goal by the opposition rather than being kicked by any of the Dockers' great players—so too legal rules can provide that a corporation acted even if the action cannot be attributed to the corporation from a single individual.

240 There are good reasons for the treatment of a corporation as capable of having actions and intentions without the necessity for attribution of the actions or intentions of a particular person. One reason is that the dynamics of group behaviour might not be reducible into the behaviour of any individual unit. This is

226 See *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421 at 457 [153].

227 Bant, "Culpable Corporate Minds" (2021) 48 *University of Western Australia Law Review* 352 at 370, referring to Bucy, "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability" (1991) 75 *Minnesota Law Review* 1095, French, *Collective and Corporate Responsibility* (1984), ch 13, and French, "Integrity, Intentions, and Corporations" (1996) 34 *American Business Law Journal* 141 at 152.

228 See List and Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (2011).

229 Leow, *Corporate Attribution in Private Law* (2022) at 45.

230 Finnis, *Intention and Identity* (2011) at 87.

the problem of "diffused responsibility".²³¹ Another reason is that the focus on the group avoids any discounting of the potentially pernicious effect of group dynamics on individual moral and ethical judgment. A group can be treated as having intended a result even if its members blindly defer to a policy or to other persons, without having any positive intention of their own as to the result.²³²

"The interaction with other people shapes how humans act. 'Group think' can cause individuals to disengage their own judgement. 'Group loyalty' can lead members to continue with practices that have proven to be ineffective. Organizations have a way of overriding individual judgement and attitudes."

241 The concept of intention should be applied to a system as though the system, as a construct, were a natural person. Intention is everything that is a "reason for behaving as one does", whether as an end in itself or as a means to an end.²³³ Intention therefore involves a volitional choice of ends or means, not merely a foresight of consequences. Foresight of consequences, even to the extent of a belief that consequences are inevitable, is merely a means of proving that those consequences were chosen as an end in themselves or as a means to an end.²³⁴

242 Intention, as a chosen end or a chosen means to an end, must be separated from emotional desire. Two examples can be reiterated which illustrate the difference.²³⁵ A person who boards a plane from London to Manchester to escape pursuit has an intention to travel to Manchester even if that is the last place that they seek to be. A person who sets fire to their enemy's house out of spite commits the act of arson intentionally even if they regret the destruction of the house as a masterpiece of period architecture. The travel to Manchester or the setting fire to the house are chosen as means to the end of escaping pursuit or injuring the enemy, even if those means are not emotionally desired.

231 Bant and Paterson, "Systems of misconduct: Corporate culpability and statutory unconscionability" (2021) 15 *Journal of Equity* 63 at 72-76.

232 Micheler, *Company Law: A Real Entity Theory* (2021) at 22.

233 Finnis, "Intention in Tort Law", in Owen (ed), *Philosophical Foundations of Tort Law* (1995) 229 at 229. See also *OBG Ltd v Allan* [2008] AC 1 at 30 [42].

234 *Zaburoni v The Queen* (2016) 256 CLR 482 at 490 [14]-[15]; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 372 [27], 392-398 [92]-[103].

235 See *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 395 [97].

The majority of the Full Court correctly addressed the ACCC systems case

243 As s 21(4)(b) of the *Australian Consumer Law* implicitly recognises, proof of a corporate system might occur either by proof of a pattern of behaviour or by "direct evidence as to the internal structure and elements of the system".²³⁶ In the present case, the "system" implemented by the College was proved by the latter means: direct evidence of the system controls that existed prior to 7 September 2015 and the abolition on that date of two crucial system controls which existed for the protection of students. This conduct of the College in removing two core system protections was the central focus of the ACCC case of unconscionable conduct.

244 The College submitted that it was not unconscionable for it to increase or transfer risk to students in circumstances where the College did "not intend that risk to come home" and had other "systems ... to investigate agents where that allegation [of procuring enrolment] was made". The College relied upon the reasoning of the majority of the Full Court that the College "was not seeking agent misconduct".²³⁷

245 The ACCC systems case alleged that the College had removed the two system controls for the purpose or end of maximising profit. The ACCC alleged that the College pursued this end with the knowledge or means of knowledge that the removal of the two system controls would reduce its ability to mitigate agent misconduct risk and unsuitable enrolment risk. In short, revenue and profit would increase with the increased enrolment of unsuitable students and students who were enrolled as a result of misconduct. The removal of the two system controls was the means adopted for the end of maximising profits. That means involved unsuitable, misled, or misguided students contributing to the College's increased revenue.

246 It can be accepted, as the majority of the Full Court concluded, that the College was not "seeking" agent misconduct or unsuitable enrolments in the sense of desiring those consequences as an end in themselves. At the very least, the existence of some remaining system controls, including the "inbound call" and procedures permitting complaints to be made about agents, shows that agent misconduct or unsuitable enrolments were not an end in themselves. But it was not necessary that agent misconduct or unsuitable enrolments be proved to be ends in

236 Bant, "Systems Intentionality: Theory and Practice", in Bant (ed), *The Culpable Corporate Mind* (2023) 183 at 201.

237 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 235 [176].

themselves before the College could be said to intend those outcomes. It was sufficient that those outcomes were chosen means to the end of maximising profits.

247 By focusing its case against the College at the level of the system, it was unnecessary for the ACCC to establish that any individual person chose agent misconduct or unsuitable enrolments as a means to maximising profit. It was enough that the College employed a system which adopted, as its means to increased profitability, an increase in unsuitably enrolled students or students whose enrolment was the subject of agent misconduct. For example, prior to the removal of the system controls, 50 per cent of students had been withdrawn by the campus-led withdrawal process. The removal of that system control would mean that the system would achieve increased profitability at the expense of enrolment of disengaged students.

248 The submission of the College that it did not intend the risks to eventuate must be rejected. The removal of the two system controls meant that the College, by its revised system, intended that the end of increasing profitability be achieved by an increase in unsuitably enrolled students or students whose enrolment was the subject of agent misconduct.

The majority of the Full Court properly applied s 22

249 The College submitted that the majority of the Full Court erred by failing to consider the absence of any inequality of bargaining power between the College and the students. But there was no evidence at trial, and no issue raised by the parties at trial, about any equality or inequality of bargaining power. There was no basis for the Full Court to make assumptions in favour of the College that were not based on the evidence and submissions. As the majority of the Full Court correctly observed, "[t]he court determines the proceeding on the evidence adduced by the parties, not speculation as to matters not addressed by the evidence. Nor does the court initiate its own investigations in relation to matters not raised on the evidence adduced by the parties."²³⁸

250 Nor, contrary to the College's submissions, does the requirement for consideration of all potentially relevant matters mean that a judge is required to articulate a laundry list of the absence of each and every potentially relevant matter and value in the precise terms set out in s 22. No inference will be drawn of a failure to consider a potentially relevant matter if that matter is not given any real focus in the submissions of the parties and has no real impact upon the assessment. To give a simple example, if a judge reached the conclusion that a vulnerable customer had been deliberately deceived by a supplier's pre-contractual statement, the judge would not be required to record that the customer had understood the

238 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 252 [214].

written contract or that the supplier had otherwise complied with an industry code, unless there were real dispute about these issues between the parties. Dishonest conduct does not cease to be unconscionable because a supplier has been transparent or honest in other respects.

251 The same reasoning applies to the numerous circumstances that were not expressly considered by the majority of the Full Court, but which the College submitted had infected the reasoning of the majority. For instance, there was no allegation and no case that the College used any undue influence, pressure or unfair tactics. But in a case where the central issue was whether it was unconscionable for the College to remove the system controls, there was no obligation upon the primary judge or the Full Court expressly to record that there was no allegation of undue influence, pressure or unfair tactics. As the majority of the Full Court correctly concluded:²³⁹

"[T]he reasons of the primary judge demonstrate that his Honour had regard to the matters enumerated in s 22(1) to the extent that the parties relied on those matters. It may be accepted that the primary judge did not always identify the matters using the paragraph numbers in s 22(1). There is no legal requirement to identify the matters in that way. The relevant question is whether his Honour took the matters into account to the extent the parties relied upon them."

For the reasons given by the majority of the Full Court that then followed this correct statement of principle, the primary judge did take into account all relevant matters in s 22.

Accessory liability: the Wills appeal

The ACCC case against Mr Wills and Mr Wills' grounds of appeal

252 The ACCC case of accessory liability against Mr Wills alleged that he was an accessory to the College's unconscionable conduct and liable for a pecuniary penalty under s 224(1)(e) of the *Australian Consumer Law* and for disqualification from managing corporations under s 248.

253 Section 224(1)(e) of the *Australian Consumer Law* provides for pecuniary penalties where any person "has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person" of a provision including s 21. Section 248 of the *Australian Consumer Law* provides for disqualification from managing corporations in circumstances including where a person has been involved in unconscionable conduct under s 21. Section 2(1) of the *Australian*

239 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 253 [219].

Consumer Law defines "involved" in terms that include: "(a) has aided, abetted, counselled or procured the contravention" or "(c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention".

254 Mr Wills' notice of appeal contained essentially two grounds for challenging the conclusion of the majority of the Full Court, in upholding the decision of the primary judge, that he was an accessory to the College's unconscionable conduct. His first ground was essentially that the majority of the Full Court erred by concluding that he was an accessory to unconscionable conduct under s 21 of the *Australian Consumer Law* because it was not established that he knew that the College's conduct "involved taking advantage of consumers or was otherwise against conscience". His second ground of challenge was essentially that the majority of the Full Court erred by concluding that he was an accessory from 20 November 2015 in circumstances in which Mr Wills was found not to have knowledge of the essential matters making the College's conduct unconscionable until 20 November 2015, and there was "no positive conduct" on the part of Mr Wills after that date.

255 The ACCC filed a notice of contention in this Court asserting that the majority of the Full Court erred in concluding that Mr Wills did not have sufficient knowledge of the essential matters that rendered the College's conduct unconscionable as at 7 September 2015. The ACCC's notice of contention is logically anterior to Mr Wills' second ground of appeal. The success of the notice of contention, for reasons explained below, means that Mr Wills' second ground of appeal need not be considered.

The assumptions in the Wills appeal

256 In the period shortly after Federation, Commonwealth legislation began to be drafted so as to extend accessory liability beyond the traditional common law formulation, which imposed liability on a person who aided, abetted, counselled, or procured the commission of an offence. Liability was extended to circumstances where the person was "in any way directly or indirectly knowingly concerned in" the commission of an offence against an Act.²⁴⁰ The assumption of all the parties to the Wills appeal was that the principles concerning the traditional formulation of the common law were the same as those concerning persons who are "in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person". It is unnecessary to consider the correctness of that assumption in this case. It suffices to address the issue, as the parties did, by reference to the established principles of accessory liability.

240 See *Secret Commissions Act 1905* (Cth), s 10; *Copyright Act 1905* (Cth), s 58; *Australian Industries Preservation Act 1906* (Cth), s 9; *Crimes Act 1914* (Cth), s 5.

The nature of accessory liability

257 An accessory is a person to whom the liability of a principal for a crime or civil wrong is attributed. The accessory did not commit the crime or other wrong but will have attributed to them the liability of the person who did. Since the focus is upon attribution of liability for a wrong found to have been committed by another, it has rightly been said that "[t]he very basis of secondary liability is different from that of a principal".²⁴¹

258 As will be explained below, the basis for attribution to the accessory of liability for an offence or contravention is that the accessory must have intended to be involved with the essence of the primary offence or contravention. There are three steps: (i) identification of the essence of the primary offence or contravention; (ii) identification of the acts of the accessory that amount to involvement in the essence of the primary offence or contravention; and (iii) identification of the intention of the accessory to be involved in the essence of the primary offence or contravention. The third matter is often the central issue, as it is in this case. Intent is important because, as Learned Hand J put it, accessory or derivative liability requires that the accessory: show a "purposive attitude" towards the venture; "associate [themselves] with the venture"; "participate in it as in something that [they wish] to bring about"; and "seek by [their] action to make it succeed".²⁴²

259 The focus on the Wills appeal was upon the knowledge or belief that Mr Wills was required to have. In short, was Mr Wills required to know or believe that the College's system was unconscionable? But, as explained below, knowledge is not, independently, a criterion for accessory liability. Instead, it is a prerequisite for the required intention.

Intention is the reason for requiring knowledge of the "essential facts"

260 In *Giorgianni*,²⁴³ Mr Giorgianni was charged with an offence of culpable driving causing death following an accident involving the failure of the brakes of a truck that was being driven by his employee. The elements of the relevant offence included death or grievous bodily harm being occasioned through the motor vehicle, at the time of impact, "being driven by another person ... at a speed or in a manner dangerous to the public". Mr Giorgianni's conviction was quashed because the direction of the trial judge did not require that the jury be satisfied that

241 Simester, "The Mental Element in Complicity" (2006) 122 *Law Quarterly Review* 578 at 588.

242 *United States v Peoni* (1938) 100 F 2d 401 at 402.

243 (1985) 156 CLR 473.

Mr Giorgianni had "knowledge of all essential facts"²⁴⁴ or had knowledge of "the facts which went to make up the offence",²⁴⁵ where "knowledge" of a fact might be inferred from wilful blindness about that fact.²⁴⁶

261 As Wilson, Deane and Dawson JJ explained, the facts that must be known by the alleged accessory are those facts necessary to establish intention: "a person cannot aid, abet, counsel or procure the commission of an offence ... without *intent based upon knowledge of the essential facts which constitute the offence*" (emphasis added).²⁴⁷ In other words: "[i]ntent is an ingredient of the offence of aiding and abetting or counselling and procuring and knowledge of the essential facts of the principal offence is necessary before there can be intent".²⁴⁸

262 The centrality of intention to accessory liability was reiterated by every member of this Court in *Yorke v Lucas*.²⁴⁹ In that case, representations about turnover had been made by a company of which Mr Lucas was the managing director. The company's representations were found to be misleading or deceptive or likely to mislead or deceive within the proscription in s 52 of the *Trade Practices Act 1974* (Cth). In upholding a finding that Mr Lucas was not an accessory to the misleading or deceptive conduct of his company, every member of this Court in *Yorke v Lucas* reiterated the point that the relevance of an accessory's knowledge was that it was used to establish intent: "[t]o form the requisite intent [an accessory] must have knowledge of the essential matters which go to make up the offence".²⁵⁰ Since the conduct relied upon as misleading or deceptive was a false statement which Mr Lucas did not know to be false, it was held that Mr Lucas "lacked the knowledge necessary to form the required intent".²⁵¹

244 (1985) 156 CLR 473 at 479. See also at 495.

245 (1985) 156 CLR 473 at 509.

246 (1985) 156 CLR 473 at 505. Compare at 487, 495.

247 (1985) 156 CLR 473 at 503.

248 (1985) 156 CLR 473 at 504-505.

249 (1985) 158 CLR 661.

250 (1985) 158 CLR 661 at 667. See also at 676.

251 (1985) 158 CLR 661 at 667.

An accessory must intentionally participate in the essence of the conduct comprising the contravention

263 Perhaps the single greatest difficulty in the area of accessory liability lies in identifying the essence of the alleged conduct that a person must intend to participate in, and therefore the associated facts that must be known to form that intent, before that person can be an accessory. This intention, and the associated knowledge, is to be identified from the allegations made in the indictment or pleadings read in light of the offence or contravention provision.

264 In *Giorgianni*, in the context of alleged offences of manslaughter, the joint judgment approved cases that had held that there was sufficient intent for accessory liability for manslaughter if the accessory counselled or procured an intended act that carelessly caused death.²⁵² Similarly, in *R v Salmon*,²⁵³ where charges for manslaughter were brought in circumstances where it was not known which of three men had fired the fatal shot, the negligence of three men collectively engaged in rifle firing practice was sufficient for each of them to be accessories to the manslaughter. By contrast, in *Giorgianni*, Gibbs CJ approved a decision, *Callow v Tillstone*,²⁵⁴ which held that there was insufficient intent for accessory liability for exposing unsound meat for sale when Mr Callow, a veterinary surgeon, carelessly provided a certificate which procured the act of exposing unsound meat for sale.²⁵⁵

265 The decisions are not easy to reconcile. As Glanville Williams said: "Callow did not know that the meat was unfit; Salmon, who took part in the shooting practice, did not know the boy was there. Both were negligent. Salmon was convicted, Callow was not. Why the difference?"²⁵⁶ Ultimately, the intention that must be held by an accessory is best expressed as an intention to participate in the essence of the conduct comprising the offence or contravention. That requires characterisation of the acts, state of mind, circumstances or result that amount to the essence of the alleged conduct that comprises the primary offence or contravention. For instance: dangerous driving in *Giorgianni*; a misleading or

252 (1985) 156 CLR 473 at 502-503, citing inter alia *R v Gaylor* (1857) Dears & Bell 288 at 291 [169 ER 1011 at 1012].

253 (1880) 6 QBD 79.

254 (1900) 83 LT 411.

255 (1985) 156 CLR 473 at 483, citing *Callow v Tillstone* (1900) 83 LT 411.

256 Williams, "Complicity, Purpose and the Draft Code—2" [1990] *Criminal Law Review* 98 at 105.

deceptive statement in *Yorke v Lucas*; exposing unsound meat for sale in *Callow v Tillstone*; and careless shooting in *Salmon*.

266 Before the accessory can intend to participate in the essence of the alleged conduct comprising the primary offence or contravention, the accessory must know all the facts that are necessary to form their intention. Necessarily, this does not require knowledge of every fact required for proof of the primary offence or contravention: only those facts necessary to intend to participate in the essence of the offence or contravention. For instance, in *Giorgianni* it was held that Mr Giorgianni did not need to know, and indeed could not have known beforehand, of the death or grievous bodily harm that resulted: that was held not to be one of the "essential facts".²⁵⁷ But Mr Giorgianni did need to know, in order to intend to participate in the offence, the essence of the alleged driving that was "dangerous to the public", namely that there was a defect in the brakes of the truck that created a real risk of harm to the public beyond that ordinarily associated with driving.

Proving intention about evaluative matters

267 Sometimes the essence of the alleged conduct is expressed as an evaluative concept. Although evaluation might be involved in determining what is required for the essence of the alleged conduct, it is irrelevant what the accessory understands the concept to mean. What the accessory must intend, and consequently the matters that must be known, will depend upon the essence of the alleged conduct.

268 For instance, although the concept of "dangerousness" involves an evaluative judgment about when a real risk of harm to the public arises, whether Mr Giorgianni intended to be involved in his employee driving dangerously would not depend upon what Mr Giorgianni thought that "dangerous" meant. That is a question of law. As explained at the outset of these reasons, in broad terms, dangerous driving is driving which involves a real risk of harm to the public beyond that ordinarily associated with driving. With the essence of the alleged conduct being driving in circumstances where a real risk of harm to the public arises, it would be enough that Mr Giorgianni knew that there was a defect in the brakes of the truck that created a real risk of harm to the public and intended that the truck be driven. It would not be sufficient merely that Mr Giorgianni knew that the brakes of the truck were irregular. Nor, as the joint judgment of Wilson, Deane and Dawson JJ held in their dispositive reasoning, would it be enough that he knew "the brakes on the vehicle were probably (or possibly) defective".²⁵⁸ Actual

²⁵⁷ (1985) 156 CLR 473 at 495, 503.

²⁵⁸ (1985) 156 CLR 473 at 506; see also at 508.

knowledge of the defect leading to an actual belief in the real risk of harm to the public was required.

269 The same is true of an intention to be involved in misleading or deceptive conduct, considered in *Yorke v Lucas*.²⁵⁹ Again, the evaluation of what is misleading or deceptive would not depend upon what Mr Lucas considered to be the meaning of "misleading" or "deceptive". For Mr Lucas to have intended to be involved in the making of a statement that is likely to mislead or deceive required him to know of the statement that was made and of a tendency of the statement to lead others into error.²⁶⁰ A knowledge of that tendency or likelihood would be inferred if Mr Lucas knew that the statement was false. Hence, accessory liability for misleading or deceptive conduct requires knowledge that the conduct would, or was likely to, lead others into error. As the New South Wales Court of Appeal held in *Anchorage Capital Master Offshore Ltd v Sparkes*,²⁶¹ this generally requires knowledge of falsity.

270 The same is again true of an intention to be involved in a substantial lessening of competition, considered in *Rural Press Ltd v Australian Competition and Consumer Commission*.²⁶² The concept of a "substantial lessening of competition" does not mean whatever the accessories, Messrs McAuliffe and Law, thought that it meant. Nor did they need to have even considered the legal concept in those terms. Indeed, "[o]nly a handful of lawyers think or speak in that fashion ... [I]t is not necessary to know that those facts [essential to the contravention] are capable of characterisation in the language of the statute".²⁶³ The sufficient finding of the primary judge, reiterated on appeal, was that each of Mr Law and Mr McAuliffe intended to procure a result whereby competition from a rival newspaper in a duopoly "should be brought to an end".²⁶⁴

271 On the allegations in the cases discussed above, the necessary intention and underlying knowledge concerning the essence of the conduct constituting the primary offence or contravention was: a real risk of harm to the public arising from

259 (1985) 158 CLR 661.

260 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198-199; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 319 [25].

261 (2023) 111 NSWLR 304 at 360 [330], 361 [332].

262 (2003) 216 CLR 53.

263 (2003) 216 CLR 53 at 74 [48].

264 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 283-284 [162].

defective brakes for the offence of "dangerous" driving; a likelihood that others will be led into error from the relevant conduct for the contravention involving the misleading or deceptive statement; and a likelihood that competition would be brought to an end for the contravention involving a "substantial lessening" of competition.

272 The same principles apply to accessory liability based upon a primary contravention of a broad or open-textured provision, such as for accessory liability under s 224(1)(e) for unconscionable conduct pursuant to s 21 of the *Australian Consumer Law*. Once the primary contravention is found, the essence of the alleged conduct constituting that contravention must be intended, and therefore known or believed, by the accessory.

Mr Wills and Site intended to be involved with the College's unconscionable conduct from 7 September 2015

273 The matters that the ACCC proved as the conduct that constituted the essence of the contravention of s 21 were the removal by the College of two important system controls against unsuitable enrolment risk and agent misconduct risk, with the expected consequence of more unsuitable students and more agent misconduct as a means to the end of increasing profitability.

274 The majority of the Full Court held that Mr Wills was knowingly concerned in the College's unconscionable conduct from 20 November 2015 rather than from the inception of that unconscionable conduct on 7 September 2015. The majority considered that until 20 November 2015, Mr Wills did not have "sufficient awareness of the extent to which the [two system controls] were important safeguards to protect the interests of students who were enrolled unwittingly or who were unsuitable for the course in which they were enrolled".²⁶⁵

275 Contrary to the reasoning of the majority of the Full Court, there was a powerful foundation for the conclusion of the primary judge that Mr Wills had knowledge of the essence of the College's contravening conduct as at 7 September 2015. In particular:

1. From around November 2010 until October 2017, Mr Wills was the Chief Operating Officer of Site, which had been the parent company of the College since 2014. The College's business was a substantial part of Site's consolidated revenue and profits and the primary judge found that this business would have been of key concern to Mr Wills.

265 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 287 [340].

2. On 15 and 17 December 2014 and 18 February 2015, Mr Wills attended a series of meetings which discussed the Sero report (which, as explained earlier in these reasons, had identified issues including the need to monitor the information provided by agents to potential students and that 84.7 per cent of Sero's students had passed a first census date without ever accessing the learning management system). The minutes of the 15 December meeting record that Mr Cook, who was the Chief Executive Officer of the College, contrasted the operation of the College with the operation of Sero. Mr Cook specifically mentioned the two system controls of the College, observing that Sero was "not doing campus driven withdrawals and just processing through census regardless" and that the College had a "rigorous" outbound call process which would have ensured that Sero students who never accessed the learning management system "would never have been put through".
3. From at least July 2014, Mr Wills was a member of an advisory board for the College which had oversight over all key financial and operational aspects of the College's business.
4. On 12 May 2015, papers were circulated for a meeting of the advisory board that reported a submission made by a College staff member to the Senate Education and Employment References Committee inquiry into the "Operation, regulation and funding of private vocational education and training (VET) providers in Australia". That issue was then discussed at the advisory board meeting.
5. On 16 June 2015, Mr Wills circulated papers for a meeting of the advisory board which included a report of the Senate Education and Employment References Committee which documented "aggressive marketing techniques" used by agents including misconduct involving incentives, misrepresentations and failures to disclose that debt would be incurred. The report also raised the risk of unsuitable enrolments, identifying issues regarding: insufficient provision of information to students affecting their ability to make fully informed decisions prior to enrolment; language and/or literacy barriers that led to students enrolling in courses for which they were unsuitable or in circumstances where they did not properly understand the terms and conditions; and inadequate screening processes for students.
6. On 26 June 2015, Mr Wills circulated an email attaching the business unit report for the College for May 2015. The report recorded that revenue was below expectations and attributed this to a failure by external agents to perform to expectations.
7. From July 2015, Mr Wills chaired and facilitated management meetings which were attended by senior management of the College.

8. In August 2015, the quality and compliance manager at Site, Mr Coward, sent an email to people including Mr Wills addressing issues that had arisen from a need to make a test for language, literacy and numeracy "agent proof". The email stated that the test "must be used in conjunction with the Pre-Enrolment Evaluation for the relevant course. It is the combination of both tools that will guide advice to the applicants as to their suitability or capacity and capability to undertake the relevant Diploma."
9. On 18 August 2015, in preparation for a management meeting the following day, Mr Wills received several documents including Mr Cook's Chief Executive Officer report, which noted that the College had "been receiving feedback from our agents regarding our enrolment process" and stated that Mr Cook and the College's partnership manager had "met with marketing to finalise a new enrolment process". Mr Cook recorded that "conversion rate is low due to the enrolment process" and his report stated that "[r]ollout of the new enrolment process will commence 4th September". The report referenced, and the primary judge concluded that Mr Wills received, a flowchart that set out the changes to the enrolment process, including the shift to an inbound call procedure and the abolition of campus-led withdrawals.
10. Also on 18 August 2015, Mr Wills received the College's monthly report for July 2015. The report recorded that revenue was below expectations due to a lack of enrolment from agents, that agents had provided feedback regarding the College's current enrolment process, and that the feedback was being used to inform a revised enrolment process that was scheduled to be implemented from 4 September 2015. The report described the revised enrolment process as a strategy to increase revenue and mitigate the risk to revenue.
11. On 19 August 2015, Mr Wills chaired and facilitated a monthly management meeting, at which the Chief Executive Officer report produced by Mr Cook and a Chief Operating Officer report produced by Mr Wills were discussed. The minutes record that Mr Cook "advised we are getting feedback from agents that our enrolment process is too complex and slowing down conversions significantly. Currently in the process to streamline the process with a rollout date of 4th September." With respect to Mr Wills' report, the minutes note that Mr Wills discussed that the College's competitors had, amongst other listed advantages, a "better admissions process". Also under Mr Wills' Chief Operating Officer report, the minutes record the following action item: "Project Plan in place by end of the week". Although there was no conscious resolution to implement those changes on that date, the primary judge found "that there was a common understanding, or expectation, of the attendees at the meeting that

subject to further details still to be worked on the enrolment changes would be implemented".²⁶⁶

12. On 20 August 2015, Mr Cook sent a report to Mr Wills and others observing that there had been "intense media scrutiny of the sector" and that "unscrupulous behaviour" by agents had required a focus on "consumer protection, quality control and identity verification". Mr Cook said that there was a need to ensure that "the appropriate measures are in place to ensure the quality of our services, and the protection of our customers".
13. Also on 20 August 2015, Mr Wills received an email from Mr Cook completing an "action item from yesterday's leadership meeting", to circulate a report "outlining the actions underway to address the underperformance of [the College] in July [2015]". The report stated that the financial situation of the College "has prompted Productivity Partners Management to undertake an urgent review of our operations in an attempt to turn around the developing trend of underperformance". The report referenced a review of the College's competitors conducted by Mr Wills which described several common themes within organisations that were identified as outperforming the College. One of those themes was "Excellent Sales/Admission Process". Under this heading, the report stated "[c]urrent review of enrolment process underway to ensure we are competitive in marketplace yet remain compliant. Revised enrolment process scheduled for [sic] go live on 4th September in conjunction with new website."

276 Mr Wills did not give evidence. None of these matters was contradicted by him and it can be inferred that he could not have said anything that would have assisted his case.²⁶⁷ Before the primary judge, Mr Wills also attempted to rely on a lack of evidence regarding his practice of reading emails sent to him, or which he was copied into, for the apparent purpose of suggesting that while the evidence established that he had sent or received emails, it did not establish that he had read them. This submission was properly rejected by the primary judge.²⁶⁸

277 Mr Wills may not have known of the operation and effect of the two system controls with precision. For instance, the primary judge concluded that it was not

266 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd [No 3]* (2021) 154 ACSR 472 at 526 [259].

267 *Jones v Dunkel* (1959) 101 CLR 298; *Adler v Australian Securities and Investments Commission* (2003) 46 ACSR 504 at 644 [661].

268 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd [No 3]* (2021) 154 ACSR 472 at 504-505 [140]-[144].

established that Mr Wills was aware of the proportion of students who avoided enrolment past the census date (and therefore incurring a VFH debt) due to the campus-led withdrawal process.²⁶⁹ But, in light of the matters set out above, there was ample evidence to support the conclusion of the primary judge that prior to 7 September 2015, Mr Wills knew:

1. "that there was an ongoing risk of [agent] misconduct and that that misconduct could significantly harm the interests of substantial numbers of [students]. The harm included that [students] might be enrolled ... even though they were unsuitable or not genuinely interested in doing the course for which they were enrolled, or had in some way been tricked, deceived or confused into enrolling";²⁷⁰
2. that there was a "risk of unsuitable students being enrolled in their courses, and the need to take steps to mitigate that risk";²⁷¹ and
3. that the abolition of campus-led "withdrawals would remove an important safeguard against" the two types of risk to students, "with the result that increased numbers and proportion of [students] would be enrolled and incur a VFH debt who would get no benefit from their enrolment".²⁷²

278 The documentary evidence also supported the primary judge's conclusion that Mr Wills was aware in August 2015 that College revenue was below expectations due to lack of enrolment of students by College agents and that a strategy to address that was changes to the system for student enrolments, including abolishing campus-led withdrawals to ensure that students passed through the census in greater numbers. The primary judge properly concluded that Mr Wills believed that this strategy would motivate College agents to increase recruitment for the College, increase student numbers passing through the census and increase College revenue and profitability.

279 In other words, "Mr Wills was a key driver of change to the [C]ollege's enrolment and withdrawal processes because of the [C]ollege's worsening

269 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd [No 3]* (2021) 154 ACSR 472 at 520 [223].

270 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd [No 3]* (2021) 154 ACSR 472 at 517 [204].

271 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd [No 3]* (2021) 154 ACSR 472 at 519 [220].

272 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd [No 3]* (2021) 154 ACSR 472 at 531 [281]-[282].

financial position".²⁷³ Although he probably did not emotionally desire an increase in unsuitable students or an increase in agent misconduct, he was aware that the changes to the College's system would involve these outcomes as a necessary means of achieving the end of increased profitability. Mr Wills intended this means to achieve the end of increased profitability for the College. He thus intended to be involved with the essence of the conduct that constituted the unconscionable conduct of the College and the College's contravention of s 21 of the *Australian Consumer Law*.

280 As explained earlier in these reasons, there was no dispute in this Court that Mr Wills' conduct and knowledge could be attributed to Site under s 139B of the *Competition and Consumer Act 2010* (Cth). Since the majority of the Full Court was correct to conclude that Mr Wills was liable as an accessory, it follows that the majority was also correct to conclude that Site was liable as an accessory.

Conclusion

281 The ACCC did not bring any cross-appeal seeking to vary the orders of the Full Court so as to amend the declarations of the primary judge to provide expressly for Mr Wills' or Site's accessory liability having commenced on 7 September 2015. In those circumstances, each appeal should be dismissed with costs.

273 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd* [No 3] (2021) 154 ACSR 472 at 531 [282].

282 STEWARD J. I very gratefully adopt the description of the facts in these appeals as set out in the reasons of the other members of this Court. I also respectfully agree with the expression of principle concerning the relevant meaning of "unconscionable" conduct as articulated by Gordon J in *Stubbings v Jams 2 Pty Ltd*,²⁷⁴ as set out in the reasons of Gordon J in this matter. In particular, Gordon J in *Stubbings* adopted the following passage from the reasons of Nettle and Gordon JJ in *Australian Securities and Investments Commission v Kobelt*:²⁷⁵

"The assessment of whether conduct is unconscionable within the meaning of s 12CB [of the *Australian Securities and Investments Commission Act 2001* (Cth)] involves the evaluation of facts by reference to the values and norms recognised by the statute, and thus, as it has been said, a normative standard of conscience which is permeated with accepted and acceptable community standards. It is by reference to those generally accepted standards and community values that each matter must be judged."

283 As a general expression of principle, the foregoing is plainly correct. But there is presently a need for it to be unpacked. In particular, it does not answer the question as to whether unconscionable conduct, both as an equitable doctrine and as a statutory concept, must still involve serious "moral obloquy". For the reasons which follow, and with very great respect, the concept of moral obloquy, or a form of moral turpitude, endures as an essential attribute of unconscionable conduct. To explain why this is so requires an examination of our legal heritage.

284 The reference in *Stubbings* to recognised "values and norms" is reflective of what Allsop CJ had earlier said in a number of judgments, but in particular in *Paciocco v Australia and New Zealand Banking Group Ltd*.²⁷⁶ There Allsop CJ observed that in applying a law, like s 21 of the *Australian Consumer Law*,²⁷⁷ which requires a court to determine whether conduct is "in all the circumstances" unconscionable, the task does not involve "the choice of synonyms" but rather:²⁷⁸

"[I]t is to identify and apply the values and norms that Parliament must be taken to have considered relevant to the assessment of unconscionability: being the values and norms from the text and structure of the Act, and from

274 (2022) 276 CLR 1 at 26-27 [56]-[58].

275 (2019) 267 CLR 1 at 78 [234] (footnote omitted).

276 (2015) 236 FCR 199.

277 In *Paciocco*, the law principally considered was s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth).

278 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 266 [262].

the context of the provision. Parliament has given some guidance to its proper application (and to its meaning) by identifying in s 12CC certain non-exhaustive factors that may be taken into account by a court in deciding whether conduct was unconscionable. Given the value-laden character of the word, it is necessary to ascertain and organise the relevant values and norms by reference to which the meaning of the word is to be ascertained, and by reference to which the application of the section is to be undertaken (the two tasks being distinct). It must, however, be emphasised at the outset that the values and norms that are relevant are those that Parliament has considered, or must be taken to have considered, as relevant."

285 Earlier in his reasons Allsop CJ referred to the judgment of Spigelman CJ in *Attorney General (NSW) v World Best Holdings Ltd*. In that case, Spigelman CJ said that unconscionability "is a concept which requires a high level of moral obloquy".²⁷⁹ Thus in *Paciocco*, Allsop CJ emphasised:²⁸⁰

"In particular, the phrase 'moral obloquy' and a 'high level of moral obloquy' has been used to identify a feature of unconscionability".

286 Referring to *The Shorter Oxford English Dictionary on Historical Principles*,²⁸¹ Allsop CJ said that obloquy involves a "deviation from moral rectitude, sound thinking or right practice".²⁸² In *Kobelt*²⁸³ Keane J also stressed that, even with statutory rules against unconscionable conduct, the presence of some "high level" form of "moral obloquy" remained important. The term is useful in making it clear that the doctrine of unconscionable conduct is not merely about characterising commercial behaviour as "unfair" or "unjust".²⁸⁴ Keane J thus said

279 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 265-266 [261], citing *Attorney General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557 at 583 [121].

280 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 265 [260].

281 3rd ed (1969).

282 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 266 [262].

283 (2019) 267 CLR 1 at 48 [118].

284 *Attorney General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557 at 583 [121]. See also *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at 48-49 [118]-[119].

the following (in the context of s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth)):²⁸⁵

"The use of the word 'unconscionable' in s 12CB – rather than terms such as 'unjust', 'unfair' or 'unreasonable' which are familiar in consumer protection legislation – reflects a deliberate legislative choice to proscribe a particular type of conduct. In its ordinary meaning, the term 'unconscionable' requires an element of exploitation. The term imports the 'high level of moral obloquy' associated with the victimisation of the vulnerable."

287 For that last proposition Keane J cited the following long list of authorities: *Paciocco v Australia & New Zealand Banking Group Ltd*;²⁸⁶ *Attorney General (NSW) v World Best Holdings Ltd*;²⁸⁷ *Earl of Chesterfield v Janssen*;²⁸⁸ *Commercial Bank of Australia Ltd v Amadio*;²⁸⁹ *Louth v Diprose*;²⁹⁰ and *Kakavas v Crown Melbourne Ltd*.²⁹¹

288 However, the relevance of the concept of "moral obloquy" to the determination of unconscionable conduct has also recently been doubted. In *Kobelt*, Gageler J rejected it as a measure of such behaviour. He said:²⁹²

"In *Paciocco v Australia & New Zealand Banking Group Ltd*, I referred to unconscionable conduct within the meaning of s 12CB as requiring 'a "high level of moral obloquy" on the part of the person said to have acted unconscionably'. 'Moral obloquy' is arcane terminology. Without unpacking what a high level of moral obloquy means in a contemporary context, using that arcane terminology does nothing to elucidate the normative standard embedded in the section. The terminology also has the potential to be misleading to the extent that it might be taken to suggest a requirement for conscious wrongdoing. My adoption of it has

285 (2019) 267 CLR 1 at 48 [118] (footnotes omitted).

286 (2016) 258 CLR 525 at 587 [188].

287 (2005) 63 NSWLR 557 at 583 [121].

288 (1751) 2 Ves Sen 125 at 155-156 [28 ER 82 at 100].

289 (1983) 151 CLR 447 at 462, 467.

290 (1992) 175 CLR 621 at 638.

291 (2013) 250 CLR 392 at 400-401 [17]-[18], 439-440 [161].

292 (2019) 267 CLR 1 at 39-40 [91] (footnotes omitted).

been criticised judicially and academically. The criticism is justified. I regret having mentioned it."

289 Gageler J went on to observe that unconscionable conduct should be seen as behaviour "that is so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience".²⁹³ The rejection of moral obloquy as a measure to test the presence of unconscionable conduct appears to divorce or detach from the concept of good conscience any societal moral principle and replaces it with something called a "normative standard" of commercial behaviour. This analysis dismisses the term "moral obloquy" as "arcane".

290 It is unclear what is meant by a "normative standard"; by "societal norms" of commercial behaviour; or by "generally accepted" "values and norms". These somewhat anaemic concepts appear to mask, or skate over, necessary analysis in accordance with a known methodology. To borrow the words of Professor Birks, it looks like an attempt to "clothe" equitable principle "in more grown-up words".²⁹⁴

291 In that respect, the required "normative standard" cannot be that of Australia's judiciary; it is not what each judge subjectively, and perhaps collectively, believes to be an acceptable standard of commercial behaviour. If it meant that, commercial life really would be subject to judicial caprice or, worse, mere fashion. It should not, with very great respect, be a "free-form choice".²⁹⁵

292 Nor should recourse to generally accepted "values and norms" be seen as a reference to some form of empirical enquiry into what most Australians might think is a normative standard of behaviour.²⁹⁶ If it was, how would a judge discern it? Would it be a matter for expert evidence of some kind? Would it be a matter of judicial notice? What if many standards exist: a possibility which is real enough in a multicultural society which may no longer exhibit "monolithic moral solidarity".²⁹⁷ And what if the standards themselves are offensive or become so? It

293 (2019) 267 CLR 1 at 40 [92].

294 Birks, "Equity, Conscience, and Unjust Enrichment" (1999) 23 *Melbourne University Law Review* 1 at 20.

295 Beech, "Corporate Unconscionability: Systems of Conduct and Patterns of Behaviour" (2023) 52 *Australian Bar Review* 323 at 331.

296 cf *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* (2013) ATPR ¶42-447 at 43,463.

297 Birks, "Equity, Conscience, and Unjust Enrichment" (1999) 23 *Melbourne University Law Review* 1 at 21.

was undoubtedly the case that some Australian "values and norms" held before the Second World War would now be considered entirely repulsive. That includes standards about racial bigotry.

293 Prior to the introduction of the concept of statutory unconscionability, with its command that it not be "limited by the unwritten law relating to unconscionable conduct",²⁹⁸ equity preferred to confine the concept of unconscionable conduct to clearly articulated rules and principles. This avoided any recourse to judicial whim. In *Tanwar Enterprises Pty Ltd v Cauchi* a majority of this Court said:²⁹⁹

"The terms 'unconscientious' and 'unconscionable' are, as was emphasised in *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd*, used across a broad range of the equity jurisdiction. They describe in their various applications the formation and instruction of conscience by reference to well developed principles."

294 Kirby J also observed:³⁰⁰

"The purchaser accepted that 'unconscionability' in this context was not synonymous with a generalised sense of fairness as between the parties or with undefined notions of justice. In order to tame the elements of unpredictability introduced into legal relationships by the imposition of equitable principles, controls upon what might otherwise become a purely discretionary assessment are accepted. They include respect for the particular categories that have emerged in equitable jurisdiction, such that it is not taken to be at large."

295 But the statutory command applicable here – that s 21 of the *Australian Consumer Law* is not "limited by the unwritten law relating to unconscionable conduct" – might be thought to preclude the same faithful and complete adherence to the "well developed" principles of equity. However, that acknowledgement does not liberate the judge from underlying principle. Instead, it makes an understanding of underlying principle all the more important. As Keane J has reminded us all, Parliament chose the word "unconscionable" for a reason.³⁰¹ When

298 *Competition and Consumer Act 2010* (Cth), Sch 2 ("the *Australian Consumer Law*"), s 21(4)(a).

299 (2003) 217 CLR 315 at 324 [20] (footnote omitted).

300 (2003) 217 CLR 315 at 343-344 [86] (footnotes omitted).

301 *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at 48 [118].

considering the essential "values" which inform statutory unconscionability, Allsop CJ has observed:³⁰²

"The first group of values are the enduring historical (and contemporary) norms and values that are recognised in the unwritten law referred to in s 12CA, and that are embedded within the conception of unconscionable conduct as referred to in s 12CB. These are the norms and values in the law, especially, but not limited to, Equity, that bear upon the notion of conscience, in this context the conception of a business conscience – one attending conduct in trade or commerce."

296 But even the foregoing observation begs the question: what are the "enduring historical (and contemporary) norms and values ... recognised in the unwritten law"?

297 The historical foundation of equity and its concern with standards of conscience is "ecclesiastical natural law"³⁰³ or perhaps more accurately just "ecclesiastical law". In that respect, judges often refer to the "ecclesiastical" or even the "religious"³⁰⁴ foundations of equity, without any more elaboration, and may do so in fear of using that one word which more accurately characterises the origins of equity, the doctrine of unconscionable conduct, and the society from which these laws historically emerged: Christianity.³⁰⁵

298 The foregoing historical foundation was recently surveyed with his customary learning by Nettle J, writing extra-judicially, as follows:³⁰⁶

"Although Chancellors were chosen primarily for their learning and administrative skill, the majority of Chancellors of the Middle Ages were either bishops or archbishops. Thus, as Professor Tim Haskett observes in his summaries of their backgrounds: 'Even a cursory assessment of the

302 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 266-267 [263].

303 Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 *Law Quarterly Review* 238 at 239.

304 Bathurst, "Law as a Reflection of the 'Moral Conscience' of Society", Opening of the Law Term Address (5 February 2020) at [6].

305 Writing as late as 1867, Kelly CB observed, "[t]here is abundant authority for saying that Christianity is part and parcel of the law of the land": *Cowan v Milbourn* (1867) LR 2 Exch 230 at 234.

306 Nettle, "Trust and Commerce in Historical Perspective" (2021) 15 *Journal of Equity* 2 at 4-5 (footnotes omitted).

curricula vitae of these men, from the beginning of the chancellorship of Edmund Stafford in 1396 to the end of Thomas More's tenure in 1532, is telling.' Of the 18 men who held the office over those 136 years, almost all were bishops or archbishops, and several were cardinals, well versed in ecclesiastical administration. The educational background of them was also significant: at university 4 had studied theology, 5 civil law, and 4 civil and canon law. It is not at all surprising, therefore, that they derived their ideas from the canonists: that the law of God governs the universe, and hence God's law, and the law of nature and reason, predominate over the laws of the state. As Plucknett reasoned, 'it must have been a perfectly natural instinct ... for a bishop, when faced by a conflict between law and morals, to decide upon lines of morality rather than technical law'. Each of those early Chancellors arrogated to himself the right to interfere in the course of law in particular instances, though they might be regarded as just according to law, if, according to conscience, they worked against the law of God."

299 Associate Professor Havelock has written that, according to Barton, the first known reference to "conscience" appeared in 1391, and that appeals to conscience became more frequent in the fifteenth century.³⁰⁷ Fortescue CJ (ca 1394-1476) said that the word "conscience":³⁰⁸

"comes of *con* and *scioscis*. And so together they make 'to know with God' to wit: to know the will of God as near as one reasonably can."

300 As Keane J has pointed out, "too much should not be made of the influence of medieval Catholic moral philosophy on the Chancellors and their clerical staff".³⁰⁹ Equity was also influenced by other sources, such as mercantile law, and, as both Keane J and Professor Birks have pointed out, by the need for "legal certainty".³¹⁰ There seem to have been no clerical Lords Chancellor since

307 Havelock, "The Evolution of Equitable 'Conscience'" (2014) 8 *Journal of Equity* 128 at 136, citing Barton, "Equity in the Medieval Common Law", in Newman (ed), *Equity in the World's Legal Systems: A Comparative Study* (1973) 139 at 146 and Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (2010) at 13-14.

308 Quoted by Campbell J in "The Development of Principles in Equity in the Seventeenth Century", in Anstey (ed), *The Idea of Principles in Early Modern Thought: Interdisciplinary Perspectives* (2017) 45 at 48.

309 Keane, "The 2009 WA Lee Lecture in Equity: The Conscience of Equity" (2010) 10 *Queensland University of Technology Law and Justice Journal* 106 at 111.

310 Keane, "The 2009 WA Lee Lecture in Equity: The Conscience of Equity" (2010) 10 *Queensland University of Technology Law and Justice Journal* 106 at 111; Birks,

St Thomas More,³¹¹ and as Campbell J, writing extra-judicially, has observed, religious-based concepts of conscience have since the seventeenth century been replaced with particular written rules, based on precedent. He said:³¹²

"By the end of the seventeenth century, rules and principles already established were enough to provide a fair measure of certainty of the outcome of most litigious disputes in the Chancery."

301 Now of course, as Allsop CJ emphasised in *Paciocco*, the ultimate task "is to identify and apply the values and norms that Parliament must be taken to have considered relevant to the assessment of unconscionability" for the purposes, here, of s 21.³¹³ That is consistent with the observation of Sir Gerard Brennan, who, writing extra-judicially, observed:³¹⁴

"The coercive power of the State must be reserved to the enforcement of those moral principles which, by a broad community consensus, enjoy recognition and acceptance and which need to be expressed as universal binding rules in order to facilitate a peaceful, ordered, just but free society."

302 But with those qualifications, the better view remains that "moral obloquy", or some form of moral turpitude, remains an important measure of unconscionable conduct. The medieval origins of conscience have emerged and developed over the centuries to refer to a more general moral and cultural standard by which commercial behaviour is to be judged as unconscionable or not. That longstanding and enduring moral standard is now juristically to be seen as a societal or community standard and it must be taken to have been included in Parliament's choice to use the word "unconscionable". In that respect, even though the statutory concept of unconscionable conduct cannot be confined to its meaning in equity (by reason of s 21(4)(a) of the *Australian Consumer Law*), it must nonetheless have a

"Equity, Conscience, and Unjust Enrichment" (1999) 23 *Melbourne University Law Review* 1 at 22.

311 Campbell, "The Development of Principles in Equity in the Seventeenth Century", in Anstey (ed), *The Idea of Principles in Early Modern Thought: Interdisciplinary Perspectives* (2017) 45 at 55.

312 Campbell, "The Development of Principles in Equity in the Seventeenth Century", in Anstey (ed), *The Idea of Principles in Early Modern Thought: Interdisciplinary Perspectives* (2017) 45 at 68.

313 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 266 [262].

314 Brennan, "Commercial Law and Morality" (1989) 17 *Melbourne University Law Review* 100 at 101.

meaning; s 21 does not authorise a judge to undertake some enquiry into what is "fair" liberated from past precedent. Rather, the meaning of what is unconscionable conduct remains anchored in, and illuminated by, past case law, which well reflects those traditional concepts of morality which have developed over time.

303 The continuing utility and relevance of the concept of moral obloquy is evident when the "values and norms" come to be fleshed out. Thus, in *Paciocco*, Allsop CJ rightly rejected any application of "personal intuitive assertion" in determining what is and what is not unconscionable conduct and said that what is required:³¹⁵

"is an evaluation which must be reasoned and enunciated by reference to the values and norms recognised by the text, structure and context of the legislation, and made against an assessment of all connected circumstances. The evaluation includes a recognition of the deep and abiding requirement of honesty in behaviour; a rejection of trickery or sharp practice; fairness when dealing with consumers; the central importance of the faithful performance of bargains and promises freely made; the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage; a recognition that inequality of bargaining power can (but not always) be used in a way that is contrary to fair dealing or conscience; the importance of a reasonable degree of certainty in commercial transactions; the reversibility of enrichments unjustly received; the importance of behaviour in a business and consumer context that exhibits good faith and fair dealing; and the conduct of an equitable and certain judicial system that is not a harbour for idiosyncratic or personal moral judgment and exercise of power and discretion based thereon."

304 All of the foregoing is consistent with a need for a grave level of moral obloquy to exist if a finding of unconscionable conduct is to be made.

305 Most, if not all, of the statutory factors set out in s 22 of the *Australian Consumer Law*, to the extent relevant in a given case, also bear out the traditional societal moral values and norms which underpin our understanding of what constitutes unconscionable conduct. Many of those factors are concerned to protect the vulnerable and the weak; examples include s 22(1)(a), (b) and (c). Others are concerned with "undue influence" and "unfair tactics" and with "good faith": see, for example, s 22(1)(d) and (l). These factors are directed at immoral behaviour in trade or commerce or behaviour constituting a high level of moral obloquy.

315 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 274-275 [296].

306 Moreover, without some form of a central organising philosophy based on history and precedent, it may in the future also be difficult to apply s 21 with certainty even with the assistance of the s 22 factors. That is because the "written" law of unconscionable conduct found in the *Australian Consumer Law* applies only a label and then highly generalised language in describing the factors to be considered. As Bathurst CJ observed, writing extra-judicially:³¹⁶

"It would be difficult to find a statutory provision which is more general than a prohibition on 'conduct that is, in all the circumstances, unconscionable'. As I have already noted, it provides no guidance about what values, 'norms of society', or 'accepted community standards' might be relevant to a particular type of conduct, and this is largely the source of its problems. The checklist of matters in, for example, s 22 of the Australian Consumer Law (schedule 2, *Competition and Consumer Act 2010* (Cth)) provides some assistance to the Court in reaching this conclusion. However, it does not provide certainty except in the most obvious of cases. It would be better for the legislature to take a more active role in prescribing the standards of conduct which it expects individuals to meet. This could well avoid many of the difficulties I see with the general prohibition on unconscionable conduct."

307 For the reasons given by Gordon J, I respectfully agree that the conduct of Productivity Partners Pty Ltd constituted unconscionable conduct for the purposes of s 21. The removal of the two safeguards was sharp practice and involved the requisite degree of moral obloquy. The majority of the Full Federal Court were correct to so conclude.

308 I also very respectfully agree with Gordon J that Mr Wills was "knowingly concerned" for the purposes of s 224 of the *Australian Consumer Law* in the contravention of s 21 by Productivity Partners Pty Ltd. He did not need to know that the conduct of Productivity Partners Pty Ltd involved a serious degree of moral obloquy. It follows that Site Group International Ltd is also accessorially liable for that contravention.

309 I otherwise respectfully agree with the orders set out in the reasons of Gageler CJ and Jagot J.

316 Bathurst, "Law as a Reflection of the 'Moral Conscience' of Society", Opening of the Law Term Address (5 February 2020) at [46].

310 GLEESON J. I agree with the reasons of Gageler CJ and Jagot J for: (1) rejecting the first two grounds of the appeal brought by Productivity Partners Pty Ltd ("the College"); (2) consequently, rejecting ground three of Mr Wills' appeal; (3) upholding the Australian Competition and Consumer Commission's ("the ACCC") notice of contention in each appeal; and (4) consequently, rejecting ground two of Mr Wills' appeal.

311 I agree with the reasons of Beech-Jones J for rejecting ground one of Mr Wills' appeal and ground three of the College's appeal.

312 In relation to ground one of the College's appeal, I write separately to explain the two ways in which s 22 of the *Australian Consumer Law* ("the ACL")³¹⁷ informs the analysis required for a conclusion that conduct is unconscionable within the meaning of s 21(1) of the ACL. While the Full Court did not err in concluding that the primary judge made adequate reference to s 22, it appears from the judgments of the primary judge and the Full Court that the proper evaluation of the impugned conduct was obscured by the way the ACCC's case was framed. That is because the ACCC's case did not pay sufficient attention to the role of s 22.

313 To prove a contravention of s 21(1), the plaintiff must identify: (1) relevant conduct; (2) why the conduct is properly characterised as unconscionable; and (3) the factual circumstances in which the conduct occurred that bear upon its characterisation as unconscionable.

The operation of s 22 of the ACL

314 I agree with Gordon J's analysis of the meaning of "unconscionable conduct" in s 21(1), and the relationship between ss 21 and 22 of the ACL. As Gordon J recognises, s 22 performs two functions in any case where a breach of s 21(1) is alleged.

315 First, s 22 provides "express guidance as to the norms and values that are relevant to inform the meaning of unconscionability and its practical application".³¹⁸ Unconscionability within the meaning of s 21(1) is itself a

317 *Competition and Consumer Act 2010* (Cth), Sch 2 ("ACL").

318 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 270 [279], quoted in *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at 60 [154] ("*ASIC v Kobelt*"). See also *Stubbings v Jams 2 Pty Ltd* (2022) 276 CLR 1 at 26 [57] ("*Stubbings*").

standard.³¹⁹ However, the content of the statutory standard of unconscionability is not obvious because Parliament has appropriated, without definition, the terminology of "unconscionability". Under the general law, "unconscionability" is a value-laden concept by which a person's conduct is judged against "standards of personal conduct compendiously described as the conscience of equity".³²⁰ Since s 21(1) is "shorn of the constraints of the unwritten law",³²¹ it may apply in a case that involves a departure from "societal norms of acceptable commercial behaviour" that would not ground a claim for relief under the general law.³²²

316 The terms "norm" and "value" are overlapping. Generally, a norm is a standard of conduct, such as a standard set by an industry code.³²³ A value, which could encompass a norm, is a quality that is desirable. In these reasons, I will refer simply to standards.

317 Secondly, s 22 provides relevant guidance by "setting a framework for the values that lie behind the notion of conscience"³²⁴ in s 21(1). Section 22 facilitates the identification of "the circumstances", within the meaning of s 21(1), in which allegedly unconscionable conduct must be assessed by listing, non-exhaustively, "matters" to which the court "may have regard" in deciding whether the conduct has contravened s 21(1).

The first function: identifying relevant standards

318 The role of s 22 in establishing a framework for analysing conduct alleged to be "unconscionable" arises: (1) in the absence of any statutory definition of the term; (2) in the context of, but without being limited by, the "unwritten law relating to unconscionable conduct";³²⁵ (3) where contravening conduct may comprise a

319 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 82 [71]; *Report of the Trade Practices Review Committee to the Minister for Business and Consumer Affairs* (1976) at 67 [9.60] ("Swanson Committee Report").

320 *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 400 [15] ("Kakavas").

321 *ASIC v Kobelt* (2019) 267 CLR 1 at 39 [89].

322 *ASIC v Kobelt* (2019) 267 CLR 1 at 40 [92]-[93].

323 cf ACL, s 22(1)(g).

324 *ASIC v Kobelt* (2019) 267 CLR 1 at 60 [154]; *Stubbings* (2022) 276 CLR 1 at 26 [57]. See also *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 272 [285].

325 ACL, s 21(4)(a).

"system of conduct or pattern of behaviour" in the absence of proof that a particular individual has been disadvantaged by the conduct or behaviour;³²⁶ and (4) where the relevant conduct may be assessed by reference to circumstances occurring after the formation of any relevant contract.³²⁷

319 It is well established that, in s 21, "unconscionable" is a legal term that derives its meaning from principles of law and equity.³²⁸ Further, to the extent that s 21 encompasses unconscionable conduct according to the unwritten law, that conduct falls within specific categories of cases. One such category invokes the principle expounded in *Commercial Bank of Australia Ltd v Amadio*, which "may be invoked whenever one party by reason of some condition [or] circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created".³²⁹ Under the general law, that principle may be invoked to protect the plaintiff from "victimisation" or "exploitation".³³⁰ It has also been said that "mere inadvertence, or even indifference, to the circumstances of the other party to an arm's length commercial transaction" does not engage the principle, so as to deprive a party of the benefit of its bargain.³³¹

320 While s 21(1) is not limited by the unwritten law, it is important to recognise that it is not untethered from that law. By invoking the unwritten law but without being limited by it, s 21 requires some justification for its extension to a case or category of case that would not attract an equitable remedy pursuant to the unwritten law. By way of example, a principled extension, based upon the express provision for application of s 21(1) to systems of conduct, might concern a system that is designed to take unfair or unconscientious advantage of a consumer who is likely to be at a special disadvantage in relation to a supplier of goods or services. Such an extension would recognise the significance of special disadvantage, and the unconscientious taking advantage of that special disadvantage, for characterising conduct as unconscionable under the general law, in applying s 21(1) to a system as contemplated by s 21(4)(b).

326 ACL, s 21(4)(b).

327 ACL, s 21(4)(c).

328 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 62-63 [7], 71 [38].

329 (1983) 151 CLR 447 at 462.

330 *Louth v Diprose* (1992) 175 CLR 621 at 638; *Kakavas* (2013) 250 CLR 392 at 401 [18], 424-425 [117], 439-440 [161].

331 *Kakavas* (2013) 250 CLR 392 at 439-440 [161].

321 Section 22 also provides for the principled extension of the scope of statutory unconscionable conduct, beyond its general law origins, by identifying relevant matters that may support a conclusion that conduct was, in all the circumstances, unconscionable under s 21. For example, s 22(1)(b) implies a standard of fair dealing that suppliers should not require customers to comply with conditions that are not reasonably necessary for the protection of the legitimate interests of the supplier; s 22(1)(g) implies a standard that suppliers should comply with the requirements of any applicable industry code; and s 22(1)(l) implies a standard that suppliers and customers should deal with each other in good faith. As has been observed by Paterson, Bant, Felstead and Twomey, the language of the statute offers a "secure way of understanding what it means for the statutory prohibition not to be 'limited by the unwritten law on unconscionable conduct'".³³²

322 Whether a breach of the standards implicit in s 22(1) contravenes s 21(1) will require an evaluation of all the relevant circumstances, to determine whether the breach is sufficiently serious to warrant a conclusion of unconscionability. As more cases come before the courts alleging contraventions of s 21(1), principles governing what a particular standard requires and whether such a standard has been breached will be developed over time. This process of incremental development is nothing new. It is consistent with standard precedent-based legal reasoning by analogy that has been, and is still being, employed by Australian courts to develop and refine the existing common law and equitable causes of action.

323 If a plaintiff were to contend that the unconscionable character of the defendant's conduct is demonstrated by reference to standards that are not derived from the unwritten law of unconscionable conduct or the terms of s 22, it would be necessary to explain how the relevant standards are enforced by s 21 as an aspect of statutory unconscionability. In *Paciocco v Australia and New Zealand Banking Group Ltd*, Allsop CJ identified several standards against which conduct may be evaluated to determine whether it is, in all the circumstances, unconscionable.³³³ Given the non-exhaustive language of s 22, it is conceivable that other standards might be drawn from the text, structure and context of the

332 Paterson et al, "Beyond the Unwritten Law: The Limits of Statutory Unconscionable Conduct" (2023) 17 *Journal of Equity* 1 at 3, referring to ACL, s 21(4)(a).

333 (2015) 236 FCR 199 at 272 [285]. See also Allsop, "Conscience, Fair-Dealing and Commerce: Parliaments and the Courts" (2017) 91 *Australian Law Journal* 820 at 839.

regime established by the ACL and the objects of consumer protection, or from other legislation that applies to the conduct in question.³³⁴

324 Turning to this case, the majority in the Full Court noted that, as pleaded, the ACCC's case had two composite elements.³³⁵ The first element concerned the implementation of changes to the College's enrolment systems during a specified period. The second element concerned claiming and retaining revenue from the VET FEE-HELP ("VFH") scheme in respect of students who enrolled during the specified period. The primary judge summarised the ACCC's case in the following way:³³⁶

"The ACCC's case is that the college changed its enrolment and withdrawal processes when it knew, or ought to have known, that the changes would significantly reduce protections for consumers and would lead to a materially increased risk of both unsuitable consumers being enrolled in its online courses and of misconduct by its sales agents ... and would materially diminish the prospect of this being identified. It says that the changes were calculated to increase the college's profits by increasing the number and proportion of consumers enrolled by the college and who passed a census date. It says that as a consequence of the changes, the college claimed and retained very significant increased revenue from the Commonwealth, and that the vast majority of consumers did not receive any vocational benefit despite incurring a substantial debt."

325 The majority in the Full Court concluded that the second element, that is, claiming and retaining VFH revenue, "completed" the unconscionable conduct and was significant because, by maintaining student enrolments and claiming VFH revenue from the Commonwealth, "the College took advantage of the students who were enrolled as a result of agent misconduct or who were unsuitable for enrolment".³³⁷ This reasoning reflects the notions of vulnerability and taking

334 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 266 [262], 275 [301]-[302]; *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* (2021) 285 FCR 133 at 154-155 [89].

335 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 245 [197] ("*Productivity Partners*").

336 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College) [No 3]* (2021) 154 ACSR 472 at 483 [27] ("*Productivity Partners*").

337 *Productivity Partners* (2023) 297 FCR 180 at 246 [198].

advantage of vulnerability that are essential to the principle expounded in *Amadio*.³³⁸

326 As described by the primary judge, the ACCC's case did not clearly identify why it contended that the College's system of enrolment was unconscionable. The ACCC appears to have made a forensic choice not to plead its case by reference to the matters listed in s 22(1). Nor did it articulate in its pleading a case that the College took advantage of vulnerable students which might have drawn on the unwritten law about unconscionability. Rather, the ACCC's pleading identified the impugned conduct and alleged that the conduct was unconscionable because it occurred in specified circumstances, which were, in summary, that: (1) the College had a profit maximising purpose; (2) the College was aware, or ought to have been aware, of the risk of agent misconduct, of the risk of unsuitable students being enrolled into courses offered by the College, and of the fact that the process changes would reduce the College's ability to mitigate those risks; (3) the implementation of the changes to the College's student enrolment processes resulted in certain consequences; (4) the College knew or ought to have known of those consequences; and (5) when the changes to its enrolment processes were implemented, the College knew or ought to have known that the process changes were likely to lead to the relevant consequences.³³⁹

327 Based on this description, and having regard to the primary judge's findings, the ACCC's case was that the directing mind or minds of the College knew or ought to have known that the College's changed enrolment and withdrawal processes would result in certain consequences, which would be detrimental to an unknown proportion of consumers who acquired its services. One detrimental consequence was the materially increased risk (better described as an incidence) of enrolment of unsuitable consumers (that is, consumers with characteristics that meant they would receive little or no benefit from their enrolment and consequential debt). Another detrimental consequence was the materially increased incidence of misconduct by sales agents, with the result that consumers would be tricked into enrolling and would receive little or no benefit from their enrolment and consequential debt. The ACCC also emphasised the financial benefit of the changed processes for the College in the absence of any vocational benefit for the vast majority of consumers who enrolled in the College's courses, in the context of the financial cost to the consumers in the form of debt to the Commonwealth.

328 By expressing the ACCC's case in this way, it is possible to see what standards the ACCC might have relied on to illuminate more clearly the pathway from the impugned conduct to a conclusion of unconscionability. Articulating the standard or standards against which conduct is to be judged exposes for debate

338 (1983) 151 CLR 447.

339 *Productivity Partners* (2021) 154 ACSR 472 at 486 [44].

whether the asserted standard is an "accepted and acceptable community standard[]",³⁴⁰ the deviation from which may be so significant in a particular case (or, even, in all cases) as to justify a conclusion of unconscionability that is in contravention of s 21(1).

329 A standard that the ACCC might have identified, based on s 22(1)(b), is that a supplier, through a system of conduct, should not impose conditions on consumers that are not reasonably necessary to protect the legitimate interests of the supplier. A standard to that effect was applied by the majority in the Full Court in concluding that the College's enrolment process during the relevant period was not reasonably necessary for the protection of the College's legitimate interests.³⁴¹

330 Another standard that the ACCC might have identified, based on s 22(1)(d), is that a supplier should not weaken systemic protections against the use of unfair tactics to enrol students, and thereby generate substantial revenue, at the expense of consumers who would suffer financial harm as a result of the likely increased incidence of such tactics. A third standard, which would be based on s 22(1)(l), is that a supplier should not weaken systemic protections against the use of bad faith conduct, in the form of dishonesty by the supplier's agents, to enrol students, and thereby generate substantial revenue, at the expense of consumers who suffer financial harm as a result of the likely increased incidence of such bad faith conduct. A final standard, not derived from the text of s 22, but implicit in the primary judge's findings, is that a supplier of education services should not disadvantage vulnerable consumers, driven by avarice and without regard to the consumers' interests.³⁴²

The second function: identifying the "circumstances" of the conduct

331 In assessing conduct for the purposes of determining whether there has been a breach of s 21(1), the court must identify "all the circumstances" relevant to whether the conduct is unconscionable within the meaning of s 21(1). Matters specified in s 22(1) must be applied "if and to the extent that they apply in the circumstances".³⁴³ Where evidence is adduced by either party about a matter specified in s 22(1), that matter will be part of the "circumstances" of the alleged conduct within the meaning of s 21(1) and, consequently, a mandatory relevant

340 *ASIC v Kobelt* (2019) 267 CLR 1 at 78 [234]; *Stubbings* (2022) 276 CLR 1 at 26 [57].

341 *Productivity Partners* (2023) 297 FCR 180 at 253-254 [221].

342 *Productivity Partners* (2021) 154 ACSR 472 at 571 [500].

343 *Stubbings* (2022) 276 CLR 1 at 26 [57], citing *ASIC v Kobelt* (2019) 267 CLR 1 at 38 [87], 49 [120], 60-61 [154]-[155], 105 [302].

consideration in the sense that s 21(1) requires the court to consider "all the circumstances" in which the alleged conduct occurred. It is in this sense that the word "may" in s 22(1) is a "conditional" and not a "permissive" expression.³⁴⁴

332 Where evidence is not adduced about a matter in s 22(1), the absence of evidence may still be relevant to an assessment of whether the conduct is, "in all the circumstances", unconscionable. In particular, "the relative strengths of the bargaining positions of the supplier and the customer" (s 22(1)(a)) and "the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier" (s 22(1)(e)) are matters that will always form part of the circumstances of the supply or possible supply of goods or services to a person, or the acquisition or possible acquisition of goods or services from a person. Section 22(1)(a) reflects the original and primary concern of statutory prohibitions against unconscionable conduct to protect consumers by addressing the harmful effects of disparities of bargaining power between supplier and consumer.³⁴⁵ Section 22(1)(e) is a materiality consideration, suggesting a measure (although not the only measure) by which the harmful effects of the impugned conduct may be evaluated.

333 Accordingly, s 22(1)(a) and (e) are mandatory relevant considerations as a matter of construction of s 21(1) when read with s 22(1). In the absence of evidence about s 22(1)(a), a court may infer that the relative strengths of the bargaining positions of the supplier and the customer do not materially affect the characterisation of the alleged conduct as unconscionable. In the absence of evidence about s 22(1)(e), a court may infer that there is no material difference in the amount for which, or the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier, or that the relevant services could not have been acquired on more advantageous terms. Such an inference may tend against a contravention of s 21(1), depending upon why the impugned conduct is said to be unconscionable.³⁴⁶

334 Section 22(1) also includes several matters that will or will not form part of the "circumstances" of relevant conduct, namely, s 22(1)(b), (c), (d) and (k). If no evidence is adduced about one of these circumstances, the court should infer that the unconscionability of the alleged conduct does not depend upon that circumstance and therefore that the alleged conduct does not offend the standard entailed in that circumstance, a breach of which may support a finding of

344 *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 at 587 [189].

345 *Swanson Committee Report* at 67 [9.59].

346 *ASIC v Kobelt* (2019) 267 CLR 1 at 50-51 [123].

unconscionability. Those standards are that a supplier should not: require a customer to comply with conditions that were not reasonably necessary for the protection of the supplier's legitimate interests (s 22(1)(b)); engage in relevant conduct where the customer is unable to understand any documents relating to the supply or possible supply of the goods or services (s 22(1)(c)); exert undue influence or pressure on, or use unfair tactics against, the customer or a person acting on behalf of the customer in relation to the supply or possible supply of the goods or services (s 22(1)(d)); or secure a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the acquisition of the goods or services (s 22(1)(k)).

335 While s 22(1) is explicitly non-exhaustive of the matters that may support a finding of unconscionability within the meaning of s 21(1), a finding that the circumstances of the alleged conduct do not include a breach of one of the standards that is implicit in s 22(1) may tend to suggest that the conduct is not unconscionable. Thus, in *Australian Securities and Investments Commission v Kobelt*, Kiefel CJ and Bell J observed that "[t]he absence of the exertion of undue influence, pressure or unfair tactics bears on the assessment of whether the commercial advantage obtained by the supplier in connection with the supply of the financial service is an *unconscientious* advantage".³⁴⁷ Similarly, in *Paciocco v Australia & New Zealand Banking Group Ltd*, Gageler J reasoned that it was not permissible for a party alleging statutory unconscionability to "ignore" matters identified in the relevant statute as circumstances bearing upon a finding of unconscionability.³⁴⁸ While the non-existence of a matter in s 22(1) might be inconclusive (or even irrelevant) in a given case, this will depend upon the other circumstances that are said to support a conclusion of unconscionability, and the standards by reference to which that conclusion may be drawn. Non-existence of a matter may raise doubt as to what standards, not found in s 22(1) but said to be offended, are alleged to be protected by s 21(1), having regard to the terms of s 22(1).

336 A third category of "circumstances" specified in s 22(1) comprises matters of degree, found in s 22(1)(f), (i), (j)(i) and (l). If no evidence is adduced about one of these matters, the court may infer that that matter gives rise to no relevant circumstance within the meaning of s 21(1). The matters of degree are, broadly: (1) consistency of conduct in similar transactions; (2) unreasonable failure to disclose facts or risks to the customer; (3) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and (4) the extent to which the supplier and the customer acted in good faith. The matters of degree identify types of conduct, including conduct of the customer, that may contribute to a finding of unconscionability. Again, the absence of relevant

347 (2019) 267 CLR 1 at 30 [58] (emphasis in original).

348 (2016) 258 CLR 525 at 587 [189].

matters may raise a doubt as to whether the alleged conduct is, in all the circumstances, unconscionable.

337 The fourth and final category of "circumstances" specified in s 22(1) comprises facts that may or may not exist in relation to the alleged conduct. The relevant provisions are s 22(1)(g) and (h) (requirements of industry codes) and s 22(1)(j)(ii)-(iv) (terms and conditions of any contract, and certain conduct in connection with any contract). If no evidence is adduced about one of these matters, the court may infer that that matter gives rise to no relevant circumstance within the meaning of s 21(1).

338 While they do not exhaust the universe of factors that may render conduct unconscionable within the meaning of s 21(1), the matters listed in s 22(1) are of salience in determining whether a supplier has contravened s 21(1). In my view, the requirement that the impugned conduct be evaluated "in all the circumstances" points strongly to the general utility of a systematic analysis by reference to the matters listed in s 22(1) in any case alleging contravention of s 21(1).

339 BEECH-JONES J. I write separately on the state of mind that a party must possess to be "involved" or "knowingly concerned" in a principal's contravention of the proscription on engaging in unconscionable conduct in connection with, inter alia, the supply of services found in s 21 of the *Australian Consumer Law* ("the ACL").³⁴⁹ Such a party must have knowledge of the "essential facts" that constitute the contravention by the principal but need not know that the principal's conduct constitutes unconscionable conduct or otherwise have knowledge of the legal characterisation or complexion of those essential facts, including that the conduct is contrary to a particular standard that embodies what is meant by unconscionable. What constitutes the "essential facts" of a contravention of which the party must have knowledge will depend on what conduct the principal's contravention consists of in a particular case. The party that is involved or knowingly concerned in the principal's contravention may, but not necessarily will, possess knowledge of a particular matter or have a particular intent that the principal does not.

Background

340 The circumstances of, and issues arising in, these appeals are set out in the judgment of Gageler CJ and Jagot J. I agree with their Honours' reasons for rejecting the first two grounds of Productivity Partners Pty Ltd's ("the College") appeal, which challenged the finding of the majority of the Full Court of the Federal Court of Australia that it had engaged in unconscionable conduct. It follows that I would also reject ground three of Mr Wills' appeal, which contended that, if the College's appeal was successful, then he could not be liable as an accessory. I also agree with that part of Gordon J's judgment that addresses the meaning of "unconscionable conduct" in s 21(1) and the relationship between ss 21 and 22 of the ACL.³⁵⁰

341 I also agree with the reasons of Gageler CJ and Jagot J for upholding the Australian Competition and Consumer Commission's ("the ACCC") notice of contention in each appeal, which challenged the finding of the majority of the Full Court that there was "an insufficient basis to infer that Mr Wills had a real appreciation, as at 7 September 2015, of the full consequences of the changes" to the College's enrolment and withdrawal procedures that came into effect on that day.³⁵¹ This also disposes of ground two of Mr Wills' appeal.

342 There remains to be considered ground one of Mr Wills' appeal (and ground three of the College's appeal, which challenges the finding that Site Group

349 *Competition and Consumer Act 2010* (Cth), Sch 2 ("ACL").

350 Reasons of Gordon J at [97]-[110].

351 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 287 [340].

International Limited was knowingly concerned in or party to the College's unconscionable conduct through Mr Wills and which depends on ground one of Mr Wills' appeal). With ground one of his appeal, Mr Wills contends that the majority of the Full Court erred in finding that he had the requisite knowledge to be liable as an accessory to a contravention of s 21 of the ACL. As the ACCC's notices of contention should be upheld, the relevant findings about Mr Wills' knowledge that must be considered are those of the primary judge.

Accessorial liability under the *Australian Consumer Law*

343 Within Pt 2-2 of Ch 2 of the ACL, s 21(1) relevantly proscribes a person, in trade or commerce, in connection with the supply (or possible supply) of services to another person from engaging in conduct that is, in all the circumstances, unconscionable. Within Pt 5-2 of Ch 5 of the ACL, s 224(1) confers on a court power to impose a pecuniary penalty on a person who the court is satisfied has contravened various provisions of the ACL,³⁵² including s 21(1), or has attempted to contravene those provisions,³⁵³ as well as any person who the court is satisfied:³⁵⁴

- "(c) has aided, abetted, counselled or procured a person to contravene such a provision; or
- (d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision; or
- (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
- (f) has conspired with others to contravene such a provision".

344 Relevantly the same wording as s 224(1)(c)-(f) is used in the definition of "involved" in the ACL.³⁵⁵ The significance of that definition is that a claimant who suffers loss or damage because of conduct that contravenes a provision of Ch 2 or 3 of the ACL may recover the amount of the loss or damage from the contravener or any person "involved" in the contravention.³⁵⁶ This includes a contravention of s 21(1), as well as s 18(1) of the ACL, which proscribes a person, in trade or

352 ACL, s 224(1)(a).

353 ACL, s 224(1)(b).

354 ACL, s 224(1)(c)-(f).

355 ACL, s 2(1).

356 ACL, s 236(1).

commerce, from engaging in conduct that is "misleading or deceptive or is likely to mislead or deceive".

345 The ACL also extends the power to grant injunctive relief for breaches of s 21(1) and other provisions of the ACL to persons who fall within the above categories (ie, aider, abettor etc).³⁵⁷

346 A variety of Commonwealth legislation adopts the above language in similar contexts.³⁵⁸ The references to aiding, abetting, counselling, procuring or being directly or indirectly knowingly concerned in or a party to a contravention appear to have their statutory origins in former s 5 of the *Crimes Act 1914* (Cth).

Giorgianni and Yorke v Lucas

347 In *Yorke v Lucas*, this Court construed the provision of the (former) *Trade Practices Act 1974* (Cth)³⁵⁹ that was materially identical to s 224(1)(c)-(f) and the definition of "involved" in the ACL as requiring an intentional participation in the relevant contravention on the part of an accessory.³⁶⁰ An accessory, including a party said to be knowingly concerned in the contravention, must have knowledge of the "essential matters",³⁶¹ the "essential facts"³⁶² or the "essential elements"³⁶³ of the contravention. This conclusion was derived from applying the understanding of the words "aided, abetted, counselled or procured" to "designate participation in a crime as a principal in the second degree or as an accessory before the fact" in criminal law as explained in *Giorgianni v The Queen*.³⁶⁴

348 *Giorgianni* confirmed that, even where an offence committed by a principal is one of strict liability, an accessory to that offence must have some form of guilty

357 ACL, s 232(1)(a), (c)-(d).

358 See, for example, *Australian Securities and Investments Commission Act 2001* (Cth), s 12GD(1)(c)-(f); *Banking Act 1959* (Cth), s 65A(1)(c)-(f); *Competition and Consumer Act*, s 44ZZD(3).

359 Section 75B.

360 *Yorke v Lucas* (1985) 158 CLR 661 at 667, 676.

361 *Yorke v Lucas* (1985) 158 CLR 661 at 667, 676.

362 *Yorke v Lucas* (1985) 158 CLR 661 at 670, 674.

363 *Yorke v Lucas* (1985) 158 CLR 661 at 670.

364 (1985) 156 CLR 473 ("*Giorgianni*"); see *Yorke v Lucas* (1985) 158 CLR 661 at 667, 673-674, 676-677.

knowledge.³⁶⁵ In *Giorgianni*, the appellant was convicted of procuring an offence under (former) s 52A of the *Crimes Act 1900* (NSW) of driving a motor vehicle at a speed or in a manner dangerous to the public where death or grievous bodily harm is occasioned through the impact of that vehicle with any vehicle or other object.³⁶⁶ The appellant's employee drove a truck with defective brakes, which failed, and the truck struck several vehicles of which some passengers were killed or injured.³⁶⁷ There was evidence from which it could be concluded that the appellant was, or ought to have been, aware that the brakes were defective.³⁶⁸ The offence under s 52A was strict in the sense that, although the driving must have been conscious and voluntary, to be culpable a driver of the vehicle need not have known of the dangerous condition of the vehicle.³⁶⁹

349 The trial judge in *Giorgianni* directed the jury that the Crown had to prove that the appellant "knew or ought to have known" of the defect with the brakes and "the danger thereby to the public".³⁷⁰ This Court held that the trial judge's summing up was defective insofar as it permitted the jury to convict the appellant based on imputed knowledge (ie, "ought to have known") as opposed to actual knowledge (or what might be inferred from "wilful blindness").³⁷¹ Using similar language to *Yorke v Lucas*, the Court referred to the necessity to establish that the accessory had knowledge of what was variously referred to as the "essential circumstances",³⁷² the "essential matters"³⁷³ or the "essential facts"³⁷⁴ of the

365 *Giorgianni* (1985) 156 CLR 473 at 481, 500-501, citing *Johnson v Youden* [1950] 1 KB 544 at 546.

366 *Giorgianni* (1985) 156 CLR 473 at 475. Section 351 of the *Crimes Act 1900* (NSW) provided that a person who, inter alia, procured an offence may be indicted, convicted, and punished as a principal offender.

367 *Giorgianni* (1985) 156 CLR 473 at 475.

368 *Giorgianni* (1985) 156 CLR 473 at 476.

369 *Giorgianni* (1985) 156 CLR 473 at 499.

370 *Giorgianni* (1985) 156 CLR 473 at 503.

371 *Giorgianni* (1985) 156 CLR 473 at 487-488, 495, 504-505, 508.

372 *Giorgianni* (1985) 156 CLR 473 at 482.

373 *Giorgianni* (1985) 156 CLR 473 at 481, 500.

374 *Giorgianni* (1985) 156 CLR 473 at 487-488.

offence, even though the principal offender could be convicted "in the absence of [such] knowledge".³⁷⁵

350 Two related limitations on the breadth of the proposition in *Giorgianni* that the accessory must have knowledge of the essential circumstances, matters or facts of the principal's offence, even though the principal offence is of strict liability, should be noted.

351 First, the accessory's knowledge must concern the relevant nature, character and circumstances of the principal's unlawful act, but does not necessarily extend to knowledge of an element of the contravention that is a consequence of that act.³⁷⁶ Thus, in *Giorgianni*, it was an element of an offence under s 52A of the *Crimes Act 1900* (NSW) that death or grievous bodily harm was occasioned to a person through impact with a vehicle being driven in a manner dangerous to the public. Each member of this Court held that to be an accessory, it is not necessary to have any knowledge or intention concerning the impact of the vehicle or the occasioning of death or grievous bodily harm.³⁷⁷

352 Second, the accessory's knowledge of the essential circumstances, matters or facts that constitute the offence does not extend to knowledge that those circumstances, matters or facts constitute an offence.³⁷⁸ Further, the requisite knowledge of the accessory does not extend to knowledge of the legal characterisation or complexion of the essential circumstances, matters or facts of the offence.³⁷⁹ Thus, in *Rural Press Ltd v Australian Competition and Consumer Commission*, this Court rejected a contention that to be an accessory to a contravention of former s 45 of the *Trade Practices Act*, the accessory must have knowledge that the principal's conduct "was engaged in for the purpose or had the likely effect of substantially lessening competition ... in the market", that being the language of the statutory provision applicable to the principal.³⁸⁰ It was observed

375 *Giorgianni* (1985) 156 CLR 473 at 483; see also *R v Rohan (a pseudonym)* (2024) 98 ALJR 429 at 437 [38].

376 See, for example, *Stokes* (1990) 51 A Crim R 25 at 38; *R v Creamer* [1966] 1 QB 72 at 80-81.

377 *Giorgianni* (1985) 156 CLR 473 at 479, 495, 503.

378 *Giorgianni* (1985) 156 CLR 473 at 494, 500, citing *Johnson v Youden* [1950] 1 KB 544 at 546-547; *Yorke v Lucas* (1985) 158 CLR 661 at 667.

379 See *R v Boston* (1923) 33 CLR 386 at 392; *R v Rogerson* (1992) 174 CLR 268 at 282-283.

380 *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at 74 [48], see also 60 [2].

that it was necessary to know the "essential facts" but not that those facts were "capable of characterisation in the language of the statute".³⁸¹ In *Rural Press*, the facts found against the accessories included that they intended that competition in a particular market and area "should be brought to an end".³⁸²

353 The conclusion in *Rural Press* that the characterisation of the market effect of the principal's conduct was not an "essential fact" of which they needed to have knowledge is consistent with Toohey and Gaudron JJ's analysis of the meaning of "dishonesty" in *Peters v The Queen*³⁸³ (which was later endorsed in *Macleod v The Queen*³⁸⁴). In *Peters*, Toohey and Gaudron JJ held that where "dishonesty" is not used in legislation in a "special sense", it is established by first demonstrating that a person had some particular knowledge, belief or intent at the time they committed the relevant act and then demonstrating that engaging in the act with that state of mind was dishonest "by the standards of ordinary, decent people".³⁸⁵ Their Honours added that whether or not the means employed were contrary to those standards was not a "question of fact", but a "question of characterisation".³⁸⁶ As such, it was not a matter for evidence even though, if there is a dispute about whether the means employed were dishonest according to the standards of "ordinary, decent people", the issue is left to the jury.³⁸⁷

354 In some contexts, the difference between an accessory having knowledge of the essential circumstances, matters or facts (or, to use the language in *Yorke v Lucas*, the essential matters, facts or elements) concerning the acts of the principal, on the one hand, and the legal characterisation or complexion of those circumstances, matters or facts, on the other hand, can be fine. Many of the dangerous driving cases involving accessories state or imply that an accessory must have knowledge that the relevant defect, manner of driving or condition of

381 *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at 74 [48], see also 60 [2].

382 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 284 [162].

383 (1998) 192 CLR 493 ("*Peters*").

384 (2003) 214 CLR 230 at 245 [46], 256 [99], 264-265 [130].

385 *Peters* (1998) 192 CLR 493 at 504 [18].

386 *Peters* (1998) 192 CLR 493 at 508 [28].

387 *Peters* (1998) 192 CLR 493 at 504 [18], 508 [29].

the driver was "dangerous" or represented a "danger".³⁸⁸ While the word "dangerous" was used in the statutory provisions creating the offences in such cases,³⁸⁹ requiring such knowledge on the part of an accessory is not necessarily the same as attributing to the accessory knowledge that the vehicle was driven in a manner dangerous to the public. In any event, the operative principle was articulated in *Rural Press*. As explained next, *Rural Press* reflected what was decided in *Yorke v Lucas* in relation to accessorial liability for misleading or deceptive conduct.

Accessorial liability for misleading or deceptive conduct

355 The statutory provision contravened by the principal in *Yorke v Lucas* was the previous equivalent of s 18 of the ACL.³⁹⁰ Like s 18, that provision imposed a form of strict liability on a principal that engaged in conduct that was misleading or deceptive or likely to mislead or deceive.³⁹¹ In *Yorke v Lucas*, a corporate land agent representing the vendor of a business was found to have contravened that provision by unwittingly but falsely representing the average weekly turnover of the business to a proposed purchaser. The director of the land agent who made the representation (Mr Lucas) was found not to be involved in the contravention in circumstances where he was "not aware and had no reason to suspect" that the information provided concerning the turnover was incorrect.³⁹² In concluding that the director had to have knowledge of the falsity of the representation to be involved in the contravention, Mason A-CJ, Wilson, Deane and Dawson JJ observed:³⁹³

"A contravention of s 52 involves conduct which is misleading or deceptive or likely to mislead or deceive *and the conduct relied upon in this case consisted of the making of false representations*. Whilst Lucas was aware of the representations – indeed they were made by him – he had no

388 See, for example, *Du Cros v Lambourne* [1907] 1 KB 40 at 45-46; *R v Robert Millar (Contractors) Ltd* [1970] 2 QB 54 at 72; *Giorgianni* (1985) 156 CLR 473 at 476-478.

389 *Motor Car Act 1903* (UK), s 1; *Road Traffic Act 1960* (UK), s 2; *Crimes Act 1900* (NSW), s 52A(1)(c), (3)(c).

390 *Trade Practices Act 1974* (Cth), s 52.

391 *Yorke v Lucas* (1985) 158 CLR 661 at 666.

392 *Yorke v Lucas* (1985) 158 CLR 661 at 665.

393 *Yorke v Lucas* (1985) 158 CLR 661 at 667-668.

knowledge of their falsity and could not for that reason be said to have intentionally participated in the contravention." (emphasis added)

356 Brennan J also held that to be knowingly involved in the contravention, the director must have had "knowledge of the acts constituting the contravention and of the circumstances which give those acts the character which s 52 defines" (ie, the falsity of the representation).³⁹⁴

357 However, consistent with what was later decided in *Rural Press*, knowledge of the falsity of the principal's representation is not to be equated with knowledge that the principal has engaged in conduct that was misleading or deceptive (or likely to mislead or deceive) contrary to the statute. Knowledge of the falsity of the representation was necessary in *Yorke v Lucas* because the misleading conduct in that case "consisted" of the making of a false representation (to a particular recipient).³⁹⁵ However, the conduct referred to in s 18 of the ACL is not confined to representations,³⁹⁶ and not all cases where the conduct can be characterised as the making of a representation are as straightforward as those considered in *Yorke v Lucas*. An identification of the requisite knowledge that an accessory must possess will depend on the nature of the conduct of the principal that contravenes the statutory provision.

358 For example, in some contexts, the failure to disclose some relevant fact or matter may amount to misleading or deceptive conduct where the circumstances are such that there is a reasonable expectation that the fact or matter would be disclosed.³⁹⁷ Although it is neither possible nor necessary to exhaustively state in the abstract the requisite knowledge an accessory must possess to be liable for such misleading or deceptive conduct, in broad terms an accessory would have to be aware of the non-disclosure and that disclosure was required. Such knowledge is different to being aware that the principal's conduct was misleading or deceptive within the meaning of the statute.

394 *Yorke v Lucas* (1985) 158 CLR 661 at 677.

395 *Yorke v Lucas* (1985) 158 CLR 661 at 667-668.

396 *Competition and Consumer Act*, s 4(2). See *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at 622-625 [100]-[108], 646 [179]; *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 ("*Miller & Associates*") at 368 [14]-[15].

397 *Miller & Associates* (2010) 241 CLR 357 at 368-370 [14]-[20]; *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 41, citing *Kimberley NZI Finance Ltd v Torero Pty Ltd* (1989) ATPR (Digest) ¶46-054 at 53,195.

359 Similarly, where the conduct is directed towards a large class of persons or the public in general, a conclusion that the principal has engaged in conduct that is misleading or deceptive contrary to the statute will, at least in part, require an attribution of certain characteristics to the "ordinary" or "reasonable" members of that class of persons (or the public in general) to whom the conduct is directed to determine whether the conduct has a tendency to lead into error.³⁹⁸ The precise state of mind required to establish accessorial liability for such conduct will depend on how the case is framed but it may not necessarily require that an accessory have knowledge of, say, the characteristics of the "ordinary" or "reasonable" members of the class of persons (or the public in general) to whom the conduct is directed.

360 In *Anchorage Capital Master Offshore Ltd v Sparkes*,³⁹⁹ the New South Wales Court of Appeal (Ward P, Brereton JA and Griffiths A-JA) noted the existence of a longstanding difference of opinion in the decisions of intermediate courts of appeal as to whether, to be liable as an accessory in circumstances like those considered in *Yorke v Lucas*, an accessory had to have knowledge of the falsity of the representation⁴⁰⁰ or if mere knowledge of the facts that rendered the representation false was sufficient.⁴⁰¹ In this case, the majority of the Full Court of the Federal Court took the latter view.⁴⁰² That approach is contrary to *Yorke v Lucas* and *Giorgianni*. In *Anchorage Capital*, the Court of Appeal was correct in adopting the former view, although the Court also erred in equating that knowledge with knowledge that the principal's conduct was misleading or deceptive.⁴⁰³

Accessorial liability for unconscionable conduct

361 In this Court, there were several different formulations of the state of mind Mr Wills contended had to be established before it could be concluded that he was involved in the College's contravention of s 21 of the ACL. Thus, Mr Wills

398 *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 at 84-85 [101]-[103]; *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at 651 [39].

399 (2023) 111 NSWLR 304 at 359-360 [329].

400 See, for example, *Belconnen Lakeview Pty Ltd v Lloyd* (2021) 156 ACSR 273 at 309 [148], 310-311 [155]-[157].

401 See, for example, *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1 at 7-10 [6]-[13].

402 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180 at 273 [305].

403 *Anchorage Capital Master Offshore Ltd v Sparkes* (2023) 111 NSWLR 304 at 360 [330].

contended that to be liable as an accessory, it had to be established that he knew that the College's conduct "involve[d] predation, exploitation, or lack of good faith, or otherwise [bore] the character that render[ed] it against conscience". The difficulty with this contention is that conduct need not be characterised as predatory, exploitative or lacking in good faith to be unconscionable, and to say that an accessory must know that the principal's conduct "bears the character that renders it against conscience" is just a different way of stating that the accessory must know that the principal's conduct was unconscionable.

362 It was also contended that, consistent with Gordon J's analysis of the meaning of "unconscionable" in *Stubbings v Jams 2 Pty Ltd*,⁴⁰⁴ it had to be alleged and found that Mr Wills knew that the relevant conduct of the College was "offensive to a conscience informed by a sense of what is right and proper according to values which can be recognised by the court to prevail within contemporary Australian society".⁴⁰⁵

363 This submission should also be rejected. The description of unconscionability in *Stubbings* and the cases to which it refers were not identifying some essential matter, fact or element of a contravention of s 21(1) of the ACL of which an accessory must have knowledge. To require that an accessory appreciate that the conduct of the principal contravened a community standard identified as part of a judicial exposition of the meaning of unconscionability is no different in substance to requiring that the accessory know the legal complexion or characterisation of the principal's conduct.⁴⁰⁶

364 To be liable as an accessory, a party such as Mr Wills must, inter alia, have knowledge of the essential facts concerning the conduct of the principal that was said to amount to unconscionable conduct contrary to s 21(1) of the ACL. It follows from the above that this requires a close analysis of what the principal's contravention of s 21(1) "consisted" of. If, in a simple case, the unconscionable conduct was found to consist of the principal, being a supplier, engaging in conduct requiring a customer to comply with a condition that was not reasonably necessary for the protection of the supplier's legitimate interests,⁴⁰⁷ then the accessory would have to be aware that the condition was imposed and that it was not necessary to

404 (2022) 276 CLR 1 at 26-27 [56]-[58].

405 *Stubbings v Jams 2 Pty Ltd* (2022) 276 CLR 1 at 27 [58], citing *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at 40 [93].

406 cf *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53.

407 ACL, s 22(1)(b).

protect the supplier's legitimate interests, even if the supplier did not have knowledge of the latter.

365 However, the analysis of the knowledge an accessory must possess can become more complex depending on the nature of the unconscionable conduct alleged and found against the principal. With unconscionability, the conduct alleged against the principal often involves the attribution of some form of intention or knowledge of at least some conduct, circumstance, consequence of conduct or likely result of conduct to the principal. In such a case, to be liable, the accessory will also have to possess that intention or knowledge. Thus, while a party "involved" or "knowingly concerned" in a contravention of s 21 must possess knowledge of the essential facts of the principal's contravention, even if in some cases the principal did not, that does not mean that in all cases the intention or knowledge of the accessory will differ from that of the principal.

Mr Wills was involved in the College's unconscionable conduct

366 The primary judge's findings of knowledge and intention against Mr Wills included that, from no later than 7 September 2015, he was aware of the proposed enrolment and withdrawal process changes at the College,⁴⁰⁸ that the changes were being made to maximise or increase the College's profits,⁴⁰⁹ that there were risks of agents engaging in misconduct in the recruitment of students (ie, the "CA misconduct risk")⁴¹⁰ and unsuitable students being enrolled (ie, the "unsuitable enrolment risk"),⁴¹¹ that the process changes would remove mechanisms that mitigated those risks,⁴¹² and that the result of the process changes would be (and over time was) a substantial increase in the number of students who enrolled in the

408 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd [No 3]* (2021) 154 ACSR 472 at 582 [557].

409 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd [No 3]* (2021) 154 ACSR 472 at 582 [559].

410 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd [No 3]* (2021) 154 ACSR 472 at 582 [562]; see reasons of Gageler CJ and Jagot J at [29].

411 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd [No 3]* (2021) 154 ACSR 472 at 583 [563]; see reasons of Gageler CJ and Jagot J at [30].

412 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd [No 3]* (2021) 154 ACSR 472 at 583 [564].

College's online courses.⁴¹³ The primary judge also found that by the time Mr Wills commenced as acting Chief Executive Officer of the College in November 2015, he "knew that substantial numbers and proportion of students were getting nothing from the college yet they were incurring very substantial debts to the Commonwealth".⁴¹⁴ Lastly, the primary judge found that Mr Wills knew that "the college ran a system of recruitment, enrolment and progression through census dates of students which enabled the college to pocket vast sums of money, effectively from students, via the [FEE-HELP] scheme, in return for which the college had to deliver nothing to very substantial numbers of students".⁴¹⁵

367 The effect of the primary judge's findings was that, from no later than 7 September 2015, Mr Wills knew that the process changes would lead to the CA misconduct risk and the unsuitable enrolment risk materialising and that as a consequence substantial numbers of students would incur debts for courses that they did not properly appreciate they had enrolled in and in respect of which they would not receive any benefit,⁴¹⁶ and knew and intended that the College would derive substantial revenue (and profits) as a consequence. After 7 September 2015, Mr Wills' belief and expectation that these matters would ensue from the enrolment and withdrawal process changes gave way to knowledge that they had come to pass.

368 As noted, with some contraventions of s 21 of the ACL, the accessory need not possess any greater intention or knowledge than that of the principal. This is such a case. The essence of the unconscionability alleged and found against the College was that it knew of the likelihood that the process changes would lead to misconduct of the agents in enrolling students and that the College intended to take advantage of that likelihood to increase profits.⁴¹⁷ The findings made against Mr Wills were to the effect that he shared that knowledge and intention. Those findings were sufficient to establish that he had the requisite state of mind to be involved or knowingly concerned in the College's unconscionable conduct.

413 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd [No 3]* (2021) 154 ACSR 472 at 583 [565].

414 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd [No 3]* (2021) 154 ACSR 472 at 584 [574].

415 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd [No 3]* (2021) 154 ACSR 472 at 584 [575].

416 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd [No 3]* (2021) 154 ACSR 472 at 584 [574].

417 See, for example, reasons of Gageler CJ and Jagot J at [67]-[68].

369 I would reject ground one of Mr Wills' appeal (and ground three of the
College's appeal).

370 I agree with the orders proposed by Gageler CJ and Jagot J.

