FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 5) [2021] FCA 1516

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| File number: |  |
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| Judgment of: | **BROMWICH J** |
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| Date of judgment: | 3 December 2021 |
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| Catchwords: | **CONSUMER LAW** – pecuniary penalties – assessment of appropriate penalties to be applied following liability judgment (*Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)* [2019] FCA 1982) – total penalties imposed of $153 million |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) schedule 2 *The Australian Consumer Law* ss 21, 29, 76, 78, 224, 237 |
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| Cases cited: | *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)* [2019] FCA 1982  *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 4)* [2020] FCA 1811  *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25  *Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73; 262 FCR 243  *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Regulator and Consumer Protection |
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| Number of paragraphs: | 22 |
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| Date of hearing: | 4 August 2021 |
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| Counsel for the First and Second Applicants: | TM Begbie QC, D Tynan |
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| Solicitor for the First and Second Applicants: | Corrs Chambers Westgarth |
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| Counsel for the Respondent: | KC Morgan SC, CA Hamilton-Jewell |
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| Solicitor for the Respondent: | Minter Ellison |

ORDERS

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|  | | NSD 453 of 2016 |
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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  First Applicant  COMMONWEALTH OF AUSTRALIA  Second Applicant | |
| AND: | AUSTRALIAN INSTITUTE OF PROFESSIONAL EDUCATION PTY LTD (IN LIQUIDATION)  Respondent | |

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| order made by: | BROMWICH J |
| DATE OF ORDER: | 3 December 2021 |

THE COURT ORDERS THAT:

1. The respondent pay the Commonwealth of Australia a pecuniary penalty of $153,000,000.

2. The respondent pay the applicants the costs of and incidental to this proceeding.

3. Order 2 of the orders made on 16 May 2017 be vacated and replaced by the following order 4.

4. The applicants not seek to enforce against the respondent:

(a) order 1 above for pecuniary penalties;

(b) order 2 above for costs;

(c) orders 1 and 2 made on 1 March 2021 for compensation under s 237 of the *Australian Consumer Law* (contained in Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (***ACL***); or

(d) any orders made for refunds under s 232(6)(a) of the *ACL*,

without first obtaining the leave of the Court to do so.

5. Order 4 does not apply to action taken seeking to prove compensation and costs in the external administration of the Australian Institute of Professional Education Pty Ltd (in liquidation) as unsecured creditors for which no leave of the Court is required.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BROMWICH J:

1 Substantial penalties are called for when a commercial enterprise systematically predates on both a government education support scheme designed to help disadvantaged members of the Australian community, and consequently, upon those consumers. Such penalties are essential to advance the principal objective of deterrence in civil pecuniary penalty proceedings. General deterrence is especially important in the circumstances of this case.

2 The applicants, the Australian Competition and Consumer Commission (**ACCC**) and the Commonwealth of Australia, brought their case against the respondent, the Australian Institute of Professional Education Pty Ltd (in liquidation) (**AIPE**), for contraventions of ss 21(1), 29(1)(g), 29(1)(i), 76 and 78 of the *Australian Consumer Law* (***ACL***), being Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (***CCA***). While AIPE was liable for penalties under s 224(1)(a)(ii) of the *ACL* for contraventions of each of those provisions, penalties are only sought in respect of the unconscionable conduct proven contrary to s 21 of the *ACL*.

3 The Vocational Education and Training Fee Higher Education Loan Program (**VET FEE-HELP** or **VFH Scheme**) is funded by the Australian Government (and thus taxpayers) to improve access to vocational education and training (**VET**). The applicants brought their case in relation to the enrolment of plainly unsuitable consumers in online VET courses provided by AIPE and funded under the VFH Scheme. The applicants proved their case in a contested trial in two separate but related ways:

(a) They made out an overall case in relation to a system of unconscionable conduct (**system conduct**) in enrolment practices; and

(b) They made out an illustrative case in respect of a small sample of individual consumers, dealing with recruitment conduct antecedent to enrolment (**illustrative conduct**), which enabled much greater detail of the conduct leading to the system conduct to be exposed.

4 Most of the case was defended unsuccessfully by AIPE. Only the case in respect of the individual consumers was largely conceded as to conduct which was substantially beyond challenge, but not as to the consequences that should flow from that conduct.

5 AIPE’s enrolment scheme was designed to maximise revenue from the VFH Scheme, and to minimise costs. An essential part of these costs was to provide educational services to each enrolled consumer. The system conduct case affected approximately 9,000 consumers. The illustrative conduct was proven in respect of 12 out of 13 individual consumers. This created two classes of penalties for determination. For the following reasons, I have decided that the total appropriate penalty to be imposed is $153 million. This is made up of:

(a) $150 million for the overall system of unconscionable conduct; and

(b) $3 million for separate unconscionable conduct in respect of the 12 individual consumers, being $250,000 per consumer.

6 My reason for imposing these penalties is that they may serve as a clarion call as to the consequences of engaging in such behaviour. I regret that AIPE is in now in liquidation so that, at best, a small proportion of that amount is going to be paid. A further regret is that no individual associated with AIPE’s conduct is being made accountable. This latter regret in particular extends to AIPE’s former Chief Executive Officer, Mr Amjad Khanche, who is not a party to the proceeding and is therefore not able to be made the subject of any liability or other adverse findings against him in person, or any related penalty. That is so despite his conduct forming an important part of basis for AIPE’s liability, as detailed at some length in *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)* [2019] FCA 1982 (**liability judgment**).

7 The liquidators of AIPE considered that the question of penalty could be determined on the papers without the need for the additional costs of a hearing to be incurred. In the event that a further oral hearing was required, the liquidators suggested in subsequent written submissions that it may be appropriate that the Court make an order that the applicants fund them to appear as a contradictor in relation to the question of the appropriate penalty to be imposed. I did not consider imposing any further outlay on the Australian taxpayer as result of AIPE’s actions to be appropriate and declined to make such an order. The bulk of the submissions were made in writing by the applicants, to which AIPE has responded by way of brief written submissions, including the suggestion of funding the liquidator referred to above. AIPE’s submissions addressed the question of costs postdating the liability judgment, and the enforcement of costs orders and compensation orders. No submissions were made as to the quantum of the penalty to be imposed. There was ultimately only a short oral hearing, at which only the applicants appeared, in order to address the approach to be taken in arriving at an appropriate quantum of penalty.

8 The key conclusions reached in the liability judgment are reflected in declarations made on 1 May 2020, a copy of which are set out in Schedule A to these reasons. There was also a judgment adjudicating on how the Court should determine whether enrolment by AIPE of a consumer in an online course was the result of the unconscionable system of conduct or pattern of behaviour which was found to have existed in the liability judgment: *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 4)* [2020] FCA 1811 (***ACCC v AIPE No 4***). That further adjudication resulted in compensation orders being made on 1 March 2021 in favour of the applicants, totalling just over $142 million between the two of them.

9 The compensation sum of just over $142 million was made up as follows. AIPE was paid $197 million in respect of almost 13,000 consumers enrolled as students. Of that sum, over $138 million (just over 70%) was ordered to be paid back in respect of students for whom it was established that they should never have been enrolled, corresponding to about 9,000 consumers. A further sum of just over $4.3 million was ordered to be paid to the Commonwealth in respect of 322 consumers enrolled in an AIPE online VET course during the period between 1 May 2013 and 1 December 2015 (**relevant period**) who completed one or more units of study in the course in which they were enrolled and met the criteria specified in sub-paragraphs 1(a), (b) and (c) of the orders made on 1 May 2020.

10 For the purposes of *ACCC v AIPE No 4*, key passages in the liability judgment were reproduced in a schedule to that judgment, and are reproduced again in Schedule B to these reasons. Those passages are a useful way in which to comprehend the seriousness of the conduct of AIPE.

11 The penalty must be appropriate to ensure deterrence, but not oppressive in the sense of being greater than deterrence requires. Because AIPE is in liquidation, there is no work for specific deterrence, which makes general deterrence the critical consideration. The applicants therefore seek penalties for the system of unconscionable conduct of $140 to $170 million and penalties of $6 to $7.2 million for the illustrative conduct involving 12 individual consumers (that is, $500,000 to $600,000 per consumer) for the following reasons, none of which can be seriously disputed:

(a) Businesses must be deterred from unconscionably taking advantage of a power imbalance to engage in exploitative business practices, in order to adequately protect consumers. The need for that protection is greater when consumers are vulnerable to exploitative practices. This was specifically proven in respect of the 12 consumers, and that in turn was illustrative in relation to the separately proven system conduct.

(b) A feature of VET FEE-HELP is that it was designed to help members of the community who would otherwise not embark upon further education or training for vocational (that is, employment) purposes. The 12 consumers had characteristics such as economic instability, low levels of education, limited literacy and numeracy skills, limited computing skills and in some cases, limited computer and/or internet access.

(c) The type of consumer targeted by AIPE’s sales and marketing techniques as designed and as deployed via its staff and recruitment agents, had an inherently higher risk of being unsuitable for the courses being sold, and a correspondingly inherently lower prospect of being able to detect any false or misleading aspect of the information provided to them. This was especially marked in respect of the Indigenous communities towards whom these techniques were directed. The evidence established that this conduct was callous and deliberately targeted.

(d) The use of commission-remunerated agents created additional incentives to engage in unconscionable conduct. This creates a need for corresponding penalty incentives to make sure that such arrangements, including systems and incentives, contain appropriate precautions and checks. Those who deploy these methods of sale must not be able to merely characterise the actions of these agents as being the unauthorised conduct of individuals in circumstances such as these.

(e) When any unconscionable conduct occurs in systems and incentives, serious penalty consequences are appropriate for any failure to address these issues promptly and effectively, or at all.

(f) Thwarting the public interest purpose of the VFH Scheme is an important factor to take into account. The end of this particular scheme does not lessen the need for deterrence as there will always be government schemes in which the need to provide assistance, sometimes with a measure of urgency, may outweigh the ability or time to implement sufficient systemic protections. The arguable laxness of a government scheme it not a reason to reduce the penalties to be imposed on those who predate upon it. To do that is tantamount to victim blaming. If anything, that tends to heighten the need for general deterrence.

(g) Penalties cannot be merely a cost of doing business, allowing them to be a calculated risk.

12 The maximum penalty for the contraventions for which penalties are sought was $1.1 million per contravention. The maximum penalty is a penalty yardstick. As there were many thousands of contraventions constituting the proven unconscionable system conduct, particular features require consideration in determining an appropriate penalty.

13 Section 224(4) of the *ACL* provides that there can only be one penalty imposed when conduct contravenes two or more provisions in respect of the same conduct, as opposed to merely similar or repeated conduct: see *Australian Competition and Consumer Commission v* ***Yazaki*** *Corporation* [2018] FCAFC 73; 262 FCR 243 at [217]-[224]. As already noted, penalties are only sought for s 21 contraventions in respect of the 12 consumers, not the ss 29(1), 76 and 78 contraventions arising out of the same conduct. No system conduct penalties are sought in respect of those 12 consumers.

14 While separate penalties should ordinarily be imposed for separate contraventions, grouping inextricably interrelated events as a course of conduct is an analytical tool permitted when appropriate: *Yazaki* at [234]-[235]. In a case such as this, in relation to the system conduct contravention, there may be no meaningful maximum penalty because of the sheer number of contraventions: see *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 at [157]. In this case, even if there was only one breach per consumer affected, there were some 9,000 contraventions, with a maximum penalty of $1.1 million each. In those circumstances a single penalty is appropriate for that course of conduct and individual penalties are appropriate for each contravention in respect of each of the 12 consumers. Once the two classes of penalty have been ascertained, there needs to be a final “*totality*” check, and any adjustment made to ensure the penalties are appropriate overall.

15 The applicants submit that I should consider the following aspects in determining an appropriate penalty:

(a) The systemic and protracted nature of the conduct, already detailed above, warrants a very strong deterrent penalty. The system deployed by AIPE was such that it rewarded unconscionable conduct and failed to protect consumers against it.

(b) The conduct was deliberate and arose out of the conduct of both management going to the very top of the organisation, and lower level staff, including a network of inadequately trained, monitored and disciplined recruiters who made misleading statements and engaged in unfair sales tactics as representatives of AIPE.

(c) A windfall profit motive was a dominant consideration in AIPE’s conduct which was allowed and encouraged, or at least not meaningfully discouraged.

(d) There was accordingly no adequate and effective culture of compliance, and indeed an active culture of non-compliance.

(e) Significant loss to the Commonwealth (and through it, the public) and corresponding harm has taken place, in the sum of at least $142 million.

(f) Liquidators were appointed to AIPE in October 2016 and were granted leave to defend the proceedings. They made admissions as to liability and contest liability on a narrowed basis following those admissions. The applicants submit that these admissions were “*limited*” and that the proceedings were otherwise vigorously contested, and that there is no real basis for a cooperation discount.

(g) There are no prior contraventions by AIPE to take into account.

(h) AIPE obtained overall revenue in excess of $210 million from the Commonwealth, only a minority legitimately, or at least not shown to be illegitimately. As revenue and enrolments rose over time, the size of AIPE’s operations and accordingly expenditure, did not, strongly supporting the inference that there was never any real intention to provide services to most of the additional consumers enrolled as students.

16 The first class of penalties to consider are the penalties in respect of the 12 individual consumers. The penalties sought by the applicants of $500,000 to $600,000 per consumer for the 12 individual consumers was arrived at by reference to the maximum per individual consumer contravention of $1.1 million. The focus in these proposed penalties is on the vulnerable consumer features identified at [11(b)] above. The applicants correctly submit that AIPE was callously indifferent to the interests of those consumers and deliberately engaged in the unconscionable conduct directed to them. Each was exposed to the risk of loss of around $14,000, plus a reduction in the lifetime amount that they could borrow from the federal government through the VFH Scheme. The conduct directed towards the 12 individual consumers is also correctly characterised by the applicants as being inconsistent with their basic dignity, and exposing them to financial and social consequences beyond their means.

17 The applicants submit that a penalty of or approaching half the maximum would properly signify the gravity of the wrongdoing. While the circumstances varied as between each of the 12 consumers, the overall seriousness of each circumstance was comparable, warranting a uniform penalty for each.

18 Synthesising all of the reasons above, with a particular focus on those specifically advanced in relation to the 12 individual consumers, I consider that the penalty proposed per contravention is excessive when regard is had to the amounts of money involved of some $14,000 per contravention. This is so given the range of conduct which is contemplated with a maximum possible penalty of $1.1 million. That said, there is no simple mathematical equation between the sum lost by the consumers and the possible penalty. Further, while the sum of money concerned per consumer may appear small to some, particularly in the context of the larger sums involved in this matter, the manner in which the 12 consumers were targeted and taken advantage of by AIPE (all set out in detail in Schedule A) must be reflected in the penalty amount. However, there remains a need for some degree of proportionality to reflect these factors. I consider that at a penalty of $400,000 per individual contravention would have been sufficiently stern to achieve the necessary level of general deterrence. A higher figure would have been justified if there was a serious issue of specific deterrence. However, taking totality into account both for the combined penalty for the 12 consumers, and for the very substantial system penalty considered below, I will adjust that downwards to a figure of $250,000 per consumer. This produces a combined penalty of $3 million in respect of the 12 consumers the subject of the illustrative conduct.

19 In relation to the quantum of the second class of penalty, for the rest of the 9,000 or so consumers constituting those affected by the system conduct, the applicants submit that the maximum penalty is not a useful guide for the reasons advanced as summarised above at [14]. However, the following points were advanced in support of a penalty range of $140 to $170 million in respect of the system conduct:

(a) Benefits of at least $142 million were obtained from the conduct.

(b) The conduct underpinned most of the operations of AIPE’s business. Training and operations did not expand in line with revenue, indicating that this outcome was intentional. The expenditure that did take place then essentially appeared part of a design to obtain public money.

(c) The profits were an extraordinary proportion of income – while the information available was limited, AIPE’s own unaudited profit and loss assessment for the 2014-2015 financial year, capturing only a small proportion of the wrongdoing, suggested a gross profit margin of more than 80% and a net profit margin of almost 70%. In real monetary teams, AIPE had a total income of just over $50 million in that financial year, which resulted in a gross profit of over $41 million and a net profit of almost $35 million. Revenue for AIPE increased after that without a corresponding increase in expenses.

(d) Any penalty must address the potential judgment call a company may make that conduct would not be detected, or if detected, would only incur a penalty in respect of the wrongfully gained benefits. The penalty should be more than a mere disgorging of profit, otherwise it may be thought to be worth the risk given the difficulties in detection and successful litigation.

(e) While the existing compensation orders should be taken into account, they serve a fundamentally different function, being redress, rather than prevention or deterrence: see *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 at [24], where compensation was described as a “*competing consideration*” of prevention and deterrence.

(f) Even though the compensation will almost certainly not be paid, given the current state of AIPE’s affairs, the penalty should not be reduced in light of this being likely.

(g) Whatever weight is given to the competing factors explored, it should not be a crude dollar for dollar accounting process.

(h) A penalty in the range of $140 to $170 million is necessary to take into account the need for deterrence.

20 The most startling figure revealed above is the huge profitability of AIPE’s operations, which reinforces the liability judgment conclusion that the delivery of educational services to most of the consumers who were enrolled was never seriously in contemplation. This makes it clear that a high level of immorality stood behind the deliberate and protracted unconscionable conduct of a highly predatory nature. Given that little if any compensation is likely to be paid, the penalty needs to be a strong signal that it will exceed the gross benefit of the conduct. There should be no deduction for the costs of obtaining that benefit, because they are costs in aid of an illegal enterprise. However, taking compensation into account to some degree, the appropriate penalty for the system conduct is $150 million. This is a notable excess over the minimum amount of revenue likely to have been obtained as a result of the conduct, being some $142 million.

21 The total pecuniary penalty to be ordered will therefore be $153 million, taking into account totality.

22 I cannot see any good reason why costs should not follow the event, subject to the constraint of obtaining leave of the Court before enforcing them. However, both the costs now ordered, and the compensation orders previously made on 1 March 2021, may be proved in the external administration of AIPE without the leave of the Court being required.

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| I certify that the preceding twenty-two (22) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromwich. |

Associate:

Dated: 3 December 2021

# SCHEDULE A

# DECLARATIONS MADE ON 1 MAY 2020

Federal Court of Australia

District Registry: New South Wales

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| Division: General | No: NSD 453 of 2016 |

**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION** and another named in the schedule

Applicant

**AUSTRALIAN INSTITUTE OF PROFESSIONAL EDUCATION PTY LTD (IN LIQUIDATION)**

Respondent

**ORDER**

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| **JUDGE:** | JUSTICE BROMWICH |
| **DATE OF ORDER:** | 01 May 2020 |
| **WHERE MADE:** | Sydney |

**THE COURT DECLARES THAT:**

1.In the period 1 May 2013 to 1 December 2015, the Respondent, trading as the Australian Institute of Professional Education Pty Ltd (in Liq) (AIPE), in connection with the supply or possible supply, or marketing of the supply, of online vocational education courses (courses) to consumers, engaged in a system of conduct or in a pattern of behaviour:

(a)which comprised:

(i)contracting the recruitment of consumers to its courses to recruiters who received no training or inadequate training in the requirements of the *Australian Consumer Law* (**ACL**);

(ii)AIPE’s recruiters making unsolicited telephone calls and calling uninvited on consumers at their homes and conducting group sign up events;

(iii)failing to explain in plain and clear terms the Vocational Education and Training Fee Higher Education Loan Program (**VET FEE-HELP**) scheme (**VFH Scheme**) to consumers resulting in consumers incurring significant debts to the Commonwealth;

(iv)AIPE’s recruiters making false or misleading statements to consumers that AIPE’s courses were free, that there was no need to participate in the courses, but that signing up was necessary in order to be given a “free” laptop and for those consumers who were Aboriginal, that AIPE’s courses were particularly designed for Aboriginals;

(v)offering inducements to consumers in the form of cash or a laptop computer or tablet for signing up to an AIPE course;

(vi)making unsolicited consumer agreements with no process for ensuring compliance with the relevant provisions of the ACL;

(vii)AIPE’s recruiters being paid large commissions for securing enrolments of consumers which encouraged the recruitment of consumers using unfair tactics;

(viii)the design of AIPE’s enrolment system being to get consumers enrolled until their census dates, after which AIPE would become entitled to receive VET FEE-HELP payments from the Commonwealth, and to limit the consumer’s knowledge and understanding of the importance of the census date and thereby opportunities for an enrolment to be cancelled before a VET FEE-HELP debt was incurred by a consumer;

(b)which occurred in circumstances where:

(i)AIPE had a business model that resulted in significant revenue through government funded VET FEE-HELP loans, where a very high proportion of consumers enrolled never actively participated in study and changes to reduce this occurring were not permitted;

(ii)AIPE disregarded the vulnerabilities of disadvantaged consumers;

(iii)AIPE’s recruiters paid some consumers to encourage other consumers to enrol in an AIPE course;

(iv)AIPE conducted only cursory verification of the bona fides of the consumers it enrolled and the suitability of its courses for those consumers and had inadequate systems and processes to ensure that only genuine and suitable students were enrolled in its courses;

(v)the overwhelming majority of consumers enrolled in AIPE’s courses were not genuine students who nevertheless incurred VET FEE-HELP debts by being enrolled when they should not have been;

(vi)AIPE was aware that a high proportion of its students were not genuine and that this was the result of the nefarious practices of its recruiters, including through the use of false or misleading information;

(vii)until about March 2015, AIPE conducted no testing of the language, literacy and numeracy (**LLN**) skills of the consumers it enrolled and, after this time, AIPE’s LLN testing was, by design, largely ineffective;

(viii)until at least mid-2015, AIPE’s monitoring and discipline of the conduct of its recruiters was ad hoc, perfunctory, tended to be ineffective and contributed to unsuitable consumers remaining enrolled past the census date so that VET FEE-HELP loan funds and commissions were paid;

(ix)AIPE was aware that only a small proportion of its enrolled online students were engaging to any extent with their courses;

(x)AIPE was callously indifferent to consumer protection considerations which were necessary when the system was directed to people who were vulnerable to being misled or deceived,

and thereby engaged in unconscionable conduct in contravention of s 21 of the ACL.

**Consumer MI**

2.In about November 2015, an AIPE recruiter approached MI at her home (the MI Sign-up Event) and informed MI that she could get a free laptop and use it to study an AIPE course, but by failing to inform MI that she would incur a debt for the course if she did not cancel her enrolment by the census date, and by making the free laptop representation AIPE thereby engaged in conduct that was:

(a)misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and

(b)false or misleading with respect to the price of the course, in contravention of s 29(1)(i) of the ACL.

3. During the MI Sign-up Event, the AIPE recruiter did not inform MI, in writing and before she was signed up to an AIPE course:

(a)that she was entitled to terminate the enrolment agreement prior to the end of the termination period; and

(b)the way in which that termination right could be exercised,

in contravention of s 76 of the ACL.

4. AIPE’s conduct towards MI:

(a)was carried out in circumstances where at the time of the conduct, MI, an Indigenous person:

(i)was unemployed and receiving a Centrelink carer’s pension;

(ii)was living in government social housing;

(iii) left school when she was 10 years old;

(iv)had, as an adult, done TAFE courses in basic literacy and numeracy;

(v)could read and write a bit of English, but had trouble understanding and reading big words;

(vi) knew how to turn on a laptop computer and to use the internet a little bit;

(vii)had no internet access at home; and

(viii)did not have the necessary numeracy and literacy skills to undertake the course in which MI was enrolled;

(b)involved the contraventions of the ACL referred to in the declarations at paragraphs 2 and 3 above;

(c)was carried out in circumstances where the AIPE recruiter:

(i)told MI that she could get a free laptop so that she could study an AIPE course;

(ii)did not inform MI that she may have to pay for the course and would incur a debt to the Commonwealth for the course if she did not cancel her enrolment by the census date;

(iii)made no enquiry of MI’s education or background;

(iv)made no enquiry as to whether she had an internet connection at her home, or any other means of connecting to the internet;

(v)did not inform MI that an internet connection was indispensable in order to be able to participate in any of the courses on offer;

(vi)made no enquiry whether MI wanted to do a diploma of management course;

(vii)made no enquiry as to whether MI had the ability to do the course in which MI was enrolled in terms of her numeracy, literacy and computer skills, particularly in circumstances where MI had advised the AIPE recruiter that she could not read what the recruiter had written and that she could not read very well; and

(viii)instructed MI what to say during a telephone verification call, rendering pointless that call taking place at all,

and AIPE thereby engaged in unconscionable conduct in contravention of s 21 of the ACL.

**Consumer RS**

5. In late 2014, two AIPE recruiters approached RS at his home uninvited (the **RS Sign-up Event**) and:

(a) informed RS that he could get free laptop computers and notebook computers for signing up for courses and did not have to pay anything for those courses, and thereby engaged in conduct that was:

(i) misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and

(ii) false or misleading with respect to the price of the course, in contravention of s 29(1)(i) of the ACL;

(b) informed RS that the courses being offered were just for Aboriginals, and thereby engaged in conduct that was:

(i) misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and

(ii) false or misleading with respect to the price of the course, in contravention of s 29(1)(g) of the ACL.

6. During the RS Sign-up Event, the AIPE recruiters did not inform RS, in writing and before he was signed up to an AIPE course:

(a) that he was entitled to terminate the enrolment agreement prior to the end of the termination period; and

(b) the way in which that termination right could be exercised,

in contravention of s 76 of the ACL.

7. AIPE’s conduct towards RS:

(a) was carried out in circumstances where RS, an Aboriginal person, at the time of the conduct:

(i) was living in Dareton in far west NSW;

(ii) left high school after year 9;

(iii) was receiving a Centrelink disability support pension;

(iv) had not been in paid employment since 1999;

(v) did not have an internet connection at home;

(vi) did not understand the forms he was asked to sign;

(b) involved the contraventions of the ACL referred to in the declarations at paragraphs 5 and 6 above; and

(c) was carried out in circumstances where the AIPE recruiters:

(i) did not tell him who they worked for;

(ii) told RS that he did not have to complete the course but could keep the laptop computers and notebook computers;

(iii) assuaged RS’s concern that he did not have internet access by informing him that the laptop to be provided would have its own free wi-fi internet access, which was false;

(iv) made no enquiries of RS’s education or background, or ability to undertake or complete the course that he was signed up for;

(v) did not tell RS about how long the course was, or how long he had to cancel the course;

(vi) did not tell RS he may have to pay for the course, and that he would incur a debt to the Commonwealth, which he would have to repay if his income reached a certain threshold;

(vii) offered RS $200 for every 20 people he introduced to the recruiters to be signed up to an AIPE course;

and AIPE thereby engaged in unconscionable conduct in contravention of s 21 of the ACL.

**Consumer TK**

8. In October 2014, TK attended a group sign up event at a pub in Bourke at which several AIPE recruiters were present (the **TK Sign-up Event)** and:

(a) informed TK that an AIPE course was free and that he could get a free laptop to study a course, and thereby engaged in conduct that was:

(i) misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and

(ii) false or misleading with respect to the price of the course, in contravention of s 29(1)(i) of the ACL;

(b) failed to inform TK that he would incur substantial debt to the Commonwealth by signing up to an AIPE course unless he cancelled his enrolment in the course before the census date, and would have to pay for the course if his income reached a certain threshold, and thereby engaged in conduct that was:

(i) misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and

(ii) false or misleading with respect to the price of the course, in contravention of s 29(1)(i) of the ACL.

9. During the TK Sign-up Event, the AIPE recruiters:

(a) did not inform TK, in writing and before he was signed up to an AIPE course:

(i) that he was entitled to terminate the enrolment agreement prior to the end of the termination period; and

(ii) the way in which that termination right could be exercised,

in contravention of s 76 of the ACL; and

(b) did not give TK a copy of the enrolment agreement which he had signed, in contravention of s 78 of the ACL.

10. AIPE’s conduct towards TK:

(a) was carried out in circumstances where TK, an Aboriginal person, at the time of the conduct:

(i) had no formal education beyond year 7;

(ii) could read, but finds some words difficult;

(iii) could pronounce words without necessarily understanding them;

(iv) had basic writing skills, and needs glasses to read;

(v) did not have a computer or internet connection at home and did not know how to use a computer, and in particular how to use email;

(vi) until shortly before October 2014, was unemployed and on a Centrelink disability support pension;

(vii) did not understand the nature of the agreement he was entering; and

(b) involved the contraventions of the ACL referred to in the declarations at paragraphs 8 and 9 above;

(c) was carried out in circumstances where AIPE recruiters:

(i) offered TK a free laptop and gave him $50 to sign up to an AIPE course;

(ii) did not provide information to TK about the nature or costs of AIPE’s courses;

(iii) did not explain the forms they asked him to sign or provide him with a copy of those forms;

(iv) did not explain, or refer to, the VFH Scheme or the obligations arising from that scheme if TK enrolled in an AIPE course, or the significance of cancelling enrolment in a course prior to or on the census date, including that he would incur a debt if he did not do so;

(v) did not tell TK that he would have to pay anything for the course, or that enrolling in the course would entail him incurring a debt to the Commonwealth, which he would have to repay if his income reached a certain threshold;

(vi) did not ascertain whether he was a suitable candidate with the intention of, and capability to, undertake and complete an AIPE course;

(vii) were informed by TK that he did not have an email address;

(viii) did not inquire about whether TK had an internet connection at his home and did not tell TK that an internet connection was necessary to participate in any of the AIPE courses on offer,

and AIPE thereby engaged in unconscionable conduct in contravention of s 21 of the ACL.

**Consumer CRS**

11. In August 2015, a recruiter for AIPE approached CRS at her home uninvited (the **CRS Sign-up Event**) and:

(a) informed CRS that an AIPE course was free and that she could get a free laptop for signing up for a course and that she would not need to pay for the course if she did not earn more than a certain amount, and thereby engaged in conduct that was:

(i) misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and

(ii) false or misleading with respect to the price of the course, in contravention of s 29(1)(i) of the ACL;

(b) failed to inform CRS that she would incur substantial debt to the Commonwealth by signing up to an AIPE course unless she cancelled her enrolment in the course before the census date, and thereby engaged in conduct that was:

(i) misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and

(ii) false or misleading with respect to the price of the course, in contravention of s 29(1)(i) of the ACL.

12. At the CRS Sign-up Event, the recruiter for AIPE:

(a) did not inform CRS, in writing and before she was signed up to an AIPE course:

(i) that she was entitled to terminate the enrolment agreement prior to the end of the termination period; and

(ii) the way in which that termination right could be exercised,

in contravention of s 76 of the ACL; and

(b) did not give CRS a copy of the enrolment agreement which she had signed, in contravention of s 78 of the ACL, in circumstances where parts of her enrolment agreement were completed by the AIPE representative.

13. AIPE’s conduct towards CRS:

(a) was carried out in circumstances where CRS, an Indigenous person who, at the time of the conduct:

(i) was unemployed and receiving Centrelink benefits, including parenting payments;

(ii) was a stay-at-home mother looking after three children;

(iii) did not have a computer or internet access at home;

(iv) had no formal education beyond year 10;

(v) does not speak English very well and mainly speaks Creole at home;

(vi) did not understand the nature of the agreement she was entering; and

(vii) did not have the necessary numeracy and literacy skills to undertake an AIPE course;

(b) involved the contraventions of the ACL referred to in the declarations at paragraphs 11 and 12 above;

(c) was carried out in circumstances where the AIPE recruiter:

(i) did not inform CRS whom he worked for;

(ii) told CRS that he was offering free courses and free laptops and that if she got him two or three more people to do the course she would receive free wi-fi and mobile phone credit;

(iii) did not provide CRS with written material about the courses, including the costs involved, during the CRS Sign-up Event;

(iv) did not explain to CRS the detail of the VFH Scheme or the obligations arising from that scheme;

(v) did not provide CRS with a copy of the forms she signed during the CRS Sign-up Event;

(vi) made no proper attempt to ascertain whether CRS was a suitable candidate to undertake the course in which CRS was enrolled, particularly in circumstances where a relatively rudimentary enquiry would reveal that there were at least difficulties with CRS having sufficient numeracy and literacy skills to do the course; and

(vii) gave CRS the answers to complete a telephone enrolment verification call,

and AIPE thereby engaged in unconscionable conduct in contravention of s 21 of the ACL.

**Consumer MS**

14. In January 2015, AIPE sent an unsolicited email to MS offering a course in human resources. Later that month, an AIPE recruiter representative contacted MS by telephone (the **MS Sign-up Call**) and informed MS that there was no cost to MS until he passed the course and earnt over $54,000 and that he would get a free laptop to keep if he signed up for and passed an AIPE course, and thereby engaged in conduct that was:

(a) misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and

(b) false or misleading with respect to the price of the course, in contravention of s 29(1)(i) of the ACL.

15. During the MS Sign-up Call, the AIPE recruiter did not inform MS, in writing and before he was signed up to an AIPE course:

(a) that he was entitled to terminate the enrolment agreement prior to the end of the termination period; and

(b) the way in which that termination right could be exercised,

in contravention of s 76 of the ACL.

16. AIPE’s conduct towards MS:

(a) was carried out in circumstances where MS, an Aboriginal person, at the time of the conduct:

(i) was living in Cowra in NSW;

(ii) left high school after year 10;

(iii) was receiving a Centrelink disability support pension;

(iv) was unemployed; and

(v) was unable to work due to a neck injury;

(b) involved the contraventions of the ACL referred to in the declarations at paragraphs 14 and 15 above;

(c) was carried out in circumstances where the AIPE recruiter during the MS Sign-up Call:

(i) told MS that he could get a free laptop;

(ii) told MS that he would not have to pay for the course unless he earned over a certain amount, but did not tell him that he would nonetheless incur an immediate debt and use up a part of his lifetime cap on benefits;

(iii) did not inquire of his personal circumstances at the recruitment stage;

(iv) did not tell MS the cost of the course; and

(v) did not explain the VFH Scheme or the obligations arising from the scheme if MS enrolled in an AIPE course, or the significance of cancelling his enrolment prior to or on the census date, including that he would incur a debt if he did not do so,

and AIPE thereby engaged in unconscionable conduct in contravention of s 21 of the ACL.

**Consumer LT**

17. In February 2014, shortly after searching for jobs on various websites and providing his personal details, an AIPE recruiter contacted LT by telephone (the **LT Sign-up Call**) and:

(a) informed LT that he was offering free management courses funded by the government, and thereby engaged in conduct that was:

(i) misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and

(ii) false or misleading with respect to the price of the course, in contravention of s 29(1)(i) of the ACL;

(b) failed to inform LT that he would have to pay for the course, the cost of the course or that enrolling in the course would leave LT with a debt to the Commonwealth if he did not cancel by the census date, and thereby engaged in conduct that was:

(i) misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and

(ii) false or misleading with respect to the price of the course, in contravention of s 29(1)(i) of the ACL.

18. The AIPE recruiters:

(a) did not inform LT, in writing and before he was signed up to an AIPE course:

(i) that he was entitled to terminate the enrolment agreement prior to the end of the termination period; and

(ii) the way in which that termination right could be exercised,

in contravention of s 76 of the ACL; and

(b) did not give LT a copy of the enrolment agreement which he had entered into, in contravention of s 78 of the ACL.

19. AIPE’s conduct towards LT:

(a) was carried out in circumstances where LT at the time of the conduct:

(i) was unemployed and searching for a job;

(ii) was 19 years old;

(iii) had just completed year 12 and was still living at his parents’ house;

(b) involved the contraventions of the ACL referred to in the declarations at paragraphs 17 and 18 above;

(c) was carried out in circumstances where the AIPE recruiters during the LT Sign-up Call:

(i) did not tell LT they were from AIPE, being a matter that LT only worked out once he had been sent a laptop and brochure;

(ii) did not give LT any information about the course;

(iii) repeatedly told LT that the course was free;

(iv) did not make any enquiry of his educational background;

(v) did not ascertain whether LT was a suitable candidate with the capability to undertake and complete an AIPE course, including whether he had adequate numeracy and literacy skills;

(vi) did not tell LT the cost of the course;

(vii) did not explain the VFH Scheme or the obligations arising from the scheme if LT enrolled in an AIPE course, or the significance of cancelling his enrolment prior to or on the census date, including that he would incur a debt if he did not do so;

and AIPE thereby engaged in unconscionable conduct in contravention of s 21 of the ACL.

**Consumer FM**

20. In 2014, an AIPE recruiter contacted FM by telephone (the **FM Sign-up Call**) and:

(a) informed FM that he would get a free laptop if he signed up for an AIPE course without informing him of the debt he would incur if he enrolled in the course, and thereby engaged in conduct that was:

(i) misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and

(ii) false or misleading with respect to the price of the course, in contravention of s 29(1)(i) of the ACL;

(b) failed to inform FM of the cost of the course or that enrolling in the course would leave him with a debt to the Commonwealth if he did not cancel his enrolment by the census date, and thereby engaged in conduct that was:

(i) misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and

(ii) false or misleading with respect to the price of the course, in contravention of s 29(1)(i) of the ACL.

21. AIPE’s conduct towards FM:

(a) was carried out in circumstances where FM, at the time of the conduct:

(i) had no formal education beyond year 11;

(ii) had undertaken a modified schooling program between year 7 and 11 because his reading and writing was not good;

(iii) was not sophisticated;

(iv) did not have the necessary numeracy and literacy skills to undertake the course in which he was enrolled; and

(v) did not understand the nature of the agreement he was entered into;

(b) involved the contraventions of the ACL referred to in the declarations at paragraph 20 above;

(c) was carried out in circumstances where the AIPE recruiter:

(i) did not tell FM anything about the AIPE course, or what was involved in doing it;

(ii) did not tell FM the cost of the course;

(iii) did not explain the VFH Scheme to FM, or the obligations arising from the scheme if he enrolled in the course, or the significance of cancelling his enrolment prior to or on the census date, including that he would incur a debt if he did not do so;

(iv) did not inquire as to FM’s educational background or ascertain whether FM was a suitable candidate with the capability to undertake and complete the course in which he was being enrolled including whether he had sufficient literacy or numeracy skills; and

(v) requested FM’s personal details without indicating that this would be used to enrol FM in a course;

and AIPE thereby engaged in unconscionable conduct in contravention of s 21 of the ACL.

**Consumer KB**

22. In June or July 2014, an AIPE recruiter contacted KB by telephone (the **KB Sign-up Call**) and:

(a) informed KB that she could complete a Diploma of Business for free, and thereby engaged in conduct that was:

(i) misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and

(ii) false or misleading with respect to the price of the course, in contravention of s 29(1)(i) of the ACL;

(b) failed to inform KB that she would have to pay for the course, the cost of the course or that enrolling in the course would leave her with a debt to the Commonwealth if she did not cancel her enrolment by the census date, and thereby engaged in conduct that was:

(i) misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and

(ii) false or misleading with respect to the price of the course, in contravention of s 29(1)(i) of the ACL.

23. During the KB Sign-up Call, the AIPE recruiter:

(a) did not inform KB, in writing and before she was signed up to an AIPE course:

(i) that she was entitled to terminate the enrolment agreement prior to the end of the termination period; and

(ii) the way in which that termination right could be exercised;

in contravention of s 76 of the ACL; and

(b) did not give KB a copy of the enrolment agreement, in contravention of s 78 of the ACL.

24. AIPE’s conduct towards KB:

(a) was carried out in circumstances where KB at the time of the conduct:

(i) did not complete school to year 12;

(ii) did not have internet access at home;

(iii) was receiving Centrelink payments; and

(iv) was unemployed;

(b) involved the contraventions of the ACL referred to in the declarations at paragraphs 22 and 23 above;

(c) was carried out in circumstances where the AIPE recruiter during the KB Sign-up Call:

(i) told KB that she was being offered a free, government-funded diploma business course, which was untrue;

(ii) did not tell KB the cost of the course;

(iii) enrolled KB in an online course despite knowing that she did not have access to the internet at home, telling her instead that she should go to a library to complete the course;

(iv) did not explain the VFH Scheme or the obligations arising from the scheme;

(v) did not explain the significance of cancelling her enrolment prior to or on the census date, including that she would incur a debt if she did not do so; and

(vi) did not take any steps to ascertain whether KB was a suitable candidate with the intention of, or the capability to undertake and complete the course, including whether she had the adequate numeracy and literacy skills,

and AIPE thereby engaged in unconscionable conduct in contravention of s 21 of the ACL.

**Consumer KP**

25. On 7 November 2014, two AIPE recruiters approached KP at her home uninvited (the **KP Sign-up Event**) and:

(a) informed KP that the AIPE course was free and that she could get a free computer for signing up to the course, and thereby engaged in conduct that was:

(i) misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and

(ii) false or misleading with respect to the price of the course, in contravention of s 29(1)(i) of the ACL;

(b) failed to inform KP that she would have to pay for the course, the cost of the course or that she would incur a debt to the Commonwealth by signing up to the AIPE course unless she cancelled her enrolment in the course before the census date, and thereby engaged in conduct that was:

(i) misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and

(ii) false or misleading with respect to the price of the course, in contravention of s 29(1)(i) of the ACL.

26. During the KP Sign-up Event, the AIPE recruiters:

(a) did not inform KP, in writing and before she was signed up to an AIPE course:

(i) that she was entitled to terminate the enrolment agreement prior to the end of the termination period; and

(ii) the way in which that termination right could be exercised,

in contravention of s 76 of the ACL; and

(b) did not give KP a copy of the enrolment agreement which she had signed, in contravention of s 78 of the ACL.

27. AIPE’s conduct towards KP:

(a) was unconscionable in circumstances where KP:

(i) was a 25-year-old single mother with three children;

(ii) lived in public housing;

(iii) received a single parent part pension;

(iv) worked part-time as a caseworker; and

(v) left high school at 14, after completing year 9;

(b) involved the contraventions of the ACL referred to in the declarations at paragraphs 25 and 26 above; and

(c) was carried out in circumstances where the AIPE recruiters:

(i) told KP they were offering free courses, and free computers and a free iPad;

(ii) did not provide KP with any written material about the courses, including as to the costs of what was involved in completing the courses;

(iii) did not leave KP with a copy of the paperwork after she had signed on a screen;

(iv) rushed through the enrolment process and signed her up for two courses, at two different colleges, in around 15 to 20 minutes, during which time she was visibly distracted by her three children;

(v) did not explain the VFH Scheme or the obligations arising under that scheme if KP enrolled in a course, or the significance of cancelling her enrolment in a course prior to or on the census date, including that she would incur a debt if she did not do so; and

(vi) did not ascertain whether KP was a suitable candidate with the intention and capability to undertake and complete the course she was enrolled in, including whether she had adequate numeracy and literacy skills,

and AIPE thereby engaged in unconscionable conduct in contravention of s 21 of the ACL.

**Consumer JC**

28. In late November or early December 2014, an AIPE recruiter approached JC at her home uninvited (the **JC Sign-up Event**) and:

(a) informed JC that the AIPE course was free and that she could get a free laptop, and thereby engaged in conduct that was:

(i) misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and

(ii) false or misleading with respect to the price of the course, in contravention of s 29(1)(i) of the ACL;

and

(b) failed to inform JC of the cost of the course or that enrolling in the course would leave her with a debt to the Commonwealth if she did not cancel her enrolment by the census date, and thereby engaged in conduct that was:

(i) misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and

(ii) false or misleading with respect to the price of the course, in contravention of s 29(1)(i) of the ACL.

29. During the JC Sign-up Event, the AIPE recruiter:

(a) did not inform JC, in writing and before she was signed up to an AIPE course:

(i) that she was entitled to terminate the enrolment agreement prior to the end of the termination period; and

(ii) the way in which that termination right could be exercised,

in contravention of s 76 of the ACL; and

(b) did not give JC a copy of the enrolment agreement which she had entered into, in contravention of s 78 of the ACL.

30. AIPE’s conduct towards JC:

(a) was unconscionable in circumstances where JC at the time of the conduct:

(i) was a 58-year-old pensioner;

(ii) left high school after year 8;

(iii) has 4 children, 23 grandchildren and 15 great-grandchildren;

(iv) was the primary carer for two adolescent grandchildren;

(v) had spent time as a younger woman living in a women’s shelter;

(vi) received the Centrelink disability support pension as her only source of income; and

(vii) did not have a computer at home, had never used a computer or an email account and did not have an internet connection;

(b) involved the contraventions of the ACL referred to in the declarations at paragraphs 28 and 29 above; and

(c) was carried out in circumstances where the AIPE recruiter:

(i) offered her a free laptop to sign up to the course;

(ii) told her the course would not cost her a cent;

(iii) did not provide her with information about the nature or costs of the courses involved;

(iv) did not explain what she had signed or provide her with a copy of what she had signed;

(v) did not explain the VFH Scheme or the obligations arising from that scheme if she enrolled in the course or the significance of cancelling her enrolment prior to or on the census date, including that she would incur a debt if she did not do so; and

(vi) took no steps to ascertain whether she was a suitable candidate,

and AIPE thereby engaged in unconscionable conduct in contravention of s 21 of the ACL.

**Consumer RL**

31. In about mid-November 2014, two AIPE recruiters approached RL at her home uninvited (the **RL Sign-up Event**) and:

(a) informed RL that she could get free laptop by signing up to an AIPE course and that if she did not earn more than a certain amount she did not need to pay for the course and the government would pay, and thereby engaged in conduct that was:

(i) misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and

(ii) false or misleading with respect to the price of the course, in contravention of s 29(1)(i) of the ACL;

and

(b) failed to inform RL of the cost of the course or that enrolling in the course would leave her with a debt to the Commonwealth if she did not cancel her enrolment by the census date, and thereby engaged in conduct that was:

(i) misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and

(ii) false or misleading with respect to the price of the course, in contravention of s 29(1)(i) of the ACL.

32. During the RL Sign-up Event, the AIPE recruiters:

(a) did not inform RL, in writing and before she was signed up to an AIPE course:

(i) that she was entitled to terminate the enrolment agreement prior to the end of the termination period; and

(ii) the way in which that termination right could be exercised,

in contravention of s 76 of the ACL; and

(b) didnot give RL a copy of the enrolment agreement which she had entered into, in contraventionof s 78 of the ACL.

33. AIPE’s conduct towards RL:

(a) was carried out in circumstances where RL, an Aboriginal woman, at the time of the conduct:

(i) had lived in Dareton in far west NSW and Mildura for most of her life;

(ii) left high school towards the start of year 9;

(iii) had not completed any courses or qualifications since leaving high school;

(iv) was the full-time carer for her partner;

(v) received a carer’s pension and her partner received a disability support pension;

(vi) lived in Aboriginal community housing;

(vii) had basic reading and writing skills and got help from a local family centre when she needed to deal with Centrelink forms or documents;

(viii) did not have an internet connection at home; and

(ix) did not know how to use email;

(b) involved the contraventions of the ACL referred to in the declarations at paragraphs 31 and 32 above; and

(c) was carried out in circumstances where the AIPE recruiters:

(i) told RL that they were handing out free laptops from the government if she signed up to a course;

(ii) noted that RL would not have to pay for the course, unless she earned over a certain amount;

(iii) did not tell her that they were from AIPE;

(iv) did not enquire about RL’s educational background or ascertain whether she was a suitable candidate for the course in terms of her skills and capabilities;

(v) did not tell her the cost of the course or give her information about the content of the course; and

(vi) did not explain the VFH Scheme or obligations arising under that scheme if RL enrolled in the course, or the significance of cancelling her enrolment prior to or on the census date, including that she would incur a debt if she failed to do so,

and AIPE thereby engaged in unconscionable conduct in contravention of s 21 of the ACL.

**Consumer GO**

34. In late October 2014, an AIPE recruiter approached GO at his home uninvited (the **GO Sign-up Event**) and:

(a) informed GO that enrolling in the course was free, and thereby engaged in conduct that was:

(i) misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and

(ii) false or misleading with respect to the price of the course, in contravention of s 29(1)(i) of the ACL;

and

(b) failed to inform GO of the cost of the course or that enrolling in the course would leave him with a debt to the Commonwealth if he did not cancel his enrolment by the census date, and thereby engaged in conduct that was:

(i) misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and

(ii) false or misleading with respect to the price of the course, in contravention of s 29(1)(i) of the ACL.

35. During the GO Sign-up Event, the AIPE recruiter:

(a) did not inform GO, in writing and before he was signed up to an AIPE course:

(i) that he was entitled to terminate the enrolment agreement prior to the end of the termination period; and

(ii) the way in which that termination right could be exercised,

in contravention of s 76 of the ACL; and

(b) did not give GO a copy of the enrolment agreement which he had entered into, in contravention of s 78 of the ACL.

36. AIPE’s conduct towards GO:

(a) was carried out in circumstances where GO, at the time of the conduct:

(i) lived in Orange;

(ii) lived with his adolescent daughter with whom he shares custody with his ex-partner;

(iii) completed year 10 at high school;

(iv) enrolled in a pre-apprenticeship course in 1987 in the hope of getting an apprenticeship in metalwork;

(v) had a serious medical condition and was unable to continue his pre-apprenticeship studies and withdrew within a few months of commencing;

(vi) had been on a disability pension since 2012 or 2013; and

(vii) did occasional local work;

(b) involved the contraventions of the ACL referred to in the declarations at paragraphs 34 and 35 above; and

(c) was carried out in circumstances where the AIPE recruiter:

(i) told GO that the course was free when it was not, in the sense of having no burden;

(ii) obtained GO’s tax file number upon the false premise that it was only to prove his identity for record-keeping purposes and was not told that his tax file number was required in order to apply for the VET FEE-HELP loan that would leave GO with a debt to the Commonwealth for the course, plus 20%;

(iii) did not tell GO the cost of the course or give him information about the content of the course; and

(iv) did not ascertain whether GO was a suitable candidate with the capability to undertake and complete the course, when such an enquiry would have revealed that he at least would have had real difficulties,

and AIPE thereby engaged in unconscionable conduct in contravention of s 21 of the ACL.

Date that entry is stamped: 1 May 2020

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# SCHEDULE B

# KEY PASSAGES FROM *AUSTRALIAN COMPETITION AND CONSUMER COMMISSION V AUSTRALIAN INSTITUTE OF PROFESSIONAL EDUCATION PTY LTD (IN LIQ) (NO 3)* [2019] FCA 1982

…

[6] This proceeding is not about the quality of teaching provided by AIPE to consumers who were bona fide or genuine students and participated as such in the courses it provided, but about the enrolment of consumers whom the applicants contend did not meet that description. The label “*student*” can only safely be applied to those consumers who enrolled for AIPE’s online VET FEE-HELP funded courses and were suitable to be so enrolled. In these reasons, I therefore refer in a neutral way to “*consumers enrolled as students*”.

[7] The applicants’ case turns on:

(1) the way in which AIPE marketed to and enrolled consumers as students in its online VET courses, including through the use of recruiter organisations (**agents**) paid by substantial commissions, with employees in the field (**recruiters**); and

(2) how it dealt with consumers who had been enrolled as students, especially in relation to a census date after which the debt to the Commonwealth was incurred.

…

[12] The outcome that an overwhelming majority of consumers enrolled by AIPE as VET FEE-HELP funded students were not suitable to be enrolled in the first place and so were not genuine or bona fide students, while formally disputed, was a conclusion that is difficult to avoid. It is a conclusion that I ultimately reach on the balance of probabilities based on, inter alia, the disputed enrolment data relied upon by the applicants and the vast number, in excess of 11,000, who incurred VET FEE-HELP debts who failed to complete their courses, with many never being active students. The live question is whether this outcome was the product of unconscionable conduct, or only, for example, a consequence that flowed naturally from an education loan funding scheme that made this likely to occur no matter what, and therefore for which AIPE could not and did not bear any legal responsibility.

…

[585] On all of the evidence it is inherently unlikely that the systematic omission of information about the meaning and importance of the census date, until after the ASQA [(Australian Skills Qualification Authority)] audit in April 2015, was accidental. To the contrary, it can readily be inferred that this was a design feature of AIPE’s enrolment system, which had the predicable effect of minimising the rate of withdrawals prior to the census date, and thus maximising VET FEE-HELP revenue. It must have been readily apparent to AIPE that providing such information, and doing so in a clear and forthright way, would necessarily increase the chance that a consumer who had been enrolled as a student would:

(1) become overtly aware of the incurring of a VET FEE-HELP debt;

(2) become aware that any representation that the course was “*free*” or that other benefits such as a laptop were “*free*”, was at best misleading, because a debt would be incurred;

(3) realise that active steps would have to be taken to avoid that debt being incurred; and

(4) take steps to withdraw from a course before the census date, or be better placed to resist becoming enrolled in the first place,

which would necessarily affect the stream of VET FEE-HELP money being provided by the government.

[Note that [585(2)] was an additional, and not an indispensable, part of the reasoning in the above paragraph.]

…

[592] During her time at AIPE, Ms Qudsia [VET coordinator at AIPE] was aware from the CRM records that the numbers of consumers enrolled as students in AIPE’s online courses had rapidly increased during 2014 to several thousand. As enrolment numbers increased, she proposed to her managers at AIPE that they should employ more trainers. However other than the staff already referred to, AIPE did not employ any additional trainers in her team. This was a telling sign that there was no expectation that increased enrolments would result in a proportionate increase in participating students.

…

[595] Ms Qudsia estimates that about 20-30% of the consumers enrolled as students that she spoke to in her time in the online business at AIPE communicated to her that they were unfamiliar with computers or the software on the laptops provided to them. It is worth noting that this was necessarily 20-30% of enrolled students who were participating, or at least attempting to participate in courses, and are therefore most likely reflective of the more capable consumers.

…

[598] The unchallenged evidence of Ms Qudsia establishes that there was a steep increase in online student numbers 2014. That is, her evidence is not confined to the period that she was in that role. The six month period that she was there is most revealing. Most importantly, it supports the inference that AIPE were not expecting that a significant enough proportion of consumers who were enrolled would in fact become active students in need of student support. That is, the expectation was that, despite thousands of consumers being enrolled, only a handful of online trainer and support workers would be required. Such an expectation is consistent with a system in which a high proportion of consumers would be enrolled, would incur a VET FEE-HELP debt, but would never in fact be active students for whom support would be required.

…

[631] About three to four weeks after the new policy was implemented, Mr Khanche [AIPE’s CEO] came to her desk and they had a conversation to the following effect:

Mr Khanche: Why do we have so many withdrawals?

Ms Casale: We need to make sure the students are suitable and want to do the course so the new policy is to contact them and make sure they want to do the course and are engaging before census.

Mr Khanche: Communicate to your team that everyone passes the census date. We can’t afford this many withdrawals.

Ms Casale: But this will increase the number of appeals.

Mr Khanche: I don’t care.

[632] As with conversations between Ms Benton [(AIPE’s Student Services Manager from January 2014)] and Mr Khanche, this conversation makes it abundantly clear that the profitability of AIPE’s business model, as reflected in its enrolment system, significantly depended on consumers who were not suitable, or not genuine, being enrolled as students and remaining enrolled until the census date so that a VET FEE-HELP payment would be made and the corresponding debt incurred. This conclusion is reinforced by further evidence below about Mr Khanche’s attitude towards the adverse effect on consumers of AIPE’s enrolment practices.

…

[635] Thus Mr Khanche was clearly not concerned with the underling integrity of AIPE’s enrolment system, and how it was implemented. He was expressly on notice that consumers were not even starting the courses in which they had been enrolled as students. He regarded that the risk of ASQA investigating non-compliance with its standards [was] a risk that he was willing to take. There had to be a very powerful countervailing incentive for this to be a risk that he was willing to take. The only incentive that is apparent on all of the evidence is the VET FEE-HELP revenue from loans advanced to such students. The raw profit from such revenue not accompanied by the cost of providing services to non-participating consumers enrolled as students had to have been obvious to Mr Khanche and thus to AIPE.

[636] In mid-February 2015, after AIPE stopped using GLS [(Global Learning Support, a Philippines-based student support company)], Ms Casale [(AIPE’s Online Student Services Team Leader from 3 November 2014 to 6 March 2016)] got her team to go through all consumers recorded in CRM and to classify them according to three different criteria (using the word “*consumers*” in place of “*students*”):

|  |  |  |
| --- | --- | --- |
| (1) | Red: | those consumers who had never logged in or only logged in during the enrolment process, and were inactive after census, which comprised about 70% of those enrolled; |
| (2) | Green: | those consumers actively progressing in a course, which comprised about 10% of those enrolled; |
| (3) | Amber: | those consumers who did not fit into the red or green categories, which comprised about 20% of those enrolled. |

[637] This is clear evidence that no more than 10% of consumers enrolled as students with AIPE were within the range of being plainly suitable in the sense of even attempting to participate. At least 70%, and probably more out of the remaining 20%, it may readily be inferred, were not suitable to be enrolled, and/or were not genuine students because, for example, they had been told that the course was “*free*” and there was no need to participate, but that signing up was necessary in order to be given (and later, “*loaned*”) a “*free*” laptop. This evidence, in the context of all the evidence, gives a sound foundation for concluding that something in excess of 70% of VET FEE-HELP payments should not have been made in the relevant period.

…

[644] As discussed above, VET FEE-HELP supported course providers should not have been enrolling consumers with language, literacy or numeracy skills that were below that required to complete the course, even if this was an obvious implicit requirement, rather than an express requirement, of the scheme. But to adhere to this was necessarily to limit the pool of consumers enrolled in the first place. As this and Ms Benton’s evidence demonstrates, not only did AIPE’s enrolment system not have any language, literacy and numeracy barrier to enrolment until early 2015, when such a barrier was introduced it was done in a way that was perfunctory and illusory, and only implemented in the shadow of closer investigation of enrolment problems by ASQA, culminating in audits. AIPE, via Mr Luhr [(AIPE’s Business Operations Manager)] and Mr Khanche in particular, was not concerned about consumers who had a real risk of not being suitable to be enrolled as students.

…

[653] Once again, Ms Casale’s attempts to do something about a clear and obvious problem with consumers being enrolled as students with AIPE despite not having the necessary language, literacy and numeracy skills were disregarded. This again is a telling indicator that revenue, and profit, were the dominant considerations. Enrolling unsuitable students was both an accepted feature of the enrolment system, and was not regarded as a problem by those in charge at AIPE.

…

[665] I attach little or no weight to such self-serving policy statements in the absence of evidence that this was what actually occurred, which was sparse and indicated that this only seemed to take place in extreme cases. There is ample evidence to indicate that AIPE was replete with policy statements which were not matched by evidence to demonstrate that this went beyond being part of a paper system that did not reflect the day-to-day reality of maximising enrolments and retaining them until the census date was the priority, ahead of consumer suitability.

…

[669] Ms Casale remembers that in May 2015, her team had a meeting which Ms Abraham [Ms Benton’s replacement as Student Services Manager from June 2015 to January 2016)] and Mr Khanche attended as well. She was working from home at the time and had dialled in. She remembers Mr Khanche said to those at the meeting words to the effect:

This is a business. You are not being paid to make moral judgments. If a student wants to take on three debts for three courses then that’s the student’s choice.

[670] This was a clear direction by the CEO to senior AIPE staff as to how they were to manage the enrolment process. The situation that Mr Khanche referred to was revealing evidence as to how far he, and thus AIPE, was prepared to permit a situation to develop as part of the enrolment process, especially given that this indicated the latitude he considered appropriate to be given to agents and their recruiters acting on behalf of AIPE. Indeed, as Ms Benton’s evidence (at [558]) shows, this was not even a hypothetical scenario. Agents clearly had a very wide authority to exercise in pursuing the maximum number of enrolments possible, treating the evidence in favour of AIPE as establishing that the line was drawn only at outright lies and overtly false information.

[671] The view expressed by Mr Khanche that concern over a consumer enrolling in three courses and taking on three VET FEE-HELP debts was, pejoratively, an inappropriate “*moral judgment*”, is a very strong indication of AIPE’s flagrant disregard for the vulnerabilities of the disadvantaged target consumers. The scenario strongly points to a consumer having no idea what they are getting themselves into, as was the case with the man with physical and mental disabilities whom Ms Benton recalled coming to AIPE’s office with a support worker (at [558]). It would not simply reflect the consumer’s “*choice*”, as Mr Khanche disingenuously suggests. If this scenario was not a source of concern, then it is fair to infer that the unconscionable enrolment of inappropriate consumers in general was not going to be a source of concern for AIPE. This and many other facts in this case contrast starkly with the circumstances in *Kobelt*, where the final resolution in favour of the respondent in that case was quite finely balanced. Like in *Empower* (at [750]-[751]), it shows a “*callous indifference*” to the consumer protection considerations that are necessary when the system is directed to people who are vulnerable to being misled or deceived.

[672] In the context of evidence of similar comments made by Mr Khanche, it is clear that he, and thus AIPE, saw nothing wrong with the provision of information that was incomplete or even misleading, deceptive or contextually false, provided it was not overtly false.

…

[676] Ms Casale knew that it was difficult to get more “*students*” into the “*green*” category of students actively progressing in a course because she was unable to contact many consumers who had enrolled in courses. If she was able to make contact, on most occasions they were not interested in doing the course.

…

[682] The unchallenged aspects of the evidence of Ms Casale, along with that of Ms Benton and Ms Qudsia, gives a strong and sound foundation for concluding that the reality of AIPE’s enrolment system bore little resemblance to the benign situation painted by the policy documents alone. While I have perused all of the policy documents in evidence, and considered more closely those to which my attention was directed, the best that could be said of most of them is that they were aspirational rather than any accurate reflection of the enrolment system they purported to convey. At best they reflect what Ms Benton, Ms Casale and Ms Qudsia endeavoured to achieve, being a weak breeze against the strong headwinds of maximising revenue and profit.

…

[686] The main conclusion to be drawn from this evidence is that, despite the efforts of the employee witnesses and some of their staff to improve AIPE enrolment practices to avoid unsuitable consumers being enrolled as students, the highest level of AIPE was concerned with high levels of enrolment rather than even modest levels of successful study. The overall conclusion is that Mr Khanche and thus AIPE were fully aware that most of the consumers who were enrolled as online students were not partaking of the course in which they were enrolled, and that this was largely the situation from the moment that enrolment took place.

[687] The proper conclusion to draw on the evidence is that those at the very top of the AIPE hierarchy were only willing to have the appearance of taking steps to confine the imposition of VET FEE-HELP debts to genuine students, but did not in fact want or allow that to happen if it had any significant impact on enrolments. Mr Khanche took active steps to reverse changes that reduced enrolments of that kind, having been told expressly that this would have the effect of causing unsuitable consumers to be enrolled as students. The overall effect and quality of the evidence satisfies me at, and indeed beyond, the balance of probabilities, that this was not merely an unfortunate outcome of a poor quality enrolment system, or even mere inadvertence, but an outcome that [was] known and was advantageous to AIPE.

[688] It was an active part of AIPE’s enrolment system that a very high proportion of consumers who were enrolled would pass the census date and incur a VET FEE-HELP debt in circumstances where it was not just predictable that they would never need to be given any student support, but also an outcome that was highly profitable. This outcome was an accepted and even anticipated part of AIPE’s business model.

[689] It is important to note that there was no evidence to indicate that a significant number of consumers enrolled as students ever commenced to participate in the courses in which they had enrolled: Ms Casale’s evidence about what an interrogation of AIPE’s student records revealed about participation rates points quite to the contrary. The survey evidence considered below helps to verify the conclusions otherwise reached, rather than being an independent or indispensable source or foundation for such conclusions.

[690] AIPE’s acceptance of the enrolment of unsuitable students is also reflected in staffing practices that are difficult to reconcile with any other understanding. There was no substantial increase in staff numbers, and certainly nothing like the three- to five-fold increase in enrolment numbers, and the overall numbers remained quite paltry. The staffing numbers evidence enables it to be safely concluded that it is more likely than not that AIPE understood that the great bulk of consumers enrolled as students who were withdrawn after census were unsuitable to be enrolled, or were not genuine students (such as by reason of being told enrolment was a means of getting a “*free*” laptop). Most of those consumers should never have been the subject of a VET FEE-HELP payment or debt.

[691] That business model, given its predictable effect on vulnerable prospective consumers, was unconscionable. It was incumbent on AIPE to conduct any recruitment from this disadvantaged pool of consumers in a way that did not take advantage of their vulnerability. That was the legal and practical framework in which AIPE was operating.

[692] While aspects of disadvantage pleaded by the applicants may be seen to turn on a specific species of vulnerability, as the case unfolded the more generalised aspect of that vulnerability came to the fore. That is, the vulnerability of a general class of consumer with an inherently higher risk of being unsuitable to be enrolled as a student, rather than having features specific to one consumer but absent from another. The outcomes and events pointing to that general vulnerability, and thus particular and special disadvantage, was not left to speculation, or generalisation, but rather was repeatedly raised by each of the three employee witnesses, sought to be rectified and thwarted or otherwise undermined by the most senior decision-makers at AIPE, most notably, Mr Khanche and Mr Luhr.

[693] As already made clear, AIPE’s approach of attacking the reliance by the applicants on only select agents to examine how AIPE’s enrolment system worked was misconceived. The employee evidence shows that there was an inherent character of the system that applied regardless of the agent or recruiter involved. That is, … AIPE was on notice that a high proportion of its consumers enrolled as students were not genuine or [bona fide] and that this was often the result of nefarious practices by agents, including through the use of false and misleading information. Yet any check or balance introduced to rectify this situation was resisted or quickly erased. It was powerful evidence of what AIPE’s enrolment system knowingly allowed to take place.

[694] The applicants make the following 10 submissions, which I accept, about the proper use that can be made of the evidence from Ms Benton, Ms Casale and Ms Qudsia:

First, up to the beginning of 2015 (more than half way through the Relevant Period), AIPE outsourced its student induction process to a call centre in the Philippines which sometimes did not call students before they incurred debts and often did not clearly explain to students that they would incur debts. Mr Luhr, at least, was aware of these problems before Ms Casale was recruited in November 2014. The issues were also discussed with Mr Khanche although the exact timing is unclear.

Second, AIPE had no process in place until early 2015 for checking whether students had adequate literacy, language and numeracy skills before enrolling them. Staff were concerned that many students seemed to have inadequate skills and made these concerns known to senior managers.

Third, even after AIPE introduced a LLN [(language, literacy and numeracy)] test it permitted its largest agent (Acquire Learning) to run its own test, the contents and application of which were not visible to AIPE’s staff.

Fourth, there were significant deficiencies in the way AIPE’s LLN test was administered, including (in an unknown but significant number of cases) the test being completed while the recruiter was with the student.

Fifth, it was only in early 2015 that AIPE introduced a process for verifying that a student actually wanted to do the course in which he or she was enrolled before the census date arrived (the withdrawal policy designed by Ms Casale).

Sixth, AIPE’s brokers had a strong interest in all of the students they recruited remaining enrolled until they passed their census dates (at which point the student would incur a VET FEE-HELP debt and the agent would become entitled to a commission). AIPE, through its CEO Mr Khanche, was unwilling to upset agents and appears to have shared their enthusiasm for having as many students as possible pass their census dates. So, for example, the policy referred to in the previous paragraph was reversed by Mr Khanche when it led to a significant fall in the number of students passing their census dates. Mr Khanche also rejected the proposal that students should only be allowed to attempt the LLN test once.

Seventh, simple measures such as attempting to contact students prior to census date (and reversing their enrolment if they could not be contacted) led to significant falls in enrolments. That must have made it obvious to AIPE’s managers (if it was not obvious already) that agents were recruiting significant numbers of students who were not genuine or suitable.

Eighth, senior managers at AIPE were well aware that only a small proportion of online students were engaging to any extent with their courses. It was only in about October 2015, when AIPE’s registration was in jeopardy, that Mr Khanche expressed concern about the low completion rates of online students.

Ninth, when AIPE’s student numbers increased very significantly, the number of people it employed to teach students and assess their work did not. Even with thousands of students on its books AIPE employed only a handful of trainers, and they spent part of their time making orientation calls. AIPE was not equipped to deliver training to the thousands of students in respect of whom it was collecting VET FEE-HELP payments.

Tenth, AIPE received a large number of complaints and requests for refunds. Common themes of these complaints included a lack of explanation about the financial consequences of enrolment and the promise of “free” laptops by agents. Senior staff were regularly informed about the number and nature of complaints. In many cases AIPE acceded to requests for cancellation of enrolment; but it did not reform its processes in any significant way, or do anything to assert tighter control over agents. Mr Khanche worked on the principle that “we don’t need to worry about the ones who don’t complain”.

[695] The applicants submit that these points, derived from the employee evidence, when taken together, strongly point to a business model focused on maximising revenue through government VET FEE-HELP loans, with little or no ambition to provide actual training to more than a very small proportion of consumers enrolled as students. This submission mirrors the point made earlier about the windfall profit opportunity to be had by maximising VET FEE-HELP revenue and minimising marginal costs by the delivery of services. Whether that was the intention, or an outcome that AIPE was simply willing to facilitate, does not greatly matter, given that an intention to have unconscionable conduct, whether by a system or otherwise, is not required to be established. I comfortably infer that this affected the way in which recruitment was able to, and was allowed to, take place and that this reality informed the approach taken by the most senior officers at AIPE, including in particular its CEO, Mr Khanche and its Business Operations Manager, Mr Luhr. A very high proportion of consumers enrolled never actively participating in study – at least 70% – was a profitable and desirable outcome that was effectively encouraged, or at least not meaningfully discouraged, to take place. Changes designed to reduce the prospect of this occurring were not permitted to continue if they had this effect.

…

[706] The evidence considered below establishes to my satisfaction that the dominant reason for AIPE commencing training was a reaction to complaints and eventually increased scrutiny of VET providers, rather than any real attempt to diminish enrolment revenue and profits from unsuitable consumers. If, contrary to that conclusion, it was meant to be a genuine response to the sorts of issues that must have been well-known by then, it was at best half-hearted. It was a mindset that was inherently unlikely to address squarely the conflict of interest on the part of both agents/recruiters and by AIPE between:

(1) maximising revenue by aggressive marketing strategies, including

approaching consumers unsolicited, and hard sell-approaches and incentives coupled with inaccurate, incomplete and even contextually false, deceptive or misleading information (putting to one side overtly false information); and

(2) ensuring that only genuine and suitable consumers with some reasonable

possibility of being able to study AIPE online courses successfully were enrolled.

…

[760] The evidence of Ms Benton and Ms Casale, as summarised and analysed, makes it clear that Mr Khanche knew full well about the conduct of AIPE’s agents and their recruiters, both by being told about the problems directly, and because of complaints that were drawn to his attention. This made it abundantly clear to him that AIPE was enrolling a high proportion of consumers who were simply incapable of undertaking the courses. Thus AIPE, especially through its CEO, knew full well that its enrolment system did not screen students for suitability, or ensure that they were aware they had been enrolled in the first place or had a VET FEE-HELP debt. Rather, it is clear, via Mr Khanche’s reaction, that the focus was to keep consumers enrolled past their census date, and that this reality was reflected in very low participation rates from the outset.

…

[762] McGrathNicol randomly selected the student records for 100 consumers enrolled as students out of 6,057 reported by AIPE for 2015, and tested the enrolment documentation held for those students. This related to 6,066 courses due to a small number of multiple enrolments. With that testing, consideration of the student records for all 6,057 consumers was able to be examined to produce the following “*engagement testing results*” at [1.4.2] of the report which “*identified on how many days a student logged into the LMS* [(learning management system)]*, and how many different parts of the online course a student had interacted with*”, producing the following results:

McGrathNicol found that for a significant number of the 6,066 course enrolments that AIPE reported for 2015, there was a very low level of engagement with the LMS. For example, our testing found that [15%] of students had not logged into the online LMS, and [76%] of students had logged in on four different days or less. Only [10%] of students had logged in on more than 10 different days. This contrasts with students who completed courses, who we found had an average of 58 days active, indicating those students who had logged in on less than 10 days may not have significantly advanced toward course completion.

[763] McGrathNicol then analysed and sought to match student activity logs with HEIMS [(Higher Education Information Management System)] data so as to calculate the dollar value of units engaged with by consumers enrolled as students in 2015 alone, with the report concluding on this topic:

Based on the methodology as outlined in Section 6.5.5, from a total of $114,123,050 VET FEE-HELP loans in HEIMS, according to the Moodle activity logs there were:

* course enrolments with no evidence of activity or engagement in a unit in Moodle with a value of $49.2 million;
* units in HEIMS with no evidence of engagement in Moodle with a value of $33.9 million; and
* a total value of loans with no evidence of engagement in Moodle of $83.1 million.

[764] I conclude that this was overwhelmingly, if not entirely, the product of AIPE’s enrolment system that enrolled unsuitable consumers, with most of this amount being a windfall profit after the deduction of actual operating expenses. This supports the conclusion independently reached that a very high proportion of VET FEE-HELP loans in 2015 (going a month beyond the relevant period) are attributable to AIPE’s unconscionable enrolment system. I can see no reason for inferring that it would have been any better in the preceding two years of the relevant period, especially considering AIPE’s submissions that its system improved towards the end of the relevant period. Even with all the evidence that AIPE says was missing, no precise figure attributable to this conduct would necessarily have been possible. Mass consumer cases of this kind cannot descend to that degree of granular detail while remaining viable as proceedings.

…

[772] Before concluding, it is necessary, for completeness, to address some of the arguments that AIPE made regarding the case against it (some of which have been mentioned above). AIPE argued that it was substantially the same as the case in *Unique*, referring to certain gaps identified by the Full Court in that case (at [254] to [256]) and relying upon them to identify what were said to be similar gaps, asserted to be fatal in the case brought by the applicants. This approach did not engage with much of the substance or detail of the applicants’ case, ignoring the evidence from its former employees and ignoring the enrolment data. AIPE made the following submissions (reproduced almost in full in italics), pointing to the asserted gaps and other deficiencies in the evidence adduced and relied upon by the applicants, with my summary comments as to each:

…

(6) *There being no evidence as to the vulnerability of the consumers enrolled as students, with it being asserted that there was instead a “silent assumption” by the applicants that consumers from disadvantaged background were vulnerable, relying on what was said in Unique at [235] as to not making stereotype assumptions of that kind.* This overlooks what the Full Court said in *Unique* at [135] to [136]. The applicants’ [unconscionability] case relied upon general attributes of the disadvantaged consumers who were targeted to be enrolled, in the sense of being less able to detect defects in the information they were given, and to resist becoming enrolled in a course despite being unsuitable. Any member of society who was told, for example, that a course was “*free*” when it was not free of a debt burden, or that a laptop was for use in such a course (or otherwise) was “*free*” when in fact it too was provided in the context of and upon the condition that a debt burden was assumed, could well be encouraged to enrol in such a course. The burden of the applicants’ case is that persons from disadvantaged backgrounds, who were targeted in accordance with the liberalised VET FEE-HELP scheme, were more likely to be misled by such conduct and therefore to become enrolled, even if they were also not suitable to be enrolled in the first place. This was not an improper or silent assumption, let alone one relying upon stereotypes, but rather a normal understanding of differential capacity, and therefore vulnerability, to be misled by conduct of the kind that the applicants rely upon.

…