FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3) [2019] FCA 1982

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| File number: | NSD 453 of 2016 |
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| Judge: | **BROMWICH J** |
|  |  |
| Date of judgment: | 26 November 2019 |
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| Catchwords: | **CONSUMER LAW** – alleged contraventions of s 21 of the *Australian Consumer Law* – where respondent provided online vocational education training courses – whether respondent engaged in unconscionable system of conduct or pattern of behaviour by visiting low socio-economic communities, making false or misleading representations courses were free, offering inducements, failing to explain nature of VET FEE-HELP obligations, not assessing adequacy of skills to complete course – whether insufficient training and monitoring of agents – whether unconscionable conduct in relation to 13 individual consumers**CONSUMER LAW** – alleged contraventions of ss 76 and 78 of the *Australian Consumer Law* – whether respondent contravened unsolicited consumer agreement provisions regarding specific consumers **CONSUMER LAW** – alleged contraventions of ss 18 and 29 of the *Australian Consumer Law* – misleading or deceptive conduct in trade or commerce – false or misleading representations about goods or services –whether recruiters made misleading or deceptive representations to specific consumers – whether this was shown to be part of a wider system of conduct or pattern of behaviour  |
|  |  |
| Legislation: | *Australian Consumer Law* (contained in Sch 2 to the *Competition and Consumer Act 2010* (Cth)) ss 18, 21, 21(4)(b), 22, 29(1), 69, 70, 76, 78, 239*Competition and Consumer Act 2010* (Cth), ss 137H(3), 139B(1)(a), 130B(2), 155*Corporations Act 2001* (Cth) s 500*Evidence Act 1995* (Cth) ss 136, 140(2)*Higher Education Support Act 2003* (Cth)*National Vocational Education and Training Regulator Act 2011* (Cth)  |
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| Cases cited: | *Australian Building and Construction Commissioner v Hall* [2018] FCAFC 83; 277 IR 75*Australian Competition and Consumer Commission v ABG Pages Pty Ltd* [2018] FCA 764*Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (formerly Advanced Medical Institute Pty Ltd) (in liq)* [2015] FCA 368; ATPR 42-498*Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq)* [2017] FCA 521*Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 2)* [2018] FCA 1459*Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* [2018] FCA 1408*Australian Competition and Consumer Commission* *v Get Qualified Australia Pty Ltd (in liq) (No 2)* [2017] FCA 709*Australian Competition and Consumer Commission v Harrison* [2016] FCA 1543*Australian Securities and Investments Commission v Kobelt* [2019] HCA 18; 368 ALR 1*Australian Competition and Consumer Commission v Medibank Private Ltd* [2018] FCAFC 235*Australian Competition and Consumer Commission v Unique International College* [2017] FCA 727*Australian Securities Investments Commission v Australia and New Zealand Banking Group Limited* [2019] FCA 1284*Briginshaw v Briginshaw* (1938) 60 CLR 336*Evans v Braddock* [2015] NSWSC 249*NRM Corporation Pty Ltd v Australian Competition and Consumer Commission* [2016] FCAFC 98, ATPR 42-531*Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50; 236 FCR 199*Paciocco v Australian and New Zealand Banking Group Limited* [2016] HCA 28; 258 CLR 525*Parker v Australian Building and Construction Commissioner* [2019] FCAFC 56; 365 ALR 402*Shepherd v The Queen* [1990] HCA 56; 170 CLR 573*Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389; 15 BPR 29,699*Unique International College Pty Ltd v Australian Competition and Consumer Commission* [2018] FCAFC 155; 362 ALR 66*Watson v Foxman* (1995) 49 NSWLR 315 |
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| Dates of hearing: | 17-21 September 2018 |
|  |  |
| Date of last submissions: | 9 November 2018 |
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| Registry: | New South Wales |
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| Division: | General |
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| Sub-Area: | Regulator and Consumer Protection |
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| Category: | Catchwords |
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| Counsel for the Applicants: | Mr G Kennett SC with Mr D Tynan |
|  |  |
| Solicitor for the Applicants: | Corrs Chambers Westgarth |
|  |  |
| Counsel for the Respondent: | Ms K Morgan SC with Ms C Hamilton-Jewell |
|  |  |
| Solicitor for the Respondent: | Minter Ellison |

ORDERS

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|  | NSD 453 of 2016 |
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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONFirst ApplicantCOMMONWEALTH OF AUSTRALIASecond Applicant |
| AND: | AUSTRALIAN INSTITUTE OF PROFESSIONAL EDUCATION PTY LTD (IN LIQ) (ACN 126 628 215)Respondent |

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| JUDGE: | BROMWICH J |
| DATE OF ORDER: | 26 November 2019 |

THE COURT ORDERS THAT:

1. The parties furnish, by email to the associate to Justice Bromwich, agreed or competing orders arising from the reasons for judgment within 14 days, or such further time as may be allowed.

2. A case management hearing be listed on a date to be fixed.

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

REASONS FOR JUDGMENT

BROMWICH J:

|  |  |
| --- | --- |
| INTRODUCTION | [1] |
| THE PLEADED POSITION AND CASE FOR THE PARTIES | [15] |
| Overview of the applicants’ case and AIPE’s response | [15] |
| Admissions as to background facts | [24] |
| Core disputed allegations | [34] |
| Divergent views on what needs to be established and how | [41] |
| THE VET FEE-HELP SCHEME | [65] |
| Essential Features | [65] |
| The VET FEE-HELP scheme and its potential for abuse | [72] |
| AIPE’S OPERATIONS | [94] |
| Overview of AIPE’s business | [94] |
| AIPE’s enrolment process and forms | [105] |
| Enrolment data relied upon by the applicants | [128] |
| LEGAL PRINCIPLES | [146] |
| Unconscionable conduct | [147] |
| Differences between this case and *Unique* | [159] |
| Use of individual consumer witnesses | [173] |
| False, misleading or deceptive conduct | [176] |
| Unsolicited consumer agreements | [178] |
| INDIVIDUAL CONSUMER WITNESSES | [182] |
| Consumer MI | [186] |
| Consumer RS | [193] |
| Consumer TK (supported by CF) | [209] |
| Consumer CRS | [243] |
| Consumer MS | [270] |
| Consumer LT | [307] |
| Consumer FM | [324] |
| Consumer KB | [335] |
| Consumer KP | [353] |
| Consumer JC | [382] |
| Consumer RL | [407] |
| Consumer KS | [431] |
| Consumer GO | [441] |
| SYSTEM/PATTERN CASE | [460] |
| Evidence of former AIPE employees | [460] |
| Ms Lyndall Benton: inadequate processes and student complaints/Acquire/unsuitable consumers/monitoring of agents/OPSA/completion rates | [470] |
| Ms Glashie Qudsia: unsuitable consumers to be enrolled as students | [588] |
| Ms Romina Casale: role, suitability of consumers to be enrolled as students, Acquire, OSPA, management meetings, LLN, student classifications, processing withdrawals: | [599] |
| Key conclusions drawn from the evidence of the former AIPE employees | [686] |
| Inadequate training of agents and recruiters | [696] |
| More than half of the relevant period – 1 May 2013 until mid-September 2014 | [705] |
| November-December 2014 | [711] |
| February 2015 | [719] |
| April 2015 | [726] |
| June-July 2015 | [727] |
| September 2015 | [729] |
| Conclusion on training materials | [734] |
| Monitoring of agents and directions given to agents | [735] |
| Extraordinary commission payments for recruitment | [753] |
| Consumer witnesses and other evidence of misleading, deceptive or contextually false or misleading representations as part of the system/pattern case | [756] |
| Unfair tactics and awareness on the part of AIPE senior staff and CEO (Mr Khanche) | [757] |
| Mr Khanche’s awareness of AIPE’s agents’ marketing practices | [760] |
| Audit findings (admitted over objection) | [761] |
| McGrathNicol report | [762] |
| ORIMA Report | [765] |
| ASQA audit | [767] |
| Enrolment data analysis (by Dr Ericson) contributing to proof of targeting | [768] |
| OVERALL CONCLUSIONS ON THE SYSTEM/PATTERN CASE | [771] |
| CONCLUSION | [774] |

# INTRODUCTION

1 The first applicant in this proceeding is the Australian Competition and Consumer Commission (**ACCC**). The second applicant is the **Commonwealth** of Australia. The respondent is the Australian Institute of Professional Education Pty Ltd (in liq) (ACN 126 628 215) (**AIPE**). The applicants allege that the respondent breached the Australian Consumer Law (**ACL**) in connection with the supply or possible supply of vocational education courses, including by engaging in a system of conduct or pattern of behaviour that was unconscionable, and by engaging in conduct that was false or misleading or deceptive.

2 The applicants commenced this proceeding against AIPE on 31 March 2016, before it went into liquidation. Later that year, on 6 October 2016, the directors of AIPE resolved to wind up the company, and liquidators were appointed on the same date. On 16 May 2017, over the opposition of the liquidators, I granted conditional leave under s 500 of the *Corporations Act 2001* (Cth) to the applicants to bring this proceeding against AIPE as a company in liquidation: *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq)* [2017] FCA 521.

3 From 1 May 2013 up to 1 December 2015 (**relevant period**), AIPE conducted a business which included marketing and providing online vocational education training (**VET**) courses. Those courses were eligible for Commonwealth funding by way of a scheme of student loans under the *Higher Education Support Act 2003* (Cth) (**HES Act**) known as the Vocational Education and Training Fee Higher Education Loan Program (**VET FEE-HELP**). Upon confirmation of a student’s enrolment in an eligible course, the Commonwealth paid the course fee directly to the VET provider, in this case, AIPE. The student incurred a corresponding debt of 120% of that course fee. That debt was payable through the income tax system once the student’s taxable income reached a certain threshold (between just over $51,000 to just over $54,000 per annum over the relevant period).

4 The VET FEE-HELP scheme was deliberately and significantly liberalised by the government in 2012 for the express purpose of addressing low participation rates of disadvantaged people, including those with a disability, living in regional and remote areas, coming from lower socio-economic backgrounds, from non-English speaking backgrounds, not in paid employment, and Aboriginal and/or Torres Strait Islander peoples. Prior requirements of progression to study at a higher education institution were removed, making vocational training an independent objective.

5 Each person had a lifetime assistance cap, at that time of less than $100,000. Money expended on any given course, whether completed successfully or not, reduced the government assistance available to that person in the future.

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.

8 The agency arrangement was confined to recruitment leading to enrolment, and did not extend to being able to bind AIPE in relation to the final step of entering into an enrolment agreement, that taking place between the prospective student and AIPE, albeit apparently with active involvement or assistance on the part of the recruiter. The agent’s role, via their recruiters, who were also thereby recruiters for AIPE, may be seen to be somewhat akin to a real estate agent, who facilitates a sale, but leaving the sale contract to take place between the vendor and purchaser. AIPE preferred to refer to agents as “*service providers*”, being a term introduced into policy documentation that was stated to take effect from 1 September 2015 for the final four months of the relevant period. However, that term does not usefully convey the nature of the agent’s role and accordingly they will be referred to as agents in these reasons.

9 There was only one such agent for most of the first year of the relevant years, **Acquire Learning** Pty Ltd, with other agents commencing to be engaged from about November 2013.

10 By mid-2014, AIPE had entered into contracts with 35 agents, although the evidence reveals that almost 80% of consumers enrolled as students during the relevant period were recruited by four of those agents. Neither AIPE, nor the applicants, called any evidence from any agent or any recruiter. The evidence concerning their activities comes from AIPE’s business records, key former AIPE employees and a small number of consumers approached by recruiters as described in the following paragraph.

11 The evidence of only 13 consumers who were, or were sought to be, enrolled as students, comprising a small fraction of the total numbers of consumers enrolled as students (in excess of 15,000 if the period is counted from 1 January 2013), is relied upon by the applicants to give direct evidence of what happened to them in an illustrative, rather than representative way, in the context of the rest of the evidence. In these reasons the term “*consumer witnesses*” is therefore used to refer to the 13 consumers who gave affidavit evidence of their enrolment experiences at the hands of recruiters from a number of different agents. They are not referred to as “*students*” because, as will be readily apparent when their evidence is considered in detail, it is clear that none of them were suitable to be enrolled as a student by AIPE.

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.

13 This posited alternative is not the complete universe of alternatives to the conclusion urged upon the Court by the applicants, but it adequately illustrates the nature of the binary determination required to be made between finding that unconscionable conduct has been made out as a matter of a system of conduct or pattern of behaviour, and a finding that this has not been made out. It is in the nature of the determination required to be made that reasonable alternative explanations for what took place to that posited by the applicants need to be considered in an evaluative sense. In that context, the evidence of the 13 consumer witnesses, while not led as a representative sample, served to illustrate how AIPE’s enrolment practices were able to be, or were even permitted and encouraged to be, implemented, rather than leaving that only to a process of judicial evaluation, including by processes such as inference.

14 The remaining and greater bulk of the evidence the applicants rely upon came from AIPE records, Commonwealth records, analysis of both kinds of records, and a number of key former AIPE employees. A report prepared by a social scientist, Dr Matthew Ericson, was rejected after his cross-examination, although certain demographic tables that he produced were admitted without objection. AIPE adduced affidavit evidence of one of its three joint and several liquidators, Mr Morgan Kelly, who was not cross-examined.

# THE PLEADED POSITION AND CASE FOR THE PARTIES

## Overview of the applicants’ case and AIPE’s response

15 The applicants seek to establish a *“system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour”* that was, in all the circumstances, unconscionable, contrary to s 21(1) via s 21(4)(b) of the ACL. Section 21 of the ACL, which is in schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**CCA**) provided as follows:

**21 Unconscionable conduct in connection with goods or services**

(1) A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to a person (other than a listed public company); or

(b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

(2) This section does not apply to conduct that is engaged in only because the person engaging in the conduct:

(a) institutes legal proceedings in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition; or

(b) refers to arbitration a dispute or claim in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition.

(3) For the purpose of determining whether a person has contravened subsection (1):

(a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(4) It is the intention of the Parliament that:

(a) this section is not limited by the unwritten law relating to unconscionable conduct; and

(b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and

(c) in considering whether conduct to which a contract relates is unconscionable, a court’s consideration of the contract may include consideration of:

(i) the terms of the contract; and

(ii) the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract.

16 The Court, in deciding whether s 21 has been contravened, may also have regard to the following non-exhaustive considerations set out in s 22(1) of the ACL:

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

(a) the relative strengths of the bargaining positions of the supplier and the customer; and

(b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and

(c) whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier; and

(f) the extent to which the supplier’s conduct towards the customer was consistent with the supplier’s conduct in similar transactions between the supplier and other like customers; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code; and

(i) the extent to which the supplier unreasonably failed to disclose to the customer:

(i) any intended conduct of the supplier that might affect the interests of the customer; and

(ii) any risks to the customer arising from the supplier’s intended conduct (being risks that the supplier should have foreseen would not be apparent to the customer); and

(j) if there is a contract between the supplier and the customer for the supply of the goods or services:

(i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and

(iv) any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services; and

(l) the extent to which the supplier and the customer acted in good faith.

17 The applicants assert that AIPE breached s 21 of the ACL in various ways. Its sales representatives, the applicants allege, visited low socio-economic communities to enrol consumers in its courses, including by calling on consumers in their homes, making representations that they could receive a free laptop computer or tablet by signing up to an AIPE course, and by offering these items as inducements. Additionally, the applicants allege that the recruiters told consumers that its courses were free, and failed to adequately explain the nature of the VET FEE-HELP scheme. The respondents are said to have provided financial incentives to its sales representatives in order to maximise the number of consumers enrolled in its course. These persons enrolled included those who could not use or access the Internet or a computer, had inadequate literacy or numeracy skills, or were otherwise unsuitable. These actions, it is said, were done in order to maximise AIPE’s revenue from payments by the Commonwealth under the VET FEE-HELP scheme.

18 The applicants contend that as a result of that asserted system of conduct or pattern of behaviour, a significant proportion of the enrolments should not have taken place, corresponding payments should not have been made by the Commonwealth to AIPE, and related debts should not have been incurred by the consumers concerned. In total, VET FEE‑HELP payments were made by the Commonwealth to AIPE in excess of $210 million, although the sums potentially affected by this proceeding are only a presently unidentified portion of that amount.

19 The applicants also assert, as a much lesser part of their case, contraventions of ss 18, 29(1)(g), 29(1)(i), 76 and 78 of the ACL, which respectively proscribe misleading or deceptive conduct, making different types of false or misleading representations, and failing to comply with particular statutory obligations in relation to unsolicited consumer agreements. In the greater part, the conduct established by the evidence is only faintly defended by AIPE in terms of reliability, with appropriate concessions as to certain findings that are properly open to be made.

20 By a further amended originating application (in part amended to reflect injunctive relief no longer sought against AIPE due to it being in liquidation):

(1) both applicants seek numerous declarations of contravention and a mandatory injunction requiring AIPE to refund to the Commonwealth amounts that were paid in purported discharge of any consumer’s VET liability as specifically identified that has not been repaid;

(2) the ACCC seeks pecuniary penalties, a sealed copy of the reasons for judgment be kept on the Court file for the purposes of s 137H(3) of the CCA, orders seeking to rectify the position of consumers by way of non-party redress, ineligibility to VET FEE-HELP and annulment of liability to the Commonwealth and directions expunging enrolment references; and

(3) the Commonwealth seeks a further declaration as to the effect of the non-party consumer redress orders sought by the ACCC.

21 There can be no enforcement of any pecuniary penalty, refund or costs order without the leave of the Court, because that was a condition of the Court granting the applicants’ leave to proceed under s 500 of the *Corporations Act*.

22 AIPE:

(1) specifically denies that it engaged in a pattern of behaviour for marketing and enrolling consumers as students that was generally or specifically unconscionable, noting as discussed below that the case was conducted also upon the basis of a system of conduct which was also denied;

(2) no longer denies that it engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, or that it made false or misleading representations in relation to certain of the individual consumers;

(3) instead admits that, in the context of enrolling students in VET courses, failing to explain the nature of the VET FEE-HELP scheme and offering inducements can amount to misleading or deceptive conduct, but submits that the applicants’ evidence is inadequate on this point;

(4) does not admit contravening ss 76 and 78 of the ACL in relation to unsolicited consumer agreements as alleged;

(5) does not maintain a prior denial that “*service providers*” were agents or sub-agents of AIPE, but states that any loss or damage proven arose from conduct of unauthorised sub-contractors or sub-sub-contractors who were not acting as agents for AIPE;

(6) denies that the individual consumers suffered loss or damage; and

(7) does not admit that the Commonwealth is entitled to any repayments.

23 AIPE in substance denies that any real or substantial wrongdoing has been shown to have taken place beyond isolated events concerning the individual consumer witnesses. It attributes, in substance, if not in terms, what happened to the very nature of the post-2012 VET FEE-HELP scheme in opening up VET to disadvantaged members of the community. To put the substance of AIPE’s opposing case in simple terms, it contends that the applicants’ evidence failed to bridge the gap between:

(1) on the one hand, consumers who *may* have been vulnerable and ripe for exploitation as the legislative target group for the post-2012 VET FEE-HELP scheme, and the recruitment practices that had the effect of encouraging enrolments that *included* consumers who *might* have had those characteristics; and

(2) on the other hand, there being enough evidence to prove any system of conduct or pattern of behaviour that established unconscionable conduct in relation to that category of consumers.

## Admissions as to background facts

24 It is convenient to reproduce the background facts that are admitted by AIPE, before turning to the allegations that are denied, in order to identify the area of dispute calling for an adjudication as to whether or not the applicants have discharged their burden and onus of proof. AIPE, in its further amended response to the applicants’ concise statement, specifically admits the following (at [1]-[13]):

[1] The respondent, Australian Institute of Professional Education Pty Ltd (**AIPE**), has carried on the business of supplying online courses, including Diplomas in Travel and Tourism, Business, and Hospitality, since 2013. Each of these courses required at least approximately 6 months’ full-time study (and in the case of Diplomas in Hospitality, 12 months).

[2] An eligible student who enrolled in an AIPE online course, each of which consisted of several units of study, was entitled to a Commonwealth student loan called VET FEE-HELP for each of those units of study. Under the VET FEE-HELP program, the Commonwealth paid eligible students’ course fees directly to AIPE in discharge of the student’s liability to pay course fees. Further, the students’ entitlement to a loan from the Commonwealth, the second applicant, was set by criteria determined by the *Higher Education Support Act 2003* (Cth) (***HESA***) and by the Commonwealth.

[3] Once a student’s annual threshold income has been exceeded the student may be required to make repayments as stipulated by the Commonwealth. There are circumstances where repayments would not need to be made even where the threshold is met, in accordance with criteria set by the Commonwealth.

[4] There were 15,932 enrolments of students in AIPE’s courses between 1 January 2013 and 1 December 2015 and AIPE has received $210,890,848.80 for these enrolments.

[5] Between 1 July 2013 and 25 August 2016, AIPE re-credited the amount of $24,660,402 in funding to the Commonwealth as part of its withdrawal of 1,681 of the enrolments specified in (4) above.

[6] The Commonwealth has not paid the sum of $20,833,332.20 to AIPE pursuant to the advance payment determination made on 18 December 2014 for the period November – December 2015. The advance payment determination made on 18 December 2014 was revoked on about 9 March 2016.

[7] Between 1 May 2013 and 1 December 2015 (**the Relevant Period**) AIPE entered into contracts with 35 service providers (**Service Providers**) to enrol students in its vocational education training (**VET**) courses. The Service Providers are listed in Attachment A to the Schedule to the Concise Statement filed on 10 May 2016.

[8] AIPE has no knowledge of the total number of sub-contractors or other entities (together **subcontractors**) engaged by the Service Providers. The vast majority of AIPE’s contracts with its respective Service Providers prohibited the Service Provider from engaging sub-contractors without AIPE’s consent.

[9] AIPE has consented to certain Service Providers engaging sub-contractors (**Authorised Sub-Contractors**), from particular dates, as set out in Annexure A to this amended response, for the purposes of marketing to and enrolling students in VET courses with AIPE.

[10] During the Relevant Period AIPE accepted enrolments of students from both Service Providers and their Authorised Sub-Contractors through an online portal.

[11] AIPE paid Service Providers a commission for referring students:

(a) once the census date had been reached without the student having withdrawn, and in some of those cases the payment was reversible if AIPE “re-credited” the student and reversed the student’s debt; or

(b) in respect of a small number of Service Providers, a service fee was paid before the census date but in those cases the service fee was repayable, or the Service Provider was required to provide AIPE with a credit equal to the amount of the service fee, if the student withdrew before the census date.

[12] Some of AIPE’s contracts with Service Providers contained clauses describing a minimum number of students to be referred each month. The number of students was arrived at based on the Service Providers’ capabilities and having regard to the requirement set by the Commonwealth to estimate VET FEE-HELP requirements and other matters.

[13] In terminating AIPE’s arrangements with [a] certain number of the Service Providers it stated as a reason for termination that the Service Provider had not met its minimum monthly student referrals but that for many of its Service Providers, over the course of the term of its contract with the Service Providers, it did not terminate Service Providers where that Service Provider did not achieve minimum referral of students for a particular month.

25 In addition to the above admissions, AIPE does not take issue, in its further amended response, in its opening submissions or in its closing submissions, with the conduct of its contracted agents and their recruiters being conduct properly able to be attributed to it. This is sensible, in light of Gleeson J’s conclusions about agency in *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* [2018] FCA 1408 (***Empower***, because that is the name of the college involved), discussed below.

26 In response to requests by AIPE for further details of the facts and allegations made in the concise statement, the applicants filed a schedule to that concise statement. The schedule lists, in three attachments, the details of the contractual arrangements established by the evidence in relation to 35 agents who had contracts with AIPE, and a list of the recruiters of those agents. The schedule additionally pleads (at [7] and [8]):

[7] Agents who were contracted to market courses on behalf of AIPE were not trained or given directions by AIPE staff in 2014 as to how its courses should be marketed to individual students so as to ensure that:

* the enrolment of unsuitable students in its courses was avoided;
* each potential student was informed of the financial obligations that arose from pursuing a course of study with AIPE;
* each potential student was aware of the range of withdrawal opportunities without penalty if the student elected not to proceed with a course of study;
* compliant practices were promoted among the agents contracted by AIPE.

Prior to January 2015 agents were not required by AIPE to attend training sessions offered by AIPE staff.

[8.1] Agents and sub-agents [i.e. recruiters] visited the areas identified in paragraph 8.1 and recruited students in those locations.

AIPE sometimes gave agents leads as to particular locations in which students might be recruited.

At all material times, AIPE was aware of the locations from which its students were being recruited because:

(i) At the time the agent and AIPE entered into the Student Enrolment Agreement, the agent and AIPE agreed the geographical areas in which the agent or sub-agent would recruit students; and

(ii) Agents were required to give 2 weeks’ notice of any changes to those agreed areas;

(iii) In regional locations, agents were required by AIPE to notify it of the suburbs to be visited by agents and sub-agents at least 2 weeks in advance; and

(iv) AIPE was provided with the addresses of potential students by agents and sub-agents before they were formally enrolled into courses by AIPE.

Notwithstanding the knowledge of AIPE, it continued to enrol students from low socio-economic communities into its courses.

[8.3] The representations were oral. The specific representations relied upon will be set out in the evidence.

[8.4] The use of the word “including” in the paragraph is deliberate. The paragraph indicates the facts that the Applicants are aware of to date. In the event that additional facts come to light at the time when the Applicants serve their evidence, the Applicants will inform AIPE of those additional facts.

[8.5] Due to the vulnerabilities of the students whom AIPE enrolled into its courses, and the relatively high cost of the courses offered, there was a heightened obligation on AIPE to ensure that students were aware of their VET FEE-HELP obligations before they were enrolled. The evidence of the individual students recruited on behalf of AIPE will demonstrate that the agents and sub-agents did not explain the nature of their VET FEE-HELP obligations to them and that the students were ignorant of their debt to the Commonwealth. The evidence will demonstrate that the Agents and Sub-Agents often represented that the courses were free, or, if they were not free, that the students would never have to repay the debt. Further they often represented to students that, if they enrolled in a course, they would be given a free laptop computer or tablet, when in fact the laptop was provided on loan.

[8.6] As above, this is a matter for evidence, which will be provided by students enrolled into AIPE courses.

27 In the further amended response, AIPE pleads as follows (at [14A], [14B] and [15A]):

[14A] AIPE admits that certain Service Providers and Authorised Sub-Contractors, on its behalf, and for the purposes of recruiting and enrolling students in VET courses of study:

a. visited, in addition to suburban and urban areas, low socio-economic communities, including rural towns, remote communities and communities with Aboriginal populations:

b. conducted face-to-face marketing by calling on consumers in their homes, telephoned potential students and conducted group marketing sessions at public venues, such as careers and education exhibitions and school presentations.

[14B] AIPE admits that it provided to students enrolled in VET courses who requested a learning device, laptops, on loan, which had been configured with relevant course material for the course in which the student was enrolled and which were required to be returned by the student at the completion of their course of study.

[15A] AIPE admits that in the context of enrolling students in VET courses:

a. a failure to explain in plain and clear terms the VET FEE-HELP scheme and that it would leave a person with a debt to the Commonwealth: or

b. offering a free laptop to poorly educated or illiterate persons on the basis that the person signs up to a VET FEE-HELP course without explaining in plain terms the VET FEE-HELP scheme:

can amount to misleading and deceptive conduct.

28 With regards to the agency issue, s 139B(2) of the CCA, which is deliberately in similar terms to s 84 of the CCA (and s 84 of the predecessor *Trade Practices Act 1974* (Cth)), provides as follows:

Any conduct engaged in on behalf of a body corporate:

(a) by a director, employee or agent of the body corporate within the scope of the actual or apparent authority of the director, employee or agent; or

(b) by any other person:

(i) at the direction of a director, employee or agent of the body corporate; or

(ii) with the consent or agreement (whether express or implied) of such a director, employee or agent;

if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;

is taken, for the purposes of this Part or the Australian Consumer Law, to have been engaged in also by the body corporate.

29 In *Empower*, Gleeson J, in dealing with the application of s 139B(2)(a) and the attribution of the conduct of agents and their recruiters in marketing a VET provider’s courses to such a provider said as follows (at [282] to [287]):

The term “agent” is not defined in the Act or in the ACL. It is thus appropriate to have regard to the meaning(s) of agent at common law.

It has been observed that the word “agent” is one that can cause difficulty because of its potentially wide and varying meaning: *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 (“*Tonto*”) at [170] per Allsop P (Bathurst CJ and Campbell JA agreeing); *NMFM* at [512] per Lindgren J; see also Dal Pont, *Law of Agency* (3rd ed, LexisNexis, 2014) at [1.1].

The key feature of an agency relationship is that the agent acts on behalf of the principal. That this is the key characteristic of agency explains why, in *Australian Competition and Consumer Commission v Maritime Union of Australia* [2001] FCA 1549; (2001) 114 FCR 472, Hill J at [81] observed that s 84(2) appeared – by its reference to “on behalf of” in addition to “agent” – to have a “double requirement” of agency. In *Tonto*, Allsop P (with whom Bathurst CJ and Campbell JA agreed) said, at [177]:

Agency is a consensual relationship, generally (if not always) bearing a fiduciary character, in which by its terms A acts on behalf of (and in the interests of) P and with a necessary degree of control requisite for the purpose of the role. Central is the conception of identity or representation of the principal.

His Honour said further at [177]:

It is sufficient to recognise that the essential characteristic is that one party (A) acts on the other’s (P’s) behalf, and that this will generally be in circumstances of a requirement or duty not to act otherwise than in the interests of P in the performance of the consensual arrangement.

It is well established that where a question arises as to whether two persons have a relationship of agency, the label they apply to the relationship, or expressly disclaim, is not determinative of the nature of their relationship. As a result, a term in a written contract between the persons that their relationship is not one of agency will not determine the matter, although such a term must be given proper weight: *South Sydney District Rugby League Football Club Ltd v News Ltd* [2000] FCA 1541; (2000) 177 ALR 611 at [134]-[135] per Finn J.

As Allsop P observed in *Tonto* at [178], it should not be controversial that the concept of agency may properly extend to persons whose roles may be described as “canvassers” or “introducing agent”. There, his Honour quoted, with apparent approval, a passage from *Bowstead and Reynolds on Agency* (19th ed, Street & Maxwell, 2010) at [1-019], where the authors observed that such agents may only introduce a third party to the principal and leave them to enter a contract between themselves. However, such agents often “have authority to receive and communication information on their principals’ behalf, and in so doing have the capacity to alter their principals’ legal position”.

30 After considering the particular contractual terms and arrangements, Gleeson J at [298] to [300] considered, by reference to long-standing authority, whether the conduct of the agents (including via their recruiters) was engaged in on behalf of the VET provider, and concluded (at [301]):

In general, and subject to the question of conduct which might be outside the scope of the agents’ authority, the conduct of the agents in selling and promoting services provided by Empower was conduct engaged in on behalf of Empower because it occurred:

(1) in the course of their respective agency relationships with Empower;

(2) when the agents were acting as representatives of Empower; and

(3) for the benefit of Empower, that is, to build the business of Empower.

31 On the topic of the scope of the agents’ actual or apparent authority, Gleeson J said the following (at [302] to [308]):

In the law of agency, the liability of the principal for an agent’s defaults can be explained by the principal’s ability to stipulate an agent’s authority: Dal Pont, *Law of Agency* [22.15].

The expressions “actual authority” and “apparent authority” are not defined in the Act or ACL. It is therefore useful to have regard to the general law in determining their meaning.

At common law, the principal is civilly liable for an agent’s torts committed by the agent while acting within the scope of his or her actual or apparent (also called “ostensible”) authority: *Ex parte Colonial Petroleum Oil Pty Ltd* (1944) 44 SR (NSW) 306 at 308. As to the latter, Jordan CJ repeated the following statement from his decision in *Bonette v Woolworths Ltd* (1937) 37 SR (NSW) 142 at 151:

If an agent is authorised to do a particular class of acts, the principle is liable if the agent does an act of the class authorised notwithstanding that it is done mistakenly, negligently or wrongfully; and a principle cannot escape liability by expressly prohibiting his agent from making mistakes or being careless in carrying out his duties …

Concluding:

A principal is not, of course, responsible, either civilly or criminally, for anything done by a person who is in fact his agent, if it is done by that person on his own behalf and not in the course of the performance of his duties as agent or within the scope of his general authority as agent.

As a matter of interpretation, these principles apply under s 139B so that the conduct of Empower’s agents in selling and promoting Empower’s courses (being conduct of the authorised class) is taken, for the purposes of the ACL, to also have been engaged in by Empower.

This conclusion is consistent with cases in which the principal has been found liable for the misleading or deceptive conduct of its agent: see, for example, *Aliotta v Broadmeadows Bus Service Pty Ltd* (1988) 10 ATPR 40-873, *Transport Accident Commission v* *Treloar* (1991) ATPR 41-123 at 52,819 and *Havyn Pty Ltd v Webster* [2005] NSWCA 182; (2005) ATPR (Digest) 46-266.

It follows that the conduct of the agents in using any of the alleged marketing methods is, by s 139B, taken to have also been engaged in by Empower.

It also follows that the conduct of the agents the subject of the evidence given in relation to the Consumers below is, by s 139B, also taken to have been engaged in by Empower.

32 I am satisfied, as was Gleeson J in *Empowe*r that, generally speaking, the activities of the agents and recruiters were agents of AIPE within the meaning of that term in s 139B, extending to the conduct of the recruiters in selling and promoting education services by AIPE. This conduct plainly occurred in the course of the agency relationship between the agents and AIPE, including the conduct of the recruiters. The agents and recruiters were generally acting as representatives of AIPE and were doing so for the benefit of AIPE, building its business by the recruitment of consumers to become enrolled as students. Except for extreme or aberrant behaviour, such as making overtly false statements, which would likely fall outside their authority, I accept that the recruiters were ordinarily acting within the scope of their actual or apparent authority on behalf of AIPE.

33 In any event, the applicants submit, and I accept, that even if the conduct of some of the recruiters was not the conduct of AIPE under s 139B(1)(a), it does not follow that such conduct is outside or irrelevant to the system of conduct or pattern of behaviour alleged. AIPE’s enrolment system involved the implementation of its decisions and actions, which facilitated and encouraged conduct in the field by reference to the structure of the written contracts with the agents, the payment of large commissions and the lack of processes identified in some detail below to ensure that only consumers who were suitable were enrolled as students.

## Core disputed allegations

34 The core disputed allegations relied upon by the applicants are sufficiently succinct to reproduce rather than summarise. At [6]-[13] of the concise statement, the applicants allege as follows:

[6] AIPE paid the Agents a commission (representing between 15-25% of the course fee) for each student enrolled into a course, thus giving them a financial incentive to maximise the number of students enrolled. Some of the agency contracts contained clauses stipulating a minimum number of students to be recruited each month. AIPE monitored the success of its Agents in meeting sales targets by organising monthly or bi-monthly meetings with them, and in some instances, AIPE terminated the contracts of Agents who did not meet the minimum monthly requirement for recruitments.

[7] AIPE failed to provide any, or adequate, training or instruction to the Agents or Sub-Agents [i.e. recruiters] to ensure that their conduct on behalf of AIPE complied with the requirements of the *Australian Consumer Law* (**ACL**), which is Schedule 2 to the *Competition and Consumer Act 2010* (**CCA**).

[8] During the Relevant Period, AIPE engaged in a pattern of behaviour for marketing and enrolling students in its courses. This pattern of behaviour involved certain Agents and Sub-Agents (the Applicants do not allege that this conduct was engaged in by all Agents and Sub-Agents):

8.1 visiting low socio-economic communities, including rural towns, remote communities and communities with Aboriginal populations, to recruit disadvantaged or vulnerable students.

8.2 conducting face-to-face marketing by calling on consumers uninvited in their homes or the homes of relatives or friends, telephoning potential students at their homes and conducting group marketing sessions at public venues, including clubs.

8.3 making false or misleading representations to prospective students that:

(a) the courses were free, when in fact a student immediately incurred a lifetime debt to the Commonwealth;

(b) if the prospective students elected to sign up for VET FEE-HELP, the debt would never have to be repaid, when this was not the case;

(c) the courses were specifically designed for Aboriginal people, when it was not; and/or

(d) if the prospective students enrolled in a course they would be given a free laptop computer or tablet, when in fact the laptop or tablet was provided on loan.

8.4 using unfair tactics, including offering inducements to prospective Aboriginal students to enrol in a course, including Wi-Fi access and mobile phone credits, and paying Aboriginal people (in cash) to assist in recruiting other Aboriginal people to enrol in courses.

8.5 failing to explain to prospective students the nature of their VET FEE-HELP obligations if they enrolled in a course, so that most of the students did not know that they had incurred a debt to the Commonwealth or when that debt would have to be repaid.

8.6 not undertaking any or any adequate assessment of the literacy, numeracy or computer skills of the prospective student, although after March 2015 Agents and Sub-Agents assisted the students to complete their learning, literacy and numeracy tests which were ostensibly designed to determine the student’s ability to undertake a course.

8.7 not assessing whether students had the necessary skills to complete the courses, and as a result, AIPE enrolling students into courses that were not suitable for them, having regard to their limited education, reading, writing and education skills.

8.8 not considering whether students had access to the internet, and as a result, AIPE enrolling students for online courses when they did not have access to the internet; and

8.9 not informing prospective students of the fact that they could withdraw from a course, and that any withdrawal had to be prior to the Census Date, nor how the agreement could be terminated, and not providing students with a copy of the agreement.

[9] During the Relevant Period, AIPE’s pattern of behaviour, set out in paragraph 8, was implemented at least in Queensland, Western Australia and New South Wales. Specific examples of the conduct include the conduct leading to the enrolment of nine students set out in Annexure A to this Concise Statement.

[10] After receiving a student enrolment application from an Agent, AIPE did not routinely make a call to the student to verify whether he or she had the necessary skills to undertake the course, wanted to do the course, was aware of his or her VET FEE-HELP obligations, was aware that the course was not free, or advise that the student could withdraw from the course prior to the Census Date.

[11] AIPE knew that each student would incur a debt to the Commonwealth regardless of whether he or she was capable of undertaking or completing the course.

[12] AIPE enrolled students in courses for its own financial gain, knowing that few if any of them would actually commence the course, or take steps to withdraw from the course before incurring the debt. AIPE would therefore receive VET FEE-HELP payments for each student without, in most cases, having to provide any teaching services.

[13] During 2014 and 2015, AIPE received complaints about the conduct of its Agents, both from students themselves who had been enrolled into courses and from other agencies representing students who had signed up for courses. Despite AIPE being aware of these complaints, it did not immediately terminate its contracts with those Agents, if at all, during the Relevant Period, nor instruct those Agents to cease the engagement of Sub-Agents to recruit students and did not seek to prevent those Agents from conducting door-to-door sales.

35 While the chapeau to [8] and the text of [9] of the concise statement reproduced above refer only to “*pattern of behaviour*”, the entire hearing of this proceeding, including opening and closing submissions, was conducted upon the dual basis of the applicants’ case being based upon establishing unconscionable conduct, beyond the consumer witnesses, by reliance upon the s 21(4)(b) concept of a “*system of conduct or pattern of behaviour*”. AIPE’s understanding that this was the case it had to meet was made explicit in AIPE’s closing written submissions at [25] to [26]. Thus, a pleading problem of the kind identified in *Australian Building and Construction Commissioner v Hall* [2018] FCAFC 83; 277 IR 75 at [25]-[26], and raised but not found to be a problem in *Parker v Australian Building and Construction Commissioner* [2019] FCAFC 56; 365 ALR 402 at [220]-[222], did not arise.

36 The applicants’ pleaded case is that AIPE exploited the vulnerabilities of the liberalised VET FEE-HELP scheme in a manner that was unconscionable. In opening written submissions dated 6 September 2018, prior to the first trial day on 17 September 2018, the applicants framed their characterisation of AIPE’s model for marketing to and enrolling consumers as students as follows (at [5]-[7], excluding footnotes, omitting parts not maintained in closing submissions, and emphasising points squarely going to the VET FEE-HELP scheme):

[5] In the period from 20 February 2013 to 16 October 2015, AIPE received $211,002,401 in VET FEE-HELP payments from the Commonwealth in respect of students it enrolled in its online courses.

[6] … AIPE had 6,057 students that were enrolled in 2015 and, of those, only 77 (1.3%) finished their course. All students enrolled in AIPE’s courses who did not withdraw before the census date and who were not subsequently withdrawn, or otherwise had their debt remitted, have been left with significant debts.

[7] It is the Applicants’ case that AIPE recruited such a large number of students through its unconscionable business practices in marketing and enrolling students in its courses and failing to identify and withdraw unsuitable students before they incurred permanent debts to the Commonwealth. AIPE’s unconscionable business practices included the following key elements:

(a) AIPE used third party recruiters to identify and recruit students on its behalf for enrolment in its courses. AIPE admits that it does not know how many sub-agents were recruiting students on its behalf …

(b) AIPE incentivised its recruiters to sign up as many students as possible by paying them commissions of up to 40 per cent of the cost of the course per student (up to $8,376). AIPE required some agents to achieve a minimum number of student recruitments per month and monitored the performance of its agents in meeting their targets.

(c) For a significant part of the Relevant Period, AIPE failed to provide any, or any adequate, training to its recruiters as to how to lawfully perform their role, including on matters such as ensuring that prospective students understood their obligations under the VET Scheme if they were enrolled in an AIPE course.

(d) AIPE did not provide any ACL training to its employees or to the recruiters before August 2015.

(e) AIPE enrolled students who were unlikely to be able, or inclined, to undertake and complete its diploma and advanced diploma level courses.

(f) AIPE’s recruiters conducted face-to-face marketing by calling on prospective students uninvited in their homes and conducting sign-ups in public venues, including public bars. At least one of AIPE’s recruiters engaged in tele-marketing by cold calling prospective students for recruitment.

(g) **AIPE’s recruiters made false and misleading representations to prospective students including that AIPE’s courses were free, or were free unless students earned over a certain amount, that students would receive a free laptop for signing up to a course, or that the courses were specifically designed for Aboriginal people.** AIPE’s recruiters offered prospective students inducements to enrol in a course, including cash and mobile phone credits. AIPE’s recruiters paid Aboriginal people (in cash) to assist in recruiting other Aboriginal people to enrol.

(h) **AIPE’s recruiters were ignorant of their legal obligations and failed to adequately explain (or explain at all) to students the VET FEE-HELP scheme and their obligations if they signed up to a course and received VET FEE-HELP assistance, including that they would incur a significant debt to the Commonwealth.**

37 The underlying issue in this proceeding is whether the applicants have proven that this was what in fact took place, and if so, whether there was anything unconscionable in doing this, in the manner alleged.

38 AIPE characterises the key dispute as being whether, by reason of what is pleaded by the applicants at [8] to [13] of the concise statement (reproduced above), its system of conduct or pattern of behaviour in enrolling consumers as students during the relevant period was unconscionable in the broad and pervasive way alleged by the applicants. By its pleaded response to those paragraphs, AIPE effectively seeks to confine any possible success by the applicants to contraventions (and thereby remedies) in relation only to the small number of individual consumers who were witnesses. In substance, AIPE admits to at least the possibility of isolated contraventions in relation to those consumers, but maintains that the applicants have not discharged the burden of showing even that took place, let alone that something more than that had taken place.

39 On the third day of the trial, the Full Court decision in the VET FEE-HELP case of ***Unique*** *International College Pty Ltd v Australian Competition and Consumer Commission* [2018] FCAFC 155; 362 ALR 66 was handed down. *Unique* had features in common with this case, thereby giving significant guidance to the approach required to be taken. In *Unique*, the primary judge’s unconscionable conduct findings based on a system of conduct or pattern of behaviour were overturned. An important point to emerge from *Unique* is that unconscionable conduct cases, especially within the framework of the VET FEE-HELP scheme, turn on their own facts and evidence, including the forensic approach taken in bringing such a case.

40 The applicants in substance contend that this case has been brought in a materially different way to *Unique*. They contend that the evidence goes further than in *Unique* to permit the necessary findings to be made. AIPE aligns this case more closely to *Unique* and maintains the applicants’ case should therefore similarly fail, albeit that the resistance to much more limited findings concerning individual consumers is less emphatic. On any view, the evidence of the applicants’ system of conduct or pattern of behaviour case, and what conclusions should be drawn from that evidence, is the most important part of this proceeding.

## Divergent views on what needs to be established and how

41 For the most part, the evidence was not disputed or made the subject of cross-examination. Limited rulings were required as to admissibility or restrictions on use (apart from the exclusion of Dr Ericson’s report, confining his evidence to tables containing limited demographic analysis). Nor was there very much dispute about the facts established by that evidence, as opposed to what to make of it, and what the evidence was capable of establishing. AIPE did not take any substantial issue in relation to what had happened to the 13 consumer witnesses relied upon by the applicants, although it cautioned about relying upon their account of what was said to them. In the end, the defence of the applicants’ individual consumer case was somewhat muted.

42 The greater part of AIPE’s case turned on arguments that the applicants’ evidence simply did not go far enough to make good their system or pattern case, especially when regard is had to the quality of evidence that is required, even on the balance of probabilities, when serious allegations are made. Reliance is placed on the practical effect of s 140(2) of the *Evidence Act 1995* (Cth) as a legislative manifestation of the principles in ***Briginshaw*** *v Briginshaw* (1938) 60 CLR 336 per Dixon J at 362.

43 The applicants, however, state that it is sufficient that they demonstrate that the marketing and enrolment process and AIPE’s business practices in relation to consumers was unconscionable, as a system of conduct or pattern of behaviour. They do not, they submit, bear an evidentiary burden of proving each instance of conduct in relation to all consumers enrolled as students during the relevant period, nor even a large representative sample. This is on the basis that AIPE’s marketing and enrolment process was a widespread system of conduct or pattern of behaviour, geographically and temporally, and that this conduct necessarily involved conduct in respect of individual consumers affected by it.

44 In summary, the bulk of the ACCC’s case relies upon evidence of the systems and patterns of behaviour, with the evidence related to individual consumers enrolled as students intending to illustrate, by way of detailed examples, the outcomes these unconscionable systems and patterns of behaviour were likely to produce, and, by reference to enrolment data and other evidence, did produce.

45 In addition to differing positions on how a system of conduct or pattern of behaviour might be evidenced, the parties diverged on how much variation is permitted in order to constitute “***a*** *system of conduct or pattern of behaviour*”. The applicants’ closing written submissions state that “*AIPE’s recruitment and enrolment processes varied somewhat*” over the course of the three-year relevant period. Those submissions then assert that:

In broad terms, AIPE’s enrolment processes involved unsolicited door-to-door contact by recruiters at prospective students’ homes and recruitment in public areas such as in public bars. Recruiters carried iPads and had students complete the AIPE enrolment form on the iPad. One of AIPE’s agents (Acquire Learning) made unsolicited telephone calls to prospective students, generally chosen from among people who had responded to online job advertisements.

46 AIPE seizes upon the reference to “*varied* *somewhat*”, and the way the submission on this topic is developed by the applicants (as described further below) to submit that this highlights a “*troubling aspect*” of the applicants’ case. AIPE asserts that because the central allegation is that AIPE engaged in “***a*** *system of conduct or pattern of behaviour*” during the relevant period that was unconscionable, and because only *one* such system is pleaded in the concise statement, the applicants’ submission referring to the processes varying somewhat was at odds with the pleaded case. AIPE contends that it is incumbent upon the applicants to establish the features of *the* enrolment process alleged to have been engaged in by AIPE, that the enrolments process was deployed “*in… such* [*a*] *manner or on a sufficient number of occasions*” to constitute “***a*** *system of conduct or pattern of behaviour*”, and that ***a*** system of that kind can be characterised as unconscionable.

47 AIPE points out that there is no pleaded allegation that the system changed during the relevant period, and submits that a variation in the enrolment process “*may well be*” inconsistent with the notion that a single enrolment process can amount to ***a***system or pattern capable of being characterised as unconscionable, as pleaded. In this context, AIPE asserts that it made admissions in relation to the way in which service providers visited low socio-economic communities and conducted marketing face-to-face by home visits, telephone calls and group marketing sessions. However, it asserts that those admissions do not amount to an enrolment process that “*in broad terms*” had the characteristics described by the applicants. AIPE submits that the Court should be cautious in accepting such “*broad brush*” submissions upon the basis that they overstate the effect of the evidence and admissions. AIPE submits that:

The precise features of the enrolment process, whether those features were deployed in a systemic way and whether that system was unconscionable is the pivotal issue which is to be addressed and the Court is not assisted by broad brush summaries of the process.

48 The applicants respond in reply to the effect that AIPE operated a marketing and enrolment process in a number of States that had common features during the relevant period, and that while there may have been some variation in the detail, common features were present at all times and are asserted to be at all times unconscionable. These common features include, but are not limited to, the use of third party recruiters, the payment of large commissions to recruiters, the use of inducements to encourage consumers to enrol and a lack of systems and processes at the operational level to ensure that the respondent only recruited suitable consumers who were capable of completing the courses. The applicants contend that remains so, even though some limited improvements were introduced, including in relation to training, which are described by the applicants as cursory. The applicants therefore submit that none of those changes were such as to alter the asserted unconscionable nature of AIPE’s enrolment system overall.

49 In support of their argument, the applicants assert that an unconscionable system of conduct or pattern of behaviour can continue to exist as proscribed even where key features that constitute it vary or evolve over time. The applicants rely upon what was said by Rangiah J in *Australian Competition and Consumer Commission v* ***ABG******Pages*** *Pty Ltd* [2018] FCA 764 at [37]. His Honour there observed:

While different elements of the system were used at different times in relation to different customers, the same system existed throughout this period and it was continuously applied by ABG Pages in relation to its dealings with customers and potential customers.

50 Rangiah J in *ABG Pages* characterised the systemic and unconscionable conduct that his Honour found had been established as forming part of an “*ongoing, single episode of wrongdoing*”. The applicants also cite Moshinsky J in *Australian Competition and Consumer Commission v* ***Harrison***[2016] FCA 1543 at [10], where his Honour took a similar approach in describing the key elements of the system of conduct or pattern of behaviour found to be unconscionable. Moshinsky J in *Harrison*, albeit in dealing with a very different case concerning telecommunications consumer contracts, took a reasonably broad and general view of the conduct, rather than descending into variations in the fine detail that was involved in the execution of the single overall system that was alleged and proven.

51 The applicants therefore submit that there is no authority of which they are aware (and none is cited by AIPE) to the effect that an alleged system must be shown to have been “*created at a particular point in time with all of its constituent elements identified and operating in a fixed manner over time*”. Rather, the applicants submit, a system may evolve over time, which is consistent with the broad remedial approach which should be taken in interpreting and applying s 21 of the ACL. The applicants submit that the approach urged by AIPE would unduly confine the operation of s 21(4)(b) to a very narrow class of conduct, which would be at odds with both business practice and a sensible understanding of the overall legislative regime and proscription. They submit that the approach that they contend for allows for a system to adapt and evolve incrementally over time, yet still be found overall to fall within the proscribed concept, provided the essential elements relied upon do not materially change. I prefer and accept the applicants’ submissions on this topic. The suggestion of a single, narrowly drawn, system case is not reflective of the case that has been brought, and sought to be proven.

52 AIPE assert a number of other weaknesses in the ACCC’s evidence in support of its system or pattern case. First, it submits that the ACCC conceded that the recruitment methods of Acquire Learning do not form part of the system of conduct or pattern of behaviour alleged. This is said to present an issue as Acquire Learning was by far the most prolific recruiter agent for AIPE, and were indeed the only recruiter agent for AIPE from before the beginning of the relevant period until November 2013. AIPE submits that any non-party redress orders made on the basis of a finding of an unconscionable system or pattern of behaviour therefore need to exclude the approximately 40% of enrolments that were procured by Acquire Learning.

53 AIPE also submits that the substantial sums received by it are insufficient to evidence a “*real motive*” for enrolling students, and that nor is there any other evidence going to motive.

54 Evidence of the individual consumer witnesses is said by AIPE not to assist the applicants’ system or pattern of behaviour case, for the following reasons:

(1) the 13 consumer witnesses were not relied upon to prove the case on a representative or sample basis;

(2) the allegations are of a widespread system or pattern, despite:

(a) it being conceded by the applicants that the impugned conduct was not engaged in by all recruiter agents;

(b) noting the concession attributed to the applicants regarding Acquire Learning’s individual recruitment method not forming part of the system alleged, there being no other recruiter agent up until about September 2013;

(c) the individual consumers are examples of conduct by only seven of the 35 recruiter agents used by AIPE; and

(d) in a similar vein, the absence of evidence of what took place by way of oral representations or omissions by individual recruiters, or the practices put in place by their employer agents; and

(3) an asserted lack of correlation between what happened to the 13 consumer witnesses and the system pleaded, having regard to the diverse locations that they came from, an asserted lack of clarity as to where those individuals fit into the pleaded case, and significant differences in the manner in which each of them was approached and enrolled, such that they cannot be relied upon to establish any uniform or consistent enrolment process; and

(4) the evidence of the consumer witnesses does not cover the whole of the relevant period, with the first in time consumer witness giving evidence of events beginning February 2014.

55 The evidence of the employee witnesses was similarly attacked on the basis that none of them gave evidence as to AIPE’s practices prior to January 2014. This and other objections related to employee evidence are dealt with in greater detailed below.

56 The further alleged deficiencies of the applicants’ systems case noted above are misconceived or overstated for a range of reasons. First, the impugned conduct does not need to be proven, letter and verse, with regards to each and every agent. Nearly 80% of enrolments came from the four biggest recruiters, and the evidence of former AIPE employees concerned the system overall without that degree of parsing. Second, the concession made by the applicants as to Acquire Learning’s conduct not forming part of the system alleged was confined to its unique practice of using job seeker advertisements to target consumers to seek to enrol them in VET FEE-HELP courses, which was not of itself of any great moment on the applicants’ case. Other conduct of Acquire Learning, for example its language, literacy and numeracy (**LLN**) test, was expressly relied upon as illustrative of what the AIPE enrolment system permitted and even encouraged.

57 The suggestion of an absence of evidence of motive is also misplaced. Motive does not require confession. It can amply be established by circumstances, as it was in this case.

58 As to the criticism of the evidence not covering all of the relevant period, that is only so if inference is excluded. The key features of the enrolment scheme were demonstrated with sufficient clarity to support an inference that they were at least no better earlier in time, although it is reasonably clear that the problems escalated as the level of enrolments rose, a fact directly proven by the employee witnesses.

59 Ultimately, and most importantly, AIPE’s criticisms fail to appreciate that it is AIPE’s system that is under scrutiny. Other evidence relied upon, such as enrolment data or consumer witnesses, helps to prove what the system allowed or even encouraged to take place. To demand more granular evidence of particular transactions or individuals would defeat the strengths of s 21(1) via s 21(4)(b) of the ACL in not requiring proof of individual disadvantage, or requiring pervasive evidence for all points in time. Similarly, to demand evidence of the conduct of each and every agent is to mistake the focus of the inquiry to be made.

60 The approach urged by the applicants should generally be preferred to that asserted by AIPE, but with the following qualification when it comes to the assessment of what has taken place. The more general or abstract the system or behaviour that is alleged and proven, the harder it may be to establish that it has the character of being unconscionable for want of necessary detail to show that is so, or that it has the necessary pervasive and proscribed character. By contrast, too granular an approach may more readily demonstrate isolated instances of contravening conduct, but may fall short of showing that any overall proscribed system or behaviour took place. That process of characterisation forms part of the evaluative exercise required to be carried out, reflecting in substance the crux of some of the key competing arguments. That is because AIPE submits that the evidence relied upon by the applicants is not sufficiently granular at the enrolment systems level, and that any contravening conduct that is shown to have taken place in respect of individual consumers was isolated, even if repeated from time to time, and that this does not establish that its enrolment system overall had the proscribed character of being unconscionable. By contrast, the applicants rightly seek to draw all of the threads of evidence together, with the individual instances being illustrative of the way in which the system worked overall in an unconscionable way as alleged.

61 A problem with the approach taken by AIPE in its final submissions was, quite understandably in light of the evidence considered in some detail below, to focus on what was not to be found in the evidence, and to pick holes in the evidence that was there, but not to engage in detail with the accumulated and combined effect of the evidence that the applicants rely upon, nor to confront the inferential reasoning processes properly available to the Court. While the applicants had an onus to discharge, and while the seriousness of the allegations required that the evidence be of a quality sufficient to establish that those allegations were proved by more than (per *Briginshaw*) “*inexact proofs, indefinite testimony, or indirect inferences*”, it remained at all times a civil case to be proven on the balance of probabilities. This aspect is discussed below in some detail when considering the Full Court *Unique* decision. The wide ambit of s 21(1) of the ACL, via s 21(4)(b), enabling unconscionable conductto be established by proving a “*system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour*”,must also be kept steadily in mind.

62 The key questions ultimately to be answered, beyond the individual consumer witnesses, were:

(1) was it more probable than not that the conduct alleged by the applicants had taken place beyond that proven by direct evidence, such as by relying on the totality of the evidence and inferences able to be drawn; and

(2) if so, did it have the requisite proscribed legal character of being unconscionable?

63 Given the gulf between the parties, it is necessary to consider a substantial volume of evidence, albeit a relatively small subset of the digital court book containing the equivalent of some 40 or so lever arch folders of documents, including affidavits, reports and AIPE business records, as well as limited viva voce evidence, mostly in cross-examination, in a methodical way. This was not the subject of any contrary view expressed by AIPE going to the detail of the arguments advanced by the applicants.

64 In conducting this evaluative exercise, the case pleaded by the applicants is of course central and important. However, a pleading does not and cannot contain every nuance and detail revealed by the evidence. This made the applicants’ oral and written submissions, both opening and closing, important to understanding the totality of their case, and to aid in the detailed consideration of the evidence. I consider that I am required to conduct my own assessment of the evidence within that broad framework, and am not restricted to every detail in the case as presented, nor on the other hand to express a view on every argument advanced. That is especially so as the parties relied only upon written closing submissions, which by necessity could not address every nuance in the evidence, nor require a response to everything that was thereby argued. The focus must be on what is determinative.

# THE VET FEE-HELP SCHEME

## Essential Features

65 In order to understand the significance of key parts of the evidence, and the use that the applicants seek to make of it, it is necessary to outline the essential features of the VET FEE-HELP scheme. It was a scheme to assist eligible consumers to undertake higher level VET courses. The scheme is detailed in **Sch 1A** of the HES Act as it applied in the relevant period. AIPE was an approved “*VET provider*” under that Act.

66 An introduction to the overall way in which the VET FEE-HELP scheme operated was helpfully summarised by Perram J in *Australian Competition and Consumer Commission v Unique International College* [2017] FCA 727. While his Honour’s ultimate conclusion as to unconscionable conduct was overturned by the Full Court on the particular facts and evidence in that case (as noted above at [39]), his Honour’s summary of the essential features of the VET FEE-HELP scheme was not affected. His Honour said (at [5]):

VET FEE-HELP is a shorthand for Vocational Education and Training FEE Higher Education Loan Program. … the VET FEE-HELP scheme had these pertinent features:

* it was available to Australian citizens or holders of a permanent humanitarian visa who were resident in Australia, provided that they were enrolled in a full fee paying course approved for VET FEE-HELP (as Unique’s four courses were);
* the Commonwealth would pay in full whatever the tuition fee was for each unit of the approved course and would treat the combined amounts as a loan to the student;
* the loan would be repayable through the tax system once the student began to earn more than the ‘minimum repayment income’ ($53,345 for the period 1 July 2014 to 30 June 2015; $54,126 for the period 1 July 2015 to 30 June 2016) on the income above that amount at a sliding scale of between 4% to 8%. The highest rate became applicable at $99,070 during the relevant period;
* each person had a maximum lifetime amount which could be borrowed through this and other related schemes (such as HECS). This amount was indexed and was $97,728 for the 2015 financial year. The amount which the student had at any time borrowed was specified in an account maintained by the Commonwealth called the FEE-HELP balance;
* there was a 20% loan fee on top of the tuition fee which was also payable to the Commonwealth and which was debited to the student’s FEE-HELP balance; and
* the amount of the student’s FEE-HELP balance was indexed to the Consumer Price Index (‘CPI’).

67 The relevant period in *Unique* was from 1 July 2014 to 30 September 2015, being in the latter part of the relevant period in this proceeding from 1 May 2013 to 1 December 2015.

68 In order to access a VET FEE-HELP loan, a student had to complete, sign and return a request for Commonwealth assistance (**Assistance Request Form**), in a form approved by the Minister, and return it to the VET provider on or before the census date for that unit of study: Sch 1A, cl 43(1)(h) and cl 88(3) of the HES Act. The version of the Assistance Request Form used by AIPE on its face had five check or tick boxes by which the person seeking a loan was required to declare that they had read the VET FEE-HELP information booklet, and were aware of their obligations to the Commonwealth if they received such assistance.

69 The applicants, in their closing submissions, draw specific attention to the terms of the Assistance Request Form. The design of the VET FEE-HELP scheme meant this form was plainly intended to be a very important part of the enrolment process. It was evidently intended to ensure, as much as possible, that consumers as prospective students understood the legal and financial obligations they were assuming by becoming enrolled in a course to which VET FEE-HELP applied. The contents of that form are therefore of importance in assessing the evidence going to the issue of AIPE’s enrolment practices and conduct, including by agents of AIPE. Specifically, the applicants point out that the Assistance Request Form required consumers to declare that they understood that:

(1) they were requesting a loan from the Commonwealth in the amount of their VET tuition fees, whereupon the Commonwealth would pay the student’s tuition fees to the VET provider on the student’s behalf, and the student would incur a debt to the Commonwealth;

(2) if they were a full fee-paying student, a loan fee of 20% would be applied to the amount of the VET FEE-HELP assistance provided;

(3) the student would repay the Australian Tax Office the amount loaned plus the 20% loan fee; and

(4) the student could cancel their request for VET FEE-HELP assistance at any time, but would become liable to pay a debt to the Commonwealth if they did so after the census date, regardless of whether they had withdrawn from or cancelled their enrolment in the VET unit of study.

70 It is helpful to reproduce the second page of an AIPE Assistance Request Form in evidence:

The above reproduction of the form gives a sense of the font size and density (although not a perfect reproduction as to overall size, but largely to scale), as well as the typographical and grammatical errors contained within (such as the first listed obligation switching from the first to the second person, and the spelling of “*Conditions*” as “*Conidtions*”).

71 As the discussion above shows, the integrity of the VET FEE-HELP scheme, and in particular the protection of the financial interests of the Commonwealth and of consumers, depended on each and every consumer enrolled as a student being aware of, and understanding, the vitally important features of that scheme as set out in the Assistance Request Form. It was a critical and mandatory safeguard, intended to prevent consumers who were unsuitable for VET study from becoming enrolled and incurring VET FEE-HELP debts. Doubtless that was why consumers were, by lodging that form, taken to declare that they aware of the obligations they were assuming if they received VET FEE-HELP assistance.

## The VET FEE-HELP scheme and its potential for abuse

72 There were two inherently vulnerable features of the VET FEE-HELP scheme that were ripe for exploitation. The first is that an eligible student incurred a VET FEE-HELP debt to the Commonwealth of 120% of the fee even if he or she did not complete any part of the unit of study for which enrolment had taken place. If a person who had been approved for a VET FEE-HELP debt was enrolled as a student with a VET provider as at the census date, but did not in fact ever partake in the course, that provider would get the revenue benefit of the course fees from the Commonwealth, but would not have to incur the variable costs of providing the course to that person, including any related support. That would happen irrespective of whether the person who was enrolled was a bona fide or genuine student or not.

73 To the extent that the outcome of enrolling consumers who were not bona fide or genuine students was able to be maximised across a large enough pool of individuals, the VET provider would obtain revenue for those consumers without needing to employ staff to provide the services that were needed for bona fide or genuine students who did partake of study. This feature therefore created a significant, and reasonably obvious, windfall profit opportunity to a VET provider who wished to exploit it, or was even prepared to let it occur without correction.

74 There was nothing in the express terms of the VET FEE-HELP scheme that prohibited a VET provider from engineering such a windfall profit outcome, and a corresponding debt being incurred by someone who was never a bona fide or genuine student. The declaration aspect of the Assistance Request Form, by seeking to avoid consumers becoming enrolled except with open eyes, would, if properly used, at least help to reduce the risk of this happening. That is because consumers were meant to be warned that they were enrolling as a student, of the debt that they would incur by doing so, and that they needed to withdraw before the census date to avoid incurring that debt if they were not going to continue with a course.

75 Any enrolment system that failed to ensure that a declaration ostensibly given by a consumer prior to enrolment was genuine and informed would be at serious risk of constituting, or at least forming an important part of, a system of conduct or pattern of behaviour that was unconscionable.

76 As will be apparent from the AIPE Assistance Request Form reproduced above, the declaration was able to be made by the mere act of submitting the form. It made no provision for a signature or initials by way of any overt acknowledgement by a person of the key features of the VET FEE-HELP scheme. This was a serious systemic weakness, because the effect was that a declaration was taken to have been made, without any real safeguard to ensure that this aligned with reality. However, even signing a version of this form would be no better unless it was much more than, literally, ticking a box. Self-evidently, a student would not be able to give a genuine and meaningful declaration as part of submitting the Assistance Request Form if they did not have the skills to understand that it had that effect, and it was not otherwise expressly brought to their attention. That is especially so if signing or otherwise adopting the form was permitted to take place on an electronic device such as a tablet, but also if that was on a piece of paper viewed only fleetingly. Any enrolment confirmation given by telephone, rather than in writing, was inherently vulnerable to error, misunderstanding or misuse, especially if the original process was not sound.

77 What was required to be done in relation to the Assistance Request Form is an important tool by which to assess the true character of what was permitted – and even encouraged – to happen by those enrolling individual consumers as students. This was usefully illustrated by the evidence of the individual consumer witnesses considered in some detail below, giving a real world indication of how the system was capable of playing out in reality. Such illustrations mean that the Court does not need to rely solely upon abstract policies or make purely abstract assessments as to what would, on the balance of probabilities, be likely to have happened to any consumer who was enrolled as a student by any recruiter acting for AIPE.

78 The evidence of what actually took place, both at AIPE via the employee witnesses, and by way of illustration in the field with individual consumers, dovetails with AIPE’s enrolment data proving, as far as it goes, the outcome that was produced. It is readily able to be inferred in all the circumstances that the enrolment outcome was either intended or at least accepted to be what the enrolment system produced.

79 The words and conduct of AIPE generally, including by its recruiter agents and by its CEO, Mr Amjad Khanche, must inevitably be inferred to have occurred in the context of awareness of the contents of the Assistance Request Form and both its express and implicit requirements. Alarm bells should have been ringing if there was a concern that consumers were being enrolled as students in circumstances where they might not, did not, or realistically could not, have understood what they were getting themselves into. If alarm bells did not ring, or were not listened to, it can be inferred that this is because inaction was a desirable thing from the point of view of a VET provider like AIPE looking to maximise profit at the expense of the actual provision of educational services – an issue addressed in some detail below.

80 An enrolment process that predictably produced, or even encouraged a situation in which such unsuitable consumers became enrolled would invite close scrutiny to see whether that was, in all the circumstances, unconscionable. The conclusion that the conduct overall was unconscionable would be more readily reached if such an outcome was either intentional or sufficiently predictable or recurrent to require overt steps to be taken to minimise the chance of it occurring. This is so even having regard to the caution to be applied before reaching such a serious conclusion.

81 A VET provider acting in good faith with the VET FEE-HELP scheme, having regard to the centrality of the Assistance Request Form, should have had an enrolment process that would minimise the prospect of consumers who were not likely to be bona fide or genuine students becoming enrolled in the first place, or remaining enrolled as at the census date.

82 A VET provider should have had in place enrolment procedures by its own staff, and by any third party agents and recruiters, that ensured that the Assistance Request Form was brought to the attention of consumers who were prospective students, that its contents were understood and that a declaration was meaningfully given. These procedures should have included monitoring such procedures for their effectiveness. If a consumer was an inactive “*student*” in the time between enrolment and the census date, that would be a warning sign that the consumer possibly had not appreciated that they had become enrolled as a student, or did not appreciate the debt that they were about to incur. Complaints about the enrolment process would also be a warning sign that the enrolment procedures might not be effective, or might not be properly implemented, or might even be improperly carried out. Examples of consumers being enrolled without having the requisite level of awareness would be illustrative of the malfunctioning of the enrolment system. If complaints to that effect were brought to the attention of senior personnel at the VET provider, and either were not acted upon, or not acted upon effectively, that would tend to indicate that this went beyond a merely unintended and unknown outcome, and was instead accepted to be a feature of the enrolment system that was in place. Enrolment data might rebut that as being an outcome, or contribute to that conclusion.

83 In this context, evidence of complaints made to AIPE about its enrolment processes, even though not admitted as evidence of the truth of the assertions as to what had occurred, is important evidence of AIPE being put on notice of potential problems with its enrolment processes. How such complaints were dealt with may be a cogent indicator of the attitude that prevailed at AIPE, including as to whether and when this was a cause for concern and what action was considered appropriate. Reluctance to act on such a complaint, or the way or basis upon which it was responded to, may be a telling sign of whether the outcome complained about was a source of concern, or just an accepted feature, as well as fixing AIPE with awareness of the issue that had been raised. It may go further in contributing to a conclusion that the outcome was considered desirable, or was even intended.

84 The step of ensuring that the terms of the declaration in the Assistance Request Form were in some way brought expressly to the attention of a prospective student is a strong sign of a good system; and absence of such a step is a warning sign that the system may be defective, including as a matter of design, intention, or just predicable consequence. A process producing a particular outcome does not have to be intentional to be unconscionable, although awareness will tend to support that conclusion. As Beach J (Perram and Murphy JJ agreeing) pointed out in *Australian Competition and Consumer Commission v Medibank Private Ltd* [2018] FCAFC 235 (at [247]):

Eighth, statutory unconscionability does not require only focusing on Medibank’s or its officers’ or employees’ state of mind, whether actual intention or knowledge or what it ought to have known. It is a broader concept requiring an “objective value judgment on behaviour” (cf *Yeoman’s Row Management Ltd v Cobbe* [2008] 4 All ER 713 at [92] per Lord Walker of Gestingthorpe). But the subjective state of mind of the alleged contravener whether actual or constructive is relevant to the broader sense. Although I am concerned with a normative notion of conscience, the boundaries and content of which are informed by the explicit and implicit values previously identified, Medibank’s state of mind is relevant.

85 Any demonstrated state of mind is especially relevant in this case because there was such an obvious and powerful financial incentive to enrol consumers as students who would incur VET FEE-HELP debts, producing corresponding revenue, without being aware of the declaration in the Assistance Request Form which might have caused them not to enrol. This class of person enrolled as a student would produce the greatest profits by bringing in revenue, without much, if anything, in the way of related marginal costs beyond the recruiter’s commission deducted from that additional revenue.

86 This had nothing to do with the quality of the course or of the teaching that was in fact provided to consumers who did partake of a course: again, whether or not that was the case is not directly relevant to this proceeding. However, assuming as I must (due to the way in which the applicants brought their case) that the quality of the courses were of the requisite standard, the number of active students would necessarily have a bearing on how many staff a VET provider would need in order to deliver such services. An inexplicably small number of staff to provide services to a large number of consumers ostensibly enrolled as students, or a lack of any notable increase in staff numbers correlated with increases in enrolments, may be a telling indication that it was anticipated that a greater number of staff would not be needed, because many such consumers who were enrolled as students would never need those services. If the discrepancy between these two statistics was large enough, that, together with other evidence, might support an inference that this was not merely a matter of good fortune or happenstance from the perspective of the course provider, but rather an outcome that was deliberately allowed to happen.

87 The second vulnerable feature of the VET FEE-HELP scheme arose from a lack of prohibition on VET providers paying not just a commission, but a very substantial commission, to an agent (also referred to as a broker), via a recruiter who caused a consumer to be enrolled as a student. The payment of the commission depended on the consumer remaining enrolled as a student as at the census date so as to trigger the entitlement to the loan payment by the Commonwealth.

88 That feature of large recruiter commissions facilitated the windfall profits to VET providers described above. Recruiters acting as an agent for a VET provider had powerful financial incentives to convince every consumer they came across not just to sign up for a course, but to do so in a way that would maximise the likelihood that they would remain enrolled until the census date. That in turn provided incentives to a recruiter to minimise the prospect of enrolment being cancelled before the census date, whether by a student or by a VET provider. This feature would tend to encourage practices that ensured that a consumer being enrolled as a student either did not know that was happening, or did not know about, or understand, the declaration in the Assistance Request Form. It would also tend to encourage the spruiking of the benefits of being a student by half-truths or even overtly false information. That could involve such things as:

(1) representing to a consumer that a course was free when in fact there would be a debt obligation incurred;

(2) offering some collateral advantage to a consumer for becoming a student, such as a “*free*” laptop which was collateral to the debt being incurred, so as not to be truly free at all;

(3) not telling a consumer that they would incur a debt;

(4) not telling a consumer about the census date; and

(5) even not telling a person that they had been enrolled at all (though students unknowingly being enrolled in a course of study does not form part of the unconscionable system alleged against AIPE).

89 The likelihood of any such conduct achieving the objective of a consumer becoming enrolled until at least the census date would potentially be enhanced if the consumer to whom such conduct was directed was in some way lacking the capacity to look after their own interests. It is important to remember that the Commonwealth government had intentionally expanded the reach of VET training to consumers who had historically been excluded by reason of disadvantage. The VET FEE-HELP scheme was intended to address the financial aspect of that disadvantage, in the same way as prior loan schemes had for university education. It was inevitable that a higher proportion of consumers who were bona fide or genuine students might not succeed compared with consumers who did not have to deal with the burden of disadvantage.

90 A VET provider was entitled to target disadvantaged consumers in keeping with the post-2012 liberalised VET FEE-HELP scheme, but was necessarily required to take such consumers as they found them and therefore to proceed upon the basis of their greater vulnerability. The same conduct might be unconscionable in relation to one class of consumers, but not for another, when regard is had to vulnerabilities, either inherent or separately proven. It is noteworthy that the High Court in *Australian Securities and Investments Commission v* ***Kobelt*** [2019] HCA 18; 368 ALR 1 divided on what the facts in that case were capable of establishing, but not in substance on the principles to be applied. The division between the four justices in the majority, and the three justices in the minority, turned on whether ASIC had proven that Mr Kobelt, in providing a “*book up*” system of credit provided to members of a remote Indigenous community, had exploited his customer’s socio-economic disadvantage in order to extract a financial advantage from them. The majority found this was not proven, while the minority found that it was. It was not in doubt that such exploitation if proven would be unconscionable. The difference in the conclusions reached largely turned on the question of whether, on the evidence, the customers could be regarded to have a free will to use or not use the credit system on offer.

91 Though the VET FEE-HELP scheme was targeted at disadvantaged groups, service providers and their agents were not permitted to seize upon these vulnerabilities such that consumers were incurring liabilities without their eyes wide open. It is clear that the scheme was only meant to be made available to consumers who were aware of its essential features; that is, course fees being charged, those fees being met by the Commonwealth as a loan, and that loan resulting in a debt being incurred by the student and made repayable once the student’s income was above a particular threshold. Each and every consumer who was enrolled as a student and who remained enrolled past the census date was meant to do so on a sufficiently informed basis, expressly reflected in the declaration in the Assistance Request Form.

92 Similarly, although low language, literacy and numeracy skills was not an *express* barrier to participation in the VET FEE-HELP scheme, it is obvious that it should not have to be express. Self-evidently, no provider should have been enrolling consumers as students if they did not have the minimum threshold of language, literacy and numeracy skills required to have any realistic possibility of participating in, and completing, a course. To do so would be a cruel hoax to perpetrate on disadvantaged consumers by giving them a false hope of this being a means of improving their lives, because even a remote possibility of success would likely be illusory in these circumstances.

93 If the two features identified above were sought to be taken advantage of, or at least allowed to be taken advantage of, it was in the simultaneous interests of the VET provider and the agents and their recruiters to make sure that as many consumers as possible were signed up as students and remained signed up until the census date. However, only the VET provider stood to gain windfall profits if the consumer never actually partook of the course after that, unless this resulted in the VET FEE-HELP debt later being cancelled despite the census date passing.

# AIPE’S OPERATIONS

## Overview of AIPE’s business

94 AIPE was incorporated in 2007 and registered as a Registered Training Organisation (**RTO**) on 12 September 2008 with the Australian Skills Qualification Authority (**ASQA**) under the *National Vocational Education and Training Regulator Act 2011* (Cth). As noted above, to be eligible to receive VET FEE-HELP payments, AIPE had to be, and was, an approved VET provider under the HES Act.

95 AIPE carried on business providing, inter alia, VET courses to domestic and international consumers, both on-campus and via an online learning platform detailed further below. AIPE also provided English Language Intensive Courses for Overseas Students (ELICOS) and higher education courses. This proceeding concerns only online VET courses in which domestic consumers could be enrolled as students.

96 AIPE’s office and operations were initially in North Sydney, employing some 90 staff by 2013. In June 2014, AIPE moved to larger premises at 160 Sussex Street, Sydney. Again, AIPE emphasises that the applicants do not allege that the courses that it offered were inadequate, inappropriate or ineligible for VET FEE-HELP funding.

97 AIPE’s registration as an RTO was cancelled by ASQA on 17 December 2015. Merits review proceedings of that decision were commenced in the Administrative Appeals Tribunal (**AAT**) the following month, but were dismissed before conclusion by consent in November 2016, consequent upon AIPE being placed into administration on 6 October 2016, and AIPE ceasing to provide any courses of study with effect from 31 October 2016.

98 A forensic audit report in evidence was prepared for the Department by McGrathNicol. The McGrathNicol report was produced by a partner, Mr Michael Dunnett, a chartered accountant. While AIPE objected unsuccessfully to the admission of the McGrathNicol report into evidence (*Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 2)* [2018] FCA 1459), Mr Dunnett was not required for cross-examination. The McGrathNicol report in the executive summary at [1.1] describes the background and scope of that report as follows:

Australian Institute of Professional Education Pty Ltd (“AIPE”) is a provider of training courses in a wide range of fields, including accounting and business, health and community, hospitality, human resources, IT, marketing, and management. AIPE is an approved VET Provider and therefore eligible students enrolled in AIPE courses are able to obtain VET loans.

AIPE management advised that in 2014, AIPE had approximately 800 students, but that this increased to approximately 6,000 students in 2015.

Due to the significant increase in VET loans claimed by AIPE, the Department engaged to undertake a forensic audit of AIPE student enrolments during 2015 and 2016.

The Department appointed McGrathNicol as auditor in accordance with clause 26(2) of Schedule 1A of the Higher Education Support Act 2003 (“HESA”). The scope of the appointment was to undertake an audit in relation to the matters listed at clause 26(1)(b)(ii), (iv), and (v) of Schedule 1A of the HESA, being:

* the veracity of enrolments in those courses of students who receive VET FEE-HELP assistance for VET units of study forming part of those courses;
* the level of engagement in any of those courses of students who receive VET FEE-HELP assistance for VET units of study forming part of those courses; and
* the completion rates for any of those courses of students who receive VET FEE-HELP assistance for VET units of study forming part of those courses.

99 Based on the second paragraph reproduced above, the applicants assert that in 2014, AIPE had about 800 consumers enrolled as students in its courses, rising to about 6,000 by 2015, which I understand to be a static figure for each year. AIPE submits that the Court should approach that submission with caution, noting that AIPE admitted that it had 15,932 enrolments in courses from 1 January 2013 (preceding the commencement of the relevant period on 1 May 2013) and 1 December 2015. It asserts that while the precise number of consumers enrolled as students is not an issue directly calling for determination in this proceeding, if the Court finds there have been any contraventions of the ACL, and that the applicants are entitled to any orders to redress loss or damage in favour of consumers as students under s 239 of the ACL, then the *precise* number of consumers that are entitled to receive the benefit of that remedy will need to be identified. There is room to debate whether that overstates what is needed and if not, how such a “*precise*” figure may be arrived at if that point is reached. The reason AIPE advances for treating the student numbers with caution is addressed below under the heading “*Enrolment data relied upon by the applicants*”.

100 AIPE delivered its VET FEE-HELP courses online to consumers through a learning management system (**LMS**) called **Moodle**, a software application it used for administering, reporting upon and delivering online education. Consumers were meant to be provided with a login at the time of enrolment which would enable them to log in to Moodle from any Internet accessible device. Clearly this was only possible if there was ready Internet access. Consumers who enrolled and partook of study conducted all of their course activity through Moodle, apart from occasional direct contact with course trainers via email. Moodle was used by AIPE’s staff to check a student’s level of engagement with their course. This is important, because AIPE were able to know with a reasonably high degree of accuracy who were the consumers enrolled as students who proceeded no further than enrolment.

101 The McGrathNicol report describes how Moodle was used:

(1) by participating students, per [6.1] of that report, to:

* view course materials;
* access library materials via the Cengage GALE portal;
* complete quizzes and submit assignments;
* chat to a course trainer;
* post topics and discuss course materials on course forums; and
* complete tests to determine course suitability.

(2) by AIPE, per [6.3] of that report, to monitor the activities of consumers enrolled as student via activity logs, which recorded data each time such a consumer engaged in a “*system defined interaction*”, and thereby to measure and ascertain the extent of consumer engagement with AIPE’s online courses, including:

* name of the student who interacted with the Moodle LMS;
* date of the interaction;
* course and subject that the student interacted with;
* module of the Moodle LMS that the student interacted with. Examples of the modules recorded include “login”, “chat”, “resource”, “assign”, “forum”, “library”, “message”, “questionnaire”, and “quiz”; and
* activity that the student undertook at each module. Examples of the activities recorded include “view”, “submit”, “attempt”, “login”, “logout”, and “search”.

102 AIPE also had a separate “*Customer Relationship Manager*” (**CRM**) computer program which stored information about every consumer enrolled as a student, including their prior level of education, the cost of the course they were enrolled in, the census date, the start date, and, from about March 2015, the results of LLN tests. CRM was also used to retain a record of AIPE’s more general dealings with consumers who were enrolled as students, including in particular, complaints. Data about VET FEE-HELP consumers who were enrolled as students and who had been granted a VET FEE-HELP loan was required to be, and was, furnished by AIPE to the Department. That data came from CRM.

103 The evidence considered in some detail below comes from, and/or is about the following key senior employees at AIPE:

(1) Mr Amjad Khanche, Chief Executive Officer of AIPE;

(2) The following direct reports to Mr Khanche:

(a) Ms Swapna Pawar, Student Retention Manager;

(b) Mr John Luhr, Business Operations Manager;

(c) Ms Lyndall Benton, Student Services Manager – who was also a witness;

(d) Ms Shumaila Ali, Human Resources and Projects Manager;

(3) Ms Dimitra Tzanos, Partnership Relationship Manager, who reported to Mr Luhr.

104 In addition to Ms Benton, other former AIPE employees who were witnesses were:

(1) Ms Glashie Qudsia, a face-to-face vocational trainer and assessor of international students; and

(2) Ms Romina Casale, an Online Student Services Team Leader.

## AIPE’s enrolment process and forms

105 It is helpful to outline the general nature of AIPE’s enrolment system in order to better understand how the various elements are sought to be proved by the applicants. As noted above, the applicants allege that AIPE’s enrolment processes involved unsolicited door-to-door contact in low socio-economic communities by recruiters at the homes of prospective students and also in public areas such as in public bars. The applicants acknowledge that Acquire Learning’s business practice differed from the face-to-face approach described in the Concise Statement, in that it made unsolicited telephone calls. AIPE admits that agents conducted face-to-face marketing on its behalf, though submits there is not enough evidence to show that this occurred in public bars. A live point of contention is the impact that socio-economic disadvantage had on the suitability of consumers who were enrolled in this way.

106 The applicants point to recruiters carrying tablet devices upon which consumers enrolling to become students were required to complete the AIPE enrolment form. In the applicants’ argument, such a device was a feature of the overall system which tended to detract from a proper understanding by a consumer as to what they were in fact being asked to commit themselves to. As the argument was developed, that was said to be so both because it facilitated the application in fact being completed by a recruiter asking questions and recording the answers, and because, even if the consumer being enrolled filled the electronic form out themselves, the significance of what was taking place was unlikely to be understood by the class of consumers who were being approached by this cold call methodology.

107 Additionally, the applicants cite as an extension of that conduct, and a particular manifestation of the implementation of the system overall, that one of AIPE’s biggest agents in terms of numbers of consumers enrolled as students, Acquire Learning, made unsolicited telephone calls to consumers as prospective students who were generally chosen from among people who had responded to online job advertisements. They do not specifically allege that doing so was unconscionable.

108 The applicants rely upon AIPE’s recruiters obtaining identification information from the consumers recruited to be enrolled as students in person and having such consumers complete enrolment forms and an Assistance Request Form. The applicants rely upon AIPE forms in evidence used for that purpose, and the results of the McGrathNicol Report addressing AIPE’s enrolment processes (which describes the Assistance Request Form as a VET FEE-HELP Assistance form, or a VET FEE-HELP form). This forms part of the applicants’ case as to how it alleges AIPE’s processes and procedures, both via AIPE itself, and via its agents and their recruiters, caused unsuitable consumers to be enrolled. There is no suggestion by AIPE that the forms that it produced by way of discovery and admitted into evidence were other than representative of the forms that were used throughout the relevant 2013-2015 period. It is safe to proceed upon the basis that there was no material change, none having been suggested.

109 The applicants note that electronic submission of the forms was meant to be, and sometimes was, followed by a verification call. Some consumers enrolled as students participated in such calls in the presence of the recruiter, while for others, this verification call took place shortly after the visit by the recruiter. The inadequacy of the verification process is part of the evidence relied upon by the applicants to show how the overall system as pleaded played out in the field upon consumers.

110 During the relevant period, until early 2015, verification calls were conducted on AIPE’s behalf by Global Learning Support (**GLS**), a company based in the Philippines. In February 2015, AIPE terminated its contract with GLS, instead using its own staff to conduct verification calls directly with consumers enrolled as students. While the applicants effectively concede that this change was an improvement, the general nature of the verification system remained, on their case, inadequate to overcome the enrolment of consumers as students who should not have reached that stage in the first place.

111 The applicants rely upon evidence that proves that prior to March 2015, AIPE had no procedures in place for its recruiters to assess the suitability of consumers as prospective students for enrolment. This was instead left to the largely unguided and unmonitored discretion of recruiters, who had ample incentive to make no such assessment given the substantial commissions to be had from each enrolment that took place and lasted until the census date. Until February 2015, those recruiters were offered no training on consumer suitability for enrolment as students (assuming that any amount of training would have been sufficient to overcome the malign incentives that were in place). Once again this is an evidentiary detail of the pleaded system that the applicants seek to establish.

112 In March 2015, AIPE introduced an LLN test as part of its enrolment procedure. This was another example of a late improvement in its enrolment system, but is still said by the applicants to fail to overcome the unconscionable nature of the system as pleaded. On the applicants’ case, at best this starkly demonstrated how poor AIPE’s enrolment system had been until that was introduced. The LLN test was introduced because staff at AIPE had noticed that many of the consumers being enrolled as students lacked basic literacy and numeracy skills, and regulator scrutiny had increased. Some consumers had not completed year 9 at school. The LLN test was meant to be completed prior to finalisation of the enrolment, but this requirement was ineffective in ensuring that only suitable consumers were enrolled in AIPE’s courses. For example, evidence from former employees of AIPE, detailed below, showed that the LLN test was sometimes completed by recruiters on behalf of consumers to ensure that they could be, and were, enrolled as students, such that the test formed no screening role at all. Thus, on the applicants’ case, the very late introduction of a process that was intended to screen out unsuitable consumers was easily able to be subverted.

113 Another feature of the evidence led by the applicants to prove the system as pleaded, and its alleged unconscionable character, is that consumers contacted by telephone by Acquire Learning were required to provide identification information before they could be enrolled in an AIPE course. However, that requirement was compromised because AIPE did not have oversight of Acquire Learning’s enrolment calls and was not in any position to monitor them. AIPE received complaints from consumers recruited by Acquire Learning, putting them squarely on notice that this was alleged to be happening. Other evidence, discussed below, shows that those complaints were reflective of what was actually taking place.

114 When AIPE introduced an LLN test in March 2015, Acquire Learning responded by developing its own LLN test, as well as conducting its own verification calls and its own induction calls. AIPE did not place itself in a position by which it could oversee these procedures to ensure that they were being conducted properly. This rendered ineffective, or insufficiently effective, the purpose of the LLN test as a means of screening out consumers who would not be able to meaningfully partake of AIPE’s online course when recruited by Acquire Learning, by far the largest agent by consumer enrolment figures.

115 The AIPE enrolment process involved the completion of an online application form by a prospective student. Although the ACCC submitted that copies of this form, apparently entitled “*Application Form for Domestic Students*” were in evidence, the documents referred to were not titled this, and instead appeared on their face to be merely a confirmation of details provided through online enrolment.

116 In response to a notice under s 155 of the CCA, AIPE provided an extract of the online enrolment form. In paragraph 10 of the s 155 response, AIPE said that if the online enrolment form was not available because its online system was down, a prospective student was directed to complete a hard copy application form.

117 The next, and indeed critical, aspect of AIPE’s enrolment system relied upon by the applicants concerns the way in which consumers who enrolled as students applied for a VET FEE-HELP loan. In general terms, a prospective student who wanted to use a VET FEE-HELP loan to pay course fees was required to complete a form entitled “*Request for VET FEE-HELP assistance*”, as discussed above. Part of that form states: “*Before completing this form, you must read the VET FEE-HELP information booklet*”.

118 For some consumers enrolled as students by some recruiters, there is in evidence a signed acknowledgement form, referring to and acknowledging key aspects of the enrolment process in conclusory terms, such as “*I understand that*” followed by a number of dot points which include “*I have applied for a VET FEE-HELP loan to pay for this course and have received information about this loan and the repayments criteria*”. However, such a form says nothing about whether the person had any understanding of what they were acknowledging, let alone whether they were themselves submitting the form. In all the circumstances, no such inference can safely be drawn. If consumers in fact understood what they were getting themselves into, this form adds nothing; but if they did not, it subtracts nothing. In other words, a system of obtaining a signed acknowledgment form could only be as effective as the enrolment system to which it related.

119 Evidence is relied upon by the applicants to demonstrate, systematically they say in the context of all of the surrounding evidence, that the enrolment process for AIPE courses failed to ensure that the consumers who were enrolled as students and applied for VET FEE-HELP assistance in fact understood the essential features of that loan scheme. The applicants rely contextually upon the high volume of consumers who were enrolled as students yet never took even the first steps to partake of the course.

120 While, as already observed, it is not necessary to prove intent, at least some of the evidence relied upon by the applicants indicates that failure on the part of agents and their recruiters to provide this information was both systemic and not accidental. But the ultimate question to be answered is whether that was nothing more than an isolated problem, essentially with an unrepresentative rogue element among agents and recruiters, or the inevitable product of an unconscionable system in its dealings with the target of consumers from disadvantaged backgrounds, and perhaps going so far as to be an effective undeclared design feature in aid of the desirable outcome of the advancement of windfall profits.

121 The enrolment information transmitted to AIPE was loaded into the CRM, recording such things as the consumer who had been enrolled as a student’s reported level of education, the cost of the course, the census date, the start date, and from about March 2015, the result, or purported result, in his or her LLN test. The CRM also recorded, to the extent that any administrative system can, AIPE’s dealings with consumers, including that conduct on behalf of AIPE by its contract call centre operator, GLS.

122 During 2014, AIPE’s procedure entailed consumers who submitted their details on an AIPE enrolment form being contacted by GLS by telephone. The sole or at least dominant purpose of the call was to verify the consumer’s enrolment. This call was supposed to take place prior to the consumer’s census date, as an effective condition to remain enrolled in a course. The applicants rely on evidence from former AIPE employees to prove that this often did not occur, including recordings of some of the verification calls which give rise to concerns about the adequacy of those calls more generally. The evidence also describes how this was reported to the CEO of AIPE, Mr Khanche, in 2014. There is a dispute about whether those witnesses are capable of giving what amounts to systems evidence to prove anything prior to the commencement of their employment. This is addressed as part of the consideration of that evidence.

123 As mentioned above, AIPE cancelled its relationship with GLS in February 2015 and thereafter, the verification calls were carried out by an internal team at AIPE. This team was led by Ms Benton. As detailed further below, in late 2014 Ms Benton asked Mr Khanche and Mr Luhr to introduce an LLN test. She made this recommendation because a review by her of student files on the CRM revealed that many of the consumers lacked the ability to complete their course.

124 Ms Benton’s recommendation was eventually accepted and acted upon with the creation of an LLN test within Moodle by Mr Davies in early January 2015, it being used from about March 2015. However, on the applicants’ case this improvement in AIPE’s enrolment system was undermined because a key AIPE recruiter, Acquire Learning, developed and used its own LLN test, to which staff at AIPE had no access.

125 Until early 2015, every consumer who enrolled as a student with AIPE for online courses was automatically issued with a “*loan*” of a Microsoft Surface tablet at no additional cost to them, provided they had paid fees upfront or via VET FEE-HELP. This was reflected in what was described as an “*Electronic Study Tool (EST) Delivery Policy*”, one of the terms of which was that the tablet would become the property of the consumer upon graduation. The tablet came with programs to assist consumers enrolled as students with their studies. The tablet was only issued after AIPE had confirmed that the consumer had passed the census date several weeks after enrolment and had thereby incurred the VET FEE-HELP debt.

126 With a change in government policy prohibiting the giving of such devices to consumers who enrolled as VET FEE-HELP assisted students, the name of the policy changed to an “*Electronic Study Tool (EST) Loan Policy*”, with effect on the face of the policy from 13 February 2015. This policy removed the provision for ownership to pass to the student upon graduation. The evidence of Ms Casale is that after April 2015, if a consumer enrolled as a student completed a loan form they would be sent a tablet/laptop sometime after they had passed their census date.

127 Part of the applicants’ case is that the timing of AIPE providing a tablet demonstrates that the focus was on getting consumers past the census date so as to trigger VET FEE-HELP payments. The applicants submit that the effect of this was that any consumer who needed the tablet to access and thereby engage with course content could not do that until the census date had passed and the VET FEE-HELP debt had been incurred.

## Enrolment data relied upon by the applicants

128 There is also a dispute about how the enrolment data in evidence relied upon by the applicants can be used. It is important to note that this was raised with the Court for the first time in AIPE’s closing submissions, the evidence not having been objected to, or sought to be qualified in any way during the hearing.

129 The applicants rely upon several “*datasets*” in order to seek to prove the following by way of three tables:

(1) the very low number of consumers enrolled as students by AIPE who had completed their courses or were “*current*” students by the time that AIPE effectively closed down on 31 October 2016, along with some related statistics;

(2) the proportion of consumers enrolled as AIPE students by various agents, including:

(a) just under 49% of consumers enrolled as students who were recruited by Acquire Learning;

(b) just under 18% who were recruited by Online Study Pathways Australia (**OSPA**);

(c) just under 7% who were recruited by the third largest recruiter, Uvision Australia; and

(d) just over 5% who were recruited by the fourth largest contributor, Vision Sales;

(e) just over 4% who were recruited by the fifth largest contributor, Students R Us;

(3) The remaining 17% of consumers enrolled as students were recruited by the remaining 30 or so recruiters, with few of those recruiters accounting for more than 1% of consumers enrolled as students – AIPE’s evidence principally focusses on Acquire Learning and OSPA;

(4) The high proportion, nearly 40%, of consumers enrolled as students who were “*withdrawn after census*” and were charged for their courses without completing them – all but 15 out of a total of 11,534 consumers.

130 The first dataset in evidence comes from Ms Maureen Wood in her capacity as a Director in the Higher Education Information Management System (**HEIMS**) Data Collections/Economic and Market Analysis Branch at the Department. HEIMS is an information technology application that enables, inter alia, VET providers such as AIPE to report to the Department as required with data about consumers enrolled as students and their courses, including such information as course enrolments, costs, fees, the VET FEE-HELP debts. This was information that was required to be provided regularly. Ms Woods deposes to the data she extracted as being for consumers that AIPE enrolled as students into a unit of study with a census date in the period 1 January 2013 to 31 December 2015 in relation to a list of 21 diploma courses.

131 The second dataset in evidence is conveniently referred to as the “*ASQA1 Spreadsheet*”. It is not necessary to detail the genesis of this spreadsheet. It suffices for present purposes to say that the data came from AIPE’s liquidators, being a copy of AIPE’s VET student records, as detailed in a 2 December 2016 letter from the liquidators’ solicitors to ASQA. That data was then analysed to prepare the tables relied upon by the applicants, as described in general terms above. The terms used in the tables come from the ASQA1 Spreadsheet. Those terms are not defined or explained in the ASQA1 Spreadsheet or elsewhere in the evidence.

132 AIPE contends that this Court should not make any findings based upon the enrolment data that the applicants rely upon in the three tables because, it contends:

(1) the first table refers to setting out the number of consumers enrolled as students by AIPE during the period from May 2013 to December 2015, giving a figure of 29,743 enrolments, whereas the concise statement alleges that AIPE had approximately 15,439 enrolments;

(2) The applicants in their closing submissions:

(a) at [2] refer to 15,932 consumers;

(b) at [27] refer to 800 consumers in 2014 and to an increase to approximately 6,000 by 2015;

(3) the enrolments in the table prepared by Dr Ericson (and admitted into evidence by consent) refer to total enrolments of 14,660 or 14,686 (as noted below, the data produced by Ms Wood was provided to Dr Ericson);

(4) the ASQA1 Spreadsheet has 30,157 line entries or records and there is no evidence as to how the total number of enrolments is to be assessed from those records, with 14,541 having no amount recorded, suggesting that their enrolment was not finalised or concluded or no application for a VET FEE-HELP loan was made;

(5) some of the descriptors in the ASQA1 Spreadsheet are admitted by the applicants in the column “*Course Status*” to have not been explained, with no evidence from the former AIPE employer witnesses or otherwise in relation to the course status information in CRM;

(6) the ASQA1 Spreadsheet refers to consumers enrolled as online and on-campus students, so cannot be used as evidence of the total number of students in AIPE’s online VET courses during the relevant period, who are the subject of this proceeding;

(7) none of the applicants’ submissions on this topic should be accepted because of there being no evidence that the ASQA1 Spreadsheet is confined to the body of consumers with which proceeding is concerned.

133 The applicants’ response in their closing submissions is that the data came from AIPE, having been created in the ordinary course of its business, and reported to several Commonwealth agencies (as required by law). The applicants submit that the data they rely upon shows that, as at 25 August 2016, there were approximately 15,190 records in the Department’s HEIMS database for consumers enrolled at students with AIPE during the period 1 January 2013 to 31 December 2015, noting that AIPE admits in its response to the concise statement that there were 15,932 enrolments in that period.

134 In relation to the three tables produced using the data in the ASQA1 Spreadsheet, again from data compiled and prepared by AIPE, this records 29,743 consumers enrolled in the period May 2013 to December 2015 and that almost 50 per cent of those enrolled were “*cancelled*” or “*cancelled after census*”, being classifications created by AIPE. This data reveals that AIPE’s marketing and enrolment process was used for a much larger cohort than those who are recorded as incurring a VET FEE-HELP debt. The applicants points out that none of this data was challenged as to validity or veracity at the trial, which is noted to be unsurprising given that the raw data was created by AIPE in the course of its business. In those circumstances, the applicants contend that it is not now open to AIPE to challenge the reliability of the data.

135 In relation to the complaint recorded at [132(6)] above, being the reference to on-campus and online enrolments, the applicants point out that only 10 entries (0.034%) were listed as being “*On Campus*” and erroneously included in the ASQA1 Spreadsheet. As such, the applicants contend that the error created by those erroneous entries is insignificant and does not affect the conclusions that may be drawn from the subset that is the online enrolment numbers.

136 I am not satisfied that AIPE has made good its objection to the use that the applicants seek to make of the data extracted into the three tables. Statistical data often has its limitations, but the conclusions sought to be drawn are not matters of fine detail in this case. Rather, this is evidence that pertains to aspects of the outcomes produced by AIPE’s enrolment system and the contributing roles of the different recruiters used by AIPE, as measured using AIPE’s own data. Properly considered, the larger student numbers in the ASQA1 Spreadsheet compared to the Departmental data produced by Ms Wood do not make any material difference to the conclusions properly able to be reached. For example, there is nothing to suggest that the proportion of consumers enrolled as students by the various agents for the larger number of consumers was in some way not representative of the subset that were part of the data submitted by AIPE to the Department. Certainly, AIPE did not make any submission to that effect.

137 Table 1 is as follows:

|  |  |  |
| --- | --- | --- |
| **Course Status** | **Count of Students** | **Percentage of Students** |
| Approved Leave | 4 | 0.01% |
| Cancelled | 10,494 | 35.28% |
| Cancelled After Census | 3,525 | 11.85% |
| Completed | 288 | 0.97% |
| Current | 1,771 | 5.95% |
| Inactive After Census | 1 | 0.00% |
| Incomplete | 19 | 0.06% |
| Pending Results | 2 | 0.01% |
| Transition | 540 | 1.82% |
| Withdrawn | 31 | 0.10% |
| Withdrawn After Census | 11,534 | 38.78% |
| Withdrawn Appeal Successful | 1,110 | 3.73% |
| Withdrawn Appeal Unsuccessful | 7 | 0.02% |
| Withdrawn Before Starting | 417 | 1.40% |
| **Total** | **29,743** | **100.00%** |

138 Table 1 is relied upon by the applicants to show the number of consumers enrolled as students by AIPE during the period from May 2013 to December 2015. It shows the “*Course Status*” of those consumers as at the date that the ASQA1 Spreadsheet was created on 31 October 2016 when AIPE shut down, both as raw numbers and as a percentage of the total. Some adjustments had to be made to the analysis reflected in the table to make up for omissions of some of the start date data for the period prior to 1 October 2014, but I am satisfied that it is not necessary to descend to that level of detail as it does not affect the results overall.

139 The point made by the applicants by reference to Table 1, drawn from an analysis of AIPE’s own data, is that fewer than 1% of those enrolled in the relevant period had completed their courses by 31 October 2016, and only about 6% remained “*current*” by that time, meaning that the vast majority had either never studied at all, or had dropped out. In context the total number may be seen to be as important as the low percentage: only 288 consumers enrolled as students completed their course of study, a miniscule outcome when considered against total enrolment figures. That is a startling figure, even when the total excludes the consumers whose enrolment was cancelled.

140 However, a low success rate on its own would be unlikely to take the applicants’ case anywhere, because that would not say anything about the cause of this happening. For example, the overall design of the VET FEE-HELP scheme might have been to blame for high failure rates after the census date. However, this outcome has an important bearing on the assessment of the evidence independently proving AIPE’s enrolment practices, to the extent that it supports a conclusion that many consumers should never have been enrolled as students in the first place, and who only became enrolled, and remained enrolled up to the census date, because of AIPE’s enrolment practices. It is such an extreme outcome that it may properly be used to assist in dispelling benign explanations for those practices. This is an important consideration given the seriousness of the conclusions that the Court is asked to reach. It is a part of the matrix of evidence to be weighed in the balance in considering whether the allegations pleaded have been made out.

141 The applicants also note in relation to table 1 that the difference between “*cancelled*” and “*withdrawn*” is not explained. As the applicants are unable to say that the term “*Cancelled After Census*” does not meant that those consumers had not just their enrolment cancelled, but also their VET FEE-HELP debts cancelled – that being the most plausible explanation and the most favourable conclusion to AIPE – an inference should be drawn to that latter effect: that is, both enrolment and VET FEE-HELP debt were cancelled. However, only about 12% of consumers enrolled as students fall into this category. About 38% of the consumers overall who were enrolled as students were “*withdrawn after census*”. The number of consumers in that category – 11,534 – are the subject of table 3 below, which apportions those consumers between the various recruiters and demonstrates that nearly all of them incurred a VET FEE-HELP debt. This is a strong indicator, but on its own not conclusive, that AIPE were enrolling consumers who should not have been enrolled in the first place. The live question is whether the explanation lies in the unrealistic expectations or inbuilt flaws of the VET FEE-HELP scheme itself, given that it targeted disadvantaged groups and did not impose any reasonable barriers to enrolment, or, as the applicants contend, AIPE’s unconscionable system of conduct or pattern of behaviour in the enrolment system it deployed.

142 Table 2 is as follows:

|  |  |  |
| --- | --- | --- |
| **Agent** | **Count of Students** | **Percentage of Students** |
| Acquire Learning | 14,537 | 48.88% |
| Amity Admin Services Pty Ltd | 53 | 0.18% |
| Ausplacement Pty Ltd | 92 | 0.31% |
| Aussie Careers Pty Ltd | 6 | 0.02% |
| Australian Academic Group Pty Ltd | 1 | 0.00% |
| Avana Group | 555 | 1.87% |
| Business Focus Pty Ltd. | 131 | 0.44% |
| Career Point | 366 | 1.23% |
| Click 2 Study | 16 | 0.05% |
| Compare Courses | 3 | 0.01% |
| Comunicom | 64 | 0.22% |
| Course Supply | 163 | 0.55% |
| CoursesNow | 1 | 0.00% |
| Distance Online Study Australia Pty Ltd | 392 | 1.32% |
| First Step Marketing Solutions | 23 | 0.08% |
| Futuristic Management Pty Ltd T/A FuturisticCareers | 15 | 0.05% |
| Go Education Pty Ltd | 28 | 0.09% |
| I Want That Course | 10 | 0.03% |
| LINK EDUCATION AUSTRALIA PTY LTD | 54 | 0.18% |
| Online Study Pathway Australia | 5,259 | 17.68% |
| Open Education Colleges | 316 | 1.06% |
| Oz Fund Education | 169 | 0.57% |
| Pioneer Marketing Pty Ltd T/A PlanEd | 25 | 0.08% |
| Qualify Me Pty Ltd | 32 | 0.11% |
| Sales & Marketing Australia Pty Ltd | 370 | 1.24% |
| Sales Solutions | 960 | 3.23% |
| Sikder Groups Pty Ltd | 497 | 1.67% |
| Smaart Ed | 78 | 0.26% |
| Students R Us | 1232 | 4.14% |
| Study Now Online | 13 | 0.04% |
| StudyNet Learning | 179 | 0.60% |
| StudyNet Pty Ltd | 1 | 0.00% |
| StudyNow | 2 | 0.01% |
| Train Station Australia | 7 | 0.02% |
| Uvision Australia | 2,062 | 6.93% |
| Vision Sales | 1,611 | 5.42% |
| [Blank] | 420 | 1.41% |
| **Total** | **29,743** | **100.00%** |

143 Table 2 is relied upon by the applicants to show the breakdown of student enrolments by the agents that caused them to be enrolled, but not further broken down by way of sub-agency or recruiter based enrolments because that is not available in the ASQA1 Spreadsheet. Table 2 shows that the bulk of enrolments – almost 80% – were produced by only four agents. There is direct illustrative and other evidence of the conduct in particular of Acquire Learning, Online Study Pathway Australia (OSPA) and Vision Sales.

144 Table 3 is as follows:

|  |  |  |
| --- | --- | --- |
| **Withdrawn after census: Agent** | **Count of Students** | **Count of Amount Charged** |
| Acquire Learning | 4,549 | 4,539 |
| Amity Admin Services Pty Ltd | 2 | 2 |
| Ausplacement Pty Ltd | 11 | 11 |
| Avana Group | 368 | 368 |
| Business Focus Pty Ltd. | 47 | 47 |
| Career Point | 157 | 157 |
| Click 2 Study | 4 | 4 |
| Compare Courses | 1 | 1 |
| Comunicom | 30 | 30 |
| Course Supply | 59 | 59 |
| CoursesNow | 1 | 1 |
| Distance Online Study Australia Pty Ltd | 182 | 182 |
| First Step Marketing Solutions | 9 | 9 |
| Go Education Pty Ltd | 5 | 5 |
| I Want That Course | 1 | 1 |
| LINK EDUCATION AUSTRALIA PTY LTD | 5 | 5 |
| Online Study Pathway Australia | 2,392 | 2,391 |
| Open Education Colleges | 108 | 108 |
| Oz Fund Education | 30 | 30 |
| Pioneer Marketing Pty Ltd T/A PlanEd | 3 | 3 |
| Qualify Me PTY LTD | 9 | 9 |
| Sales & Marketing Australia Pty Ltd | 168 | 168 |
| Sales Solutions | 565 | 565 |
| Sikder Groups PTY LTD | 278 | 276 |
| Smaart Ed | 22 | 22 |
| Students R Us | 636 | 636 |
| StudyNet Learning | 56 | 56 |
| StudyNow | 2 | 2 |
| Train Station Australia | 1 | 1 |
| Uvision Australia | 1,260 | 1,259 |
| Vision Sales | 491 | 491 |
| (blank) | 82 | 81 |
| **Grand Total** | **11,534** | **11,519** |

145 Table 3 picks up the 11,534 consumers enrolled as students who were withdrawn after census in Table 1, of whom all but 15 – 11,519 – were charged with a VET FEE-HELP debt, providing a breakdown by the recruiting agent responsible for their enrolment, with the same four agents representing the lion’s share of those enrolments. This goes some way, when considered with AIPE’s enrolment system and how it was implemented, to support the conclusion that the system of conduct or pattern of behaviour for enrolments deployed by AIPE produced a highly profitable outcome of revenue without corresponding cost. It strongly indicates, albeit not conclusively on its own, that revenue was obtained without the marginal course provision costs in relation to at least a significant proportion of 11,519 out of 11,534 consumers, especially when considered with the employee evidence indicating low levels of participation.

# LEGAL PRINCIPLES

146 There is largely common ground as to the applicable principles, but substantial disagreement as to how they should be applied to the facts found to be established by the evidence in this case. It is the application of those principles that is the most challenging part of the process. In part that is because of the value judgments and evidence analysis that is required to be applied by reference to those principles in reaching the final adjudication.

## Unconscionable conduct

147 Beyond the language of s 21 of the ACL, and in particular the statement in s 21(4)(b) that the prohibition on unconscionable conduct “*is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour*”, the case law establishes the necessary broad parameters for evaluating whether conduct is unconscionable, a term that is not defined. The term “*unconscionable*” therefore has a common law meaning, though Parliament has stated an intention that s 21 not be limited by the unwritten law relating to unconscionable conduct (s 21(4)(a)), and requires an assessment of whether the conduct in question meets the description of failing to measure up to a reasonable standard of conscience. As such, “*unconscionable*” does not lend itself to any comprehensive definition: *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389; 15 BPR 29,699 at [291].

148 In *Kobalt,* Kiefel CJ and Bell J, omitting footnotes and references to the parallel provisions of the legislation there under consideration, said (at [14]-[15]):

The term “unconscionable” is not defined … and is to be understood as bearing its ordinary meaning. The proscription … is of conduct … that objectively answers the description of being against conscience. The values that inform the standard of conscience … include those identified by Allsop CJ in *Paciocco v Australia and New Zealand Banking Group Ltd*: certainty in commercial transactions, honesty, the absence of trickery or sharp practice, fairness when dealing with customers, the faithful performance of bargains and promises freely made, and:

“the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage.”

It is the application of the last-mentioned value with which the appeal is concerned. In *Kakavas v Crown Melbourne Ltd* [(2013) 250 CLR 392] and *Thorne v Kennedy* [(2017) 263 CLR 85] it was said that a conclusion of unconscionable conduct requires not only that the innocent party be subject to special disadvantage, but that the other party must also unconscientiously take advantage of that special disadvantage. This has variously been described as requiring victimisation, unconscientious conduct or exploitation.

149 Both the applicants and AIPE place reliance on what was said on this topic by Allsop CJ (with whom Besanko and Middleton JJ agreed) in ***Paciocco*** *v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50; 236 FCR 199. Nothing of what the Chief Justice said in the Full Court was disturbed by the High Court in dismissing the appeal that followed: *Paciocco v Australian and New Zealand Banking Group Limited* [2016] HCA 28; 258 CLR 525. In aid of the assessment of human conduct, Allsop CJ said (at [296]-[299]):

The working through of what a modern Australian commercial, business or trade conscience contains and requires, in both consumer and business contexts, will take its inspiration and formative direction from the nation’s legal heritage in Equity and the common law, and from modern social and commercial legal values identified by Australian Parliaments and courts. The evaluation of conduct will be made by the judicial technique referred to in *Jenyns* [*v Public Curator (Qld)* (1953) 90 CLR 113]. It does not involve personal intuitive assertion. It is an evaluation which must be reasoned and enunciated by reference to the values and norms recognised by the text, structure and context of the legislation, and made against an assessment of all connected circumstances. The evaluation includes a recognition of the deep and abiding requirement of honesty in behaviour; a rejection of trickery or sharp practice; fairness when dealing with consumers; the central importance of the faithful performance of bargains and promises freely made; the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage; a recognition that inequality of bargaining power can (but not always) be used in a way that is contrary to fair dealing or conscience; the importance of a reasonable degree of certainty in commercial transactions; the reversibility of enrichments unjustly received; the importance of behaviour in a business and consumer context that exhibits good faith and fair dealing; and the conduct of an equitable and certain judicial system that is not a harbour for idiosyncratic or personal moral judgment and exercise of power and discretion based thereon.

The variety of considerations that may affect the assessment of unconscionability only reflects the variety and richness of commercial life. It should be emphasised, however, that faithfulness or fidelity to a bargain freely and fairly made should be seen as a central aspect of legal policy and commercial law. It binds commerce; it engenders trust; it is a core element of decency in commerce; and it gives life and content to the other considerations that attend the qualifications to it that focus on whether the bargain was free or fair in its making or enforcement.

The normative standard of a business conscience referred to in the statute is permeated with accepted and acceptable community values: *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] ATPR 42-447 at [23]; *Perpetual Trustee Company Ltd v Khoshaba* (2006) 14 BPR 26,639 at [64] and *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132 at 139-140, esp [30].

These considerations may involve behaviour that is best evaluated relationally in a transaction; they may involve conduct that can be evaluated against normative or ethical standards, apart from any particular transaction: see, for instance, *National Exchang*e.

150 The Full Court in *Unique* conducted a comprehensive review of the current state of authority concerning contraventions of s 21 of the ACL based upon a system or conduct or pattern of behaviour: see [103] to [153]. It will not be necessary to consider all of the detail in that survey, particularly as a considerable amount of time was spent on cases involving the use of evidence of individual consumers as being representative of a wider pool of consumers to which particular impugned conduct was directed. The ACCC in this case specifically disavowed advancing the individual consumer evidence as representative evidence. However the following key aspects of that survey as relevant to this proceeding warrant consideration and a degree of reproduction. Of particular value is [104], which addresses how the distinction between a “*system*” case should be distinguished from a “*pattern*” case. This paragraph in *Unique* also contains a useful survey of the very notion of unconscionability. It is convenient to reproduce [104] divided into those two parts.

151 As to the first part of [104], the Full Court said the following on the topic of “*system*” as opposed to “*pattern*”:

The extension of s 21 by para (4)(b) to a “system of conduct or pattern of behaviour” which is unconscionable removes the necessity for revealed disadvantage to any particular individual. A “system” connotes an internal method of working, a “pattern” connotes the external observation of events. These words should not be glossed. How a system or a pattern is to be proved in any given case will depend on the circumstances. It can, however, be said that if one wishes to move from the particular event to some general proposition of a system it may be necessary for some conclusions to be drawn about the representative nature or character of the particular event.

152 On the nature and proof of unconscionability the Full Court said the following in the balance of [104]:

The notion of unconscionability is a fact-specific and context-driven application of relevant values by reference to the concept of conscience: see *Paciocco v Australia and* *New Zealand Banking Group Ltd* (2015) 236 FCR 199; 321 ALR 584; [2015] FCAFC 50 (*Paciocco*) and *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421; 341 ALR 572; [2016] FCAFC 186 (*Kojic*). It is an assessment of human conduct. A system of conduct requires, to a degree, an abstraction of a generalisation as to method or structure of working or of approaching something. If s 21(4)(b) is to be engaged, it is the system that is to be unconscionable. Nevertheless, the concept of unconscionability (even of a system) is a characterisation related to human conduct by reference to conscience, informed by values taken from the statute. As Cardozo J said (speaking for the Court) in *Lowden v Northwestern National Bank & Trust Co* (1936) 298 US 160 at 166 (albeit in a very different context): “A decision balancing the equities must await the exposure of a concrete situation with all its qualifying incidents. What we disclaim at the moment is a willingness to put the law into a straitjacket by subjecting it to a pronouncement of needless generality.” This expression of legal technique in the firmly gentle style of that great judge only reflects what other great judges of the tradition of Equity have said, such as in the passage of the judgment of Dixon CJ, McTiernan J and Kitto J in *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113 at 119 adopting what Lord Stowell had said in *Juliana* (1822) 165 ER 1560 at 1567; 2 Dods 504 at 522: “A court of equity…looks to every connected circumstance that ought to influence its determination upon the real justice of the case.” These expressions of legal technique should be recalled when the temptation arises to seek to re-define in short terms the words chosen by Parliament that require the application of general values to factual and contextual circumstance by reference to the notion of conscience.

153 The Full Court in *Unique* discussed a number of decisions on representative evidence. Though these proved to be ultimately fatal to the ACCC’s case, because the six consumer witnesses were found to be incapable of supporting the representative case advanced, the Full Court nonetheless made the following observation (at [126]):

None of the above is to set the burden of proving a system case too highly. As we discuss below unconscionability is a serious issue to which the terms of s 140(2) of the Evidence Act 1995 (Cth) are relevant. Some assertions of unconscionability will be more serious than others. That is inevitable due to the fact- and context-specific evaluation that it is necessary to undertake by reference to the values recognised by the statute. Regard should also be had to the ability of a party to prove or disprove the existence or nature of any system: *Blatch v Archer* (1774) 98 ER 969; 1 Cowp 63.

154 The Full Court then considered the **AMI** **case** (*Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (formerly Advanced Medical Institute Pty Ltd) (in liq)* [2015] FCA 368; ATPR 42-498) decided by North J. That case was brought by the ACCC against a corporation trading as the Advanced Medical Institute (**AMI**), its CEO and two doctors engaged by it. An appeal against the North J’s decision was dismissed: *NRM Corporation Pty Ltd v Australian Competition and Consumer Commission* [2016] FCAFC 98, ATPR 42-531. In the AMI case, an argument by the respondent similar to that which succeeded in *Unique* on appeal had failed. AMI had submitted that the ACCC’s case was based on particular patients rather than being a business practice or tendency case and therefore contended that the case was confined to each individual transaction with each individual patient. As the Full Court observed in *Unique* at [129], North J in the AMI case had rejected that submission, finding that at all times the ACCC had conducted the proceeding both on the basis of allegations of unconscionable conduct in relation to a number of individuals arising out of 168 consultations, but also as a systems case. North J extracted a part of the ACCC’s closing submissions and then accepted the approach thereby urged upon his Honour. Because of its value to this case it is worth reproducing both the submission as North J extracted it and his Honour’s findings about them, also reproduced in the Full Court decision in Unique at [130] and [131]. The relevant part of the ACCC submission in the AMI case was as follows:

By saying “AMI/NRM had, and implemented a business model” we are not suggesting, nor do we need to say or prove, that AMI or NRM engaged in this conduct (implementation of a plan) all or most of the time. To conclude that AMI and NRM implemented a business model does not, of necessity, require or imply reliance on tendency (similar fact) evidence.

We do not mean, nor do we say, that “this is how AMI/NRM usually or typically acted”, or “these examples are typical of what you would find if you sampled any instance or time during the period”. We simply say, and mean, that AMI and NRM did certain things generically and certain things 170 times, and that those things, taken together (or separately or in more limited combination) reflected their intention — their ‘model’, and therefore their attitude towards consumers.

155 North J’s findings on this topic were approved by the Full Court in *Unique* at [132] with the observation, *“[i]n principle, there is no reason why evidence about what happened in the circumstances of a number of individual consumers cannot also be adduced as evidence to prove the system*”, an observation that applies equally to a pattern. North J’s findings were as follows (at [939] to [942]):

The ACCC demonstrated that AMI and NRM designed a system of conducting business which included some general elements. The nature of the advertising, the process by which patients interacted with AMI and NRM, the role of salespeople and their remuneration by commission, the contract terms and relevant refund policies, and the length and cost of treatment programs, were all matters which AMI and NRM implemented systemically and marked the way they conducted business. These systemic features could be seen in the individual cases which the ACCC proved.

In addition, the 168 individual cases demonstrated some features which occurred in most of those cases, such as the offering of medications being limited to the AMI and NRM medications, the failure of doctors to diagnose an underlying cause or refer patients to GPs or specialists for those causes or presenting conditions, and the use of high-pressure selling techniques by salespeople. The individual cases also involved some features which were specific to those cases, such as the refusal of refunds in particular cases.

The conduct which has been found to have been unconscionable existed in most of the 168 individual instances. Certainly, the most serious unconscionable conduct existed in most cases. That is not to say that all of the unconscionable conduct existed in all 168 cases. However, all the conduct found to have been unconscionable was sufficiently widespread to justify the relief sought, as discussed later in these reasons for judgment.

Although the point has been made elsewhere in these reasons for judgment, it is useful to repeat at this point that the ACCC did not set out to show that the patients in each of the 168 cases suffered some disadvantage. Proof of unconscionable conduct depended on what AMI and NRM did, whether or not it had an effect on the individual patient. For instance, some of the Annexure B patients did not enter into agreements at all. That did not mean that, for example, in using high-pressure selling techniques in attempting to procure contracts, AMI and NRM did not engage in unconscionable conduct. The circumstances that no contract was concluded may bear on whether the Court would grant relief, but it does not prevent a finding that AMI and NRM engaged in unconscionable conduct. So much is clear from *National Exchange* and, now, s 21(4)(b) of the ACL.

156 The Full Court in *Unique* qualified the approach to be taken with the use of evidence of individual consumers in support of a system or pattern case, as follows (at [132] to [136]):

With respect, we consider his Honour was correct to [accept the approach of the ACCC]. In principle, there is no reason why evidence about what happened in the circumstances of a number of individual consumers cannot also be adduced as evidence to prove a system.

Nevertheless, the circumstances of the alleged unconscionable conduct, and the evidence adduced, will be critical. The proportion or distribution or some other feature that the individual consumers can be seen to represent of the entire consumer class may be important. Whether the class can be said to have substantially common relevant characteristics, or not, will also matter. In *AMI*, the class (men seeking treatment for impotence) all had a number of common characteristics which were what gave rise to their vulnerabilities. More individual attributes — level of education, literacy, socio-economic grouping — did not, or could be seen not to, matter. How many of the transactions involving individual consumers reveal features said to be part of the “system” will be important. Obviously, the more features which self-evidently have an unconscionable character, the easier it will be to prove an unconscionable system. For example, in *AMI*, some of the features included:

(a) the training of salespeople in methods which were likely to frighten men into agreeing to buy the treatment programs;

(b) the remuneration of salespeople by commission and the failure to disclose this fact in a context where men believed they were consulting a medical practice, which would characteristically have patient welfare as a primary concern;

(c) the “unduly harsh” refund terms, which required parties to try all treatment options (including invasive self-treatment procedures) before becoming entitled to a refund or cancellation of debts, and the strict enforcement of such terms;

(d) the exploitation of the doctor/patient relationship, which created an inherent power imbalance and was combined with concealment of the lack of scientific basis for the medications sold; and

(e) the use of long-term contracts with consumers, in circumstances where this was without medical justification and was not necessary to protect the legitimate interests of suppliers.

Further, the nature of the evidence adduced from those responsible for the alleged design and implementation of the system will be important. In *AMI* at [891], North J summarised his findings about the evidence about Dr Vaisman:

Dr Vaisman knew that men who suffered from ED or PE generally felt anxious about their condition. He believed that they felt frustrated, ashamed, dissatisfied, distressed, and that they suffered from low self-esteem. Dr Vaisman targeted these characteristics as a method of pressuring patients to agree to treatment programs. Salespeople were trained by him to take advantage of these feelings as a means to sell treatment programs.

Most critically, the nature of the allegations of unconscionable conduct will govern how probative the evidence of individual consumers will be. The more generic the alleged conduct, and the less the unconscionability depends on the attributes of consumers, the more probative evidence about what happened to a number of consumers may be. An example is *EDirect* and its telemarketing scripts and calls: the attributes of consumers did not play such a central role in those allegations. The facts of *AMI* are another example. The vulnerabilities of the male consumers were generic vulnerabilities, which could be said to arise from the very situation of seeking treatment from *AMI*: they were concerned about their sexual performance.

In contrast, in the present appeal, the vulnerabilities of the consumers were very much dependent on their individual circumstances: their levels of education, their literacy and numeracy, whether they had intellectual impairments, what was explained to each of them and what was not, and whether they had access to the internet and whether they understood how to operate a computer. These were not matters about which inferences could be drawn without sufficient evidence.

157 The approach of the ACCC in this case was brought in a way that avoided most of the shoals that proved fatal to its case in *Unique*.

158 The other point worth noting from the Full Court in *Unique* concerns the argument advanced by AIPE regarding *Briginshaw*/s 140(2) of the *Evidence Act* and findings of unconscionabilty, not least because some sweeping assertions were made as to how they should operate in this case. It is worth reproducing what the Full Court had to say in full (at [154] to [157]):

It is unnecessary to determine Unique’s arguments about how the approach set out by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362; [1938] ALR 334 (*Briginshaw*) (and now s 140 of the Evidence Act), as a general proposition, should be applied to allegations of contraventions of s 21 of the ACL, although some observations should be made. Unique contended its submission was supported by observations of the Full Court in *Kobelt*, as well as by the inclusion of unconscionable conduct in r 16.42 of the Federal Court Rules 2011 (Cth).

There is no third standard of proof: see *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 449–50 (*Neat Holdings*) (Mason CJ,Brennan, Deane and Gaudron JJ). No doubt an allegation of unconscionableconduct is a serious allegation, to use the plurality’s characterisation in *Neat Holdings*, and this explains its inclusion in r 16.42. (Though a court rule is nothelpful in the construction and interpretation of a statute). To behaveunconscionably should be seen, as part of its essential conception, as serious,often involving dishonesty, predation, exploitation, sharp practice, unfairness ofa significant order, a lack of good faith, or the exercise of economic power in away worthy of criticism. None of these terms is definitional. The *Shorter Oxford Dictionary on Historical Principles* (1973) gives various definitions including “having no conscience, irreconcilable with what is right or reasonable”. The *Macquarie Dictionary* (1985) gives the definition “unreasonably excessive; notin accordance with what is just or reasonable”. (The search for an easy aphorismto substitute for the words chosen by Parliament (unconscionable conduct)should not, however, be encouraged: see *Paciocco* at [262]). These aredescriptions and expressions of the kinds of behaviour that, viewed in all thecircumstances, may lead to an articulated evaluation (and criticism) ofunconscionability. It is a serious conclusion to be drawn about the conduct of abusinessperson or enterprise. It is a conclusion that does the subject of theevaluation no credit. This is because he, she or it has, in a human sense, actedagainst conscience. The level of seriousness and the gravity of the matters allegedwill depend on the circumstances. Courts are generally aware of the character ofa finding of unconscionable conduct and take that into account in determiningwhether an applicant has discharged its civil burden of proof. We see no reasonto doubt the primary judge was conscious of this: so much is apparent from someof the passages in his Honour’s reasons to which we have earlier referred. Wereject Unique’s invitation to make some broader statement of principle about *Briginshaw* in the context of alleged contraventions of s 21. We do not considerthat the findings of the Full Court in *Kobelt* at [206] and in following paragraphs,on which Unique relied in its written submissions, assist Unique’s arguments:those passages deal with grounds of appeal in relation to the pleadings in that case.

The primary judge dealt with the nature of unconscionability at [727] of his reasons as follows:

So far as the concept of unconscionability in s 21 of the ACL is concerned, the principles are also clear. What constitutes unconscionable conduct for the purposes of s 21 is an inquiry undertaken by reference to an evaluative statutory standard. One should not test the matter by reference to other non-textual evaluative standards such as ‘moral obloquy’ but should remain focussed on the word ‘unconscionability’ in s 21 in its statutory context. Thus one must survey the values and norms recognised in the statute itself, the place of norms and values in equity and commercial law and the guidance the statute itself gives as to its values. As Allsop CJ said in *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199; 321 ALR 584; [2015] FCAFC 50 at [296] the concept of unconscionability (which informs the related statutory definition of ‘unconscionable conduct’):

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

There was no submission put that the instructions his Honour gave himself were in any way inadequate. Reference may also be made to *Paciocco* at [259]–[306] and *Kojic* at [55]–[59] per Allsop CJ and [85]–[87] per Edelman J. Whether or not, and, if so, to what extent the conduct impugned as unconscionable involves a degree of reprehensibility or “moral obloquy” (see *Paciocco* at [262]), depends on the nature and character of what is alleged. But there can be no doubt here that the essential criticism of Unique was the exploitation of, and predatory conduct in relation to, vulnerable people in order to maximise monetary gain from the Commonwealth. As senior counsel said, somewhat colourfully (albeit substantially accurately), his client was said to have been engaged in a scam. It may be, however, that the conduct can be characterised as unconscionable and articulated as such without going as far as counsel put it.

## Differences between this case and *Unique*

159 It is important to identify key differences between the present case brought by the applicants and the case brought by the ACCC in *Unique*. The pleading in this case was by concise statement and not by statement of claim. The utility of such an approach was recently outlined by Allsop CJ in *Australian Securities Investments Commission v Australia and New Zealand Banking Group Limited* [2019] FCA 1284, at [2]:

The question whether a body of conduct has in all the circumstances been unconscionable in the statutory sense … is not amenable to pleading “a cause of action” constituted by “material facts”, with some distinction between them and mere “particulars” of such. Rather, the better approach is to understand what the plaintiff says are the “connected circumstances that ought to influence the determination of the case”.

160 The use of a concise statement in this case had the beneficial effect of avoiding the way in which the statement of claim in *Unique* was found by the Full Court at [42] to have a “*certain deconstructed and particularised*” character. This in turn avoided the risk that the Full Court identified in that paragraph of losing the “*holistic interrelationship between all the factors, both as they affect the individuals and the system or pattern of behaviour*”. As their Honours further observed in the concluding sentence of [42]:

… it is an important and serious aspect of a case of unconscionability if [consumers as prospective students] are targeted because of the ease of persuading them to sign up to courses for which they are unsuited by enticing them with lures of gifts and by misleading them, not so that they may be given the opportunity of obtaining a useful education, but so that Unique can maximise its revenue from the Commonwealth.

161 The applicants’ pleaded case overtly and additionally pleaded a motive for AIPE’s conduct, which in and of itself provided an important holistic dimension to its case. That motive operated to contextualise and explain, as well as contribute to the proof of, the overall unconscionability alleged. Just as a proven motive is not an element of a charge of murder, yet is often powerful evidence contributing to inferences as to intention and responsibility for conduct, so too can a proven motive be a powerful means of explaining and characterising other types of conduct. For example, it might elucidate why conduct or practices were carried out in a particular way or persisted with in the face of known problems.

162 In *Unique*, the ACCC’s evidence was characterised by the Full Court (at [55]) as “*focused on what occurred at the locations where the six individual consumers were enrolled*”, with only two witnesses giving relatively narrow evidence going to the system case outside those locations. The need identified in *Unique* for individual instances of proven conduct or behaviour, such as by agents in the field enrolling consumers as students, to be sufficiently pervasive to make the description of being part of a system or pattern, was found to be a requirement in that case because that was the factual and evidentiary foundation for the ACCC’s case. As already explained, the applicants’ case against AIPE is not so limited.

163 Indeed, a key conceptual difference between the *Unique* case and this case is that the vectors of reasoning went in different directions. In the aspect of *Unique* that was overturned on appeal, specific instances of what had happened to six individual consumers were said to substantially establish the overall system case. While there was some general evidence, such as the targeting of disadvantaged students, the Full Court held that evidence could not of itself prove the case. The applicants’ case here, by way of a fundamental contrast, was substantially based upon evidence directly going to AIPE’s internal workings, as proven by AIPE’s former employees, as well as business records such as enrolment records and data, enrolment forms and other documents, together with complaints and how they were handled. This evidence combined to give a reasonably pervasive sense of what was taking place, and its likely impact could thereby be ascertained on the balance of probabilities. Evidence from individual consumers was then used to demonstrate, by example, how this pattern or system played out at the enrolment coalface. The evidence of the individual consumer witnesses was thus helpful and made for a stronger case for the applicants, but was not indispensable and not used as evidence that of itself was representative of the system or pattern.

164 The applicants had the very considerable benefit of the inner workings of AIPE via the three former relatively senior employees, including how they struggled with the enrolment system causing unsuitable consumers to be enrolled as students, and the refusal of the CEO of AIPE to permit changes, or to allow changes to continue, that would have curtailed enrolments (and thereby, inevitably, revenue and profits) to any marked extent. This evidence provided the context for the AIPE data reported to the Department, which was hardly going to understate the situation in terms of success, which demonstrated a very low rate of participation in courses.

165 Without the evidence of the employees, this might have been left as the troubling but unexplained product of the target group of disadvantage persons to whom the liberalised post-2012 VET FEE-HELP scheme was directed, being the effective outcome in *Unique*. There would have been ample grounds for suspicion, fuelled by the proven experiences of individual consumers, but there would have been gaps in establishing the requisite system or pattern. The combination of the former employee evidence, both in its own terms and with the AIPE documentary evidence, enabled these gaps to be closed. AIPE was able to maximise profit by obtaining the revenue of students who, in the greater part, would never partake of study and therefore never impact on the marginal cost side of AIPE’s business. The combination of employee and documentary evidence enables this outcome to be viewed as not merely fortuitous, but from AIPE’s perspective, desirable, facilitated and even encouraged.

166 The Full Court in *Unique* criticised the ACCC as effectively having a system case that did not go much beyond the targeting of persons from disadvantaged backgrounds, which aligned to the objective of the revised (post-2012) VET FEE-HELP scheme. As the Full Court in *Unique* pointed out as part of [61]:

… that the government policy had the aim and purpose of running educational courses directed to marginalised or disadvantaged groups, does not make either irrelevant or virtuous the targeting of such groups if the conduct as a whole can be seen as signing up as many people as possible, to the maximum financial benefit of unique, irrespective an uncaring of the suitability of the course for the consumer in the consumer for the course, using methods that involve misleading and inadequate information or other tactics that can be criticised.

167 As noted above, this case has the additional pleaded and proven dimension of a positive motive to deliberately enrol students who would not be likely ever to partake of study and to keep them enrolled until the census date, or at least deliberately to keep and maintain in place an enrolment system which produced that outcome. That motive has been shown to have been acted upon, even if not overtly discussed, because, when the problem of unsuitable students being enrolled and remaining enrolled past the census date was pointed out, steps were either not taken to alleviate it, or were overridden or watered-down when they resulted in a reduction in the rate of such enrolments continuing to the census date. It needs to be kept steadily in mind that the applicants did not need to prove intention to produce a particular outcome. But the character of the regime by which the outcome was produced has to be shown to be unconscionable.

168 For those reasons and others of lesser significance, the outcome in the Full Court case in *Unique* does not afford AIPE much in the way of support. The applicants are correct in distinguishing the outcome and important parts of the reasoning in *Unique* as confined to the case advanced, while relying on the reasoning of assistance.

169 Importantly, in this case, targeting of disadvantaged persons to be enrolled as students was important, but only as the first step. There were ways and means of carrying out such targeting that would be unobjectionable and in keeping with the deliberate liberalising of the VET FEE-HELP scheme by the government, or at least could not be shown to be objectionable even if shown to be troubling. That was not the applicants’ case. The substance of its case was that this program design was unconscionably exploited for profit by AIPE in a way that inevitably was productive of harm to consumers who were enrolled as students who were never likely to, and in the much greater part never did, in fact partake of the courses.

170 The ACCC’s systems case in *Unique* was overwhelmingly circumstantial. The applicants’ case against AIPE had important circumstantial aspects – most direct evidence cases do – but the evidence of the internal workings of AIPE had important and far-reaching direct evidence components. This was not a case of extrapolation from what was done to individual students: cf *Unique* at [74]. Rather, the evidence of what was done to individual consumers was illustrative of how the pattern of behaviour by AIPE played out in the field, avoiding that being left only to inference or abstract evaluation. The totality of evidence supports a reasonable inference that the pattern of behaviour was widespread, and thereby had a widespread effect, contributing to a very high proportion of that type of enrolment. The ACCC did not have to go so far as to eliminate every other possible explanation – that would be to impose a standard of proof beyond the balance of probabilities.

171 The evidence was more than enough to prove that it was an inevitable outcome of the enrolment system that unsuitable consumers would be enrolled as students, which it actively resisted changing in a way that would limit, let alone avoid, that outcome being highly prevalent. This materially assists the applicants’ unconscionabilty case. There is nothing compelling to suggest any other significant cause for this extreme outcome, so as to stand in the way of this conclusion. The liberalised nature of the post-2012 VET FEE-HELP scheme does not provide as good an explanation and may safely be put to one side, because disadvantage is better understood as a barrier to, rather than a cause of, unsuitable enrolment. The applicants’ evidence went far enough to remove as any reasonable explanation that the outcome arrived at was due simply to the inevitable consequence of disadvantaged persons having a higher rate of failure than other members of the community. What mattered in this case was how such persons came to be enrolled in the first place. That exercise in blaming the consumers was, to my mind, a most troubling and almost patronising conclusion to reach in any event, but one that can be reduced to, at most, a minor and inconsequential explanation in this case.

172 All of the above placed the case brought against AIPE well beyond the features applied by the primary judge in *Unique* (at [773]-[778]) which were found by the Full Court to fall short of what is required to make good a system or pattern based contravention of s 21 of the ACL.

## Use of individual consumer witnesses

173 The 13 consumer witnesses were not relied upon by the applicants as a representative sample, but they did not have to be. As the applicants correctly submit, it was open to them to step back from that approach deployed ultimately unsuccessfully in *Unique*, arguing that the decision of the Full Court in *Kobelt* (since affirmed on appeal to the High Court)indicates that evidence from individual consumers may assist in proving a system case even if it is not done by way of seeking to have drawn statistically valid inferences about the incidence of unconscionable conduct. Those witness were part of the matrix of facts relied upon by the applicants, even if no more precise inference is open for want of random selection. The applicants rely upon observations in *Australian Competition and Consumer Commission* *v Get Qualified Australia Pty Ltd (in liq) (No 2)* [2017] FCA 709 by Beach J. His Honour’s approach to the application of s 21 (and s 22) of the ACL at [60]-[66] is concise and elegant in its expression and evocative in its approach:

First, “unconscionability” means something not done in good conscience or conduct against conscience by reference to the norms of society. But that is to be understood and applied in the context of trade or commerce, but including consumer protection objectives directed at the requirements of honest and fair conduct free of deception (see generally *Paciocco v Australia and New Zealand Banking Group Limited* (2015) 236 FCR 199 at [259] to [304]). But one must be careful in using the phrase “norms of society” to ensure that the identification thereof is not interlarded with some distorted subjective view of social philosophy. It is fraught with risk to move beyond the explicit and implicit norms enshrined in and bounded by the statutory language of ss 21 and 22 construed in context, being trade or commerce, notwithstanding the apparent breadth of s 21(4) and the non-limiting prefatory words of s 22(1). Moreover, the evaluation of unconscionability must not be decontextualised from the particular case under consideration.

Second and relatedly, in order to determine whether conduct is unconscionable, it is necessary to look at all the conduct, by “[s]tanding back and looking at the whole episode” (*Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90 at [44]).

Third, as the norms of society include statutory prohibitions on deceptive conduct and the regulation of unsolicited consumer agreements, deceptive practices and contraventions of provisions concerning unsolicited consumer agreements can form part of the “whole episode”, for the purpose of assessing whether, in all the circumstances, the conduct in question is unconscionable (*Lux Distributors* at [41] to [44]).

Fourth, s 22(1) of the ACL sets out a non-exhaustive list of factors to which the Court may have regard for the purpose of determining whether a person has contravened s 21. The matters enumerated assist in understanding the scope of the meaning of unconscionable conduct, but the presence of one or more matters contained in s 22(1) (or indeed their absence) is not necessarily determinative.

Fifth, s 21(4)(b) of the ACL states that it is the intention of Parliament that s 21 is “capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour”.

Relatedly, proof of examples of similar unconscionable conduct in respect of individual cases can be used to demonstrate the features of a system of conduct or pattern of behaviour, even though no particular individual need be identified as having been disadvantaged.

Finally, the evidence of unconscionable conduct may be quite varied and, in some cases, not even substantial, but still form part of an overall pattern or system of unconscionability. It may be established by a systemic pattern of behaviour involving an accumulation of minor incidents.

174 That is plainly enough the approach that the applicants have sought to bring to bear in this case. They suggest that the following approach should be taken by this Court in light of the body of authority upon which they rely (omitting footnotes):

First, both the question whether conduct is unconscionable and the question whether a system of conduct or pattern of behaviour that bears that character are fact-specific. They are interrelated but distinct questions.

Secondly, demonstrating unconscionability does not require proof that the persons who were subject to the conduct were ‘vulnerable’; taking advantage of a lack of understanding may be sufficient.

Thirdly, s 21(4) directs attention to the conduct of the contravenor rather than the characteristics of the individual affected by its conduct. Proof of examples of similar unconscionable conduct in respect of individual cases can be used to illustrate the features of a system of conduct or pattern of behaviour – however, no particular individual need be identified as having been disadvantaged.

Fourthly, in order to establish a contravention of s 21 of the ACL in respect of a business system, the Applicants are not required to establish separately that each of the critical features of that system was unconscionable by themselves. The proper approach to the assessment of an alleged contravention is a composite analysis of all relevant features and characteristics, that is, of all of the circumstances.

Fifthly, an unconscionable system of conduct or pattern of behaviour may emerge over time without having been expressly articulated. It need not have been deliberately adopted or planned. Evidence of unconscionable conduct may be quite varied and, in some cases, not even substantial, but still form part of an overall pattern or system of unconscionability.

Sixthly, it is difficult for an applicant to build a “system” case on a relatively small number of individual examples without (at least) proving how those examples were selected. But such examples may nevertheless be relevant, if only as illustrations confirming the effects of a business model.

Seventhly, evidence about the demographic composition of a body of consumers is capable of founding or supporting a conclusion about how a business model was designed or how it operated. Clearly, there are considerable difficulties with a case that assumes that individual consumers are vulnerable because they are indigenous, or because they live in areas with sizeable populations of low socio-economic status. However, it cannot be controversial that there are correlations between indigeneity and low socio-economic status, on the one hand, and lack of the education and experience needed to look after one’s interests on the other. Depending on the surrounding circumstances, if a business concentrates on areas of low socio-economic status or with large indigenous populations in recruiting customers, that may (at least in some cases) be taken to indicate a strategy of preferring customers who are vulnerable; and that may be an ingredient of unconscionability. At least, the presence of disadvantaged or vulnerable people in the target audience makes it more important for recruitment to be conducted consistently with proper notions of consumer protection.

175 The applicants contend, and I accept, that this approach falls within the scope of the observations of the Full Court in *Unique* (at [61]) which bear repeating:

… that the government policy had the aim and purpose of running educational courses directed to marginalised or disadvantaged groups, does not make either irrelevant or virtuous the targeting of such groups if the conduct as a whole can be seen as the signing up of as many people as possible, to the maximum financial benefit of Unique, irrespective and uncaring of the suitability of the course for the consumer and the consumer for the course, using methods that involve misleading and inadequate information or other tactics that can be criticised.

## False, misleading or deceptive conduct

176 It is common ground that the legal principles arising from s 18 and s 29 of the ACL were not in dispute and were well-summarised by Gleeson J in *Empower* as follows at [554]-[565], including references to parts of the decision at first instance in *Unique* of Perram J that were not appealed or otherwise affected by the Full Court decision:

Section 18(1) of the ACL provides:

A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 29(1) of the ACL relevantly provides that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

(g) make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits; or

…

(i) make a false or misleading representation with respect to the price of goods or services; or

…

Conduct is misleading or deceptive if it induces or is capable of inducing error: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640 (“*TPG*”) at 39; *Parkdale Custom Built Furniture Proprietary Ltd v Puxu Proprietary Ltd* [1982] HCA 44; (1982) 149 CLR 191 (“*Parkdale*”) at 199.

It is not necessary to show actual deception to establish a contravention of s 18 of the ACL: *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1; (2013) 249 CLR 435 (“*Google*”) at [6]. Conduct will be likely to mislead or deceive if there is a “real and not remote chance or possibility” of misleading or deception regardless of whether it is more than fifty per cent: *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682; (2009) APTR 42-290 (“*Dukemaster*”) at [14]. Whether conduct (including representations) is misleading or deceptive is a question of fact to be determined in the context of the evidence as to the alleged conduct and as to all of the relevant surrounding facts and circumstances: *Taco Co of Australia v Taco Bell Pty Ltd* [1982] FCA 170; (1982) 42 ALR 177 at 200; *Parkdale* at 199; *Google* at [89], [102], [118]; *Australian Competition and Consumer Commission v Coles Supermarkets Pty Ltd* [2014] FCA 634; (2014) 317 ALR 73 (“*Coles*”) at [38].

It is well established that silence can amount to misleading or deceptive conduct. Silence is to be assessed as a circumstance like any other, and the question is “whether in the light of all relevant circumstances constituted by acts, omissions, statements or silence, there has been conduct which is or is likely to be misleading or deceptive.”: *Demagogue Pty Ltd v Ramensky* [1992] FCA 851; (1992) 39 FCR 31 (“*Demagogue*”) at 32, 41; *Rafferty v Madgwicks* [2012] FCAFC 37; (2012) 203 FCR 1 (“*Rafferty*”) at [277].

In s 29, the word “representation” is interpreted broadly and includes a statement, made orally or in writing or by implication from words: *Given v Pryor* (1979) 39 FLR 437 at 441. A half-truth may be a false or misleading representation. In *Australian Competition and Consumer Commission v LG Electronics Australia Pty Ltd* [2017] FCA 1047 at [53], in considering the possible application of s 29(1)(m) of the ACL, Middleton J said:

It can readily be accepted that a half a truth may be worse than a blatant lie. A half-truth may beguile the receiver of the half-truth into a false sense that he or she is receiving the whole truth and nothing but the truth – and hence is under the understanding, and reasonable and legitimate expectation, that the person giving the information is presenting all the information necessary for the recipient to act accordingly.

There is no material difference between the terms “misleading or deceptive” (in s 18) and “false or misleading” (in s 29): *Dukemaster* at [14]; *Coles* at [40].

There are numerous authorities which emphasise that the word “free” has a particularly strong attraction and unless adequately qualified it can readily produce a wrong understanding: see, for example, *TPC v Optus Communications Pty Ltd* (1996) 64 FCR 326. When marketing goods or services, qualifications need to be prominently and clearly spelled out so that the “magnetism” of the word “free” may be properly understood by a consumer: see *Nationwide News Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 215 at 228.

In *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452, the question for the Full Court was whether an offer in a prospectus of “free” shares was misleading given that it was to members of a mutual association which proposed to convert to a company limited by shares and the offer was to its members. The Full Court said at 483:

Although it is no doubt true that in some contexts, such as in the expression “buy one, get one free”, the word “free” may be understood as meaning “without additional or marginal outlay over what is obviously being paid”, this is not invariably so. “Free” can easily be misleading or deceptive, depending on the context…We agree with the trial judge that in the present context of a document that strongly argued in favour of voting for the proposed changes, the persistent use of the expression “Free Shares” was in fact likely to engender the notion that the shares might be acquired without significant loss or outgoing and it was in this respect misleading or deceptive, or likely to mislead or deceive, to use that phrase.

In *Unique* at [725]-[726], Perram J said:

[725] The debt created by the VET FEE-HELP scheme was readily able to be understood by people who had no expectation of earning more than $50,000 as being the same as free. But free it was not. It reduced their ability to enrol in future vocational training courses. Such a scheme, when combined with the attractive offer of a free laptop, created a powerful impression of a very good deal. That powerful impression was incorrect, however. Having engendered such an impression with the laptops, it was misleading not to explain in the clearest terms precisely how the VET FEE-HELP scheme worked and the fact that it would leave each person who took the laptop with a lifetime debt as well as a reduced ability to access the VET FEE-HELP system in the future. And, the kind of explanation which was called for was one which was tailored to the audience which had been persuaded to attend the sign-up sessions by the lure of a free laptop in the first place. The cohort involved, even on Unique’s case, was a cohort in which disadvantaged persons featured. Such a group was even more exposed to the lure of the laptop than the general community. Thus, an even clearer explanation was called for.

[726] Perhaps put a little less formally, it was misleading to offer free laptops to groups of poorly educated and/or illiterate people on the basis that they sign up to VET FEE-HELP courses without explaining in the plainest of terms what the ramifications of this would be.

In *Unique*, Perram J found contraventions of s 18 of the ACL in relation to a number of consumers variously by: (a) not telling consumers they were enrolling in a course; (b) not telling consumers they would have to pay for the course; (c) not telling consumers the cost of the course; and (d) not telling consumers that enrolling in a course would leave them with a debt to the Commonwealth if they did not cancel by the relevant census date. The failure to inform students that they would have to pay for the course and about the cost of the course was also found to contravene s 29(1)(i) of the ACL.

The applicants submitted, and I accept that, it is false and misleading to offer “free” courses and “free” laptops on the basis that a consumer signs up to a VET FEE-HELP course without explaining to them that they will thereby incur a significant debt.

177 AIPE admits, at [15A] of its further amended response to the concise statement, reproduced at [27], that in the context of enrolling consumers as students in VET courses, a failure to explain in plain and clear terms the VET FEE-HELP scheme, including that it would leave a person with a debt to the Commonwealth, or offering a free laptop to a poorly educated or illiterate person on the basis that the consumer signs up to a VET FEE-HELP course without explaining in plain terms the VET FEE-HELP scheme, can amount to misleading and deceptive conduct. That pleading is subject to a submission that a cautious approach should be taken to the reliability of the evidence that the applicants rely upon to that effect.

## Unsolicited consumer agreements

178 Section 69 of the ACL provides as follows:

**69 Meaning of *unsolicited consumer agreement***

(1) An agreement is an ***unsolicited consumer agreement*** if:

(a) it is for the supply, in trade or commerce, of goods or services to a consumer; and

(b) it is made as a result of negotiations between a dealer and the consumer:

(i) in each other’s presence at a place other than the business or trade premises of the supplier of the goods or services; or

(ii) by telephone;

whether or not they are the only negotiations that precede the making of the agreement; and

(c) the consumer did not invite the dealer to come to that place, or to make a telephone call, for the purposes of entering into negotiations relating to the supply of those goods or services (whether or not the consumer made such an invitation in relation to a different supply); and

(d) the total price paid or payable by the consumer under the agreement:

(i) is not ascertainable at the time the agreement is made; or

(ii) if it is ascertainable at that time—is more than $100 or such other amount prescribed by the regulations.

(1A) The consumer is not taken, for the purposes of subsection (1)(c), to have invited the dealer to come to that place, or to make a telephone call, merely because the consumer has:

(a) given his or her name or contact details other than for the predominant purpose of entering into negotiations relating to the supply of the goods or services referred to in subsection (1)(c); or

(b) contacted the dealer in connection with an unsuccessful attempt by the dealer to contact the consumer.

(2) An invitation merely to quote a price for a supply is not taken, for the purposes of subsection (1)(c), to be an invitation to enter into negotiations for a supply.

(3) An agreement is also an ***unsolicited consumer agreement*** if it is an agreement of a kind that the regulations provide are unsolicited consumer agreements.

(4) However, despite subsections (1) and (3), an agreement is not an ***unsolicited consumer agreement*** if it is an agreement of a kind that the regulations provide are not unsolicited consumer agreements.

179 Section 70 provides a rebuttable presumption that an agreement is an unsolicited consumer agreement, where a party alleges that the agreement is an unsolicited consumer agreement.

180 The principles were helpfully summarised by Perram J in *Unique* at first instance (at [730]-[756]) and by also by Gleeson J in *Empower* (at [677]-[696]). It is not necessary to detail them further because there is no real dispute that the approaches made to the 13 consumer witnesses was relevantly unsolicited and that ss 69 and 70 were generally applicable to the situation of each of them.

181 AIPE takes a point about the various stages that a person being enrolled has to go through before a settled agreement exists, being an enrolment application, then, after acceptance, an application for VET FEE-HELP assistance. AIPE therefore submits that the point at which an agreement has been reached must be ascertained. What is clear from this submission is that the agreement process is complete once a VET FEE-HELP loan is approved. For the individuals for whom a finding of a breach of s 76 and s 78 is sought, there is no doubt that this point was reached. I accept the applicants’ submission that a determination of the precise point of time when that took place is not required.

# INDIVIDUAL CONSUMER WITNESSES

182 Affidavit evidence from 13 consumer witnesses and a number of supporting affidavits were read. They are dealt with individually below in the order in which they appear in the competing submissions of the parties, rather than the order in which they appear in the Court Book. For each, their names are on the affidavits, but they will be referred to by letters only to maintain their privacy, which AIPE did not object to.

183 The applicants seek declarations of contravention, with some variation from student to student, in relation to breaches of ss 18, 21, 29(1)(i), 29(1)(g), 76 and 78 of the ACL. The provisions remained the same during the Relevant Period and continue to date (other than the exclusion as to listed public companies in s 21 being omitted after the Relevant Period, on 26 October 2018). Those provisions during the Relevant Period were as follows:

(1) section 18 provides:

**18 Misleading or deceptive conduct**

(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

(2) Nothing in Part 3-1 (which is about unfair practices) limits by implication subsection (1).

(2) section 21 provides:

**21 Unconscionable conduct in connection with goods or services**

(1) A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to a person (other than a listed public company); or

(b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

(2) This section does not apply to conduct that is engaged in only because the person engaging in the conduct:

(a) institutes legal proceedings in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition; or

(b) refers to arbitration a dispute or claim in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition.

(3) For the purpose of determining whether a person has contravened subsection (1):

(a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(4) It is the intention of the Parliament that:

(a) this section is not limited by the unwritten law relating to unconscionable conduct; and

(b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and

(c) in considering whether conduct to which a contract relates is unconscionable, a court’s consideration of the contract may include consideration of:

(i) the terms of the contract; and

(ii) the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract.

(3) section 29(1)(g) and (i) provide:

**29 False or misleading representations about goods or services**

(1) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

…

(g) make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits; or

…

(i) make a false or misleading representation with respect to the price of goods or services; or

…

(4) section 76 provides:

**76 Informing person of termination period etc.**

A dealer must not make an unsolicited consumer agreement with a person unless:

(a) before the agreement is made, the person is given information as to the following:

(i) the person’s right to terminate the agreement during the termination period;

(ii) the way in which the person may exercise that right;

(iii) such other matters as are prescribed by the regulations; and

(b) if the agreement is made in the presence of both the dealer and the person—the person is given the information in writing; and

(c) if the agreement is made by telephone—the person is given the information by telephone, and is subsequently given the information in writing; and

(d) the form in which, and the way in which, the person is given the information complies with any other requirements prescribed by the regulations.

184 AIPE makes an overall submission concerning the individual consumer witnesses as to evidence of conversations given by each of them, citing:

(1) the misleading or deceptive conduct cross-claim case opposing the recovery of a bank debt of ***Watson v Foxman*** (1995) 49 NSWLR 315 at 319 as to the fallibility of human memory in consumer cases in which self-interest is in play, relying upon accounts of what was said without documentary corroboration, so that there may be a process of little more than impression around which plausible details are constructed, falling short of the necessary level of precision and reliability to be acted upon;

(2) the wills and trust case of ***Evans v Braddock*** [2015] NSWSC 249 at [70]-[77], citing *Watson v Foxman* and a range of like authority on the problems with recollection, reconstruction and reliability when it comes to accepting and acting upon uncorroborated accounts of critical conversations relied upon – in that case, contemporaneous documents were accepted in preference to the account of a critical witness as to what had been said, following extensive cross-examination.

185 Despite the absence of any cross-examination of most of the consumer witnesses and, with the exception of certain documentary records, the evidence being largely unchallenged, AIPE points out that the Court must still reach the requisite level of satisfaction that what was deposed to was in fact said with sufficient precision to conclude that what was conveyed was misleading, and that this was done on behalf of AIPE. Particular caution is urged by AIPE when civil penalty provisions are in play. It is convenient to note generally, but having had regard to each particular affidavit, that I found nothing in the nature of the evidence of the individual consumer witnesses or witnesses supporting their accounts to give rise to any of the concerns identified in *Watson v Foxman* or in *Evans v Braddock*.

## Consumer MI

186 MI is a Broome resident, now 40 years of age, having grown up in an Aboriginal community. The events to which she deposes took place in about November 2015, and her affidavit was sworn in final form on 25 February 2016. She deposes to a relatively important, or at least unusual, event in her life and to that extent it may readily be inferred to be memorable to her. There is nothing to suggest that she had any perception of personal gain from being a witness, especially in the absence of any cross-examination of her demonstrating anything to the contrary. That is so notwithstanding that the applicants seek non-party consumer redress for consumer witnesses specifically, and for all consumers subject to conditions ([24]-[25] of the further amended originating application) as there is no suggestion that she was aware of this possibility at the time of swearing her affidavit, let alone any evidence that she was influenced by that possibility to do anything other than tell the truth. That observation applies to the remaining consumer witnesses in a like position.

187 MI deposes to being unemployed and on a carer’s pension, renting from government social housing. She left school when she was 10, and as an adult has done TAFE courses in basic literacy and numeracy. She can read and write a bit of English, but deposes to having trouble understanding and reading big words. She knows how to turn on a laptop and to use the Internet “*a little bit from TAFE*”, but has no Internet access at home.

188 In about November 2015, MI saw a well-dressed salesman in the street – a recruiter on behalf of AIPE (and hereafter referred to as such) as it turns out – who then came to her door. She candidly says that she cannot remember where he said he was from, but recalls a conversation to the effect that he said “[*w*]*e’re here to give away free laptops for your education. You can use it to study a course.*” to which she said “[*y*]*eah if it’s for free, for sure.*”

189 She was interested in study after her previous experience with TAFE, wanting to make up for having left school when she was young, and wanting to make her English and maths better. He obtained her name, address and telephone number, writing them down, and then asked her for identification, which she provided. The balance of what she relevantly deposes to is better reproduced than summarised (at [13]-[29] of her affidavit, verbatim):

The conversation continued with words to the following effect:

He then said: Can you sign?

I signed the form with my signature where he pointed on the piece of paper. I didn’t read the papers I signed because I can’t read very well. I told the salesman: “I can’t read very well.”

He then said: I’m going to call someone now.

He pulled out his phone from his pocket and called someone.

He said: I’m calling the mob who have the laptops.

He talked to them and said: “I’ve got someone here that wants the laptop”. He then handed the phone to me.

I spoke to a woman, she didn’t say where she was from. It was on speakerphone. We had a conversation including words to the following effect:

She said: Why do you want the laptop?

The man wrote down on a piece of paper and passed it to me “to do some studies”.

I said to him: “I can’t read what you’re writing, I can’t read very well”

He said: say “to do some studies”.

I repeated this back to her.

She said: Alright then you can hand the phone back to the man.

I handed the phone back. The man then talked to her.

The conversation with me continued in words to the following effect:

He then said: You’re finished now.

I said: Ok

He said: Does your Aunty want a laptop?

This was about my Aunty Jacinta Augustine who was at my place. He talked to my aunt outside the house. I went inside the house. There were about five people in the house.

While he was talking to my aunt, he looked inside the front door. I heard him yell out to the people inside and say words to the following effect:

The laptop is free. You have to be 18 and over.

One of the ladies inside said to me quietly:

Don’t do it, they’ve just been out to Fitzroy Crossing.

The salesman asked nothing about my education levels. He did not read the document to me that I signed, or explain it to me even though I said to him that I could not read very well.

He didn’t tell me that the course would cost money. He didn’t say anything about a government loan or VET FEE HELP. He didn’t say I would have to pay any money back. There was no mention of money. If I had known it would cost money, I wouldn’t have got it.

The salesman didn’t tell me I could cancel the course. He didn’t say anything about how to do the course. He told me the laptop was free.

At the end of our meeting he said:

It will take one month to get the laptop. It will come in the mail.

He didn’t tell me the name of any courses.

About a few weeks later, but before the laptop arrived, a lady of Indian appearance knocked on my door. She was from a different college to the man that came, but I can’t remember the name of the college. She also offered me a free laptop. I said “a man has come already and said I can have a laptop. It hasn’t come yet.” She said words to the effect “I can get one for you, I will make it happen for you.” I didn’t take much notice of her as I already signed for another laptop. I thought I would get in trouble if I got two laptops. She left after this.

I got the laptop in December 2015. Annexed hereto and marked with the letters “MI‑1” is the despatch slip with AIPE’s name on it. This was printed on 1 December 2015. Annexed hereto and marked with the letters “MI-2” is a letter that was in the box with the computer.

I haven’t had any calls from AIPE even though I gave the man my mobile number.

I tried to tum the laptop on but I could not work it. I didn’t know if I needed to put credit in it to use it or if it needed a password. My niece has taken it because my niece said to me “you don’t know how to use it.”

I haven’t received any letters from AIPE since I received the laptop.

190 The dispatch date of the laptop was 20 November 2015, with the sender described as “*Staples Australia*” and “*Promo*”, with an address in Erskine Park in NSW. The receiver is described as AIPE, with MI’s address in Broome. The letter that was in the box with the laptop made it abundantly clear that it was from AIPE, stating in full as follows:



191 The following additional features and observations, and conclusions reached, should be noted:

(1) records extracted from AIPE’s “*Customer Relationship Management*” (**CRM**) computer program establish that:

(a) MI was recorded as having commenced the diploma of management in August 2015, months before the earliest possible date upon which MI could even have been spoken to, and thus months before any documents completed by the recruiter and signed by MI could possibly have been furnished to AIPE. This evidence about false information being entered into AIPE’s systems has wider application than just MI, not least because there is no basis for concluding that this was other than deliberate;

(b) MI was referred for enrolment by Distance Online Study Australia Pty Ltd, by whom the recruiter must have been employed; and

(c) MI was charged an amount of VET FEE-HELP in relation to her enrolment with AIPE;

(2) AIPE accepts that the Court may find that there may have been contraventions of the ACL in relation to MI, which may result in declaratory relief, but submits that the Court should be cautious in making any finding that a failure to inform her that she would have to pay for the course was misleading or deceptive because that depended upon her reaching the income threshold before that was required, noting that this step was not taken by Gleeson J in *Empower* at [571]. I also note, however, that her Honour did make such a finding by reference to the incurring of a debt to the Commonwealth, but declined to make a finding of an overt false or misleading representation: see [319], [572]-[573];

(3) the applicants submit, and I accept, that AIPE’s recruiter did not provide MI with information about her right to terminate her enrolment or how to go about doing that, and that this is a breach of s 76 of the ACL, for which a declaration should be made;

(4) the applicants submit, and I accept with the following slight modifications, that AIPE’s recruiter told MI that she could get a free laptop and use it to study a course, but, by reason of representations by omission, by not being told that she would have to pay for the course if her income was above a threshold, or that she would incur a debt for the course if she did not cancel her enrolment within a certain time (the census date), that overt free laptop representation was misleading. By omission, it was also deceptive and false, because the laptop was not free in the ordinary sense in which that word would be understood by any reasonable person as entailing the incurring of no economic burden at all, and accordingly breaches of both s 18 and s 29(1)(i) of the ACL have been established, and declarations should be made to that effect; and

(5) the applicants submit, and I accept, that the circumstances in which MI was enrolled in a course by AIPE’s recruiter was, in all the circumstances, unconscionable in breach of s 21 of the ACL, because of the following acts and omissions (with some variation on how they are put by the applicants):

(a) she was told that free laptops were being given so that she could study a course;

(b) no enquiry was made of her education or background;

(c) no inquiry was made as to whether she had an Internet connection at her home, or any other means of connecting to the Internet, and she was not told that such a connection was indispensable in order to be able to participate in any of the courses on offer;

(d) she was not told that anyone would have to pay anything for the course, let alone that enrolling in the course would entail her incurring a debt to the Commonwealth, which she would have to repay if her income was ever high enough;

(e) nothing was done to ascertain whether she even wanted to do a diploma of management, let alone whether she had the ability to do the course by reason of numeracy, literacy and computer skills – she had expressly said that she could not read what the recruiter had written and that she could not read very well; and

(f) she was instructed on what to say during a verification call, rendering pointless that call taking place at all.

192 It follows that AIPE, via its agent, made false, misleading and deceptive representations, engaged in unconscionable conduct, and failed to comply with clear and mandatory unsolicited consumer agreement provisions in the ACL. Declarations will be made to that effect.

## Consumer RS

193 RS is an Aboriginal man, now 54 years of age, living in Dareton in the far west of NSW, not far from the far north Victorian border town of Mildura. He left school after year nine and has not been in paid employment since 1999, receiving a disability support pension. He has a laptop at home, but does not have an Internet connection. RS lives with his partner. RS deposes to events in late 2014, in an eight-page affidavit not sworn until 1 March 2016. I therefore approach his account of conversations with caution, but not with any preconception as to reliability.

194 RS was approached in his home by two of AIPE’s recruiters, after they had been to his cousin’s (RL’s) house next door. The younger recruiter told him “[*w*]*e are just out here enrolling people in courses and giving out free laptops and notebooks.*” After the second, older, recruiter also came to his house a short time later, one of them had a conversation with him to the following effect:

RS: What do we have to do for the free laptop and notebook?

Recruiter: All you have to do is sign with us.

RS: Do we have to pay anything?

Recruiter No, it’s free. But you have to join a course. Can we come in?

195 RS let them into his house, because he was interested in learning more about free laptops. He was not told who the recruiters worked for. He was given a brochure with the name “Empower College”. The conversation continued to the following effect:

Recruiter: If you enrol in these courses, you will get two free laptops and two free notebooks.

RS’ partner: Why are you going around getting people to sign up and giving them free laptops?

Recruiter: To help Aboriginal people.

RS: Who can do this course?

Recruiter: Just Aboriginals.

RS’ partner: Do you have some ID?

Recruiter: Yes.

196 The younger recruiter then showed RS’s partner and him an identification card, which he recalls had the word “*AIPE*” on it. The older recruiter did not have an identification tag, but showed his drivers licence. There was then a conversation about the pamphlets he had been given and the content of the different courses available, the details of which RS cannot recall. He recalls being told about a business course, and he thinks a tourism course. The conversation then continued:

RS’ partner: Will we have to go away to do the course?

Recruiter: No, the course can be done online in your home, so you don’t have to go away.

RS’ partner: We don’t have the internet.

Recruiter: Don’t worry, the laptop comes with free Wi-Fi.

RS’ partner: Okay. What do we need to pay to get in?

Recruiter: Nah, nah, you don’t have to pay anything. We’ve signed up a lot of other Aboriginal people for the courses. If you don’t want to do the course, you can either keep the laptop and notebook or sell them, they’re yours for free.

RS: When will we get the laptops?

Recruiter: About two to three weeks.

197 The older recruiter then said: “*If you don’t want to do the course, you don’t have to do it. You can keep the laptops and tablets. You don’t have to pay anything.*”

198 RS then signed a piece of paper that was given to him to get the free laptop. He was not asked about his level of schooling. He was then asked to provide identification, and once the forms were completed both he and his partner were asked to read them to make sure they were correct. RS did not read the form closely, because he did not understand it. RS and his partner signed their respective forms. RS does not recall if they were given copies of those documents. He recalls his identification being photographed by a mobile phone.

199 RS was then told that he would be getting a call to ask him what course he had signed up to, and was told that he should say that he had signed up for “*this course*”, pointing to the piece of paper with the names of the courses. One of the recruiter’s mobiles then rang and RS had a conversation in which he confirmed that he had signed up for the course as he had been told to say. He was given some numbers and a password, which he did not write down. RS has not used any email address that he was given.

200 RS was not told that he would be incurring a debt, and says that if he had known that the laptop and the course were not free, he would not have signed up. He was not told anything about how long the course was, or how long he had to cancel the course. He was not given any document to that effect.

201 RS then went outside to have a cigarette and was joined by one of the recruiters. He was asked if he could introduce the recruiters to relatives and friends, asking if there was a mission around there, which he confirmed there was. The recruiter told RS that the recruiter needed to sign up 20 people and when RS was hesitant, was offered $200 for every 20 people he introduced. He then went with the recruiters to a number of homes at a nearby mission run by an Aboriginal land council, saying at each location words to the effect that “[*t*]hese *people are going around, signing people up to courses and giving out free laptops and notebooks.*” He recalls that at each location, a recruiter said words to the effect of “[*y*]*ou don’t have to pay anything. If you don’t want to do the course, you keep the laptop and the notebook.*”

202 About two weeks later, two laptops arrived at RS’ house via courier, first for his partner, and then for him. Later that week, they both received tablet (or notebook) computers as well. The brochures provided by the recruiters, annexed to RS’ affidavit, indicated that the laptops were to come from Empower Institute; and the notebooks from AIPE. The former depicted laptops with the name of Empower on it. The latter depicted a Microsoft Surface 2 tablet, with handwriting “*AIPE*” and “*Diploma of travel and tourism*”, each written in two places. They were not given anything to use these devices on the Internet and, unsurprisingly, were unable to connect to the Internet.

203 Some weeks late, RS received a call from his daughter, who said to him words to the effect of “*you know this is a scam?*” A few days after speaking to his daughter, RS received a call from someone he thought was at a university and had a conversation. He does not remember much of what was said beyond something about how to use the laptop for the course, but does remember words to the following effect:

Caller: Did you receive the laptops?

RS: Yes.

Caller: Which course would you like to do? Diploma in business or diploma in tourism?

RS: I’ll take the tourism one.

Caller: How soon can you start on this course?

RS: I’m busy now.

Caller: What is a better time to ring back?

204 RS recalls being reluctant to give a date because of what his daughter had said. He gave another time, but cannot recall when.

205 RS recalls later receiving a call from someone who said he was from AIPE, who asked him if the persons in the university were helpful in signing him up for courses, but cannot recall what he said. He then received texts from AIPE, which he lost when he lost his mobile phone. This second call, combined with the reference to a tourism diploma supports the inference that the first call related to AIPE courses despite the reference to a laptop rather than a notebook or tablet (noting that the Surface 2 depicted in the brochures annexed to RS’ affidavit looks as much like a laptop as a tablet or notebook, having features of both), and therefore the earlier caller was representing AIPE, not a university as RS perceived.

206 RS never started any courses and did not plan to do so. His enrolment with AIPE was cancelled as detailed below, resulting in no VET FEE-HELP debt being incurred. His affidavit was read to him, and he agreed it was correct.

207 The following additional features and observations, and conclusions reached, should be noted:

(1) records extracted from AIPE’s “*Customer Relationship Management*” (**CRM**) computer program establish that:

(a) RS was recorded as having enrolled in a diploma of travel and tourism on 6 December 2014;

(b) RS was referred for enrolment by Vision Sales, by whom the recruiters must have been employed, ultimately as agents of AIPE; and

(c) MI was charged an amount of VET FEE-HELP in relation to his enrolment with AIPE;

(2) by an email sent on 13 April 2015, RS was informed by AIPE (per Ms Lyndall Benton) that his application for withdrawal without academic or financial penalty had been successful, without any VET FEE-HELP liability;

(3) AIPE accepts that the Court may find that there may have been contraventions of the ACL in relation to RS;

(4) AIPE points out that RS’ evidence also relates to enrolment with Empower and was the subject of findings in *Empower* at [595]-[602], calling for caution having regard to those findings, directed as they were to having been made as to Empower’s services. I do not, however, read those findings as necessarily precluding parallel findings being made against AIPE as the representations were made without differentiation between the two and therefore, in context, pertaining to both;

(5) AIPE, in keeping with the submissions about MI, submits that the Court should be cautious in making any finding that a failure to inform RS that he would have to pay for the course was misleading or deceptive because that depended upon him first reaching the income threshold before that was required, in contrast to making such a finding by reference to the incurring of a debt to the Commonwealth, but still declining to make a finding of an overt false or misleading representation;

(6) the applicants submit, and I accept, that AIPE’s recruiter did not provide RS with information about his right to terminate his enrolment or how to go about doing that, and that this was a breach of s 76 of the ACL, for which a declaration should be made;

(7) the applicants submit, and I accept, that RS was also told that the courses being offered were for “[*j*]*ust Aboriginals*”. This was said to encourage RS to sign up. This representation contravenes both s 18 and s 29(1)(g) of the ACL;

(8) the applicants submit, and I accept, again with the following slight modifications, that AIPE’s recruiter told RS that he could get free computer equipment for signing up for courses and did not have to pay anything for those courses. Both of those representations were misleading, and were additionally deceptive and false by reason of representations by omission by not being told that he would have to pay for the course if his income was above a threshold, or that he would incur a debt for the course if he did not cancel his enrolment within a certain time (the census date). Neither the laptops (in fact tablets), nor the courses, were free in the ordinary sense in which that word would be understood by any reasonable person as entailing the incurring of no economic burden at all. This was a breach of s 18 and s 29(1)(i) of the ACL, and accordingly declarations should be made to that effect; and

(9) the applicants submit, and I accept, that the circumstances in which RS was enrolled in a course by AIPE’s recruiter was, in all the circumstances, unconscionable in breach of s 21 of the ACL, because of the following acts and omissions (with some variation on how they are put by the applicants):

(a) the recruiters were not upfront as to who they were and represented, commencing with misleading and ultimately deceptive and false representations that laptops were free to use on courses, and that those courses were also free;

(b) RS was further enticed by the entirely false representation that the laptops and courses were only available to Aboriginal people;

(c) a concern about Internet access was assuaged by a suggestion that the laptop to be provided would have its own free Wi-Fi Internet access, which must have been known to be false, as there is no evidence to suggest that this was ever any aspect of what was to be provided;

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

(e) RS was not told that anyone would have to pay anything for the course, let alone that enrolling in the course would entail him incurring a debt to the Commonwealth, which he would have to repay if his income was ever high enough.

208 It follows that AIPE, via its agent, made false, misleading and deceptive representations, engaged in unconscionable conduct, and failed to comply with clear and mandatory unsolicited consumer agreement provisions in the ACL. Declarations will be made to that effect.

## Consumer TK (supported by CF)

209 TK is an Aboriginal man, now 61 years of age, living in Bourke in the far north‑west of New South Wales. He has lived there all his life. He attended Bourke High School until year 7, and can read, but deposes to finding some words difficult. He can pronounce words without necessarily understanding them. He describes his writing as basic, and needs glasses to read. He does not have a computer or Internet connection at home and does not know how to use a computer, and in particular does not use email. Until about late 2014, TK was unemployed and on a disability support pension. He works as a groundsman at a radio station and it can be inferred that he must have started that job by the time of the events he describes, because he refers to contact with people at that workplace at that time.

210 TK’s affidavit is dated 6 April 2016, and refers to events some 18 months earlier in mid-October 2014. The affidavit must therefore be approached with caution due to the passage of that length of time, but the events are highly likely to have been unusual and for that reason more memorable than TK’s usual daily routine. Importantly, key aspects of what TK deposes to are supported by a volunteer worker at the radio station, **CF**, who is also a qualified accountant employed full-time elsewhere. CF’s affidavit was also sworn on 6 April 2016. I therefore also approach her affidavit with caution due to the passage of that length of time, but not with any preconception as to reliability.

211 In mid-October 2014, TK was told by three or four people he knows in Bourke that there were people from out of town giving out $50 cash and free laptops at the **Diggers** on Darling pub. The next day he had a conversation with a person from his workplace, during which he asked to be taken to Diggers because he wanted to sign up for a laptop. The response of the other person was to warn TK to be wary as there must be some catch to be getting a free laptop and money. TK responded that he wanted to go down there and see. He was thereafter driven to Diggers that morning.

212 When TK got to Diggers, the “*locals from Bourke that* [*he*] *saw inside… were all Aboriginal. There were about 15 to 20 locals gathered in the main room.*” He saw four recruiters, who looked to be of Indian appearance, in a back room. He doesn’t remember whether they had name tags or logos on their clothes. One or two of them were sitting at computers, with the locals going into the back room one by one. He saw one local man he knew (and identified by name), handing out $50 notes. The man approached him and asked if he was there for “*the laptop and 50 bucks*”, to which he said “*yeah*”. The man told him that he was being paid for getting people to sign up, and that “*the more I sign up, the more I get paid*”. The man then took him over to where the recruiters were and told him to sit down and “*this bloke will fix you up*”.

213 TK sat down at a table and had a conversation with one of the recruiters to the following effect:

Recruiter: Are you interested in $50 and a free laptop in a couple of weeks’ time?

TK: Yeah, why not.

Recruiter: You just need to sign up to a course. It’s online with the laptop and assignments are sent to you. It costs you nothing; you just need to sign up.

214 The recruiter then said something about a university or college and suggested a business course, to which TK said “*alright*”. TK wanted the money and the laptop and believed the recruiter when he said the course was free. He did not want to do the course because it sounded like it would be hard. He did not ask about the course, and the recruiter did not tell him anything about it. He was asked to provide his tax file number, which he obtained by either calling someone or going to his place of work. (The corroborating affidavit of CF referred to below deposes to her providing TK with his tax file number.) The recruiter then asked if he had an email address.

215 TK told the recruiter that he did not have an email address. The recruiter gave him a piece of paper with an email address written on it. He did not know how to use email and no longer had that piece of paper at the time of swearing his affidavit. The recruiter did not tell him what the email address was for. The recruiter then asked TK to write down some of his personal details. He cannot now recall exactly what the information was, but he believes that it included his address. He then signed some papers the recruiter gave to him, which he did not read. The recruiter did not explain any of that paperwork. The recruiter did not read the paperwork to him. He did not have his reading glasses with him so could not see very well. He does not recall any of the recruiters giving him any paperwork to keep. One of the recruiters said words to the effect of: “*You get to keep the laptop after you’ve finished the course. It will probably take a week or two to get the laptop.*”

216 The man who had taken TK to the recruiter then walked up to him and gave TK $50 in cash. TK then left Diggers. The process of signing up took about 15 minutes. The recruiters did not say anything about how long the course was or how long he had if he wanted to cancel his enrolment in the course, anything about the cost of the course or that he would have a debt for doing the course, which he would have to pay back. Neither recruiter asked him about when he finished school or his employment. Based on what he had been told, he thought the course was free, which is why he signed up.

217 CF’s affidavit describes providing TK with his tax file number, including a conversation wherein he was unable to say why that was needed, on 15 October 2014. Later that morning, CF had a conversation with another radio station employee, AD:

AD: There are a lot of people down there to get 50 bucks to sign up. They would never do the course.

CF: Who are they?

AD: I think they’re TAFE.

CF: Do they want to come and announce it on the radio? TAFE has a sponsorship with us. Let’s go down there and see if they want to advertise on the radio.

218 CF describes being concerned about what TK and AD had told her and wanted to see what was happening at Diggers for herself. That was why she suggested speaking to whoever was signing people up about advertising on the radio. Soon after that conversation, CF went to Diggers with AD. She saw people in both the main room and in a back room. She saw one of the recruiters who looked Indian in appearance. She saw a number of people in the back room signing things. There were no banners or logos from any institution in either room that she could see.

219 CF and AD approached the recruiter, whom AD had been introduced to as Kumar. CF and Kumar had a conversation to the following effect:

CF: If you’re TAFE, we’ve got sponsorship with TAFE over the radio and we could put an announcement on, free of charge.

Kumar: We’re not TAFE, we’re a private college.

220 CF did not think to ask what private college he was from. She was worried about the recruiters asking for personal information from local Aboriginal people, many of whom she deposed to having poor literacy skills. She was especially worried because they did not have any signage advertising who they were and what they were offering.

221 TK returned to the radio station soon after CF. They had a conversation:

(1) to the following effect according to TK:

TK: I signed up to a course and they gave me $50 and a free laptop. The course is free.

CF: Be careful. You may have to pay the money back.

(2) to the following effect according to CF:

TK: Yeah, I signed up to a course. They are gonna send us a laptop.

CF: Did you get a copy of any paperwork?

TK: No. I signed a form but didn’t get a copy.

CF: What did they tell you about the course?

TK: Not much. They only said it’s a business course done online on a computer.

CF: Did they say how much it would cost?

TK: It won’t cost anything. They told me it was free unless you earned a lot of money, but we wouldn’t have to pay because we wouldn’t earn that much.

CF: That sounds like HECS. If it’s HECS that would mean that even though you don’t have to pay the money now because you don’t earn enough, you will still have a debt against your name.

CF was familiar with the Higher Education Contribution Scheme (HECS) as she had a son at university. VET-FEE HELP was similar in concept to HECS.

222 The conversations recalled are on the same subject matter, and I conclude that both sets of words were uttered, or words to that effect.

223 It appeared to CF that TK was worried. She said to him that she would “*try to get onto these people and try and find out more about it*”, to which he agreed.

224 The following day, TK gave CF a piece of paper with the name Kumar, a mobile number and an email address. She rang the number and had a conversation to the following effect with a man or woman (Speaker):

CF: I understand you were in town signing people up for an online business course. I just missed you yesterday because I was out of town but I am really interested in doing a business course. Can you please tell me about it?

Speaker: It’s an online business course. The course is through AIPE. It is free. You don’t have to pay unless you earn over $50,000.

CF: So it’s on HECS?

Speaker: It’s VET FEE-HELP

CF: Who is it through?

Speaker: AIPE.

CF: What is that?

Speaker: Australian Institute of Professional Education.

CF: How much would I have to pay if I earned over $50,000?

Speaker: You would actually have to earn more than $51,000.

CF: Okay, but how much would I have to pay?

Speaker: It would just be a little bit at a time.

CF: Who to?

Speaker: I don’t know.

CF: Can you tell me more about the course?

Speaker: You can find more information about it on AIPE’s website.

225 According to CF’s unchallenged account of events, at no stage did the person she spoke to say that she would incur a debt if she signed up to the course.

226 TK started to have doubts about whether he should have signed up and said to CF:

I want to cancel and they can take their laptop and $50 back if they want it.

TK subsequently asked CF to help him write and send some emails to cancel the course. On 27 October 2014, she drafted two separate emails:

(1) an email to one of the recruiters called Kumar; and

(2) later on the same day, an email to AIPE at info@aipe.edu.au.

CF read each email out to TK, and he agreed to each being sent. TK annexed a copy of each email to his affidavit.

227 The email to Kumar bounced, in that CF received a notification that the email could not be delivered, so is only a relatively contemporaneous record of the matters recorded, rather than of those matters being communicated. The email states TK’s name and that he signed up to a course with Kumar when he was in Bourke on or about 14 October 2014. The email stated that he wished to cancel his participation and withdraw from the course. The email said that he understood he could do that without penalty. The email asked for confirmation of cancellation of the course.

228 After sending the email to Kumar and having it bounce, CF looked up AIPE on the Internet and found an email address “*info@aipe.edu.au*”. She also found a phone number, which she called, but no one answered.

229 The email to AIPE again includes his name and that he signed up to a course with Kumar when he was in Bourke on 14 and 15 October 2014. The email then stated (verbatim):

Although none of the people signing up received any paperwork, including any copy of what we signed, I have since been told the organisation Kumar was representing was the Australian Institute of Professional Education, although at the time he first led us to believe he was from TAFE but then said he was from a private college.

I now wish to cancel my participation and withdraw from any and all courses I signed up for. I understand that I can do this without penalty and will owe your organisation or the Australian government nothing.

Please email the above address confirming cancellation of my participation in any course with your organisation.

230 CF received a holding email from AIPE, stating:

Thank you for emailing AIPE StudyOnline, we will respond to your request shortly.

In the meantime, you may find the FAQ section on our website helpful-http://www.aipe.edu.au/about-us/faqs/

Please be advised that this email account is managed on Monday-Friday 9am to 4pm (excluding public holidays).

231 CF called the AIPE phone number again and got a recorded message. She cannot recall whether or not she left a message. She also contacted the HECS Assistance line, and was told to forward TK’s complaint to an email address, which she did.

232 On 12 November 2014, TK received a phone call from AIPE. CF was present in the room and heard TK say “[*n*]*o, I already said I want to cancel*”, followed by a pause, followed by TK saying “[*n*]*o, I definitely want to cancel*”.

233 A few weeks later TK received a laptop in the post. He opened the box and saw a bundle of documents, annexed to his affidavit. They included a courier satchel label with the name and Sydney address for AIPE, documents from the laptop manufacturer, and a chrome book policy from Empower Institute. TK took the laptop and some papers to the radio station on 3 or 4 December 2014 and showed them to CF, which both TK and CF have annexed to their affidavits. CF looked at the documents for TK and helped him by writing another email to cancel his enrolment, this time addressed to the Australian Institute of Higher Education on 4 December 2014. TK annexed a copy of that email to his affidavit. In addition to again providing his name and a reference to signing up to a course with Kumar when he was in Bourke on 14 and 15 October 2014, the email states the following (verbatim):

I am [TK], from Bourke and I signed up to a course with Kumar when he was in Bourke on 14th and 15th October 2014. Although none of the people signing up received any paperwork, including any copy of what we signed, I have since been told the organisation Kumar was representing was the Australian Institute of Professional Education. We were not told this when we signed up he just said it was a private college.

On the 27th October 2014 I sent AIPE an email cancelling my course application. Iwas unable to find out the course census date by either phoning or searching AIPE’s website. However, my cancellation email on the 27th October should have been well before the census date. Even though, to date, Ihave only received an automatic reply email stating the AIPE received my cancellation email. My original cancellation email should have been well before to any census date.

On the 12th November 2014 someone from AIPE phoned me to ask me if I was still doing the course. I told them that I had already cancelled. Then they suggested putting my application on hold but Itold them no, I definitely want to cancel my application.

This week I receivedaChromebook from Empower Institute, sent by the Australian institute of Higher Education. This is the first time I have heard of the Empower Institute or the AIHE and as I also have no knowledge of my course other than being told it was a Business course and therefore do not know the course start date, even with the Information regarding Census Dates, on the Empower Institute website,it would be impossible for me to notify either Empower Institute or AIHE of my application cancellation, with Empower Institute or AIHE, before today. As such, regardless of the Census Date, on any course, I am giving notice of cancellation now. If I am on any list for any course with the Australian Institute of Higher Education I statenow that I wish to cancel all and any application and do so with no penalty nor debt owed to Empower Institute, the Australian Institute of Education, the Australian Government nor any other third party. If Empower Institute requires its Chromebook back, I have already emailed them to let them know to arrange for its collection, as I do not require it because I have cancelledmy course application.

Again I would like to make it clear that I withdraw from any and all courses I signed up for. I understand that I can do this without penalty and will not owe your organisation or the Australian Government or any third party anything.

I wa**s** not given a student number on filling out the application nor has any student number been forwarded to me.

Please email the above addressconfirming cancellation of my participation in any course with your organisation and that it has been done with no penalty from the Australian Institute of Higher Education or any third party.

234 CF received three emails in response to her emails. The first was from AIH Higher Education on 4 December 2014, advising that the email had been forwarded to Empower Institute. The second email from Empower Institute on 5 December 2014 addressed to TK, confirmed his cancellation and said that it had been arranged to pick up the laptop. The third email, also from Empower Institute on 5 December 2014, said:

We have recently received your cancellation letter and can confirm that you are no longer enrolled into the Diploma of Business with Empower Institute and no fees have been charged in relation to this enrolment.

We are also looking into your concerns in relation to your agent and the information you were provided and in some cases, not provided. Please note that we take this matter very seriously and will be raising this with the agency in question.

Thank you for your patience and cooperation and we wish you the best of luck with your future endeavours.

There is no evidence as to what, if anything, happened after that.

235 TK does not have a laptop anymore because it was stolen.

236 On 14 May 2015, TK called the Australian Taxation Office to check if he had it recorded against his name was told that he did not have a debt.

237 AIPE points out that records extracted from AIPE’s CRM computer program establish that TK was referred for enrolment by UVision, that his enrolment was cancelled and he was not charged an amount of VET FEE-HELP. AIPE also asserts that there is no evidence that TK’s enrolment with AIPE reached the point contractually where there was any concluded agreement. AIPE point to there being no evidence that TK ever submitted an application for VET FEE-HELP, but the better view is that it can readily be inferred not only that he did not do so, but would never have done so if he had any idea that incurring a debt was part of what he was signed up to. AIPE relies upon the absence of any agreement between TK and AIPE for the purposes of ss 76 and 78 of the ACL to submit that no finding of contravention of those provisions should be made. However, I do not consider that cancellation of enrolment means that no agreement was reached, but rather that the agreement that was entered into was terminated upon that being requested. I therefore see no reason why ss 76 and 78 cannot apply.

238 The applicants submit, and I accept, that AIPE’s recruiter did not provide TK with information about his right to terminate his enrolment or how to go about doing that, and that this is a breach of s 76 of the ACL. Nor did they provide him with a copy of the unsolicited agreement that he must have signed in order to have been enrolled by AIPE at all, constituting a breach of s 78 of the ACL. Declarations of both breaches should be made.

239 AIPE accepts that findings of contravention of the ACL could be made, but points out, correctly, that part of TK’s evidence also refers to a second provider, Empower. As with MI, AIPE accepts that the Court may find that there may have been contraventions of the ACL in relation to TK, which may result in declaratory relief, but again submits that the Court should be cautious in making any finding that a failure to inform him that he would have to pay for the course was misleading or deceptive because that depended upon him reaching the income threshold before that was required, relying again on what was said in *Empower*. I do not consider that the additional evidence about Empower is any impediment to finding contraventions as sought by the applicants. It is also not to the point that this warranted similar or different conclusions in *Empower*.

240 The applicants submit, and I accept with the following slight modifications, that AIPE’s recruiter(s) told TK that he could get a free laptop and use it to study a course, and that the course itself was free. However, by reason of representations by omission, by not being told that he would have to pay for the course if his income was above a threshold, or that he would incur a debt for the course if he did not cancel his enrolment by a census date (which was not referred to at all), that overt free laptop representation and that overt free course representation was misleading. By omission, it was also deceptive and false, because neither the laptop nor the course was free in the ordinary sense of incurring no economic burden at all, and accordingly breaches of both s 18 and s 29(1)(i) of the ACL have been established, and declarations should be made to that effect.

241 As to the asserted unconscionable conduct and thereby breach of s 21, and having regard to TK’s personal background detailed at the beginning of the summary of his evidence, the applicants submit, and I accept, that a contravention is made out in all the proven and indeed largely unchallenged circumstances, because, with some variation as to how the circumstances are put by the applicants, AIPE’s recruiters in October 2014 signed up TK at a group sign-up event during which they, or at least one of them:

(1) offered him a free laptop to sign up to a course, caused him to be given $50 in cash, and told him that he would not have to pay anything;

(2) did not provide information to him about the nature or costs of the courses involved, nor did they explain the forms they asked him to sign or provide him with a copy of those forms;

(3) did not even refer to, let alone explain, the VET FEE-HELP scheme or the obligations arising from that scheme if he enrolled in a course, or the significance of cancelling enrolment in a course prior to the census date, and thus he was not told that anyone would have to pay anything for the course, let alone that enrolling in the course would entail him incurring a debt to the Commonwealth, which he would have to repay if his income was ever high enough;

(4) made no attempt at all to ascertain whether he was a suitable candidate with the intention of, and capability to, undertake and complete the course in which he was enrolled;

(5) made no inquiry as to whether he had an Internet connection at his home, or any other means of connecting to the Internet, and he was not told that such a connection was indispensable in order to be able to participate in any of the courses on offer;

(6) made false, misleading and deceptive representations (including by omission or silence), in contravention of s 18 and s 29(1)(i) of the ACL; and

(7) given that it is beyond any reasonable view that anything was done differently in relation to any of the other 10-15 Aboriginal and/or Torres Strait Islander consumers present and participating in the same process, it can reasonably be inferred that this was a deliberate and systematic course of conduct, rather than something that was unusual or out of the ordinary.

242 It follows that AIPE, via its recruiter agent, made false, misleading and deceptive representations as outlined above, and failed to comply with clear and mandatory unsolicited consumer agreement provisions in the ACL, in relation to TK. The unconscionable conduct allegation has also been made good. Declarations will be made to that effect.

## Consumer CRS

243 CRS is a 26 year old Aboriginal and Torres Strait Islander woman who had lived in Cairns for 20 years and on Cape York Peninsula for three years at the time that she swore her affidavit on 9 March 2016. CRS lived in Cape York between 2006 and 2009 and went to school at a State high school and subsequently went to school in Cairns at a College, leaving during year 11. She can speak English and Creole, but mainly speaks Creole at home. At the time of signing the affidavit she was unemployed and at home looking after her three children. She was in receipt of Centrelink benefits totalling about $1,400 per fortnight, including family tax benefits and parenting payments. She does not have a computer or Internet at home.

244 In about August 2015, about six months prior to signing her affidavit, on a Thursday just after lunch, a man and a woman knocked on her door and she had a conversation with them in words to the following effect:

Female recruiter: Do you want to apply for an online course?

CRS: I’m not interested.

Male recruiter: Are you sure, it is free online study.

CRS: No, I’m fine thanks.

They left soon after this.

245 About five minutes later, a man of “*Indian appearance*” knocked on the door wearing business clothes. He introduced himself, but CRS could not recall his name. He said “*I come from down south*”. He did not tell her the name of the college that he was from. They had a conversation to the following effect:

Male recruiter: Would you like a free laptop to do a course?

CRS: No, I don’t want to do it.

Male recruiter: The course is free, but if you earn more than $50,000 you will have to pay it back.

CRS: No.

Male recruiter: If you get me two or three people to do the course, you will get free Wi-Fi and a mobile phone credit. I can make an exception with my boss, if you get two other people.

246 CRS thought this was a good option and agreed to “*give it a go*”. He said, “*can we sit down to fill out the paperwork?*” They then went inside her house and sat down at the kitchen table and she understood from the conversation that the course would be free. He asked her for her personal details, including whether she was Aboriginal and/or Torres Strait Islander and asked what year she finished school to which she replied “*Year 10*”. He did not ask if she could read or write. He said, “*I’ll need your birth certificate, Medicare card, key card, concession card, tax file number and photo ID*”. She said she had some of those details but not the photo identification. He then copied the details from those documents onto the forms that he had in front of him. She did not fill out any of the forms herself. She did not read the forms.

247 He then said, “*we have courses in hospitality, management, marketing and childcare*”. She said, “*I’ll do the marketing course*”. He didn’t have any brochures for her to read about these courses. He said, “*if you want any information about them, you can look it up on the college website*”, but did not give her the address for the website. They then had a conversation to the following effect:

CRS: How long will the course take?

Recruiter: If you do it online, it will take 3 to 6 months. If you can’t complete it, you can ring up and extend the course for up to 1 to 2 years. When you log in for the first time there will be a test in the orientation.

CRS states that she was very confused. She must have conveyed at least a state of concern, because of what followed:

Recruiter: Look, don’t worry about it. I will just get another worker to do the orientation test for you.

CRS: Ok then.

CRS did not ask any further questions about this. The recruiter then said:

Recruiter: Someone will call you in 15 minutes to answer some questions.

CRS: I don’t speak English very well.

Recruiter: “I’ll just write the answers on a piece of paper so that you don’t get confused”.

She then saw him writing his notebook including the words “*diploma of marketing*” and “*earn $50,000 before you have to pay back*”. He also wrote some other things, but she can no longer remember what they were.

248 CRS recalls the man mentioning VET FEE-HELP, but he did not explain what this meant and at the time of swearing her affidavit, she still did not know what that meant. They then had a conversation to the following effect:

Recruiter: I have to get someone to identify you because you don’t have any photo ID. Do you have a JP or is there any other place that can witness documents?

CRS: No, not that I know.

Recruiter: What about the chemist? Do you go there often?

CRS: Yep, there’s one at Raintrees. We go there to get scripts.

Recruiter: We’ll go there.

249 The recruiter then drove CRS to the Raintrees Shopping Centre in his car. When they arrived he spoke to a lady that worked in the chemist. CRS did not hear the conversation. The lady of the chemist stamped a piece of paper. She and the man then walked out of the chemist and back to the car where he gave her a piece of paper and said words to the effect of “*can you please sign this? This is a contract for the course you are applying for.*” He did not say anything else and he did not explain what she was signing. CRS then signed the document he gave her before she got back in his car. This was the same document he had been writing on at her kitchen table. He said “we’ll send you a copy in the post”. CRS deposes to never receiving a copy in the mail.

250 When they were driving back to her house, she received a phone call from a lady on her mobile phone. The recruiter told her to put the call on speakerphone. The lady who called did not tell CRS who she worked for and she asked CRS to confirm her date of birth, name, phone number and address. During the conversation, words to the following effect were said:

Woman: What course are you applying for?

CRS: Diploma of marketing.

Woman: It is free, but if you earn over $50,000 you will have to pay it back.

CRS: Ok then.

251 It may be observed at this point that there is no overt reference to incurring a debt at the outset, despite the reference to paying money back. A person in CRS’s position should not be taken to have understood by inference that she was incurring a debt.

252 The woman who rang asked CRS some other questions, but CRS can no longer recall what they were. Throughout the conversation, CRS understood what she had been told to mean that she would not have to pay for the course and therefore did not understand what she meant by this. She wanted the man to go, so she just said “*ok*”. During the course of the conversation, the man was showing CRS the answers to each of her questions which were written in his notebook, which he had filled out while he was at her house before they went to the chemist. The answers he wrote out were to the questions the lady had then asked on the phone. The phone call took approximately five minutes.

253 When they arrived back at CRS’ house, she and the man had a conversation to the following effect (verbatim):

He said: If you want to cancel course, you can, but you have to do it within a timeline. You have a couple of weeks to cancel. If you don’t cancel within that time, you will have to pay it back.

CRS said: What do you mean I have to pay back?

He said: There’s nothing to worry about, it is nothing big. You are getting the free wifi and the free credit, there’s nothing to worry about. If you have trouble getting a laptop or Internet, give me a call.

254 He did not leave his phone number with CRS and did not leave her with copies of anything that she signed.

255 In October 2015, CRS received a package in the mail comprising a box that had the word “*AIPE*” on the outside, containing a drink bottle, a backpack and a hat. Each of those items had “*AIPE*” written on them. There was no laptop in the box, but there was some paperwork. She was angry because she had been promised a laptop, free Wi-Fi and credit to start studying and nothing had arrived. Annexed to her affidavit was a copy of an “*AIPE 2015 Online Learning Student Handbook*”, a copy of a “*6 month Study Plan – Diploma of Marketing*”, a copy of a document entitled “*AIPE e-learning website StudyConnect*” and a letter that confirmed her enrolment. After she received this box in the mail, she went to the local library to try log into the e-learning website with the details that had been provided. She could not login with those details.

256 About a week later she received a phone call from a lady who said she was calling from AIPE. They had a conversation to the following effect (verbatim):

Woman: Have you started on the course yet?

CRS: How do you expect me to start a course without a laptop?

Woman: Has a computer come?

CRS: No, I only got a bag, hat and a water bottle. I don’t have time to deal with this shit, I just want to cancel.

Woman: Are you satisfied?

CRS: No, the things the fella told me about that I would get for free have not come.

Woman: Ok, you can cancel.

257 During this conversation CRS could hear the woman typing and while she was doing that the woman did not ask any questions. The woman then said to her, “*Ok, everything is done. You won’t hear from us again*”.

258 This was the last contact CRS had from AIPE.

259 The recruiter did not provide CRS with information in writing that she had a right to terminate the agreement with AIPE within a termination period.

260 The AIPE CRM records show that the course start date for CRS was 27 August 2015, with the census date of 1 October 2015, that she was referred for enrolment by Online Study Pathway Australia and that she was charged an amount of VET FEE-HELP in relation to her involvement with AIPE. AIPE relies upon CRS’ evidence to the effect that she was orally informed that if she earned more than $50,000 she would be required to repay the costs of the course, that she was asked the level of schooling she completed, that the recruiter referred to VET FEE-HELP, that she was informed that if she wanted to cancel her enrolment, then she would need to do so within a couple of weeks or otherwise be required to pay back the course fees, that she received the AIPE Student Handbook 2015, and that she received a letter confirming her enrolment and setting out the course tuition fee of $19,600, which was to be paid by VET FEE-HELP, also containing information in relation to the census dates.

261 AIPE also points out that the student handbook contained information about the online e‑learning portal providing web-based learning, but that it was a requirement that the student have access to a computer and the Internet and have a basic level of computer literacy to access the course materials and contents, that AIPE may provide consumers enrolled as students with an electronic study assistant, certain information in relation to the census dates, and further information to withdraw after the census day resulting in a consumer being financially liable to tuition fees, and information in relation to the payment of fees either upfront or with the assistance of the VET FEE-HELP, with details of websites with additional information.

262 AIPE also relies upon the evidence of CRS that she attempted to log into the online course, and the absence of any suggestion in the evidence that she was not able to complete the course of study, did not have the requisite literacy or computer skills or the intention to undertake and study the course. AIPE submits that the evidence is to the contrary in establishing that she did have those requisite computer, literacy and numeracy skills, and intention.

263 AIPE submits that in considering whether the Court should find that there has been a contravention of s 76 of the ACL, the Court should have regard to the letter that she received, which contained information about VET FEE-HELP and withdrawing from the course and also the information in the AIPE student handbook. AIPE submits that CRS’ evidence that she was told that she would need to pay back the course if she earned over $50,000 is relevant in determining whether, as alleged, she was not told she would have to pay for the course. Once again, reliance is placed on the effect of the *Empower* decision in determining whether the alleged failure to inform CRS that she would have to pay for the course of study was misleading or deceptive and also whether the alleged failure to inform CRS that she would incur a debt to the Commonwealth if she did not cancel by the census date amounted to a contravention of s 29(1)(i) of the ACL.

264 The applicants put the question of what CRS was told verbally to one side, relying upon the obligation to provide her with notice in writing about her right to terminate her enrolment with AIPE and also how she could do that as being a contravention of s 76 of the ACL. It is clear that that contravention is made out. Oral provision of information is not an answer to such a contravention, although it may mitigate the serious of the contravention as against a situation in which the information was not provided at all.

265 Similarly, the applicants point to the failure of the recruiter to give CRS a copy of the enrolment agreement which was entered into immediately after she had signed the agreement, as being a contravention of s 78 of the ACL. Once again, it is incontrovertible that this contravention took place given the nature of the obligation, which cannot be met by providing the information later, except perhaps as mitigation.

266 In relation to false, misleading or deceptive conduct, the applicants rely both upon what CRS was told and what she was not told. She was told the course was free and that she could get a free laptop for signing up for the course and that she would not need to pay for the course if she did not earn more than a certain amount. The applicants submit, and I accept, that these representations constitute contraventions of s 18 and s 29(1)(i) of the ACL.

267 The question of what CRS was not told is somewhat more complicated. Although she was not told at the time that she signed the documents what the precise costs of the courses were, that was contained within the letter sent to her, again making it difficult to be considered a representation by omission, except that it remains a contravention for the limited time period between the time of the meeting and when she received the letter. She was not clearly told at the time, however, that enrolling in the courses would leave her with a debt to the Commonwealth if she did not cancel by the census date, and it is no answer that such information was supplied after she had enrolled. As such, that constitutes a representation by silence or omission and therefore constitutes contraventions of both s 18 and s 29(1)(i) of the ACL.

268 On the topic of unconscionable conduct and thereby a breach of s 21, and having regard to CRS’s proven and unchallenged circumstances, I accept the applicants’ submission that the process by which CRS was enrolled in the course by an AIPE recruiter was unconscionable because the recruiter did not say who he was working for, 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, did not provide her with written material about the courses (although that was later provided in the mail), including the cost of what was involved in completing the course before she signed up, or leave a copy of what she had signed. While the VET FEE-HELP scheme was mentioned, neither the detail of the scheme or the obligations arising from it were explained. No proper attempt was made to ascertain whether CRS was a suitable candidate to be able to do the course, especially in circumstances in which a relatively rudimentary enquiry would reveal that there were at least difficulties with her having sufficient numeracy and literacy skills to do the course. Her attempts to log on do not demonstrate that she had the necessary skills, and her evidence establishes, on the balance of probabilities, that she did not. It is not to the point that she made some attempt to do so, but rather whether those enquiries were made at the appropriate time. The fact that this conduct also constitutes false, misleading and deceptive representations, including by omission or silence, in breach of s 18 and s 29(1)(i) of the ACL, together with the contravention of the unsolicited consumer agreement provisions in s 76 and s 78 of the ACL, amply supports the conclusion that in all the circumstances the conduct of AIPE via its recruiter was unconscionable.

269 It follows that AIPE, via its agent and recruiter, made false, misleading and deceptive representations as set out above, and failed to comply with clear and mandatory unsolicited consumer agreement provisions in the ACL in relation to CRS. As already noted, the unconscionable conduct contravention has also been established. Declarations will be made to that effect.

## Consumer MS

270 MS is a 64 year old Aboriginal man who lives alone on a block of land outside of Cowra. He is divorced with adult sons. He was born in Sydney and lived in Cowra for 10 years at the time of swearing his affidavit on 3 June 2016 in relation to events that had taken place almost six months earlier in January 2015. He finished year 10 at a high school in Sydney and then did an apprenticeship to become a motor mechanic. He worked as a mechanic in Sydney for 30 years until he was involved in a car accident at work and sustained a neck injury. After that he was not able to work any more. He is unemployed and receives a disability support pension.

271 MS had diagnosed neck and back damage from the car accident and severe depression and anxiety, seeing a psychologist to treat these conditions. He was on medication to treat his depression and anxiety. About two years prior to swearing his affidavit he did a work health and safety course at the local TAFE, but had not done any other study. He had a desktop computer and a laptop at home with Internet access and an email address.

272 In January 2015, MS received an unsolicited email from AIPE. It explained that they were offering a course in human resources. The email, which he no longer has a copy of, appeared to be generic with the AIPE name at the top and an explanation of the college courses offered. He did not know how AIPE got his email address, but he had been planning to do a course in human resources at the local TAFE. Just before he received the email from AIPE, he had telephoned the course director of the TAFE and had been told that they were no longer offering the course as the government had cut the funding for it. He was interested in doing the course because his psychologist advised him to try and do courses to keep his mind busy and active.

273 MS went on the AIPE website and had a look at a PDF document which described the course. That document did not have anything about cut-off dates, how long the course would take, or what he would need to have to do the course.

274 Later that same month, a man from AIPE called MS. They had a conversation to the following effect:

Man: Are you interested in the Diploma of Human Resources Management?

MS: Yes. Is there any cost involved?

Man: There is no cost to you whatsoever at any time until you pass the course, get a job and start earning over $54,000. If this happens the ATO will make arrangements with you to pay it back.

MS understood this to mean that the course would be free unless he earned over a certain amount of money. He also understood this to mean that if he was not working, he would not have to pay for the course.

275 MS and the man then had a conversation to the following effect:

Man: You get a free laptop which you get to keep once you pass the course.

MS: I’m not interested in the free laptop. I’ve already got my own computer.

Man: It’s up to you.

MS: I don’t want one.

Man: No worries, I’ll note that down. Do you have the internet at home?

MS: Yes I do. That should be obvious you have already sent me an email.

Man: I will send you through the application forms.

MS: Is this legitimate?

Man: It’s an Australian accredited course.

276 The man from AIPE did not ask MS for any personal information about his current circumstances or his ability to do the course. MS said to him, “*I am a pensioner and I want to keep my brain active*”. The man said, “[*t*]*hat is fine, we don’t have an issue with that. You’ll get a diploma. It doesn’t cost you anything.*” MS tried to verify with the man whether it would cost any money. MS asked him how much it would cost about a dozen times. The man said, “*I assure you it won’t, unless you earn over $54,000*”. At no time did the man tell MS how much the course will cost or how much he would be required to pay back to the ATO. The man did not tell MS that he would be incurring a debt to the ATO at the point of enrolling.

277 About three or four days after this phone call, MS received an email from AIPE that had an application form attached. He no longer has a copy of that email. He recalls that the form was very basic and asked for personal information such as his name, address, phone number and the name of the course he wanted to do. He filled this form out and sent it back to AIPE by email. The form did not say anything about the cost of the course, the census date or any cooling off period. MS did not know what a census date was until December 2015. MS was not asked to provide a tax file number and did not think that he even had one, as he was retired.

278 On 22 January 2015, MS received an email from “*StudyOnline*” at AIPE. The letter thanked him for enrolling in the diploma of human services and told him that he had to fill out the VET FEE-HELP application form. A link to this application form was included in the email. The email also attached a course outline. MS annexed a copy of that email to his affidavit. He does not recall filling out the form.

279 On 23 January 2015, MS received an email from Ms Alyssa Sy at AIPE. In this email, she said that she was from the AIPE Profiler Team and that she had been trying to call him to organise an orientation appointment. MS annexed a copy of that email to his affidavit. MS replied to that email, providing a convenient time to speak, but she did not call him to carry out this appointment.

280 In February 2015, MS received a laptop from AIPE. When he received it, he called AIPE to say that he did not want the laptop, and had a conversation with a woman to the following effect:

MS: You’ve sent me a notepad computer. This is something that I didn’t want and I told the man this the first time on the phone.

Woman: Ok then, just leave it at home and if you need it you can use it.

MS: I’m just voicing my concerns as I didn’t want it in the first place.

Woman: I’ll note that down and I’ll send you an email with a return address if you decide that you don’t want it.

MS did not receive the email with the return address.

281 On 3 February 2015, MS received an email from Ms Madeliene Dela at AIPE. MS annexed a copy of that email to his affidavit. That email gave him information about the AIPE portal, his user details and his study plan. Prior to receiving this email, he had called AIPE to tell them that he was having trouble logging in. He spoke with Ms Dela and had a conversation with her to the following effect:

MS: The username and password to log in with aren’t working. Every time I log in, it doesn’t recognise my details.

Ms Dela: I’ll contact the technical department to work that out and will let you know.

MS: I prefer to use Gmail, I don’t want to use a new email.

282 MS still had trouble logging into the system even with the user details in the email. Ms Dela’s email said that she would call him on 11 February 2015. She did not call him back.

283 In about March 2015, he called AIPE and spoke again with Ms Dela. At that time he still had not been able to log into the course portal. He had a conversation with her to the following effect:

MS: Due to my family and health commitments, I can’t continue with the course.

Ms Dela: It will be okay to discontinue as it is only early March. I will send you the necessary paperwork. Fill it out and get back to us and that will be it.

MS did not receive the paperwork that Ms Dela mentioned, so he rang AIPE again later in March 2015. He had a conversation with Ms Anthea Levie in words to the following effect:

MS: Can I speak to Madeliene?

Ms Levie: Madeliene is not here but I can help you. I’m a student course coordinator.

MS: I want to withdraw due to my family and health commitments, I can’t continue with the course.

Ms Levie: No worries, everything will be fine. As soon as I see Madeliene I will let her know you have been in touch and she will call you.

MS did not receive a call from Ms Dela as promised by Ms Levie.

284 On 2 April 2015, MS sent an email to Ms Dela at AIPE. MS annexed a copy of that email to his affidavit. In that email he asked Ms Dela to call him at her earliest convenience.

285 On 7 April 2015, MS received a reply from Ms Levie, not from Ms Dela. MS annexed a copy of that email to his affidavit. That email asked him to send emails through to an alternative email address and said that a 1300 number would be the best contact number. Later on the same day MS called the 1300 number and spoke to another female advisor called Ms Alysier Marie. They had a conversation to the following effect:

Ms Marie: Everything will be okay. I will get Madeliene to contact you.

MS: I am waiting for the form to withdraw.

Marie: Everything is fine. I will let Madeliene know that you rang.

286 On 16 April 2015, MS called AIPE again. This time he spoke to Ms Monica Cochrane. He raised similar issues again. They had a conversation to the following effect:

MS: I haven’t been able to contact anyone and I still haven’t got the forms to withdraw.

Ms Cochrane: Everything is fine. We deal with a lot of students. You’re not in the course at the moment so don’t worry about it.

MS understood this to mean that someone he had spoken to previously had left a note on his file that said he had called earlier to withdraw. On the same day, MS received an email from Ms Cochrane. MS annexed a copy of that email to his affidavit. That email said that he should contact Ms Cochrane directly if he needed anything. He did not speak with her again.

287 MS did not hear anything from AIPE until 11 December 2015, when a male AIPE staff member called him. The man did not give his name. They had a conversation to the following effect:

Man: What’s happening with the course?

MS: I told AIPE in March that I wanted to withdraw because I was sick.

Man: We don’t have anything about that in writing.

MS: I spoke to Madeliene, she said it was fine.

Man: You’ll need to put it in writing. I’ll send you the forms to fill out.

288 MS felt upset and angry after this conversation, particularly because he had spoken to so many different people earlier in the year about wanting to withdraw from the course. He then received an email on the same day which required him to provide a reason for his cancellation request. He had to download a form from the AIPE website and then send it to an AIPE email address. Annexed to his affidavit is a copy of this email and also a copy of the email he sent back that attached the completed form. On the same day, he received an email from “*Notifications*” at AIPE, which confirmed that he had submitted his reason for cancelling from the course. MS also annexed a copy of that email to his affidavit.

289 On 12 December 2015, MS received an email from AIPE which explained that his request to withdraw from the course had been received, but that the census date for the course had passed on 26 February 2015. MS annexed a copy of that email to his affidavit. The email said that he had accumulated a VET FEE-HELP debt of $19,600. He felt intimidated by this email. MS deposes to having trembled at the knees and nearly dropping to the ground in reaction to the price of the course. That was the first time he had seen how much the course cost and that he now had a debt. The email also said that if he cancelled, the Department of Industry would be notified. He understood this to mean that he might get into trouble with the government if he cancelled. He found this very intimidating. Upon receipt of this email, he called Ms Maria Nguyen at AIPE on her direct line. They had a conversation to the following effect:

MS: I want to withdraw.

Ms Nguyen: Why are you withdrawing?

MS: Due to personal family issues, ongoing health issues associated with family.

Ms Nguyen: There isn’t anything to worry about. It will go to a dispute committee and it will take 7 to 10 days but I don’t think you’ll have any problems. You will need to provide documentation and any medical forms.

MS: I’ve had to speak to different people every time I have called.

Ms Nguyen: The women you were previously in contact with no longer work for AIPE. They were based in Manila. Everything is now based back in Sydney. I will send you the ‘dispute papers’ for you to fill in and send back to me.

290 On 12 December 2015, Ms Nguyen sent MS an AIPE “*Withdrawal Without Academic and Financial Penalty Application (Special Circumstances)*” form and information about the withdrawal process. MS annexed a copy of this email and the form to his affidavit. He saw on the form that he was required to provide documentation from his doctors about his medical condition. On the same day he called Ms Nguyen and had a conversation with her to the following effect:

I said: I can’t go straight to the doctors, I need to make appointments.

Ms Nguyen: That’s fine.

291 Two days later, MS called Ms Nguyen again and they had a conversation to the following effect:

MS: I’ve made appointments with the doctor and psychologist to get certificates. I’ll send them to you once I’ve got them.

Ms Nguyen: Ok.

292 On 21 December 2015, MS filled the application in and signed it. He explained that he was withdrawing due to ill health and personal and family matters. He emailed the documents along with a cover letter to Ms Nguyen on 21 December 2015.

293 MS rang Ms Nguyen on 4 January 2016, and asked whether she had received the documents. She said that she had not, so he went to the post office and sent a copy by fax. MS annexed a copy of this letter and the completed application form to his affidavit.

294 On 21 January 2016, MS received an email from Ms Anthea Levie, which explained that in order to finalise the dispute process he would need to send the laptop he received back to AIPE. On 25 January 2016, he took the laptop down to the post office and sent it back to the address provided by AIPE.

295 On 3 February 2016, he received an email from Ms Levie of AIPE, advising that they had received the laptop and would be processing his appeal. MS annexed a copy of the email chain to his affidavit.

296 Later the same day, he received an email from StudyOnline informing him that his application to withdraw without penalty from his course of study with AIPE had been successful. MS annexed a copy of that email to his affidavit.

297 In the cross-examination of MS, one of the few consumer witnesses called, it was established that he understood that the course having no cost meant that he was not required to pay unless and until he earned over $54,000. He accepted that it was “*free*” in that sense. But it should be observed that it was not free in the ordinary sense of incurring no financial burden or obligation.

298 It was also established in cross-examination that MS had received a verification call from OzFund Education in relation to his enrolment with AIPE, including the following exchange obtained from a recording of the call (exhibits 3R and 4R):

IO: Okay. I can see that you have decided to apply for the VET FEE HELP to pay for this course. Is that correct?

MS: Yes.

IO: Excellent. Just to let you know, you can always refer to your emails and the StudyAssist.gov.au website for any further information you need about VET FEE HELP. Do you require any further information from me now on this?

MS: Nope.

IO: Okay. AIPE has sent you an email with your census date which is the 26th of the 2nd, 2015. Have you received this information and do you have any questions?

MS: Received it and haven’t, and I’ve got no questions.

…

IO: Okay. As this is an online course, can I just confirm with you that you have regular access to a computer and to the internet?

MS: Yes.

IO: Okay. What was your reason and motivation for applying for this study course?

MS: To better my job opportunities.

…

IO: Do you have any disabilities, medical conditions or long term illnesses that may affect your online studies?

MS: No.

299 The applicants rely upon the undoubted fact that MS did not receive from the AIPE recruiter information about his right to terminate his enrolment with AIPE, or how to do that, in contravention of s 76 of the ACL. That information was not given on the telephone, nor provided until much later in writing. Despite this, AIPE submits that the Court should be reluctant to find that there was such a breach, in light of the verification call and the email of 22 January 2015 providing information about VET FEE-HELP and completing an application for that scheme. That information may mitigate the breach that occurred, but does not stand in the way of the contravention that I find took place.

300 AIPE similarly submits that the Court should be reluctant to find that MS was not told that he would have to pay for the course in light of his evidence in cross-examination that he understood that he would have to pay for the course in the future if he earned over $54,000. The problem with that submission is that it elides the distinction, real in MS’s mind, between having to pay for something as a future debt if his income was to reach that threshold, and incurring a current and on-going debt, which would only have to be repaid if that threshold was reached. The representation of the former is that the course is effectively free, whereas the latter is that it is never free, but the obligation to pay the debt incurred does not become enforceable unless and until the threshold is reached. The former is therefore misleading, if not false. A contravention of s 18 is therefore made out.

301 The representation that he would get a free laptop was misleading, because of the associated VET FEE-HELP debt obligation which was not explained to him at the relevant time. That is not diminished just because the obligation to pay the associated VET FEE-HELP debt might never arise.

302 It is plain that MS was not told the cost of the course as clearly demonstrated by his reaction when he found out how much it was, thus establishing a breach, by omission or silence, of s 18 and s 29(1)(i). Given MS’ evidence about the verification call, the allegation as to the census information cannot be sustained, despite his evidence in chief in his affidavit as to not knowing about the census date until much later. It seems that he had not remembered this particular detail.

303 On the topic of unconscionable conduct contrary to s 21, AIPE submits that the Full Court in *Unique* found (at [231]) that there was nothing inherently unconscionable about providing free laptops unless they were shown not to be of any use to the student or did not enable the student to start or finish the course for which they had incurred a debt; but rather were no more than a lure to encourage enrolment. That threshold has not been met. But the fact that this alone cannot constitute unconscionable conduct does not make its misleading character irrelevant to determining unconscionability. The Full Court was, in effect, seeing if any individual aspect could support the conclusion of unconscionable conduct. Somewhat akin to a circumstantial case, a case asserting unconscionable conduct may be made out by individual acts, none of which in isolation establishes that character, but in combined effect does.

304 AIPE also relies upon the questions asked of MS in the verification call, to which he was taken in cross-examination, about his ability to do the course, including whether he had Internet access so as to be able to complete the course and whether he needed further information about VET FEE-HELP. Reliance was also placed on the subsequent ability of MS to withdraw from the course without financial penalty and being able to contact AIPE regularly (albeit often without a successful resolution).

305 The applicants rely upon seven features in combination to make its case of unconscionable conduct:

(1) telling MS that he could get a free laptop, which was in fact a part of the incurring of a financial burden, and therefore misleading, although not false or deceptive in his particular case;

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

(3) not inquiring of his personal circumstances, which would have revealed the features which stood in the way of him being able to do the course – in substance this is aimed at the recruitment stage, at which time no inquiry was made, rather than the more limited inquiries made at the verification stage;

(4) not telling MS about the cost of the course, a critical feature that was not among those considered by the Full Court in *Unique*;

(5) not explaining the VET FEE-HELP scheme – nothing was said at the recruitment stage, and the question asked at the verification stage was limited to asking if he wanted more information, rather than explaining the salient features of the scheme, which was rendered more necessary in light of what he was positively told about the laptop being free and not having to pay anything unless his income was above $54,000, being only half of the truth;

(6) making misleading, and in places false or deceptive, representations; and

(7) contravening the unsolicited consumer agreement provisions of the ACL.

306 Weighing and considering the combined effect of these characteristics, I am satisfied that what took place with MS did constitute unconscionable conduct. It was only through very considerable perseverance that MS was able, finally, to obtain a satisfactory outcome. He was lured into enrolment that was, by the combination of features identified by the applicants, unconscionable. It is not to the point that the conduct was not as serious an example as was present for some of the other individual consumer witnesses.

## Consumer LT

307 LT is 24 years of age. At the time of the events to which he deposes he was 19, had only just finished year 12 and was still living at his parents’ house. By the time of his affidavit he was employed as a casual kitchen hand on a permanent part-time basis and also as a receptionist on a casual basis. The evidence to which LT deposes took place in 2014, and his affidavit was sworn in final form on 20 October 2017. As with the other consumer witnesses, I therefore approach his account of conversations with caution, but not with any preconception as to reliability.

308 In February 2014, LT was searching for jobs on various websites, providing his name, email and mobile number. Later that month he received a phone call on his mobile and had a conversation with a man who did not tell him what organisation he was calling from, but said words to the effect of “*I’m offering a free management course funded by the government. It will help you get a job*.” After a short discussion he was put through to a woman who spoke to him and said words to the effect of “*we are offering you a free course*.” During the conversation she repeated the phrase “*it’s a free course*” several times. LT said “*yes ok*” to the course, thinking that there would be no harm if he pulled out of a free course. During the conversation the woman asked for his full name, email address and phone number which he provided. He did not give her his tax file number. At the end of the conversation the woman said to him words to the effect of “*congratulations, you have signed up for this course*”. At no time did he sign any documents relating to any courses, nor was he asked by either the man or the woman to sign any documents. He was not told that he would be receiving documents to sign later. Nor did either the man or the woman ask any questions about his education or whether he was able to do the course. At no time did either explain that he was enrolling into a VET FEE-HELP course, nor explain that he would be incurring a debt if he agreed to enrol in such a course.

309 On 8 March 2014, LT changed his mobile number and did not receive any further phone calls from this man, a woman, or anyone else referring to the course.

310 In cross-examination, he was shown an email sent to him by AIPE with the date of 12 February 2014. He agreed that the bottom row of that email described it as being sent to him, but had no recollection of getting that email, did not remember seeing it, and denied receiving it. He accepted, based on how he had been shown the way the AIPE email system worked in cross-examination, that the email was sent to him. The evidence is therefore that the email was sent, but not that it was ever received or seen. It may, for example, have ended up in an email client junk mail folder, as happens from time to time. AIPE’s reliance on the contents of the email is therefore misplaced, because there is no evidence that the contents of that email were ever received by LT in the sense of being in fact communicated to him. That is one of the inherent perils of email. What matters for present purposes is that there is no evidence that the contents of the email was conveyed to LT, and therefore no evidence that it had any role in rectifying the representations or omissions from the initial conversation.

311 In about June or July 2014, LT received a package delivered to his home. Inside was a laptop and a brochure enclosed with a letter addressed to him. The brochure had the logo “*AIPE*” and the words “*Australian Institute of Professional Education*”. In his affidavit he said that this was the first time he had heard of this organisation, which remains as evidence that can be accepted. Even if the 12 February 2014 email had been read and received, it most likely would not have made any impact upon him and he could not have appreciated the significance of its content given the context and content of the initial telephone conversation.

312 In his affidavit, LT said that he did not want to start the course, or show that he had started the course, so he left the laptop alone. This deliberate choice indicates that LT did not know or understand that he had already been enrolled in the course.

313 On 3 July 2014, LT received an email from an AIPE email address congratulating him on completing the first section of his course and beginning the second section. LT annexed a copy of this email to his affidavit. He deposes to this being the first time he received an email from AIPE, evidence that can be accepted in light of the conclusion reached above about the 12 February 2014 email. At no time had he logged into any AIPE website or engaged in any study with AIPE, either before or after receiving this email.

314 On 18 August 2014, LT received another email from AIPE informing him that they would be sending a laptop to assist him in completing their course, which is curious in light of a laptop already having been sent. He annexed a copy of that email to his affidavit.

315 From 2014 to the end of 2015, LT received a number of emails asking how he was going with his course. LT annexed copies of those emails to his affidavit.

316 On 20 April 2016, LT received and read an email from an AIPE email address. The email explained that he had a VET FEE-HELP debt of $12,160. This was the first time he was ever informed about this. LT annexed a copy of this email to his affidavit. He then contacted the Australian Taxation Office which confirmed that he had this debt amount recorded against him.

317 The AIPE CRM records show that LT’s course start date was 12 February 2014, that he was referred for enrolment by Acquire Learning and that he was charged an amount of VET FEE-HELP in relation to his enrolment with AIPE. In the course of his cross-examination, LT said that he had completed his year 12 studies and in January 2014 had enrolled in a Bachelor of Arts degree at La Trobe University. When enrolling for University he signed up for HECS (the Higher Education Contribution Scheme) and understood in relation to that liability that he could attend university but defer payment for the course until sometime in the future. He agreed with questions to the effect that he understood that the census date is the date by which he could withdraw from a course without penalty without being charged VET FEE-HELP, and that after the census date he would no longer be able to withdraw without penalty and would be charged $6,080, but it is not clear when he had that understanding given that he was clear in not having received the 12 February 2014 email. He stopped going to university halfway through 2015.

318 AIPE submits that the Court should, in considering whether there had been a breach of ss 76 or 78 of the ACL, have regard to the 12 February 2014 email. The difficulty with that submission is twofold. First, the evidence is that LT did not receive that email. AIPE’s reliance on the decision in *Empower* is misplaced once the 12 February 2014 email cannot be relied upon.

319 Secondly, it is clear that LT was enrolled prior to that email being sent as it was the same day as the commencement of the course he was enrolled in. Accordingly, the information was only provided after the agreement was made and not before, and it follows that the requirements of s 76 were therefore not met. Similarly, in relation to s 78(2), if an unsolicited consumer agreement was negotiated by telephone, the dealer who negotiated the agreement must, within five business days after the agreement was made or such longer period as agreed, give the consumer a document evidencing the agreement. It does not appear that a copy of such an agreement was ever provided and accordingly the 12 February 2014 email does not address the requirement in s 78 of giving, not just sending, the agreement. Contraventions of ss 76 and 78 of the ACL are therefore made out.

320 In any event, the focus of the contraventions in question turn on the contents of the initial February 2014 telephone conversation, rather than what took place later. The issue is what was, and was not, communicated during those telephone conversations, being the point at which the agreement I infer must have been entered into, given the enrolment that followed. The repeated representations made to LT in that initial telephone conversation that the course was free were false and deceptive and are therefore contraventions of s 29(1)(i) of the ACL. LT was not told at that time that he would have to pay for the course, 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 by the census date, and by that omission, constituted representations by silence. Each of those three representations are contraventions of s 18 and also s 29(1)(i) of the ACL.

321 AIPE places reliance on the email of 12 February 2014, the fact that LT had enrolled in university and had access to HECS to pay for his university subjects, that a brochure sent by AIPE to LT in April 2014 contained the costs of the course and, further, that an email of 3 July 2014 sent by AIPE to LT repeated the substance of the 12 February 2014 email, but in relation to the second semester. Against that, the applicants rely upon the conduct of the recruiters in the initial telephone call which it is submitted was unconscionable conduct in contravention of s 21 of the ACL. That is said to be so because the recruiters:

(1) 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;

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

(3) repeatedly told him that the course was free;

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

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

(6) did not tell him the cost of the course (the necessary consequence of him being repeatedly told it was free);

(7) did not explain the VET FEE-HELP scheme or the obligations arising from the scheme if he enrolled in a course, or the significance of cancelling enrolment prior to the census date, including that he would incur a debt; and

(8) contravened s 18 and s 29(1)(i) of the ACL, as well as contravening the unsolicited consumer agreement provisions of the ACL.

322 The reliance by AIPE on information supplied after the conversation in April 2014, in June or July 2014 and on 3 July 2014, do not change the character of the conduct relied upon by the applicants as being unconscionable. The conduct in that initial February 2014 conversation, and the subsequent conduct in enrolling LT in a course and causing him to be charged with a VET FEE-HELP debt was plainly unconscionable and in breach of s 21 of the ACL.

323 It follows that declarations of contravention will be made.

## Consumer FM

324 FM is a 32 year old Victorian man, who took a standard educational program at his school until year seven and in that year began a modified program because his reading and writing was not good. He continued in this modified program until year 11 and had not completed any further education to the date of his affidavit. He used to work in transport, including driving a forklift, and now works in the hospitality industry. The evidence to which FM deposes took place in 2014, and his affidavit was sworn in final form on 6 October 2017. As with the other consumer witnesses, I therefore approach his account of conversations with caution, but not with any preconception as to reliability.

325 In about 2014, FM received a phone call on his mobile. He answered the phone and heard a male voice who said words to the effect of “[*h*]*i my name is Jamie calling from the Australian Institute of Professional Education. I’m calling to offer you a chance to do an advanced diploma course in management.*” FM had never heard of AIPE before and did not know how they got his telephone number. He told Jamie “*I’m sorry I’m not interested. I’m too busy with work.*” Jamie said “[*y*]*ou don’t have to pay anything for now until a certain time. You even get a free laptop.”* FM said “[*s*]*orry still no*”. At some point in the conversation, Jamie asked him for his tax file number, address and date of birth. FM provided that information because he could see no harm in providing those details, itself a telling indicator of his lack of sophistication. After this, what Jamie said to him was to the effect of “[*o*]*k I’ll send you some documents for you via email to sign*.” The conversation then ended. There is no evidence that any such documents were ever sent.

326 FM was not told what the courses were about or how much they cost. He was not asked any questions about his education or reading and writing skills. He never heard any mention about VET FEE-HELP, including that he would be incurring a debt if he enrolled in a course that was offered. He did not know anything about VET FEE-HELP at that time. At no time did FM agree with anything that was offered and has never signed anything from AIPE about enrolling in a course, and never gave consent to anyone else to sign on his behalf. He did not receive any emails from AIPE.

327 About a week and a half after FM received the first call from Jamie, he received a call from a person at AIPE every week or week and a half, or couple of days. He received at least five such calls. Each time he heard a voice different to Jamie’s, who asked whether he would attend the course, to which he responded each time that he could not do the course because he had a full-time job. Each time, the caller indicated that they would call him back in a couple of weeks to see how he was going. After about the fifth call when he told the person that he could not do the course because of his work, the person who had rung said something to the effect of “*okay no worries*” and hung up. FM received no further phone calls from people saying they were from AIPE.

328 Sometime in 2016, FM’s mother told him that she had been to their accountant for his taxes and was told that FM had a HECS debt. The next day he contacted the Australian Taxation Office, which confirmed that he had a VET FEE-HELP debt in his name of about $19,600. His sister helped him with trying to get out of this debt, and gave him an AIPE withdrawal form with written reasons, which he signed. In October 2016, he lodged a withdrawal request with AIPE. He annexed a copy of that request to his affidavit. As at the date of his affidavit he had not had his VET FEE-HELP debt removed and still does not know exactly how he was enrolled in a course with AIPE.

329 The AIPE CRM records show that his course start date was 6 October 2014, that he was referred for enrolment by Acquire Learning and that he was charged an amount of VET FEE-HELP in relation to his enrolment with AIPE.

330 AIPE points out that it is important to note that there is no allegation in the concise statement that consumers were enrolled as students without their consent and accordingly that such conduct should not form any part of a finding of a contravention of s 18 of the ACL. AIPE also submits that the evidence does not establish that FM had any particular vulnerability or disadvantage, which is a factor that should be considered when assessing whether AIPE engaged in unconscionable conduct in relation to him. AIPE again relies upon the comments made in the *Empower* case in determining whether the alleged failure to inform FM that he would incur a debt to the Commonwealth if he did not cancel by the census date amounts to a contravention of s 29(1)(i) of the ACL.

331 I accept that there is no pleaded case, even by way of concise statement, of enrolment without consent and accordingly this cannot be advanced as a basis for a contravention of s 18. However, it is clear that there were contraventions of s 18 and s 29(1)(i) of the ACL because FM was told that he would get a free laptop if he signed up for a course within the context of the need to incur an undisclosed debt, which was, false, misleading and deceptive. FM was not told 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. Both of these constituted representations by silence, amounting to contraventions of s 18 and s 29(1)(i) of the ACL.

332 The applicants submit that in light of FM’s personal circumstances, his enrolment caused by the AIPE recruiter was unconscionable in contravention of s 21 of the ACL. The applicants rely upon the following features of the conduct of the AIPE recruiter:

(1) not telling FM anything about the course, or what was involved in doing it;

(2) not telling him the cost of the course;

(3) not explaining the VET FEE-HELP scheme, or the obligations arising from the scheme if he enrolled in the course, or the significance of cancelling his enrolment prior to the census date, including that he would incur such a debt;

(4) not inquiring as to his educational background or ascertaining whether he was a suitable candidate with the capability to undertake and complete the course including whether he had sufficient literacy or numeracy skills (which would have revealed that he was not at all well-equipped to do any independent learning course);

(5) requesting his personal details without indicating that this would be used to enrol him in a course, which he had clearly and emphatically said that he did not wish to do;

(6) enrolled him in the course despite him saying that he did not wish to do the course; and

(7) made the false, misleading and deceptive representations referred to above.

333 I do not consider that FM not having communicated his vulnerability or disadvantage stands in the way of a finding of unconscionable conduct in this case. This was predatory behaviour in relation to any consumer, let alone a person with FM’s background. It was unconscionable.

334 Accordingly, the declarations sought will be made, except as to the aspect of enrolment without consent.

## Consumer KB

335 KB is a young woman and aged care worker living in a suburb of Hobart, Tasmania. She studied childcare and English at a college in Tasmania but did not complete year 12. She received a diploma in aged care in 2016. In 2014, she was not working and was in receipt of Centrelink payments. The evidence to which KB deposes took place in mid-2014, and her affidavit was sworn in final form on 6 October 2017. As with the other consumer witnesses, I therefore approach her account with caution, but not with any preconception as to reliability.

336 In about June or July 2014, she was looking for jobs and placed her resume with contact details on the Seek employment website. A few days after she placed her resume on that website, she received a phone call and had a conversation to the following effect:

Caller: Hi there, I’m from the Australian Institute of Professional Education and I saw your resume on Seek and saw you were looking for work. We can help you get into a course. Are you interested in doing a Diploma of Business? It’s free and you are guaranteed a job. It’s government funded.

KB: I’m interested in doing it but I don’t have internet.

Caller: Don’t worry, we can loan you a laptop and you can go to the library to do the course.

KB: Ok, I’m interested.

337 The caller told KB that the course was free. At no time did the caller tell her that by enrolling in this course she would incur a VET FEE-HELP debt. She would not have agreed to enrol if she had known this. The caller then asked for, and she provided, her full name, address, other contact details and tax file number. At no time did the caller ask her any further questions about herself, including as to her education, reading and writing, or numeracy abilities. The caller then said words to the effect of “[*o*]*kay you will soon receive login details to start the course*”.

338 A couple weeks later, KB received an email with the logo “*AIPE*”. She did not see any login details or any information about how to start the course, so she did not commence the course. She never received any course material.

339 Over the next 12 months into mid-2015, KB received a phone call every month or so from a different person who had a conversation with her identifying themselves as calling from AIPE and making sure that she had started the course. Each time she said that she had not received anything to do the course and did not even have a login. Each time the caller indicated that they would fix this, but at no time did any of these people or anyone else from AIPE provide her with access or details to the course.

340 Over the same 12 month period, KB received a number of emails from AIPE, asking her to start the course. She still did not receive any details on how she could start the course. She called AIPE on a number provided in the email and had a conversation with an AIPE representative wherein she said words to the effect of “*I keep getting these emails asking me to start the course but I don’t even have any course material and no idea on how* [*to*] *start the course*”. The person whom she spoke to said “[*o*]*k we will fix this*”. She still did not receive any emails or phone calls from AIPE about how to start the course.

341 In 2015, KP was having health problems and was admitted to hospital. She had her grandmother send an email to AIPE that she could not do the course now and would contact them later. While she was in hospital she received a phone call from an AIPE representative, who said words to the effect of “[*h*]*i I’m calling from AIPE asking whether you have started the course*”. She said “*I can’t complete it. I’m in hospital*.”

342 After KP had left hospital in or about August 2015 she sent an email to AIPE asking to withdraw from the course. She mentioned in the email that she wanted to withdraw because of her health and the fact that she was not doing well. About an hour after she sent this email she received an email reply from AIPE asking how she was going with her course. She could not see any reference to her request to cancel her enrolment in this email. That evening she got a phone call from someone at AIPE and had a conversation. The representative said words to the effect of “[*y*]*ou have to complete the course. Do you want a job or do you want to be on Centrelink for the rest of your life?*” She said “*I want to withdraw. I can’t do the course.*” The caller continued to encourage her to complete the course, but she continued to ask to withdraw. The last part of the call was to the following effect:

AIPE representative: You can withdraw at no cost because you did not start the course.

I said: It’s a government funded course so there shouldn’t be any charges anyway. I was told it was free.

AIPE representative: Oh yeah, of course.

343 In about February or March 2017, KB logged onto her Australian Taxation Office (ATO) account through myGov for the first time. She then found out that she had a debt of about $23,000. She did not know what the debt was for so she called the ATO. The person she spoke to told her it was for a course.

344 The AIPE CRM records show that KB’s course start date was 25 September 2014, that she was referred for enrolment by Acquire Learning and that she was charged an amount of the VET FEE-HELP in relation to her enrolment with AIPE.

345 AIPE submits that the evidence does not establish that KB had any particular vulnerability or disadvantage and again urges this Court to consider that when assessing whether or not there was unconscionable conduct in relation to her. AIPE also take issue with the applicants relying upon features that were not pleaded in the concise statement, as set out as part of the consideration below.

346 The applicants assert, and I accept, that the representation that the course was free was false, misleading and deceptive conduct and thereby a contravention of s 18 and s 29(1)(i) of the ACL because the course was not ever without a financial burden if continued past the census date. The applicants also rely upon representations by silence or omission as contraventions of the same provisions by not telling 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 by the census date. I accept that those contraventions are made out.

347 The applicants submit that in light of KB’s personal circumstances (summarised above), the circumstances in which she was enrolled in a course by AIPE’s recruiters was unconscionable and therefore in contravention of s 21 of the ACL because:

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

(2) KB was not told the cost of the course;

(3) KB was enrolled 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;

(4) the VET FEE-HELP scheme or the obligations arising from the scheme if KB enrolled in a course were not explained to her, nor the significance of cancelling her enrolment prior to a census date, including that she would incur a debt;

(5) no steps were taken to ascertain whether KB was a suitable candidate with the intention of a capability to undertake and complete the course, including whether she had adequate numeracy and literacy skills; and

(6) the above-mentioned false, misleading and deceptive representations were made in contravention of s 18 and s 29(1)(i) of the ACL.

348 The applicants also rely upon the following details which are not specifically pleaded in the concise statement, but forming part of her affidavit evidence, namely:

(1) KB, whom AIPE must have known was unemployed and looking for work because that was where her details were obtained from, was told that she would be guaranteed a job as a result of enrolling in and completing a course with AIPE (conduct that is not pleaded in the concise statement);

(2) KB was not provided with login details or materials to allow her to commence a course despite repeated requests and offers to do so; and

(3) KB was pressured not to cancel the course by being told that she would otherwise be on Centrelink for the rest of her life. This was despite the caller knowing she was attempting to cancel the course because of health concerns. KB was also falsely told that her cancellation would proceed without cost to her for the course because she did not start the course and because the course was government funded.

349 While I do not rely upon the specifics of those particular aspects given that they were not pleaded in the concise statement, they are part of the evidence that was served well ahead of the hearing as part of the factual matrix that can be taken into account in understanding the nature, context and detail of the representations that were made and relied upon.

350 In all the circumstances, I am satisfied that the behaviour of AIPE by its recruiters towards KB was unconscionable for the core reasons relied upon by the applicants, and that the contravention of s 21 of the ACL has been made out.

351 It is clear that there were contraventions of both ss 76 and s 78 of the ACL because, respectively, the AIPE recruiter did not provide KB with information about her right to terminate her enrolment with AIPE or how to do that, and did not give her a copy of the enrolment agreement that she signed.

352 Declarations will be made in accordance with the findings above.

## Consumer KP

353 KP is a single mother with three children. She was 25 years old in November 2014 when the events about which she gives evidence commenced. She lives in a housing commission house and receives a single parent part pension. She works part-time as a caseworker and before that worked as a home tutor for Anglicare. She finished year nine at high school when she was 14 and can read and write. She completed a certificate III in childcare at TAFE in 2013 and completed a certificate IV in community services in 2016. The evidence to which KP deposes took place in late 2014, and her affidavit was sworn in final form on 3 May 2016. As with the other consumer witnesses, I therefore approach her account of conversations with caution, but not with any preconception as to reliability.

354 On the afternoon of 7 November 2014, KP heard a knock on the front door. She was at home with her three boys who would normally have been at school at that time, but she had picked them up early as one of them had a doctor’s appointment. She saw a man and a woman whom she considered to appear “*to be of Indian background*”, both well-dressed. The woman was not wearing any identification and the man was wearing an identification tag, but she cannot recall a photograph. During the conversation that ensued, the woman said that she was from a company offering courses on behalf of a college.

355 During the course of the conversation the woman said “*I’m offering people the chance to do an online course. The course is free and you get a free computer or a free iPad. You also get a designated person to support you throughout the course*.” KP did not ask why the courses were free. At the time, she thought that they were free as part of a government program to get people in her area back into the workforce. At that time her employer offered free short courses to people in the area and she thought these courses were something similar.

356 At the time KP was interested in doing a course to improve her skills and career prospects. She asked “[*w*]*hat courses are you offering? I’m interested in a community service course*.” The woman told her “*we don’t offer courses in community services. We do have courses in business management and bookkeeping.*” KP said “*I’m not really interested those courses. I really want to do one in community services.*” The woman said “*the business one would be good if you want to manage a business.*” KP said “*I used to sell brand name clothing online so it might help me*.”

357 The woman then started getting more paperwork out and showed KP a piece of paper, which had a list of courses. The woman did not show any other brochures or pamphlets. KP saw a course in travel and tourism included in the list. KP pointed to the travel and tourism course and asked “[*w*]*hat’s that one?*” She asked about the course because her brother worked as a flight attendant, and she had always enjoyed travelling and wanted to travel more. The woman said “*I can sign you up for that course with another college but I’m not supposed to. We can also offer you a tablet for that one. You will get a computer for the business course and an iPad for the travel course*.” KP said “*sign me up for both then*.” The woman said “*I will need your driver’s license, birth certificate and tax file number*.” KP was not very interested in doing a business course, but thought she may as well try it because it was free. She also already had a computer, and deposes that the decision to sign up to do the courses was therefore not based on the offer of a free computer or iPad.

358 KP provided the identification documents that were asked for. Photographs were taken of the drivers licence and birth certificate using her phone and the male recruiter then asked her which email service he could use to send them to himself. She was shocked at him taking it upon himself to look at her emails, but said to use Yahoo. The photographs were sent using her Yahoo email address. She looked at her mobile phone and saw that the male recruiter had sent an email with photographs of her identification attached. KP annexed a copy of that email to her affidavit.

359 The female recruiter came back to the lounge room after having gone to the toilet and asked if everything was done. The male recruiter said that it was. The female recruiter handed KP a small tablet, and said words to the effect of “[*c*]*an you sign here to confirm you are enrolling in the courses?*” The woman gave KP a small pen-type instrument and pointed to a position on the screen. KP signed her name on the screen. The woman then said words to the effect of “*you will get an email from the colleges telling you that you are enrolled in the courses and what you have to do after that. You’ll receive a computer and iPad in the mail.*”

360 KP’s three boys were in the lounge room during the entire interaction and she was distracted because they were quite boisterous. The two recruiters were at her house for about 15 to 20 minutes. They went through the paperwork very quickly. She did not have an opportunity to ask questions as it seemed very rushed. They then left the house. They did not leave her with a copy of any paperwork. They did not show any other paperwork or give her any brochures, or ask her to read any information about the courses or how the courses were paid for. Neither told her that about being able to cancel her enrolment or how she could do that. They did not provide her with any information in writing about terminating any agreement.

361 KP thought the courses were free because of what the woman had told her. Neither salesperson told her that there was a cost for the courses or how they would be paid for. Neither of them mentioned that she would incur a debt for the courses.

362 On 25 November 2014, KP received an email from an academic support officer from AIPE about an induction session. KP annexed a copy of that email to her affidavit.

363 In late November 2014, KP received an email from the college that she signed up to do a business course with. She thinks that the email included login details, but can no longer find the email and thinks she must have deleted it.

364 In January 2015, KP logged into the AIPE travel and tourism online course. She started the first assignment. She was unable to complete the assignment because it was too difficult and time-consuming. At around the same time as starting the course, her then eight-year-old son was diagnosed with a cyst on his brain. This was a further reason for why she believed that she would not be able to complete the course. KP decided to withdraw from the AIPE course and the Empower Institute course as well.

365 In late January 2015, KP called AIPE and asked to cancel the course. On 29 January 2015, KP received an email from AIPE acknowledging her wish to cancel the course and providing her details on how to withdraw. KP annexed a copy of that email to her affidavit.

366 During the following week, KP sent an email to the AIPE email address that she had been given to withdraw from the course. She no longer has that email.

367 On 5 February 2015, KP sent an email to Empower Institute, noting that she would not be able to complete their course. She also detailed in her affidavit a series of emails about the process of withdrawing from the Empower Institute course, the details of which are not relevant to this proceeding.

368 One day in late February 2015, KP arrived home to find a package by her front door, which contained a new Acer Chrome laptop. There was no paperwork that came with the laptop and she does not know who sent it to her. In July 2015 she took three photographs of the laptop, which are annexed to her affidavit.

369 On 2 March 2015, KP received an email from Empower Institute requesting that she read an attached document. KP annexed a copy of the email and attached “*Commonwealth Assistance Notice*” document to her affidavit. She does not recall receiving a similar document for the AIPE debt that she incurred. She details further email communications with Empower Institute, which are not material.

370 In April 2015, KP enrolled in a certificate IV course in community services at TAFE. During the signing up process, VET FEE-HELP was explained to her by a TAFE staff member. She only had to pay $240 for the course because she was receiving Centrelink benefits. This was the type of course she considers that she could afford.

371 On 19 May 2015, KP received an email from Empower Institute telling her that the diploma of management course had been superseded by another course called the diploma of leadership and management. KP annexed a copy of that email to her affidavit.

372 On 27 May 2015, KP sent an email to Empower Institute requesting that someone contact her about withdrawing from the course. KP annexed a copy of that email to her affidavit.

373 When KP was preparing her affidavit, she reviewed all of the emails that she had received from Empower Institute. She opened an attachment to a 2 March 2015 email, being a Commonwealth Assistance Notice, and for the first time became aware that she had incurred a VET FEE-HELP debt of $5,328. Until that point in time she believed both the Empower and AIPE courses were free as neither VET FEE-HELP nor a debt had ever been mentioned or explained to her in relation to the courses. She signed up to the courses because, based on what the recruiter had told her, she understood that they were free and the travel and tourism course sounded interesting. However, she would not have signed up to either course if she knew that she was going to incur a debt of thousands of dollars.

374 In around July 2015, she made an online enquiry on the ATO website to find out if there were any other HELP debts (that is, VET FEE-HELP debts) against her name and found out that she had a debt of $41,280. Other than what she refers to in her affidavit, KP is not aware of any other basis for this debt. KP annexed a copy of the record from the ATO website to her affidavit.

375 On 11 August 2015 she received an email from AIPE which confirmed that she had incurred fees of $2,450. She annexed a copy of that email to her affidavit.

376 AIPE CRM records show that KP’s course start date was 7 November, 2014, that she was referred for enrolment by Career Point, and that she was charged an amount of VET FEE-HELP in relation to that enrolment.

377 AIPE accepts that on the basis of KP’s evidence, there could well be findings made of contraventions of the ACL, but also refers to the complication of dual enrolment with another provider, being the subject of findings in the *Empower* case. AIPE relies on what was said in that case at [571] and [573] in relation to the allegation that the failure to inform KP that she would have to pay for the course was misleading or deceptive or the allegation that the failure to inform KP that she would incur a debt to the Commonwealth if she did not cancel by the census date amounted to a contravention of s 29(1)(i).

378 AIPE’s recruiters did not provide KP with any information about a right to terminate her enrolment or how to do that, constituting a clear contravention of s 76 of the ACL. Similarly, AIPE’s recruiters did not give KP a copy of the enrolment agreement that she entered into by signing on the screen and this was a clear contravention of s 78 of the ACL.

379 As the applicants submit, and I accept, the positive representations to KP that the courses were free and that she could get a free computer for signing up for the courses offered by AIPE constitute contraventions of s 18 and s 29(1)(i) of the ACL, because the course was not without a financial burden and although the there was no separate charge for the laptop or iPad that was on offer, it too was not without a financial burden, being associated with the enrolment. I also accept the submission by the applicants that there were representations by omission or by silence constituting contraventions of s 18 and s 29(1)(i) of the ACL by reason of the fact that KP was not told that she would have to pay for the courses, and thus the AIPE course, the costs of the course or that enrolling in the course would leave her with the debt to the Commonwealth if she did not cancel by the census date.

380 The applicants submit, and I accept, albeit not in every respect submitted, that in light of KP’s personal circumstances and the manner in which her enrolment was procured, the way in which she was enrolled in a course by AIPE’s recruiters was unconscionable in contravention of s 21 of the ACL because they:

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

(2) did not provide KP with any written material about the courses, including as to the costs of what was involved in completing the courses, did not leave her with a copy of the paperwork after she had signed on the screen, rushed through the enrolment process and signed her up to two courses in around 15 to 20 minutes, during which time she was visibly distracted by her three children;

(3) did not explain the VET FEE-HELP scheme or the obligations arising under that scheme if she enrolled in a course, or the significance of cancelling her enrolment in a course prior to the census date, including that she would incur a debt if she did not do so;

(4) 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

(5) made false, misleading and deceptive representations, constituting contraventions as outlined above and also contravened the unsolicited consumer agreement provisions in the ACL as also outlined above.

381 It follows that declarations will be made in accordance with the contraventions found to have taken place.

## Consumer JC

382 JC is a 63 year old pensioner who was 58 years of age at the time of the events that she gives evidence about. She attended school until year eight and has four children, 23 grandchildren and 15 great-grandchildren. When she was 17, JC left a home and went to another town where she worked as a babysitter. She got married there and had four children. JC left when she separated from her husband and went to a women’s refuge, having two children with her at the time. She was at the refuge for a couple of months before she left and lived in an apartment in Parramatta where she stayed for a number of years and then lived in numerous suburbs in Sydney.

383 In June 1990, JC returned to her home town to live with her mother. JC had been at her present home for 13 years when she signed her affidavit. She is the primary carer for two adolescent grandchildren. She is dependent on a disability support pension for arthritis and a bad back. The pension is her only source of income. JC does not have a computer at home, has never used a computer or an email account, and does not have an Internet connection. The evidence to which JC deposes took place in late 2014. JC gave a statement to the ACCC in relation to its investigation into private colleges in June 2015, and swore her affidavit for these proceedings in its final form on 20 September 2016.

384 Sometime in late November or early December 2014, a man knocked on the front door of JC’s house. It was about 3:30 pm as her grandchildren were home from school. The man had an identification card around his neck, looked about 25 years of age, and was of “*Indian appearance*”. He mentioned the name of the college in Sydney that he was from, but had what she considered to be a strong accent so she found it hard to understand what he was saying. She was annoyed because she mistrusted door-to-door salesmen. They had a conversation to the following effect:

Recruiter: I’m here from a college in Sydney and I’m offering courses with a free laptop.

JC: Fuck off! I’m not interested.

Recruiter: No, no, no please give me a chance to explain. I’m here from Sydney. There’s a free laptop you don’t have to pay anything.

385 JC would not have let the recruiter inside. However, her 10 year old granddaughter was sitting in the living room and overheard the recruiter talking about a free laptop and said words to the effect of “*come on Nan go for it, get the free computer*”. She felt pressured by her grandchild, so she let the recruiter into her home. They went inside the living room. The recruiter only offered one course which she cannot recall the name of, however he mentioned something about the course, which she understood related to maths. They then had a conversation to the following effect:

Recruiter: The course is free, it’s online.

JC: I don’t have the internet at home. I couldn’t do the course.

Recruiter: We’ll put the internet in for you.

JC did not think to ask about how he was going to provide her with the Internet as she did not know anything about how the Internet works.

386 The conversation continued:

JC: I’d only want to do it so I can help my grandkids with maths and stuff. I’m a battler myself, I ain’t got nothing.

Recruiter: The course is free; it won’t cost you a cent. We’ll just send you a laptop in a few weeks and hook you up to a course. I just need your tax file number and your birth certificate.

JC: I don’t know how to use a computer I’ve never used one before.

Recruiter: That’s alright you’ll learn.

JC: Where is the course and how can I do it?

Recruiter: The college is in Sydney but the course is online. You’ll get all the course information with the computer. Do you have an email address?

JC: No, I don’t.

Recruiter: That’s fine. I’ll set one up for you.

387 At numerous times during the conversation, JC had to ask the recruiter to repeat what he was saying as she had trouble understanding him. At no point did the recruiter ask JC about her qualifications or employment. JC recalls at one point he asked what level of schooling she completed and that she said words to the effect of “*I went to about year eight or nine*”.

388 While she was talking to the recruiter, JC’s granddaughter kept saying words to the effect of “*go on Nan, it’s free, just do it*”. At one point the recruiter said to her granddaughter words to the effect of “*the course will help your Nan learn new things and she can help you*”. JC wanted to do the course because it was free and she thought it would improve her maths and allow her to help the family more.

389 The recruiter did not mention anything about course fees or VET FEE-HELP. She was not told when the course would start or how long it would take. The recruiter had told her that she would receive course information later on with the computer. JC had never enrolled in a course before, so she did not know what details to ask about.

390 JC still felt hesitant, but her granddaughter was really excited about the computer so she went into her back room and got her tax file number and birth certificate, which the recruiter photographed and also entered some details into a device which is similar to what couriers use when she signs for parcels. The recruiter then handed her a stylus pen and said words to the effect of “*sign here*” and pointed to the device. She signed the device using a stylus pen. He then said words to the effect of “*I’m writing down some details for you*”. He handed her a piece of paper with writing on it. She did not read it at that time, but annexed a copy to her affidavit. The piece of paper had a course name and email address written on it. JC did not understand why he gave these details to her or what they were for, but she believed it was something to do with the computer. She did not ask any further questions about the course at this time and assumed that she would be sent further information when she was sent the computer.

391 The recruiter made a call on his phone and then handed it to her. He said words to the effect that she “*just need*[*s*] *to speak to this person from the college in Sydney, he’ll explain a bit about the course*”. The man on the phone said “*I need to confirm your name and date of birth for the course*”. She gave her name and date of birth. They spoke for another minute, but she cannot recall what was said. He then said words to the effect of “*in about six weeks you’ll have your computer*”. She then handed the phone back to the recruiter and he spoke to the man on the phone for about a minute or so, but could not recall at the time of her affidavit what was said.

392 After the recruiter had finished entering details into his device, they had a conversation wherein he asked “[*d*]*o you know anyone else that would want to do this free course and get a laptop?*” JC replied, mentioning her daughter’s name and said that she would give him her number. She was hesitant to give the man any further details, but her granddaughter shouted out the address. She then said that address was just around the corner and he said that he would go around and see her in a couple of days. The recruiter then left JC’s home at about 4.00 pm, so he was there for about half an hour. He went outside and made a phone call outside the front of her house.

393 The recruiter did not leave any paper work about the college she had signed up to, her enrolment in a dual diploma of business and management, any form that she had signed or the course itself. The recruiter did not provide her with information in writing that she had a right to terminate an agreement with AIPE within a termination period.

394 Approximately five minutes after the recruiter had left, she called her daughter to warn her that the recruiter would be coming around. JC said to her daughter words to the effect of “*I’ve just signed up to a course to do with maths, it’s free you get a free computer and everything. It’s an Indian guy and he’ll be around in a few days*.” JC cannot recall what her daughter said, but had the impression that her daughter was angry that JC had given out her address.

395 Since KC was signed up for the course she had been contacted only once by the college. This happened about a month after the recruiter came to her house. She thinks it was in early December as the children were still in school. She cannot recall the conversation but does remember that a man introduced himself and said that he was calling from the college that she had signed up to. She said words to the effect of “*I’m not interested*” and hung up the phone. She had no further dealings with the college and did not receive the laptop.

396 When preparing her affidavit, JC read the piece of paper the recruiter gave her when she came to the house and she now realises that he had created an email address with a password. She recognised that it was an email address when the recruiter visited her home, but did not realise it was an account she could use. She does not know how to use email and has never accessed the email account.

397 JC gave permission to an investigator from the ACCC to access the email account and send any emails to his work email account and to a person at the Department of Fair Trading and also gave permission for the emails to be tendered as evidence.

398 Sometime in late December 2014, JC’s daughter contacted her and they had a conversation wherein her daughter told her that she had seen a school newsletter which said the courses were not free because there was a charge. She felt really bad because she had involved her daughter with the courses and was worried her daughter was going to be charged.

399 JC subsequently had a conversation with a teacher and found out what the courses were going to cost approximately, being $20,000, and that her daughter was involved as well.

400 On 29 April 2015, JC rang the ATO to check whether she had a debt recorded to her name and found out that she had a debt of $23,520 registered against her tax file number.

401 AIPE CRM records show that JC’s course start date was 29 October 2014, such that this amounted to a backdating of the course to a point in time before the first contact had been made with JC a month or more later. She was referred for enrolment by Uvision and was charged an amount of VET FEE-HELP in relation to her enrolment with AIPE. Those records also show that the VET FEE-HELP amount has been reversed in full and that her enrolment was withdrawn, such that there was no liability in relation to that enrolment.

402 AIPE accepts that on the basis of JC’s evidence, there could well be findings of contraventions of the ACL. However, AIPE again relies upon the comments made in the *Empower* case in determining whether the alleged failure to inform JC that she would incur a debt to the Commonwealth if she did not cancel by the census date amounts to a contravention of s 29(1)(i) of the ACL.

403 It is clear that there were contraventions of both s 76 and s 78 of the ACL because, respectively, the AIPE recruiter did not provide JC with information about her right to terminate her enrolment with AIPE or how to do that, and did not give her a copy of the enrolment agreement that she signed.

404 In relation to false, misleading or deceptive conduct, I accept the applicants’ submissions that the representations made to JC that the course was free and that she could get a free laptop constitute contraventions of s 18 and s 29(1)(i) of the ACL because there was a financial burden associated with the course and there was a collateral financial burden through the cost of, and thereby the debt from, the course in order to get a “*free*” laptop. Similarly, there were representations by omission or silence in contravention of s 18 and s 29(1)(i) of the ACL by failing to tell 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 by the census date.

405 I also accept the applicants’ submission that the conduct in relation to JC was unconscionable, in contravention of s 21 of the ACL, because:

(1) AIPE’s recruiters offered her a free laptop to sign up to the course;

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

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

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

(5) did not explain the VET FEE-HELP scheme or the obligations arising from that scheme if she enrolled in the course or the significance of cancelling her enrolment prior to the census date;

(6) took no steps to ascertain whether she was a suitable candidate; and

(7) made misleading or deceptive and false or misleading representations, including by omission, in contravention of s 18 and s 29(1)(i) of the ACL, as referred to above.

406 It follows that corresponding declarations will be made.

## Consumer RL

407 RL is a 47 year old Aboriginal woman who has lived in Mildura and Dareton for most of her life. She was 42 years of age at the time of the events about which she gives evidence. She was not employed at the time of swearing her affidavit and for the previous four years had been a full-time carer for her partner, receiving a carer’s pension and her partner receiving a disability support pension. They live in Aboriginal community housing. The evidence to which RL deposes took place in about late 2014, and her affidavit was sworn in final form on 29 February 2016. As with the other consumer witnesses, I therefore approach her account of conversations with caution, but not with any preconception as to reliability.

408 RL left high school towards the start of year nine and has not completed any courses or qualifications since then. She has basic reading and writing skills and gets help from a local family centre when she needs to deal with Centrelink forms or documents. She has a computer at home which she uses for games, but does not have an Internet connection at home and does not know how to use email.

409 In the late morning of a weekday in about mid-November 2014, RL heard a knock on her door. Her partner was at home but was out the back having a coffee. She opened the door to two recruiters. They were both wearing casual clothes and appeared to her to be of Indian background. They introduced themselves by name, but RL cannot remember their names now. RL had a conversation with the older recruiter to the following effect:

Recruiter: We are going around giving out free laptops.

RL: There must be a catch.

Recruiter: No there is no catch. You just have to sign up for a course. You don’t have to do the course if you don’t want to.

RL: What course? I can’t do any courses because I’m on a carer’s pension for my partner.

Recruiter: You can do the course at home. The laptops are free from the government. You can keep the laptops or do what you want with them. They are worth over $1,500 each. Can we come in?

410 RL thought the recruiters were from the government because of what they had said.

411 It was a very hot day so RL let the recruiters into her house. They sat down on her lounge. They showed her some brochures and one of the recruiters said words to the effect of “[*t*]*hese are the courses*”. She had a quick look at the brochures. They did not explain who the colleges were or any details about the courses. They did not ask any questions about her education or background. One of the recruiters said words to the effect of “[*y*]*ou do not need to do the course. You can keep the laptop or sell it.*” He also said “[*i*]*f you do not make more than a certain amount, you don’t need to pay. The government will pay*.” RL cannot recall the amount of money he referred to, but she remembers thinking at the time that it was more than her pension. This made her think that the government would be paying for the laptop and the course. She agreed to the free laptop and said “*ok*”. The recruiter showed her a document, which he did not read and he did not explain to her. She was only interested in the free laptop and wanted the recruiter to leave as soon as possible because she was about to prepare lunch.

412 The older recruiter wrote on one of the brochures, which had a picture of a tablet computer on it, the words “*AIPE College – Diploma of Travel and Tourism*”. RL annexed a copy of that brochure to her affidavit. He then said words to the following effect:

When a college rings you, you will have to tell them what course you are doing. If AIPE ring, you have to tell them that you are doing the Diploma of Travel for your free laptop. If AVLC ring, tell them you are doing the Diploma [of] Management. If Empower ring, tell them you are doing a Diploma of Business.

413 While the man was talking he also wrote things on two other brochures. On one brochure he circled the words “*Diploma Management*” and wrote the words “*free laptop*” and “*AVLC*”. He also circled the figure $13,000 and drew an arrow to the word “*government*”. RL annexed a copy of this brochure to her affidavit.

414 On the third brochure, the man circled the words “*Diploma of Business*” and “*Empower Institute*”. RL annexed a copy of that brochure to her affidavit.

415 Other than the description given above, the recruiter did not explain these brochures to RL.

416 The older recruiter and her had a conversation to the following effect:

Recruiter: Do you have your tax file number, photo-identification and birth certificate?

RL: I don’t have my tax file number.

Recruiter: I will ring the tax office for you.

417 The older recruiter made a call on his mobile phone, which was on loudspeaker. The person on the phone introduced themselves as being from the Tax Office. The person on the phone asked RL for her name, date of birth, and the number from her birth certificate, which she provided. The person on the phone read out her tax file number, which the older recruiter wrote down. RL gave the older recruiter her photo identification and he looked at it and wrote some numbers on a document and gave it back to her.

418 She then had a conversation with the older recruiter wherein he asked whether she had email and she responded that she did not. One of the recruiters then wrote down an email address on a piece of paper, which he gave to RL, but which she no longer has. She did not try to use the email address, because she did not know how to use email.

419 The recruiters were at her house for about half an hour. The older recruiter and RL had a conversation to the following effect:

Recruiter: I will pay you $500 cash if you introduce me to more people.

RL: I’m not travelling around with you blokes on a hot day like this.

Recruiter: Is there anyone around here?

RL: There is my cousin [name redacted] over there.

420 RL then pointed out the door to her cousin who lives across the road and was outside his front door at the time. The two recruiters then left and she saw them walk over to her cousin’s house.

421 The recruiters did not ask RL to sign any documents and she was not given a copy of any contracts or agreements. At no stage during their conversations with RL did the recruiters mention the words “*VET FEE-HELP*” or explain that she would incur a debt for agreeing to do a course. RL thought that the laptop was free, which she deposes to being why she gave the recruiter her details. RL could not do the course, because she is her partner’s carer and had no intention of doing any of the courses. If she had been told the cost of the courses she deposes that she would have told the recruiter to leave. At no stage did the recruiter tell her that she could cancel her enrolment or explain how long she had to do that. They did not provide her with information in writing that she had a right to terminate any agreement within a termination period.

422 At around Christmas 2014, a courier came to her unit and gave her a package containing a white HP laptop computer. There was no paperwork with it. In January 2015, another courier came to her unit and delivered a Chrome branded laptop along with a disc. She has not opened it or used the disk.

423 At some stage in 2015, RL’s lawyer told her that she had been enrolled in three colleges and that they had cancelled her enrolment.

424 AIPE CRM records show that RL’s course start date was 6 December 2014, that she was referred for enrolment by Vision Sales and that she was never charged an amount of VET FEE-HELP in relation to her enrolment with AIPE.

425 AIPE submits that there is no evidence that establishes that RL’s enrolment with AIPE reached the point in contractual terms where there was a concluded agreement nor that there was any evidence to suggest that an application for VET FEE-HELP was submitted by RL or a claim for payment made by AIPE in relation to her application for enrolment with AIPE. I do not accept that this is a barrier for most of the contravention declarations sought. There was an agreement entered into because RL signed as she was asked and because, as a consequence, she was enrolled with a course start date.

426 AIPE accepts that on the basis of RL’s evidence that there could well be findings of contravention of the ACL, but again draws attention to the second provider and the findings made in the *Empower* decision at [603]-[609]. Once again, AIPE urges caution by reference to the comments of Gleeson J in the *Empower* decision in determining whether the alleged failure to inform RL that she would incur a debt to the Commonwealth if she did not cancel by the census date amounted to a contravention of s 29(1)(i) of the ACL. I note that the applicants’ closing submissions at [125] suggest, by way of summary, that they are no longer seeking declarations of contravention of the unsolicited consumer agreement provisions with regards to RL, being s 76 and s 78 of the ACL, yet at [317] they do seek such declarations. I regard the former as a slip and attach decisive weight to the latter. In any event, having found that there was a contravention, I see no impediment in deciding that a declaration is appropriate.

427 The applicants submit, and I accept, that representations were made that constitute contraventions of s 18 and s 29(1)(i) of the ACL by reason of the fact that RL was told that she could get a free laptop by signing up to a 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. This was misleading, and within the relevant context also false and deceptive, because the VET FEE-HELP scheme did not only give rise to an obligation to pay for the course if an income threshold was reached, but incurred a debt, for which payments were only required when that threshold was reached. Thus, a financial burden would be incurred by signing up to the course unless cancelled in time. It was false, misleading and deceptive to describe a course that is proceeded with that gives rise to a permanent debt, even if only required to be repaid if an income threshold was met, as “*free*”. That representation was made even if the enrolment process did not go through to completion with RL. I therefore find that the pleaded contraventions took place.

428 Similarly, the applicants submit, and I accept, that there were contraventions by representation, by omission or by silence, of s 18 and s 29(1)(i) of the ACL because RL was not told the cost of the course or that enrolling in a course would leave her with a debt to the Commonwealth if she did not cancel by the census date.

429 The applicants submit, and I accept, that in light of RL’s personal circumstances (summarised above), the conduct of AIPE’s recruiters when enrolling RL was unconscionable, contrary to s 21 of the ACL. That is so, given that the recruiters:

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

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

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

(4) 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;

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

(6) did not explain the VET FEE-HELP scheme or the obligations arising under that scheme if RL enrolled in the course or the significance of cancelling enrolment prior to the census date; and

(7) also made the contraventions identified immediately above.

430 It follows that the declarations sought will be made.

## Consumer KS

431 KS is a 46 year old woman living in a major country town in south-western New South Wales. She lives in public housing with her now adolescent son. She has had learning disabilities all her life caused by a genetic disorder and also suffers from severe migraines. She is not employed, has never worked because of her disability and relies solely on a disability pension. She finished year 10 at high school and has not completed any courses or further study since leaving school. She cannot read or write very well. She can only read simple words and has difficulty in understanding big words. She also has difficulty spelling. She does not know how to use email, and has only ever used a computer to play computer games and to look at Facebook and YouTube. Before 2015, KS had never owned a computer or a laptop and does not have an Internet connection at home. The evidence to which KS deposes took place in late 2014, and her affidavit was sworn in final form on 2 May 2016. As with the other consumer witnesses, I therefore approach her account of conversations with caution, but not with any preconception as to reliability.

432 On a weekday in early to mid-December 2014, KS was sitting on her front veranda with her sister. It was around 2.00 pm because she was getting ready to pick her son up from school and needed to be there by 2:40 pm. She saw a woman walking in front of her house. The woman looked “*Indian in background*” and looked like she was in her late 20s or early 30s, and was wearing black trousers and a white blouse. She called out to the woman “[*a*]*re you the people giving away the free laptops?*” KS asked that question because her cousin had told her a week or two earlier about some people who looked Indian who were giving away free laptops from the government. The woman replied “*yes*” and walked over and sat with them on the veranda. She was not wearing a uniform or any identification and did not introduce herself or say where she was from. They then had a conversation to the following effect:

Recruiter: If you sign up for a course you will get a free laptop and after six months you get a free iPad.

KS: Can I sign up then?

Recruiter: Yes, I will get you to sign the paperwork.

433 The woman did not tell KS anything about the courses. She did not tell her if the course was taught online or face-to-face. KS did not ask for any more details as she did not plan to do any course because she knew it would be too hard for her. She just wanted to get the free laptop.

434 The recruiter then asked KS for her tax file number, birth certificate, pension card, and Medicare card. KS went inside and collected a Centrelink statement, which had her tax file number on it, her son’s birth certificate, her pension card, and her Medicare card, and gave them to the recruiter. They then had a conversation to the following effect:

KS: I don’t have my birth certificate. That’s my son’s birth certificate. My details are on it.

Recruiter: That’s fine.

435 KS saw the woman look at the documents, write some things down and take a photograph of each with a mobile phone. The documents were returned after the photographs had been taken. The woman then handed her some papers and said “[*c*]*an you sign here?*”, pointing to where she wanted KS to sign on two separate pages. KS signed her name on each page. There was writing on each page but she did not read it, because it looked too difficult for her to read. KS understood that she was signing up for a course. The woman did not explain the documents to KS or tell her what the documents were. KS then saw the woman write on the back of an envelope. The woman gave the envelope to KS. KS saw that the woman had written down the names of two courses: “*Empower – Diploma of Business*” and “*AIPE – Diploma of Hospitality*”. The woman had also written down an email address and password. KS annexed a copy of the envelope to her affidavit.

436 The woman did not explain to KS what the email address was for, nor ask KS if she knew how to use a computer or email or whether she had access to the Internet or whether she had an email address. They then had a conversation to the following effect:

KS: How long will the laptop take to get here?

Recruiter: About four to six weeks.

437 The recruiter then left. The woman did not give KS any paperwork, show her any other paperwork, give her any brochures about the courses, tell her anything about having to pay for the course, explain to her that she would be taking a loan from the government or tell her that she would have a debt if she enrolled in a course. The woman did not tell KS anything about her being able to cancel her enrolment in the course, or how to do that, or give her anything in writing about the course. The recruiter was at KS’ home for about 20 minutes. KS believed that the laptop was free on the basis of the recruiter telling her so.

438 On about 15 January 2015, a laptop was delivered to KS by Australia Post Courier. There was no paperwork with the laptop.

439 The balance of KS’s affidavit deals with further offers to provide free laptops, apparently on behalf of Unique International College. None of that evidence assists.

440 Had the events detailed above taken place in relation to a course offered by AIPE, and had that resulted in KS being enrolled in an AIPE course, the necessary nexus to AIPE would probably have been established and findings of contraventions would likely have followed akin to those made in relation to other consumers. However, as AIPE observes, the AIPE CRM records do not contain any record of a student with KS’ name, address or date of birth. No amount of VET FEE-HELP has been charged to KS. The envelope that is in evidence bears the name of Empower and of AIPE. It is not possible to know which college was involved and had supplied the free laptop. The only evidence as to enrolment suggests that it was not AIPE. There is no basis for concluding otherwise, and therefore there is insufficient evidence to make any of the declarations sought.

## Consumer GO

441 GO is a 48-year-old man who lives in Orange. He has lived there since about 2004. He lives with his now adolescent daughter with whom he shares custody with his ex-partner. He completed year 10 at high school and enrolled in a pre-apprenticeship course in 1987 in the hope of getting an apprenticeship in metalwork. However, he has a serious medical condition and was unable to continue his studies and withdrew within a few months of commencing. When he arrived in Orange, he worked in a number of jobs, including driving a truck, being an off-sider to a truck driver and a paper run. He is on a disability pension and has been since 2012 or 2013. He does occasional work locally. The evidence to which GO deposes took place in about late 2014, and his affidavit was sworn in final form on 2 May 2016. As with the other consumer witnesses, I therefore approach his account of conversations with caution, but not with any preconception as to reliability.

442 Sometime in about late October 2014 at approximately 11.00 am, a “*door-to-door salesman*” came to his home. GO was at home alone, as his daughter was at school. He was watching television. The recruiter was of Indian appearance, well-dressed and well spoken. He was wearing an identification tag around his neck, and showed it to GO. The recruiter introduced himself and the company that he worked for, but GO cannot recall those details. They had a conversation to the following effect:

Recruiter: I’m going around Orange to people’s homes to see if they want to do online courses. Would you like a change of career?

GO: I’m not working.

Recruiter: Are you on Centrelink?

GO: I’m on the disability pension.

Recruiter: I’ve got several free courses you can do online.

GO: I can’t do an online course my laptop is stuffed.

Recruiter: That’s alright we will send you a brand new one in a couple of weeks.

GO: What courses have you got?

443 GO had previously thought about enrolling in a business course as he was interested in starting his own business. His employment had previously involved manual labour and he thought that a business qualification would assist in future employment. The recruiter started to show GO two courses that were available at a college. This was done on a tablet. GO recalls one of the courses was for business management and he thinks the other involved hospitality, as it was very different to the business course. The information on the recruiter’s tablet was not detailed. He chose a business course and they had a conversation to the following effect:

Recruiter: I’ll enrol you in a business course, it goes for 6 months and the course materials will be emailed to you.

GO: What if I’m having trouble and I can’t finish the course?

Recruiter: You can get assistance online for the course. There aren’t any requirements to get into the course.

GO: If I cancel out of the course will I get to keep the laptop?

Recruiter: Yes it doesn’t matter if you drop out you get to keep it.

GO: How much does the course cost?

444 The recruiter avoided GO’s questions above, especially when he asked about how much the course would cost. GO asked the recruiter other questions about the course, but does not recall what was said. The recruiter was dismissive of his questions as if he was not listening to him and talked over the top of him. GO was concerned that there might be parts of the course he was not able to do, and was therefore concerned to get further details. The recruiter did not answer his questions directly. However, because the recruiter said that the courses were free, GO was not concerned about signing up without further information. The conversation continued to the following effect:

Recruiter: I need your birth certificate and Tax File Number.

GO: Why do you need my Tax File Number?

Recruiter: It’s for proof of age, for college records and their enrolment forms.

GO: I’ll go grab them.

Recruiter: Do you have an email address? If not, I can help you set up one.

GO: Yeah I do have one. It’s [redacted].

445 GO obtained the documents that were asked for and gave them to the recruiter who took photographs of them and then said words to the effect of “*I’ll just send these to the college and you’ll have to speak to someone from the college.*” The recruiter then called a number and spoke to someone. GO cannot recall exactly what was said, but he thinks it was his name and some form of identification number to the person the recruiter was talking to. The recruiter then handed the phone to GO. GO spoke to a woman, but cannot remember her name or who she worked for. It was a very short call with the woman doing most of the talking and GO mostly saying “*yes*” or “*no*” to the questions. He remembers confirming his identity. The call lasted about five minutes. The woman did not mention any details about the course or the cost of the laptop. After GO had spoken to the woman on the phone, the recruiter and GO had a conversation to the following effect:

Recruiter: Do you know anyone else that wants to do a free course?

GO: No.

Recruiter: You will be receiving, in the next day or so, a confirmation email of your registration into the course. You will also receive in the email, information about the course.

446 The recruiter then left without giving GO any documents about his enrolment or any information about the course he had been signed up to. The visit took about one hour. GO did not receive any emails, course materials or the laptop.

447 On 28 October 2014, GO received an email from info@studyonline.edu.au (**StudyOnline**) confirming his enrolment in a diploma of business. GO annexed a copy of that email to his affidavit. A short time later he received another email from StudyOnline welcoming him to AIPE StudyOnline with the diploma of business program. GO annexed a copy of that email to his affidavit.

448 The recruiter had not provided GO with information in writing that he had a right to terminate the agreement with AIPE within a termination period.

449 A few days after GO was signed up, he ran into a teacher who is also a community worker who assists people in the community. He said to the teacher words to the effect of “[*c*]*an you have a look at this course that I signed up to? Tell me what you think*.” He then showed her the two emails he received from AIPE on his mobile phone. She said “*look, come back another day so I can have a better look at all of this*”. The next day he went to one of the schools where the teacher worked and again showed her the two emails and had a conversation to the following effect:

Teacher: Do you realise this is going to cost you $20,000?

GO: Are you joking?

Teacher: No, look!

The teacher then pointed out the $19,600 figure on the computer.

GO: Can you help me get out of it?

Teacher: I’ll see what I can do and try to make some phone calls.

450 GO stayed in the teacher’s office while she called AIPE, using the number on one of the emails GO had received from AIPE. Following this call the teacher said words to the effect of “[*t*]*hey will send something to you. You need to fill out an online form to get the course cancelled*.” GO mentioned to the teacher that this recruiter may have visited other houses on his street. She then said words to the effect of “*I’ll have to let the community know about this. I’ll put something in the school newsletter.”*

451 On 3 November 2014, GO received an email from AIPE noting that he had indicated that he wished to cancel his diploma of business course. KS annexed a copy of that email to his affidavit.

452 A few weeks later, GO visited the teacher at the office of one of the schools that she taught at. She helped GO complete a form to withdraw from the course that he had been emailed. The form was provided as a link in the email. The teacher made a few phone calls on his behalf. She made a complaint to the Australian Skills Quality Authority. GO then left the teacher’s office.

453 On 21 November 2014, GO received an email from AIPE, noting that they had received his request to withdraw from the diploma of business course. GO annexed a copy of that email to his affidavit. Later the same day, GO received another email from AIPE, again noting that it had received his request to withdraw from the diploma of business course. The email also stated that his enrolment had been cancelled and that he would not accumulate a VET FEE-HELP debt. GO also annexed a copy of that email to his affidavit.

454 The AIPE CRM records show that GO was referred for enrolment by Uvision, that his enrolment was cancelled, and that he had not been charged an amount of VET FEE-HELP in relation to his application for enrolment and therefore has no liability in relation to that application. The “*exit comments*” made by him as recorded in CRM were as follows:

This was presented to me as a free course that would not cost me anything. I felt enticed to sign up by the offer of a FREE COMPUTER from a company claiming to be a Government Agency. I was also informed that even if I did not participate in the course that I could still keep the computer at no cost. There was never any mention of $19,600 and I was shocked when I received the paper work with this amount to be charged. I DO NOT WANT TO BE INVOLVED IN THIS PROGRAM AS IT IS A SCAM ON GOVERNMENT MONEY THAT LEAVES ME WITH A HUGE DEBT!!!!!!!

455 AIPE submits that there was no complete agreement between AIPE and GO and that GO did not incur any liability in relation to a course of study with AIPE. AIPE points out that the applicants at [125] of their submissions indicated that the declarations in relation to ss 76 and 78 of the ACL are no longer pressed, but this is contrary to the applicants’ submissions at [345]-[346] that such contraventions occurred. I again treat the earlier submission as a slip and proceed upon the basis of the later submission pressing for relief. Further, those declarations were inserted in the further amended originating application at [16], which was filed by consent on 4 October 2018. AIPE submits that the Court should not make any findings of a contravention of ss 76 or 78 of the ACL in relation to GO, especially as the evidence does not establish that there was an agreement in place. I reject that particular part of those submissions because the termination of the agreement and thereby the cancellation of the enrolment does not mean that an agreement did not exist. To the contrary, the very fact that there was an enrolment in place able to be cancelled indicates that an agreement did exist.

456 AIPE again relies upon the comments of Gleeson J in the *Empower* case in determining whether the alleged failure to inform GO that he would have to pay for the course of study was misleading or deceptive or that the alleged failure to inform him that he had incurred a debt to the Commonwealth if he did not cancel prior to the census date amounts to a contravention of s 29(1)(i) of the ACL. Contrary to AIPE’s submissions, I am satisfied that the contraventions of ss 76 and 78 of the ACL have been established because, respectively, it is beyond doubt that AIPE’s recruiter did not provide GO with any information about his right to terminate the enrolment or how to do that, and did not give GO a copy of the enrolment agreement that he had entered into.

457 I am similarly satisfied that what took place constituted false, misleading and deceptive conduct, both by commission and by omission or silence. As to the former, GO was told that the course that he was enrolling in was free, and that he would get a laptop if he enrolled in the course. I do not accept that the second representation of getting a laptop amounts to a contravention, because there was no overt representation that it would be free, even if that was an available inference to be drawn in all of the circumstances. However, the representation that the course was free was false, misleading and deceptive because the course was not free of burden, but instead involved the incurring of the debt unless the course was cancelled by the census deadline, being a debt that would remain to be paid even if the trigger for commencing repayments did not exist and never came into existence.

458 In relation to unconscionable conduct, I am satisfied that in all of the circumstances, including GO’s personal circumstances, what took place at his home was unconscionable conduct in contravention of s 21 of the ACL. The key salient grounds for reaching that conclusion are that:

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

(2) his tax file number was obtained upon the false premise that it was only to prove his identity and 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 cost of the course, plus 20%;

(3) GO was not told the cost of the course or given information about the content of the course;

(4) the recruiter 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;

(5) the recruiter made the false misleading and deceptive representation as to the course being free already referred to; and

(6) the contraventions of the unsolicited consumer agreement provisions of the ACL.

459 It follows that the declarations identified above will be made.

# SYSTEM/PATTERN CASE

## Evidence of former AIPE employees

460 The applicants submit that the evidence of AIPE’s former employees, Ms Lyndall Benton, Ms Romina Casale and Ms Glashie Qudsia, provides clear and mostly uncontested evidence of how AIPE’s business operated as relevant to this proceeding. The applicants place particular emphasis on AIPE’s processes and systems in place as to marketing and enrolment during the relevant period of almost three years from 1 May 2013 to 1 December 2015. This is therefore presented as evidence to prove AIPE’s marketing and enrolment system in place during that period, not just the times at which the witnesses were employees of AIPE, the earliest being from 20 January 2014.

461 AIPE counsels caution in relation to this evidence, while not substantially engaging with its detail. AIPE submits that there is an impediment in relying upon the employee evidence to prove, to the necessary standard of satisfaction, AIPE’s processes throughout the relevant period from 1 May 2013 to 1 December 2015, although even on that argument the evidence was at least relevant from early 2014 onwards when the first of the AIPE employee witnesses, Ms Benton, was in a position to give evidence as to what took place. Insofar as AIPE is referring to the *Briginshaw*/s 140(2) issue of the quality of the evidence needed to make findings, on the balance of probabilities, of serious wrongdoing, this submission elides the distinction between assessing separately and in combination the individual items of evidence, and the caution required in reaching the adverse ultimate conclusions sought by the applicants, including any indispensable intermediate conclusions.

462 It would be quite wrong to require each constituent piece of evidence to meet the *Briginshaw*/s 140(2) quality requirement, unless acceptance of an item of evidence was itself indispensable in reaching the ultimate conclusion. To use the metaphor from *Wigmore on Evidence*, deployed in the context of considering the requirements of circumstantial evidence by Dawson J in *Shepherd v The Queen* [1990] HCA 56; 170 CLR 573 at 579, the *Briginshaw*/s 140(2) quality of evidence requirement may well apply to a link of a chain of indispensable reasoning, but will not necessary or even ordinarily apply to a strand in the cable of such reasoning.

463 This point can be demonstrated by AIPE’s misplaced submission that none of the three employee witnesses can give evidence as to its VET business practices during 2013 because:

(1) Ms Benton commenced employment in January 2014;

(2) Ms Qudsia, although commencing employment in 2011, commenced that employment as a trainer of international students and was only transferred into a role in the VET business as a coordinator in August 2014; and

(3) Ms Casale commenced employment in November 2014.

464 That is, the AIPE employee witnesses give relevant evidence about what occurred when they were employees at AIPE from January 2014, from August 2014 and from November 2014. Because of that, AIPE asserts, without nuance or qualification, that “*[i]n this respect the employee evidence cannot be relied upon to support* ***any findings*** *as to AIPE’s systems or marketing and enrolment practice* ***prior to January 2014***” (emphasis added).

465 That blanket proposition only has to be reproduced for its illogic to be apparent, leading to its rejection in the form and to the extent stated. On that view of the world, the Court is compelled to treat the evidence at one point in time as having zero relevance to any other point in time, especially any prior point of time. Taken to its logical conclusion, evidence from Ms Benton as to AIPE’s systems or marketing and enrolment practices when she started on 20 January 2014, is not any evidence at all as to what those practices were on 20 December 2013, even if the evidence, viewed in a logical and coherent way, reveals little reason for any relevant change in that particular record keeping or other practice, such as between, say, 20 January 2014 and 20 February 2014. That way of viewing organisational change may be seen to be far removed from ordinary human experience and the repetitive nature of tasks related to such things as marketing and enrolment. This is not tendency or coincidence evidence, but direct evidence able to support inferences about a system.

466 Sometimes evidence of what happened at one point in time will say nothing about the past (or the future); but sometimes it will not be difficult to infer that it is reasonably representative of what has taken place for some time. That may be especially so in relation to systemic procedures and practices that must be repeated many times and may be shown to be slow to change and adapt when problems emerge, or perhaps only to change in superficial ways. That difficulty is part of what stands behind the pejorative use of the word “*bureaucratic*”, commonly used to describe rigid and inflexible procedures which do not substantially change over time, or take account of different individual circumstances or new or persistent problems.

467 The correct approach is to view evidence about what has happened at one point in time and conduct a rational assessment as to whether, in the context of other evidence, it may reasonably be inferred that this was representative in some way of what was in place at an earlier point in time, and if so, how far back. In that way, the evidence of individual consumer witnesses, for example, may be relevant in giving a basis for drawing such an inference by demonstrating that a practice described at one point in time within AIPE was experienced at an earlier point in time by a consumer. Resistance to change at one point in time, may strongly indicate that the proposed practice has not been attempted before. And adverse effects of change, resulting in such a change being watered down or reversed, may indicate that such a change in the system most likely (that is to say, on the balance of probabilities) would not have been present at an earlier point in time. Other evidence may also support such an inference, such as statements made that have an enduring rather than evanescent quality to them, or that reveal an attitude towards change or improvement that makes it more likely that an identified issue or problem has been in existence for a longer period of time, perhaps stretching, by way of sound and proper inferential reasoning, to some point well in the past.

468 It may be, for example, inherently unlikely that a particular feature of the system which rationally contributes to the financial success of an organisation was materially different just before a witness was employed, or even for some time before such a witness was employed, and has suffered a dramatic and unexplained change immediately prior to that employment starting. While extrapolating backwards is a potentially perilous exercise, with due care and restraint it is not an inherently unreliable use of evidence, let alone impermissible. It entails conventional inferential reasoning, albeit with a cautionary approach. This is also a civil and civil penalty context, not a criminal context. While the overall quality of evidence must be of the kind identified in *Briginshaw* before serious adverse conclusions can be reached, there is no requirement, akin to that in criminal law, in the final analysis to exclude explanations consistent with innocence beyond reasonable doubt, let alone in the steps leading to that final step. That would be to create a third standard of proof, which does not exist: *Unique* at [155]. That is not to say that alternative explanations for what has occurred can be ignored if they cast doubt on the soundness of the conclusion being agitated for.

469 It is with the above observations in mind that I consider the evidence of the former AIPE employee witnesses.

### Ms Lyndall Benton: inadequate processes and student complaints/Acquire/unsuitable consumers/monitoring of agents/OPSA/completion rates

470 Ms Benton began working at AIPE in January 2014 as the “*Student Services Manager*”. Prior to that, by way of background, she had worked in the education sector since 2004, including at Central Queensland University (**CQU**) and at the University of Newcastle (**UON**). She was the international student advisor at UON from June 2013 to January 2014.

471 The position at AIPE was advertised on the “*Seek*” employment website. At the time Ms Benton saw the advertisement, she expected the position would involve dealing with international students in tasks such as managing admission teams, supporting students and screening students in carrying out immigration reporting. Her first interview for the position took place in December 2013 with a recruitment agency called “*Exact Recruitment Services*”. A second interview took place at AIPE’s offices on 17 December 2013. The interviewers at the second interview were the human resources manager at AIPE, **Ms** Shumaila **Ali**, and the academic director, **Mr** Stephen **Davies**. Ms Benton had previously heard of AIPE due to their role as a pathway provider for international students during her time at CQU.

472 During the interview at AIPE, Ms Benton was not told much about the role. Instead she was asked questions about her experiences in dealing with students and with streamlined visa processing for international students. Because of those questions, she expected the role to relate specifically to international students. No reference was made to online courses.

473 Ms Benton was offered the role with AIPE the day after her 17 December 2013 interview. At that time she received a copy of the position description and contract. She commenced work at AIPE on 20 January 2014, and reported directly to the Chief Executive Officer (**CEO**), Mr Amjad Khanche.

474 Ms Benton was initially responsible for managing three staff members, Ms Nicole Zhang, Ms Sabina Koirala and Ms Upasana Amatya. Ms Zhang was primarily responsible for answering telephones, assisting with the front counter and carrying out confirmation of enrolment for visas. Ms Koirala handled the processing with international student admissions, such as generating offer letters and screening potential students. Ms Amatya provided support for on-campus students at the front counter and also assisted with the telephones.

475 When Ms Benton started with AIPE, the office was located in North Sydney. The campus was essentially an office block with three floors. Her office was situated near that of Mr Davies and some of the academic staff, near the reception area. The CEO and other senior staff were located nearby on the same floor.

476 When Ms Benton first started working at AIPE, she was not aware that consumers were enrolled as students in online courses. One of her team’s responsibilities was to answer calls made to AIPE’s main telephone line. Ms Benton’s team members fielded phone calls from consumers who were online students on this phone line. This was the first time she realised that AIPE had consumers enrolled as online students. Ms Koirala and Ms Amatya told her that if a consumer enrolled as an online student called the general AIPE number, they were to transfer the call to a 1300 telephone number. One day in January 2014, her team attempted to transfer the calls to the dedicated 1300 number, but the number was repeatedly engaged. Ms Benton had a conversation with Ms Amatya in words to the following effect:

Ms Amatya: What should we do?

Ms Benton: Who is in charge of online students?

Ms Amatya: John Luhr.

477 Mr John Luhr was responsible for AIPE’s online business. Ms Benton walked over to the other side of the floor to his desk and they had a conversation to the following effect:

Ms Benton: What’s going on? What are we doing with these online students? We can’t put these students through to the 1300 number that my staff have told me about as it is constantly engaged.

Mr Luhr: Just put them through to the number.

Ms Benton: We can’t get through.

Mr Luhr: Take their details down and I will call them back.

Ms Benton: Can I do anything to help?

Mr Luhr: No, you don’t deal with that.

478 Ms Benton and her staff continued to receive calls from consumers enrolled as online students with complaints. She again consulted Mr Luhr about what to do with these types of calls as they repeatedly were unable to transfer their calls to the 1300 number. They had a conversation to the following effect:

Ms Benton: A lot of the calls that I am receiving from our online students are complaints about AIPE and asking that their enrolment should be cancelled. What am I supposed to do with these?

Mr Luhr: Forward them to the call centre in the Philippines. I don’t want you or your team discussing their complaints with them.

Ms Benton: I’m worried we aren’t providing these students with an adequate level of service if we do that. Some of these calls are for simple enquiries.

Mr Luhr: Its GLS’ role, not ours.

479 Ms Benton deposes to “*GLS*” standing for Global Learning Support, a call centre based in Manila in the Philippines that managed AIPE’s 1300 number.

480 As the volume of phone calls increased, sometimes Ms Benton’s team were able to transfer these callers to Ms Roxanne Andrada or to Ms Lynne O’Hagan, who worked in the online team with Mr Luhr.

481 Ms Benton first learned about VET FEE-HELP through a conversation with Ms O’Hagan, an Online Academic Officer who reported to Mr Luhr. While she had worked with the University level FEE-HELP at UON and CQU, and had used it to complete her postgraduate studies, she had not realised that a similar scheme was being used for VET courses.

482 Ms Benton said that one day, Ms O’Hagan approached her and they had a conversation to the following effect:

Ms O’Hagan: Lyndall, would you be able to help me with some of these complaints that I’ve been getting from our online students?

Ms Benton: What complaints are those?

[After a response that was objected to and disallowed]

Ms Benton: Alright, can you provide me with any information you have and I will look into it.

483 During the course of discussing complaints that had been made, Ms O’Hagan explained that AIPE had many consumers enrolled as students using VET FEE-HELP. After that conversation, Ms Benton tried to view a consumer’s student record in the AIPE computer system. Ms Benton describes that system as the use of “*Microsoft Dynamics*”, being a custom-built Customer Relationship Management **(CRM)** software tool to enrol and monitor students. That system permitted AIPE to look up an individual consumer’s student record using the student number and whether the consumer was enrolled as a domestic student using VET FEE-HELP. A student record would also identify the census date, the broker that enrolled the consumer, personal contact details, the course assigned and the status of the course (i.e. whether they had applied for VET FEE-HELP, were currently enrolled or had withdrawn). It also had a section for documents to be uploaded and a section to record contact with a student. Ms Benton observed, however, that the online student records that she viewed did not contain any documentation evidencing what the consumer enrolled as a student had done to meet the entry requirements for the course. Moreover, no documents were uploaded, such as academic qualifications, high school records, proof of identity, application forms, offers of admission or signed course acceptance agreements.

484 After viewing the CRM system, Ms Benton asked to have a meeting with Mr Luhr, during which a conversation to the following effect took place:

Ms Benton: Can you show me how this works? I can’t find information about this student.

Mr Luhr: We’ve changed our processes a lot since then, you should just go by the census date.

485 Mr Luhr’s response is somewhat cryptic. He is apparently referring to some processes having changed in some way, perhaps with the liberalisation of VET FEE-HELP, not to the content of computer records changing. This is a good example of point in time evidence that can readily be inferred as applying to the situation in the past and at least to the preceding calendar year, 2013, in the absence of any evidence to suggest that there had been a material change in the CRM system at AIPE during 2013. That inference is assisted by the application of logic: it is inherently unlikely that an earlier version of the CRM system had earlier recorded such information and that this had inexplicably stopped taking place, even if other aspects of the system had changed.

486 Ms Benton drew Mr Luhr’s attention to an example where, for a particular consumer enrolled as a student, the census date was missing on the record. This meant the email that went to the consumer that normally contained the census date was also missing. They had a conversation to the following effect:

Ms Benton: If I got something like this, where the student was not advised of the census date, I would reverse the student’s debt.

Mr Luhr: Fine. If you think you know how to do these requests, then do it.

487 After this conversation, Ms Benton did some research. That research must have involved existing records and therefore I readily infer would have included records from 2013. As a result she realised that AIPE did not have any policy or appropriate form to enable consumers enrolled as students to make an application to withdraw from a course without financial penalty after the census date had passed. While there was a course withdrawal policy that catered for some domestic and international students, there was no specific policy or form by which a student could lodge an appeal in relation to a VET FEE-HELP debt. She also ascertained that, at that time, no information was provided to consumers about the meaning of the term “*census date*” or the financial implications of that term for a consumer. Rather, consumers were sent a long “*welcome to your course*” email, which had a sentence buried within the text advising them of the census date, but not informing them, let alone doing so clearly, that it was the last day to withdraw from the course without academic and financial penalty.

488 Ms Benton then had a conversation with AIPE’s CEO, Mr Khanche, to the following effect:

Ms Benton: Amjad, we are receiving many complaints from online students. A lot of them are unhappy that they have been enrolled. There is no process for withdrawal after census date without financial penalty and I am having difficulty identifying what stage of enrolment a student is up to. Information is missing from our system. I want to create a form to make sure it is done properly.

Mr Khanche: Ok, sounds good.

489 Two things are able to be derived from this conversation with the AIPE CEO:

(1) that the enrolment system resulted in a significant number of consumers who were enrolled at least unwillingly, if not unknowingly; and

(2) an expressed willingness to change this.

However, the evidence as discussed below reveals that changes that were made did not endure if they in fact had any marked impact on enrolment rates or numbers.

490 Following this conversation, Ms Benton drafted a policy and form with the title “*Withdrawal without Academic and Financial Penalty*”. The form included a section where a student could set out the reasons for wanting a withdrawal and attach any evidence in support of the reasons given. It also provided some guidance on the type of reasons that could be relevant. Ms Benton showed Mr Khanche the form and he asked her to have it reviewed by Ms Ali and Mr Davies. I infer that such approval was forthcoming because Ms Benton deposes to it being uploaded onto the staff share drive “*once it was approved*”. Ms Benton deposes to this new form initially being only available internally, and being provided to consumers if they contacted AIPE, presumably on this issue. Later, the form was publicly available on the AIPE website as well.

491 This was the beginning of Ms Benton’s involvement with online students at AIPE. After this, Mr Luhr was still in charge of the student support in GLS and handling complaints, but applications for withdrawal using the new form came to her. At this time, Ms Benton also asked Mr Luhr if she could revise some of the emails that went to consumers enrolled as students to make the census date more prominent and explain its meaning. She asked to do this because she considered that the consumers that she dealt with did not understand the implications of the census date. Mr Luhr agreed to this.

492 Ms Benton deposes to AIPE continuing to receive complaints relating to consumers not understanding they needed to withdraw before a census date to have no financial or academic penalty. So that she could understand why that was so, Ms Benton deposes to frequently discussing with Mr Luhr the stages of the enrolment process for prospective AIPE students. She was not familiar with the whole enrolment process, and describes the processes as one that “*kept changing without notice*”, which I take to be referring to the detail of what was done, rather than its substantive direction or core elements. In one of these discussions, she had a conversation with Mr Luhr to the following effect:

Ms Benton: Are there any academic entry requirements that people need to meet to enrol in a diploma course?

Mr Luhr: No.

Ms Benton: Not even something to test the students’ English literacy?

Mr Luhr: No, it’s not required. You talk to Stephen [Mr Davies] and can check for yourself on the training.gov.au website.

493 Ms Benton checked the training.gov.au website and saw there were no minimum academic entry requirements listed for diploma-level courses.

494 Ms Benton noticed that from late April 2014 the number of these complaints increased substantially. As other evidence makes clear, especially from Ms Casale, this coincided with a sharp increase in enrolments. Although Ms Benton was never formally delegated responsibility for dealing with online student complaints, her team began dealing with those complaints due to the high volume of calls that were being received. These complaints were passed to Ms Benton and her team by GLS staff in Manilla, or came through the main reception number handled by her team. Many of the phone calls from GLS were passed directly to her. As GLS staff became aware that Ms Benton was handling appeals, they began referring some difficult cases to her directly.

495 Ms Benton alerted the staff on her team to the “*Application for Withdrawal Without Academic and Financial Penalty*” form that she had drafted, as described above. To her knowledge, consumers making complaints about being enrolled in an AIPE course who believed their debt should be reversed were encouraged to fill out one of these forms and send it to her team. At this time, Mr Luhr was responsible for the email accounts info@studyonline.edu.au and info@aipe.edu.au to which consumers enrolled as students sent these forms.

496 Soon after moving from North Sydney to the new AIPE campus at Sussex Street, the volume of these complaints was sufficiently substantial that AIPE recruited an officer to deal with them specifically and take over management of the two “*info*” email in boxes referred to above. That new employee was Ms Tereza Korouva, who reported directly to Ms Benton. Ms Korouva passed “*withdrawal without penalty*” applications to Ms Benton, who noticed that many of the complaints from consumers enrolled as online students that she received continued to relate to consumers either not being informed, or being misinformed, of the census dates for the courses in which they were enrolled. Upon reviewing their files on the CRM, Ms Benton sometimes saw that either:

(1) the file showed that no email had been sent to the student informing him or her of the course census dates;

(2) if there had been an email sent, the census date was either omitted or incorrect.

In such instances Ms Benton used her discretion, in light of her prior knowledge of both the University level FEE­HELP system and the general consumer law, to process refunds and withdrawals for these consumers immediately, when that was what they requested.

497 In November 2014, AIPE employed another staff member, Ms Casale**,** to join Ms Benton’s team in the position of Online Student Team Leader to assist with consumers enrolled as online students. Ms Casale’s evidence is considered in detail below.

498 In order to address the problem of uncontactable consumers who were inactive after census and had incurred a VET-FEE HELP debt, Mr Khanche agreed to Ms Benton sending out a letter to those consumers. Ms Benton generated a report from the CRM for those “*inactive students*” and used this to create a “*mail-merge*” (that is, a form letter providing information was generated, with specific details for each consumer enrolled as a student drawn from the report generated from the CRM system). Ms Benton recalls there were thousands of these consumers listed on the CRM report.

499 Ms Benton completed the mail merge and also drafted a template letter to consumers who had been called many times but could not be contacted. To address this problem of consumers who were recorded as inactive students after their census date, who were therefore charged with a VET FEE-HELP debt, apparently due to misinformation or lack of information being provided about the census date, Ms Benton’s team conducted a mail-out to what she estimated to be thousands of consumers enrolled as online AIPE students who were recorded in CRM as “*inactive after census*”, but had a VET FEE-HELP debt. The meaning Ms Benton gave to the phrase “*inactive after census*” is addressed below.

500 Ms Benton recalls the letter contained the following information, using her own words:

(a) The courses in which they were enrolled;

(b) The census dates for those courses;

(c) Their login details;

(d) What amount they had been charged for their courses; and

(e) Who at AIPE they could contact in order to talk about their course.

501 Ms Benton deposes to AIPE receiving almost no response to this mail-out.

502 She describes the majority of complaints that she received as being from consumers who, in her words, said that they:

* did not know that they had been enrolled in an AIPE course;
* thought the course was free and said they had agreed to enrol only to receive a laptop;
* had to wait too long to receive their laptop;
* could not get through to the 1300 number; or
* asked why they kept being called/harassed.

503 Ms Benton observed that a lot of complaints were from people who kept receiving what they said were unwanted telephone calls. These phone calls were from GLS induction or support staff who were regularly calling consumers enrolled as students about their courses. When Ms Benton had occasion to ask consumers about their harassment complaints, she found that the phone number, time and frequency of calls matched the call logs in the CRM made by the GLS staff for those consumers. This is a reasonable indicator that the call logs may, in the manner of business records, be considered prima facie reliable.

504 Ms Benton deposes to her knowledge of GLS, the Philippines call centre used by AIPE. Her evidence is that in 2014, AIPE had a system in place whereby consumers could be contacted by a unit within the GLS call centre in the Philippines known as the induction team. The induction call was the first contact made with a student after they had submitted their enrolment online (including, it may be observed, such online enrolments carried out by recruiters). The ultimate purpose and scripts used for these calls changed over time. However the call was supposed to be conducted prior to the census date for the student to remain enrolled and be charged VET FEE-HELP. After a student had received an induction call, all calls to and from GLS thereafter were to be handled by the support team. The support team were another group of staff in the GLS office who attempted to make regular contact with consumers enrolled as students to help them with accessing and completing the course content. Ms Benton characterised these follow up calls as being essentially motivational in nature.

505 If GLS had been unable to contact a consumer enrolled as a student prior to the census date of the course, that consumer was supposed to be assigned the status “*Inactive Within Census*”. In those circumstances the consumer was not to incur a VET FEE-HELP debt as a “*verbal policy*” of AIPE’s. However, Ms Benton became aware, through a number of complaints that she received from consumers enrolled as student, that those who had not received induction calls did in fact incur VET FEE-HELP debts when their census dates passed. She also received complaints from consumers who did complete an induction call stating they believed the information provided to them was not sufficient to understand that they were incurring a debt. Ms Benton consulted with Mr Khanche about this issue. They had a conversation to the following effect:

Ms Benton: Amjad, I am worried that GLS is frequently not making contact with students for their induction calls prior to their census dates, and are not changing their system status to ensure that the new students are not given VET FEE-HELP debts. These students may not even know that they are enrolled. What should we do about them?

Mr Khanche: If there is a problem then the students will complain – we don’t need to worry about the ones who don’t complain. Let the students decide if they want to complain, we have sent them all of the information through email in writing. Besides, I’m regularly in contact with GLS management to make sure that they make these calls on time in the future, so this will not be a problem going forward.

Ms Benton: Even induction calls that have been made do not cover information about VET FEE-HELP properly. The call centre is not clearly explaining that this is a debt that students need to repay. I am also concerned after listening to the conversations about the ability of these students to undertake a course. Some have said in the phone calls they have only completed Year 9. They can’t do a diploma course. The bottom line is: we don’t know what a student’s highest level of schooling is.

Mr Khanche: Can you work with Swapna [Pawar] to look at the scripts that are used for these phone calls to make sure they cover the right information?

Ms Benton: Yes.

506 Ms Benton says that in a call of the type that she referred to in this conversation, the student told her they had only completed year 9 education. She states that it was not AIPE’s practice to screen the student’s education as part of the induction call. It is worth noting that Mr Khanche’s reference to problems being revealed by complaints is a clear indication that there was no active mechanism either in existence or in contemplation to address those consumers did not know about facts that could give rise to such a complaint, such as the existence of the census date, or the existence of, or incurring of, an VET FEE-HELP debt.

507 Ms Benton explains that the person “*Swapna*” referred to by Mr Khanche in the above conversation, Ms Swapna Pawar, was employed to supervise the GLS staff and work with them on processes. Ms Pawar was based in Singapore and would regularly visit GLS in the Philippines. Sometimes GLS executive managers flew to Sydney to meet with Mr Khanche and others at AIPE. On one such occasion, Mr Khanche brought Ms Benton into the meeting room and she raised with the manager the problem of induction calls not being made prior to the census date passing.

508 In July 2014 and again in September 2014, Ms Benton travelled to the Philippines. The July 2014 visit was with Mr Luhr and Ms Ali. They were met there by Mr Khanche and Ms Pawar. For the second visit in September 2014, Ms Benton travelled with Mr Luhr. For Ms Benton, the main purpose of both visits was to train newly recruited GLS call centre staff on how to conduct international, on-campus student pre-screening for AIPE. She needed more staff in Sydney to handle these calls and Mr Khanche asked her to have GLS staff perform these duties as it was cheaper. Mr Luhr and Ms Pawar were there to deal with AIPE’s online support section. However, when Ms Benton was there, she was occasionally pulled into conversations about consumers enrolled as online students.

509 On Ms Benton’s first visit to GLS in July 2014, she observed that GLS was a large call centre spread across a single floor of a building in Manilla. GLS appeared to service several Australian Registered Training Organisations (**RTOs**).As she walked through the building, she saw signs above different areas, which indicated which RTO that area served. These included Careers Australia, Evocca College and Study Group Australia. During that visit, she had a conversation with Mr Luhr to the following effect:

Ms Benton: How did AIPE come to use GLS as its call centre?

Mr Luhr: They were referred by Acquire Learning. They also use GLS’s services.

510 Also during this July 2014 first trip to GLS, Ms Benton was approached by a man who said that he was an Executive of Acquire Learning. He asked if he could show her something and took her to the other side of the call centre where there was an unsigned part of the floor, in which approximately twenty staff were reviewing curriculum vitae (**CVs**) on their screens. She later found out from Mr Luhr that these CVs had been supplied by Australian job seeker websites. Mr Luhr told her that Acquire tricked job seekers into enrolling in VET FEE-HELP diploma courses. Mr Luhr said words to the effect:

You know what Acquire does? They post fake job ads and then when people apply for them, they say that they are not qualified enough and then talk them into doing a course.

511 Thus at the most senior levels at AIPE, it was known that one of its key agents was engaging in conduct in relation to enrolments that should have been alarming.

512 Ms Benton saw from her visits that the AIPE section of the GLS call centre was split into two areas: the induction team and the support team. It was the job of the induction team to make the first contact induction phone calls to consumers recently enrolled as students. The support team’s role was to make calls to these consumers, encourage them in their coursework, to explain the online learning system, to book appointments with trainers either in the Philippines or in Sydney, or to arrange for their work to be marked by Sydney staff in order to pass a unit of competency.

513 Ms Benton deposes to the fact that Mr Khanche hired Ms Pawar, who lived in Singapore, sometime in mid-2014. Ms Pawar was employed to fly back and forth to GLS in order to monitor GLS’s performance. Ms Benton later discovered that Ms Pawar was Mr Khanche’s sister-in-law. Notwithstanding the employment of Ms Pawar, Ms Benton observed that throughout the second half of 2014 the volume of student complaints continued to rise.

514 In mid to late 2014, while processing some appeals, Ms Benton noticed that consumers who had recently been enrolled as students claimed they had asked AIPE to be withdrawn from their course, but had not in fact been withdrawn. The consumer’s student records on CRM would show that his or her course status was still “*current*”. When she checked the CRM call log on student profiles from GLS staff, she saw that a staff member at GLS had noted down in CRM that the “*student*” had verbally requested withdrawal from the course. She contacted Mr Luhr to show him what was happening. He said to her words to the following effect:

I’ve discovered that GLS staff have been withdrawing students from their courses incorrectly. Brokers have started complaining to Amjad [Mr Khanche] about this, saying that they have not been paid commissions for courses that students should still be enrolled in. Apparently, some students who want to study their courses and have not asked to be withdrawn, have been withdrawn by GLS. These students have been complaining to their brokers about this. I have removed the authority of GLS staff to withdraw students from their courses in order to address this.

515 Ms Benton deposes to frequently seeing in student records in CRM a diary note recording a conversation with the student showing that he or she had asked to be withdrawn from an AIPE course prior to census, but remained enrolled. When she came across this, she reversed the student’s debt, but only when she received an appeal form.

516 Ms Benton asked Mr Khanche and Mr Luhr to create a status of “*pending cancellation*” that would be available to GLS staff. She explained to them that this would allow GLS staff to mark consumers for withdrawal as students, but this would not be processed until a Sydney staff member had reviewed and approved that consumer’s request for withdrawal. This was approved and implemented approximately two weeks later. As a result, aprocess was established whereby Ms Korouva or Ms Casale ran a report from the CRM system each day to check which student enrolment records had the course status “*Pending Cancellation”*. They would then look at the notes and attempt to contact the “*student*” and then either approve or not approve those these cancellations.

517 Mr Khanche told Ms Benton that AIPE needed to follow a different process with Acquire Learning. Acquire Learning were instead to be notified by AIPE staff and given the opportunity to try to retain any consumer who had requested his or her enrolment as a consumer be cancelled, but only if the request was made prior to census date. This was a process known as “*saving*” the “*student*”. If the request was made after census date then Acquire Learning did not make an attempt to try and contacts those consumers and they would incur VET-FEE HELP debts.

518 Ms Benton described what happened when a student was “*saved*”: Acquire Learning sent an email to AIPE notifying that the student in question had been “*saved*”, so that the enrolment could be continued and the “*pending cancellation*” entry be removed from the consumer’s student record status. Ms Benton objected to this to Mr Khanche in a conversation with him in December 2014 to the following effect:

Ms Benton: I don’t think that Acquire Learning should have the right to try and “save” students who have requested that their enrolment be cancelled. I have received several complaints from Acquire Learning students who we have been told were “saved”, but who told me that they did not agree to remain enrolled.

Mr Khanche: OK, what changes to this procedure would satisfy you?

Ms Benton: I think that the student should have to put in writing that they had agreed to remain in the course and under stood their census date and the amount that they would be charged.

Mr Khanche: Okay, I will see that this is done.

519 Ms Benton describes how AIPE then introduced a process where the student would have to specify in writing that they agreed to continue their course. However that only lasted a matter of perhaps a few weeks, and then Acquire Learning returned to the former process of sending an email advising the student was “*saved*”, but without the student confirming in writing that they wanted to carry on with the course and understood the consequences of doing so. These consumers incurred a VET FEE-HELP debt when the census date passed.

520 In late 2014, Ms Pawar and Mr Luhr informed Ms Benton that the management of GLS had changed, and there was a new CEO and upper management team. Ms Benton knew from the complaints she received from consumers who had been enrolled as online students that the GLS induction team continued to fail to contact a significant number of them before their census date. These consumers continued to receive a VET FEE-HELP debt once the census date passed. She was also receiving complaints that consumers were being sent the same email by GLS multiple times, and were not being called back by GLS staff. At either the end of 2014 or the beginning of 2015, a decision was made by Mr Khanche to terminate AIPE’s contract with GLS.

521 Once the contract with GLS ceased, Ms Benton’s team took over the roles previously performed by GLS. The online team at that time, comprising Ms Casale, Ms Anthea **Levie** and Ms Korouva, began recruiting new staff to make induction and support calls. She and her team attempted to implement measures to actively identify new enrolments that did not represent genuine consumers, so that these enrolments would not continue past census date.

522 Ms Benton described the CRM system operating so that when a consumer enrolled as a student was listed as having “*current*” status, this triggered the CRM workflow to immediately allocate the full course subjects and the census date. Ms Benton sent Mr Khanche and Mr Luhr an email which explained the workflow to stop listing the consumers as “*current*” students until after they were contacted through the orientation phone call to confirm they wanted to participate in the course. Some of these new processes caused falls in enrolment numbers overall and also complaints from AIPE’s brokers.

523 This evidence supports a compelling inference that AIPE’s enrolment system, until the changes that Ms Benton introduced, resulted in consumers being enrolled despite not being bona fide or genuine students. This accords with the evocative illustration afforded by the evidence of the individual consumer witnesses. The reaction of Mr Khanche next described is to be understood in that context.

524 Ms Benton then learned through her staff, and by seeing a changed workflow on the CRM system, that Mr Khanche had intervened to stop the new workflow process. She confronted Mr Khanche about this and he said to her words to the effect “*This process cannot continue as I have received complaint calls from brokers. We should have plenty of time to call them within the census period.*”

525 Ms Benton also added words to the induction script to ensure that if a consumer advised AIPE that he or she did not have access to the Internet, then the prospective student would not be enrolled. Mr Khanche changed the script to the effect that the AIPE staff member was required to advise a consumer in this situation to go to the local library and use a computer and the Internet, or go to the house of a friend or family member which had access to a computer and Internet. Those consumers would then be enrolled as students and incur a VET FEE-HELP debt. In cross-examination, Ms Benton was taken to a GLS call centre script in order to suggest that such a change had not in fact taken place. The script in question that she was taken to had the following:

**Does the student have regular access to a computer and the internet? TICK BOX**

As this is an online course, can I just confirm with you that you have regular access to a computer and to the internet? Make sure this is a yes, otherwise a change in start date may be applicable if they are waiting for this.

526 While this script did not contain the change that Ms Benton had deposed to, it did not contradict the thrust of her evidence. Rather, this was the sort of entry that she had sought to change to make the question more specific, so is not the form of script she was referring to having changed in the first place. The reference to “*regular access*” in this script was in any event vague and left it open to GLS staff to advise a consumer in this situation to go to the local library and use a computer and the Internet, or go to the house of a friend or family member which had access to a computer and Internet.

527 A common complaint that Ms Benton received from consumers enrolled as students was that when they received their induction call, the broker was standing next to them and prompting them with answers to questions posed by the AIPE staff. She also received complaints from consumers who advised her that brokers had pretended to the AIPE staff to be the consumer during the induction telephone call. Ms Benton implemented a rule that the induction call could not take place with the consumer proposed to be enrolled as a student when the broker was present. This meant the induction staff would not accept incoming calls from applicants or brokers to complete an induction call on the spot. Instead the consumers would be added to a workflow and an outbound call would be made to the applicant a few hours after they had applied online for the course. In response to this, Mr Khanche said to Ms Benton words to the effect “*this process can’t continue, I have received complaint calls from brokers and our enrolment numbers have dropped significantly.*”

528 This last comment is, in context, effectively an admission that the AIPE enrolment system had resulted in consumers who were unsuitable being enrolled as students as recognised by the recruiter blocking the proper induction call that might have detected this. Such consumers were then incurring VET FEE-HELP debts by being enrolled when they should not have been. There is no plausible alternative explanation on offer. In turn, it can readily be inferred that this was the product of the faults in the enrolment system identified by Ms Benton and specifically raised by her. The beneficiaries of this continuing – the agents and recruiters – were not happy for obvious enough reasons. The changes that Ms Benton sought to bring in, and which were not allowed to continue, meant that such consumers would not continue to be enrolled as students, would not then incur VET FEE-HELP debts and the agent would not then receive commissions in respect of those consumers.

529 When a Language, Literacy and Numeracy **(LLN)** test was introduced by AIPE in about March 2015, Ms Benton drafted a re-design of the system workflows so that an applicant was only permitted to attempt the test once. When she showed to draft workflow to Mr Khanche, he said words to the effect “*change this to give them two opportunities and if they are still unsuccessful, they need to have a phone call assessment from an academic staff member to see if they can assess them as suitable over the phone. We should not cancel students who do not pass the test.*” Thus Mr Khanche, and through him, AIPE, were only prepared to make marginal changes, having the likely result of weeding out only the most extreme cases of consumers unsuitable for enrolment. Allowing two attempts at the LLN test, followed up by a phone call assessment was not a proper screening process, but rather a neutering of such a screening process. This would necessarily minimise the impact of the introduction of LLN tests, giving them more of a window dressing effect than making any meaningful contribution to ensuring that unsuitable consumers were not enrolled. The applicants are correct to characterise this as no substantial improvement in AIPE’s enrolment system.

530 Ms Benton learned through her investigation of student complaints that AIPE recruited consumers as new online students through brokers, referred to in these reasons as agents. By the second half of 2014, she was aware of six brokers/agents that AIPE utilised. She remembers receiving the most complaints relating to consumers recruited as students by Acquire Learning and Vision Sales. She received complaints attributable to Acquire Learning at the rate of about one or two per week from about March 2014. By June 2014, she was receiving multiple such complaints every day. Her evidence is that consumers enrolled as students complaining to her about Acquire Learning often said “*I thought I was getting a job*” and asking her why they were not in fact getting a job.

531 Ms Benton spoke to both Mr Luhr and Mr Khanche about student appeal cases regularly. There were at least 10 occasions on which she spoke with each of them individually about appeals. The complaints that Ms Benton refers to are not captured by the s 136 ruling as to documents containing those complaints, not least because her practice was to verify many of them, but also because the objection was taken and a s 136 ruling sought only in relation to standalone documentary complaints. Even if that was not so, a sufficient number of these complaints were raised with Mr Luhr and Mr Khanche to put them and AIPE on notice of them and of the problems raised, giving context to their reaction or response. The burden of what happened was that a proposal to react to a complaint or class of complaint was not permitted to extend to any lasting systemic improvement if it had an adverse impact on enrolment rates.

532 In approximately August 2014, Ms Benton noticed that the nature of many of the complaints concerning Acquire Learning changed in a nuanced way. Rather than inquiring why they had not been given a job, consumers complained that they had not been given the support promised to them by Acquire Learning in finding a job. She often requested Mr Luhr and Mr Khanche obtain from Acquire Learning the recordings of telephone calls between consumers and Acquire staff, but neither of them ever gave her any recordings from Acquire Learning. Plainly enough, AIPE had no interest in reducing enrolments coming from Acquire Learning’s recruitment conduct and activities, even in the face of serious concerns being raised, with the employees’ evidence being evidence of what was actually happening under AIPE’s enrolment system.

533 Ms Benton received, or became aware of, a complaint about brokers targeting Aboriginal communities for enrolments by offering cash as inducements to sign up. (For completeness it should be observed that Ms Benton’s affidavit referred to other matters which were objected to and rejected.) This issue is dealt with in greater detail below and also in Ms Casale’s evidence.

534 Ms Benton deposed to AIPE sometimes cancelling an agreement with a broker, but only after consistent and ongoing complaints about them being reported. One broker that she recalls being cancelled was SAI Global. The main value of this evidence is to indicate that the contractual right of termination of an agent reposed in AIPE was seldom exercised, despite a high level of complaints, many of which were verified by the employee witnesses and their staff, when it concerned key agents like Acquire Learning and OSPA.

535 AIPE moved to a new campus in Sussex Street, Sydney around June 2014. Ms Benton and her team were located on level one. Other staff were located up on level 10. In her team at that time were Ms Zhang, Ms Koirala and Ms Amatya. In early 2015, they recruited 10 new staff for the online support team. The team ended up being about 30 people. Ms Benton continued to report directly to Mr Khanche. Mr Luhr remained responsible for online students and was the main contact for the staff in Manila and with AIPE’s brokers. If brokers came to the office they spoke with Mr Khanche and Mr Luhr. Brokers were not her responsibility. Ms Pawar joined soon after and assisted Mr Luhr and Mr Khanche with the management of GLS staff. Ms Pawar did not deal with brokers.

536 Ms Benton says that because complaints increased, her team created a dedicated email address that she was in charge of: appeals@aipe.edu.au. She watched the increase in emails. It became a significant part of her daily workload. Some days there were two or three appeal forms and at other times there were up to twenty appeal forms a day. There was a regular flow of appeals and emails relating to appeal investigations. Ms Benton also regularly received complaints and appeals referred to her by AIPE staff, or was copied into emails regarding complaints. She referred serious complaints to Mr Khanche. Examples of complaints and appeals that she received from AIPE staff or were copied to her were set out in an exhibit to her affidavit, a selection of which follow, being complaints that were, I infer, investigated and found to have sufficient substance to warrant being forwarded to Ms Benton to consider what action should be taken – that is, they are not bare complaints. In any event they give a vivid picture of the foundation for some of the issues and problems that Ms Benton was raising. A selection of these emails is therefore reproduced below, verbatim.

537 The below email was forwarded to Ms Benton after the consumer enrolled as a student had been informed that she would have an accumulated VET FEE-HELP debt of $6,080 for withdrawing after the census date:

To AIPE Student Services,

RE: The request to withdraw from Diploma of Management following a verbal phone intention withdrawal on 18/2/2014 at 2:23pm with Anne Delcano and 26/2/2014 email of intent to withdraw to Student Services.

The following events occurred in chronological order which you need to be aware of:

1) Spotjobs disclosed my personal information to Australian Institute Professional Education.

2) I received an unsolicited phone call from AIPE – 10:30am 24/1/2014 from Jack Davis re course discussion, no information was given to me at this point I was asked to do a phone application with Jack Davis via website. Email sent 10:56am 24/1/2014. Link to enrolment and vet fee form online completed. At this stage no time allowed to read information, no course discussion, no course fees mentioned. No cooling off period provided.

3) Email 28/1/2014. Conformation of enrolment- course information and details, student ID and vet fee.

4) Email 28/1/2014 – Student Services

5) Phone call – Anne Delcano 10:34am 28/1/2014. RE: complete student profile, proof of citizenship and to call next week with details of course.

6) Phone call – Monique Reekers 12.29pm from Student Support Services RE study details, course fee accrued on census date, enrolment 24/1 census date informed to be 28/2/2014 via phone call but 22/2/2014 via email.

7) Phone call 12/2/2014 Anne Delcano – how to commence course online.

8) Phone call 18/2/2014 Anne Delcano – 10:30 and (call back because I was busy at 10:30) at 2:23pm. Discussed withdrawing from course. Anne said “to think about it” and “will call back in a week”. No mention of census date. Email received with possible qualifications gained from course and to “think it over” Anne said. Was told that I would receive a call back in a weeks time to discuss.

9) Phone call 25/2/2014, 4:03pm, Anne Delcano. Asked what I decided and told I wanted to withdraw from course. No mention of census date from Anne and sent an email saying how to withdraw. I sent an email toinfo@studyonline.edu.au to withdraw on the 26/2/2014. Student Services received request to withdraw. Told of census date of the 25/2/2014 and accumulated vet fee debt of $6,080 and suggested to complete subjects for statement of attainment. If enrolment cancelled and Department Industry and Australian Taxation office will be notified.

10) 28/2/2014 Phone call to student services 5:50pm and AIPE. Message left with Student Service, no reply received.

I wish all relevant factors be considered and to withdraw from the course mentioned without incurring any financial penalties now and in the future. I have not commenced any part of the online course. Please reply within 10 days as I will be seeking further legal advice if a resolution can’t be made.

Regards,

538 Ms Benton was forwarded the below complaint from a consumer enrolled as a student, who had attempted to withdraw after suffering from a serious medical condition. The forwarding staff member noted that “*somehow*” the cancellation had not been actioned:

I requested to cancel it in the frame time the lady on the phone told me it was before the census date so i didn’t have to pay a fee she told me it was fine and she put the cancellation through. That is why i have refused to answer calls from the number that keeps calling me because i have spoken to 2 different people and i don’t have the time to do this course and to be honest i dont trust anything that is put to me by phone i hadn’t even heard of this until i got a phone call to do it so i am not doing it and i am not paying a fee because i have already cancelled it before the census date and am not going to be bullied into something again.

Thank you.

539 Ms Benton was copied into an email forwarding on the below complaint from a consumer enrolled as a student:

To Whom it may concern,

I received a random phone call 3 weeks ago from a lady whom I am not sure of her name. I have been dealing with Angelo Tismo since that phone call and believe that it may have been Angela who originally contacted me but cannot guarantee this. I have asked several times over the phone “do I have to pay any money for this course” each time I was told “no it is paid by the Australian Government, they are subsiding several courses and project management is one of them”. I asked more than once this question. So I enrolled in the course believing it was some sort of scholarship or incentive by the Government. Only today whilst speaking to AJ Kristian Degollacion in relation to the assessments he asked me if I was alright with everything and received all the enrolment information and that I was ok with the VET Fee payments etc. I questioned why I would being paying a VET Fee payment when I was originally told that I would not have to pay anything. He advised me that I would have to pay the Government back through my tax. I had never been told this before and in fact was led to believe that I would not have to pay anything which is why I enrolled in the course. I think that this is a scam and am very tempted to contact higher authority in relation to this and wonder how many more people who have enrolled are under the impression that they do not have to pay anything.

I spoke to Mohammed Dizle of AIPE this morning to discuss this and he advised that I was within the Census date to withdraw which is 13 September 2014, and that because I was within the Census date I would not have to pay any money. I would like to withdraw my enrolment. I am very angry that this has happened to me and believe that the agencies that are ringing around randomly trying to get people to do these courses are not informing the people about the fees and leading them to believe they will not have to pay any money towards the course so that they enrol, I am sure the agencies receive a commission for enrolments and this needs to be looked into.

I was very excited and looking forward to do this course but will never be able to afford to pay $20,000 for a course, in fact the Bachelor of Project Management at University is $20,000 so I do not understand why anyone would do a Diploma for this cost.

540 Ms Benton was similarly copied into an email that forwarded the following complaint, where the person enrolled as a student had an accumulated VET FEE-HELP debt of $9,120:

On Behalf of [name redacted] I wish you to **WITHDRAW WITHOUT ACADEMIC AND FINANCIAL PENALTY** his enrolment with your organisation under the premise that he was FORMALLY MISLEAD by your employee during the recruitment stage.

I am responding at this stage for my son [name redacted] who is extremely traumatised by the realisation that he has been taken advantage of and I will represent his understanding of events as he has told them to me.

[He] was initially contacted by the representative and led to believe he was contacted because he was eligible for access to a course as he was long term unemployed and the course was fully government funded. ([Name redacted] is a young man not long out of school who is impressionable, feeling worthless and desperate to find work.) At this point he was formally and knowingly taken advantage of by your representative, who continued to mislead [name redacted] with the language “fully government funded.” At no stage during this whole saga until the week of 22nd June did [name redacted] realise he was responsible for any payment or repayment to the government. He consistently told me it was fully government funded, because that’s what he was told and believed.

[Name redacted] clearly expressed this understanding to me after the first conversation with your representative.

The second time your representative called [name redacted] he continued with the misleading practice, and I believe used tactics which prevented [name redacted] from understanding or becoming aware of what was actually occurring.

The representative told [name redacted] he would help him with the process and told him exactly what to do on his computer to fill in relevant enrolment forms.

Trustingly [name redacted] proceeded to do exactly what he was told which was tick boxes and putting in details. He was not given time to read the documentation nor was he aware of its contents. He truly believed he was enrolling in a free course which was fully government funded and offered to him because he had been unemployed and was being supported. He thought the caller was employed by the government.

The speed and manner he was walked through the application including the Vet fee application did not allow him to read or understand anything. He didn’t realise or understand he had filled in a vet application form during this process. He had not accessed or read any booklet (this had not been provided) and yet your representative told him to tick all of those boxes. [Name redacted] indicates he walked through saying tick all the boxes and then moved on. ***[Name redacted] did not independently or knowledgably fill in the documents.*** AGAIN formally misled and falsely co-erced into ticking a box stating he understood when he had no opportunity to read or understand the documents. Shortly after he received what he thought was a confirmation email from the representative.

[Name redacted] received no contact to his knowledge until the week of 20th of June when the study tool was delivered. (This was two weeks after census date) Shocked at this point he thought the program had been cancelled as he hadn’t heard, (Due to regional internet and phone reception problems one contact email and two phone calls made by support had not been successful.) I duly question the sending of a study tool when no contact had been successful.

He opened the tool only to find he could not access the subjects as he didn’t have a student id. On my encouragement he called the support number to sort it out. It was at this time that his support person informed him about the Vet fees, the meaning of census date and his financial obligations. He was in shock and I took the phone.

The student support person organised for me to speak to a supervisor later that day. This person told me because [name redacted] was 18 and it was past census date he was legally responsible and she needed to talk to him.

After the discussions with the Supervisor [name redacted] felt obliged to proceed with the enrolment as he felt he had no choice- trapped by dishonest misleading persons.

During this phone conversation with the supervisor [name redacted] provided an alternative land line contact number and was assured he would receive a student id number – At no point to date had he been provided with a student number.

Your emails and student contact record would reflect these conversations. After several phone conversations and emails initiated by [name redacted] to your support team he was still not furnished with a student number? His last email was sent on the 10th of July and he still had no response or further contact by early August.

Finally I decided this was not a reputable experience and that I needed to remove my son from the continuous and negative experience that was initiated and purported by your company. I rang the support line and informed the receiver of my grievance.

I have emails evidencing [his] consistent requests for student id as would you.

Sadly the first time the Id number was disclosed was in the withdrawal email sent from your organisation after the withdrawal conversation in August.

[Name redacted] has not been able to access the course work at all during the whole process.

Receiving ld after withdrawal meant no course work has been completed viewed or accessed in any way.

Finally I believe the practices of your organisation are questionable and that advantage has been taken of a young vulnerable person. As such the process was misleading and consequences beyond his control. I question the validity of your access to Vet if this is standard practice for your company.

The only satisfactory outcome is for you to withdraw my son with no academic penalty then the situation will be resolved with no further action from myself on behalf of my son.

541 The following email was forwarded to Ms Benton for her approval of the debt cancellation:

Good afternoon Lynne

I would like to follow up on correspondence from last year regarding a course I was planning on doing with your College.

I subsequently withdrew my application and you advised [me] by letter on 20 December, 2013 that my application to withdraw had been successful and no fees would be applied.

On completing my tax return this year I found the amount [of] $2,400 against my tax file and the ATO have advised this was a fee that was imposed by your College.

It is now nine months since you advised me that no fees would be applied and I believe ample time has passed for this to be revised.

I am therefore asking that you immediately revise the debt and advise the ATO that no fees are applicable. If this is not completed by Friday, 26 September, 2013 I will lodge a formal complaint with the Office of Fair Trading.

I look forward to your advice that this has been completed.

Sincerely

542 Ms Benton was similarly forwarded the below email:

Dear Dominic,

I am writing to express my dissatisfaction at the way my withdrawal from the Diploma of Project Management Course was handled, and to ask that the debt of $19,600 for the above course be waived.

On 25 November 2014, I had a phone conversation with Laarni Uy from the student support team, I said: “I am considering withdrawing from the course because I was experiencing adverse living conditions; I was at risk of becoming homeless; I was living at or below the poverty line due to being on income support for an extended period of time; and the efforts of finding a job to support myself were more urgent than considering a course of study.” The advice I received from Laarni was to defer from the course from 26/11/14 to begin on 26/2/15 (3 month deferment). My understanding at that point was because I had responded before the census date of 27/11/14 then I fulfilled my obligation to the organization and was not obliged to pay any further costs.

In ensuing email correspondence between Laarni and myself, I confirmed on 12/12/14 that my situation had become worse and I subsequently had no interest in study. On 15/12/14, Laarni advised that the withdrawal that I had to complete online was all had to do. I asked for clarification if there was anything else I had to do to disengage from this course of study, and was further advised on 17/12/14 that I just had to fill in the withdrawal form and there would be ‘no worries’. I withdrew online and from this final email, I felt confident that since I had complied with everything asked of me and since the student support person was confidently saying there were ‘no worries’ then there was be no debt and I was free of any obligations.

On Monday 5/1/15, I received a phone call from your office, and I was told that I am required to pay the fee of $19,600 for the Diploma of Project Management whether I do the course or not since I failed to withdraw from the course of study by the census date. I was further advised by the caller (I did not record the male person’s name) in what I perceived to be a threatening manner, to do the course anyway since I was going to have to pay the fee. I did not appreciate a few comments made to me by said person such as: ‘Oh, are you living in a car, are you?’ when I advised him of my living situation and that I would still not like to do the course after my situation worsening, which is highly inappropriate regardless of if by homeless I’m on the floor outside or on a friends couch and: ‘Oh c’mon, mate, you can do it in 40 minutes a day.’ After remaining firm in my explanation of how my priorities are accommodation and occupation over spending money I now don’t have on a computer and internet. Regardless of the callers task at hand and/or if he had a daily quota this is not how you talk to a person.

On Wednesday 7/1/15, I received an email stating:

‘we received your request to withdraw and please note the census date was 27/11/14, therefore, you now have an accumulated VET FEE-HELP debt of $19,600.’

‘Should you choose to discontinue your online studies, your enrollment [sic] will be cancelled and the Department of Industry and the Australian Taxation Office will be notified of this cancellation and the debt.’

…

543 Ms Benton was also informed of the results of various orientation calls. One staff member copied her into the following summary of her conversation with three consumers enrolled as students she had contacted that day, so this is not complaint evidence, but rather an AIPE business record of the results of information it had obtained in the ordinary course of business, for which no restrictive ruling was sought:

I called [name] for her induction and after I explained what the call was regarding she said she did not know what I was talking about. She asked if the call was about the laptop. [She] does not have a computer. So when I asked her how she went about completing her LLN she said that “the man who was there” completed it on his phone. She said she signed the vet-fee form out in front of her house. When I asked her if she had seen any of the emails that were sent to her, she asked for that email address because she never provided the agent with one. On CRM her email address is [redacted]. I asked her if she had any of his details even a name and she said he had collected all of hers but did not share any of his. She was under the impression that the course was free and once she heard that it involved a loan from the government, she immediately wanted to cancel her enrolment.

…

[Name redacted] was unaware that she had enrolled into a diploma. She remembers signing something and giving her tax file number; however she was told that the course was free and she would receive a free laptop which she could use to search for jobs and other courses. Her original enrolment date was on 16/03/2015. She does not have a computer and her LLN was completed today- she has no memory of this. She also wanted her enrolment cancelled as soon as she heard it involved a loan from the government.

…

[Name redacted] seemed to be aware of the course she was enrolled into. She has no computer - when I asked how she went about completing the LLN, she said “the guys who signed her up” let her use theirs. I asked her how she intends to do an online course without a computer she said she was told she’d get a free laptop. When she found out that she won’t be getting a free laptop she said “don’t worry about it then” and hung up.

544 Examples of other summaries of conversations that employees had with consumers enrolled as students that Ms Benton was copied into are as follows:

Sorry to bombard you with another issue. I just spoke to [name redacted] who was enrolled today. The first issue was that the student said the agent from Online Study Pathway Australia was helping him complete the LLN test and was actually the one who ticked all of the questions. When I let this student know he has to retake this test again (he failed the first attempt) without the agent present he let me know he has no access to a computer. The agent had told him he would receive a free laptop in about 8 weeks and he could start the course then.

The agent was supposedly meant to come back to his house at any moment and I asked student to have him call me so I can explain why [name redacted] couldn’t continue the course, but I have a feeling he won’t be calling in. Unfortunately the student didn’t remember the agent’s name.

…

And:

I’ve just spoken with a student who wants to cancel as claims he was never interested in the course – only interested in the free laptop that he’s been expecting and waiting for since a week after her first ‘signed up’.

The student advised me he was basically instructed ‘exactly what to say’ by the agency when he received his orientation call. He didn’t fill out any of the forms himself, the agency apparently filled out everything for him on his own surface. The student had apparently told him previously he wasn’t interested in studying a diploma, but he came back and said you don’t even really need to complete it, it’s really just the government offering free laptops.

He claims that the agent went all the way up his street stating that the government is essentially giving out laptops. Can you please look into this one, as the student stated he found it quite unusual from the beginning, but went ahead as he was ensured he would receive one in about a week.

If you need any more information regarding this one, please let me know.

And:

Last night I received a call from an OSPA agent in WA. When I was doing the induction for the student, her understanding of VET FEE-HELP was that it was a free course and she would never pay it back. I explained to her how VF actually works and she was understanding at the time.

This morning, the student called me back. She wants to cancel from the course because she was given the wrong information.

The agent sold the course to her by saying that; it is a free course, she is on Centrelink so she doesn’t need to worry about ever paying it back and the college will give her a free laptop. She also said that he made her put the phone on speaker while I was completing the orientation so that he could prompt her what to say to my questions and that he wasn’t happy when she mentioned that it was a free course because he knew he would get in trouble.

The student was very uncomfortable while he was there.

…

545 Ms Benton says that other complaints that steadily increased after AIPE moved to the new campus in Sussex Street related to consumers not receiving their laptops by the due date as promised by a broker. She typically received between one and three complaints of this nature each day, but sometimes it could be as high as 10 complaints a day.

546 On Monday, 28 July 2014, Ms Benton was copied into the following email sent by Mr Stephen Davies, the Academic Director of AIPE, to AIPE’s CEO, Mr Khanche:

I am escalating this complaint to you. Lyndall [Ms Benton] has spent a lot of time on the phone with this student and I have approached the complaint from an academic perspective. The student clearly feels he has been badly treated and, as we know how Acquire operates, the student may have a legitimate case. Therefore, Lyndall and I feel it would be better to approve the withdrawal rather than it going to Fair Trading.

547 A number of telling conclusions can readily be drawn from this email:

(1) a decision to allow a student to withdraw after the census date was considered to be of such moment that the CEO, Mr Khanche, had to be consulted, on at least this occasion, and give approval to withdraw;

(2) at a high level at AIPE it was known “*how Acquire operates*”, which in context can only reasonably mean that it was well-known that Acquire Learning engaged in improper recruitment practices which resulted in consumers being enrolled as students when they should not be;

(3) such improper recruitment practices were tolerated and taken advantage of, unless a sufficiently strident complaint warranting this degree of escalation was made;

(4) if such a complaint was made and escalated, it would be recommended to be acted upon and post-census withdrawal permitted, so that the student did not take the complaint to the Department of Fair Trading, the State consumer protection regulator – plainly enough a student needed to have not just knowledge of what had happened, but a high degree of persistence, before such a complaint was taken seriously. Only then would it meet the high threshold of “*special circumstances*” whereby a post census withdrawal would be granted.

548 Ms Benton’s evidence was that prior to April 2015, every consumer enrolled as a student by AIPE under the VET FEE-HELP scheme was given a laptop. They did not have to request it. It was Mr Luhr’s responsibility to order the laptops to be sent to consumers enrolled as students. He ordered Microsoft Surface Pro computers for this purpose in bulk through an office equipment supplier called Staples. However as the number of enrolments grew, Mr Luhr did not keep up in ordering laptops on time. In an attempt to reduce the number of complaints, Ms Benton asked Mr Luhr and Mr Khanche for Ms Casale and her to take over this process. They were shown by Mr Luhr which reports to run and who to send the order through to.

549 From April 2015, the offering of laptops to consumers as inducements to enrol as students was banned by the Commonwealth Government. Mr Khanche wanted AIPE to continue to offer laptops to consumers enrolled as students by way of a loan. Ms Benton recalls a conversation with Mr Khanche about this to the following effect:

Mr Khanche: It is not fair that we are not able to give our students laptops any more. Universities are still allowed to do it, why can’t we? I think that we should still give out laptops to students, but we will give them as loans to our students for the duration of their courses. Lyndall, could you draft a loan policy and loan agreement form that would allow us to do this?

Ms Benton: Yes, I will draft these documents.

550 Ms Benton drafted the loan policy document and loan agreement in April or May 2015. When she gave those draft documents to Mr Khanche, she said words to the effect:

I have drafted the documents per your request. I should point out however that I don’t think that we should give these forms to our brokers to hand to students. If there is a genuine student in need of a laptop then I can organise the loan for them.

551 Ms Benton became aware that the staff at the broker OSPA were aware of the loan policy and were promoting it to consumers that they recruited to be students. She knew this as some OSPA staff asked her about the loan facility, and many consumers recruited to become students by OSPA actively made requests for these loan laptops. She informed Mr Khanche and Ms Dimitra Tzanos of this.

552 In early 2014, Ms Benton discovered that AIPE did not have a policy in place to monitor brokers. She was concerned about this, and drafted a policy on her own initiative, although this was outside her area of responsibility. In cross-examination, Ms Benton was shown a document entitled “*Agency monitoring and cancellation policy (domestic students)*” said to commence from 1 September 2013. She said that she did not recall that policy, was not at AIPE in 2013, and that she had drafted a policy. She was not challenged further, which left intact her evidence to the effect that there was no policy actually in place until she drafted it. I infer that the policy document dated to commence from 1 September 2013 was an example of a paper policy, not a policy that was actually known about so that it could, at least in theory, be given effect to.

553 Ms Benton says that AIPE conducted ethics classes for brokers from mid-2014. Originally it was Mr Michael Zelvis’ responsibility to run the classes. At other times it was Mr Luhr’s responsibility and then Ms Tzanos’s responsibility. One day when Mr Zelvis was absent, she conducted one of these classes. She also ran some of these courses with Ms Tzanos for OSPA when the LLN was introduced. In the absence of direct evidence about the content or delivery of these courses, I infer in AIPE’s favour that these courses were at least attempted to be run in accordance with, but not beyond, the training material in evidence and discussed below, being at that stage voluntary. But that is still a far cry from establishing how well attended the courses were, or that they were at all effective. It seems that these courses were not well received by those who did attend. Ms Benton was advised by Mr Khanche that some brokers stopped working for AIPE. She had a conversation with Mr Khanche during which he said words to the effect:

I think we are placing too many compliance requirements upon our brokers. Many brokers avoid working with AIPE, and some have even stopped working for us, on the basis of what we are requiring from them.

554 This comment strongly suggests that questionable enrolment practices with VET FEE-HELP funding were known to be prevalent and that there was resistance from Mr Khanche to following up and insisting upon compliance.

555 From late 2014 onward, Ms Benton noticed that complaints about door-to-door sales of AIPE courses also increased, suggesting that whatever training was given had not been effective. These complaints were from consumers who said someone came to their door and asked for personal documents. (For completeness it should be noted that objection was taken to other things referred to by Ms Benton, and that evidence was rejected.) Others consumers told her that they knew they were enrolling in a course, but did not realise they were incurring a VET FEE-HELP debt. Many of the complainants told her they were informed these courses were a government initiative to help struggling families with education, and that a laptop was provided free of charge.

556 In mid-2014, Mr Luhr hired Mr Zelvis. Mr Zelvis was responsible for managing relationships with AIPE’s brokers. When Ms Benton passed complaints about specific instances of door-to-door marketing to Mr Zelvis, he informed her that he had addressed these concerns with the brokers responsible. He often did not tell her what actions he had undertaken. He left AIPE in January 2015.

557 Ms Benton also received complaints from Legal Aid organisations on behalf of Aboriginal consumers and refugee consumers, who were offered incentives in an effort to sign them and their relatives up to courses offered by AIPE. Each time she received a complaint of this nature she informed both Mr Luhr and Mr Khanche. (For completeness it should again be noted that objection was taken to other things referred to by Ms Benton, and that evidence was rejected.)

558 Ms Benton describes a day during which a man with physical and mental impairments who was enrolled into a course with AIPE came to the campus with his support worker. The support worker sat down with her and explained that this man had been enrolled into several institutions by a door-to-door salesman. The student had been enrolled in diplomas offered by AIPE and Evocca College. The support worker said words to the effect “*how could this happen, it is obvious even in a short conversation with him that he could not study these courses*”. Having listened to the man, it was obvious to Ms Benton that he was mentally impaired and could not undertake the AIPE course he had been enrolled in. Ms Benton went to find Mr Khanche to tell him about this case, and to see if he wanted to come and talk to them to find out more. Mr Khanche said words to the effect “*just reverse the debt and we’ll look into it*”. The support worker would not leave until he was given a letter to say that the debt was reversed and the course cancelled. Ms Benton created the letter and gave it to them. She then wrote an email to Mr Khanche with the information to enable him to investigate the case, but she does not know whether he did that.

559 The overall burden of the evidence, especially as follows, was that training and monitoring would only be tolerated by agencies and AIPE itself (via the CEO, Mr Khanche) to the extent that it remained ineffective in having any meaningful impact on the enrolment of consumers as students who would remain enrolled until the census date, but would not be active “*students*” who required support resources to be deployed to assist them.

560 Early in 2014, before the move to the new campus in Sussex Street, Ms Benton discovered, when entering AIPE into a Google search, an online forum on whirlpool.net.au. The forum thread had consumers enrolled as VET FEE-HELP students complaining about the conduct of brokers enrolling them into AIPE courses. She had a conversation about this with Mr Khanche and Mr Luhr to the following effect

Ms Benton: I have seen that there has been an online Whirlpool forum started about problems that students have been having with VET FEE-HELP providers and the brokers that sign students up to them. AIPE has been specifically mentioned on the forum. I’m concerned about what this will do to our reputation in the market.

Mr Khanche: Yes. John knows about this and already showed me.

561 Ms Benton states that Mr Robby Singh Sawhney was the CEO of RIMT Pty Ltd, which traded as a broker for domestic online students as OSPA, and acted exclusively as a broker for AIPE. OSPA recruited consumers to become students through door-to-door sales methods. The consumers who complained to Ms Benton about OSPA typically complained that either they had not actually agreed to sign up for a course, that they were told that the course was free at the time that they had signed up, or that they never received the laptop that was offered to them. If a consumer enrolled as a student was not aware that the broker was from OSPA, Ms Benton could nonetheless see from the student record on CRM that the consumer had been enrolled by a broker from OSPA.

562 Ms Benton was told by Mr Khanche that he and Mr Sawhney were good friends. She had a conversation with Mr Khanche in April 2015 during which he said words to the effect:

I have a lot of control over OSPA. I have raised the complaints that you told me about with Robby [Mr Sawhney] and he always dismisses the staff member responsible for the conduct complained about. One time he even dismissed his whole team. This is very hard on Robby.

563 Ms Benton states that even in circumstances where a broker was dismissed in response to student complaints, she knew from her examination of the CRM records that it was not the practice of AIPE to cancel the debts of consumers signed up by that particular broker.

564 In approximately March or April 2015, OSPA were assigned their own direct phone line, which meant OSPA’s brokers had a dedicated number to call the AIPE induction team. This allowed those brokers to confirm enrolments quickly as the induction call could be completed while the broker was in the student’s house signing them up to the course. This meant that all at the same time a student’s enrolment would be added, the broker would take copies of their proof of citizenship and get the student’s Tax File Number, and the induction call would be completed. This was the only information needed in AIPE’s policy in order to charge the consumer once the census date passed.

565 Late in 2014 and early in 2015, when AIPE was in the process of recruiting enough staff to cover all induction calls, OSPA was granted authority to perform their own induction calls to consumers that they had enrolled. The recordings of these induction calls were uploaded into CRM. Ms Benton was able to listen to those phone calls. She recalls that some consumers complained that at the time they had been enrolled they did not understand that VET FEE-HELP was a loan. She was able to see from an examination of the student’s record on CRM that he or she had been enrolled by an OSPA broker. When she listened to the phone calls, she confirmed that it was not made clear to the consumer that it was a loan and they would incur a debt. Some phone calls did provide the information required by AIPE at that time.

566 In late 2014, Ms Benton made many requests of both Mr Khanche and Mr Luhr to introduce a pre-enrolment requirement for AIPE’s diploma-level courses that prospective students complete and pass their LLN. She believed that such tests were necessary as she could see from CRM that many of the consumers enrolled by AIPE as students had not completed year 9 in education. The LLN test was also online, so it provided AIPE with an indication if the prospective student had access to the Internet.

567 Ms Benton found that some consumers spoke very limited English. She questioned one student who called about the whereabouts of her laptop and asked whether she ever sat an English test or studied English in Australia. She said “*no*” and could not answer Ms Benton’s questions properly. The student handed the phone to her son who had also signed up to a course. The son said he would help his mother with the course as she did not speak much English. Ms Benton ended up withdrawing this student from her course with her permission after spending quite some time explaining to her that her son could not do the course for her. If the consumer had not called AIPE to ask about the laptop, she would have remained enrolled.

568 Mr Khanche had resolved to introduce an LLN as part of their pre-enrolment procedure. Ms Benton frequently raised this at Friday morning management meetings as something that urgently needed to be implemented. She remembers a conversation to the following effect:

Ms Benton: We need the LLN. It’s taking too long. We need it to come in as soon as possible – we are enrolling too many students who aren’t capable of completing our courses. This is a big risk for AIPE.

Mr Khanche: Stephen [Mr Davies]? John [Mr Luhr]? What is the progress on this? When are we likely to see this come in?

Mr Luhr: Ask Stephen, not me, we are waiting on the questions.

Mr Davies: We’re working on it. We have other priorities right now, like creating the assessment tasks for courses students are already enrolled in. We have one or two students who have completed the first few units and we don’t have the course materials ready for them to continue.

569 AIPE did not introduce an LLN as part of its pre-enrolment procedure until approximately March 2015. After this, Ms Benton began to receive complaints from consumers that some brokers were completing LLNs on their behalf.

570 The official AIPE process was that a consumer (referred to as a “*student*”) who failed their LLN on the initial attempt was given a second chance to complete it. A pass on the second attempt allowed the “*student*” to enrol in a course. Consumers who failed their second attempt were referred to support staff to see if they were able to be enrolled.

571 Some of Ms Benton’s staff raised with her a suspicion that some brokers were doing the test on behalf of consumers, on the basis that tests from these brokers would get the answers to the same questions wrong on each occasion. She raised these concerns with Mr Khanche and Mr Luhr.

572 In around mid-2015, Acquire Learning was granted permission by Mr Khanche to enrol consumers as students using its own separate LLN test. After the consumer was enrolled, that test was sent to AIPE to be uploaded onto the student record. Ms Benton recalled Ms Levie showed her the test and some completed test results by some consumers who the CRM confirmed had been successfully enrolled into an AIPE course and incurred a VET FEE-HELP debt. The questions were easy, and were much easier than the questions in AIPE’s test. Some of the consumers were enrolled as students even if most of the answers on the LLN test were incorrect. This evidence sufficiently establishes, on the balance of probabilities even if that threshold is needed for an intermediate finding, that the LLN test allowed by AIPE to be conducted by Acquire Learning for the very large proportion of consumers who came to be enrolled as students was a test in name only, and did not form any real function of screening out unsuitable consumers. It was not really a change at all, let alone an effective change.

573 The overall conclusion to be reached about LLN tests, both those conducted by AIPE itself, and especially those conducted by Acquire Learning, is that they did not constitute any meaningful barrier to unsuitable consumers being enrolled as students. Rather, the LLN test was administered as a hurdle to be surmounted. Further, the very fact that such an obvious means of ensuring that the true objectives of the liberalised VET FEE-HELP scheme to provide genuine educational opportunities to consumers who were disadvantaged was sabotaged in this way is a telling indicator that the obvious windfall profit benefit, and thus motive, and the equally obvious commission benefit, and thus motive, were dominant considerations in the way in which enrolments processes were allowed and encouraged to be conducted.

574 Ms Benton deposes to the fact that consumers enrolled as online students in VET FEE-HELP courses offered by AIPE had two years to complete their programs (it should be noted that although this was the limit, other evidence points to the courses generally being intended to be completed in three to six months). Therefore the issue of student completion rates (as opposed to participation rates considered in Ms Casale’s evidence below) did not arise until 2015, which marked two years from which AIPE commenced offering such courses. She says that from mid-2015, completion rates were discussed at every management meeting. At each meeting she attended, Ms Pawar presented a report on student engagement. Ms Benton recalls that the reports indicated that most consumers were not engaging with their courses. A student was engaging if they were submitting assessments or having regular contact with AIPE in order to prepare an assessment. This is a telling indication of consumers not being suitable for the courses in which they were enrolled.

575 Prior to the introduction of the LLN, Ms Benton noticed there were many Aboriginal and/or Torres Strait Islander consumers enrolled as students. She determined this from photo identification she noticed in the CRM record, and because in conversations the consumer would sometimes tell her they were Indigenous. Also, many consumers were being enrolled from remote locations. Ms Benton knew this from conversations with people who phoned in with complaints. She looked their address up in CRM and dealt with Legal Aid complaints made on their behalf. Around late 2014 or early 2015, she had a discussion in Mr Khanche’s office with Mr Khanche and Mr Luhr about this. The burden of this evidence, in the context of the rest of Ms Benton’s evidence, and especially by reference to the complaints made by Legal Aid, is that the concern was with such consumers not being suitable to be enrolled as students, not merely a reference to being from one of the classes of disadvantage to which the liberalised VET FEE-HELP scheme was directed. During that discussion, there was a conversation to the following effect (emphasis added):

Mr Khanche: We’re dealing with it, we are working on it.

Ms Benton: This is 100% the type of thing on A Current Affair or 60 minutes.

Mr Khanche: You know, these students are **also** rorting the system, getting these free handouts and making Centrelink study claims. Other colleges are doing it, the students need to take some ownership that they are rorting the system.

576 This was an implied admission by Mr Khanche that AIPE was rorting the VET FEE-HELP scheme by enrolling unsuitable consumers as students, or at least non-bona fide or non-genuine students even if they might otherwise have been suitable, and that this was seen to be justified because such consumers were enrolling as students to get free handouts and to obtain government study assistance payments, and other VET providers were also rorting the VET FEE-HELP scheme in generally the same way. While an allegation of rorting per se is no part of the applicants’ case, nor realistically could it be as such an implied admission is not sufficiently unambiguous or detailed to bring such a case, it is an item of evidence adduced without objection and able to be taken into account in the case that is brought. It at least encompasses the notion of AIPE’s enrolment system being known to operate to enrol consumers who were not suitable to be students or at least were non-bona fide or non-genuine students.

577 Taking this into account is a legitimate part of the evaluative exercise required to be carried out, referring to evidence and the facts and circumstances it reveals, eschewing any reliance on any “*personal intuitive assertion*”, and relevantly recognising “*the deep and abiding requirement of honesty in behaviour; a rejection of trickery or sharp practice; fairness when dealing with consumers; … the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage*”: *Paciocco* at [296].

578 In approximately April 2015, ASQA conducted an audit of AIPE. Though there was initially an objection to the relevance of Ms Benton’s evidence on this point, I reject this. The evidence is plainly relevant. Ms Benton was instructed by Ms Ali that she would be required on the day and that the focus of the audit would be AIPE’s online student database as well as the recruitment/enrolment process and systems. On the day of the audit, the ASQA officials requested a number of student files. She had great difficulty in fulfilling their requests, as AIPE did not keep centralised student files. AIPE instead retained, in different databases, emails with consumers enrolled as students as well as records of phone conversations with them, and these had to be selected and printed out manually. Ms Benton did not see what documents were given to ASQA in response to their requests for student files. The ASQA officials also requested various AIPE policy and procedure documents, which she supplied on the day of the audit.

579 AIPE employed trainers for consumers enrolled as students who required assistance with a course. For consumers enrolled as online students, Ms Benton was aware that about five trainers were employed. That was, on any view, a tiny number of trainers. Mr Khanche, and thus AIPE, it may readily be inferred, had a high level of confidence that no greater number would be required. In light of the above evidence, it is safe to infer that this had been the system in place in 2013.

580 The cross-examination of Ms Benton was in a very limited compass. The substance of her evidence was not directly challenged to any great degree, with the challenge being largely confined to the general limitations of her memory and her lack of reliance on documentary records. She was asked questions to confirm that her endeavours to effect policy changes to address specific problems did result in some changes being made. However, that left intact her evidence to the effect that such changes remained in force so long as they did not adversely impact on enrolment numbers. This was especially stark in relation to Acquire Learning’s practice of “*saving*” consumers so that their enrolment continued, intentionally to be deployed in circumstances in which a barrier should not have been erected to ending a consumer’s enrolment and avoiding them incurring a VET FEE-HELP debt. As noted above, Mr Khanche was opposed to “*too many*” compliance demands being placed on brokers, in circumstances where it can readily be inferred that this was, in practical terms, a reference to any compliance measures that had the effect of having any real impact on the numbers of consumers who remained enrolled up to the census date, at which time a VET FEE-HELP debt would be incurred.

581 AIPE correctly characterises Ms Benton as a honest witness who admitted that, at the time that she prepared her affidavit in September 2017, she did not have access to AIPE’s documentary records other than those shown to her in an Administrative Appeals Tribunal proceeding and did not have the ability to run searches in AIPE’s CRM database. She accepted that her evidence was her best recollection of what occurred during her time with AIPE, however her affidavit, and her limited cross-examination, reveals a sound and sufficiently intact memory, of what were clearly troubling and therefore more memorable events. She accepted that records extracted from CRM would be a more accurate and reliable way of reflecting the data in that database than her recollection of that data, but that did not render the memory she did have as being shown to be inaccurate or unreliable. From these statements of the obvious, and in the absence of any substantial challenge to the conversations and events that Ms Benton deposes to, AIPE nonetheless submits that these concessions illustrate that the Court should not “*place too much weight*” on her recollection of events, and that, to the extent that there is documentary evidence which is not consistent with that recollection, the documentary evidence should be preferred.

582 The correct position is that the Court should not place either too little, or too much, weight on Ms Benton’s evidence. Her evidence has been carefully assessed for its content and internal logic and coherence, as well as whether it is supported, not supported, contradicted or qualified by any other evidence. In that regard, little weight can be given to self-serving statements contained in AIPE policy and other aspirational documents that might in some way be thought to rebut her recollection. She should be regarded as an honest witness, as properly conceded by AIPE. She was an impressive witness who was clearly doing her best to give a truthful and accurate account of what took place during her time at AIPE, and was a person who did her best to improve the enrolment practices of AIPE with limited success and at times outright failure. It is plain that Ms Benton had a reasonably clear and coherent memory, especially as to key events and otherwise evanescent conversations which are not likely to be detailed in AIPE’s CRM records.

583 There is no reason to doubt the general reliability of what Ms Benton deposed to. Her evidence goes some considerable way beyond mere transactional records, explaining and proving the real nature of AIPE’s enrolment system as it actually operated on a day-to-day basis, and had plainly been operating since well before she commenced working at AIPE in January 2014. I conclude that her evidence was reflective of what was substantially in place since at least 1 May 2013, being the commencement of the relevant period.

584 Despite Ms Benton’s repeated and robust efforts to improve that system, the necessary changes she endeavoured to introduce were constrained and did not endure when they resulted in a reduction of enrolments surviving past the critical census date. The whole design of AIPE’s enrolment system was to get consumers enrolled as students past that date so that VET FEE-HELP money would be received from the government, and to limit the 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. That approach alone had strong elements of unconscionably. But this gets worse for AIPE when it is given an indication of its practical effect by the illustrative, rather than representative, individual consumer evidence. That consumer evidence is compelling circumstantial evidence that tends to reinforce Ms Benton’s evidence and give some comfort in drawing appropriate conclusions from her evidence.

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 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.

586 I am satisfied by Ms Benton’s evidence, when considered with the enrolment data and Ms Casale’s evidence as to participation rates, that it was an important and pervasive part of AIPE’s enrolment practices in the relevant period for a significant proportion of consumers to not be properly informed of the importance of making any withdrawal of enrolment by the census date. The evidence of the individual consumer witnesses amply illustrates how this played out in the field, and I reject any suggestion that this was somehow aberrant, while necessarily falling short of finding that it was or could be representative. Rather, that consumer evidence supports the conclusion otherwise able to be reached. It is no answer that such information was buried in a subsequent email from AIPE, not least because there was no evidence of any system to ensure that such an email was received, let alone that it was read and understood.

587 I am unable to find that AIPE actively supported or encouraged consumers being enrolled as students without their knowledge, although it was clear that once this was detected there was a resistance by Mr Khanche and other senior managers at AIPE to this being reversed. This was reflected in the view express by Mr Khanche that AIPE would await a complaint before taking action, even where the conduct of an individual agent who enrolled a consumer was so egregious as to warrant being fired.

### Ms Glashie Qudsia: unsuitable consumers to be enrolled as students

588 Ms Glashie Qudsia, is a vocational trainer. In 2011 she was employed by AIPE as a face-to-face vocational trainer and assessor of international students. That involved training students who were taking courses in business, human resources and management at different levels, including certificate IV to diploma level.

589 In August 2014, Ms Qudsia started in a new role as a VET coordinator with AIPE, in the part of the business which offered online courses to consumers enrolled as students who were Australian citizens or residents and therefore entitled to access the VET FEE-HELP scheme. At that time she was aware that AIPE used GLS to help it to enrol consumers as students and to manage bookings with trainers. She was aware that there was a team of about eight to ten people from GLS in the Philippines working for AIPE. Ms Qudsia set up Microsoft Calendar as a link between consumers enrolled as students, GLS and the trainers, which enabled AIPE staff to monitor how many calls were made by GLS to consumers in a day. She was aware that CRM was a computer software system used by AIPE that identified the numbers of consumers enrolled as online students to undertake AIPE courses. It also contained records of individual consumers enrolled into AIPE courses. She had access to that data and those student records.

590 In Ms Qudsia’s team, Mr Hasan Chowdhary was employed full-time as an online trainer and two casual face-to-face trainers were also employed to mark students’ work, Mr Luciano D’Ambrosi and a person by the name Divya Judge. Therefore, from the beginning of her new role, there were three trainers available to assist students with their courses. A short time after that a fourth trainer, Rana Sharif, was employed part-time to assist online students for webinars and to make calls to students and to do assessing and marking. A further casual trainer was employed to mark students’ work in about September or October 2014. On any view, five trainers was a very small team, but that was all that was needed if a relatively small number of consumers enrolled as students were actively participating in their enrolled course.

591 Ms Qudsia deposes to a “*large*” number of enrolled students who required support outside AIPE’s office hours of 9.00 am to 5.00 pm who had no access to online supporters or trainers outside those hours. She instituted shifts for the trainers so that they were available between 8.00 am and 10.00 pm, Monday to Friday. Given the other evidence regarding the small number of active students, the reference to a “*large*” number of students must be taken to be a reference to a large number of consumers relative to the small number of trainers, not a large number relative to the total number of enrolments.

592 During her time at AIPE, Ms Qudsia 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.

593 Ms Qudsia deposes to GLS staff being responsible for making an enrolment call to prospective AIPE students. She was aware that after that initial enrolment call, GLS would arrange for consumers enrolled as students to speak with trainers. It was her team’s responsibility to make follow-up calls to consumers who had been enrolled in an AIPE course. Her team each contacted on average five to ten consumers who had been enrolled as students per day on the telephone. Thus 25 to 50 consumers enrolled as students were contacted per day across the five trainers.

594 Ms Qudsia also often spoke to consumers herself on the telephone to provide learning support. From these calls, she had concerns about the abilities of some of the consumers to do the online courses in which they had been enrolled, which required some computer skills in order to undertake and complete course work. She deposes to regularly receiving comments from consumers saying words to the effect “*I have received a Microsoft surface tablet. I do not know how to use it. What do I do?*”, or “*I have never used Microsoft Word before. How do I use it to do my assignments?*”

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.

596 Ms Qudsia’s managers were Mr Stephen Davies and Ms Mia Palidwar. She regularly reported concerns that she had about the students’ unfitness to undertake the AIPE courses, or the course materials, to Ms Palidwar. She also raised concerns about the lack of trainers employed by AIPE and requested that more trainers be employed. She also copied Mr Khanche and Ms Pawar into emails in which she outlined her concerns. She raised her concerns in emails which she copied to Mr Khanche at least once per month.

597 Ms Qudsia left AIPE in about mid-February 2015 when she was offered another job. She was not required to attend for cross-examination.

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.

### Ms Romina Casale: role, suitability of consumers to be enrolled as students, Acquire, OSPA, management meetings, LLN, student classifications, processing withdrawals:

599 Ms Romina Casale was employed by AIPE as the Online Student Services Team Leader in the period from 3 November 2014 to 6 March 2016. Prior to that she had worked in administrative roles at two different registered training organisations.

600 Ms Casale was interviewed for her position at AIPE by Ms Ali and Ms Benton and started work there three weeks later. She attended an orientation for about half a day at which new employees were given an introduction by AIPE managers. Those introductions were done by Ms Benton, Mr Luhr and Ms Qudsia. She also met the CEO, Mr Khanche.

601 When Ms Casale commenced employment with AIPE she worked at the campus at Sussex Street Sydney, reporting to Ms Benton. Initially the online services team was made up of just her and Ms Tereza Kausova, who was an administrative assistant, and Ms Benton. They were based in Sydney. When she started, AIPE worked with GLS, which she was aware was a call centre based in the Philippines. She was aware that Ms Pawar was responsible for the GLS staff in the Philippines and that Ms Pawar regularly visited the GLS offices from her base in Singapore.

602 Ms Casale’s role as the Online Student Services Team Leader was to deal with complaints made by consumers regarding their enrolment, complaints made about staff at GLS and to assist consumers who had lodged internal appeals. They were known as “*escalated issu*es” in that they were escalated from GLS to AIPE in Sydney. In her role, Ms Casale referred the more serious complaints to Ms Benton, her manager from November 2014 to May 2015 and after Ms Benton left, to Ms Mylene Abraham in the period from June 2015 to January 2016. She also regularly sent complaints to Mr Khanche and Mr Luhr by email that she considered were significant enough to warrant attention.

603 In her role as the Online Student Services Team Leader, Ms Casale used AIPE’s CRM system, which she knew contained information about every consumer enrolled as a student by AIPE. She confirmed that the CRM system recorded when consumers enrolled as students were contacted by GLS and by AIPE, and that the records on CRM showed the level of education, the cost of the course, the census date, the start date, any notes made by AIPE or GLS staff, the history of any contact recorded (such as emails and phone calls), any documents the consumer had attached and the consumer’s Language, Literacy and Numeracy (**LLN**) test when this was introduced in March 2015.

604 Ms Casale also used AIPE’s Moodle software system, which was an academic platform. When she received complaints from consumers enrolled as students, she used Moodle to check their level of engagement in the course. As discussed above, the Moodle platform would show AIPE staff every time an enrolled consumer had viewed the course material or completed an assessment.

605 A few days after Ms Casale started at AIPE, she had a conversation with Ms Benton to the Following Effect:

Ms Casale: Lyndall, could I ask you about AIPE’s systems?

Ms Benton: Look Romina, I just don’t have a lot of time at the moment. Could you just have a go and familiarise yourself with them.

606 Ms Casale played around with the CRM and Moodle software and looked at different student files to see what information was there. From the records that she viewed, it appeared to her that many of the consumers enrolled as students did not seem to be engaging in the course or had never been contacted by AIPE or GLS staff.

607 It was Ms Casale’s responsibility when she started at AIPE to manage complaints and appeals which were received by AIPE through email inboxes “*complaints@aipe.edu.au*” and “*appeals@aipe.edu.au*”. She also dealt with complaints that were sent to “*info@aipe.edu.au*”. Before she started at AIPE, to her knowledge Ms Kausova managed those inboxes.

608 Ms Casale recalled that these email inboxes received between 15 and 20 emails per day throughout the period from November 2014 to March 2016. She estimates that 70% of the complaints that she received in the email inboxes were about the enrolment process. These complaints regularly set out that the consumer felt misled or misinformed by the enrolment process, by which he or she was told that the course was free and/or would get a free laptop. She also received some complaints by telephone. If a consumer enrolled as a student called to complain, she sent them an appeal form or asked them to put the complaint in writing.

609 As Ms Casale read all complaints and appeals that came to the email addresses referred to above, she investigated them by using the information available in the Moodle and CRM software systems. Prior to April 2015, every consumer who was enrolled as a student was given a laptop by AIPE. After the consumer’s enrolment had continued past the census date, Mr Ali Mohammad or Ms Levie confirmed with the finance department that the “*student*” had incurred the VET FEE-HELP debt and then put that person’s name and address on the spreadsheet which was sent by AIPE’s suppliers, Staples, to Mr Luhr. She believes that Staples then sent the consumer a laptop. From April 2015, only consumers that had completed a loan application form and passed the census date were added to the spreadsheet and sent a laptop.

610 Ms Casale’s evidence is that some of the consumers who complained had stated they had been offered cash and vouchers to enrol in an AIPE course. Some complained that they did not want to do the course they had been enrolled in. Many complained that they had not received a laptop.

611 From January 2015 to July 2015, Ms Casale processed about 500 refunds for consumers who had lodged a complaint. She recalls that there was a spike in complaints in July 2015 when consumers discovered they had a VET FEE-HELP debt upon completing their tax returns. Throughout the period that she worked at AIPE, she regularly received complaints and forwarded them to Ms Benton, Mr Khanche and Ms Abraham, when she considered them to be serious. She produced examples of the complaints that she had received between November 2014 and December 2015 as part of an exhibit to her affidavit. Like the bundle of emails annexed to Ms Benton’s affidavit, these show a theme of students complaining that they were told courses were free, enticed with “*free*” laptops, and instructed by agents in exactly what to say during orientation calls.

612 Ms Casale’s evidence is that the role of GLS, the company based in the Philippines, was to complete the initial orientation call to confirm the course and that, by rolling in an AIPE course, the consumer was then incurring a VET FEE-HELP debt. All consumers who enrolled as students were given an account number when they signed up to an AIPE course, which was allocated to a student support officer at GLS. It was GLS’s responsibility to telephone a consumer who had been enrolled as a student prior to the census date, to introduce them to AIPE, and to tell them about the course contents. GLS was also required to call consumers once enrolled and to book appointments with trainers and assist consumers in navigating the online learning platform.

613 Ms Casale dealt with GLS staff on a day-to-day basis. She had access to the recordings of the calls that were made by GLS staff. She could see in the CRM notes of telephone calls being made to consumers enrolled as students and also had access to the script that was used by GLS staff when making those calls. She saw the script as there was a shared drive at AIPE where the scripts were stored.

614 As part of her role, Ms Casale listened to recordings of a call when it was a complaint from a consumer enrolled as a student. She recalls that from the calls she listened to that some did not mention that the consumer was to incur a VET FEE-HELP debt. She also often heard the term “*government incentive*” used by GLS staff to describe the course and that GLS staff members sometimes did not say how much the course cost. From her review of student records on CRM, she noticed a lot of consumers enrolled as students had not been called by GLS, but the records showed that the consumer still had their enrolment continued in the course and were charged VET FEE-HELP at the census date.

615 A couple weeks after she started at AIPE, Ms Casale had a conversation with Ms Benton in her office to the following effect:

Ms Casale: I have been looking at student records on CRM and I can see that there is a lot of non-compliant things with GLS.

Ms Benton: What things?

Ms Casale: A lot of students have gone through census without being contacted by GLS. The students are asking to withdraw from a course in the census, they are then being referred to a broker called Acquire to stop them withdrawing.

Ms Benton: Yes I know about this and am concerned as well.

616 During this conversation, Mr Luhr came into Ms Benton’s office. The conversation continued to the following effect:

Ms Benton: John, Romina is concerned that GLS is not making orientation calls to students and they are being referred to Acquire when they try to withdraw.

Mr Luhr: Yes I’m aware of these issues Romina, this is why you were brought on board. It might be a good idea for you to spend some time in the Philippines with GLS.

617 About a week after this conversation, Ms Casale had a management meeting also attended by Mr Khanche, Mr Luhr and Ms Benton. This meeting took place in about late December 2014 or in January 2015. In that meeting, she repeated her concerns, and Mr Khanche said words to the following effect:

I know that GLS do these dodgy things, it’s why we need to get away from the Philippines. Swapna [Ms Pawar] and I have berated the owner about these things many times.

618 In the context of all the evidence, Mr Khanche was evidently concerned at the more flagrant aspects of GLS’s behaviour. I infer that he was aware of the risks to AIPE in GLS giving overtly false information to consumers and did not want that to continue. However, it is equally evident that he regarded merely enrolling consumers who were manifestly unsuitable to be students did not fall within his conception of “*dodgy*”.

619 Soon after this meeting, AIPE started to recruit an in-house team to do the work that had been done by GLS. AIPE recruited persons referred to by Ms Casale as Elizabeth Brown, Rochelle, Matthew Benton, Kieran Syed, Monica and Rita.

620 Ms Casale was aware that Acquire Learning was a broker used by AIPE. CRM records showed that Acquire Learning enrolled a large number of consumers into AIPE courses. Acquire Learning was based in Melbourne. Mr Luhr and Mr Khanche were responsible for dealing with personnel from Acquire Learning.

621 Neither Ms Casale nor her team generally had access to recordings of the recruitment calls made by Acquire Learning to consumers enrolled as AIPE students. However, from email complaints that her team received, she became aware that consumers told the team that they applied for a job and then were called by an Acquire Learning representative to sign up for a course with AIPE. As noted above, this aspect of Acquire Learning’s enrolment practice does not form part of the applicants’ system case. Consumers regularly complained that they thought they were getting a job or getting help to get a job when they signed up for a course. In those emails, consumers also complained that they had been told by Acquire Learning that the course was free or paid for by the government. Ms Casale tried to resolve those complaints by contacting Acquire Learning and asking one of their staff members to conduct an internal review of the complaint and inform her of the outcome. She communicated with Ms Lisa Ainslie at Acquire Learning, usually via email. An account manager with Acquire Learning would usually email her saying that they have listened to the calls and that it was all fine and done correctly. Acquire Learning recordings of only one or two telephone calls were provided to her.

622 In about mid November 2014, Ms Casale began receiving complaints from consumers who alleged that they had received misleading information from GLS staff in the Philippines. The consumers said that they had been told by GLS staff that they had been withdrawn from the course prior to the census and would not be charged, but had not in fact been withdrawn. She found out about this when she received at least 150 complaints soon after 30 June 2015, from consumers who had realised from a tax return that they had a VET FEE-HELP debt arising from an AIPE course. The complaints allege that, contrary to what the consumers were told by GLS, they received a call from a broker at Acquire Learning who attempted to “*save*” the consumer as a student and keep them enrolled until after the course census date had passed.

623 From the complaints she received, Ms Casale saw several instances where the student was convinced by a call from a broker at Acquire Learning to “*keep the census date*” so they could pick up the course if they ever wanted to continue with it. The consumers were not told by Acquire that “*keeping the census date*” meant that they would be charged for the course, incur a VET FEE-HELP debt, or that Acquire Learning would thereby earn a commission. Some consumers stated that they did not receive a call from Acquire Learning, but she could see on CRM that they were still not withdrawn from the course.

624 Ms Casale listened to a number of calls where GLS staff said to consumers words to the following effect: “*you will need to speak to Acquire in order to cancel the enrolment*”. She knew that if a student did not pass the census date for a course, Acquire Learning did not receive the commission payment from AIPE. Of the consumers that “*kept the census date*”, she observed that very few restarted the course, at most about five per 100 consumers who had been enrolled.

625 In December 2014, Ms Benton and Ms Casale completed a mail out to all the VET FEE-HELP consumers enrolled as students listing their course name, the VET FEE-HELP debt and when they had a census date. There were about 800 of these letters. She remembers this because she folded some of the letters and put them in envelopes to the consumers herself.

626 AIPE used certain terms in the CRM to describe consumers enrolled as students. The phrase “*inactive before census*” meant those consumers that had not logged in or made any progress with the course prior to their census date. The phrase “*inactive after census date*” meant those consumers who had not logged in or made any progress in the course after their census date had passed. Ms Casale was able to look at the Moodle program which informed her the last time that a consumer enrolled as a student had logged in, how long they had logged in for and if they had looked at an assessment. The relevant census date for each consumer was recorded on CRM.

627 Ms Casale could see from the records on CRM that a large number of consumers were inactive after enrolment. She had an idea to withdraw the consumers from the course before the census date if they did not log in to do their course or could not be contacted by AIPE staff. She designed the policy by which the student support team was to contact the consumer enrolled as a student two weeks prior to the census date. If no contact was made, the consumer was to be withdrawn from the course in which they had been enrolled. She brought the draft policy to a management meeting attended by Ms Benton, Mr Luhr, Ms Tzanos, Ms Pawar and Ms Ali. They all agreed that AIPE should implement the policy. It was Ms Tzanos’s job to communicate the new policy to AIPE’s agents. Ms Casale remembers instead the following taking place.

628 One evening in mid to late February 2015, Mr Robbie Singh Sawhney, whom she knew as the CEO of Online Study Pathway Australia, one of the brokers used by AIPE, came to the AIPE office in Sussex Street. He was visibly angry. She had a conversation with Mr Sawhney and Mr Khanche to the following effect:

Mr Sawhney: This policy will affect my business. I have invested a lot of money getting my agents out there. If students don’t go past the census [date] then my agents won’t go out and sell the courses. Romina, you must get the team to have an open mind.

Ms Casale: You need to bring better students. We want quality students not large numbers that can’t do the course.

Mr Khanche: Robbie, please calm down. Romina, our partners are important, is there anything we can do?

Ms Casale: You need to get your staff to do and say the right thing, there are big concerns with what they are telling the students.

Mr Sawhney: Yes, yes I’ll speak to my agents.

629 After Mr Sawhney left, Ms Casale had a conversation with Mr Khanche to the following effect:

Ms Casale: We can’t have recruitment agents dictating our enrolment policies to us. They can’t come in and tell us how to run the business. They bring in money but they bring in a lot of problems, we hold the licence not them, we should tell them what to do not the other way round.

Mr Khanche: I will speak to him, I can get through to him.

630 After the new policy had been introduced, Ms Casale generated a report from CRM in late February 2015. She observed the number of consumers enrolled as students that were passing the census date had dropped by about 15-20%. I pause to observe that this was a near instant effect and almost certainly understates the impact that the new policy would have had if it had remained in place for any reasonable period of time.

631 About three to four weeks after the new policy was implemented, Mr Khanche 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 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.

633 After this conversation with Mr Khanche, Ms Casale brought her team together and told them that the rule had changed. She instructed her team to process all the consumers enrolled as students in accordance with the direction form Mr Khanche, even if they had not engaged with the course or could not be contacted. Thus, the system changed back to what it had been before, whereby consumers remained enrolled even if they had not taken any active steps in relation to the course that they had been enrolled in.

634 In mid-March 2015, Ms Casale had a back operation and started working from home four hours a day from the last week of April 2015. In June 2015, she had another conversation with Mr Khanche and Ms Benton. She was told that AIPE had recruited Ms Abraham to replace Ms Benton, who was moving to the international student division of AIPE. Ms Casale was still working from home at that time, mostly dealing with complaints and appeals. She deposes to part of this conversation being in words to the following effect:

Ms Casale: The students aren’t even starting the course, we aren’t compliant with ASQA standards. We can’t keep running the business like this. We have processed 560 refunds since Jan 2015 and this will raise red flags with ASQA and they will ask questions about our enrolment processes, course materials or whether we have a poor support system.

Mr Khanche: I am aware of the risk, it is my risk to take and I am willing to take it.

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 as 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, Ms Casale 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.

638 Ms Casale sent an email with these classifications to Mr Khanche, Mr Luhr and Ms Tzanos. References by Mr Khanche to the “*green*” category below make it clear that he was aware of this information.

639 The 500 or so refunds from appeals that Ms Casale processed were necessarily from consumers who had sufficient awareness of what had happened to them, and sufficient skills and confidence, to be able to appeal in the first place, or were fortunate enough to have legal centres or family members able to advocate on their behalf. The number of refunds and withdrawals was reported by her to management meetings which took place on a weekly basis. On multiple occasions, she reported this to her supervisor, Ms Benton, and to the CEO of AIPE, Mr Khanche. Each of those conversations were to the following effect:

Ms Casale: We have a large amount of appeals each day.

Mr Khanche: Ensure you only refund legitimate cases, make sure they have a valid reason for withdrawal.

Ms Casale: I check all records before making any decision on a possible refund, but most appeals are valid for refunds as they have grounds for appeal.

Ms Benton: Keep doing what you are doing and check with me if you have any doubts.

640 While the above, in isolation, would tend to indicate that Mr Khanche approved the giving of refunds, numerous other comments he made and actions he took, as discussed in these reasons, makes it clear that his concept of a valid reason for withdrawal was narrowly drawn, as the next encounter with Mr Khanche below makes clear. It is worth also repeating that Mr Khanche’s approach was to wait for customer demands for refunds, rather than altering the processes and systems that inevitably saw unsuitable enrolments and these valid demands arise in the first place.

641 When Ms Casale raised the issue of refunds and withdrawals at team meetings, she said words to the effect:

Students are complaining that the agents didn’t tell them about the cost of the course, that they have a debt and are unaware of this and that there is a debt against their tax account until after the census date had passed.

642 Ms Casale gives an example of a withdrawal she processed. On about 1 September 2015 a man emailed her to say that he wanted to withdraw from an AIPE course because he never received the $250 in cash that an agent had promised him, and that his girlfriend had received $200 deposited into her account, but not into his. She took this case to Mr Khanche, who said:

I want proof that she had the money deposited in her account before we refund this student.

643 Ms Casale contacted the student’s girlfriend, who said:

I did receive something but I’m not sharing my bank account, I don’t want to get involved.

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 and Mr Khanche in particular, was not concerned about consumers who had a real risk of not being suitable to be enrolled as students.

645 Ms Casale’s evidence regarding the LLN testing corroborates that provided by Ms Benton. She states that prior to the LLN test being introduced at AIPE, GLS staff did not ask prospective students in the orientation call about their level of education, or their reading, writing or numeracy skills. She knew this because scripts drafted for GLS staff did not contain such questions. Further, in all of the calls that she listened to from GLS staff to students, she never heard GLS staff ask about level of education or learning skills, despite the fact that this information was available in the CRM because it was required to be entered by the person who was signing a consumer up for a course. However, that information was never used to determine how much support was needed for the consumer. Even when the LLN was introduced, this information was not used to determine how much support the consumer enrolled as a student required.

646 The LLN test that AIPE began using in February 2015 was created in-house by Mr Davies, and had approximately 100 questions.

647 The LLN for consumers recruited to be enrolled as students by agents other than Acquire Learning was online and submitted through the Moodle platform. AIPE staff were able to see the IP (Internet protocol) address when the LLN was submitted. Ms Casale observed, and her staff reported to her, that this was often the same IP address for multiple students. From orientation calls that she listened to, approximately 90% of the LLNs were completed when the recruiter was there, as consumers enrolled as students were asked at the orientation call whether they completed the LLN themselves or had assistance.

648 From her review of call recordings, Ms Casale recalls that many consumers stated in their enrolment telephone calls that the agent had completed the LLN test for them, given them the answers, or helped them complete it. Some consumers said that they did not know what the test was. Many consumers said that they had not completed an LLN test.

649 Ms Tzanos was in charge of managing the relationship with the agents. Ms Casale spoke with her on several occasions about the agents completing the LLN for the consumers in conversations to the following effect:

Ms Casale: Dimitra, you need to tell the agents not to assist students or do the LLN on their behalf.

Ms Tzanos: I will communicate with agents to tell them that this isn’t compliant.

On any view, this was an acquiescent response, that, even if carried out, was inadequate considering the serious systemic failing that was being referred to.

650 Ms Casale also raised the issue with LLNs at management meetings with Mr Khanche in words to the following effect:

Ms Casale: I am concerned about agents doing the LLNs for the students.

Mr Khanche: Dimitra is dealing with this with the agents.

651 Apart from this comment, there is no evidence that I was taken to that indicated that this communication took place. It if had taken place, and been effective, it is inherently unlikely that Ms Casale would have been unaware of that. Merely telling agents not to do this, without more, was most unlikely to have been effective as it would result in fewer enrolments taking place, fewer VET FEE-HELP payments being made, and correspondingly fewer commission payments being made.

652 Ms Casale’s staff regularly came to her with complaints about agents completing LLNs on behalf of consumers. As she was unable to check this with Acquire Learning, she spoke to Mr Luhr. They had a conversation to the following effect:

Ms Casale: Do you have the marking criteria for the LLNs?

Mr Luhr: Don’t worry about it, I’ve seen the test and it’s fine.

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.

654 As discussed above, Acquire Learning was permitted by AIPE to use its own LLN test, which staff at AIPE were unable to access. While a student’s LLN test was normally available on CRM, it was not available when the student had been enrolled by an Acquire Learning broker. In March 2015, Ms Casale had a conversation with Mr Luhr in the presence of Mr Khanche and Ms Levie to the following effect:

Mr Luhr: Acquire conduct their own LLNs and they will send us the result.

Ms Casale: Will we get the results so we can look to where students are weak?

Mr Luhr: I’m not sure what it will look like.

655 On a later occasion, Ms Casale remembers asking Mr Luhr for a copy of an Acquire LLN:

Ms Casale: Can I have a copy of an LLN that Acquire has done? I’m concerned about the education level of a couple of students enrolled by Acquire.

Mr Luhr: Don’t worry about it.

656 Ms Casale knew from her investigation of student records in CRM that most consumers who enrolled in an AIPE course had not completed year 12 in High School. She remembers one illustrative incident on this topic in particular. Two adults had been enrolled in AIPE courses. When she called to speak to them, they could not speak English, she had to speak to their ten year old son. She arranged for both of their enrolments to be refunded. On another occasion in July 2015, one of her staff, Mary, forwarded to her a recording of a call she had with one of the recruiters regarding consumers that they had enrolled with AIPE, whom the agent described the consumers as “*junkies*”.

657 As with Ms Benton, Ms Casale states that in the period from November 2014 to April 2015, it was AIPE’s policy to provide laptops to all consumers enrolled as VET FEE-HELP students. The laptops were not provided until the consumer had passed the census date. After April 2015, a loan device form was brought in which had to be completed by a consumer enrolled as a student.

658 OSPA was the main door-to-door marketing company used by AIPE. Mr Sawhney came in to the AIPE office every couple of weeks. In 2015, Mr Khanche informed Ms Casale that OSPA staff were going to Western Australia to enrol students for AIPE courses. He required her team to work late, and she had to arrange for staff to be available to take the enrolment phone calls from Western Australia.

659 On 5 May 2015, Ms Casale was copied into an email from Ms Denise Shimess, who was responsible for the orientation calls to consumers enrolled as students at AIPE, to Ms Tzanos and Ms Benton. The email gave details of a complaint made by a consumer that an OSPA agent in Western Australia had told her it was a free course and that the college would give her a free laptop, and that the agent prompted her on her answers during the orientation call. Ms Casale produced a copy of this email. This is representative of the sorts of complaints that Ms Casale produces and dealt with.

660 Ms Casale remembers in July 2015 listening to a recording of a consumer who said to Ms Tzanos that he was offered $800 by an agent who enrolled him in an AIPE course not to complain to AIPE or to the police about what appeared to be fraudulent activities.

661 In late December 2014, Ms Casale became aware of complaints made to AIPE by Legal Aid staff of another incident of OSPA going into remote areas. She received six complaints about OSPA agents enrolling consumers as students from a remote Aboriginal community. She looked in the CRM and confirmed that it was an OSPA agent. All of those consumers were given refunds. Ms Casale knew of two other Legal Aid complaints in similar circumstances, one that related to three consumers and the other that related to nine consumers.

662 Ms Casale also remembers one occasion when OSPA had enrolled consumers as students from rural Western Australia, but did not provide their identification documents in the enrolment documents. She brought this to Ms Tzanos’s attention and had a conversation with her about it in words to the following effect:

Ms Tzanos: Robbie [Mr Sawhney] has called me and said he’s got some problems with ID, he isn’t going to pay for the agents to go back out there to get the proper documents.

Ms Casale: This is illegal.

Ms Tzanos: There are only four or five of them Romina – just put them through.

663 This exchange makes it reasonably clear that Ms Tzanos did not carry out her role of managing the relationship with agents and the recruiters they employed in a way that focused on compliance, or upon only suitable consumers being enrolled as students with AIPE. Ms Casale was apparently subordinate to Ms Tzanos, because she did as she was told. However her evidence is that there were about 40 consumers enrolled as students without identification, not only five as Ms Tzanos had suggested.

664 In cross-examination, Ms Casale was taken to an email that indicated that sales representatives had been terminated due to this conduct. However she was astute to point out that the email concerned a different agency called “*Vision Sales*”, not OSPA. She was not aware of any request from AIPE in relation to a sales agent from OSPA to be terminated, which is reasonably compelling evidence that this did not occur when she was in this role at AIPE. Ms Casale was shown an AIPE “*domestic incident report*” which stated:

**Action taken by domestic partner:** Providing misleading information is not tolerated by AIPE. This agent should no longer be representing us and placing both companies at risk of legal action against us.

**Action requested by AIPE:** provide sale representative full notice and ensure he/she no longer represents 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.

666 Ms Casale accepted that one of the steps in the complaint process taken by AIPE was to request that service providers not permit certain sales representatives to enrol consumers as students at AIPE, but this concession does not detract from the conclusion that this was a sanction that only applied in extreme cases. She accepted the hypothetical proposition that *if* there was a document which showed that the OSPA agent in relation to the same complaint was terminated, that would be consistent with AIPE policy in relation to such complaints. However, that supposed concession was meaningless in the absence of any such a document being identified.

667 The weight of the evidence concerning OSPA, and its CEO, Mr Sawhney, was that he was very close to Mr Khanche and was active and effective in having any policy that tended to cancel the enrolment of consumers recorded as “*inactive before census*” neutralised or reversed. In any event, AIPE’s business model, as reflected in its enrolment practices and enrolment outcomes, did not depend on consumers being enrolled upon the basis of actively false information, but rather upon the omission of information making it clear that enrolment in a course was taking place and that there was a census date upon which a VET FEE-HELP debt would be incurred, which was more than enough to meet the description of being unconscionable. This approach required active steps to be taken by consumers who, by definition, either did not know that this was taking place (a less common occurrence and not part of the unconscionable system alleged) or did not understand the significance of what was taking place, most particularly about fees being charged and VET FEE-HELP debts being incurred (a reasonably common occurrence when the evidence is viewed as a whole).

668 In her role as the Online Student Services Team Leader, Ms Casale participated in management meetings every Friday, with Mr Khanche, Mr Luhr, Ms Pawar, Ms Ali, Ms Benton, Ms Abraham, and Mr Luciano D’Ambrosi. In those meetings they discussed what was happening with the agents (and thus recruiters), and she often raised issues brought to her attention by consumers enrolled as students during orientation calls, regarding the cost of the course not being explained to them. Thus AIPE was squarely fixed with knowledge as to what was taking place.

669 Ms Casale remembers that in May 2015, her team had a meeting which Ms Abraham 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.

673 Ms Casale’s evidence regarding the very small number of trainers and support staff for students aligns with the evidence given by Ms Benton. From November 2014 until February 2015, the assessments of consumers were carried out by GLS staff in the Philippines as they had six trainers. Ms Casale knew there were six trainers because she had correspondence, mainly via email, with them.

674 Ms Casale states that after GLS was dismissed in February 2015, there was a limited increase in staff numbers. From February 2015 there were approximately 15 support student staff, two or three doing orientation calls and the rest doing student support. From July to December 2015, this number increased to about 30 staff, which included eight working in student orientation and the rest working on student support who booked trainers and assisted the student with any course content, and attempted to re-engage consumers not engaged in the course in which they had been enrolled. Throughout the entire period, there were approximately five trainers looking after online students, a tiny number for the number of consumers enrolled as students. However, other trainers were available in case there was a backlog of work.

675 During the latter part of the relevant period that AIPE was in proceedings with ASQA about its registration, Ms Casale observed that Mr Khanche was concerned about the low level of completions and said that AIPE needed to increase this to keep the registration with ASQA. Thus his concern was more with keeping the regulator at bay. In a management meeting in October 2015, less than two months before the end of the relevant period, and when things must have appeared dire for AIPE, Mr Khanche said words to the following effect:

We need to show that students have completed the course. We have 160 in the green and we need those students to complete their courses. If they don’t complete then the trainers and support staff will be fired.

On any view, this was a very low ambition – a mere 160 students completing their course, was thought to be sufficient.

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.

677 Ms Casale was subject to limited cross-examination over about half an hour. That cross-examination was not addressed in AIPE’s closing submissions. It is however accurately described in the applicants’ submissions (omitting footnotes):

Ms Casale was required for cross-examination. She also presented as an articulate and honest witness. Ms Casale was questioned about the operation of CRM and Moodle. She was also questioned about the timing of the introduction of AIPE’s laptop policy and made appropriate concessions about the date she recalled that it was implemented based on documents shown to her in court. Ms Casale also made appropriate concessions about her recollection of whether certain sales representatives were terminated by AIPE when shown documents. Otherwise, her evidence was not challenged.

678 A few additional points are worth noting from that cross-examination, including my conclusion that the applicants’ view of the concessions made somewhat overstates the very limited impact this had on the burden of her evidence. Like Ms Benton, Ms Casale was certainly an honest, but also incisive, reliable and impressive, witness.

679 Ms Casale stated in cross-examination that when she started working at AIPE in November 2014 there were some 3,000 to 5,000 consumers enrolled as students. By the time she finished working there in March 2016 there was close to 15,000 consumers enrolled as students, a three- to five-fold increase. If there had been an expectation on the part of AIPE that even a modest proportion of that increase in enrolments would be of genuine students who would in fact be studying, there would have needed to have been a corresponding increase in staff levels, yet the evidence reveals only modest increases. Even then, that was largely due to taking over the call centre functions carried out so poorly by GLS that this was brought back in-house from February 2015.

680 Ms Casale was taken to a document headed “*Electronic Study Tool (EST) Delivery Policy*”, which counsel for AIPE stated was still in use when she started at AIPE in November 2014. Her attention was directed to the part of that policy that was concerned with the circumstances in which a laptop would be provided, as follows:

Distance Education students will be automatically issued with a loan of an Electronic Study Device for use with their studies when they have met the following criteria:

* Completed their full profile in the student management system (AIPE Connect);
* Completed their eligibility check and staff induction contact call;
* Provided any documentation requested as part of the admissions/enrolment process;
* Have a current enrolment in distance education units of study;
* All tuition fees have been paid, either upfront or through the FEE-HELP loan scheme.

681 Ms Casale’s evidence under cross-examination was that consumers were given laptops even without a lot of this information. She was not challenged further on this topic. This is another example of evidence illustrating why AIPE’s policy statements must be approached with considerable caution, if not out-and-out scepticism. Testimony as to what was actually happening from the employee witnesses or other non-self-serving evidence is to be preferred over paper systems that, at most, purport to show what was meant to happen.

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.

683 The disconnect between stated policy, especially policy ostensibly directed to rectifying the problem with consumers who were “*inactive before census*” remaining enrolled after the census date, and what actually happened, was reinforced by further cross-examination of Ms Casale. She was shown an email which indicated that by October 2015, a policy had been re-introduced at AIPE whereby, as the email stated “*Should we have no contact with a student within the first 3 weeks of enrolment, we will be changing enrolment status to* ***inactive within census***.” Ms Casale’s evidence in cross-examination was “*I can see it in the email, but it wasn’t the practice, though.*” She agreed with the proposition put to her that Ms Tzanos told agents that this would be happening, but maintained that it was not in fact implemented. I accept without reservation her affidavit evidence and evidence in cross-examination on that topic.

684 In answer to questions in cross-examination about a later version of the document entitled “*Electronic Study Tool (EST) Loan Policy*”, which was said on its face to commence from 13 February 2015, Ms Casale said that her recollection was that the implementation of the policy started in April 2015. She accepted that in her experience it was a requirement that consumers enrolled as students sign the loan documents before a laptop was provided. The cross-examination did not, on a careful reading, displace her evidence as to a delay in that policy taking effect. However, even if that cross-examination is read in a way most favourable to AIPE so that the policy did in fact take effect on 13 February 2015 (and it is difficult to see how this materially assists AIPE), that evidence rather begs the question as to the circumstances in which consumers signed such documents. Parts of the individual student evidence indicate that signing a loan agreement could be done on an agent’s tablet without the student needing or even being practically able to read anything, let alone understanding what they had signed. While that is not representative evidence, it is direct evidence of what was possible under the enrolment system in which it occurred. Once shown to be possible, it is open to infer, in the context of all of the evidence, that it was likely to be prevalent. Indeed, there was no logical reason why it would not be prevalent, given the financial incentives given both to agents and their recruiters and to AIPE. An email shown to Ms Casale indicates that when the student advisors at AIPE were involved, not just the recruiters in the field, consumers could be told by such an email:

Please find the attached loan agreement and policy. If you would like to apply for a loan device, you will need to fill out the agreement and send it back to info@studyonline.edu.au

Please call Student Support on 1 300 256 118 if you need any assistance with this.

685 This email has little or no bearing on consumers who were signed up as students in their homes via recruiter agents in the field. It would not have dispelled a suggestion or implication left with a consumer that the loan aspect was a mere formality and that, in due course, they would get to keep this “*loaned*” device. It is a matter of common knowledge that such devices are not worth very much after a few years as such technology rapidly becomes superseded. In those circumstances, a “*loan*” of a tablet for any significant period of time bears only a formal distinction from such a tablet being given to a consumer.

### Key conclusions drawn from the evidence of the former AIPE employees

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 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, the AIPE was on notice that a high proportion of its consumers enrolled as students were not genuine or bone 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 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.

## Inadequate training of agents and recruiters

696 AIPE submits that the applicants have not been able to establish that it failed to provide training, or adequate training, to its agents and recruiters. It is convenient to describe AIPE’s position first, before turning to the arguments advanced by the applicants on this topic.

697 AIPE relies upon the contracts it had with each of the agents, and the obligations imposed by those contracts, and attaches to its closing submissions a number of annexures pertinent to this topic:

Annexure C: Chronology of AIPE’s relationships with agents

Annexure D: Summary of AIPE’s policies (confined to those relating to agents)

Annexure E: Summary of agent/recruiter training presentations

Annexure F: Summary of induction scripts

698 AIPE submits that during the relevant period it developed and improved training presentation materials for its staff and for its agents. It contends that those materials covered AIPE as an organisation, the VET courses it provided, the VET FEE-HELP scheme and provisions of the ACL. Annexure E summarises the contents of seven presentations. Those presentations will be considered in more detail by way of comparison with the applicants’ submissions on the same topic, based on their schedule which lists even more of this kind of document.

699 AIPE suggests, I think somewhat facetiously, that the applicants have overlooked the fact that there were no agents other than Acquire Learning until about November 2013, and that the majority of its agents were engaged in mid to late 2014. This, AIPE submits, coincides with the time at which it started to require its agents to attend compulsory training in relation to its courses, as set out in Annexure C which provides a chronology of its relationship with its agents.

700 AIPE notes that despite the information gathering and compulsory powers available to the applicants via the ACCC, no agents were called, and thus there was no evidence in relation to the training they received, or the way in which they carried out their processes when conducting enrolment activities. AIPE points out that there is no suggestion that the scripts utilised by the agents, and summarised in Annexure F, contained misleading or unconscionable materials. However this point is not of any assistance: it would be astonishing if AIPE’s training materials overtly told agents and their recruiters to say and do the wrong thing. AIPE submits that because of the training evidence, the applicants cannot discharge their onus in establishing the systems case. As is discussed below, however, the material on its face was sufficient to show that the training was inadequate. Furthermore, given the weight of the other evidence relied upon by the applicants, at best for AIPE the training material could have acted as a form of defence.

701 Care must be taken not to treat summaries of evidence, such as those provided by AIPE in its closing submissions, as being anything more than a submission about that evidence. It is also important to note that the documentary records of AIPE, such as policies, training and scripts, have an optimistic or even aspirational quality to them, reflecting a paper system rather than necessarily having any real relationship to what was actually achieved or even what was really sought to be achieved. The evidence of the former employees and of the consumer witnesses suggests a significant gulf between AIPE’s policies, training and induction materials, and what actually happened. The Court is under no obligation to take such materials at face value, especially when there is a substantial basis to doubt their evidentiary worth. It is legitimate to use illustrative and other evidence to cast doubt on the efficacy of policies and training materials. The issues raised by the employee witnesses made it plain enough to AIPE that any training that was conducted was not effective in stopping unethical behaviour taking place. This is considered in more detail below in the section dealing with the monitoring of agents. Before turning to monitoring, I consider the effectiveness and sufficiency of the training materials on their face, noting that the only overt evidence as to training was the very limited reference by Ms Benton to conducting some ethics training.

702 The applicants submit that a “*critical feature of AIPE’s unconscionable system*” was that it failed to train the agents that were relied upon to recruit consumers to enrol as students on its behalf and for its benefit. I am not convinced that this was critical in the sense of being in some way necessary or indispensable for the applicants’ case to succeed, but it is important evidence in the applicants’ case by which they seek to close the door on any credible suggestion that, except perhaps for aberrant extremes such as outright lies, AIPE was not responsible for what the agents and their recruiters did on its behalf.

703 The applicants characterise the training material directed to agents and their staff, including recruiters, as being of variable quality and not suitable for an organisation which outsourced its marketing function. That observation is especially apposite when regard is had to the disadvantaged consumers able to be targeted for enrolment as a feature of the liberalised VET FEE-HELP scheme. The applicants submit that this contributed to the result that unsuitable consumers were enrolled as online students at AIPE, which assumes in AIPE’s favour that the existence of such training material means that its contents were delivered, and delivered fully and faithfully. I am not convinced that such an assumption is warranted without any clear evidence to suggest that is so, but even if it was, this only came to pass very late in the relevant period.

704 The applicants’ submissions also annex a schedule which, like AIPE’s Annexure E, lists training material documents, but refers to more of them (22) and focuses more on what is omitted. Two of the documents listed by AIPE are not listed by the applicants, although one of them is referenced in the footnotes to the applicants’ closing submissions.

### More than half of the relevant period – 1 May 2013 until mid-September 2014

705 The first agent or recruiter training material relied upon by AIPE is dated 16 September 2014, over half way through the relevant period, but as noted below appears to be later than the initial version. The sparseness of training material up to and including September 2014 is probably an incident of AIPE having no agents other than Acquire Learning until about November 2013, with the majority of its agents engaged in mid-2014. However, it means that AIPE did not approach the advent of the liberalised VET FEE-HELP scheme in place by 2013 with a rigorous or thorough training bent of mind. That is unlikely to have been accidental, and had the practical and predictable effect of giving Acquire Learning a free run with the newly expanded and liberalised VET FEE-HELP scheme, with all its vulnerabilities given the disadvantaged consumers to whom attention was now being given.

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.

707 One thing that strongly and consistently emerges from the training material considered below is that AIPE itself, and any agents and their recruiters who in fact partook of the training, or otherwise became aware of its contents, had forcefully brought home to them the importance for their income of ensuring that a person enrolled as a student retained that status until the census date. If that status was not maintained to that point in time, no VET FEE-HELP loan funds would be paid and no commission would be paid. Thus the training material was capable of having, if not highly likely to have, the perverse effect of encouraging the wrong behaviour on the part of agents and their recruiters.

708 The applicants’ submissions critically analyse the content of the training material, which first appears in the evidence in the second half of 2014. As the applicants point out, in the period up to late November 2014, AIPE’s training materials for agents comprised a short slide presentation entitled “*AIPE Agent Training*”. This presentation is described in the footer as “*Version 4.1*”, so would have been the most advanced version by that time. There is no evidence as to when any version of this training material that might have existed and might have been used was brought into existence prior to September 2014.

709 The last page of “*AIPE Agent Training … Version 4.1*”, inviting questions, identifies Mr Zelvis as the presenter. The first four slides after the cover page contain general information about AIPE and its courses. The last two slides deal with recognition for prior learning and provide contact information. The fifth slide states:

 FEE-HELP & VET FEE-HELP is a loan, not a Government handout.

 Students must know this before becoming a student.

 As of 2014, students will pay their debt back after earning $51,309 AUD per annum at 4%.

 As of 2014, the lifetime limit is $91,000 AUD.

710 The most important thing to note is that there is no reference to the census date, nor as to legal obligations such as those most pertinent to an unsolicited recruiting model in ss 18, 29, 76 and 78 of the ACL. Even if this training was faithfully delivered (for which there is little evidence), it was perfunctory. By this time, AIPE had received serious complaints from consumers who had dealt with recruiters. In any event, the next portion of evidence makes it clear that attendance at training by agents was not made compulsory until the end of 2014, well over half way through the relevant period.

### November-December 2014

711 There is no evidence that AIPE required its agents to attend any compulsory training prior to November 2014. This was a year after the agent pool had started to expand from just being Acquire Learning and just under six months after that expansion was substantially complete. The applicants characterise AIPE’s introduction of compulsory training from that time as a reluctant response to increased scrutiny of VET, relying on the following 6 November 2014 email from Mr Zelvis:

Unfortunately, due to the increased media coverage about noncompliant agents and ASQA (our governing body) getting new powers to govern brokers next year, we need to train all current agents starting with Face 2 Face sales agents – who are the most scrutinised by media and government alike. This is a compulsory training session and will need to be conducted for your agents at **4:00pm – 5:30pm, Monday, 5th November**. [sic, as the Monday following this email sent on Thursday, 6 November 2014 was Monday, 10 November 2014]

Every sales agent **MUST** attend, if a sales agent does not attend, then they are not to sell any courses on behalf of AIPE until training is received.

Please have your sales agents bring with them:

1. Proof of Citizenship or proof of rights to work in Australia.

2. 100 points of ID (Please see attached for relevant documents)

Please can you bring with you:

1. A list of all employees you have engaged to market AIPE and its courses including evidence of identity collection, criminal check and valid contract.

2. Details of all marketing operations conducted by Vision Sales and its employees with reference to AIPE and what areas/suburbs you have been working in.

3. Details of the training process undertaken by your employees prior to them beginning the marketing of AIPE and our courses

Thank you for your understanding.

We want to make sure that all of our agents are compliant so as to avoid any problems in the future.

Kindest Regards

[AIPE logo and contact details, with Mr Zelvis’ name and position]

712 The above email largely puts paid to the suggestion by AIPE that this merely coincided with the expansion of the agent pool that had commenced a year earlier. If the training was motivated by the increase in agent numbers, rather than a perceived need to head off or otherwise meet any investigation that might take place, and perhaps put a better paper gloss on its procedures, one would expect that to have preceded or at least coincided with the expansion, rather than take place many months afterwards. The applicants’ interpretation of this email is sound and should be accepted.

713 The applicants further submit, correctly, that it is apparent from the above email that AIPE did not know who at Vision Sales was recruiting consumers on its behalf, what marketing operations Vision Sales had conducted and where its recruiters were operating to enrol consumers or what, if any, training Vision Sales had provided to its recruiters prior to them marketing AIPE’s courses.

714 In November and December 2014, AIPE prepared an expanded set of training slides for its agents, each entitled “*AIPE Partner Training*”, dated 5 November 2014, 24 November 2014 and 15 December 2014. While there are some minor differences, they are broadly similar.

715 Annexure E summarises the features that AIPE relies upon for the 24 November 2014 and thus 15 December 2014 slide sets, pointing out that 11 slides cover VET FEE-HELP. Slides 19 and 20 in particular contain the following information about the census:

Slide 19

VET FEE-HELP & FEE-HELP

CENSUS DATES

The census date is the most important date

The census date is the last day students can:

* submit a *Request for VET FEE-HELP assistance* form to access a VET FEE-HELP loan; or
* withdraw your enrolment without incurring the cost or debt for that unit.

Census dates are 20% of the study period.

Slide 20

VET FEE-HELP & FEE-HELP

CENSUS DATES

What happens if students fail/withdraw from a unit?

If a student fails a unit, or withdraws from the unit after the census date, they are still liable to pay the tuition fees of that unit, regardless of whether they attended any classes or handed in any assessment items.

716 The applicants point out that while these slides include information about the census date, there is no instruction to advise consumers about what that means for them. In the absence of that requirement, these slides emphasised the importance of keeping consumers who were enrolled as students as having that status until the census date, failing which VET FEE-HELP loan moneys would not be advanced and commissions would not be paid. The substance of this point is that telling agents and thus recruiters about the importance of the census, without clearly and expressly requiring them to tell consumers, is likely to have the practical effect of encouraging them not to disclose the very thing that most imperils the payment of loan funds and thus a commission. It may also be observed, as noted above, that, perversely, these slides made it clear, if it needed to be pointed out to agents and their recruiters, that there could be adverse financial consequences for them, and for AIPE, if the importance of the census date was made clear and that was acted upon by consumers who were enrolled as students.

717 The applicants similarly point out that the slides include additional information about the VET FEE-HELP scheme and the right of consumers to withdraw from a course, but do not:

(1) set out what information must be provided to prospective students, nor any information about complying with the ACL;

(2) contain a direction to not tell consumers the courses or laptops are free (in the context of known complaints of that happening);

(3) contain any information about how to assess the suitability of consumers for enrolment, other than that they must be over 18 years of age (and that those over 16 must complete a statutory declaration).

718 Thus over half of the relevant period passed without any proven training material even existing, let alone training having taken place. The training material introduced in November/December 2014 fell well short of what was required to avoid recruitment behaviour of the kind deposed to by the 13 consumer witnesses and identified as being prevalent by the three former employee witnesses. It could not be seen to attempt even to counter the strong financial incentives to keep prospective students in the dark about the census and its importance in crystallising the existence of a VET FEE-HELP debt. The applicants are correct to treat this as an important supporting feature of the systems case they advance.

### February 2015

719 A further training slide – “*Welcome to Partner Training*” – was issued by AIPE on 16 February 2015, with just over 9 months of the relevant period to go. AIPE points out that 13 slides refer to VET FEE-HELP (and the corresponding FEE-HELP scheme for higher education). In particular, AIPE points to the fact that slide 20 states that “*It is NOT a FREE LOAN as students MUST pay it back*” and both AIPE and the applicants point out that slide 32 states:

**MUST NOT**

* Advise that course is Free
* Mislead students to believe study tool is for free
* Create urgency by giving false information (ie we will waive your application fee if you sign up today)
* Complete or force a student to complete their application while on the phone
* Obtain personal details such as POC & Tax file numbers (as stated before)
* Refrain from advising student of their Census Date

720 The applicants also point out that slide 37 states, in relation to door-to-door recruiters:

**MUST ADHERE TO ACCC RULES AND GUIDELINES**

**AT ALL TIMES**

Door-to-door sales Reps May Not visit prospect[ive] students

* on Sundays or public holidays
* before 9am or after 6pm on weekdays
* before 9am or after 5pm on Saturdays
* Source: https://www.accc.gov.au/consumersisalesdelivery/telemarketing- door-to-door-sales

721 The applicants otherwise submit that this set of slides contained the same defects by way of omission as the previous slides. That submission must be accepted. While the slides raise compliance with some features of the ACL in relation to door-to-door sales, and contain a direction to not give false or misleading information including as to “*study tool[s]*” and courses being free (though they do not say this conduct itself would be a breach of the ACL), they do not contain a direction to advise of the census date and its importance, nor do they provide direction in assessing consumer suitability.

722 A short time later, on 26 February 2015, AIPE had in place a new set of training materials entitled “*Welcome to AIPE Partner Training*”, substantially repeated in slides issued on 2 March 2015. These sets of slides are not directly addressed by AIPE. The applicants describe the relevant new information as being that consumers to be enrolled as students must have a year 12 or equivalent qualification, good English language and literacy skills and regular access to a PC and Internet, as well as an additional slide dealing with LLN enrolment requirements, including that from 1 March 2015, all consumers to be enrolled as students would be required to complete successfully an LLN test tailored to their course of study, and that “*All applicants MUST complete the LLN independently and cannot be provided with any assistance.*” The aspirational dimension to the LLN aspect is undermined by the way in which the apparent intent of such testing was subverted in practice, as considered in some detail above.

723 The following was added to slides 31 and 32 (Compliance and Regulation):

Slide 31

**MUST NOT**

* Advise that the course is Free
* Create urgency by giving false information (ie we will waive your application fee if you sign up today)
* Complete or force a student to complete their application if they have not confirmed commitment to study
* Obtain personal details such as POC & Tax file numbers (as stated before)
* Avoid advising student of their Census Date
* Assist students with LLN

Slide 32

Cont...

* May not bribe or offer any type of incentive to students in order to enrol
* Enrol students who do not meet entry requirements **(e.g Poor language skills, unable to read and write)**
* Must not advise students you work directly for AIPE
* AIPE DOES NOT condone unethical practices. Failing to comply with Compliance and Government Regulations will result in immediate termination of your contract and potentially the termination of your employer[‘]s contract with AIPE

724 The applicants implicitly accept that this was better than the earlier slides, but point out that this still did not contain any information about the content of the courses being offered, the costs of the courses or anything about the ACL, nor identify the regulations being referred to.

725 These slides also amount to a tacit admission that agents were known to be behaving inappropriately, in the context of the mounting efforts by the employee witnesses to rein in such behaviour, as well as the complaint evidence, which was admitted to prove the fact that the complaints were made but not the truth of the matters asserted. There is no evidence about the delivery of this training, but by then it was meant to be compulsory.

### April 2015

726 A further set of training slides was prepared in April 2015, also entitled “*Welcome to AIPE Partner Training*”. The prohibitions reproduced above in the preceding slide sets had added to them not promising free [Microsoft] Surfaces and Study Tools as enrolment incentives or, somewhat cryptically, “*Act[ing] in a way which may appear misleading to AIPE Enrolment staff and the student*.” As the applicants point out, there is no content to these admonitions, such as practical guidance or examples. The new information in part reflects a standard form letter sent by AIPE to a range of agents, dated 7 April 2015, notifying them about the update of the VET Guidelines, and the new prohibitions on offering incentives such as iPads and other electronic items.

### June-July 2015

727 In June 2015, a new AIPE 23-page set of slides for agents entitled “*Recruiting Students – Domestic Partners*”, with the subheading “*Main Compliance Rules*” was created, setting out the obligations imposed upon agents. It reproduced what appears to be a statement from the Department, describing the ban from 1 April 2015 on offering inducements to prospective students to enrol. A number of slides, reproduced below, indicate what should and should not be said to prospective students at a high level of generality. The slides also address restrictions on unsolicited approaches by reference to the New South Wales Department of Fair Trading, but do not delve into the ACL. Census date information is printed in very small print. A further version of these slides was prepared a few weeks later, on 1 July 2015.

Slide 6

VET FEE-HELP

**DO NOT SAY:**

- FREE

- GOVERNMENT FUNDED

- GOVERNMENT INITIATIVE TO HELP PEOPLE GET BACK TO WORK

- DON’T WORRY, YOU WILL NEVER EARN ENOUGH TO HAVE TO PAY IT BACK

Slide 7

VET FEE-HELP

**DO SAY:**

- LOAN

- DOES NEED TO BE PAID BACK WHEN THRESHOLD OF EARNING IS MET.

- ATTRACTS AN ADMINISTRATION FEE

- VET FEE-HELP BOOKLET MUST BE READ AND TERMS AND CONDITIONS ONE-FORM UNDERSTOOD

728 A reasonable inference to draw is that these admonitions reflected a response to complaints that had in fact been made, and amount to a form of admission that this had been taking place. But there is no evidence that any training to this effect that actually took place was effective.

### September 2015

729 According to a form of minutes produced by AIPE, senior staff met on 12 August 2015 for the stated purpose of discussing an action plan for “*Domestic Agents and their Reviews*”. Those in attendance included the CEO (Mr Khanche), the Human Resources and Projects Manager (Ms Ali), the Relationships Manager (Ms Tzanos), Legal Counsel (Ms Anurag Kanwar) and the CFO (Mr Isil Sam), with Mr Luhr giving his apologies. The key aspect discussed and decided was that a new agents’ contract would require them to undergo training into, inter alia, the ACL; and that commissions would no longer be paid, being replaced with set fees for service for referrals that resulted in quality students being enrolled, upon which remuneration would be based. This amounts to a clear enough indication that none of these things were already in place, only some three months from the end of the relevant period. I infer that was the situation.

730 The new material on the ACL, again entitled “*Welcome to AIPE Partner Training*” dated 8 September 2015 was contained in the last five substantive slides out of 61 in the form of general talking points:

Slide 56

 What is ACL?

 Australian Consumer Law (2011) [sic] replaced the old Trade Practices Act.

 Onus is different from ‘trade’ to ‘consumers’

 Can no longer use s52 as an insult ☹

 Handy websites

 [www.consumerlaw.gov.au](http://www.consumerlaw.gov.au/)

 [www.accc.gov.au](http://www.accc.gov.au/)

Slide 57

 We are all consumers

 Education is everyone’s business

 Need to avoid unfair business practices. This means anything misleading, deceptive, false, misleading and unconscionable conduct.

 Big words? What does it all mean?

 FINES

 Name and Shamed and GAOL

Slide 58

 Energy Australia cases: 1.2 million fine and agents fined.

 Who cares?

 Onus of proof.

 Door to door knocking is regulated.

 Can’t call on Sunday or public holiday

 Before 9am or after 6pm. Monday-Friday.

 Call before 9am or after 5pm on a Saturday.

Slide 59

 Always identify

 And inform consumer that they can leave when asked

 Can’t contact the same consumer again for at least 30 days

 Provide contact details

 Explain right to terminate the agreement with no repercussions within “cooling off period”

Slide 60

 Agreement must be clear and plain language

 VET FEE HELP is a loan

 Clearly printed

 See knock knock guide for consumers.

731 It is noteworthy that slide 57 simply states the prohibitions – “*Need to avoid unfair business practices. This means anything misleading, deceptive, false, misleading and unconscionable conduct*” – without any explanation as to what they mean. This was not going to be very helpful, especially the bare use of “*unconscionable conduct*”, a concept that has proven hard enough for lawyers and judges to understand and apply. There was no mention, for example, of the sort of practices that would constitute unconscionable conduct.

732 The above slides, together with the July 2015 slides, better approximates the sort of training material that AIPE should have implemented from the outset. However, given how late in the piece these were, I am unwilling to infer that such training as delivered would have been effective. By this stage, the problematic behaviours of the agents would have become entrenched. It is highly unlikely that the slides could have reversed this behaviour, given that 55 slides preceded these crucial slides, and they were presented in a general and rhetorical manner.

733 The applicants point out that there were further sets of slides to substantially the same effect as brought into existence on 15 September 2015, 22 October 2015 and 27 October 2015. The 22 October version takes a step back by deleting slides dealing with misleading and deceptive conduct reproduced above. The last such set of slides, created 2 November 2015, reverts to content akin to the February 2015 versions.

### Conclusion on training materials

734 I conclude that the training evidence, properly considered, mostly helps the applicants’ case and does very little of substance to help AIPE. As the complaints evidence and employer evidence makes clear, AIPE was squarely on notice of the sorts of problems that it may have been experiencing in its enrolment system that it needed to ensure were not taking place. One crucial way to do this was through adequate training of agents and recruiters. Its effective inaction in this context amounts to acquiescence or even complicity, especially when there was a predictable gain to be had from allowing the status quo to continue. It therefore contributes a component of the matrix of evidence establishing a system or pattern that produced predictable outcomes in a manner that was unconscionable.

## Monitoring of agents and directions given to agents

735 The applicants’ case on the monitoring of agents is that a review of the evidence relevant to this topic reveals that AIPE’s processes were mostly ad hoc and only formalised and developed late in the relevant period, from mid-to-late 2015. They submit that AIPE’s failure to monitor, train and discipline its agents adequately is an important aspect of its unconscionable conduct. In particular, the outsourcing of the recruitment function and failure to oversee that outsourced function “*enabled its agents to recruit vast numbers of* [*consumers enrolled as*] *students for AIPE’s financial benefit who did not undertake or engage with their courses, but who were ultimately saddled with very large debts*”. The substance of the applicants’ case on this topic is that the monitoring policies were both inadequate in content, and inadequately implemented in any event so as not to be reflective of what actually happened.

736 A good example of the inherent limits that can be placed on the evidentiary value of AIPE’s policies generally concerns the issue of monitoring agents. Ms Benton gave evidence that she had no recollection of any monitoring or cancellation policy for agents. In cross-examination, she acknowledged that she did not have access to AIPE’s records at the time that her affidavit was prepared. She also conceded that there was such a policy in place for international students as at the commencement of 2014. But it was not put to Ms Benton that her recollection of there being no such policy in place was a result of a faulty recollection by her of part of the day-to-day operations of AIPE. Her memory of what that was like was credible and reliable. If such monitoring was in fact in existence, it is highly unlikely that Ms Benton would not have been aware of it.

737 AIPE’s cross-examination of Ms Benton relied, and its closing submissions rely, in part upon a document in evidence entitled “*Agency Monitoring and Cancellation Policy (Domestic Students)”* (**agency policy**), Version 1.0, which on its face commenced from 1 September 2013. The implementation of the agency policy was, on its face, assigned to the CEO (Mr Khanche), and, interestingly, the “*Business Operations Manager*” and “*All Marketing Staff*”, rather than indicating any involvement by those dealing with enrolment issues and performance or conduct problems with agents. The very fact that Ms Benton was not aware of the existence of the agency policy during the time she was at AIPE, despite the pivotal position she held in relation to consumers enrolled as online students, supports an inference that its aspirational detail did not reflect what in fact took place, or that the agency policy permeated to the staff dealing with problems arising from conduct by agents who were in a position to give effect to the implementation of the actual monitoring and cancellation of agents.

738 The contemporaneous records also support Ms Benton’s recollection. On 8 October 2014, Mr Zelvis sent an email, apparently to all of AIPE’s then agents, with a subject line “*Agency Monitoring And Cancellation Policy (Domestic Students)”* in the following terms:

Dear Agents

Please be advised we now have a new Agency Monitoring and Cancellation Policy for Domestic Students and you will find this attached.

We ask that all Agencies read through this new policy thoroughly, sign the policy and send back to John Luhr (jonl@aipe.edu.au) by Wednesday, 15th October as I will be on annual leave.

If you have any queries, please don’t hesitate to contact John.

739 AIPE’s cross-examination of Ms Benton on her lack of awareness of the existence of a policy dealing with the monitoring of agents was therefore not a reflection of any inadequacy of her reasonably detailed recollection of key events, or of her evidence more generally, but rather demonstrated that any policy that did exist as a paper document had little or no practical effect so as to be known to exist as a practical reality.

740 It may also be observed that the “*minimum mandatory criteria*” to “*qualify for assessment of their application for representation*” (that is, to become an agent), set out in cl 1 of the agency policy, were slight: that they hold a registered business name, declare that they are not currently under investigation, that the owners have not filed for bankruptcy in the past or been the owner or part owner of registered business that has become insolvent, and have worked as an agent within the Australian educational sector for six months in the past five years. There was no qualitative dimension to the requisite prior experience.

741 The agency policy, and the other policy, training and script documents relied upon by AIPE, existed in the context of powerful financial incentives for recruiters, agents and AIPE itself to pay little heed to such policies, training and scripts, and to take steps that would result in as many consumers as possible being signed on as students, and to do so in a way that maintained that status until the census date. This was capable of having the practical effect of discouraging behaviour that was stated to be required by the agency policy. That is so despite, among the stated obligations in cl 7(a)(v) of the agency policy, the requirement not to “*make or cause or permit to be made or to occur any false, misleading or deceptive representations, statements or conduct for or in relation to AIPE’s business or any dealing of AIPE’s business*”, which appears to be an oblique reference to the ACL.

742 Ms Benton was instrumental in having an actual agency policy introduced a year later, starting 1 October 2014, over half the way through the relevant period. Further versions commenced from July 2015 and September 2015. The applicants conveniently and accurately summarise the stated intent of the agency policies in October 2014 (and in substance also July and September 2015) as follows:

All agents were required to attend a formal induction session held by AIPE before entering into an agency agreement with AIPE. This formal induction was to provide information on, among other things, current AIPE Marketing Practices, rules and future strategic planning and compliance training on relevant standards for marketing/admissions and handling personal information;

AIPE would provide regulator training sessions to agencies, including on updates on AIPE’s overall marketing strategic plan;

Agents were subject to a number of obligations, including, among other things, not conducting themselves in a manner likely to bring AIPE into disrepute, not making or causing or permitting to be made or to occur any false, misleading or deceptive representations, statements or conduct for or in relation to AIPE’s business or any dealing of AIPE’s business, and complying with all applicable laws relating to the promotion of AIPE courses;

AIPE would conduct *“monitoring of agencies and their referred students to ensure that the agreement maintains to be in the best interest of AIPE and its students*” (sic).

AIPE had the right to cancel an agency agreement in the following circumstances: breach of contract conditions, breach of requirements as mentioned within the policy; misrepresenting AIPE in any way which is detrimental to the reputation of the business; changes in AIPE’s overall marketing strategic plans.

743 More telling, and as an indication that AIPE had little concern about the profile of most consumers enrolling as students, but never actively participating in their supposed courses is that, when AIPE implemented a quarterly review policy requiring agents to submit a form detailing their marketing strategies and compliance with (and thus knowledge of) AIPE’s policies, the internal review documents developed in response disclosed that compliance was not raised as much of an issue with a series of agents. By way of example, the review of Acquire Learning for the third quarter of 2015 reveals a perfunctory review process consisting of largely self-serving responses and no apparent concern being expressed at the very high withdrawal rate or with compliance issues given those rates, and the high rate of complaints still being received at that time. That said, it may be observed that monitoring was being taken more seriously by the second half of 2015, being the last stage of the relevant period, but not to the point of actively discouraging a high rate of unsuitable consumers being enrolled as students.

744 AIPE’s records as to what was supposed to take place, as against what actually took place, were exposed by Ms Benton’s evidence. Those records, taking as an example the notes of a meeting about online students on 13 July 2015, suggest that Ms Benton and Ms Tzanos were meant to be key contacts for agents, yet Ms Benton’s evidence (at [78] of her affidavit) was that agents were not her responsibility and that agents came to the AIPE’s offices and spoke directly to Mr Khanche. As already noted, Ms Tzanos seemed to be more concerned about keeping agents and their recruiters happy, than in doing anything effective with compliance issues – evocatively demonstrated by the instruction she gave to Ms Casale just to enrol students despite manifest defects in the recruitment and enrolment of them: see [662] above. As another example, AIPE used stern language around new regulations concerning the marketing of VET FEE-HELP courses, indicating a zero tolerance policy for non-compliance, yet in truth did very little, even in the face of many complaints as set out in Annexure 4 to the applicants’ submissions.

745 There were clear examples of situations in which AIPE were aware of untoward comments by an agent. For example, as pointed out by the applicants, AIPE was well aware that verification calls were conducted with the recruiter present, defeating arguably the most important reason for such a call in the first place. In a 14 May 2015 email from Ms Benton to other staff within AIPE regarding a complaint about OSPA, Ms Benton warned that “*OSPA always stands over them* [*the consumer*] *while the orientation call is being done so they won’t say anything then* …”. AIPE’s response was not to take action to prevent this practice as its policies suggested would happen, but instead only to monitor the progress of the consumers enrolled as students (and it would seem, to do so ineffectively).

746 The reality revealed by a clear consideration of the evidence is that a possibly effective system of monitoring of agents, if properly implemented, did not come into existence until well into the second half of 2015, with policies and procedures to that effect at least ostensibly starting to be implemented from about August 2015, as recorded in the minutes of a 40 minute meeting with senior staff and Mr Khanche. In that meeting, it was decided that ACL training “*would be*” required to be attended by agents in the future, making it tolerably clear that this was not the reality by that time, whatever was said in policy documents. This was to be accompanied by a new agent contract to improve compliance, at least overtly.

747 From November 2015, almost at the end of the relevant period, better systems were introduced, but that was too late to have any measurable effect before the end of the relevant period, and was again a telling sign of the weaknesses that were in place up to that time. In particular:

(1) Ms Tzanos contacted agents to advise them of restricted areas where recruitment was not permitted. Agents were told by email that if they had staff working in the areas listed, they were to be removed immediately and let AIPE know.

(2) AIPE apparently introduced a weekly monitoring summary document, which outlined monitoring activities in relation to agents. The summary for the week commencing on 9 November 2015, three weeks from the end of the relevant period, referred to all OSPA and Distance Online Study Australia (**DOSA**) staff attending compulsory compliance training, with both agents’ accounts suspended for that period.

(3) It would seem that AIPE was aware they were in the sights of the Department. For the week commencing 20 November 2015, the following was recorded concerning OSPA:

AIPE is in regular contact with OSPA to discuss all aspects of the business. Discussion items include risks matters, staffing, ongoing training and any challenges. The meetings with OSPA are organised every alternate day.

(4) AIPE appears to have introduced a weekly update for agents called the “*Weekly Service Provider Update*” to provide to Mr Khanche, including enrolment statistics. The following is the data assembled in relation to Acquire Learning:

Service Provider: Acquire Learning

**Enrolments**: 41

**Cancellations:** 155

**Reason for cancellations:**

* Concerns on course cost 7.10%
* Course is harder than anticipated 0.65%
* Death in the Family 0.65%
* Felt misled by enrolment process 1.29%
* Got a new Job 11.61%
* Health reasons 1.94%
* Lost Interest 9.03%
* No Computer, No internet Connection 1.29%
* Other 18.06%
* Unaware of enrolment 1.29%
* Undertaking other studies, wants to study on campus 10.32%
* No Reason recorded 36.77%

**Complaints**: 1

List of complaint/s

**Student Id:** [student name redacted] 201416275

**Nature of complaint:** supports did not complete VET FEE-HELP

**Outcome:** The calls were screened and Acquire has reported there was not a noncompliance issue involved

**Appeals:** 4

15010705 – Student cancelled before census date

20148189 – Requested to cancel before census

20143496 – Believed course was free/misleading information

201415525 – Student claims wasn’t enrolled/never logged into Moodle

**Website Review:** 2 x reviews completed.

**Additional Comments:**

748 The process that was meant to take place was that, upon a complaint being received to one of three email addresses, it was to be referred for action by or to the Online Student Services Team. The agent would then be contacted and asked to investigate the conduct of the recruiter, and in the meantime the recruiter was suspended from representing AIPE. Once the agency’s response was to hand, it would be reviewed and a decision made as to whether or not to take disciplinary action against the agent and/or recruiter. However, in practice, sometimes action would be taken, but sometimes an explanation from the agency would simply be accepted.

749 After reviewing a number of the documents in evidence, I conclude that the monitoring and disciplining of agents and recruiters was ad hoc and tended to be ineffective and unduly forgiving of egregious behaviour until things, at least on paper, started to be tightened up from about the middle of 2015. This absence of action failed to rein in conduct by which unsuitable consumers were enrolled as students. As such, poor monitoring and disciplining practices were, at least until mid-2015, part of the system of conduct or pattern of behaviour relied upon by the applicants. This contributed to unsuitable consumers remaining enrolled past the census date so that VET FEE-HELP loan funds were paid and commissions were paid.

750 Vision Sales and OSPA recruited the second and fourth largest number of consumers who were enrolled as students (just over 5% and just under 18%). Despite receiving a large volume of complaints about each of these agents, AIPE did not terminate their contracts. Rather, AIPE purported to require Vision Sales and OSPA to dismiss individual agents that were the subject of complaints and/or required agents to attend additional training sessions. It also temporarily suspended the accounts of both agents but subsequently allowed them to continue representing AIPE. I infer that this only took place for the most egregious behaviour, and did not extend to where agents omitted information, or made representations that were misleading, deceptive, or contextually false.

751 The applicants point out that while:

(1) in October 2015, AIPE terminated the agency contract with Open Education Colleges (**OEC**) for using unauthorised sub-agents (recruiters) to promote AIPE’s courses in breach of that contract because it had received a significant volume of complaints about that broker; and

(2) earlier, AIPE terminated the agency contract with Aussie Careers for using unauthorised recruiters (August 2015) and SAI Global and Sikder (in 2014),

a number of AIPE’s largest brokers, including OSPA, DOSA, Vision Sales and Acquire Learning, were not terminated despite being subject to a large volume of complaints as set out in Annexure 4 to the applicants’ closing submissions.

752 The proper conclusion to be drawn on all of the evidence is that AIPE gave agents and recruiters a very wide latitude to conduct in relation to the enrolment of consumers as students. The monitoring was at best perfunctory, largely, I infer, because there was a strong alignment between AIPE and the interests of the agents and their recruiters in enrolling as many consumers as possible, and because in truth it suited AIPE to have significant numbers of unsuitable consumers enrolled. Mr Khanche was not concerned at all about repeated complaints regarding consumers being enrolled by way of misleading or incomplete information, although it seems clear enough that he recognised that objectively false information should not be given. This attitude was necessarily inconsistent with any monitoring of less egregious behaviour, let alone effective monitoring.

## Extraordinary commission payments for recruitment

753 As has been noted numerous times in these reasons, the commissions paid by AIPE to its agents gave powerful incentives to recruiters to enrol as many consumers as possible, and to do so without regard to their suitability to undertake the course in which they were enrolled. Because of the importance of this aspect of the applicants case, further detail as to the structure of the commission payments helps to understand how such arrangements likely needed to be accompanied by stringent monitoring of conduct and enforcement of the sorts of minimum standards, at the least, adverted to in AIPE’s training and policy documents, using complaints made as a warning system to areas needing attention to avoid the contravening conduct. Yet, it is clear from what the employee witnesses both said, and did not say, that this was not a feature of AIPE’s business practices.

754 The evidence before the Court makes it clear that commissions were paid solely upon the number of students that agents enrolled, mostly only after the census date, such that the emphasis was not on suitability, or participation, let alone likely completion of a course. By way of example, a typical AIPE agent agreement in standard form, entered into with OSPA for 2014, provided the following “*service fee*” in Schedule 1, Item 2:

25% of the Course Fee received in each section for all Enrolled and Current Students referred by the Agent for online study. The total of which is payable after the student has passed their Census Date for each section.

755 The same agreement provided at cl 12.1(a) that AIPE could terminate the agreement if OSPA failed to refer more than a minimum number of students specified. While the part of the schedule specifying a number (item 3 in schedule 1) is blank, by the date of the next agreement in April 2015, the commission (service fee) had been increased from 25% to 35% of the course fee, and the omission had been rectified by the insertion of a minimum referral threshold of 1,200 enrolments per month. While there is no evidence that termination took place for failure to meet that threshold, it is a telling indicator that the suitability of consumers to be enrolled as students formed no overt part of an agent’s overt contractual obligations. The burden of the agreement was focussed on enrolling as many consumers as possible and having them remain enrolled until the census date. Such incentives were an important part of the applicants’ unconscionable conduct case.

## Consumer witnesses and other evidence of misleading, deceptive or contextually false or misleading representations as part of the system/pattern case

756 The applicants rely upon the consumer evidence as direct evidence contributing to its system/pattern case. As already noted, this also serves as capacity evidence as to what AIPE’s enrolment system permitted to take place, reflecting in that way upon this feature of the system as a whole, without reliance on it as representative evidence. It is not necessary to repeat the evidence from the various consumer witnesses as to representations already found to be misleading, deceptive or contextually false that courses were “*free*” or that laptops provided were “*free*”. The evidence that this was a pervasive feature of AIPE’s enrolment system is also supported by:

(1) evidence from the survey conducted by ASQA of consumers enrolled as AIPE students that, of those contacted, 100% did not know the cost of the course, 14% believed the course was free and 31% were not aware that they had incurred a debt by enrolling in the course;

(2) evidence from the ORIMA report survey of consumers enrolled as AIPE students that up to 30% were not provided with information about course fees;

(3) evidence from the McGrathNicol report that 19% of students who submitted a Request for VET FEE-HELP assistance form were provided with a form that did not include the cost of AIPE’s course, consistently with the evidence of Ms Benton and Ms Casale; and

(4) as already detailed, AIPE’s training materials up to November 2014 contained cursory information about the VET FEE-HELP scheme and did not even direct agents not to say the courses were free until February 2015.

## Unfair tactics and awareness on the part of AIPE senior staff and CEO (Mr Khanche)

757 The content and analysis of the employee evidence above, including in particular their interaction with Mr Khanche and Mr Luhr, makes it clear that AIPE permitted the features of its marketing and enrolment system that I have found to be unconscionable to continue despite the attempts of the employee witnesses who gave evidence to operate differently. This evidence carries more weight in light of, and supported by, the enrolment data evidence and the complaints made and looked into, concerning how consumers were dealt with as part of the enrolment process. In particular, the complaints include consumers saying, as raised by the employee witnesses, that they were unaware they had been enrolled by AIPE, that they had incurred a VET FEE-HELP debt to the Commonwealth, that they could withdraw by the census date, and that they had not been contacted after being enrolled (and found out later, such as when a tax return was lodged and the debt was revealed). The lack of response to these complaints, except in extreme cases, was not evidence that AIPE did not believe the complaints were true, but rather that they did not regard this as important, with Mr Khanche instead placing responsibility back on the consumer.

758 Mr Khanche and other senior staff, including in particular Mr Luhr, clearly knew from the enrolment data and from Ms Casale’s red, green and amber analysis and coding of the consumers from their own CRM information, that most of the consumers enrolled as students were not engaging with or completing their courses; and must have known that this was not just the product of this sort of course, with suitable students being enrolled but subsequently failing. Those staff, and thus AIPE, were therefore well aware that AIPE was enrolling consumers as students who were unlikely from the outset to be able to commence or complete the courses in which they were enrolled, including those who had no interest in commencing a course and only enrolled because of the inducements offered. These and related issues were raised at AIPE management meetings, with, in particular, consumer complaints and low completion rates being discussed. Yet, AIPE had no language, literacy or numeracy testing until early 2015, with inadequate or subverted testing taking place after that.

759 As detailed in the consideration of Ms Casale’s evidence above, in the period from December 2014 to January 2015, it was well-known that many of the consumers enrolled as students were inactive because they had not commenced their course, and had not been contacted by AIPE or GLS to verify their enrolment. When Ms Casale introduced a procedure to withdraw inactive students prior to their census date, this was reversed once it led to the number of students passing the census date to drop sharply. The evidence disclosed that Mr Khanche made any such change contingent on it not resulting in any marked change in enrolments, responding swiftly to complaints from AIPE’s agents.

## Mr Khanche’s awareness of AIPE’s agents’ marketing practices

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.

## Audit findings (admitted over objection)

761 I have not used the survey evidence considered below to provide any independent footing for the conclusions reached, but rather in the nature of clarification and as a form of yardstick against which to obtain further assurance that the conclusions independently reached are sound.

### McGrathNicol report

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, 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 per cent of students had not logged into the online LMS, and 76 per cent of students had logged in on four different days or less. Only 10 per cent 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 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.

### ORIMA Report

765 ORIMA Research conducted enrolment data interviews for consumers enrolled as students with AIPE on behalf of the Department and produced a report in evidence dated 28 January 2016. For that purpose, the Department provided electronic records for 5,532 consumers enrolled as student with AIPE, 2,125 of whom were enrolled between 1 July and 30 September 2015, with 2,057 (97%) having a mobile or landline contact number. Over four days in January 2016, ORIMA made at least six attempts to contact each of those consumers, with a view to conducting a telephone interview to verify their enrolment status. This was the result of those attempts:

**Table 1: Number of people who participated in AIPE enrolment data verification interviews**

|  |  |  |  |
| --- | --- | --- | --- |
|  | **# Persons** | **% of Total Sample** | **% of Contactable Sample** |
| **Total Sample** | 2,057 | 100% |  |
| **Uncontactable Sample** | 1,493 | 73% |  |
|  Disconnected number | 393 |  |  |
|  Answering machine only | 874 |  |  |
|  No answer (called 6+ times no answer) | 180 |  |  |
|  Not known at number / wrong number | 34 |  |  |
|  Uncontactable for other reasons | 12 |  |  |
| **Contacted Sample** | **564** | **27%** | **100%** |
|  Completed interviews | 345 |  | 61% |
|  Partially completed interviews | 6 |  | 1% |
|  Contactable but unable to complete during the fieldwork period | 185 |  | 33% |
|  Refusals | 28 |  | 5% |

766 Of the 564 (27%) who were able to be contacted, 345 (61%) completed interviews, with 333 reporting that they were currently or previously enrolled with AIPE. Of those 333, the following was reported:

(1) 183 (55%) had not participated in the course at all, for reasons that included not having a computer or Internet access;

(2) 150 (45%) had participated, with 107 (71%) being satisfied, 21 (14%) being neither satisfied nor dissatisfied and 23 (15%) being dissatisfied;

(3) 120 (36%) were not aware that they had received a loan from the Australian Government (a VET FEE-HELP loan) to pay for the course;

(4) 269 (81%) were nonetheless aware (presumably upon being told of its existence for some) that they were required to pay the loan back;

(5) 198 (59%) were aware that the debt is owing even if the course was not completed;

(6) 101 (30%) were not provided with information about course fees and charges before enrolment;

(7) 156 (47%) were not provided with information about options for paying for the course;

(8) 105 (32%) were not provided with information about their rights and obligations as a student;

(9) 161 (48%) were not provided with information about AIPE’s course refund policy;

(10) 147 (44%) did not receive a Request VET FEE-HELP loan form;

(11) 140 (42%) received a Request VET FEE-HELP loan form, of whom 123 (88%) recall signing the form; and

(12) 87 (26%) were offered inducements to enrol with AIPE, of whom:

(a) 57 (66%) received a laptop or computer, in the proportions of: to keep 31 (54%); as a loan 26 (46%); and

(b) 27 (31%) received an iPad or other tablet, in the proportions of: to keep 17 (63%); as a loan 10 (37%).

## ASQA audit

767 ASQA conducted an audit in 2015 to ascertain whether AIPE was compliant with the relevant standards for RTOs. The audit focussed on three courses provided by AIPE, being the diploma of management, the diploma of travel and tourism, and the diploma of events management, with eight consumers being sampled for each course. The audit was conducted by way of a site audit, interviews, a draft report and response from AIPE, before a final report was completed and sent to AIPE. The portion particularly relied upon by the applicants found, in summary, that of the consumers who were contacted:

(1) 12% did not know the name of the RTO they had enrolled with;

(2) 12% did not know the name of the course they had enrolled in;

(3) 100% did not know the cost of the course;

(4) 14% believed the course was free;

(5) 31% were not aware that they had incurred a debt by enrolling in the course;

(6) 43% did not complete the enrolment forms themselves;

(7) 86% were offered inducements to enrol; and

(8) 48% had not commenced training since enrolling, with the actual figure likely to be much greater.

## Enrolment data analysis (by Dr Ericson) contributing to proof of targeting

768 The limited evidence of enrolment data analysis prepared by Dr Ericson, and admitted by consent, comprised of six tables. The evidence demonstrates in some greater detail a fact that was substantially not in dispute, namely that there was targeting of disadvantaged consumers, including those within remote communities, for the purpose of enrolling them as students with AIPE, consistently with the objectives of the 2012 liberalisation of the VET FEE-HELP scheme. The issue is not the fact of targeting, but rather how it was carried out.

769 As the following footnote to the applicants’ closing submissions makes clear, the term “*remoteness*” is used in the following sense:

The Australian Bureau of Statistics deploys the Australian Statistical Geography Standard (**ASGS**). The ASGS defines Remoteness Areas into five classes of relative remoteness across Australia. These 5 classes of remoteness are: Major Cities of Australia; Inner Regional Australia; Outer Regional Australia; Remote Australia and Very Remote Australia. The five classes of remoteness are determined using a process that provides a consistent definition across Australia and over time. This allows statistical data to be classified in a consistent way that allows users to analyse changes in data for different remoteness categories over time: see [www.abs.gov.au](http://www.abs.gov.au/): 1270.0.55.005 – Australian Statistical Geography Standard (ASGS): Volume 5 – Remoteness Structure, July 2016

770 With the above definition in mind, it is convenient to reproduce the applicants’ summary (at [569] to [574] of their closing submissions, omitting footnotes) of the six tables prepared by Dr Ericson as this was not disputed, as far as it went, but rather as to the use that could be made of it:

Table 2 divides the dataset into Acquire and Non-Acquire enrolments and shows the number in each category.

An overview of AIPE student enrolments by state, remoteness and indigeneity is set out in Table 3 of the extracted tables from the Dr Ericson Report. This shows that students were enrolled from every state and territory within Australia, with just under half of enrolments being from students in New South Wales (**NSW**) (6975 out of a total of 14680). For each State and Territory and nationally, the table breaks down the Acquire, Non-Acquire and total AIPE enrolments into Major Cities, Inner Regional, Outer Regional, Remote and Very Remote categories. It does so both for enrolments generally and indigenous enrolments.

Table 4 contains an overview of enrolments by agent, provider (AIPE or TAFE) and indigenous status. It reveals that the proportion of indigenous students enrolled into an AIPE course was higher (at 14.55%) than the proportion of indigenous students enrolled into TAFE courses (4.22%). If the AIPE data is limited to agents other than Acquire, the proportion of indigenous students was significantly higher again (at 22.96%). The difference is significant when it is borne in mind that Acquire operated by telephoning job applicants, whereas the other agents recruited door to door.

Table 5 contains an overview of enrolments by agent, provider (AIPE or TAFE) and remoteness. The overall proportion of students enrolled into AIPE courses from Major Cities was broadly similar to that of TAFE (66.15% compared to 70.84% for TAFE). However, the figure was markedly lower (58.94%) for students enrolled into AIPE courses by non-Acquire agents. Meanwhile, the Non-Acquire enrolments included markedly higher proportions of students in Outer Regional, Remote and Very Remote areas than TAFE (and Acquire).

Table 6 contains an overview of enrolments by agent and provider (AIPE or TAFE) and SEIFA Disadvantage. Quintile 1 (the most disadvantaged areas) are significantly over-represented among AIPE enrolments – 36.49%, compared to 22.26% of TAFE students. Again, the disparity is significantly greater for the Non-Acquire enrolments: 48.59% of these were from quintile 1 areas. Conversely, only 3.53% of AIPE students recruited by non-Acquire agents were from areas in quintile 5, and 6.5% from quintile 4, compared to 16.80% and 19.50% for TAFE. When the different methods of Acquire and the other agents are taken into account, it becomes clear that the agents who visited prospective students were doing so predominantly in relatively disadvantaged areas: 72.30% of Non-Acquire enrolments came from areas in the lowest two ventiles (compared to 43.32% for TAFE).

Table 36 contains an overview of AIPE enrolments by quarter, between Q2 2013 and Q4 2015, and the average SEIFA disadvantage level (by decile) of the areas from which the students were enrolled. It reveals that Acquire Learning made the vast majority of its enrolments on behalf of AIPE during 2014 (4652 out of a total of 5789, being 80%) and that a significant number (54%) of students enrolled by non-Acquire agents took place in Q4 of 2014 (2315 students) and Q1 of 2015 (2154). In each of those periods of heightened activity, the mean SEIFA decile for non-Acquire enrolments was below 3 – well below the average SEIFA deciles for Acquire enrolments (always over 5 except in one quarter).

# OVERALL CONCLUSIONS ON THE SYSTEM/PATTERN CASE

771 For the reasons identified above, I find that the applicants have established that AIPE engaged in a system of conduct or pattern of behaviour that was, in all the circumstances, unconscionable within the meaning of s 21 of the ACL.

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:

(1) *The absence of a representative sample of consumers enrolled as students.* There was no obligation on the applicants to bring its case on a representative basis; they were entitled to place central reliance on the evidence of former employees who had direct dealing with AIPE’s CEO and other senior staff, and to buttress that evidence by illustrative evidence of how the enrolment system described in fact operated as a system in the field, as well as by enrolment evidence of the overall outcomes that were produced.

(2) *The limited weight to be given to complaint evidence.* The s 136 limitation applied to purely documentary evidence of complaints made, the admission of which was thereby limited to being evidence of the fact that each complaint was made, and not, of itself, as evidence of the truth. The complaints admitted as evidence of the fact that they were made indicated both AIPE’s awareness of the sorts of problems that were being encountered. It was to be read with the evidence of the employee witnesses, who investigated a substantial number of such complaints, giving a clear window into the responses by the most senior officers of AIPE to the actual workings of the enrolment system as to both a system of conduct and a pattern of behaviour.

(3) *The asserted lack of evidence that the problems encountered by the consumer witnesses was attributable to all of the agents.* This does not do justice to evidence which revealed a widespread systemic problem with the AIPE enrolment system as deposed to in some detail by key employees directly involved with that system, supported by illustrative evidence of what was taking place in the field showing what was capable of happening in giving effect to AIPE’s enrolment system and what that system permitted to occur;

(4) *The asserted absence of evidence that the actual provision of laptops was an unfair tactic rather than merely a study tool.* This elides the real issue, which was the fact that AIPE’s enrolment system permitted consumers being told that laptops were free, which was misleading and deceptive and contextually false in light of the need to incur a VET FEE-HELP debt before any such laptop would be provided. As such it was an unfair tactic.

(5) *There being no evidence that the consumers were signed up to a “bad deal” in the sense of it being shown that the courses able to be provided to consumers enrolled as students were deficient.*  This too is a red herring, both because the issue raised by the applicants’ case was not to do with the services that might have been available to suitable consumers, but with enrolling consumers who were not suitable to be students in the first place, and because the staffing numbers were very low in keeping with a very low rate of actual participation in courses proven by the enrolment data.

(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’ unconscionabilty 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.

(7) *Putting to one side the McGrathNicol and ORIMA reports which were not prepared for this proceeding and should be given little weight, there was “no evidence” of AIPE’s business systems, completion rates, participation rates or the structure of its business that would “permit” the Court to conclude that its enrolment system was unconscionable in all the circumstances.* First, the McGrathNicol and ORIMA reports formed part of the matrix of evidence that was available to form a holistic view of AIPE’s enrolment system. Secondly, this submission is ambiguous in that it is not clear whether the thrust of it was an absence of evidence, or an insufficiency of evidence of the kind referred to. The former is plainly incorrect, as there clearly was evidence of AIPE’s business systems, enrolment data evidence and evidence from employees on enrolment information that they worked with from which can be derived conclusions about completion rates and participation rates, and evidence about the structure of AIPE’s business. It must therefore be a submission about the insufficiency of evidence on that topic. That evidence has been approached as part of the matrix of evidence, each in the context of other evidence, rather than in the disconnected way that AIPE effectively urged upon the Court.

773 It follows that the asserted gaps in the applicants’ evidence were not of the nature or extent asserted by AIPE, and were therefore not fatal to the unconscionable system case brought against it. The asserted gaps in particular overlook the real force and effect of the compelling inside evidence of the former employees, which formed no part of the case in *Unique*.

# CONCLUSION

774 I will hear further from the applicants as to the orders to give effect to these reasons and for the further conduct of the matter.

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| I certify that the preceding seven hundred and seventy-four (774) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromwich. |

Associate:

Dated: 26 November 2019