Federal Court of Australia

Productivity Partners Pty Ltd (trading as Captain Cook College) v Australian Competition and Consumer Commission [2023] FCAFC 54

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| Appeal from: | *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (trading as Captain Cook College) (No 3)* [2021] FCA 737*Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (trading as Captain Cook College (No 5)* [2021] FCA 919 |
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| File number(s): | NSD 887 of 2021NSD 895 of 2021 |
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| Judgment of: | **WIGNEY, O**’**BRYAN AND DOWNES JJ** |
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| Date of judgment: | 6 April 2023 |
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| Catchwords: | **CONSUMER LAW** – unconscionable conduct – statutory unconscionability under s 21 of the Australian Consumer Law (**ACL**) – registered training organisation provided vocational education and training under Commonwealth’s Vocational Education and Training Fee Higher Education Loan Program (**VFH scheme**) – whether certain changes made by the registered training organisation to the student enrolment process, and the claiming and retaining of revenue in respect of enrolments under the VFH scheme, constituted unconscionable conduct – whether a senior executive of the registered training organisation was knowingly concerned in, or party to, the alleged contraventions of the registered training organisation for the purpose of ss 224, 246 and 248 of the ACL – whether conduct of sales and marketing agents of the registered training organisation undertaken in contravention of ss 18, 21 or 29 of the ACL can be taken to have been engaged in by the registered training organisation within the meaning of s 139B(2) of the *Competition and Consumer Act 2010* (Cth) – whether conduct of registered training organisation was not unconscionable by reason that the organisation promptly remedied harm that was caused by conduct that would otherwise have been characterised as unconscionable  |
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| Legislation: | *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CB, 12CC*Competition and Consumer Act 2010* (Cth) ss 139B, 155, Sch 2 (Australian Consumer Law) ss 2, 18, 20, 21, 22, 29, 69, 78, 79, 224, 246, 248 *Higher Education Support Act 2003* (Cth)*Trade Practices Act 1974* (Cth) Pt IVB, ss 51AC, 51ACA, 51AD, 52A Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) |
|  |  |
| Cases cited: | *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564*Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* (2018) 261 FCR 301*Ashbury v Reid* [1961] WAR 49 *Attorney General of New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR 557*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68*Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)* [2019] FCA 1982*Australian Competition and Consumer Commission v BlueScope Limited (No 5)* [2022] FCA 1475*Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* [2018] FCA 1408*Australian Competition and Consumer Commission v Danoz Direct Pty Ltd* [2003] FCA 881; 60 IPR 296*Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* [2006] FCA 1427; 236 ALR 665*Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd* [2015] FCA 274*Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90; ATPR 42-447*Australian Competition and Consumer Commission v Mazda Australia Pty Limited* [2023] FCAFC 45*Australian Competition and Consumer Commission v Medibank Private Ltd* (2018) 267 FCR 544*Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (trading as Captain Cook College) (No 3)* [2021] FCA 737; 154 ACSR 472*Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (trading as Captain Cook College) (No 4)* [2021] FCA 752*Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (trading as Captain Cook College) (No 5)* [2021] FCA 919 *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* [2021] FCAFC 40; 388 ALR 577*Australian Competition and Consumer Commission v Rural Press Ltd* [2001] FCA 116; ATPR 41-804*Australian Competition and Consumer Commission v TF Woollam & Son Pty Ltd* (2011) 196 FCR 212*Australian Competition and Consumer Commission v Phoenix Institute of Australia Pty Ltd (Subject to Deed of Company Arrangement)* [2021] FCA 956*Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* (2021) 285 FCR 133*Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1*Australian Securities and Investments Commission v Maxwell* [2006] NSWSC 1052; 59 ACSR 373*Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132*Australian Securities and Investments Commission v Westpac Banking Corporation (No 3)* [2018] FCA 1701; 131 ACSR 585*Australian Securities and Investments Commission v Westpac Banking Corporation (Omnibus)* [2022] FCA 515; 159 ACSR 381*Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424*Coggin v Telstar Finance Company (Q) Pty Ltd* [2006] FCA 191; ASAL 55-156*Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421*Fox v Percy* (2003) 214 CLR 118*Giorgianni v The Queen* (1985) 156 CLR 473*Good Living Company Pty Ltd v Kingsmede Pty Ltd* (2021) 284 FCR 424*Jenyns v Public Curator (Qld)* (1953) 90 CLR 113*Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392*Keller v LED Technologies Pty Ltd* (2010) 185 FCR 449*Leighton Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union* (2006) 154 IR 228*McGrath v HNSW Pty Ltd* (2014) 219 FCR 489*Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1*Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199*Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525*Perpetual Trustee Company Ltd v Burniston (No 2)* [2012] WASC 383; 271 FLR 122*Perpetual Trustees Victoria Limited v Xiao* [2015] VSC 21*Quinlivan v Australian Competition and Consumer Commission* (2004) 160 FCR 1*R v Nifadopoulos* (1988) 36 A Crim R 137*R v Tannous* (1987) 10 NSWLR 303*Rafferty v Madgwicks* (2012) 203 FCR 1*Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236*Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53*Stefanovski v Digital Central Australia (Assets) Pty Ltd* [2018] FCAFC 31; 368 ALR 607*Stubbings v Jams 2 Pty Ltd* [2022] HCA 6; 399 ALR 409*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) 266 FCR 631*Wade v J Daniels and Associates Pty Ltd* [2020] FCA 1708*Western Australia v Ward* (2002) 213 CLR 1*Yorke v Lucas* (1985) 158 CLR 661*Xiamen Huadian Switchgear Co Ltd v Powins Pty Ltd* [2022] FCA 1159; 169 IPR 77*The Juliana* (1822) 2 Dods 504; 165 ER 1560 |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Regulator and Consumer Protection |
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| Date of hearing: | 4, 5 and 6 May 2022  |
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| Solicitor for the Second and Third Respondents in NSD895/2021: | MinterEllison |

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| **Table of Corrections** |  |
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| 22 December 2023 | Paragraph 39: In the second final line of the paragraph, the words “have evidence” have been amended to “gave evidence”.  |
| 22 December 2023 | Paragraph 201: In the second sentence of the paragraph, the word “that” has been deleted. The amended sentence reads, “His Honour found that…”. |
| 22 December 2023  | Paragraph 298: In the fifth final line of the paragraph, the pinpoint reference to the citation of *Yorke v Lucas* (1985) 158 CLR 661 has been amended from 667-678 to 667-671.  |
| 22 December 2023  | Paragraph 310: In the fifth line, the pinpoint reference to [252]-[256] has been amended to [252]-[255].  |
| 22 December 2023 | Paragraph 336: The paragraph numbers in the extracted text have been amended from [574] and [575] to [575] and [576].  |

ORDERS

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|  | NSD 887 of 2021 |
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| BETWEEN: | PRODUCTIVITY PARTNERS PTY LTD (TRADING AS CAPTAIN COOK COLLEGE) ACN 085 570 547First AppellantSITE GROUP INTERNATIONAL LTD ACN 003 201 910Second Appellant |
| AND: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONFirst RespondentBLAKE WILLSSecond Respondent |

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| order made by: | WIGNEY, O’BRYAN AND DOWNES JJ |
| DATE OF ORDER: | 6 aPRIL 2023 |

THE COURT ORDERS THAT:

1. The First Respondent has leave to rely on the amended notice of contention dated 4 May 2022.
2. Paragraphs 1, 2 and 3 of the orders of the Court made on 4 August 2021 be set aside.
3. The question of what declaratory relief, if any, ought to made in place of paragraphs 1, 2 and 3 of the orders of the Court made on 4 August 2021 be remitted to the primary judge.
4. Paragraphs 8, 11, 14 and 17 of the orders of the Court made on 4 August 2021 be set aside.
5. The question of whether any adjustment should be made to paragraph 19 of the orders of the Court made on 4 August 2021 be remitted to the primary judge.
6. The appeal be otherwise dismissed.
7. The Appellants pay 95% of the First Respondent’s costs of the appeal.

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

ORDERS

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|  | NSD 895 of 2021 |
|   |
| BETWEEN: | BLAKE WILLSAppellant |
| AND: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONFirst RespondentPRODUCTIVITY PARTNERS PTY LTD (TRADING AS CAPTAIN COOK COLLEGE) ACN 085 570 547Second RespondentSITE GROUP INTERNATIONAL LTD ACN 003 201 910Third Respondent |

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| order made by: | WIGNEY, O’BRYAN AND DOWNES JJ |
| DATE OF ORDER: | 6 april 2023  |

THE COURT ORDERS THAT:

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5. The question of whether any adjustment should be made to paragraph 19 of the orders of the Court made on 4 August 2021 be remitted to the primary judge.
6. The appeal be otherwise dismissed.
7. The Appellant pay 95% of the First Respondent’s costs of his appeal.

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

REASONS FOR JUDGMENT

WIGNEY AND O’BRYAN JJ:

# A. Introduction

1. This appeal principally concerns the application of the statutory proscription of unconscionable conduct in s 21 of the Australian Consumer Law (**ACL**) (Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**CCA**)) in the context of the enrolment of students in vocational education and training (**VET**) under the Commonwealth’s Vocational Education and Training Fee Higher Education Loan Program (which is referred to in these reasons as the **VET FEE-HELP scheme** or **VFH** **scheme**).
2. For many years, the Australian Government has assisted students to fund higher education fees through loans offered by the Government pursuant to the Higher Education Loan Programme (**HELP**), established under the *Higher Education Support Act 2003* (Cth) (**HES Act**). In 2007, the scheme was expanded to assist students fund VET courses. The scheme allowed eligible students to take out a VET FEE-HELP loan to cover all or part of their tuition fees. When a student took out a VET FEE-HELP loan, the Government would pay the loan amount directly to the relevant registered training organisation (**RTO**). The student would be required to gradually repay the loan plus a 20% “loan fee” through the tax system once they earned above a specified threshold (which, in the relevant period, was approximately $54,000).
3. Productivity Partners Pty Ltd trading as Captain Cook College(generally referred to in these reasons as the **College**) was a registered training organisation that offered VET courses to students. The College was founded in 1998 and was owned and operated by the Cook family. At all relevant times, the Chief Executive Officer (**CEO**) of the College was Mr Ian Cook. It had four on-site campuses and also provided courses online for distance learning through what was referred to as its distance (or online) campus. The proceeding below and this appeal concerns the online campus only. The College obtained approval to offer courses through the VFH scheme on 30 March 2012. Productivity Partners was acquired from the Cook family by Site Group International Ltd (**Site**) in mid-2014. Thereafter, the College was conducted under the names Captain Cook College and Site Institute. The Chief Operating Officer (**COO**) of Site and, between November 2015 and January 2016, acting CEO of Captain Cook College, was Mr Blake Wills.
4. The Australian Competition and Consumer Commission (**ACCC**) brought proceedings alleging that the College had engaged in a system of conduct, or a pattern of behaviour, in respect of persons who were enrolled in online courses in the period 7 September 2015 to 18 December 2015, that was, in all the circumstances, unconscionable in contravention of s 21 of the ACL. The ACCC alleged that the unconscionable conduct involved the implementation of certain changes to the College’s enrolment process for the online campus (which changes took effect from 7 September 2015), and also involved the College claiming VET FEE-HELP (**VFH**) revenue from the Commonwealth up to and including September 2016 in respect of students who had been enrolled in the period 7 September 2015 to 18 December 2015 (collectively, the **impugned conduct**). Thus, the period of the impugned conduct was between September 2015 and September 2016. To distinguish the two periods that are relevant to the ACCC’s allegations, we will refer to the period of 7 September 2015 to 18 December 2015 as the **impugned enrolment period**, and we will refer to the period between September 2015 and September 2016 as the **impugned conduct period**.
5. The ACCC further alleged that each of Mr Cook, Mr Wills and Site were knowingly concerned in, or party to, the College’s contravention of s 21, within the meaning of s 224(1)(e) of the ACL and also paragraph (c) of the definition of “involved” within s 2 of the ACL. In respect of Site, the ACCC alleged that Mr Wills’s knowledge and conduct were to be attributed to Site pursuant to s 139B of the CCA. Accordingly, the ACCC’s allegations concerning Site were dependent upon its allegations against Mr Wills.
6. In addition to its case of systemic unconscionable conduct contrary to s 21 of the ACL, the ACCC also alleged contraventions of the ACL with respect to the College’s dealings with five individuals who are referred to in the primary judge’s reasons as Consumers A through to E to maintain their privacy. The ACCC alleged that the conduct of marketing and sales agents acting on behalf of the College (who are also referred to as **course advisors** or **CAs** in the primary judgment) in recruiting each of the individuals was unconscionable in contravention of s 21 of the ACL and misleading or deceptive or likely to mislead or deceive in contravention of s 18(1) of the ACL, and/or included false or misleading representations in contravention of ss 29(1)(i) or (m) of the ACL. The ACCC further alleged that the conduct of the agents is taken to be the conduct of the College by reason of s 139B(2) of the CCA such that the College is taken to have contravened ss 18, 21, 29 of the ACL. The ACCC also alleged that the agreements by which the individuals were enrolled in the College constituted unsolicited consumer agreements within the meaning of s 69(1) of the ACL and that, upon the enrolment of the individuals, the College failed to comply with ss 78 and 79 of the ACL in that the College:
7. did not send the documents evidencing the agreement between the College and the student by a method permitted by s 78(2); and
8. the documents evidencing the agreement between the College and the student did not contain a notice that conspicuously and prominently informed the student of his or her right to terminate the agreement or a notice that the student could use to terminate the agreement.
9. Shortly prior to trial, Mr Cook admitted the ACCC’s allegations that the College had engaged in a system of conduct, or a pattern of behaviour, in respect of persons who were enrolled in online courses in the impugned enrolment period that was, in all the circumstances, unconscionable in contravention of s 21 of the ACL and that he was knowingly concerned in that contravening conduct. As the College, Site and Mr Wills continued to defend the proceeding, the proceeding against Mr Cook was referred to a different judge for the purposes of determining relief: see *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (trading as Captain Cook College) (No 4)* [2021] FCA 752.
10. The trial before the primary judge proceeded as against the College, Site and Mr Wills. The primary judge delivered judgment on 2 July 2021: *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (trading as Captain Cook College) (No 3)* [2021] FCA 737 (**primary judgment** or **PJ**). In a lengthy and careful judgment, the primary judge found in favour of virtually all of the ACCC’s allegations (the limited exception being that the primary judge did not find that the College had contravened s 78 of the ACL in respect of Consumers A, C and D). In light of those findings on liability, the trial judge directed the parties to provide agreed or competing orders as to the future conduct of the proceeding. On 4 August 2021, the primary judge made declarations in respect of the contravening conduct in a form largely proposed by the parties and ordered that the respondents pay the ACCC’s costs of the trial: *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (trading as Captain Cook College) (No 5)* [2021] FCA 919 (**declaration judgment**). The primary judge deferred the further hearing of the ACCC’s application for the imposition of pecuniary penalties and other relief until after the conclusion of the anticipated appeal from the primary judge’s findings on liability, as reflected in the declarations.
11. By their notice of appeal, the College and Site challenge the primary judge’s findings that:
12. the College had engaged in a system of conduct, or a pattern of behaviour, in respect of consumers who were enrolled in online courses in the impugned enrolment period that was, in all the circumstances, unconscionable in contravention of s 21 of the ACL (grounds 1 to 5);
13. Mr Wills, and through him Site, were knowingly concerned in the College’s systemic unconscionable conduct (ground 6);
14. in respect of Consumers A, B, D and E, the relevant course advisors had engaged in the contravening conduct “on behalf of” the College for the purposes of s 139B(2) of the CCA, rendering the College liable for that conduct (ground 7); and
15. the College engaged in conduct that was unconscionable in all the circumstances in relation to Consumers B to E in circumstances where, upon learning of the conduct to which Consumers B to E were subjected, the College withdrew Consumers B to E from the courses they had enrolled in and remitted all VFH fees or debt (ground 8).
16. On the appeal, the College and Site do not challenge the primary judge’s findings of primary fact. The grounds of appeal advanced by the College and Site largely concern questions of law and the application of the relevant statutory provisions to the facts as found. In short, the College and Site submitted that the facts as found do not constitute unconscionable conduct within s 21 of the ACL.
17. By his amended notice of appeal, Mr Wills challenges the primary judge’s findings that:
18. the College had engaged in a system of conduct, or a pattern of behaviour, in respect of consumers who were enrolled in online courses in the impugned enrolment period that was, in all the circumstances, unconscionable in contravention of s 21 of the ACL (ground 1); and
19. Mr Wills was knowingly concerned in the College’s systemic unconscionable conduct (grounds 2 to 10).
20. With respect to the appeal against the finding of unconscionable conduct, Mr Wills largely relied on the submissions advanced by the College. With respect to the appeal against the finding that Mr Wills was knowingly concerned in the College’s systemic unconscionable conduct, Mr Wills challenged the primary judge’s findings that Mr Wills engaged in conduct that involved or “implicated” him in the contravening conduct, and also challenged the primary judge’s findings with respect to Mr Wills’s knowledge of the contravening conduct, its purpose and its likely effects. It should be noted that Mr Wills chose not to give evidence at the trial (without explanation). The primary judge’s findings with respect to Mr Wills’s knowledge were based on inferences drawn from other evidence, with the primary judge also drawing the inference that Mr Wills’s evidence would not have assisted his case (PJ [142]-[143]).
21. At the hearing of the appeal, the ACCC sought leave to rely on amended notices of contention in both appeals. Leave was not opposed and we would grant that leave. The contentions advanced by the ACCC related to a limited number of factual findings which the ACCC contended were erroneous.
22. The principles concerning appellate review in the Federal Court are well-established. An appeal to this Court is not an appeal in the strict sense but is rather an appeal by way of rehearing: *Western Australia v Ward* (2002) 213 CLR 1 at [71] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). In *Fox v Percy* (2003) 214 CLR 118 (***Fox v Percy***), the majority (Gleeson CJ, Gummow and Kirby JJ) affirmed the following principles (at [23] and [25], citations omitted):

23 On the one hand, the appellate court is obliged to “give the judgment which in its opinion ought to have been given in the first instance”. On the other, it must, of necessity, observe the “natural limitations” that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses’ credibility and of the “feeling” of a case which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole.

…

25 Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of “weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect”. In *Warren v Coombes*, the majority of this Court reiterated the rule that:

[I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge but, once having reached its own conclusion, will not shrink from giving effect to it.

1. The principles applicable to appellate review in the context of evaluative judgments (such as a finding of statutory unconscionable conduct) have been discussed in a number of cases. In *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* (2018) 261 FCR 301 (***Aldi Foods***), the Full Court affirmed the principles as stated in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 (***Branir***). On such appeals, the Court must first make up its own mind on the facts, observing the “natural limitations” that exist in the case of any appellate court proceeding wholly or substantially on the record, as explained in *Fox v Percy*. Having determined the facts, the Court must undertake itself the required evaluative assessment. However, error is not demonstrated merely because the appellate court might incline to a different evaluative assessment than the primary judge where the competing views are finely balanced and equally open (*Branir* at [28] per Allsop J). As Perram J explained in *Aldi Foods* (at [49]):

When an appellate court comes to review such conclusions it must be guided not by whether it disagrees with the finding (which would be decisive were a question of law involved) but by whether it detects error in the finding. On the one hand, error may appear syllogistically where it is apparent that the conclusion which has been reached has involved some false step; for example, where some relevant matter has been overlooked or some extraneous consideration taken into account which ought not to have been. But error, on the other hand, may also appear without any such explicitly erroneous reasoning. The result may be such as simply to bespeak error. Allsop J said in such cases an error may be manifest where the appellate court has a sufficiently clear difference of opinion: *Branir* at [29].

1. For the reasons that follow, we would dismiss both appeals save in the following three respects:
2. First, paragraph 1 of the declarations made by the primary judge on 4 August 2021 was the subject of challenge on the appeal. As explained below, it suffers from significant ambiguity which should be corrected. We consider that paragraph 1 should be set aside and the question of whether a declaratory order should be made and the form of that order should be remitted to the primary judge for consideration. A necessary consequence of setting aside paragraph 1 is that paragraphs 2 and 3 must also be set aside and the question of whether a declaratory order should be made in respect of Mr Wills and Site and the form of that order should also be remitted to the primary judge for consideration. However, the setting aside of paragraph 1 (and the consequential setting aside of paragraphs 2 and 3) does not involve any change to the primary judge’s overall findings and conclusions and does not mark any success on the part of the appellants in respect of the systemic unconscionable conduct case.
3. Second, we would allow ground 8 of the appeal by the College and Site and find that the College did not engage in unconscionable conduct with respect to Consumers B to E (which requires that paragraphs 8, 11, 14 and 17 of the declarations made on 4 August 2021 be set aside).
4. Third, we would allow ground 10 of the appeal by Mr Wills in part. We would replace the primary judge’s implicit finding that Mr Wills was knowingly concerned in the College’s unconscionable conduct from the date of implementation of the enrolment process changes, to a finding that Mr Wills was knowingly concerned in the College’s unconscionable conduct from the date he became acting CEO of the College on 20 November 2015.
5. Otherwise, having conducted a close review of the evidence and the reasons of the primary judge, we find no error in the primary judge’s reasoning and conclusions. In our view, the College’s conduct should be condemned as unconscionable. The College knew of the risk and prevalence of misconduct by recruitment agents and the enrolment at the College’s online campus of unwitting or unsuitable students. Despite that knowledge, at the behest of agents and in the pursuit of increased enrolments (and the resulting VFH revenue), the College altered its enrolment processes in a manner that weakened its existing safeguards against the occurrence of agent misconduct and against the enrolment of unwitting or unsuitable students. It was entirely foreseeable that the College’s conduct would result in large numbers of students being enrolled in the online campus in circumstances where the student did not do so willingly and with full knowledge of the obligation being incurred (the VFH debt) or where the student was unsuitable for enrolment because they lacked sufficient language, literacy or numeracy skills or technology skills or access. What was entirely foreseeable came to pass, to the enrichment of the College and the harm to thousands of persons who should never have been enrolled at the College’s online campus. In respect of Consumers A to E, the College is required to be held responsible for the misleading conduct of its agents.
6. Mr Blake Wills held a position of senior authority over the activities and decisions of the College. He was involved in all of the key decisions that resulted in the College’s unconscionable conduct and he was knowingly involved by the time he assumed the position of acting CEO on 20 November 2015. His attempts to avoid personal responsibility for the decisions that he was intimately involved in should be rejected. Under s 139B of the CCA, the conduct of Mr Wills is taken to be the conduct of Site.
7. In these reasons, we will depart from one aspect of the terminology adopted by the primary judge. In the primary judgment, his Honour generally referred to persons enrolling in courses provided by the College as “consumers”. In the context of the prohibition of unconscionable conduct in s 21 of the ACL, the word “consumer” is not a term of art. Indeed, the word does not appear in the statutory provision and, in the allied provision s 22(1), the word “customer” is used rather than “consumer” to refer to persons who are supplied goods and services. The present proceeding concerns the supply of VET courses to members of the public. In these reasons, we will generally refer to persons who enrolled at the College to undertake a VET course as students. They are “customers” within the meaning of s 22(1).

# B. relevant findings of the primary judge

## Introduction

1. As recognised by the primary judge (PJ [70]), assessing statutory unconscionability, like unconscionability in equity, “calls for a precise examination of the particular facts, a scrutiny of the exact relations established between the parties”, citing *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113 at 118-119. The need for a precise examination of the facts is mandated by the statutory proscription against conduct that is unconscionable “in all the circumstances”.
2. The primary judge undertook a detailed examination of the relevant facts and circumstances, and made extensive findings of fact. Before considering the grounds of appeal, it is helpful to summarise the key factual findings made by the primary judge, which place the impugned conduct in context. Those findings concern: the business operated by the College, the education services offered by it through the online campus and the methods by which the College “recruited” students to enrol; the regulation of the VFH scheme by the Commonwealth government, the known problems under the VFH scheme with respect to the “recruitment” of students and the guidance given by the Commonwealth government to RTO’s enrolling students under the VFH scheme in order to protect them from misleading and unfair practices; the specific decisions of the College with respect to enrolment practices which were in effect during the impugned enrolment period; and the consequences of the College’s decisions.
3. The following summary is drawn from the findings of fact made by the primary judge. The findings set out below were not challenged in the notices of appeal. Aspects of the primary judge’s findings that are challenged in the notices of appeal will be addressed in connection with the relevant grounds of appeal and the ACCC’s contentions.
4. In the course of submissions, the Court was taken to some of the underlying evidence to gain a better understanding of the basis of the findings that were made by the primary judge. In the summary that follows, reference is made to certain underlying testimony or documents for that purpose. In the course of submissions, the appellants also criticised certain factual findings, suggesting that the finding did not fully reflect the evidence on which it was based. The criticisms were made in circumstances where the relevant finding was not the subject of challenge as a ground of appeal. Submissions of that kind are procedurally unfair as the respondent is not given due notice of the asserted factual error and has limited opportunity in the hearing of an appeal to respond. We have given such submissions little weight in the consideration of the appeal.

## The VFH scheme

1. The backdrop to the alleged unconscionable conduct on the part of the College is the VFH scheme which was administered by the Commonwealth Department of Education and Training (**Department**). The key aspects of that scheme were summarised by the primary judge at PJ [9]-[26]. These reasons assume familiarity with that summary, but the following aspects of the scheme that are important to the disposition of the appeal are noted.
2. First, the scheme provided for the Commonwealth to pay, in full, tuition fees for any approved course, on the basis that the amounts paid would be treated as a loan to the student, such loan to be repayable through the taxation system once a student earned above a specified income threshold. In the applicable period, that income threshold was approximately $54,000. The scheme was designed to be a pathway into further higher education.
3. Second, amendments were made to the scheme in 2012 with the aim of broadening the demographic of students who qualified for assistance through the scheme. This was for the express purpose of addressing low participation rates from identified demographic groups including Indigenous Australians, people from non-English speaking backgrounds, with disability, from regional and remote areas, from low socio-economic backgrounds, and people not currently engaged in employment.
4. Third, under the scheme, a student’s entitlement to VFH assistance was conditional on (amongst other things):
5. being enrolled in a VET unit of study and remaining enrolled at the end of the relevant census date; and
6. completing a request for Commonwealth assistance form on or before the census date.
7. VET providers were required to determine a “census date” for each unit of study in accordance with the VET Guidelines made by the Minister. At the relevant time, the VET Guidelines provided that the census date must not occur less than 20% of the way between the VET unit of study commencement date and the completion date.
8. Fourth, the scheme provided for the Commonwealth to lend to the student the amount of the VFH assistance and pay the amount lent to the education provider in discharge of the student’s liability to pay their VET tuition fee for the unit of study. If the Commonwealth made such a payment, the amount of the student’s VFH debt was 120% of the loan; i.e., there was a 20% “loan fee”. The VFH debt was incurred immediately after the census date for the unit.
9. Fifth, a VET provider was required to repay any VET tuition fees paid by a student in respect of a VET unit of study if the student withdrew on or before the census date. Thus, a student could withdraw from a VET unit of study on or before the census date without incurring any financial liability to the VET provider or to the Commonwealth.
10. Sixth, a VET provider was required to give students seeking Commonwealth assistance such notices as were required by the VET Guidelines, specifically a Commonwealth Assistance Notice (or **CAN**). A CAN was required to include, amongst other things, the census date(s) of the VET unit(s) of study, the VET tuition fee amount(s) of the units(s) of study and the amount(s) of the VFH loan fee. The CAN was required to be given within 28 days of the census date indicated in the notice. The primary judge found (at PJ [21]) that, typically, the College would send a student a Confirmation of Enrolment (**COE**) letter at the same time that it sent the CAN, which was after the first census date, to confirm that the student was enrolled with the College and had incurred the first part of their VFH debt.

## The business operated by the College

### Ownership and governance

1. The College is an RTO that offered VET courses to students. It was founded in 1998 and, until mid-2014, it was owned and operated by the Cook family. It had four on-site campuses and also provided distance learning through its “distance” or “online” campus. The College obtained approval to offer courses through the VFH scheme on 30 March 2012 (PJ [145]).
2. The shares in the College were acquired from the Cook family by Site in mid-2014. Thereafter, the College operated under the names Captain Cook College and Site Institute. As noted earlier, Mr Cook was the CEO of the College and continued in that role following the acquisition of the College by Site (PJ [120]).
3. Vernon Wills was the CEO and Managing Director of Site (PJ [117]). Blake Wills was the COO of Site and became involved in the governance of the College through his role on the Advisory Board (referred to below) (PJ [118] and [131]). Blake Wills assumed the position of acting CEO of the College between November 2015 and January 2016 when Mr Cook was on leave. References in these reasons to Mr Wills are to Blake Wills unless otherwise indicated. Craig Dawson was Site’s Chief Financial Officer and he also became involved in the governance of the College through his role on the Advisory Board (PJ [119] and [131]). Messrs Wills and Dawson conducted the due diligence investigation of the College prior to its acquisition by Site (PJ [148] and [547]). The executive group of Site included Vernon Wills, Craig Dawson, Blake Wills and Ian Cook (PJ [121]). None gave evidence in the proceeding.
4. A Site Group strategy document, apparently authored by Mr Wills in January 2015, set out descriptions of the roles of each of the executive officers (PJ [545], with reference to the strategy document). The document depicted lines of reporting, with Mr Cook (as CEO of the College) reporting directly to Mr Wills (as COO of Site) and described Mr Wills’s COO role as “to establish business unit objectives (plan), allocate resources (implement) & hold individuals accountable (evaluate)”.
5. As at mid-2015, the College represented a substantial proportion of Site’s consolidated revenue and profits. A budget for the 2016 financial year prepared at that time showed that the College’s budgeted revenue and EBITDA (that is, earnings before interest, taxes, depreciation and amortization) were 39% and 61% respectively for the consolidated group (PJ [225]). The primary judge found that the (financial) performance of the College was very significant to the performance of Site overall, and that the performance of the College would have been of key concern to Mr Wills (PJ [228]).
6. A Captain Cook College and Site Institute Advisory Board was established in May 2014 with the stated intention that it would meet monthly. A charter was adopted to govern its operation (PJ [146]). Mr Wills was a member of the Advisory Board and the primary judge’s findings with respect to Mr Wills’s knowing involvement in the impugned conduct are based, in part, on his role on the Advisory Board. The primary judge summarised the terms of the Advisory Board charter at PJ [146] and [543]-[544]. It is convenient to quote the relevant aspects of the charter which demonstrates the degree of control exercised by the Advisory Board over the operations of the College:
7. Under the heading “Mission”, the charter states:

It is the mission of the advisory board to:

* Establish Vision & Brand
* Motivate Key Employees to ensure the vision is shared
* Plan Strategic Initiatives
* Create a reporting framework
* Mitigate Regulatory and Business Risk
* Be abreast of market developments and information
* Identify & Analyse Growth Opportunities
* Agree on opportunities to be pursued
* Provide monthly reports to Site Group International Executive
1. Under the heading “Key Areas of Reporting & Responsibility”, the charter referred to:
	1. financial performance, including the College’s profit and loss and projected performance against budget;
	2. operational performance, including “Total Students by Course and Location”, VET FEE-HELP Reporting and “Student Grievances”;
	3. compliance, including VFH compliance and “Relevant Metrics (Completion Rates/Quality Indicators/Feedback)”;
	4. sales and marketing, including “External Student Recruitment Performance” and “Sales Funnel – (Client Contracts & Student Enrolments)”.
2. Under the heading “Role of the Board”, the charter stated:

The Board Charter sets out the principles for the operation of the Advisory Board ("Board") of Captain Cook College & Site Institute ("Business") and to describe the functions of the Board and those functions delegated to management.

The Board has primary responsibility to shareholders of Site Group International Ltd and for the welfare of the Business by guiding and monitoring its activities. The Board is required to ensure that the Business is properly managed and constantly improved to protect and enhance shareholder value within a framework of effective accountability.

1. Under the heading “Responsibilities of the Board”, the charter stated:

**2.1 The Board is responsible for the affairs of the Company, including:**

* Setting strategic objectives
* Evaluating, approving and monitoring the strategic plans of the company
* Evaluating, approving and monitoring the annual budgets and ensuring appropriate resources are available, including resources required to meet environmental and work place health and safety management plans

…

**2.3 Risk management**

* Reviewing with management how the strategic environment is changing, what key business risks and opportunities are appearing, how they are being managed and what, if any, modifications in strategic direction should be adopted
* Considering the extent and types of risk that are acceptable for the Business to bear
* Monitoring the Business's operations in relation to, and compliance with, relevant regulatory and contractual requirements

**2.4 Reporting**

* Review & Approve all relevant management reports
1. Under the heading “Statement of the Division of Authority between the Chairman and Chief Executive Officer”, the charter stated:

**4.4 Role and responsibilities of the Chief Executive Officer**

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

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

1. From July 2015, the primary judgment makes reference to “Management Meetings” that then occurred monthly. The minutes of the Management Meetings disclose that they were typically chaired and “facilitated” by Mr Wills, and were attended by the senior management of the College together with Mr Wills and Mr Dawson.
2. The senior management of the College during the relevant period, who are referred to below, included: Mr Cook (CEO); Khaled Akbery (the College’s Partnership Manager from 1 July 2014, having responsibility for the College’s relationship with partner organisations such as the student recruitment agents); Mohammed Akbery (the College’s Operations Manager between March 2014 and June 2017); Elizabeth (Liby) Edwards (the College’s Corporate Services Manager between late 2013 and March 2017) (PJ [120], [123], [125], [126] and [128]). Mohammed Akbery and Ms Edwards gave evidence in the proceeding. In these reasons Khaled Akbery and Mohammed Akbery are referred to by their full names to distinguish them.

### Student recruitment by marketing and sales agents (also called course advisors)

1. An important aspect of the surrounding circumstances was the manner in which the College “recruited” students for its VET courses, including its online campus. The word “recruit” is a word used by the College and Site in contractual agreements and internal business documents. At all relevant times, the College contracted third parties, referred to as course advisors or CAs, to undertake marketing of its courses (including online courses) and to recruit persons for enrolment into its courses as students (PJ [31]).
2. Prior to Site acquiring the College, the College’s primary method of recruiting students was through National Training and Development Pty Ltd (**NTD**) pursuant to a contract dated 23 May 2012 and titled Marketing and Sales Agreement. Approximately 80% of the College’s students were recruited by NTD (PJ [148]). Under the agreement, the College appointed NTD as its sole agent to market and promote the College’s courses to prospective students and solicit applications for the courses. In consideration for recruiting students, the College agreed to pay NTD a commission equal to 20% of total course fees where a student is enrolled and passes the census date (which is explained further below), with 62.5% of the commission payable at the first census date and the remainder at the second census date.
3. In July 2014 (following the acquisition of the College by Site), the College reviewed its relationship with NTD. The review noted that after September 2013 the number of NTD referrals started to decline and struggled to recover. External factors affecting all VFH marketing were said to include the changes in Centrelink reporting, which had moved online. This had reduced NTD’s effectiveness because it had relied on street sales outside Centrelink offices. NTD was also being affected by market saturation with an increased number of training providers available for students (PJ [149]). The outcomes of the review were that the College continued to build an internal sales capability (a business division called **Learn2Earn** or **L2E**) and negotiated the removal of exclusivity conditions in the agreement with NTD. The College entered a new agreement with NTD and also entered into agreements with a number of other external marketing agencies. In each case, remuneration for recruitment services was by commission upon the recruited student remaining enrolled past a census date. As found by the primary judge, the commission structures were such as to strongly incentivise the agents to recruit students and ensure that they passed at least their first census date and incurred VFH debts (PJ [149]-[151]).

### Courses offered by the College’s online campus

1. There was evidence before the primary judge concerning the courses offered by the College’s online campus, course fees and relevant census dates. In that regard, the primary judge noted that, during the relevant period, the College offered the following courses: Diploma of Business, Diploma of Project Management, Diploma of Information Technology and Diploma of Human Resources Management (PJ [32]). The primary judge did not provide details of the course fees and relevant census dates in his reasons. On the appeal, the Court asked whether those matters were the subject of evidence and whether the parties could provide the Court with appropriate references or a summary. Following the hearing of the appeal, the parties provided the Court with an agreed document, based on the evidence at trial, which stated as follows (noting that the “Relevant Period” as referred to in the document is the period that we have defined as the impugned enrolment period, and further noting that Mohammed Akbery was a witness in the proceeding):

1. This summary has been prepared by the parties in response to the Full Court's request for a note on courses offered by Capital Cook College (the **College**) in the Relevant Period, the duration of those courses and census dates.

2. During the Relevant Period, the College offered the following online courses:

(a) Diploma of Business;

(b) Diploma of Project Management;

(c) Diploma of Information Technology; and

(d) Diploma of Human Resources Management.

3. Each course offered by the College had between two and four units of study and a corresponding number of census dates (i.e. one census date per unit of study). A unit of study was a time period over which study was to occur. A census date was the deadline for the student to withdraw from their course without incurring a debt.

4. The duration of each course for a person studying full time was as follows:

(a) for the Diplomas of Business, Project Management and Human Resources Management, there were two units of study as follows:

(i) the first unit of study consisted of a 10 week period; and

(ii) the second unit of study consisted of an 18 week period,

with a total course length of 28 weeks;

(b) for the Diploma of Information Technology, there were four units of study as follows:

(i) the first, third and fourth units of study were 14 weeks; and

(ii) the second unit of study was 10 weeks,

with a total course length of 52 weeks.

5. A student would pass their census date and incur a debt for a unit of study two weeks after the commencement of that unit of study.

6. Mr Akbery gives the following example of how this operated in practice:

*[36] … the course fee was divided over the number of census dates, so that for a course that cost $13,000 and had two census dates, a $6,500 debt was incurred on the first census date and a further $6,500 debt was incurred on the second census date …*

*[37] … Continuing from the example at the end of paragraph 36 above:*

*(a) students who remained enrolled after two weeks were charged $6,500 for the first ten weeks of access to the course; and*

*(b) if the student remained enrolled after 12 weeks, were charged a further $6,500 for a further ten to 18 weeks of access to the course.*

1. With respect to course fees, the Court was taken to a copy of the pre-enrolment quiz (**PEQ**) used by the College which records the following fees payable for each course offered at the online campus:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Course** | **Unit of study 1** | **Unit of study 2** | **Unit of study 3** | **Unit of study 4** | **Total** |
| **Dip of Business** | $6,500 | $6,500 | N/A | N/A | $13,000 |
| **Dip of Project Mgmt** | $7,500 | $7,500 | N/A | N/A | $15,000 |
| **Dip of IT** | $5,000 | $5,000 | $5,000 | $5,000 | $20,000 |
| **Dip of Human Resources Mgmt** | $6,500 | $6,500 | N/A | N/A | $13,000 |

1. The fees may not have been at those rates throughout the relevant period. However, the above figures demonstrate that the obligation that would be assumed by a student by enrolling in one of the above courses and incurring a VFH debt is substantial.

### The College’s enrolment and withdrawal processes prior to the impugned enrolment period

1. The impugned conduct concerns changes that were made by the College to its enrolment and withdrawal processes which took effect at the commencement of the impugned enrolment period. It is relevant in that context to understand the College’s enrolment and withdrawal processes immediately prior to the changes.
2. Prior to the impugned enrolment period, the College’s enrolment processes involved the following steps:
3. First, the recruiting agent would give the potential student access to an “enrolment kit” which was made up of enrolment information, a PEQ and an enrolment application form. Access was either in the form of hard copy documents or online through the agent’s portal (PJ [155]).
4. Second, the prospective student completed the enrolment form and the PEQ, either in hard copy or online through the portal. The documents could be completed by the prospective student or by the agent on their instruction (PJ [156]).
5. Third, an admissions officer at the College reviewed the documents that had been submitted to assess whether there were any factors that may affect the student’s ability to study such as any disabilities, employment status, access to a computer or language, literacy or numeracy issues (PJ [157]).
6. Fourth, the admissions officer at the College made an outbound quality assurance (**QA**) call which would generally occur 48 hours after the submission of the documents (such that the recruiting agent would not be present at the time). The content and purpose of the call was to ensure that the student understood the commitment they were making under the VFH scheme and to identify any reasons that suggested the student may not have the ability to undertake the course (PJ [158]).
7. Fifth, following the acceptance of the prospective student for enrolment, a student support officer would contact the student to provide them with orientation, access to the online learning portal and send them a training plan and offer letter. The student was also assigned to a trainer who monitored their progress and flagged if any language, literacy or numeracy issues were identified prior to census. If such issues were flagged, the enrolment offer would be withdrawn with a pathway program recommended or other appropriate actions taken. The effect was that the student would be withdrawn from enrolment prior to first census and thus prior to incurring a VFH debt (PJ [162]).
8. Once the student had progressed through census they would be sent a COE and CAN (PJ [163]).
9. Students who enrolled in a College course were able to withdraw from the course prior to the first census date and thereby avoid incurring fees (and a VFH debt). Students could withdraw by submitting a withdrawal form or by verbally communicating an intention to withdraw to the College (PJ [164]). The College also had a process of withdrawing students who were not contactable after enrolment, which was referred to as a “campus driven withdrawal”. The process included the following elements (PJ [164]):
10. The student’s lack of (online) attendance in the first week of study would be brought to the attention of the campus administration. The student support officer or campus administrator would attempt to contact the student at least three times in the first week and at the end of the week send an email to the agent who had recruited the student to seek assistance from the agent to re-engage the student.
11. In the second week, the student support officer or campus administrator would continue to attempt to contact the student at least three times and thereafter place a note on the weekly census reports saying “HOLD may withdraw”.
12. In the third week, the student support officer or campus administrator or recruiting agent would continue to attempt to contact the student at least three times, failing which they would complete a campus driven withdrawal email template to withdraw the student.
13. If the student was re-engaged in week 2 or week 3, they would be moved into the next available intake date which would have the effect of enabling them to re-engage in the course with a later first census date.
14. With effect from June 2015, the College’s policy was revised to make clear that campus driven withdrawals must be done before the first census date (PJ [166]-[167]). After the first census date, a student could only withdraw from the course and have their fees reversed if they satisfied “special circumstance” criteria (PJ [168]-[169]).
15. As at May 2015, about 50% of the students enrolled at the College’s online campus withdrew before the first census date, and a significant reason was campus driven withdrawals (ie, the student was uncontactable) (PJ [170] and [221], read with the transcript of Mohammed Akbery’s evidence). This is a very significant factual finding to which it will be necessary to return.

## Known risks and problems under the VFH scheme

1. The findings of fact made by the primary judge demonstrate that, at the relevant time, there were risks and problems under the VFH scheme that were known publicly through Senate enquiries and media reports and also known privately by the College and Site. By way of summary, the primary judge observed (at PJ [22]) that:

The scheme gave rise to an obvious risk, being the risk of unsuitable or otherwise insufficiently interested or committed consumers being too easily or casually, or unconscionably or deceptively, signed up as students, progressing through their census dates thereby incurring debts to the Commonwealth and the VET provider being paid its tuition fees, and the students not otherwise engaging with the course in any meaningful way or receiving any meaningful benefit.

1. The risks inherent in the VFH scheme were also described in similar terms by Bromwich J in *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)* [2019] FCA 1982 in a passage cited by the primary judge at PJ [22].
2. Another way of expressing the same point is to observe that the scheme increased moral hazard. Moral hazard is a situation where a commercial actor has an incentive to increase its exposure to risk because it does not bear the full costs of that risk. In the absence of the VFH scheme, an RTO would have a strong incentive to ensure that a student enrolling in one of its courses will pay the relevant course fee because the RTO would bear the full cost of failing to secure payment of its fees. To ensure its course fees are paid, the RTO would either require payment up front or seek to ensure that a contractual promise to pay the course fee is enforceable. In turn, the RTO would have a strong incentive to ensure that a student who enrols does so voluntarily, with a proper understanding of the obligation to pay the course fees and without being misled.
3. The VFH scheme reduced the RTO’s exposure to risk with respect to the payment of course fees. Provided certain enrolment paperwork was completed by or on behalf of a student, the RTO received payment of its course fees from the Commonwealth. The enrolled student would incur a debt to the Commonwealth which was repayable through the taxation system (once the student earned above the applicable income threshold). Students might be enrolled in circumstances where they had no or limited understanding of the obligations they were incurring because there was no immediate financial impact for them, and in circumstances where they were not capable of undertaking the course for which they were enrolled.
4. The inherent risks that arose from the VFH scheme were compounded by two other features of the business conducted by the College.
5. First, to a large extent the College outsourced the recruitment of students to marketing and sales agents, which called themselves “course advisors”. The agents were remunerated on a commission basis, being paid 20% of the applicable course fee upon the student passing the first and second census dates (at which time the College would receive its course fee from the Commonwealth under the VFH scheme). The College was vulnerable to an obvious risk that its agents might pursue commission revenue in an unethical manner: agents might seek to recruit persons who were unsuitable to undertake the online courses of study offered by the College (for example, having insufficient language, literacy or numeracy skills or no access to a computer) or might engage in misleading conduct about the financial obligations that would be incurred by the student.
6. The second feature of the College’s business that compounded the risk of students being enrolled in circumstances where they had no or limited understanding of the obligations they were incurring, or in circumstances where they were not capable of undertaking the course, is that the College provided its courses through an online campus. This meant that the College had no face to face contact with students and only dealt with students online or via telephone. Dealing with students in that manner increased the difficulty of guarding against the risk of students being misled or unsuitable students being enrolled. That problem was known to the College and its senior managers. In an email sent by Ms Edwards to Mr Cook on 18 August 2015, immediately prior to the implementation of changes to the College’s enrolment process for the online campus, Ms Edwards referred to the fact that the campus driven withdrawal policy “has always been our policy and is most critical for distance because the campus can’t build a relationship with the student to determine they are suitable for the course” (PJ [245]).
7. In its pleading, the ACCC referred to the above circumstances as the “CA misconduct risk” and the “unsuitable enrolment risk”. The use of such labels or defined terms is often a convenient shorthand method of expression. In using such labels or defined terms, however, it is important to keep in mind the matters being described. The expression “CA misconduct risk” is used in the pleading to describe the risk of agents acting unethically when recruiting persons to enrol, including by making false or misleading statements, offering inducements (such as free laptops), pressuring persons to enrol and completing documents and answering questions on behalf of the person. The expression “unsuitable enrolment risk” is used in the pleading to describe the risk of persons being recruited for enrolment who do not in fact want to study, or who are unsuitable for the course of study by reason of lacking sufficient language, literacy or numeracy skills or technology skills or access that would enable them to undertake a course of study online. There is obvious overlap in the two categories of risk. Essentially, they both describe the risk, arising from unethical or careless conduct of recruitment agents, of persons being enrolled in the online campus in circumstances where the person does not do so willingly and with full knowledge of the obligation being incurred (the VFH debt) or where the person is unsuitable for enrolment because they lack sufficient language, literacy or numeracy skills, technology skills or access. They are the risks and problems summarised by the primary judge at PJ [22]. In these reasons, we will generally refer to those two categories of students as **unwitting or unsuitable students** by way of shorthand. The description “unsuitable students” is not intended to include students who willingly (and with knowledge of the obligations being incurred) enrolled in a course, engaged with the course material on the learning management system but were unsuccessful in their studies. It is only intended to include students who were unsuitable for enrolment because they lacked sufficient language, literacy or numeracy skills or technology skills or access to undertake the course of studies.
8. The findings of fact made by the primary judge demonstrate that, at the relevant time, these risks and problems were known publicly through Senate inquiries and media reports and also known privately by the College and Site. If nothing else, the online campus had very large numbers of disengaged students – as at May 2015, about 50% of the students enrolled at the College’s online campus withdrew or were withdrawn (under the campus driven withdrawal policy when the student was uncontactable). That figure highlights the extent of the problem arising from agent recruitment of students to the online campus under the VFH scheme. But there were a number of other events and reports that highlighted the risks and problems. The following is a summary of the key findings of the primary judge in that regard.

### Sero campus audit

1. In November 2014, the College audited its “Sero campus”. The Sero campus was conducted by Sero Learning Pty Ltd which provided the College’s online courses as a “co-provider” pursuant to an agreement with the College. Amongst other things, the audit indicated that 260 out of Sero’s 307 enrolled students (ie, about 85%) had passed their first census date (and therefore incurred a VFH debt) but had never accessed their online learning management system. In contrast, only 52 of the College’s 245 students (ie, about 21%) had passed their first census date but never accessed their online learning management system (PJ [182]). The Sero audit report rated the risk as “high” and stated that the “campus withdrawal process must be acted on” (PJ [183]). The minutes of a meeting held on 15 December 2014 attended by, amongst others, Mr Cook and Mr Wills, record that Mr Cook provided the meeting with the background to Sero learning and the audit and specifically the problem that Sero was “not doing campus driven withdrawal and just processing through census regardless” and that, of the 340 students, 65 are engaged, 35 want to engage, 36 want to withdraw and “200 yet to be in contact with” (PJ [184], with reference to the minute). The same issue was discussed at Advisory Board meetings held on 17 December 2014 and 18 February 2015, of which Mr Wills was the meeting facilitator and in attendance (PJ [185]-[187]).

### The College’s complaints registers

1. The College maintained a Complaints Register which was intended to record every complaint that was made to the College by a student and an Agent Issues and Complaints Register. The Complaints Register included complaints, prior to the impugned enrolment period, concerning misleading conduct by recruitment agents including representations as to the provision of laptops and that a potential student would pay nothing because she was on Centrelink and not earning $53,000 per annum, as well as an agent assisting a potential student to complete the PEQ. The Agent Issues and Complaints Register included complaints, prior to the impugned enrolment period, concerning the potential completion by agents of PEQs, an agent being “pushy” throughout the enrolment process, an agent claiming that the online courses were all funded by the NSW Government including provision of a free laptop and iPad upon completion of the course, an agent recruiting customers outside a Centrelink office and promising an increase in the student’s Centrelink payments and a free laptop and failing to disclose the cost of the course or that a VFH debt would be incurred. Details of the latter complaint were circulated by email in February 2015 to Mr Cook and Mr Wills, amongst others (PJ [189]-[191]).

### Media reports

1. The primary judge’s findings refer to a number of internal emails and reports of the College which reference media reporting on problems in the VFH scheme associated with unethical behaviour by recruitment agents, including an article from an ABC News 24 television program which drew attention to poor practices in RTOs with regard to the VFH scheme and a report about a VET provider referred to as “CAG” on the 7.30 Report, a regular ABC television program (PJ [196]-[197]). In a report by Mr Cook that he sent on 20 August 2015 to, among others, Mr Wills, Mr Cook recounted that in late 2014 and early 2015 there had been “intense media scrutiny of the sector” and that “unscrupulous behaviour” by co-providers and sales agents had required a focus on “consumer protection, quality control and identity verification” (PJ [200]). Internal email correspondence in September 2015 referred to “growing media intensity around a VET provider referred to as Phoenix because of a police investigation into some of its agents” and Mr Cook stated that there was “significant commercial risk” from “unethical agents” (PJ [202]).

### Senate Education and Employment References Committee inquiry

1. In June 2015, the Senate Education and Employment References Committee published its second interim report with respect to the “Operation, regulation and funding of private vocational education and training (VET) providers in Australia”. The report documented aggressive marketing techniques used by VET providers and their brokers, including promises of free equipment such as laptops and tablets upon signing up for courses, and a failure to disclose costs. There were suggestions that some providers had indicated that courses were free, and had not disclosed the VFH debt that would be incurred (PJ [198]). It is relevant to reproduce the following matters recorded in the second interim report (summarised at PJ [209]):

While the committee is yet to fully examine all submissions, a number of issues have been raised repeatedly, including:

(a) aggressive marketing techniques that include promises of free tuition or free equipment;

(b) insufficient information provided to allow students to make a fully informed decision prior to signing up for a course;

(c) language and/or literacy barriers that lead to students either signing up for courses without properly understanding the terms and conditions, and/or courses not being appropriate for their language/literacy level;

(d) inadequate screening processes for students; and

(e) difficulties in dealing with providers by students who wish to withdraw from courses, or express other concerns about courses or fees.

1. The Senate inquiry had been a topic of discussion at Advisory Board meetings prior to circulation of the second interim report (PJ [199]). On 16 June 2015, Mr Wills circulated a copy of the second interim report to the Advisory Board in advance of its meeting the following day (PJ [198]).

### Regulatory changes to the VFH scheme to address known risks and problems

1. On 19 March 2015, Mr Cook received a pro-forma circular email from the Assistant Minister for Education and Training with the subject line “VET FEE-HELP Update”. The purpose of the circular was to advise VFH providers of changes that the government was making to the VFH scheme over the course of 2015. It was stated that the “changes have proven necessary as a result of unethical behaviour by a small group of approved registered training providers, along with agents and brokers who have been engaged to recruit potential students under the scheme”. It was also said that the “new arrangements will be critical in protecting students and taxpayers as well as the reputation of the entire national vocational education and training sector” (PJ [193]).
2. In July 2015, the Department published further documents concerning the reforms, including in the Addendum to the booklet titled *VET Administrative Information for Providers*. The Addendum recorded that: with effect from 1 April 2015, VET providers were not permitted to offer inducements to persons to enrol in a course of study (such as free laptops); and with effect from 1 July 2015, VET providers and their agents must not market a VET course of study as free or without obligation to repay or in any other way which would mislead a person into believing that VFH assistance is not a loan to be repaid. Mr Cook sent the July version of the Addendum to Mr Wills saying that it “has some significant implications for our business, our marketing partners, and the business of our competitors” (PJ [201]).
3. In August 2015, the Department published a further update to the Addendum to the booklet titled *VET Administrative Information for Providers*. Relevantly, the update included frequently asked questions about student withdrawals. It included the following question and answer (summarised at PJ [214], emphasis added):

Q Can we cancel students’ enrolments in VET courses or VET units of study if we cannot contact the student?

A Yes. There are no barriers in HESA to VET providers cancelling enrolments. VET providers should advise students of the circumstances that will lead to cancellations. **It would be expected that if students could not be contacted and/or they had not participated in the unit before the census date, a provider would cancel the enrolment to avoid the student incurring the debt.**

1. The update was emailed to Mr Cook on 3 August 2015 and circulated within the College and Site (PJ [214]-[215]).

### The College’s internal reporting

1. The College’s internal reports frequently commented on the importance of ensuring that enrolled students understood the VFH obligations and the course was suitable for the student having regard to factors such as language, literacy and numeracy skills. In that regard, the internal reporting referred to the importance of the College’s enrolment processes in testing those matters without the involvement of the recruiting agents (see generally PJ [192], [195], [205]-[208] and [210]-[213]).

### Primary judge’s conclusions

1. The primary judge found that the evidence established that all the key personnel at the College, and Mr Wills at Site, were well aware that there was an ongoing risk of agent misconduct and that that misconduct could significantly harm the interests of substantial numbers of persons. The harm included that persons might be enrolled as students even though they were unsuitable or not genuinely interested in doing the course for which they were enrolled, or had in some way been tricked, deceived or confused into enrolling (PJ [204]). The primary judge also found that the evidence demonstrated that, prior to the impugned enrolment period, the College and Mr Wills were well aware of the risk of unwitting or unsuitable students being enrolled in their courses, and the need to take steps to mitigate that risk (PJ [220]).

## Changes to the College’s enrolment and withdrawal processes

1. The College began to report declining enrolments from April 2015 (PJ [224]). The College was losing the support of external recruitment agents, with the College receiving feedback from agents that its enrolment processes were convoluted and difficult (PJ [230], [234], [236]). From August 2015, the College developed and implemented a new enrolment and withdrawal process.
2. Early on 18 August 2015, an agenda and papers were circulated for a Management Meeting for the College to be held at 8.00 am the next day (PJ [236]). Despite the meeting being called a Management Meeting, the papers were sent to, and the agenda indicated that the attendees were expected to be, Mr Wills and Mr Dawson. The papers included Mr Cook’s CEO report which stated:

Please note we have been receiving feedback from our agents regarding our enrolment process. Khaled and I met with marketing to finalise a new enrolment process, see attached flowchart. Rollout of the new enrolment process will commence 4th September.

1. The flowchart attached with the report showed two significant changes to the pre-existing enrolment process (PJ [239]). First, the QA call would be initiated by the recruitment agent to the College’s admissions office rather than being initiated by the admissions office to the student (48 hours after submission of the student’s documents) as had previously been the position. Secondly, once the QA call had been completed, the student would pass through census unless the student requested to withdraw. That is to say, campus driven withdrawals would be abolished.
2. In the late afternoon on 18 August 2015, Mr Cook sent the College’s monthly report for July to Mr Wills (PJ [241]). In respect of revenue, the report stated:

Revenue continues below expectations due to lack of volume from agent channels. L2E maintained volume during July, but external agents are not performing to expectations. Agents have provided feedback regarding our current enrolment process, and that feedback is being fed into a revised enrolment process scheduled to go live on 4th September 2015 in conjunction with the new enrolment page.

1. The primary judge found that, by 18 August 2015, the key officers of the College understood that declining enrolments, which was negatively affecting revenue and EBITDA, and feedback from agents that the College’s enrolment process was too cumbersome, were key drivers for the revised enrolment process that was being developed. The primary judge summarised the changes as enabling prospective students to be enrolled more quickly and easily at the time that they were recruited by agents, and to ensure that they passed through census in greater numbers by abolishing campus driven withdrawals (PJ [242]).
2. It is apparent from the management statements recorded above that the College’s revenue had declined because recruitment agents were dissatisfied with the College’s enrolment process and wanted the enrolment process to change. The obvious inference, drawn by the primary judge at PJ [242], is that the College’s enrolment process was adversely affecting the agents’ commission revenue – the agents would not receive any commission unless the student passed the first census date and would not receive their whole commission unless the student passed the second census date. The management documents recorded that the proposed changes to the enrolment process arose from the feedback given by agents about the process, and had also been developed in consultation with the College’s marketing department. The changes to the enrolment process were thus driven by sales and marketing objectives. The changes were to remove two impediments to a prospective student being enrolled and passing first census – those impediments were the College initiating a QA call with the student in the absence of the agent and campus driven withdrawals if a student was uncontactable before the first census date. Removing those impediments would increase the likelihood of prospective students being enrolled and passing first census, and would therefore increase the likelihood of agents receiving their commission. In turn, this would increase the attractiveness of the College to recruitment agents, leading to an increase in prospective students being recruited for the College by agents. Conversely, by removing two important safeguards against the known risks and problems in the VFH scheme, the changes were also likely to increase the number of students being enrolled in courses for which they were not suited and students being enrolled without a full understanding of the financial obligation they were incurring.
3. The implications of the changes resulted in immediate pushback from one of the College’s senior managers, Elizabeth Edwards. As noted earlier, Ms Edwards was Corporate Services Manager for the College whose job description included “improving processes and systems to ensure a smooth and easy flow for the student from pre-enrolment through to graduation”. Ms Edwards reported to the College’s Operations Manager, Mohammed Akbery. The primary judge recorded an email exchange between Ms Edwards and Mr Cook on 18 August 2015 in relation to the proposed enrolment and withdrawal changes (PJ [244]-[248]). The email exchange also refers to a telephone conversation that day which appears to have been heated. In her email, Ms Edwards reiterated the importance of having a rigorous QA process “to support the onboarding of students who are ABLE and WILLING to do the course” (emphasis in original) and retaining campus driven withdrawals for students unable to be contacted by the College. In contrast, Mr Cook’s email emphasised the College’s need to have “a compliant enrolment process that is competitive with others in my industry so I can regain market share”.
4. The minutes of the Management Meeting held at 8.00 am on 19 August 2015 were in evidence. The minutes showed that Mr Wills chaired the meeting and was its “facilitator” and that the meeting was attended by, amongst others, Mr Cook, Mohammed Akbery, Ms Edwards (by phone) and Mr Dawson (PJ [249]). The minutes recorded that (PJ [249]-[252]):
5. Mr Cook’s CEO’s report was tabled and “confirmed as read”.
6. In respect of discussion on Mr Cook’s report, it was recorded that Mr Cook “advised we are getting feedback from agents that our enrolment process is too complex and slowing down conversions significantly. Currently in the process to streamline the process with a rollout date of 4th September”.
7. In respect of Mr Wills’s COO’s report, it was recorded that Mr Wills discussed that the College’s competitors had “larger range of courses available, strong brand and marketing, strong sales culture, better admissions process, better delivering platforms”. The following “action” was also recorded: “Project Plan in place by end of the week.”
8. The primary judge concluded that, as the enrolment process flowchart was not referred to in the minutes, it was probably not discussed at the meeting (PJ [253]).
9. The primary judge also concluded that no decision was made at the Management Meeting to adopt the details of the enrolment process changes (PJ [259]). However, his Honour found:

In broad terms, the proposed changes were reported to the meeting and some discussion took place as reflected in the minutes. In particular, it was reported, and presumably accepted, that the process changes were expected to play an important role in alleviating the straitened financial position of the college. There is also no reason to suppose that attendees at the meeting did not expect that the proposed enrolment changes would be implemented as that was the implication of Mr Cook’s report. I find that there was a common understanding, or expectation, of the attendees at the meeting that subject to further details still to be worked on the enrolment changes would be implemented, but not that they consciously decided or resolved to implement those changes.

1. By its notice of contention, the ACCC challenges that finding and contends that the evidence supports a finding that a decision was made at the Management Meeting to adopt the enrolment process changes.
2. A subsequent meeting occurred on 19 August 2015. In evidence was an electronic meeting invitation for a meeting scheduled for 10.00 am with the subject “Enrolment/Admissions process” and the following message: “Discussion to finalise revised enrolment/admissions process”. The addressees of the invitation included Mr Cook, Mohammed Akbery and Ms Edwards, but not Mr Wills (PJ [261]). The primary judge concluded that the evidence did not support a finding that Mr Wills attended the meeting (PJ [274]). At the meeting, Khaled Akbery (the College’s Partnership Manager, responsible for the relationship with partner organisations such as the recruitment agents) gave a presentation to the meeting in the form of PowerPoint slides (PJ [262]). The slides included the following statements (PJ [263]-[268], with reference to the document):
3. At the College, more than 90% of students were sourced via agents.
4. The College’s course selection was being addressed by “Project Nitro” and the College’s commission rate was competitive, but the College’s enrolment process was “behind competitors”. Because of this, third party agencies were directing volume towards other RTOs.
5. The College required a “streamlined enrolment process that is competitive enough to regain market share”.
6. With respect to the timing of the QA call, the presentation stated that the delay between the receipt of documentation and the QA call was problematic because: “Generally at the time of application the student has free time” whereas a call after receipt of the application “creates difficulty having to find further free time”.
7. With respect to the content of the QA call, the presentation stated that the QA call involved “Further quizzing of pre-enrolment information rather than provision of pre‑enrolment information (The quiz is the LLN indicator not the QA call itself)”, that “Due to the delay between application and the QA call students often forget aspects of the pre-enrolment information”, that “Because of this these students are flagged and are therefore required to complete the LLN prior to census”, and “When students have computer/access issues it makes it difficult to complete the LLN prior to census”. The initialism “LLN” was commonly used by the College as an abbreviation for “language, literacy and numeracy”. In context, the reference to completing the “LLN” prior to census is a reference to completing some form of assessment of “LLN” ability. The primary judge observed that, although the QA call was being used as a quality assurance mechanism, as its name implies, this was regarded as a problem because if the call revealed that for one reason or another the student was not (yet) appropriate for enrolment that might result in them not passing through census.
8. On a slide titled “Barriers”, the presentation stated:
* At the moment there are a number of unnecessary barriers to pass through Census
* These barriers cause significant attrition between application to CAN
* This causes dissatisfaction amongst Sales Agents
* As mentioned in slide 5, Agents have a choice
1. The presentation identified required changes including that: the pre-enrolment information and quiz are merged; an ability for the agent to call the admissions office as soon as the application is complete; an ability for the agent to “close out the sale before walking out the door”, and that there be “a policy update to remove the number of barriers to CAN”. The primary judge inferred that the reference to “a policy update to remove the number of barriers to CAN” was a reference to the abolition of the campus driven withdrawal process.
2. On 20 August 2015, Mr Cook sent an email to, amongst others, Vernon Wills, Blake Wills and Mr Dawson attaching a “report outlining the actions underway to address the underperformance” of the College (PJ [278]). The report largely reiterated matters referred to above. The report references a review of the College’s competitors that had been undertaken by the COO (ie, Mr Wills) that had highlighted a number of common themes within those organisations that had been identified as currently outperforming the College. Amongst seven identified themes were “Excellent Sales/Admission Process” and “Strong Sales Culture”. In respect of those matters, the report stated:

**Excellent Sales/Admission Process (Live Chat, Enquiry/Enrolment Forms etc.)**

Current State: Underperforming. Feedback from referral partners is current process is not competitive in the marketplace, and referral partners are sending volume to alternative providers as a result. Current review of enrolment process underway to ensure we are competitive in marketplace yet remain compliant. Revised enrolment process scheduled for go live on 4th September in conjunction with new website.

**Strong Sales Culture**

Current State: Underperforming. While a strong sales culture exists within our Internal Sales Team, 3rd Party Agents, and our most profitable campuses, there remains some sections of the business where a strong sales culture is lacking. This can be attributed in part to the events of 2014/early 2015 where additional controls where mandated by the regulator, intense media scrutiny of the sector was occurring, and unscrupulous behaviour by 3rd party co-providers and sales agents required a focus on consumer protection, quality control and identity verification. While management is aware of the need to ensure that the appropriate measures are in place to ensure the quality of our services, and the protection of our customers, we do need to encourage a strong sales culture at the same time.

1. The revised enrolment and withdrawal process became effective from 7 September 2015 (the beginning of the impugned enrolment period) (PJ [285]). There were two principal changes to the procedures: first, the outbound QA call procedure was abolished and replaced with an inbound QA call; secondly, the campus driven withdrawal procedure was abolished (PJ [286]). Significant features of the new process, as described by the primary judge, were as follows:
2. The new enrolment process was operated through a new online enrolment portal, thus doing away with hardcopy enrolment applications. The portal contained enrolment documents, which, once completed, were uploaded to the College by the portal. The documents comprised an enrolment form, a request for VFH assistance and a PEQ. Once the documents were uploaded, the agent who had recruited the student and either overseen or assisted them completing and uploading the forms, would call the admissions office in order that the inbound QA call could be conducted (PJ [287]‑[288]). On the appeal, the Court was taken to the testimony of Mohammed Akbery who said that the new enrolment process involved the agent opening the College’s portal on the agent’s laptop or tablet, and the agent or the student completing the relevant documents using the agent’s device. Mohammed Akbery agreed that, under that process, there was a very real likelihood that the agent would complete the information on behalf of the prospective student.
3. In relation to the QA call, the primary judge described the nature of the questions asked and reached the conclusion that the questions asked set a very low standard, or no standard at all, for testing whether the PEQ answers were genuinely the answers of the prospective student (PJ [292]).
4. There were a number of features of the new enrolment process that made it materially different from the previous process. First, the QA call was done with the recruiting agent present with the student. This meant that the admissions team member conducting the QA was not able to be confident that the answers given were indeed the student’s answers and were not influenced or prompted by the agent (PJ [304]). Secondly, the admissions team member would see the enrolment documents for the first time while on the call with the agent and/or the student. They would thus not have the opportunity to examine the enrolment documents in advance and identify any problems or any indicators of unsuitable enrolment (PJ [307]). Thirdly, the call was not itself designed to be a means of assessing the student’s suitability, but was rather a means of giving limited information and, in a limited way, checking that the relevant part of the PEQ had been completed by the student (PJ [308]). Fourthly, the new process meant that a student could become enrolled while never being contactable by the College because the QA call point of contact was initiated by the agent. This was in contrast to the previous QA call procedure whereby a person could not become enrolled as a student unless they had been contacted at least once by the College, being the admissions call itself. Thus, under the new procedure, and leaving campus driven withdrawals aside, there was a greater risk that uncontactable people would be enrolled as students (PJ [311]). Fifthly, unlike the earlier process, there was no post-enrolment assessment of language, literacy and numeracy capability which, if negative, would lead to withdrawal of the student prior to first census (PJ [312]).
5. The abolition of campus withdrawals was announced in the August 2015 Edition 7 of the College’s staff newsletter as follows (PJ [314]):

**Important Withdrawal Policy and Procedure update!!!**

As of Monday 7 September the updated Withdrawal procedures will be live. A major change to the policy is that there will no longer be campus driven withdrawals. It will be the students [sic] responsibility to withdraw before their census date. Please read the release carefully.

1. The College’s revised withdrawal policy had a release date of “08/2015”. The new withdrawal procedure only provided for student driven withdrawals on or before first census and stated: “There are no campus driven withdrawals. All withdrawals need to be initiated by the student.” The procedure did, however, provide that the Campus Manager had the discretion to “cancel” a student’s enrolment status prior to or after a census if they were deemed unsuitable for language, literacy or numeracy, academic misconduct or behaviour reasons for the applied course level. The student not being contactable, or not engaging with the course, were not stated grounds to enliven that discretion (PJ [316]-[317]).

## The consequences of the changes to the College’s enrolment and withdrawal processes

### Rapid increase in enrolments and VFH revenue

1. The expected increase in the College’s enrolments and VFH revenue as a result of the changes to the College’s enrolment and withdrawal process was rapid. On 14 September 2015, Mr Cook sent to Mr Wills and Mr Dawson the College’s “Business Unit Monthly Report” for August 2015 which noted that “implementation of the revised enrolment process on September 4, 2015 has increased sales volume, but the full positive effect of the revised enrolment process for all channels will not be realised in the accounts until Oct/Nov due to delay from sales activity to revenue recognition…” (PJ [326]). The following day, 15 September 2015, Mr Cook sent an email to Mr Wills and Mr Dawson showing that applications for enrolment in the week 7-13 September 2015 had increased dramatically which he characterised as “showing early signs of recovery” (PJ [327]). Mr Cook’s CEO report for the Management Meeting on 16 September 2015 reported that rollout of the new enrolment process had commenced on 7 September, that “feedback has been positive” and that “the new enrolment process along with the update to the withdrawal policy should see CA numbers and student numbers increase” (PJ [328]). The minutes of the Management Meeting on 16 September 2015 recorded that the meeting was facilitated by Mr Wills, who attended via Skype, and chaired by Mr Dawson, and attended by Mr Cook and other senior College management. The minutes recorded that Mr Cook “advised the new enrolment system is working well, it presents well, increased headcount and have re‑recruited old CAs”. Under the CFO report, the minutes recorded that Mr Cook believed that the financial position was “about to pick up, with Khaled talking with our agents” (PJ [329]).
2. On 28 September 2015, Vernon Wills wrote an email to the other directors of Site, including Blake Wills, which stated the following in relation to the College (PJ [327], with reference to the email):

Basically over the last 4 weeks management has pressured PP/CPM into accepting change. Whilst this has been slow we are going to see the benefit of some changes (like enrolment procedure) from September but expected to show real results from October. Early indications are the changes to enrolment and activating marketing are showing significant increases in registrations and should show an upswing in C1 & C2.

1. The primary judge found that it was recognised during the month of September by senior employees of the College and by Site executives, who were driving the need for change and closely following the changes, that the enrolment process changes were not only expected to significantly increase enrolments, but that by the end of the month such increases were already being experienced. It was also recognised that the conduct of agents posed a significant risk to the College which had to be mitigated by ensuring that the agent selection, engagement and monitoring processes were rigorous (PJ [342]).
2. On 14 October 2015, Mr Dawson circulated the College’s financial results for the month of September to, amongst others, Mr Cook and Mr Wills. The reports showed that, for the online campus, VFH income for September exceeded budget by 133% and EBITDA exceeded budget by 137%. VFH income had increased from approximately $326,000 in August to $830,000 in September, an increase of 255%, and in the same period EBITDA had increased from approximately $138,000 to $520,000, an increase of 376% (PJ [344]). Mr Cook’s reports to the Advisory Board members and for the Management Meeting held on 21 October 2015 recognised that increased enrolments and revenue had resulted from the changes to the enrolment process (PJ [345]-[346]).
3. On 3 November 2015, a Site board meeting was held. The papers for the meeting included a First Quarter Review 2015/2016 that was authored by Vernon Wills, Mr Dawson and Blake Wills. The review included a bar graph showing the monthly figures for the College from January to October 2015 of the number of students enrolled and the number passing through first census. The bar graph showed that in the months from January to August the conversion rate (enrolled students passing through first census) varied between a minimum of 46% and a maximum of 66% with the average appearing to be a little above 50%. That is to say, about half the enrolled students withdrew or were withdrawn prior to first census. By September, the conversion rate had increased to 71% and by October to 76%. That is to say, after the enrolment changes and the abolition of campus driven withdrawals, the number of students withdrawing before first census decreased to about a third in September and a quarter in October. The primary judge found that there was nothing to suggest that the quality, suitability or level of engagement of the enrolled students had improved in the latter period, and that the improved conversion rate meant that unsuitable students in increasing numbers and proportions were being enrolled and incurring debt (PJ [356]-[357]).
4. The financial results for the College for October 2015 were circulated on 16 November 2015. They showed that, for the online campus, the actual VFH income was 163% above budget and EBITDA was 148% above budget. The September VFH income had been $820,500 and the October VHF income was $4,301,250; ie, an increase of more than 500%. The July and August VFH income had been $428,125 and $326,125 respectively, being an average of $377,125 per month. The increase from then to October was an increase of 1,140%. The primary judge found that there was nothing to suggest that the increase was brought about other than by the enrolment process changes (PJ [359]). Mr Cook’s report for the 18 November 2015 Management Meeting stated, in respect of the online campus, that student numbers had “increased significantly due to the new enrolment process and on boarding of new agents” (PJ [360]).
5. The financial results for November 2015 became available in December 2015. These showed that, for the online campus, VFH income for November 2015 was $13,931,625, which was 443% over budget, and EBITDA $4,730,762, which was 236% over budget. Revenue was more than 5000% greater than the average for July and August (ie, $377,125) (PJ [394]).
6. The financial results for December 2015 became available in January 2016. These showed that, for the online campus, VFH income for December 2015 was $18,938,750, which was 1151% over budget, and EBITDA was $1,744,185, amounting to 218% over budget. The VFH income for December 2015 was 5022% above the average for July and August 2015 (PJ [402]).

### Rapid increase in the number of disengaged students

1. The rapid increase in the College’s enrolments and VFH revenue was matched by a rapid increase in disengaged students. Concerns were raised by Mohammed Akbery and Ms Edwards at the College’s Management Meeting on 21 October 2015. The chair and facilitator of the meeting was Mr Wills. The minutes recorded that Mohammed Akbery and Ms Edwards discussed that “no matter how good your LMS [learning management system] is students are not engaging”. Mohammed Akbery said in evidence that, by this time, he was well aware that students were not engaging with their courses (by logging in to the LMS), and that it was sufficiently problematic that he considered it appropriate to raise it at the meeting (PJ [348]).
2. On 18 November 2015, Mr Wills asked Mr Buonora (who was the campus manager of the online campus from October 2015) for his “projected/required numbers for early 2016” in the following staffing categories: admissions, student support officers, distance trainers and distance campus administration. Mr Buonora’s response assumed, in respect of his projected need for trainers, that the “ratio of active students will remain at a minimum of 20% of the total number of students” and that the “current trend will bring the total number of students to 7000”. Mr Buonora explained in evidence that the 20% figure “was our best estimation at the time of how many of the total number of students we would expect to remain engaged”, and that the “remainder of the students” (being 80%) would not be “engaged in the course” (PJ [364]‑[366]). The primary judge observed that the figure of 20% engagement is found elsewhere in the College’s documents at that time. Mr Wills’s Short Term Strategy for the College dated 16 November 2015 noted that the current performance of “student participation” was “Student login to ATLAS <20% by week 7 of the course” and that the targeted performance was 75%. The same figures were reflected in a document sent by Mr Buonora to Mohammed Akbery on 30 November 2015 (PJ [367]).
3. On a number of occasions between 7 September and 18 December 2015, Ms Edwards accessed the learning management system to find out what proportion of students had logged in, and it showed that only a very small proportion of the enrolled students were actually accessing the system. Ms Edwards said that the topic of the level of student engagement was something that was regularly discussed between the management team members. The primary judge observed that the figures for the level of engagement (ie, logging in and accessing the system) were apparently readily available on the learning management system (PJ [368]).
4. From 19 October 2015 to January 2016, Candice Stevens was employed by the College as a student support officer. During that period, and as a result of the large influx of students, Ms Stevens was allocated a large number of students to contact. For the most part Ms Stevens was unsuccessful in contacting students. She said she spoke to around 10% of the students that she tried to reach. Ms Stevens also said she tried to email as well as telephone students; however, this was generally unsuccessful and she did not recall any email replies of substance, emails often bounced and one email was often used for multiple students. The primary judge made detailed findings about Ms Stevens’s work and her attempts to escalate the problem of the vast numbers of uncontactable students being enrolled within the College, to no avail (PJ [374]‑[390]).
5. On or around 18 November 2015, Jo Solly commenced contract work as a training and development officer with the College in the Diploma of Business. When the students were introduced, it was her role to contact the students online and deliver support while they were doing their course, and then to assess the students. Around the end of January 2016, Ms Solly was given a list of names and her job was to manage the list to make sure she made initial contact with every student, after the student had spoken with the student support officer. She ended up with 264 names of “actual students”, however she only managed to make contact with a dozen at the most. She did not have a lot of success with those students she contacted. The language skills of the students she contacted in some instances were not developed sufficiently to be able to comprehend the course materials. None of the students allocated to Ms Solly completed their course, or even a single unit of competency (PJ [391]-[392]).
6. In February 2016, Mr Buonora with assistance from, at least, Mohammed Akbery and Ms Edwards, developed a “Student Support – contact strategy” which set out guidelines for student support officers and trainers to identify and apply the appropriate communications strategy with students in order to give them support (PJ [408]). The strategy identified five categories of students:
7. Category A – student initiates and/or responds to contacts from the College (student support officer/trainer) and/or student has completed assessments on ATLAS in the past 2-4 weeks;
8. Category B – student responds irregularly to contacts from the College;
9. Category C – student does not respond to contacts from the College;
10. Category D – student contact information no longer current; and
11. Category E – College exhausted electronic communications alternatives with the student.
12. Categories C to E were all categories of students with whom the College did not have contact. On 18 February 2016, a report in relation to the 5,561 students then enrolled at the online campus showed that 15% of students were in category A, 30% in category B and 55% in categories C to E. That is to say, 55% of the students, all of whom had by then passed through the first census and incurred a VFH debt, were uncontactable and not engaged with the College. Mr Buonora accepted that it was “highly unlikely” that they would ever be in contact with the College. The College’s strategy was to keep trying to contact them until eventually a “letter of concern” was sent to them, but the withdrawal policy did not permit them to be withdrawn and their debts reversed (PJ [409]). The report was sent by Mohammed Akbery to Mr Wills on 18 February 2016 (PJ [410]).
13. A “health check” of the online campus was undertaken on 14 and 15 April 2016. Amongst other things, it revealed, positively, that 40 more students each month were accessing the online resources, but negatively, that only 361 of 5,032 students were accessing the system. That is to say, only 7% of the students were actively engaged. It was also recorded that the “attrition rate” before first census was 19.26%, which means that the conversion rate (enrolled students passing the first census date) was more than 80%. To put this in context, more than 80% of enrolled students were passed through first census even though more than 50% of students were not contactable by the College and only 7% of students were actually logging into the learning management system (PJ [413]).
14. The online campus “health check” was discussed at the College’s Management Meeting held on 18 May 2016 which was facilitated and chaired by Mr Wills and attended by, amongst others, Mr Cook, Mohammed Akbery, Ms Edwards and Mr Dawson. Ms Edwards reported to the meeting that the number of complaints that were being received had increased. The complaints included from students who did not know that they had been enrolled, who did not know that they would incur a VFH debt, who had not wanted to enrol but had felt under pressure to do so, who did not understand what was required in order to complete a course, and who had been subjected to forms of misconduct by agents (PJ [414]). Mohammed Akbery’s operations report for May 2016 was also tabled and discussed. The report included an update concerning the categorisation of the 4,052 students enrolled at the online campus according to categories A to E in the Contact Strategy. The report showed that only 36% of students were in categories A and B, with the remaining 64% in categories C to E and therefore not contactable or not responding to contact (PJ [415]).
15. At the hearing, the ACCC adduced forensic evidence in respect of students at the online campus in the form of two separate reports. The forensic evidence was based on data drawn from the College’s data systems, but there was debate at trial, and on appeal, about whether the facts disclosed and conclusions drawn in the reports would have been known by the relevant officers of the College, including Mr Wills, at relevant times. It will be necessary to return to that issue.
16. The first report was from Matt O’Donnell of Deloitte Risk Advisory Pty Ltd. Mr O’Donnell’s report calculated and compared, in two separate periods, the number of enrolled students who passed through at least one census (thereby incurring a VFH debt) and who had no contact with the College after the initial QA call. The first period was 1 January to 30 June 2015, which preceded the impugned enrolment period, and the second period was 1 July 2015 to 31 May 2016 (PJ [462]). The data related to students who passed a census date within the relevant period (PJ [463]). Thus, the first period excluded students who enrolled in the impugned enrolment period, whereas the second period included students who enrolled in the impugned enrolment period. The primary judge made the following finding based on Mr O’Donnell’s report (PJ [470]):
17. in the six months January to June 2015, there was not a single student who was enrolled in the College and who progressed through at least one census and incurred a VFH debt with whom the College had had no contact after the initial QA call; and
18. in the 11-month period July 2015 to May 2016, there were 1,859 students who progressed through at least one census and incurred a VFH debt with whom the College had had no contact after the initial QA call.
19. The primary judge further found (at PJ [489]):

The fact that in the period January to June 2015 not a single student was passed through census with whom the college had had no contact can be ascribed to the policy of campus driven withdrawals – that policy was aimed at achieving exactly that result, that is that all students with whom the college could not make contact before the first census would be withdrawn so that they did not incur VFH debts. Then, in the period July 2015 to May 2016 nearly 2,000 students with whom the college had had no contact and who had had no login activity progressed through first census and incurred VFH debts. Most of that period was when the campus driven withdrawal policy prior to first census had been abolished. It is unavoidable that but for the abolition of the campus driven withdrawal policy those students would not have passed through first census and would not have incurred VFH debts.

1. The second report was from Janine Thompson, a Chartered Accountant and a partner of McGrathNicol. That report calculated and compared, in respect of enrolments for the online campus that occurred within two separate periods, the number of student enrolments, the number of enrolled students passing through the first census, the number of enrolled students passing through the first census but without ever accessing (logging into) the learning management system, the number of enrolled students passing through the first census who did not complete any unit of competency, and the number of enrolled students passing through the first census who did not complete the course. The first period was 1 November 2014 to 6 September 2015, which preceded the impugned enrolment period (and which is referred to in the table below as the “Earlier Period”), and the second period was 7 September to 18 December 2015 (ie, the impugned enrolment period, which is referred to in the table below as the “Relevant Period”) (see the table reproduced at PJ [485]).
2. At trial, the appellants criticised aspects of Ms Thompson’s calculations. The primary judge addressed those criticisms and concluded that Ms Thompson’s analysis can be relied on as being substantially correct (PJ [480]). The appellants did not challenge that conclusion on the appeal. The primary judge reproduced Ms Thompson’s analysis in the form of a table at PJ [485]. The primary judge also recalculated certain numbers on the basis that there were 50 students who had enrolled in the impugned enrolment period (out of a total of 6,032) who had some or all of their VFH debt re-credited by the College and who ought to be excluded from the data (PJ [483]). By its notice of contention, the ACCC contended that the adjustment made by the primary judge involved an erroneous calculation and, to the extent any adjustment should be made, it would have an immaterial effect on the figures presented by Ms Thompson. On the appeal, the respondents did not seek to dispute the ACCC’s contention in any material way. We accept the ACCC’s contention, with the result that the primary judge’s adjustments should be disregarded, and the primary judge’s conclusion at PJ [488] is erroneous. The following table reproduces the table at PJ [485] but without the adjustments made by the primary judge (and removing unnecessary detail):

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Description** | **Earlier Period** | **Relevant Period** |
| (1) | Length of the period | 10 months | 3 months |
| (2) | No. of course enrolments | 1,316 | 7,324 |
| (3) | No. of enrolments through C1 | 806 | 6,032 |
| (4) | % of enrolments through C1 (i.e., conversion rate) | 61.25% | 82.36%  |
| (5) | % of enrolments withdrawn before C1 (i.e., attrition rate) | 38.75% | 17.64% |
| (6) | Tuition fees claimed (and not refunded, re-credited or reversed) | $7,403,000 | $54,165,875 |
| (7) | % of enrolments through at least C1 with no LMS log in  | 27.9% | 86.5%  |
| (8) | Tuition fees claimed (and not refunded, re-credited or reversed) in respect of enrolments through at least C1 with no LMS log in  | $1,999,313 | $46,136,459 |
| (9) | % of enrolments through at least C1 who did not complete any unit of competency | 81.9% | 98.9% |
| (10) | Tuition fees claimed (and not refunded, re-credited or reversed) in respect of enrolments through at least C1 who did not complete any unit of competency | $5,650,375 | $49,579,168 |
| (11) | % of enrolments through at least C1 who did not complete the course | 93.2% | 99.7% |
| (12) | Tuition fees claimed (and not refunded, re-credited or reversed) in respect of enrolments through at least C1 who did not complete the course | $7,078,250 | $50,063,293 |

1. In respect of the above data, the primary judge found (at PJ [490]):

There is no getting away from the fact that the identified changes between the earlier period and the relevant period are dramatic. As previously identified, the dramatic and sharp increase in enrolments and revenue, the increase in the conversion rate, the substantial lack of LMS login activity and that very substantial numbers of students could not be contacted were all known to the college. To the extent that the other identified data was not actually known, it could certainly have been extracted from the college’s systems – after all, that is where it came from for the purpose of compiling the ASQA data which was the foundation for Ms Thompson’s work.

1. The primary judge also rejected a submission made on behalf of Mr Wills that it was not proved that these results were caused by the enrolment and withdrawal process changes. The primary judge concluded (at PJ [492]):

There is no basis to that submission. The process changes were made precisely in order to turn the college’s economic fortunes around by incentivising CAs to increase enrolments. Campus driven withdrawals were abolished precisely to increase the conversion rate, thereby offering greater incentive to CAs to recruit for the college and increasing the college’s revenue. There is nothing other than the process changes that anyone has pointed to that might have accounted for the dramatic results that were witnessed. Certainly, the respondents led no evidence in that regard. In the circumstances, I infer as the most probable and reasonable conclusion that the process change results that were established in evidence were substantially caused by the enrolment and withdrawal process changes.

1. The appellants did not challenge any of those findings on the appeal.
2. It is convenient at this point to note a number of matters that arise from the data presented in the above table. Looking first at the earlier period (ie, before the relevant changes were made to the enrolment process), about 40% of enrolled students withdrew or were withdrawn prior to the first census date. That reflects poorly on the recruitment practices of agents. Of those who passed through the first census (and incurred a VFH debt), more than a quarter never accessed the learning management system. It is reasonable to infer that many of those students were not “suitable”, in the sense that they either had no interest in undertaking the course for which they were enrolled or had no capability to do so whether as a result of a lack of language, literacy and numeracy skills or technology skills or access. That again reflects poorly on the recruitment practices of agents. It can also be seen that, of those students who passed through the first census (and incurred a VFH debt), about 82% did not complete any unit of competency and about 93% did not complete the course. Those figures reflect poorly on the overall efficacy, from an education perspective, of the College’s participation in the VFH scheme. Turning to the impugned enrolment period, those poor outcomes increased in a compounding manner. The number of student enrolments increased by a factor of about 20 (taking account of the numbers enrolled and the period of enrolment). The percentage of enrolled students who withdraw or were withdrawn prior to the first census date reduced to about 20%, while the percentages of students who passed through the first census (and incurred a VFH debt) and who never accessed the learning management system, who did not complete any unit of competency and who did not complete the course were, respectively, about 87%, 99% and almost 100%.

## Government imposed cap on VFH loans

1. On 1 December 2015, the Commonwealth Government announced a cap on the total VFH loans existing VET providers would be able to issue in 2016, based on each provider’s 2015 loan levels. On 9 December 2015, the Department sent an email to Mr Cook (who forwarded it to Mr Wills) with attachments describing this and other reforms the government was making to the VFH scheme. The cap would be calculated by reference to the VFH loans the VET provider offered in the period 1 January 2015 to 31 August 2015, extrapolated to a 12-month figure (PJ [396]).
2. On 2 December 2015, Mohammed Akbery wrote to Mr Wills by email making two proposals to bring forward VFH revenue into 2015 to avoid the cap in 2016. First, he proposed that some census dates that were scheduled to occur in 2016 be brought forward into 2015 so that the revenue generated on those dates would be generated in 2015. Secondly, he proposed that additional intake dates be added up to 17 December because in respect of each of those dates the first census would still fall in 2015 (PJ [397]). The primary judge found that both of Mohammed Akbery’s proposals represented a cynical attempt to maximise revenue without regard to the students’ interests (PJ [398]).
3. By letter dated 18 December 2015, the Department informed Mr Cook that the cap for the College for 2016 would be $16,818,413, which was based on reported student data for 1 January to 31 August 2015 of $11,212,275. Mr Cook was informed that the College’s estimate for 2016 could not exceed that cap. The consequence of the VFH loan cap was that the College would not be able to enrol *any* new students in 2016. That was because the College’s anticipated VFH revenue from students enrolled in 2015 who would progress through their second and subsequent census dates in 2016 was in excess of the ceiling imposed by the cap. The College ceased enrolling students in its online courses on 18 December 2015 (PJ [399]‑[401]).

## Responding to complaints and reversing enrolments

1. On the appeal, the appellants argued that the College actively responded to complaints made by students, which negatived a conclusion of unconscionable conduct. It is necessary to summarise the primary judge’s findings with respect to the College’s conduct in responding to complaints and reversing enrolments. It is also relevant to note that the ACCC first began its investigation with respect to the conduct of the College on 14 January 2016, when the ACCC sent a letter to Mr Wills (while Mr Wills was the acting CEO of the College) (PJ [407]). Notices issued by the ACCC under s 155 of the CCA (**section 155 notices**) were to follow in the ensuing months (see for example PJ [421]).
2. Between 2014 and 2016, the Corporate Services team of the College was responsible for maintaining a Complaints Register. The register was intended to record every complaint made to the College that was initiated by a student. The staff member who received the complaint was responsible for reporting on the complaint and the outcome of the complaint to the Corporate Services team, who would update the Complaints Register (PJ [417]). Ms Edwards’s role was to endorse or question the outcomes of each complaint. If she was satisfied that the student had been misled or otherwise treated badly by an agent, then she would reverse the student’s VFH debt. Complaints from students or external parties would only go onto the register if an official complaint form was filled in (PJ [418]). There was also the Agent Issues and Complaints Register, which Ms Edwards managed jointly with Khaled Akbery, the Partnerships Manager (PJ [419]).
3. By a section 155 notice dated 10 March 2016, the ACCC sought details of complaints received by the College in relation to the enrolment of students into VFH courses and the College’s complaint handling processes in relation to such enrolment. The College’s response as at 4 April 2016 revealed that 19 of the 77 items on the Complaints Register and 88 of the 165 items on the Agent Issues and Complaints Register remained open, some going back to early 2015. The primary judge found that the response indicated that the ordinary process of review and follow-up on complaints was less than thorough (PJ [422]).
4. In response to the section 155 notice, the College also produced six investigation reports in respect of investigations that had been undertaken by the College in relation to complaints against agents. The content of those reports were summarised by the primary judge, being the Looma investigation, the Umair Butt investigation, the Adil Ganchi investigation, the Ramesh Gaire investigation, the Walgett investigation and the Harpreet Kaur investigation (PJ [424]‑[458]). It can be accepted that, where the investigation revealed unethical behaviour by agents (which occurred in each of the investigations), the College acted to reverse the enrolments of affected students. However, it was also the case that the College maintained a narrow focus for its investigations and proposed remedial actions were not followed up. For example, the Looma investigation concerned the conduct of agents recruiting persons from the remote area of Looma in the Kimberley region of WA. The investigation was confined to the preceding 30 days notwithstanding that the investigation revealed “poor practices” by agents (PJ [424]-[425]). The primary judge concluded that (PJ [459]-[460]):

459 Although the college had in place systems for recording and investigating complaints about CAs, and it tended to respond to such complaints quickly, there are a number of weaknesses in its investigations and responses. These include limiting some investigations by time and geography where all enrolments by the CA(s) concerned would appear to have warranted investigation, and not taking any action in respect of students categorised as “progressing satisfactorily” where such categorisation appears to have been unjustified.

460 It is also apparent that there was inadequate follow-up on complaints until the college was required by the ACCC to report complaints and investigations, and several of the investigation reports appear to have been prepared specifically in response to that requirement. The quality and nature of complaint handling and investigations is not such as to have justified any belief that it contributed significantly to reducing the risk of CA misconduct or unsuitable enrolment.

1. The appellants did not challenge those findings on the appeal.

## Finding of unconscionable conduct by the College

1. Based on the factual findings summarised above, the primary judge concluded that the College’s decision to alter its enrolment process to remove the outbound QA call procedure and the campus driven withdrawal procedure, and enrol students at its online campus during the impugned enrolment period without those safeguards, was a system of conduct in connection with the supply of services to persons that was, in all the circumstances, unconscionable within the meaning of s 21 of the ACL (PJ [500]). The key findings that supported that conclusion were identified by the primary judge as the following:
2. At all relevant times, the College (through its key officers being Mr Cook, Mohammed Akbery and Ms Edwards) knew of the “CA misconduct risk” and the “unsuitable enrolment risk” (PJ [494]-[495]). As noted earlier, these were the risks, arising from unethical or careless conduct of recruitment agents, of persons being enrolled in the online campus in circumstances where the person does not do so willingly and with full knowledge of the obligation being incurred (the VFH debt) or where the person is unsuitable for enrolment because they lack sufficient language, literacy or numeracy skills or technology skills or access. They are the risks and problems summarised by the primary judge at PJ [22]. The primary judge found that these were risks that regularly materialised (PJ [494]).
3. At all relevant times, it was known by the College that the outbound QA call enrolment procedure and the campus driven withdrawal procedure provided important safeguards against the “CA misconduct risk” and “unsuitable enrolment risk”. Notwithstanding the safeguard of the outbound QA call, and other safeguards such as training and monitoring of recruitment agents, it was known to the College that a substantial proportion of applications for enrolment were in respect of persons who were unsuitable for enrolment. The result was that the safeguard of campus driven withdrawals before first census was a critical safeguard against the enrolment of such persons as students, and those students incurring VFH debts for which they would get no benefit (PJ [496]).
4. Notwithstanding that knowledge, for the purpose of profit maximisation substantially driven by budget expectations set by Site, the College altered its enrolment process to remove the outbound QA call procedure and the campus driven withdrawal procedure. The College knew that the inbound QA call procedure offered less of a safeguard against “CA misconduct risk” than the previous outbound call procedure. Notwithstanding that, and notwithstanding the absence of the introduction of alternative rigorous safeguards which might mitigate that increased risk, the College abolished the campus driven withdrawal procedure (PJ [497]).
5. To the knowledge of the College, the changes to the enrolment process and the abolition of campus driven withdrawals had a number of immediate consequences. In particular, the number of enrolments at the College increased very significantly, very quickly. The number and proportion of enrolments of unwitting or unsuitable students rapidly escalated (demonstrated by the number of students who were uncontactable and did not access the learning management system). To the extent that the College was not aware of the escalating numbers and proportion of unwitting or unsuitable enrolments, it should readily have had that awareness from its own systems (PJ [498]).
6. The result was that the College knew that its dramatic increase in revenue and turnaround in profits was substantially built on VFH revenue in respect of students who may have been the victims of CA misconduct, were unwitting students or unsuitable for enrolment, should not have been enrolled and who would gain no benefit whatsoever from their enrolment, yet who incurred very substantial debts to the Commonwealth as a result of their enrolment (PJ [499]).
7. The primary judge concluded as follows (at PJ [500]):

In those circumstances, the college took advantage of the consumers who were enrolled as a result of CA misconduct or who were unsuitable for enrolment by maintaining their enrolment and claiming VFH revenue from the Commonwealth or both. That is particularly the case in respect of consumers who, subsequent to applying for enrolment through the inbound QA call process in the presence of a CA, were not able to be contacted by the college and failed to login to the LMS. By allowing such consumers to progress through census so that the college could claim the VFH revenue from the Commonwealth was to act against conscience; it was a sharp practice that was manifestly unfair to such consumers; it was driven by avarice without regard to the interests of such consumers; it preyed on their vulnerability (being their being prey to CA misconduct, their unsuitability or their uncontactability). …

1. The primary judge also concluded that, by claiming and retaining VFH revenue from the Commonwealth up to and including September 2016 (ie, the impugned conduct period) in respect of students who had been enrolled in the period 7 September 2015 to 18 December 2015 (the impugned enrolment period), with the result that those students’ debts were or would be maintained, the College engaged in a system of conduct in connection with the supply of services to persons that was, in all the circumstances, unconscionable within the meaning of s 21 of the ACL (PJ [501] and [507]). The key findings that supported that conclusion were that:
2. by claiming and retaining VFH revenue from the Commonwealth, the students were burdened by the corresponding VFH debt (PJ [502] and [506]); and
3. the unconscionability of the College’s conduct in changing its enrolment process could have been cured, or at least ameliorated, by not claiming or retaining the revenue derived from the conduct and thereby reversing the students’ debts (PJ [507]).

## Mr Wills’s knowledge and involvement

1. Based on the factual findings summarised above, the primary judge concluded that Mr Wills was knowingly concerned in the College’s unconscionable conduct. The key findings that supported that conclusion were identified by the primary judge as the following.
2. First, prior to the impugned enrolment period, Mr Wills was aware of each of the following matters:
3. the plan to implement the enrolment process changes (the removal of the inbound QA call procedure and the campus driven withdrawal procedure) and then the implementation of those changes (PJ [557] and [558]);
4. the profit maximising purpose in respect of those changes (PJ [559]);
5. the “CA misconduct risk” (PJ [562]);
6. the “unsuitable enrolment risk” (PJ [563]); and
7. that the outbound QA call and campus driven withdrawals that applied prior to the impugned enrolment period provided means by which the College could mitigate “CA misconduct risk” and “unsuitable enrolment risk”, and that the enrolment process changes (by abolishing those mechanisms) reduced the College’s ability to mitigate those risks (PJ [564]).
8. Second, during the impugned conduct period, Mr Wills was aware of each of the following matters:
9. in September 2015, Mr Wills was putting the changes that had been introduced “under the microscope”, he was aware that increased enrolments and hence revenue were beginning to show, and the ongoing risk of “CA misconduct” had been brought to his attention (PJ [549]);
10. in October 2015, Mr Wills continued to be involved in all areas of the College’s operation, the dramatic increase in enrolments and hence income had become apparent, and he became aware that the Department had published a guideline stating the Department’s expectation that if students could not be contacted and/or they had not participated in the unit before the census date, a provider would cancel the enrolment to avoid the student incurring the debt (PJ [550]);
11. by November 2015, Mr Wills had such confidence in the improved enrolment and financial position of the College that he (with others at Site) set the College’s budgeted revenue for the second quarter at $10 million notwithstanding that revenue in the first quarter had been only $3.257 million, he was aware that the conversion rate (ie, enrolled students passing the first census) had increased from a little over 50% to about 76% in October, he knew that the ratio of active students may be as low as 20% of the total number of students and that less than 20% of students logged in to the learning management system by week 7 (PJ [551]);
12. as acting CEO of the College from 20 November 2015 to 20 January 2016, Mr Wills knew that the College ceased enrolling students for 2016 but continued to claim VFH revenue in respect of students who had enrolled in 2015 (PJ [552]);
13. by February 2016, Mr Wills was aware that as many as 55% of students who had passed through and incurred the first census debt were uncontactable and had not engaged with the College (PJ [553]); and
14. by May 2016, Mr Wills knew that more than 50% of students were not contactable, only 7% of students were logging in to the learning management system and 77% of students were not engaging with their courses (PJ [554]).
15. Third, Mr Wills was involved in the unconscionable conduct through his management and oversight of the College at all material times, particularly his roles on the Advisory Board and in the Management Meetings for the College (PJ [542]-[547]), as well as being acting CEO from 20 November 2015 to 20 January 2016. During 2015, Mr Wills had increasing involvement in the College’s affairs (PJ [567]). He was a key driver of changes at the College to improve its financial performance and while he was not the architect of the enrolment process changes, the relevant decisions were reported to him and he oversaw their implementation (PJ [572]-[574]); he was associated with the decisions and was a participant in key aspects of it (PJ [575]).

## Site’s knowing involvement

1. The primary judge concluded that Mr Wills’s knowledge and conduct by which he was knowingly concerned in the unconscionable system of conduct or pattern of behaviour of the College was attributable to Site pursuant to s 139B of the CCA (PJ [585]). Site does not challenge the factual findings by which the primary judge concluded, for the purposes of s 139B, that Mr Wills’s state of mind and conduct is to be attributed to Site. On the appeal, Site joined in Mr Wills’s challenge to the conclusion that he was knowingly concerned in the College’s unconscionable conduct.

## Consumers A to E

1. Relevantly for the purposes of the appeal, the primary judge found that each of the agents that recruited Consumers A to E as students of the College engaged in misleading and deceptive conduct and unconscionable conduct in the course of the recruitment.
2. In respect of Consumer A, the College admitted that the recruiting agent engaged in misleading conduct by failing to disclose to Consumer A the cost of the course in which she enrolled and by failing to explain the College’s withdrawal policy and the relevance of census dates (PJ [620]-[621]). The College also admitted that the recruiting agent engaged in unconscionable conduct by: (i) failing to explain key aspects of the VFH scheme (such as the need to withdraw before the census date to avoid incurring a VFH debt); (ii) filling out the enrolment documents (including the PEQ), rather than ensuring Consumer A filled them out herself; (iii) letting Consumer A believe that she could keep the laptop the agent gave her, when offering inducements to enrol was inconsistent with cl 4.4 of the VET Guidelines; and (iv) telling Consumer A the answers she should give to some of the questions in the inbound QA call (PJ [623]-[624]).
3. In respect of Consumer B, the College admitted that the recruiting agent engaged in misleading conduct by telling Consumer B that the course in which he enrolled was free and that he would get a free laptop (PJ [660]). The College also admitted that the recruiting agent engaged in unconscionable conduct by: (i) enrolling Consumer B notwithstanding that Consumer B told the agent that he had an acquired brain injury and was on a pension; (ii) enrolling Consumer B notwithstanding that Consumer B had told the agent he was not interested and where Consumer B felt pressured and unable to tell the agent to leave; (iii) filling out the enrolment documents (including the PEQ), rather than ensuring Consumer B filled them out himself; and (iv) telling Consumer B the answers that he should give to some of the questions in the inbound QA call (PJ [661]-[662]).
4. In respect of Consumer C, the College admitted that the recruiting agent engaged in misleading conduct by telling Consumer C that the course she was being signed up to (a Diploma in Human Resources Management) would help her become a flight attendant, by telling Consumer C that the course was “free” for people on Centrelink benefits and that a person did not have to pay anything unless they earned a lot of money, and by not telling Consumer C the cost of the course she was being signed up to (PJ [693]-[695]). The College also admitted that the recruiting agent engaged in unconscionable conduct by: (i) filling out the enrolment documents (including the PEQ), rather than ensuring Consumer C filled them out herself; (ii) letting Consumer C believe she could keep the laptop she was to receive, when offering inducements to enrol was inconsistent with cl 4.4 of the VET Guidelines; and (iii) telling Consumer C the answers she should give to some of the questions in the inbound QA call (PJ [696]-[697]).
5. In respect of Consumer D, the College admitted that the recruiting agent engaged in misleading conduct by telling Consumer D that the course was free, that she could cancel her course at any time, and that she could get a free laptop if she signed up for a course (PJ [725]-[727]). The College also admitted that the recruiting agent engaged in unconscionable conduct by: (i) failing to explain key aspects of the VFH scheme to Consumer D (such as the need to withdraw before the census date to avoid incurring a VFH debt); (ii) filling out the enrolment documents (including the PEQ), rather than ensuring Consumer D filled them out herself; (iii) letting Consumer D believe that she could keep the laptop he gave her, when offering inducements to enrol was inconsistent with cl 4.4 of the VET Guidelines; and (iv) telling Consumer D the answers she should give to some of the questions in the inbound QA call (PJ [728]-[729]).
6. In respect of Consumer E, the College admitted that the recruiting agent engaged in misleading conduct by telling Consumer E that he would get a free laptop if he signed up to the course and by failing to disclose to Consumer E the cost of the course (PJ [755]-[756]). The College also admitted that the recruiting agent engaged in unconscionable conduct by: (i) offering Consumer E a laptop and telling him he could keep it when that was inconsistent with cl 4.4 of the VET Guidelines; (ii) persisting in enrolling Consumer E even though Consumer E had said that he had disabilities which meant he could not do a course and was not interested; (iii) causing Consumer E to feel pressured to enrol; and (iv) telling Consumer E the answers he should give to some of the questions during the inbound QA call (PJ [757]-[758]).
7. In respect of each of Consumers A to E, the primary judge found that the contravening conduct by the relevant recruitment agent was to be attributed to the College pursuant to s 139B(2) of the CCA (PJ [619], [657], [692], [724] and [754]). In each case the primary judge found that the contravening conduct was within the agent’s apparent authority. The bases for that conclusion were that:
8. the relevant agency agreements required the agent to ensure that prospective students were informed that the agent was providing sales services “as an agent” for the College;
9. by styling the agent as a “Course Advisor” for the College and sending the agent into the field as such, the College held out to the world that the agent would have the usual or expected authority of a course advisor, which gave the agent the apparent authority to make representations on behalf of the College with regard to recruitment; and
10. the contravening conduct occurred in the course of recruiting persons as students, which was conduct the agent was authorised to engage in.

# C. accc’s notice of contention

## Overview

1. It is convenient to consider first the matters raised by the ACCC’s notice of contention, as they are discrete challenges to certain findings of fact made by the primary judge. The contentions relate to three matters:
2. the meetings that were held on 19 August 2015 and whether Mr Wills attended the enrolment/admissions process meeting scheduled for 10.00 am on that day;
3. a report prepared by Alex Makar (Head of Group Services for the Site Group) in response to an instruction given by Mr Cook on 23 September 2015 to be involved in a review of the College’s marketing, sales and enrolment processes; and
4. the recalculations performed by the primary judge with respect to Ms Thompson’s report (referred to earlier in these reasons).

## The meetings held on 19 August 2015

1. The ACCC advanced two contentions in relation to the meetings that were held on 19 August 2015. First, the ACCC contended that the primary judge erred in finding that no decision was made at the Management Meeting held at 8.00 am on 19 August 2015 to proceed with the changes to the College’s enrolment processes. The ACCC contended that the primary judge ought to have found that an “in principle” decision to proceed with the changes was made at that meeting (at which Mr Wills was present). Second, the ACCC contended that the primary judge erred in failing to find, and should have found, that Mr Wills attended the enrolment/admissions process meeting scheduled for 10.00 am on 19 August 2015.
2. In relation to the Management Meeting held at 8.00 am on 19 August 2015, the ACCC submitted that the evidence of Ms Edwards supported a finding that an “in principle” decision to proceed with the changes was made at that meeting. The ACCC also submitted that the nature of the meeting, the papers prepared for the meeting and the action item recorded in the minutes of the meeting (the “Project Plan” to be in place by the end of the week) supported an inference that an “in principle” decision had been made at the meeting.
3. The primary judge made detailed findings with respect to the evidence relating to that meeting (at PJ [249]-[260]). The contention pressed by the ACCC was put to Ms Edwards in oral testimony and Ms Edwards said that she did not remember (PJ [255]). For the reasons explained by his Honour, subsequent examination of Ms Edwards did not advance the matter (PJ [256]). As to the documentary record, the primary judge found that the documents for the meeting included Mr Cook’s CEO report which foreshadowed the new enrolment process (PJ [236]) and included a flowchart depicting the new enrolment process (PJ [238]). These matters were communicated directly from Mr Cook to Mr Wills (PJ [241]). The minutes of the Management Meeting recorded that the enrolment process was discussed by Mr Cook, and that Mr Cook gave a report to the effect that the College was “[c]urrently in the process to streamline the process with a rollout date of 4th September”.
4. The primary judge concluded as follows (PJ [259]):

In the circumstances, I do not consider that there was a decision at the Management Meeting to adopt the details of the enrolment process changes. In broad terms, the proposed changes were reported to the meeting and some discussion took place as reflected in the minutes. In particular, it was reported, and presumably accepted, that the process changes were expected to play an important role in alleviating the straitened financial position of the college. There is also no reason to suppose that attendees at the meeting did not expect that the proposed enrolment changes would be implemented as that was the implication of Mr Cook’s report. I find that there was a common understanding, or expectation, of the attendees at the meeting that subject to further details still to be worked on the enrolment changes would be implemented, but not that they consciously decided or resolved to implement those changes.

1. We discern no error in that conclusion. Nor do we discern, though, a great deal of difference between the finding for which the ACCC contended and the primary judge’s finding, as it relates to the ultimate issue to be determined. The primary judge’s finding was only that no decision was taken at the Management Meeting to adopt the details of the enrolment process changes. That finding was based on the fact that the details were to be finalised in other forums. The primary judge did find, consistently with the documentary record, that the proposed changes were reported to the meeting; that it was reported, and presumably accepted, that the process changes were expected to play an important role in alleviating the straitened financial position of the College; and that there was a common understanding, or expectation, of the attendees at the meeting that, subject to further details still to be worked on, the enrolment changes would be implemented. That inference is supported by the minute of Mr Cook’s report that the College was in the process of streamlining the enrolment process with a rollout date of 4th September. The effect of the primary judge’s finding is that the attendees of the Management Meeting, including Mr Cook and Mr Wills, were aware of the changes being proposed to the enrolment process, were aware that this was being done to improve the College’s financial performance, and were aware that the College was proceeding with the changes with the details being worked out. The difference between those facts and the making of an “in principle” decision is slight.
2. In relation to the enrolment/admissions process meeting scheduled for 10.00 am on 19 August 2015, the ACCC submitted that the primary judge ought not to have accepted Mohammed Akbery’s attempt, in his examination-in-chief, to resile from his affidavit evidence that Mr Wills attended that meeting.
3. In his reasons, the primary judge recorded Mohammed Akbery’s affidavit evidence and his subsequent oral testimony that he did not recall the enrolment/admissions process meeting and could not recall how or why his affidavit stated that he did recall the meeting (at PJ [269]-[272]). The primary judge found that Mohammed Akbery’s affidavit evidence was too infirm a basis to conclude that Mr Wills was at the enrolment/admissions process meeting (at PJ [274]). We discern no error in that finding.

## The report prepared by Alex Makar

1. The ACCC contended that the primary judge erred at PJ [336] in finding that the statements there recorded were the conclusions of Mr Makar’s review report and that the conclusions of Mr Makar’s review report were those set out at PJ [343].
2. The ACCC’s contention should be accepted. The document to which the primary judge referred at PJ [336] was not Mr Makar’s Agent Management Review Report (described at PJ [343]), but a report prepared by the College’s Partnerships Manager, Khaled Akbery, and provided (along with other documents) to Mr Makar for the purpose of his preparation of his review report.
3. The error does not affect the primary judge’s conclusions, or the issues raised on the appeal, in any material way. As found by the primary judge, on 23 September 2015 Mr Cook wrote to Mr Makar and asked Mr Makar and his team to be “involved in the review process currently underway of our Marketing, Sales and Enrolment processes, as well as the systems we have in place to engage and monitor the activities of our Sales Agents (both external and L2E) … in light of the recent negative media attention in our sector” (PJ [335]). Mr Makar reported back on 1 October 2015. The primary judge found (at PJ [343]):

On 1 October 2015, Mr Makar circulated to Vernon Wills, Mr Cook, Mr Dawson and Blake Wills, a draft of an “Agent Management Review Report” that had been completed by him the previous day. Mr Makar asked everyone to whom his email was addressed to read the report and then have a meeting to discuss it. [D5123] Although the report was generally positive with regard to the college’s management of its CAs and compliance with the relevant standards, it did identify areas of concern. These included that there was a risk of students being enrolled without the controls and support programs in place with some agents, that such enrolments represented a risk to the college with limited control over how they were recruited, and that there were systematic gaps in the control of the processes and implementation of improvements.

1. The report reiterates the known risks and problems associated with the VFH scheme and the outsourcing of student recruitment by the College to sales and marketing agents.

## Ms Thompson’s report

1. The ACCC contended that the re-calculations performed by the primary judge in the table at PJ [485], and the resulting conclusion stated by his Honour at PJ [488] (that the percentage of enrolments who passed through at least one census date who did not complete their course remained steady as between the earlier period and the impugned enrolment period) were in error.
2. The ACCC’s contention with respect to the table at PJ [485] was addressed earlier in these reasons. While the appellants did not accept fully the ACCC’s recalculations, they did not advance their own recalculations, or submit that any different calculations would make any material difference to the figures calculated by Ms Thompson in her report. We consider that the ACCC’s written submissions dated 5 May 2022 with respect to the re-calculations performed by the primary judge are persuasive. In the absence of substantive submissions advanced by the appellants in opposition to those submissions, it is unnecessary to reproduce them. Accepting the contention, the table at PJ [485] has been reproduced earlier in these reasons without the primary judge’s adjustments.
3. It also follows that the conclusion stated by the primary judge at PJ [488], which was based on his Honour’s adjustments to certain of the figures in the table, is incorrect. The appellants did not seek to support that conclusion. Contrary to his Honour’s conclusion, the data in the table shows that the percentage of enrolled students who passed at least the first census but did not complete their course did not remain constant across the impugned enrolment period and the prior period. The percentage increased from 93.2% in the prior period to 99.7% in the impugned enrolment period.

# D. Appeals against finding of Systemic unconscionable conduct

## Overview

1. Grounds 1 to 5 of the notice of appeal of the College and Site, and ground 1 of the notice of appeal of Mr Wills, concern the primary judge’s finding that the College engaged in a system of conduct that was unconscionable contrary to s 21 of the ACL. In his written and oral submissions on the appeal, Mr Wills essentially adopted the submissions of the College with respect to this aspect of the appeal. For that reason, when discussing the contentions and submissions advanced by the appellants against the primary judge’s finding that the College engaged in a system of conduct that was unconscionable, we will refer to the appellants generally without differentiating between the College and Site on the one hand and Mr Wills on the other.
2. By way of overview, the grounds of appeal raise the following contentions:
3. ground 1 is a contention that the primary judge erred in finding that the impugned conduct was unconscionable having regard to all the circumstances (in essence, the contention is that the primary judge erred in his application of the statutory standard or norm to the facts and circumstances as found);
4. ground 2 is a contention that the primary judge erred in finding that the impugned conduct was unconscionable at its inception because the primary judge placed reliance on facts and matters that could only have been known at a later date;
5. ground 3 is a contention that the primary judge erred in finding that the impugned conduct was unconscionable where none of the matters required to be taken into account pursuant to the statutory criteria in s 22(1) of the ACL were present; and
6. grounds 4 and 5 are contentions that the primary judge erred in respect of certain discrete findings.

## Applicable legal principles

1. The appellants do not challenge the primary judge’s summary of the applicable legal principles concerning s 21 of the ACL. The following matters can be regarded as uncontroversial.
2. Section 21(1) of the ACL provides that a person must not, in trade or commerce, in connection with (relevantly) the supply or possible supply of goods or services to a person engage in conduct that is, in all the circumstances, unconscionable.
3. Section 21(3) stipulates that, for the purpose of determining whether a person has contravened subs (1), the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention. By implication, the Court may have regard to circumstances that were reasonably foreseeable at the time of the alleged contravention.
4. Section 21(4) stipulates that it is the intention of the Parliament that:
5. this section is not limited by the unwritten law relating to unconscionable conduct; and
6. 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
7. in considering whether conduct to which a contract relates is unconscionable, a court’s consideration of the contract may include consideration of the terms of the contract and 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.
8. Paragraph (b) of s 21(4) is significant in this case. The ACCC alleged, and the primary judge found, that the College’s decision to alter its enrolment process to remove the outbound QA call procedure and the campus driven withdrawal procedure, and enrol students at its online campus during the impugned enrolment period without those safeguards, was a system of conduct in connection with the supply of services to persons that was, in all the circumstances, unconscionable within the meaning of s 21 of the ACL. Paragraph (b) was inserted by the *Competition and Consumer Legislation Amendment Act 2011* (Cth) and commenced on 1 January 2012. The accompanying Explanatory Memorandum stated the intention of Parliament with respect to the amendment in the following terms:

2.21 Paragraph 21(4)(b) of the ACL provides that it is the intention of the Parliament that the section is capable of applying to a system of conduct or a pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour. The unconscionable conduct provisions of the ACL are not limited to individual transactions. Rather, the focus of the provisions is on conduct that may be said to offend against good conscience; it is not specifically on the characteristics of any possible ‘victim’ of the conduct (though these may be relevant to the assessment of the conduct).

…

2.24 To emphasise this point, paragraph 21(4)(b) of the ACL indicates Parliament’s intention that the provision may apply whether or not there is an identified person disadvantaged by the conduct or behaviour. This ensures that the focus is on the conduct in question, as opposed to the characteristics of a particular person, or the effect of the impugned conduct on that person.

1. In *Unique International College Pty Ltd v Australian Competition and Consumer Commission* (2018) 266 FCR 631 (***Unique***), the Full Court observed (at [104]):

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.

1. Subsection 22(1) of the ACL is relevant to ground 3 of the appeal. For that reason, the subsection is reproduced in full:

**22 Matters the court may have regard to for the purposes of section 21**

(1) 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.

1. The meaning of the proscription of unconscionable conduct in s 21 of the ACL, and its analogue in the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), has been the subject of considerable explication in the decided cases over the years. The proscription has a long history, as recounted by Edelman J (in dissent as to the result) in *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 (***Kobelt***) at [283]-[294]. Section 52A of the *Trade Practices Act 1974* (Cth) (**Trade Practices Act**), enacted in 1986, was intended to make available the statutory remedies under the Trade Practices Act to conduct that fell within the equitable proscription against unconscionable bargains as well as the equitable doctrine of undue influence (*Kobelt* at [283]). A legislative intention to extend the proscription to conduct beyond the equitable doctrines was made clear with the enactment of s 51AC of the Trade Practices Act in 1998 (*Kobelt* at [286]). From that time, the statute separately proscribed conduct that was “unconscionable within the meaning of the unwritten law” and conduct “that is, in all the circumstances, unconscionable”. That legislative intent was made express in s 21(4)(a) which commenced in 2012 (*Kobelt* at [292]). The separate proscriptions are currently enacted as ss 20 and 21 respectively of the ACL. In considering the decided cases, it is necessary to appreciate that many of the significant cases, such as *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, were decided under the statutory predecessor of s 20 (which proscribed conduct that was unconscionable within the meaning of the unwritten law).
2. In a series of cases decided in the last ten years in the High Court and this Court, there has been considerable discussion and distillation of the principles governing the proscription of unconscionable conduct in s 21 of the ACL. Without seeking to be exhaustive, the principal cases are (in chronological order): *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90 (***Lux***); *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 (***Paciocco FCAFC***), affirmed by the High Court in *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525 (***Paciocco HCA***); *Kobelt*; and, most recently, *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* [2021] FCAFC 40; 388 ALR 577 (***Quantum***). The following principles emerge from those cases:
3. First, the prohibition of unconscionable conduct in s 21 of the ACL is not confined to conduct that is unconscionable within the meaning of the general law and remediable on that basis by a court exercising jurisdiction in equity (in contrast to s 20 of the ACL): *Kobelt* at [83] (Gageler J), [119] (Keane J), [144] (Nettle and Gordon JJ) and [311] (Edelman J); *Quantum* at [83].
4. Second, s 21 of the ACL operates to prescribe a normative standard of conduct which the section marks out. The function of a court is to recognise and administer that normative standard of conduct. That must be done in the totality of the circumstances taking account of each of the considerations identified in s 22 of the ACL if and to the extent that those considerations are applicable in the circumstances: *Lux* at [23], [41] (Allsop CJ); *Paciocco HCA* at [189] (Gageler J); *Kobelt* at [87] (Gageler J).
5. Third, the word “unconscionable” is to be understood as bearing its ordinary meaning, being conduct that objectively answers the description of being against conscience: *Kobelt* at [14] (Kiefel CJ and Bell J), [92] (Gageler J) and [119] (Keane J); *Quantum* at [87].
6. Fourth, the values that inform the standard of conscience fixed by the statutory prohibition include those identified in *Paciocco FCAFC* at [296] (Allsop CJ), being 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: affirmed in *Kobelt* at [14] (Kiefel CJ and Bell J) and at [234] (Nettle and Gordon J).
7. Fifth, the approach to the application of the prohibition in s 21 which is required by s 22 is analogous to the approach of a court of equity which takes a “more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case”: *The Juliana* (1822) 2 Dods 504 at 521; 165 ER 1560 at 1567 (Lord Stowell) and *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113 at 118-119 (Dixon CJ, McTiernan and Kitto JJ), referred to by Allsop CJ in *Paciocco FCAFC* at [271] and in *Kobelt* by Keane Jat [120] and Nettle and Gordon JJ at [150].
8. Sixth, the task is an evaluation of the impugned conduct to assess whether it is to be characterised as a sufficient departure from the norms of acceptable commercial behaviour as to be against conscience or to offend conscience and so be characterised as unconscionable: *Kobelt* at [47] (Kiefel CJ and Bell J), [120] (Keane J) and [153] (Nettle and Gordon JJ); *Quantum* at [92].
9. In *Quantum*, the Full Court of this Court considered whether for conduct to be unconscionable within s 21 there must be found some form of pre-existing disability, vulnerability or disadvantage of which advantage was taken. The Court concluded that while taking advantage of a pre-existing disability, vulnerability or disadvantage is a common feature of cases in which conduct has been found to be unconscionable, it is not an essential requirement of the statutory proscription (at [85] and [91]). The primary judge followed *Quantum* in that respect (at PJ [68]). There is no appeal against that conclusion.
10. A finding that conduct is unconscionable is a serious matter. It involves a significant departure from proper commercial behaviour. Over the years, courts have sought to explain the normative standard marked out by the section by the use of synonyms such as “a high level of moral obloquy” (*Attorney General of New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR 557 at [121] per Spigelman CJ). Today, the use of such synonyms in the explication of the normative standard is less favoured: see *Paciocco FCAFC* at [262] (Allsop CJ); *Kobelt* at [59] and [60] (Kiefel CJ and Bell J), [91] (Gageler J), [152] (Nettle and Gordon JJ). The Full Court explained in *Quantum* (at [91]):

… it is no light matter, indeed it is a serious matter, to have one’s conduct impugned as against or as offending conscience. Business people understand such things, as do ordinary people. They need no definition to assist them. “Unconscionable” is the language of business morality and unconscionable conduct is referable to considerations expressed and recognised by the statute. The word is not limited to one kind of conduct that is against or offends conscience. Surely to predate on vulnerable consumers or small business people is unconscionable. But why is it not also unconscionable to act in a way that is systematically dishonest, entirely in bad faith in undermining a bargain, involving misrepresentation, commercial bullying or pressure and sharp practice, using a superior bargaining position, behaving contrary to an industry code, using significant market power in a way to extract an undisclosed benefit that will harm others who are commercially related to the counterparty?

1. It need hardly be said that the foregoing description of the types of conduct that may be characterised as unconscionable is illustrative and not exhaustive.
2. Further reference should be made to the decision of the Full Court in *Unique*. That is for two reasons. First, there are similarities between the factual circumstances considered in *Unique* and the present case in that both cases concerned the enrolment of students in online VET courses under the VFH scheme. Second, in support of their grounds of appeal, the appellants placed reliance on statements made by the Full Court in that case.
3. In *Unique*, the ACCC alleged that Unique’s method of marketing its online courses to prospective students was unconscionable having regard to the manner in which the marketing was undertaken and the vulnerabilities of persons to whom the marketing was targeted (see at [30]-[34]). The Full Court observed (at [35]) that the ACCC’s allegations were highly fact specific, as to the way Unique conducted its enrolment processes; what its employees failed to do; and what were the vulnerabilities of the consumers said to have been targeted by Unique. The Full Court upheld an appeal against a finding of systemic unconscionable conduct on the basis that the primary judge had erred in extrapolating from the experience of six consumers to conclusions with regard to there being a system or pattern of behaviour in the absence of persuasive evidence about how six consumers could be said to be representative of the experience of 3,600 consumers (at [111]). The Full Court concluded that, where the nature of the system and the nature of unconscionability depends on the attributes of individual consumers or the specifics of transactions with individual consumers, inferences about such matters cannot be drawn without sufficient evidence and there will need to be evidence about either a material proportion of individual consumers, or evidence about how and why the individual consumers were chosen, or evidence about the representativeness of the individual consumers, or a combination of all three (at [136] and [161]-[162]).
4. The conclusion of the Full Court in *Unique* must be understood in the context of the allegations and case advanced by the ACCC. It was a case that depended upon proof of the attributes (vulnerabilities) of individual consumers. As the Full Court observed (at [153]):

Proving that a characterisation of unconscionability is appropriate also requires careful attention to precisely what it is about the class of consumers that is relied upon. The more that individual characteristics of consumers are said to be what makes them vulnerable, the greater the need for evidence about individual consumers is likely to be. The more that unconscionability depends on specific interactions between the respondents and consumers, the more likely it is that a level of representative evidence will be required. Where, as in the current appeal, the features of the alleged “system” depended on what happened at various enrolment sites, what was said and what was not, and what attributes those who attended and enrolled had, it is unlikely that an unconscionable system case can be proven without more attention being paid by the regulator to the need to prove representativeness of individuals, or to have a sufficient sample of individual consumers, or expert evidence, which addresses these matters.

1. The present case differs from *Unique* in significant ways. It was common ground that amendments were made to the VFH scheme in 2012 with the aim of broadening the demographic of students who qualified for assistance through the scheme. As stated earlier, this was for the express purpose of addressing low participation rates from identified demographic groups including Indigenous Australians, people from non-English speaking backgrounds, with disability, from regional and remote areas, from low socio-economic backgrounds, and people not currently engaged in employment. However, the ACCC did not allege, and the primary judge did not find, that the College engaged in a system of conduct that was unconscionable because it marketed its courses in an unethical way to persons with vulnerabilities. Indeed, the primary judge rejected a submission from the ACCC that a finding should be made that, of the students who enrolled at the College’s online campus, there was an over-representation of students from disadvantaged backgrounds (at PJ [218]-[219]). The finding of unconscionability was based on the College’s knowledge of the risks of agent misconduct and the enrolment of unwitting and unsuitable students, which risks were manifest at the College’s online campus, and was based on the College changing its enrolment processes to remove safeguards that were known to protect such students from incurring VFH debts when they had no intention to study, insufficient ability to study or were unaware of the obligation being incurred.

## Appeal ground 1

1. By appeal ground 1, the appellants contend that the primary judge erred in concluding that the impugned conduct constituted an unconscionable system of conduct in contravention of s 21 of the ACL in circumstances where:
2. the risks identified by the primary judge were addressed in the specific regulatory framework which bound the College, and the ACCC did not allege or prove that the College had failed to comply with that regulation;
3. the College’s enrolment procedure prior to the enrolment process changes both exceeded the specific regulatory requirements and was out of step with the market;
4. the College made the enrolment process changes together with other changes to its systems, addressing risks in a manner it believed was compliant with the regulatory requirements under which it operated;
5. the trial judge made no finding of the extent to which the risk of agent misconduct materialised (nor did the evidence allow a finding to that effect);
6. although the trial judge found that students “might” be unsuitable for various reasons and that the proportion of unsuitable students that were enrolled rapidly escalated, the extent of that risk or the materialisation of that risk was not known at the time the changes were made or implemented; and
7. the statutory norm in s 21 applies to unconscionable conduct, not to the identification of the risk of conduct and protection of students from that conduct engaged in by others.
8. In effect, the appellants contend by ground 1 that the primary judge failed to weigh all of the circumstances, and particularly those circumstances identified in the preceding paragraph.
9. We reject that contention. Perversely, it was the submissions advanced by the appellants in support of ground 1 that involved a selective approach to the facts and a failure to confront the totality of the factual circumstances as found by the primary judge. In most respects, the submissions of the appellants involved cherry-picking and nit-picking. Such an approach is contrary to established principle, which requires an examination of all the circumstances.
10. As a starting point, the appellants observed that the primary judge found that the College’s altered enrolment process was unconscionable, at least in significant part, because the process did not adequately protect students from risk. The appellants submitted that such a finding is unusual because the statutory norm usually applies to unconscionable conduct, not the risk of unconscionable conduct. That submission involved a non-sequitur. The primary judge did not find that the impugned conduct gave rise to a risk of unconscionable conduct. The primary judge found that the impugned conduct was unconscionable because:
11. the College knew of the risks, which regularly materialised and which arose from the unethical or careless conduct of recruitment agents, of persons being enrolled in the online campus in circumstances where the person does not do so willingly and with full knowledge of the obligation being incurred (the VFH debt) or where the person is unsuitable for enrolment because they lack sufficient language, literacy or numeracy skills or technology skills or access;
12. the College knew that the outbound QA call enrolment procedure and the campus driven withdrawal procedure provided important safeguards against those risks;
13. despite that knowledge, and for the purpose of profit maximisation, the College altered its enrolment process to remove the outbound QA call procedure and the campus driven withdrawal procedure;
14. the College knew or ought to have known that the changes to the enrolment process and the abolition of campus driven withdrawals dramatically increased the number of enrolments by disengaged students; and
15. the College knew or ought to have known that its dramatic increase in revenue was substantially built on VFH revenue in respect of students who may have been the victims of CA misconduct, were unwitting or unsuitable for enrolment, should not have been enrolled and who would gain no benefit whatsoever from their enrolment, yet who incurred very substantial debts to the Commonwealth as a result of their enrolment.
16. Next, the appellants submitted that the primary judge’s finding was novel because it was based on a system that “did not adequately meet the risk of someone else engaging in wrongful conduct, where the wrongful conduct was in contravention of that person’s instructions and training”. Asserted novelty is no answer to the application of the statutory proscription against unconscionable conduct. As discussed earlier, the proscription is not limited to particular types or categories of conduct or circumstance such as those to which equitable principles would apply. The proscription is broadly framed and is capable of application to myriad circumstances that may arise in commerce. In support of the “novelty” submission, the appellants sought to contrast the facts of the present case and the facts of other cases such as *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132 and *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6; 399 ALR 409. The comparisons are of no assistance as each case involves entirely different factual circumstances. The submission that the “risk” concerned the behaviour of recruitment agents and that any such behaviour would be in contravention of the College’s instructions and training of agents involves a narrow portrayal of the relevant circumstances and the College’s conduct. The full picture requires consideration of the facts that: the College chose to outsource student recruitment to agents on a commission basis; risks and problems arose from student recruitment that were known publicly through Senate inquiries and media reports and also known privately by the College; prior to the enrolment process changes, the College knew that some 50% of enrolled students withdrew or were withdrawn before the first census date; and the College knew that the outbound QA call enrolment procedure and the campus driven withdrawal procedure provided important safeguards against those risks. It is plain from the evidence that the College’s instructions and training of agents was ineffective to prevent unwitting and unsuitable students being enrolled, and that was known by the College. In that knowledge, the College acted in a manner that reduced the existing safeguards for such students in the pursuit of increased VFH revenue which would burden those students with VFH debt. Additionally, it cannot be overlooked that the CCA attributed legal responsibility to the College for the conduct of its recruitment agents (as will be discussed below).
17. The appellants submitted that, while the primary judge found that the College knew that there was a real risk of misconduct by agents, the findings do not evidence any *intent* for this risk to eventuate and do not demonstrate that the College took advantage of the risk. In support of that submission, the College placed reliance on an email sent by Mr Cook on 20 September 2015 to Vernon Wills and Blake Wills, amongst others, which asserted that there was “already a very robust and rigorous agent selection, on boarding and monitoring process” in place and that, aware of potential risks with agents, the College was “taking what we believe are the necessary precautions” (see PJ [333]). The appellants submitted that those precautions included:
18. contractual obligations in its contracts that required agents to carry out sales fairly, providing accurate information to prospective students (PJ [525](1));
19. an agent induction and on-boarding process comprised of a training presentation, a knowledge quiz aimed at training agents to act appropriately (PJ [525](2), [527]);
20. maintaining a Student Complaints Register, Agent Issues and Complaints Register and CA Monitoring Log to address agent misconduct (PJ [417]-[420], [525](6));
21. speaking directly to prospective students during the inbound QA call to confirm the consumer’s contact details and provide information, including withdrawal information, and ascertaining whether prospective students completed the PEQ (PJ [292], [525](3));
22. a system for admissions officers to flag concerns about a QA call or student, so that enrolment was not processed until the concern was resolved (PJ [310]);
23. terminating relationships with marketing partners or individual agents when misconduct had been established (PJ [426], [427]);
24. reversing enrolments or reimbursing students’ VFH debts in cases in which it thought CA misconduct had occurred (PJ [418], [422], [424], [428], [429], [433], [436], [437], [440], [441], [444], [445], [452], [453], [654], [690], [719]-[720], [751]).
25. The appellants submitted that, merely because later in time facts demonstrate the system could have been executed more robustly or failed does not allow a conclusion of unconscionable conduct.
26. The submission that the primary judge’s findings do not evidence any *intent* on the part of the College for the risk of agent misconduct to eventuate may be accepted but is not determinative of the question whether the College’s conduct was unconscionable (see for example *Kobelt* at [91] per Gageler J). The College was not seeking agent misconduct, whether in the form of misleading students to enrol or being careless as to the suitability of students to undertake the courses for which they enrolled, and it can be accepted that the College had the staff and facilities to provide the education courses it offered. The College was not conducting a sham organisation. The appellants’ submissions that “there is no reason to assume that enrolling a student in a course of vocational education would be against the interests of consumers” and “there was nothing inherently deficient in the courses offered” can also be accepted, but does not confront the burden of the case put against the College.
27. We reject the appellants’ further submission that the primary judge’s findings do not demonstrate that the College took advantage of the risk of agent misconduct. The findings demonstrate precisely that, and that is what the primary judge found (at PJ [500]). The risks and problems associated with the VFH scheme and the College’s use of agents to recruit students were known to the College. There could not be a more powerful demonstration of the risks and problems than the fact that, prior to the enrolment process changes, about 50% of enrolled students withdrew or were withdrawn before the first census date. This was not merely a theoretical risk; it was a manifest problem. It was plain that the College’s agents had been recruiting large numbers of students who did not understand what they were committing to. The College knew that the outbound QA call enrolment procedure and the campus driven withdrawal procedure provided important safeguards against that problem. The catalyst for the College to change its enrolment process and remove those safeguards was the fact that agents were increasingly referring students to VET providers other than the College because they were unhappy with the College’s enrolment process, and the College’s revenue was declining as a result. The College changed its enrolment process in consultation with its agents to placate its agents. It removed the two safeguards for students with the result that more students would pass through the first census, incurring a VFH debt, and agents would receive more commission. This gave agents the incentive to refer more students to the College. The result was that the College’s revenue experienced an exponential increase, brought about by the combined effect of an increased number of students enrolling and a much higher proportion of those students passing the first census. In changing its enrolment process, the College took advantage of the known risks and problems of the VFH scheme and its recruitment system to gain a financial benefit for itself to the disadvantage of persons who enrolled in circumstances where the person did not do so willingly and with full knowledge of the obligation being incurred (the VFH debt) or where the person was unsuitable for enrolment because they lacked sufficient language, literacy or numeracy skills or technology skills or access.
28. The “precautions” relied upon by the College, as listed above, are relevant considerations and were considered by the primary judge. The appellants’ submissions fail to address, however, the primary judge’s findings with respect to those “precautions”. As his Honour observed at PJ [526], none of these elements of the College’s business system, individually or together, was sufficient to protect students and there was no evidence from the corporate respondents to support any finding that any officer on behalf of the corporate respondents believed that these components operated effectively to protect students. The elements were in place prior to the changes to the enrolment process, during which time agent failings with respect to student recruitment can only be described as common-place and were known to the College. Taking each of the matters in turn:
29. The primary judge found that, while there were contractual terms requiring agents to act promptly and honestly, and they received training in that respect, it was known that there was a risk that they would not act as required (PJ [527]). It can be added that there was more than a risk; it was common-place. There was no evidence of any material change in training practices during the impugned enrolment period.
30. The primary judge found that, while the College maintained a Student Complaints Register and an Agent Issues and Complaints Register, the ordinary process of review and follow-up on complaints was less than thorough (PJ [422]). In relation to the Agent Issues and Complaints Register, the primary judge found that Khaled Akbery was responsible for dealing with those complaints but there was no evidence with regard to what he did, if anything, to monitor agents and what he did, if anything, in response to complaints about agents (PJ [419]). On the evidence adduced at trial the primary judge concluded that the quality and nature of complaint handling and investigations was not such as to have justified any belief that it contributed significantly to reducing the risk of agent misconduct or unsuitable enrolment (PJ [460]). There is no challenge to those findings.
31. In relation to the inbound QA call, the primary judge identified numerous deficiencies in the process as a means of detecting unwitting and unsuitable enrolments including that:
	1. the inbound call was done with the recruiting agent present with the student, with the result that the admissions team member conducting the QA call was not able to be confident that the answers given were indeed the student’s answers and were not influenced or prompted by the recruiting agent (PJ [304]);
	2. for that reason, it increased the risk of agent misconduct and enrolling unsuitable students (PJ [305]);
	3. the admissions team member would see the enrolment documents for the first time while on the call and would thus not have the opportunity to examine the enrolment documents in advance and identify any problems or any indicators of unsuitable enrolment (PJ [307]);
	4. the call was not itself designed to be a means of assessing the student’s suitability (PJ [308]);
	5. a student could become enrolled while never being contactable by the College because the QA call point of contact was initiated by the recruiting agent (PJ [311]); and
	6. there was no post-enrolment assessment of language, literacy and numeracy capability which, if negative, would lead to withdrawal of the student prior to first census (PJ [312]).
32. The evidence showed that, on at least two occasions, the College terminated its contract with a sales and marketing agent when misconduct had been established (PJ [426] and [427]). The numbers of students enrolled by those agents is small in comparison to the total numbers of students who enrolled with the College in the period prior to and during the impugned enrolment period. That fact has little significance in comparison to the scale of the problems of unwitting and unsuitable enrolments that existed prior to and during the impugned enrolment period.
33. The evidence also showed that the College reversed enrolments or reimbursed students’ VFH debts in cases in which it thought agent misconduct had occurred. However, the primary judge’s findings demonstrated that the College’s actions in this respect were wanting. The primary judge found that there were a number of weaknesses in the College’s investigations and responses, including limiting some investigations by time and geography where all enrolments by the agents concerned would appear to have warranted investigation, and not taking any action in respect of students categorised as “progressing satisfactorily” where such categorisation appears to have been unjustified (PJ [459]). The primary judge also found that there was inadequate follow-up on complaints until the College was required by the ACCC to report complaints and investigations, and several of the investigation reports appear to have been prepared specifically in response to that requirement (PJ [460]). Overall, and as noted above, the primary judge concluded that the quality and nature of complaint handling and investigations was not such as to have justified any belief that it contributed significantly to reducing the risk of agent misconduct or unsuitable enrolment.
34. The primary judge’s findings, when read as a whole, demonstrate that the College could not have had any basis for a belief that the elements of its business systems described above would materially reduce the risk, which arose from the unethical or careless conduct of recruitment agents and which regularly materialised, of persons being enrolled in the online campus in circumstances where the person does not do so willingly and with full knowledge of the obligation being incurred or where the person is unsuitable for enrolment because they lack sufficient language, literacy or numeracy skills or technology skills or access. Rather, the elements of its business systems that were proven to have materially reduced that risk were the outbound QA call and particularly the campus driven withdrawal process. Under financial pressure brought about by agents bypassing the College because of its more stringent enrolment processes, the College removed those elements of its system.
35. The appellants also placed reliance on the steps taken by the College during the impugned enrolment period to contact students, submitting that such steps are inconsistent with the primary judge’s conclusion that the College took advantage of the students who were enrolled as a result of agent misconduct or who were unsuitable for enrolment by maintaining their enrolment and claiming VFH revenue from the Commonwealth or both (at PJ [500]). In that regard, the appellants referred to the following matters:
36. in November 2015, the College substantially increased staff recruitment within the student support officer, admissions and training teams (PJ [360]);
37. during the impugned enrolment period, the topic of the level of student engagement was regularly discussed between management team members (PJ [368]);
38. when Ms Stevens started at the College in October 2016 as a student support officer, she had to drop everything to try and call students before their census date (PJ [376]), she flagged students she could not reach so another student support officer could try again (PJ [378]) and her team were “relentless” in trying to get in touch with students to make sure they understood “what they were getting themselves into” (PJ [381]);
39. in an internal email exchange on 9 December 2015 between Ms Stevens and her supervisor, Ms Stevens wrote: “it’s good to know there is a dedicated team at CCC between Khaled, Elle and all the SSO’s trying to make sure only suitable students are enrolled” and Ms Stevens gave evidence that allowing students to withdraw, even if the student had passed the census date, occurred from time to time (PJ [388]);
40. on occasions, the College withdrew and refunded students despite the terms of its policy (PJ [322]);
41. when concerns were raised about the English language skills of some students, Mr Buonora (Manager of the online campus) asked staff to research resources the College could make available to students on the learning management system (PJ [393]); and
42. in February 2016, the College developed a “Student Support – contact strategy” outlining ongoing efforts to contact and engage enrolled students (PJ [408]).
43. Again, the appellants’ reference to and reliance upon the foregoing matters does not present the full facts, either as to the individual matters referred to or as to the broader picture in which those individual matters should be considered. The broader picture was the decision, made by senior management of the College with the knowledge and implicit endorsement of the senior management of Site, to change the enrolment process to remove important safeguards against known risks of enrolling unwitting and unsuitable students. The decision was taken knowing the risks and problems associated with the enrolment of unwitting and unsuitable students through the carelessness or misconduct of recruitment agents. The decision was taken to address complaints by agents who considered the College’s enrolment process to be too stringent and who were referring students elsewhere. The decision was taken in the expectation that agents would refer more students to the College and revenue would increase. The decision was taken in circumstances where the College knew or should have known that the number of unwitting and unsuitable students would increase with the increase in enrolments. It is against that backdrop that the individual matters relied on by the College fall to be considered. Those individual matters largely concern the efforts undertaken by more junior staff to make contact with students and identify unwitting and unsuitable students prior to the first census date. Given the escalation in numbers of the enrolment of unwitting and unsuitable students brought about by the enrolment process changes, the evidence showed that the efforts undertaken by more junior staff were futile. They were simply overwhelmed. That ought to have been known by senior management.
44. Turning to the individual matters relied on by the appellants:
45. Mr Cook’s CEO report on 17 November 2015 reported that, as student numbers had “increased significantly due to the new enrolment process and on boarding of new agents”, there had been a substantial increase in staff recruitment within the student support officer, admissions and training teams (PJ [360]). That fact hardly ameliorates the impugned conduct. It occurred some two months after the changes were made. Further, as the primary judge found, the College’s assumption at that time was that about 80% of enrolled students would not engage in the course (PJ [365]-[367]). There is no suggestion that staff recruitment would alter that critical problem.
46. Ms Edwards gave evidence that, during the impugned enrolment period, the topic of the level of student engagement was regularly discussed between management team members. The context for that evidence was Ms Edward’s evidence that, on a number of occasions during the impugned enrolment period, she accessed the learning management system to find out what proportion of students had logged in, and it showed that only a very small proportion of the enrolled students were actually accessing the system. Ms Edwards said that the figures for the level of engagement were readily available on the system (PJ [368]). Thus, it can be inferred that the matter that was discussed between the management team was the low level of student engagement, reinforcing the College’s knowledge of the escalating problem of disengaged students.
47. Ms Stevens’s evidence was to the effect that, during her period of employment as a student support officer from 19 October 2015 to January 2016, she worked hard in an effort to contact and engage enrolled students. However, her evidence was that when she started at the College there was a huge influx of students and that, by the time she came to the end of her time at the College, she had been allocated approximately 400 to 500 students and there were more than 30 student support officers (PJ [376]). She had great difficulty in attempting to contact the students allocated to her (PJ [377]); for the most part, Ms Stevens was unsuccessful in contacting students and spoke to around 10% of the students that she tried to reach (PJ [378]). That figure is consistent with Ms Thompson’s data, showing that of the students who enrolled during the impugned enrolment period, about 87% never logged into the learning management system; in other words, they were entirely disengaged (and, it can be inferred, can be characterised as unwitting or unsuitable students). Ms Stevens’ team leader confirmed that this was a constant topic amongst the team of student support officers (PJ [379]).
48. The primary judge found that, notwithstanding the removal of the campus driven withdrawal policy, the College’s new policy had limited grounds on which a student’s enrolment could be cancelled after the first census date. However, cancellation depended on the initiative of the student in raising a complaint, and the complaint then having some basis for a conclusion of “special circumstances” (PJ [322]). The primary judge illustrated the effect of the change by a particular case in December 2015 where a student raised with someone at the College that she had no idea that she had incurred a VFH debt, did not know what it was, was confused, had no idea what she had signed up for, and was not interested in studying. She had never logged in to the learning management system and had remained uncontactable despite several attempts over nearly three weeks. Mr Buonora, the Campus Manager, responded to the case when it was escalated to him in February 2016 saying that he could not approve a campus driven withdrawal due to the College’s policy, that he did not have the “facility to withdraw a student”, and could only cancel an enrolment “once the circumstances are clear” (PJ [319]).
49. Ms Solly was employed in around 18 November 2015 as a training and development officer with the College in the Diploma of Business. Around the end of January 2016, Ms Solly was given a list of names and her job was to manage the list to make sure she made initial contact with every student. She ended up with 264 names but only managed to make contact with a dozen. The language skills of the students she contacted in some instances were not developed sufficiently to be able to comprehend the course materials. Ms Solly raised her concerns with regard to the competency of the students with Mr Buonora. Her evidence was that there was a general concern about the English-language skills of the prospective students. Mr Buonora’s response was to ask Ms Solly to research resources that the College could make available to students on the learning management system (at PJ [391]-[393]). The absurdity and futility of that response is readily apparent. The College was not offering courses in the English language. Ms Solly was responsible for students who had enrolled for a Diploma of Business, but had insufficient language skills. It could hardly be expected that students would be able to acquire English language skills using resources on the learning management system, while at the same time undertaking the Diploma of Business.
50. It can be accepted that, in February 2016, the College developed a “Student Support – contact strategy” and that the strategy reflected ongoing efforts to contact and engage enrolled students. As discussed earlier, the strategy had 5 categories (A to E), three of which related to uncontactable students. A report dated 18 February 2016 showed that 55% of the students, all of whom had by then passed through the first census (and incurred a VFH debt) were uncontactable and not engaged with the College (PJ [409]). Mr Buonora accepted that it was “highly unlikely” that they would ever be in contact with the College. The primary judge found that the College’s strategy was to keep trying to contact them until eventually a “letter of concern” was sent to them, but the withdrawal policy did not permit them to be withdrawn and their debts reversed (PJ [409]). The contact strategy merely highlighted the enormous problem the College had with disengaged students; it did not in any sense ameliorate the problem.
51. The appellants submitted that there was no evidence that any particular student was suffering from some specific disadvantage or had been misled or improperly pressured into making the decision to enrol. The appellants further submitted that consumers are generally imputed with a real degree of personal responsibility for their decisions and that the decision by consumers not to engage with the online course in which they had enrolled, not to withdraw prior to the census date, and not to respond to contact initiated by the College, was conduct of the consumer not the College.
52. We reject that submission because it ignores the relevant facts and circumstances including, most importantly, the effect of the College’s decision to change its enrolment process in a manner that foreseeably, indeed inevitably, inflicted harm on students. The College participated in, and sought to profit from, the VFH scheme, by which the College supplied VET courses to students and was paid by the Commonwealth. As detailed earlier in these reasons, the evidence shows that the College’s participation in the VFH scheme in respect of its online campus and using external agents to recruit students gave rise to a known risk of agent misconduct and the enrolment of unwitting and unsuitable students, and that risk regularly materialised.
53. It is unnecessary to make a finding as to whether and to what extent such students were suffering from a “special disadvantage”. As explained in *Quantum*, the prohibition in s 21 of the ACL is not confined to the taking advantage of a special disadvantage within the equitable principles. The amendments that were made to the VFH scheme in 2012 had the aim of broadening the demographic of students who qualified for assistance through the scheme in order to address low participation rates from identified demographic groups including Indigenous Australians, people from non-English speaking backgrounds, with disability, from regional and remote areas, from low socio-economic backgrounds, and people not currently engaged in employment. It can be readily inferred from the totality of the evidence that many recruitment agents targeted the above identified demographic groups and that many of the College’s disengaged students were within those demographic groups. However, that is not a critical fact. What is critical is the College’s awareness of the problem of agent misconduct and unwitting and unsuitable student enrolments, which was present at the College’s online campus in large numbers.
54. Despite knowing the risks and problems that arose from the VFH scheme and which were present at the College’s online campus in large numbers, the College decided to change its enrolment process to remove two principal safeguards against that risk. It did so because agents were referring students elsewhere as a result of the College’s safeguards and the College’s enrolments and revenue were declining. It did so in consultation with agents to increase revenue. In doing so, it knew or ought to have known what the effect would be: a large increase in enrolments and a large increase in the enrolment of unwitting and unsuitable students who would incur VFH debts. These were persons being enrolled in the online campus in circumstances where the person did not do so willingly and with full knowledge of the obligation being incurred or where the person is unsuitable for enrolment because they lack sufficient language, literacy or numeracy skills or technology skills or access. The appellants’ submission on this appeal, that those persons should have looked after themselves and taken responsibility for their own decisions, reflects the same disregard of the interests of students as was evident in its original decision to change its enrolment process. In our view, the primary judge was correct to conclude that the College’s decision was unconscionable.
55. The appellants submitted that the prohibition of unconscionable conduct requires an assessment of the impugned conduct, and whether it involves a sufficient departure from the required norms or standard of commercial behaviour. The appellants argued that a comparison of the College’s conduct at one point in time to a later point in time tells one little about whether either category of conduct is outside of societal norms of acceptable commercial behaviour. That submission was made to the primary judge and his Honour explained that the ACCC’s case was not based on a mere comparison between the College’s processes at different points in time (at PJ [529]-[530]). As explained by the primary judge, the College’s conduct at an earlier point in time was significant because it addressed the known risks and problems in the VFH scheme in a manner that protected students. The change in the College’s conduct was a deliberate decision to remove those safeguards, thereby increasing the risk of harm to students. The chronology of events showed that the College made the decision to change its enrolment process in order to increase revenue, knowing the foreseeable and likely consequences of its decision and the harm that would be occasioned students. The conduct can be rightly judged as unconscionable.
56. Relying upon paragraphs (g) and (h) of s 22, the appellants submitted that, instead of comparing the impugned conduct with the College’s enrolment processes before the change, the primary judge ought to have compared the impugned conduct with “compliance with industry regulation”. The appellants argued that the Department had identified the same risks and introduced a regulatory response that included banning inducements, requiring RTOs to have written agreements with their sales agents, and requiring that those agreements contain particular terms concerning agents’ conduct and the monitoring of agents by VET providers. The appellants submitted that the College complied with the regulatory scheme, and the regulatory framework in 2015 did not mandate either an outbound QA call or the campus driven withdrawal policy to address the identified risks.
57. We reject those submissions. They misstate the effect and relevance of paragraphs (g) and (h) of s 21. Each of those paragraphs are concerned with compliance with “industry codes”, not industry regulation at large. The expression “industry code” is defined in s 2 of the ACL as having the same meaning as in s 51ACA of the CCA. Section 51ACA is in Pt IVB of the CCA, which Part provides for the enforcement of industry codes. An industry code is defined as a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry. There was no evidence of any industry code in the VET sector. At a general level, it may be accepted that compliance with industry regulation is a relevant consideration in assessing whether commercial behaviour is unconscionable. However, compliance must be regarded as the norm, such that non-compliance might be a factor indicating that conduct is unconscionable. The mere fact of compliance with industry regulation does not lead to a conclusion that the conduct is not unconscionable, as observed by the primary judge (at PJ [518]). There is a further point. In August 2015, before the change was made, the Department published a further update to the Addendum to the booklet titled *VET Administrative Information for Providers*. The update included frequently asked questions about student withdrawals and stated the Departments’ expectation “that if students could not be contacted and/or they had not participated in the unit before the census date, a provider would cancel the enrolment to avoid the student incurring the debt”. The College’s changed enrolment process failed to comply with that expectation.
58. The primary judge addressed the appellants’ arguments concerning compliance with the VET Guidelines and the HES Act at PJ [518]-[519]. The primary judge correctly observed that, if particular conduct is not against the rules (that regulate the conduct), that may be relevant in the evaluative judgment with regard to unconscionability, but it is not determinative. It is clear that the primary judge took that matter into account in his decision. The primary judge also observed that the VET Guidelines proscribed any barriers to withdrawal and that an absence of awareness by a consumer that they have been enrolled or that they can withdraw is a barrier to withdraw. His Honour considered that it could be inferred that enrolled students who had not accessed the learning management system and were uncontactable were not aware of their enrolment or, if they were aware, did not know that they could withdraw before the first census date. His Honour considered that, in those circumstances, abolishing campus driven withdrawals represented a barrier to withdrawal. Respectfully, we do not agree that the abolition of the campus driven withdrawal can be characterised as a barrier to withdrawal within the meaning of the VET Guidelines. As such, the impugned conduct should not be understood as breaching any regulatory obligation relating to the VFH scheme. However, in our view, that conclusion does not have any material effect on the primary judge’s evaluation of the conduct. As already noted, paragraphs (g) and (h) of s 22(1) concern industry codes, not regulatory obligations more generally. Further, although the abolition of campus driven withdrawals was not, in our view, in breach of the VET Guidelines, it was contrary to the guidance provided in the Department’s August 2015 update to the Addendum to the booklet titled *VET Administrative Information for Providers*.
59. Relying upon paragraph (e) of s 22(1), the appellants submitted that it was relevant to consider the circumstances under which a student could have acquired identical or equivalent goods or services from a person other than the College and that the ACCC led no evidence about the enrolment processes of other RTOs. The appellants also noted that the primary judge rejected evidence of the withdrawal policies of other RTOs tendered by the College and made no finding that students could acquire equivalent services on different terms. For the following reasons, the submission does not demonstrate appellable error in the primary judge’s conclusion. First, there was no evidence before the Court as to the enrolment processes of any other RTO, including their terms and conditions with respect to withdrawing from a course. Thus, the primary judge could not make any finding with respect to the matters referred to in paragraph (e) of s 21. Second, while the primary judge refused the College’s tender of the withdrawal policies of other RTOs, that refusal has not been raised as a ground of appeal. Third, and as found by the primary judge, in the circumstances of the present case the matters referred to in paragraph (e) of s 22(1) had limited relevance to the assessment of unconscionability. That is because the conclusion of unconscionability did not arise merely from the circumstances of the College’s enrolment process. If the College had never experienced, and was unaware of the risk of, agent misconduct or the risks of unwitting and unsuitable students being enrolled, the College’s enrolment process may not have involved unconscionable conduct. If the College’s agents were highly ethical and the risk of enrolment of unwitting and unsuitable students was remote or theoretical, it may not have been unconscionable for the College to have an inbound QA call process and not to have a campus driven withdrawal process. It follows that evidence concerning the withdrawal policies of other RTOs has little, if any, bearing on the assessment of the College’s enrolment process. That is particularly so when nothing is known of the experience of other RTOs with agent misconduct or the enrolment of unwitting or unsuitable students, or other safeguards such RTOs may have had in their enrolment processes.
60. For those reasons, we reject appeal ground 1.

## Appeal ground 2

1. By appeal ground 2, the appellants contend that the primary judge erred in finding that making and implementing the enrolment process changes was part of an unconscionable system in contravention of s 21 of the ACL by reference to the College’s knowledge acquired subsequent to the decision to make and implement the system in circumstances where:
2. the primary judge found that the decision to make the enrolment process changes was considered and made in mid-August to early September 2015 (at PJ [234]-[281]); and
3. the College’s knowledge of the effect of the enrolment process changes necessarily was acquired after the enrolment process changes were made and the effect was ascertained, and the primary judge made no finding as to when the College came to know those matters (and nor did the evidence allow a finding to that effect).
4. In determining this ground of appeal, it is necessary to consider the ACCC’s pleaded case, the primary judge’s findings and reasoning on that case, and the declaration made by the primary judge to give effect to his Honour’s judgment. In its submissions, the appellants rely, in part, upon a claimed disconformity between the primary judge’s findings and reasoning and the declaration that was ultimately made.
5. The allegation of unconscionable conduct in the ACCC’s pleading (the second further amended statement of claim) was contained in paragraph 124 and was as follows (with terms defined in the pleading converted into the terms generally used in these reasons):

By its conduct in (i) implementing the enrolment process changes in respect of consumers who became enrolled in courses during the impugned enrolment period (which implementation, for some consumers extended beyond the impugned enrolment period), and (ii) in the period up to and including September 2016 (when the last census date for a consumer who became enrolled during the impugned enrolment period was processed by the College) claiming (which for the avoidance of doubt includes making an ongoing claim to entitlement) the VFH revenue in respect over 90% of the consumers who became enrolled in an online course during the impugned enrolment period and passed one or more census dates and/or retaining such VFH revenue as was paid by the Commonwealth, in circumstances where:

(a) the College had the “Profit Maximising Purpose”;

(b) the College was aware, or ought to have been aware, of:

(i) the CA misconduct risk;

(ii) the unsuitable enrolment risk; and

(iii) the fact that the enrolment process changes would reduce its ability to mitigate the CA misconduct risk and the unsuitable enrolment risk, when compared to its prior processes being the outbound QA call process and the campus driven withdrawal process,

and/or each of those matters was reasonably foreseeable at the commencement of, and/or during, the period when the enrolment process changes were implemented;

(c) the implementation of the enrolment process changes resulted in the process changes results;

(d) as set out at paragraph 123 above, the College knew, or alternatively ought to have known, of the enrolment process changes results;

(da) further or alternatively, as set out at paragraph 123A above, at the commencement of and/or during the period when the enrolment process changes were implemented, the College knew or ought to have known that the enrolment process changes would likely lead to the enrolment process changes results or results of the type of the enrolment process changes results and/or the enrolment process changes results were reasonably foreseeable,

the College engaged in a system of conduct, or a pattern of behaviour that was, in all the circumstances, unconscionable in contravention of s 21 of the ACL.

1. The drafting of paragraph 124 of the pleading can be fairly criticised. It displays all the characteristics of poor legal expression. In particular, it rolls up a number of allegations in the one (very) lengthy sentence and lends itself to ambiguity. Despite that, no point was raised on the appeal that the primary judge misunderstood the case as pleaded by the ACCC or that the appellants were denied procedural fairness at trial.
2. As pleaded, and as understood by the primary judge, the ACCC’s case was that the conduct of the College that was unconscionable had two composite elements. The first element was implementing the enrolment process changes during the impugned enrolment period (ie, changing the outbound QA call procedure to an inbound QA call procedure, as described by the primary judge at PJ [287]-[313], and removing the campus driven withdrawal process, as described by the primary judge at PJ [314]-[323]). The second element was claiming and retaining the VFH revenue in respect of students who enrolled during the impugned enrolment period. We note that at PJ [33]-[36] the primary judge describes the unconscionable conduct as involving three elements, separating out the change to the QA call process from the change to the campus driven withdrawal process. In these reasons, we have merged those two elements because they were implemented at the same time, they are referred to in paragraph 124 of the pleading as the first element and, later in the primary judgment, they are analysed as the first element of the unconscionable conduct.
3. It is tolerably clear from the pleading, and understood by the primary judge, that the two categories of conduct referred to in paragraph 124 of the pleading are composite elements of the unconscionable conduct alleged by the ACCC. By that we mean that each element is a part of the unconscionable conduct. The ACCC alleged that it was unconscionable for the College to implement the enrolment process changes and claim and retain the resulting VFH revenue. In his reasons, the primary judge posed the rhetorical question of what the second element added to the first – in other words, would the first element be unconscionable without the second element (at PJ [501]-[507]). His Honour concluded that if the enrolment process was unconscionable, then to claim and retain the benefits of that conduct is also unconscionable. His Honour reasoned that the unconscionability of the conduct (the enrolment process) could have been cured, or at least ameliorated, if the College had not claimed or retained the revenue derived from that conduct (and thereby reversed the students’ debts) (PJ [507]). In our view, that is the essential point. Claiming and retaining the VFH revenue that was derived from student enrolments that occurred during the impugned enrolment period (during which the new enrolment process was in place) completed the unconscionable conduct. It is unnecessary to express a view whether the implementation of the enrolment process changes without more would have sustained a finding of unconscionable conduct. The answer likely depends upon what the College intended to do following the implementation of the changes. The allegation in the present case, and the proven facts, were that the College claimed the resulting VFH revenue. It acted upon the enrolment process changes and took full advantage of the changes. As found by the primary judge, the College took advantage of the students who were enrolled as a result of agent misconduct or who were unsuitable for enrolment by maintaining their enrolment and claiming VFH revenue from the Commonwealth (PJ [500]). It is in that sense that claiming and retaining the resulting VFH revenue was a composite part of the unconscionable conduct.
4. As pleaded, and as understood by the primary judge, the ACCC’s case was also that the conduct of the College was unconscionable from its initial implementation, and the conduct remained unconscionable throughout the impugned conduct period (being the period through to September 2016 during which the College claimed and retained VFH revenue that was derived from student enrolments that occurred during the impugned enrolment period). That conclusion follows from paragraph 124 of the pleading, although it is unfortunate that that paragraph intermingles the temporal dimensions of the allegation. The relevant circumstances relied upon in paragraph 124 to render the conduct unconscionable had the following temporal dimensions:
5. the circumstance in paragraph (a), the “Profit Maximising Purpose”, was alleged in paragraph 112 of the pleading to be the College’s purpose in implementing the enrolment process changes (ie, from September 2015);
6. the circumstances in paragraph (b), relating to the CA misconduct risk and unsuitable enrolments risk, were alleged to be reasonably foreseeable at the commencement of the period when the enrolment process changes were made and/or during that period (which appears to be a reference to impugned enrolment period, that is, until 18 December 2015);
7. the circumstances in paragraphs (c) and (d) related to the fact of, and the College’s awareness of, the “Process Change Results” which occurred progressively over the impugned conduct period; and
8. the circumstance in paragraph (da) was alleged in the alternative to paragraphs (c) and (d) and was to the effect that at the commencement of the period when the enrolment process changes were made or during that period the College knew or ought to have known that the “Process Change Results” were likely to result or were reasonably foreseeable.
9. Whilst that intermingling of temporal allegations is regrettable, it is clear that the ACCC’s case was based on alternative allegations: that the impugned conduct was unconscionable from its inception having regard to the College’s awareness of the above facts and matters at the commencement of the period when the enrolment process changes were made, and remained unconscionable throughout the impugned conduct period; or that the impugned conduct became unconscionable at a point in time during the impugned conduct period when the College became sufficiently aware of the consequences of the changes.
10. The ultimate findings of the primary judge were based on the first of the two alternatives. His Honour found that the impugned conduct was unconscionable from its inception and remained unconscionable throughout the impugned conduct period. That is made clear from his Honour’s summary of findings at PJ [493]-[507]. His Honour observed that, at the inception of the enrolment process changes, the College knew of the risks of agent misconduct and of unwitting and unsuitable students being enrolled, and the College knew that the outbound QA call procedure and the campus driven withdrawal process were important safeguards to protect the interests of students who were enrolled unwittingly or who were unsuitable for the course in which they were enrolled. His Honour further observed that, to counter declining enrolment and declining revenue brought about by agents referring students to other VET providers, the College implemented the enrolment process changes (the so-called profit maximising purpose) knowing that it increased the risk of the enrolment of unwitting and unsuitable students (which was already occurring regularly at the College). The College also knew, or ought to have been aware, of the immediate consequence of the changes, which was to escalate the numbers of students who were enrolled unwittingly or who were unsuitable for the course in which they were enrolled. In respect of the period following the implementation of the enrolment process changes, and throughout the impugned conduct period, his Honour observed that the College knew that its dramatic increase in revenue and turnaround in profits was substantially built on VFH revenue from the enrolment of unwitting and unsuitable students who would gain no benefit from their enrolment but who incurred very substantial debts to the Commonwealth as a result of their enrolment.
11. At trial, the appellants submitted that the ACCC’s case was flawed because it was not based on knowledge of relevant circumstances at any particular point in time (PJ [534]). The appellants argued that the profit maximising purpose and the College’s knowledge of the risks of agent misconduct and unwitting and unsuitable students being enrolled ceased to be relevant considerations at the end of the impugned enrolment period because that is when the College ceased enrolling students. The primary judge rejected that submission (at PJ [535]), observing that the College’s profit maximising purpose and its knowledge of the risks of agent misconduct and unwitting and unsuitable students being enrolled remained and were relevant throughout the impugned conduct period as the College continued to claim and retain VFH revenue in respect of students who had been enrolled during the impugned enrolment period. The appellants also criticised the ACCC’s reliance upon the results of the enrolment process changes, arguing that the results were not known until 2016. The primary judge gave two reasons for rejecting the criticism (at PJ [535] and [536]); first, the College’s knowledge of the results of the enrolment process changes was relevant to the claiming and retaining of revenue earned as a consequence of the process changes; and secondly, his Honour did not rely on the results of the enrolment process changes in concluding that the College operated an unconscionable system. Although those reasons were not expressed with the same clarity as the remainder of his Honour’s reasons, we understand his Honour to have explained that:
12. in finding that the impugned conduct was unconscionable from its inception, the primary judge did not place any reliance on the results of the enrolment process changes that only became known as time went on; and
13. in finding that the impugned conduct remained unconscionable throughout the impugned conduct period, the primary judge did place reliance on the results of the enrolment process changes which would have been known by the College during the course of that period (as the information was ascertainable from the College’s information systems).
14. The appellants have not demonstrated any error in that reasoning. It is consistent with the case pleaded and conducted by the ACCC and it is supported by the evidentiary findings made by the primary judge.
15. When delivering judgment on 2 July 2021, the primary judge made orders requiring the parties to bring in agreed or competing orders reflecting the Court’s findings, and on costs and the further conduct of the proceeding. As frequently occurs, the parties provided the Court with the form of a proposed declaration reflecting the Court’s findings. The primary judge recorded that the differences between the parties as to the form of the declaration to be made were minor (declaration judgment at [2]). That was confirmed in the course of oral submissions on the appeal. Despite that, the form of the declaration is the subject of criticism by the appellants on the appeal. The declaration made by the Court on 4 August 2021 regarding the College’s conduct was as follows:

The first respondent, Productivity Partners Pty Ltd (ACN 085 570 547) trading as Captain Cook College (**CCC**), in connection with the supply or possible supply of online diploma level courses (**courses**) to consumers whose enrolment was processed during the period 7 September 2015 to 18 December 2015 (**Relevant Period**), engaged in conduct that was unconscionable in contravention of s 21 of the ACL, in that CCC engaged in a system of conduct or pattern of behaviour:

(a) which comprised:

(i) making and implementing the following changes to its enrolment and withdrawal processes (**Process Changes**):

(A) outbound calls made by CCC staff to consumers after CCC had reviewed consumers’ enrolment documents, and during which CCC staff asked the consumer a range of questions directed at identifying any issues concerning the consumer’s suitability for the course, were replaced by inbound calls to CCC, made by the persons who conducted marketing and recruitment on behalf of CCC (**Course Advisors**) immediately after electronically submitting the prospective student’s enrolment documents, so that the Course Advisors were generally present when the consumer completed the call. On these calls, CCC staff followed a script which consisted principally of closed questions (requiring only “Yes/No” answers) and reading scripted information, and did not have an opportunity to conduct an analysis of the enrolment documents in advance and identify any problems; and

(B) CCC abolished its campus driven withdrawal (**CDWD**) procedure, by which, prior to the Relevant Period, CCC had taken steps to withdraw consumers from their course prior to the first or subsequent census date if a consumer was not engaging in their course, was not contactable or if CCC staff otherwise concluded that the consumer was not suitable for their course, so that consumers subject to a CDWD would not incur VET FEE-HELP (**VFH**) debt (which arose upon the passing of a census date); and

 (ii) claiming and retaining the consequently increased revenue by way of payment from the Commonwealth in respect of VFH debts incurred by consumers (**VFH Revenue**);

(b) and which occurred in circumstances where:

(i) a substantial purpose of CCC adopting and applying the Process Changes was to increase its VFH Revenue;

(ii) CCC knew that:

(A) there was a real risk that consumers recruited and enrolled by Course Advisors may not wish to enrol in an online course, would lack the language, literacy and numeracy skills, the computer skills and/or access to technology necessary to undertake the course, would not be contactable by CCC, and/or would have no or only minimal engagement with their course;

(B) there was a real risk, that regularly materialised, that Course Advisors marketing the courses and recruiting consumers on a commission based payment structure would engage in misconduct such as by making false or misleading representations to consumers that the courses were free, failing to properly inform consumers that they would incur VFH debt if they enrolled in the courses or the circumstances in which that VFH debt would have to be repaid, pressuring consumers to enrol, offering inducements to enrol, completing consumers’ enrolment documents for them and coaching consumers for the purposes of the call with CCC with the result that unsuitable consumers became enrolled as students; and

(C) the Process Changes would increase the susceptibility of the enrolment process to Course Advisors' misconduct and reduce CCC’s ability to promptly detect and prevent CA misconduct or to assess a prospective student’s circumstances or ability to complete the course, and would therefore be likely to result in an increase in the number of consumers enrolled in courses who were not contactable, not engaged with the course, or who were unsuitable for the course incurring VFH debt for which they would get no benefit because they remained enrolled on a census date;

(iii) CCC knew, through its own analysis, audits, investigations and the receipt of complaints from consumers that, as a result of the Process Changes, in the 14 weeks comprising the Relevant Period when compared to the 10 months comprising the period 1 November 2014 to 6 September 2015 (**Earlier Period**), there was a substantial increase in:

(A) the number of consumers whose enrolment in a course was processed by CCC, with approximately 1,300 consumers enrolled during the Earlier Period and approximately 7,300 consumers enrolled in the Relevant Period;

(B) the number and proportion of consumers who, once enrolled, incurred a VFH debt;

(C) the number and proportion of consumers who incurred a VFH debt but who did not complete any unit of study or the course as a whole;

(D) the number and proportion of consumers who incurred a VFH debt but who did not engage in their course or were not contactable;

(E) CCC’s VFH Revenue, with CCC claiming approximately $57.1 million in VFH Revenue for the combined Earlier Period and Relevant Period for students who did not complete the course, of which around $50.1 million was in respect of consumers whose enrolment was processed in the Relevant Period.

1. The focus of the appellants’ criticism of the declaration was subparagraph (b)(iii) which referred to knowledge of the effects of the enrolment process changes gained by the College after the implementation of the enrolment process changes. The appellants submitted that the primary judge erred in concluding (and declaring) that making and implementing the enrolment process changes was unconscionable on the basis of knowledge that was only gained after the change had been implemented.
2. Respectfully, the form of the declaration made by the Court to record the ultimate findings was less than ideal. It reflected the manner in which the ACCC’s allegation of unconscionable conduct was expressed in paragraph 124 of the pleading, and suffers from the same difficulty of intermingling the temporal dimensions of the impugned conduct.
3. There is no difficulty with paragraph (a) of the declaration. That paragraph makes clear that the unconscionable conduct was in connection with the supply or possible supply of online diploma level courses to consumers whose enrolment was processed during the period 7 September 2015 to 18 December 2015 (the impugned enrolment period). The paragraph also makes clear that the unconscionable conduct had two composite elements: making and implementing the enrolment and withdrawal process changes, and claiming and retaining the VFH revenue from students enrolled during the impugned enrolment period. It is perhaps unfortunate that the declaration did not expressly define the period during which the second element of the unconscionable conduct continued (until September 2016), but that period is implicit in the language used. It is also implicit from paragraph (a) that the conduct so described was unconscionable from its inception and remained unconscionable throughout the period that the College claimed and retained VFH revenue resulting from students who enrolled during the impugned enrolment period. Thus, that aspect of the declaration accurately reflects the findings by the primary judge.
4. Paragraph (b) of the declaration, though, is unfortunate in that it refers to circumstances existing at the inception of the impugned conduct (subparagraphs (i) and (ii)) and circumstances existing during the impugned conduct period (subparagraph (iii)). For the reasons given by the primary judge, both are relevant to the overall course of unconscionable conduct engaged in by the College in the period of contravention (until September 2016). However, the circumstances referred to in subparagraph (iii) cannot be relevant to the finding of unconscionable conduct at the inception of the conduct.
5. In the course of argument on the appeal, Senior Counsel for the College and Site accepted that if the declaration was an inapt way of expressing the primary judge’s ultimate findings, the Court would allow the appeal to vary the declaration and otherwise dismiss the appeal (and make an order that the College and Site pay the ACCC’s costs of its appeal). For the reasons explained above, we consider that the declaration does not aptly reflect the primary judge’s findings and that the declaration should be varied or set aside. We will return to the orders to be made on the appeal at the end of these reasons.

## Appeal ground 3

1. By ground 3, the appellants contend that the primary judge erred in finding that the College engaged in a system of unconscionable conduct “in all the circumstances”, where none of the matters required to be taken into account pursuant to the statutory criteria in s 22(1) of the ACL (in particular paragraphs (a) to (e)) were present.
2. The appellants’ submissions departed, to some extent, from the ground of appeal. The appellants did not submit that none of the matters listed in s 22(1) were present; rather, they submitted that, while the primary judge made reference to some of the criteria in s 22(1), his Honour did not approach that task in a manner which reflected that he had weighed the various statutory criteria. The appellants submitted that the criteria in s 22(1) are conditional, not permissive (referring to Gageler J’s statements in *Paciocco HCA* at [189] and *Kobelt* at [93]). They argued that where it is evident that there would be evidence in respect of matters identified in s 22(1), but evidence going to that issue is not led by the moving party, that fact does not render the factor neutral or irrelevant. The provision does not leave it open to the moving party to pick and choose, relying on matters weighing in favour of one outcome but ignoring those against that party (again referring to Gageler J’s statements in *Paciocco HCA* at [189]). The absence of relevant evidence of the identified criteria, where that evidence would have been readily available if it pointed to unconscionable conduct, is itself a factor to be weighed. The appellants submitted that the primary judge failed to consider the following matters required by s 22(1):
3. whether, as a result of conduct engaged in by the College, students were required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the College (per s 22(1)(b));
4. whether the student would be able to understand information (including whether the student understood they had enrolled in a course and had the option to withdraw) (per s 22(1)(c));
5. whether there was any attempt to exert undue influence on the student (per s 22(1)(d));
6. the circumstances in which students could have acquired identical or equivalent services from a person other than the College (per s 22(1)(e));
7. whether the College was disclosing to students relevant risks (per s 22(1)(i)); and
8. whether the College acted in good faith (s 22(1)(l)).
9. There are numerous problems with the appellants’ submissions in respect of appeal ground 3.
10. First, the appellants’ submissions misstate Gageler J’s reasons in *Paciocco HCA* at [189]. Justice Gageler did not say that where it is evident that there would be evidence in respect of matters identified in s 22(1), but evidence going to that issue is not led by the moving party, that fact does not render the factor neutral or irrelevant; nor did his Honour say that the absence of relevant evidence of the identified criteria, where that evidence would have been readily available if it pointed to unconscionable conduct, is itself a factor to be weighed. The problems with any such principle are self-evident, inviting the Court to speculate as to whether it is “evident” that evidence would have been available on the enumerated matters. Rather, his Honour explained (in respect of the cognate provision in the ASIC Act):

The word “may” in s 12CB(2) of the ASIC Act was not permissive, but conditional. The import of s 12CB(2) was to spell out that circumstances relevant to the determination of whether conduct was objectively to be characterised as “unconscionable” according to the ordinary meaning of that term might or might not include, in respect of particular conduct, all or any of the particular matters referred to in s 12CB(2). The provision made clear that, where any one or more of those matters existed in respect of particular conduct, each of those extant matters was to form part of the totality of the circumstances mandatorily to be taken into account for the purpose of determining the statutory question posed by s 12CB(1). The provision did not leave it open to a consumer who alleged that conduct of a supplier was in breach of s 12CB(1) to pick and choose. The customers could not choose to rely on matters referred to in s 12CB(2)(a) and (b), yet to ignore matters referred to in s 12CB(2)(c), (d) and (e).

1. His Honour’s statement “where any one or more of those matters existed in respect of particular conduct” refers to the existence of those matters established by the evidence, not speculation by the court as to the existence of such matters. It need hardly be said that Australian courts apply adversarial – and not inquisitorial – procedures to the determination of proceedings. The court determines the proceeding on the evidence adduced by the parties, not speculation as to matters not addressed by the evidence. Nor does the court initiate its own investigations in relation to matters not raised on the evidence adduced by the parties.
2. Justice Gageler’s statement that the word “may” is not permissive but conditional means that the matters there enumerated are to be taken into account if and to the extent they are relevant to the case at hand. In *Kobelt*, his Honour reiterated that point (at [83], again in respect of the cognate provision of the ASIC Act, citations omitted):

Furthermore, determination by a court exercising jurisdiction in a matter arising under the section of whether conduct is, in all the circumstances, unconscionable is required by s 12CC to be informed by the numerous considerations specified in that section, each of which has the potential to bear positively or negatively on the characterisation of conduct as conduct that is or is not unconscionable, and each of which must be taken into account if and to the extent that it is applicable in all the circumstances.

1. It can be accepted that the absence of proof of a matter may also be relevant. As Kiefel CJ and Bell J observed in *Kobelt* in respect of paragraph (d) of s 12CC(1) (at [58], citations omitted, emphasis in original):

Recognition that the supplier of a financial service may engage in conduct that is unconscionable, notwithstanding the recipient’s voluntary entry into the contract for the supply of the service, does not make the absence of the exertion of undue influence an irrelevant consideration. Section 12CC(1)(d) invites the court to consider “*whether* any undue influence or pressure was exerted on, or any unfair tactics were used against” the recipient of the financial service (emphasis added) as one of the factors to be weighed in determining whether, in all the circumstances, the supplier’s conduct is unconscionable. The absence of the exertion of undue influence, pressure or unfair tactics bears on the assessment of whether the commercial advantage obtained by the supplier in connection with the supply of the financial service is an *unconscientious* advantage.

1. A number of the matters enumerated in s 22(1) of the ACL invite enquiry as to whether certain conditions or circumstances existed or conduct was undertaken. The absence of the conditions, circumstances or conduct must be taken into account to the extent it is relevant to the impugned conduct.
2. Second, it is a fundamental principle that a party is bound by the party’s conduct of the case below. The parties define the issues to be determined at trial and, in a case brought under s 21 of the ACL, identify by evidence and submissions the matters that the parties contend are relevant to the determination of the case and should be taken into account, including by reference to the matters enumerated in s 22(1). There is no appellable error if a judge fails to take into account a fact or matter that neither party placed reliance upon at trial. In its submissions on this appeal, the appellants failed to identify any submission put to the primary judge with respect to the matters enumerated in s 22(1) that the primary judge failed to take into account. That is a fundamental flaw in this ground of appeal.
3. Third, the reasons of the primary judge demonstrate that his Honour had regard to the matters enumerated in s 22(1) to the extent that the parties relied on those matters. It may be accepted that the primary judge did not always identify the matters using the paragraph numbers in s 22(1). There is no legal requirement to identify the matters in that way. The relevant question is whether his Honour took the matters into account to the extent the parties relied upon them. It is necessary to consider each of the matters in turn.

#### Section 22(1)(b)

1. Paragraph (b) of s 22(1) invites consideration of whether, as a result of conduct engaged in by the College, students were required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the College. The primary submission that the appellants advanced on the appeal with respect to paragraph (b) was that, as the College’s enrolment process was consistent with the VFH scheme, this factor favoured the College. That submission was considered earlier in the context of paragraphs (g) and (h) of s 22(1). As noted above, the appellants submitted at trial that the withdrawal policy in the impugned enrolment period was consistent with the VET Guidelines and the HES Act, in particular because campus driven withdrawal had never been mandated (PJ [518]). The primary judge took that matter into account, but ultimately gave it little weight. For the reasons given earlier, we consider that there is no appellable error arising from his Honour’s consideration of that factor.
2. Further, the fact that the College’s enrolment process did not contravene the regulations governing the VFH scheme does not bear upon the question, raised by paragraph (b), whether students were required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the College. The findings made by the primary judge demonstrated that the College’s enrolment process during the impugned enrolment period were not reasonably necessary for the protection of the College’s legitimate interests. The College had a legitimate interest in enforcing education contracts, formed at the time of enrolment, with students who enrolled willingly, with full knowledge of the obligation being incurred, where the student had sufficient language, literacy or numeracy skills to undertake the course and technology skills or access to study online. The College had no legitimate interest in enforcing education contracts with students who failed that criteria, particularly in the circumstances of this case where the risks of such enrolments were well recognised and such enrolments were prevalent. That is the substance of the primary judge’s findings at PJ [494]-[497] and [500].
3. The appellants advanced the further argument, during the hearing of the appeal, that the enrolment process changes were necessary to protect the legitimate interests of the College because the College’s previous enrolment processes (outbound QA call and campus driven withdrawals) were causing the College to lose enrolments to other VET providers. In other words, the appellants argued that they were forced to make the enrolment process changes by competitive pressures in the market. We reject that further argument for the following reasons.
4. It can (and should) be accepted that trading corporations have a legitimate interest in competing to supply the goods and services desired by the Australian community. The object of the CCA, of which the ACL forms part, is to promote competition, recognising that competition enhances the welfare of Australians. As has been explained in many cases, the welfare of Australians is enhanced when firms compete to supply the goods and services most desired by the community at the lowest price. However, the object of the CCA is also to promote fair trading and consumer protection. The CCA recognises an interrelationship between, and balancing of, the objects of competition and consumer protection. The pursuit of competitive advantage is not a legitimate goal of a trading corporation if it comes at the cost of material consumer harm. To illustrate, if in the pursuit of competitive advantage a corporation were to reduce its manufacturing costs but the resulting product was unsafe for consumers, the cost reduction could not be characterised as a legitimate interest or goal of the trading corporation. The competition that is promoted by the CCA, and which can be characterised as “legitimate”, is competition for the supply of goods and services in accordance with the statutory obligations in the ACL.
5. Thus, the fact that the College was losing enrolments to other VET providers did not entitle the College to implement changes to its enrolment processes that were likely to cause material harm to the Australian community. Competition which involves a “race to the bottom” in terms of consumer protection cannot be characterised as a legitimate interest of the College. The enrolment process changes implemented by the College did not improve the quality of the education services provided to students or lower the price of the supply of those services. The changes were a response to complaints by agents who were unhappy with the College’s enrolment process. The College changed its enrolment process in consultation with its agents to remove two safeguards for students. The result was that more students would pass through the first census, incurring a VFH debt, and agents would receive more commission. Insofar as the conduct can be described as a response to competitive pressure, it was a race to the bottom in terms of consumer protection.

#### Section 22(1)(c)

1. Paragraph (c) of s 22(1) invites consideration of whether the student would be able to understand information (including whether the student understood they had enrolled in a course and had the option to withdraw). The only submission that the appellants advanced on the appeal with respect to paragraph (c) was that, as there was no proof of any characteristics of the students, this factor favoured the College.
2. This factor was considered by the primary judge in connection with the appellants’ submission, repeated on this appeal and addressed earlier, that consumers are generally imputed with a degree of personal responsibility and personal autonomy for their decisions (PJ [520]). The primary judge accepted that, while personal responsibility and autonomy of consumers must be recognised and that consumers are free to make their own bad decisions, Parliament has imposed a particular standard of behaviour on suppliers of goods and services in trade and commerce, namely that they do not engage in conduct (or a system of conduct) that is unconscionable in all the circumstances (PJ [521]). His Honour further observed that where “significant numbers and proportions of consumers who are enrolled as students cannot thereafter be contactable by the College and do not engage in any way with their courses, it is very clear that something is remiss”. We agree.
3. The appellants’ submission that there was no proof of any characteristics of the students fails to address the primary judge’s finding that something was remiss. The primary judge found that all the key personnel at the College, and Mr Wills at Site, were well aware that there was an ongoing risk of agent misconduct and that that misconduct could significantly harm the interests of substantial numbers of persons. The harm included that persons might be enrolled as students unwittingly, having been in some way tricked, deceived or confused into enrolling and not genuinely interested in doing the course for which they were enrolled (PJ [204]), or that persons would be enrolled who were unsuitable by reason of a lack of language, literacy and numeracy skills or technology skills or access. The primary judge found that, prior to the impugned enrolment period, the College and Mr Wills were well aware of the risk of unwitting or unsuitable students being enrolled in their courses, and the need to take steps to mitigate that risk (PJ [220]). Further, prior to the impugned enrolment period, up to 50% of enrolled students withdrew or were withdrawn. The problem of unwitting and unsuitable students being enrolled at the College was prevalent. The evidence gave rise to an overwhelming inference that large numbers of enrolled students did not understand the obligations being incurred through enrolment, and may not have understood that they had enrolled.
4. The matter referred to in paragraph (c) does not in any way assist the appellants.

#### Section 22(1)(d)

1. Paragraph (d) invites consideration of whether any undue influence was exerted on, or any unfair tactics were used against, students by the College or any person acting on behalf of the College. The only submission that the appellants advanced on the appeal with respect to paragraph (d) was that no attempt to exert undue influence on students was proved, at least not “systemically”. That submission was advanced at trial and rejected by the primary judge (at PJ [511]-[513]). His Honour took into account the facts that: a form of CA misconduct risk was the risk that agents might use undue influence, pressure or unfair tactics on unsuspecting persons; the evidence bore out that that form of CA misconduct risk materialised from time to time; and the College knew of this and nevertheless introduced enrolment and withdrawal process changes that weakened the protections against those risks materialising. By way of further elaboration, the risk and prevalence of unfair tactics used by agents, as well as undue influence, was apparent from the College’s complaints registers, media reports, the Senate Education and Employment References Committee inquiry, and regulatory changes that were made by the Department to the VFH scheme in an effort to address the known problems of agent misconduct, as recorded in the findings of the primary judge. Those findings bear directly on the matter referred to in paragraph (d) and were also central to the primary judge’s reasoning.

#### Section 22(1)(e)

1. Paragraph (e) of s 22(1) invites consideration of the circumstances under which students could have acquired identical or equivalent services from a supplier other than the College. With respect to that paragraph, the appellants repeated their submission that the ACCC led no evidence about the enrolment processes of other RTOs, and that the primary judge rejected evidence of other RTOs’ withdrawal policies tendered by the College and made no finding that students could acquire equivalent services from other RTOs on different terms. Those submissions have been addressed in the context of appeal ground 1. For the reasons there expressed, there was no evidence before the primary judge that enabled any relevant finding with respect to that factor.
2. At trial, the appellants submitted that the fact that the ACCC did not adduce evidence to suggest that students who enrolled in comparable online courses in other VET providers were able to withdraw from their courses on more favourable conditions founds an inference that the College’s withdrawal policy was consistent with the withdrawal policy of every other VET provider in Australia (PJ [516]). That submission was rejected by the primary judge (at PJ [517]). His Honour correctly observed that to gain anything useful from an analysis of the withdrawal policies of other colleges would require an analysis of their whole systems of enrolment and withdrawal, including supervision of agents. An identical withdrawal policy in another VET provider may not be unconscionable because other aspects of the VET provider’s overall system of enrolment offers better protection against CA misconduct risk and unsuitable enrolment risk than that of the College. The application of paragraph (e) in the present case would have required consideration of all of the circumstances under which students could have acquired identical or equivalent services from a supplier other than the College, not one circumstance in isolation. The College did not adduce evidence to enable such consideration to be undertaken.
3. For those reasons, the primary judge did not fail to consider matters relevant to paragraph (e).

#### Section 22(1)(i)

1. Paragraph (i) of s 22(1) invites consideration of the extent to which the College unreasonably failed to disclose to students any risks to the student from the College’s intended conduct. The only submission that the appellants advanced on the appeal with respect to paragraph (i) was that this factor favoured the College because the College made proper disclosure to students of the VFH scheme during the inbound QA call. A similar submission was made at trial and was considered by the primary judge. The appellants relied on the QA call as being an ordinary aspect of commerce (PJ 514]) and the appellants submitted that the QA call was a safeguard (PJ [525]). The primary judge accepted those matters, as far as they went. But they did not go very far. His Honour found that the inbound QA call, on its own or together with other aspects of the College’s enrolment processes, was not sufficient to protect consumers and there was no evidence from the corporate respondents to support any finding that any officer on behalf of the corporate respondents believed that these components operated effectively to protect students (PJ [526]). The change in the QA call process weakened the safeguards available to students in a material way (PJ [526]-[527]).
2. The primary judge made detailed findings about the inbound QA call process and its deficiencies at PJ [287]-[313], which were summarised earlier in these reasons. His Honour found that there were a number of features of the inbound QA call process that made it materially different from the outbound call process including: the QA call was done in circumstances where the agent was present with the student, which meant that the admissions team member could not be confident that the answers given were the student’s answers; the admissions team member would see the enrolment documents for the first time while on the call and would not have the opportunity to examine the enrolment documents in advance and identify any problems; the call was not itself designed to be a means of assessing the student’s suitability; the new process meant that a student could become enrolled while never being contactable by the College; and there was no post-enrolment assessment of language, literacy and numeracy capability which, if negative, would lead to withdrawal of the student prior to first census.
3. No appellable error has been demonstrated in those findings of the primary judge.

#### Section 22(1)(l)

1. Paragraph (l) of s 22(1) invites consideration of the extent to which the College acted in good faith. The only submissions that the appellants advanced on the appeal with respect to paragraph (l) were that the College collected contact information for students, disclosed withdrawal information and made concerted efforts to contact students (also submitting that consumers are generally imputed with a real degree of personal responsibility for their decisions). Each of those matters has been referred to above. They were taken into account by the primary judge.

#### Conclusion on ground 3

1. For the reasons expressed above, appeal ground 3 should be rejected.

## Appeal ground 4

1. By appeal ground 4, the appellants challenge a series of findings, or asserted findings, made by the primary judge. The challenges were addressed briefly in written and oral submissions. The challenges are without merit.

### Ground 4(a)

1. By ground 4(a), the appellants contend that the primary judge erred in finding that students might be unsuitable for enrolment because they would not be contactable by the College, would have no or minimal engagement with their online courses, or did not in fact wish to enrol in an online course (referring to PJ [495]).
2. The primary judge’s finding at PJ [495] is as follows:

Consumers might be unsuitable for enrolment for various reasons including, for example, that they would not be contactable by the college, they would have no or minimal engagement with their online courses, they did not in fact wish to enrol in an online course, or by reason of lacking sufficient [language, literacy and numeracy] skills, computer skills, or access to technology required to undertake online courses.

1. The appellants argued that suitability is directed to the characteristics of the student, not later in time events or actions (or inaction) of the student (relevantly, being contactable by the College or engaging with the course). The appellants argued that the trial judge’s definition of unsuitable enrolment risk is logically flawed, undermining his Honour’s conclusion of unconscionable conduct.
2. The primary judge’s finding at PJ [495] occurs in a section of the reasons in which the primary judge summarises earlier findings for the purpose of drawing threads together and reaching a conclusion (see PJ [493]). It is readily apparent that the finding at PJ [495] is not intended to be a complete description of earlier findings. It can be accepted that suitability for enrolment is directed to the characteristics of the student and that the expression used in PJ [495] is framed loosely. However, the matters found and relied upon by the primary judge are clear and no appellable error is demonstrated.
3. Elsewhere in the primary judgment, the primary judge describes the known risks and problems under the VFH scheme and which are discussed earlier in these reasons. At PJ [204], the primary judge concluded that all the key personnel at the College, and Mr Wills at Site, were aware that there was an ongoing risk of agent misconduct and that persons might be enrolled as students even though they were unsuitable or not genuinely interested in doing the course for which they were enrolled, or had in some way been tricked, deceived or confused into enrolling. At PJ [208], the primary judge refers to the evidence of Mohammed Akbery concerning his awareness of the risk that persons who were unsuitable for an online course, for example because they had poor language, literacy or numeracy skills or an intellectual disability, would seek enrolment because they were confused or ill-informed, or because of agent misconduct.
4. The primary judge also summarises the known risks and problems of agent misconduct and unsuitable enrolments at PJ [494], concluding that the College knew that there was a real risk, which regularly materialised, that agents would use a range of prohibited or deceptive stratagems to pressurise or trick persons to enrol in courses at the College with the result that unsuitable consumers became enrolled as students. The prohibited or deceptive stratagems might include making false and misleading statements to consumers to the effect that the online courses were free, failing to properly inform consumers that they would incur VFH debts if they enrolled in online courses or the circumstances in which the debts would have to be repaid, pressuring consumers to enrol in online courses, offering consumers inducements (such as free laptops or other devices) to enrol in an online course, completing consumers’ enrolment documents including the PEQ for them, and coaching consumers during the course of the inbound QA call.
5. Read in context and in light of the primary judgment as a whole, PJ [495] refers to circumstances from which it was readily apparent that students were being enrolled at the College unwittingly or where the student was not suitable for enrolment. The circumstances were that the student was uncontactable by the College and had no or minimal engagement with their online course. That circumstance was prevalent at the College before the impugned conduct was undertaken, demonstrating that the known risks and problems, associated with agent recruitment, were occurring at the College.
6. Ground 4(a) should be rejected. It fastens upon an infelicity of expression. Contrary to the appellants’ submissions, there is no logical flaw in his Honour’s findings and conclusions.

### Ground 4(b)

1. By ground 4(b), the appellants contend that the primary judge erred in finding that the College enrolled students who were unsuitable for enrolment (at PJ [496], [498], [499]) and who could derive no benefit from their debt (at PJ [502]), because the students (i) lacked sufficient language, literacy and numeracy skills, computer skills or access to technology, or (ii) did not in fact wish to enrol in an online course, where there was not a sufficient evidentiary basis regarding these matters in respect of the majority of the students enrolled. In support of that ground, the appellants sought to rely upon the conclusion of the Full Court in *Unique* that vulnerabilities of individuals, such as their level of literacy and numeracy or whether they had intellectual impairments, were not matters about which inferences could be drawn without sufficient evidence (at [136]).
2. In our view, ground 4(b) proceeds from a misstatement of the primary judge’s reasoning and a consequential misapplication of the Full Court’s reasoning in *Unique*. As discussed earlier, while there are similarities between the factual circumstances considered in *Unique* and the present case (in that both cases concerned the enrolment of students in online VET courses under the VFH scheme), there are significant differences.
3. The ACCC’s allegations in the present case differ greatly from the allegations in *Unique*. The ACCC’s allegations in the present case proceeded from known risks and problems arising under the VFH scheme which were occurring at the College and, from public sources, were known to be widespread. Those known risks and problems related to misconduct by recruitment agents and large numbers of unwitting and unsuitable students being enrolled. The primary judge found that those risks and problems were known to the College and had materialised at the College from a large body of evidence, summarised earlier in these reasons. In our view, that finding was well supported by the evidence. It was unnecessary for the ACCC to adduce evidence from students who had been enrolled in an online course at the College through unethical conduct of agents. The College’s complaints register established the fact that it had occurred in the past and was known by the College to have occurred in the past. In combination with the other evidence adduced, the fact that approximately 50% of students withdrew or were withdrawn from their course before the first census date because they were uncontactable or had not accessed the learning management system gave rise to a strong inference that those students had been enrolled unwittingly or were unsuitable for enrolment. The College adduced no evidence to suggest otherwise. There was no alternative hypothesis advanced by the College as to why or how so many disengaged students had been enrolled. The system of conduct alleged and found to be unconscionable was the removal of two important safeguards against agent misconduct and the enrolment of unwitting or unsuitable students.
4. The primary judge’s finding at PJ [498] and [499] was that the College knew or should have known that removing those safeguards would result in an immediate increase in enrolments, which would bring with it an immediate increase in the enrolment of unwitting or unsuitable students. That finding was supported by the College’s experience with online enrolments in the period before the changes were made. No part of the ACCC’s case required proof that students who were enrolled after the changes were made had particular vulnerabilities. It was a fact known to the College that its method of recruiting students resulted in the enrolment of unwitting and unsuitable students.
5. For those reasons we reject ground 4(b).

### Ground 4(c)

1. By ground 4(c), the appellants contend that the primary judge erred in finding that abolishing the campus driven withdrawals policy introduced a barrier to withdrawal, and that the probability was that students did not know they had been enrolled or did not receive and appreciate the information telling them that they could withdraw (at PJ [519]). The appellants argued that not having a campus driven withdrawals policy was not a barrier to withdrawal (an expression used in the VET Guidelines). The appellants further argued that the primary judge’s finding that students did not know they had been enrolled or did not receive and appreciate the information telling them that they could withdraw appears to have been extrapolated from the limited evidence referred to at PJ [295]-[296] and [301].
2. The appellants’ submission that the primary judge’s finding at PJ [519] is an extrapolation of the evidence referred to at PJ [295]-[296] and [301] must be rejected. It is contradicted by the reasoning at PJ [519]. There, the primary judge reasoned that if, having been enrolled through the inbound QA call process, a student is thereafter uncontactable and never accesses the learning management system, the probability is that they do not know that they have been enrolled or, if they do know that they have been enrolled, that they have not received and appreciated the information telling them that they can withdraw. The conclusion is a logical inference arising from the stated circumstances.
3. As to the primary judge’s finding that abolishing the campus driven withdrawals policy introduced a barrier to withdrawal, we have earlier concluded that we do not agree with his Honour’s characterisation. However, for the reasons expressed earlier, we consider that that finding does not have any material effect on the primary judge’s evaluation of the College’s conduct.

### Ground 4(d)

1. By ground 4(d), the appellants contend that the primary judge erred in finding that the College acted “relevantly unfairly” to students by allowing them to pass through census in circumstances where they were not able to be contacted by the College or failed to login to the learning management system (at PJ [500]). In support of that ground, the appellants relied on information concerning withdrawal given to enrolling students during the inbound QA call process and the fact that the College made significant efforts to contact students after enrolment and before census.
2. In our view, there is no error in the primary judge’s finding. The deficiencies in the inbound QA call procedure were addressed by the primary judge at length (at PJ [303]-[313]), and there is no challenge to those findings. The deficiencies have also been addressed earlier in these reasons. The efforts made by the College to contact students after enrolment have also been addressed earlier in these reasons. As previously noted, given the escalation of the enrolment of unwitting and unsuitable students brought about by the enrolment process changes, the evidence showed that the efforts undertaken by College staff to contact students were largely futile. The student support officers were simply overwhelmed. That ought to have been known by the College’s senior management.

### Ground 4(e)

1. By ground 4(e), the appellants contend that the primary judge erred in finding that there was no evidence to support any finding that any officer of the College or Site believed that the components of the College’s overall enrolment system operated effectively to protect students (at PJ [526]). In support of that ground, the appellants relied on two pieces of evidence:
2. the email sent by Mr Cook to Vern Wills on 20 September 2015 in relation to the appointment of recruitment agents (referred to at PJ [333]); and
3. Mr Makar’s report with respect to the College’s agent appointment process (which the primary judge misquoted at PJ [336], but correctly quoted at [343]).
4. Those pieces of evidence do not undermine the primary judge’s finding. First, the evidence referred to deals with only one aspect of the College’s enrolment processes – the appointment and supervision of agents. Second, the evidence does not support a finding that any officer of the College or Site believed that the College’s enrolment system operated effectively to protect students. As the primary judge found (at PJ [343]), Mr Makar’s report referred to the risk of students being enrolled without the controls and support programs in place with some agents, the fact that such enrolments represented a risk to the College with limited control over how they were recruited, and the fact that there were systematic gaps in the control of the processes and implementation of improvements. For those reasons, we reject ground 4(e).

## Appeal ground 5

1. By appeal ground 5, the appellants contend that the trial judge erred in finding that the Commonwealth paid certain amounts to the College which it was unconscionable for the College to have claimed and retained (at PJ [504]). In support of that contention, the appellants advanced two principal submissions. First, the appellants submitted that no finding was made that any claim for fees was made by the College in contravention of the terms of the VFH scheme. Second, the appellants submitted that, while the College claimed fees in respect of students enrolled during the impugned enrolment period in accordance with the VFH scheme, it was not part of the College’s system to retain fees in respect of students the College considered had been subject to agent misconduct. In support of that submission, the appellants referred to the primary judge’s findings with respect to (i) the College’s complaints handling system, (ii) the College’s six investigation reports (which overlapped with the ACCC’s investigation of the College’s conduct); and (iii) the College’s decision to reverse the enrolment of Consumers B to E and refund their course fees.
2. The first submission is misconceived. It was no part of the ACCC’s case, nor any finding of the primary judge, that the College’s conduct was unconscionable because it claimed fees in contravention of the terms of the VFH scheme. The College’s conduct was unconscionable because, knowing of the risks of agent misconduct and the problem of unwitting and unsuitable students being enrolled, it changed its enrolment process in a manner that increased those risks in order to increase enrolments, and then claimed and retained the resulting VFH revenue. As discussed earlier in the context of appeal ground 2, claiming and retaining the VFH revenue that was derived from student enrolments that occurred during the impugned enrolment period (during which the new enrolment process was in place) completed the unconscionable conduct. The fact that the College was legally entitled, as between itself and the Commonwealth, to claim the resulting VFH revenue did not immunise its conduct from the prohibition against unconscionable conduct. As the primary judge observed (at PJ [506]), the relevant issue was the unconscionability of the College’s system towards students who were saddled with considerable VFH debt.
3. As to the second submission, and as observed earlier in these reasons, the ultimate evaluation of the College’s conduct may have been different if the evidence established that the College had not claimed and retained the VFH revenue that resulted from the changes it made to its enrolment processes. However, the evidence established the contrary. Once again, the appellants’ submission that it was not part of the College’s system to retain fees in respect of students the College considered had been subject to agent misconduct does not address the full picture. The findings made by the primary judge reveal significant flaws in the College’s complaints handling systems and investigations concerning agent misconduct. As noted earlier, the primary judge concluded that the quality and nature of the College’s complaint handling and investigations was not such as to have justified any belief that it contributed significantly to reducing the risk of agent misconduct or unsuitable enrolment.
4. Overall, the appellants’ submissions with respect to the retention of VFH revenue, which continued until September 2016, failed to confront the facts that, by reason of the changes to its enrolment processes, the College enrolled very large numbers of students the vast majority of whom never had any contact with the College (and were uncontactable by the College) and never accessed the learning management system. While the College may have undertaken some limited investigations of agent misconduct (and done so slowly and ineffectively), and may have refunded some students who contacted the College with complaints, the College did not act in any systemic way to address the significant harm suffered by the vast majority of students enrolled during the impugned enrolment period.
5. For those reasons, we reject ground 5.

# E. Appeals against finding of knowing involvement in systemic unconscionable conduct

## Overview

1. As noted earlier, the ACCC alleged that each of Blake Wills and Site were knowingly concerned in, or party to, the College’s contravention of s 21. That allegation founded the ACCC’s claims for the following relief against Mr Wills and Site in its second further amended originating application:
2. civil pecuniary penalties under s 224(1) of the ACL;
3. non-punitive orders under s 246 of the ACL; and
4. in respect of Mr Wills, a disqualification order under s 248 of the ACL.
5. Under s 224(1)(e), the Court may order a person to pay a civil pecuniary penalty if the Court is satisfied that the person has been in any way, directly or indirectly, knowingly concerned in, or party to, a contravention (relevantly) of s 21 of the ACL. Under ss 246 and 248, the Court may make a non-punitive order or a disqualification order respectively in relation to a person who has been involved in a contravention (relevantly) of s 21 of the ACL. Under s 2, a person is involved in a contravention if the person has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention.
6. The primary judge found that Mr Wills, and through him Site, were knowingly concerned in the College’s systemic unconscionable conduct (at PJ [576] and [585]). Each of Mr Wills and Site appeal against that finding.
7. By his amended notice of appeal, Mr Wills advanced 12 grounds of appeal. In written submissions, Mr Wills addressed the numerous grounds under the following topics:
8. an absence of relevant participation by Mr Wills in the contravening conduct (appeal grounds 2 and 3);
9. an error of law in relation to the requisite knowledge for accessorial liability (appeal ground 3A);
10. an absence of relevant knowledge (appeal ground 3B); and
11. the remaining grounds, which generally involved challenges to factual findings made by the primary judge (grounds 3C to 10).
12. In oral address, Mr Wills also addressed ground 10, which concerns the date on which Mr Wills knew certain matters, as a discrete ground. Ground 10 is particularly relevant to ground 3B and will be addressed immediately following ground 3B.
13. Site adopted the submissions of Mr Wills. Accordingly, the grounds of appeal will be considered under the headings adopted by Mr Wills. In this section of the reasons, references to the appellants should be understood as a reference to Mr Wills and Site.
14. While it is convenient to consider the grounds of appeal under the headings adopted by Mr Wills, there are dangers in analysing separately the “conduct” and “knowledge” elements of accessorial liability. It should not be overlooked that conduct (whether by way of act or omission) may take on a different significance, including by way of implication, when it is shown to have been undertaken with knowledge of particular facts (with the converse also being true).
15. In his reasons, the primary judge summarised the established principles concerning “knowing involvement” in a contravention under the ACL (ie, being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention). The appellants largely accepted the primary judge’s summary of the applicable principles, although they challenged one aspect which is the subject of appeal ground 3A. It is convenient to refer to the primary judge’s summary before considering the appellants’ grounds of appeal. In this part of the reasons, the phrases “knowing involvement” or “knowingly involved” in the contravention are used as a shorthand reference to the statutory phrase “being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention”.

## Applicable principles

1. The primary judge summarised the applicable principles in the following terms:

98 There are two requirements that must be established before it can be concluded that a person was knowingly concerned in, or party to, a contravention.

99 First, the person must have had actual knowledge of all the essential facts constituting the contravention: *Yorke v Lucas* at 669-670. That is not imputed or constructive knowledge but, rather, actual knowledge: *Young Investments Group Pty Ltd v Mann* [2012] FCAFC 107; 293 ALR 537 at [11] per Emmett, Bennett and McKerracher JJ. However, it is not necessary that the person knew that those matters constituted a contravention: *Rafferty v Madgwicks* [2012] FCAFC 37; 203 FCR 1 at [254] per Kenny, Stone and Logan JJ. The requisite actual knowledge must be present at the time of the contravention; a later acquisition of knowledge of the essential matters is not sufficient: *ASIC v Australian Investors Forum Pty Ltd (No 2)* [2005] NSWSC 267; 53 ACSR 305 at [113]-[118] per Palmer J; *ASIC v ActiveSuper Pty Ltd (in liq)* [2015] FCA 342; 235 FCR 181 at [405] per White J.

100 Actual knowledge may be inferred from “a combination of suspicious circumstances and a failure to make an inquiry” – which is sometimes referred to as “wilful blindness”, but “knowledge must be the only rational inference available”: *Pereira v Director of Public Prosecutions* [1988] HCA 57; 82 ALR 217 at 220 per Mason CJ, Dean, Dawson, Toohey and Gaudron JJ. It has also been said that “actual knowledge may be inferred from ignorance dishonestly and deliberately maintained or wilful blindness”: *Lloyd v Belconnen Lakeview Pty Ltd* [2019] FCA 2177; 377 ALR 234 at [321] per Lee J.

101 In a case such as the present which, relevantly, involves a case asserting knowing concern in unconscionable conduct, it is necessary to show that the person said to be knowingly concerned knew of all the circumstances by which the conduct is ultimately found to have been unconscionable in contravention of the statutory norm: *Stefanovski v Digital Central Australia (Assets) Pty Ltd* [2018] FCAFC 31; 368 ALR 607 at [71] per McKerracher, Robertson and Derrington JJ.

102 Secondly, the person must have engaged in conduct (by act or omission) which can properly be said to “implicate” them in the contravention or which shows a “practical connection” between them and the contravention: *ActiveSuper* at [407]-[410]; *Ashbury v Reid* [1961] WAR 49 at 51; *Trade Practices Commission v Australia Meat Holdings Pty Ltd* [1988] FCA 338; 83 ALR 299 at 357 per Wilcox J. It is not necessary that the person physically do anything to further the contravention; it is sufficient if the person, by what they said and agreed to do, in fact became associated with and thus involved, in the relevant sense, in the conduct constituting the contravention: *R v Tannous* (1988) 10 NSWLR 303 at 308 per Lee J, Street CJ and Finlay J agreeing; *Leighton Contractors Pty Ltd v CFMEU* [2006] WASC 144; 154 IR 228 at [29] per Le Miere J; *Qantas Airways Ltd v TWUA* [2011] FCA 470; 280 ALR 503 at [324]-[325] per Moore J; *Fair Work Ombudsman v Priority Matters Pty Ltd* [2017] FCA 833 at [118]-[119] per Flick J; *Termite Resources NL (in liq) v Meadows* [2019] FCA 354; 370 ALR 191 at [717] per White J.

1. The primary judge rejected a submission of Mr Wills that it was necessary for the ACCC to establish that he “participated” in each essential element constituting the contravention. His Honour concluded that while it was necessary for Mr Wills to have knowledge of the essential elements of the contravention, it was not necessary that he participated in each element (PJ [103]-[108]). There is no appeal from that conclusion.

## Appeal grounds 2 and 3: participation by Mr Wills in the contravening conduct

1. By appeal ground 2, the appellants contend that the primary judge erred in finding that Mr Wills was knowingly involved in the College’s contravention of s 21 of the ACL because the findings of fact made by the primary judge were not capable of satisfying the conduct element of being knowingly involved. The findings of fact referred to by the appellants in the ground of appeal were the following:
2. Mr Wills’s “leadership role” (PJ [566]);
3. Mr Wills’s role as a member of the Advisory Board (PJ [543]-[545], [558], [564]);
4. Mr Wills’s role as COO of Site (PJ [542], [545], [564], [567]);
5. Mr Wills’s attendance at the 16 September 2015 Management Meeting of the College (PJ [558]);
6. Mr Wills’s conduct as being a “key driver of the changes at the College to ensure that its financial performance improved” (PJ [573]); and
7. Mr Wills’s role as acting CEO of the College between 20 November 2015 and 20 January 2016 (PJ [566], [569]).
8. By ground 3, the appellants contend that the primary judge erred in finding that, by virtue of Mr Wills’s “leadership role”, he was “implicated” in the conduct of the College ceasing to enrol students for 2016 but continuing to claim revenue in respect of students who had enrolled in 2015 (PJ [566]).
9. The appellants did not contest the primary judge’s statement that, to be knowingly involved in a contravention, a person must have engaged in conduct (by act or omission) which can properly be said to implicate them in the contravention or which shows a practical connection between them and the contravention. Rather, the appellants contend that the primary judge’s findings do not support the conclusion that Mr Wills engaged in such conduct.
10. The thrust of the appellants’ argument was that the primary judge made no finding that Mr Wills was directly involved in the contravening conduct. The appellants argued that the primary judge made no finding that Mr Wills conceived or participated in the design of the enrolment process changes or instructed or directed that they be implemented; and made no finding that Mr Wills participated in or directed the claiming or retaining of revenue in respect of students enrolled during the impugned enrolment period or participated in any decision-making as to whether to do so. The appellants argued that the primary judge’s findings rose no higher than a finding that Mr Wills was a senior executive and attended meetings at which there was discussion of matters related to the impugned conduct. The appellants submitted that such an approach is wrong in law, relying upon the statement of Brereton J in *Australian Securities and Investments Commission v Maxwell* [2006] NSWSC 1052; 59 ACSR 373 (***Maxwell***) (at [92]) that the “mere circumstance that a person is a director of a company that engages in contravening conduct is insufficient to establish that he or she is a person involved in it”. The appellants argued that a practical connection to the contravening conduct cannot arise purely on the bases that: Mr Wills was the COO of Site; or that he was the facilitator of Advisory Board meetings; or that the Advisory Board had a broad advisory remit; or that Mr Wills held a leadership role; or that Mr Wills briefly acted as acting CEO of the College.
11. We reject those submissions. They suffer from two errors. First, they proceed from an unduly narrow understanding of the statutory concept of “knowing involvement”. Second, they are based on a narrow reading, if not misreading, of the findings of the primary judge.
12. A person will be liable as an accessory to contraventions of s 21 of the ACL if they are “in any way, directly or indirectly, knowingly concerned in, or party to, the contravention”. The word “concerned” has been construed in accordance with its ordinary meaning – having to do with, having a part in, or being implicated or involved in: see *Ashbury v Reid* [1961] WAR 49 at 51 (Virtue, D'arcy and Hale JJ); *R v Tannous* (1987) 10 NSWLR 303 at 307-308 (Lee J, Street CJ and Finlay J agreeing); *R v Nifadopoulos* (1988) 36 A Crim R 137 at 140 (Kirby ACJ with Maxwell and Carruthers JJ agreeing). The statutory phrases “in any way” and “directly or indirectly” are important. They serve to emphasise that accessorial liability is not confined to a person who physically or practically undertakes the unlawful conduct, but extends to a person who is in a position of authority and expressly or implicitly approves or assents to the unlawful conduct: see *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 (***Rural Press***) at [48] (Gummow, Hayne and Heydon JJ,with Gleeson CJ and Callinan J agreeing at [2], Kirby J agreeing at [108]). We respectfully agree with the following explanation given by Le Miere J in *Leighton Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union* (2006) 154 IR 228 (at [29], in relation to equivalent statutory language in s 48 of the *Building & Construction Industry Improvement Act 2005* (Cth)):

A person is not involved in a contravention unless he assents to or concurs in the conduct which constitutes the contravention. To be involved in a contravention requires that the person have a practical connection with the contravention. However, it is not necessary that the person physically do anything to further the contravention. It is sufficient if the person, by what he said and agreed to do, in fact became associated with and thus involved, in the relevant sense, in the conduct constituting the contravention: see *R v Tannous* (1987) 10 NSWLR 303 at 308.

1. The statement by Brereton J in *Maxwell* that the “mere circumstance that a person is a director of a company that engages in contravening conduct is insufficient to establish that he or she is a person involved in it” is uncontroversial. The emphasis, though, is upon the word “mere”. Occupation of an office does not of itself establish participation in or assent to conduct. However, the appellants’ reliance upon that statement is entirely misplaced. The factual findings made by the primary judge demonstrate that Mr Wills assented to and concurred with the contravening conduct of the College.
2. In turning to the facts as found by the primary judge, it needs to be repeated that Mr Wills chose not to give evidence in the proceeding to explain his role in the contravening conduct. The primary judge drew a *Jones v Dunkel* inference from his failure to give evidence, finding (at PJ [143]-[144]):

143 In circumstances where Mr Wills could have given evidence and elected not to do so without explanation, and any evidence by him could have explained the extent of his knowledge and involvement, which emails and documents he read and which he did not and what understanding he gained from them, and the extent of his participation in crucial discussions at different meetings, and indeed the position taken by him in those discussions, I draw the inference against him that his evidence would not have assisted his case. It is most reasonably and probably for that reason that he elected not to give evidence, particularly where there is no other competing explanation.

144 The result is that in what follows, and to the extent indicated, I infer that Mr Wills read and understood the emails and documents that were sent to him, and that he participated in and understood the discussions that took place at meetings at which he was present.

1. There is no appeal from those findings.
2. The facts as found by the primary judge establish that, at all relevant times (and increasingly so over time), Mr Wills had considerable authority over the College and its senior management and played a significant role in its decision-making. The extent of that authority can be inferred from the cumulative effect of the following matters (which have all been referred to earlier in these reasons):
3. At all relevant times, Mr Wills was the COO of Site which was the corporate owner of the College.
4. Prior to the acquisition of the College in mid-2014, Mr Wills and Mr Dawson undertook the due diligence investigations of the College on behalf of Site.
5. A Captain Cook College and Site Institute Advisory Board was established in May 2014 with the stated intention that it would meet monthly. Mr Wills was a member of the Advisory Board. A charter was adopted to govern its operation. The terms of the charter (parts of which are extracted earlier in these reasons) demonstrate the degree of control exercised by the Advisory Board over the management of the College. The Advisory Board had oversight and accountability for all key financial and operational aspects of the College’s business.
6. A Site Group strategy document, apparently authored by Mr Wills in January 2015, set out descriptions of the roles of each of the executive officers and also depicted lines of reporting, with Mr Cook (as CEO of the College) reporting directly to Mr Wills (as COO of Site), and described Mr Wills’s COO role as “to establish business unit objectives (plan), allocate resources (implement) & hold individuals accountable (evaluate)”.
7. As at mid-2015, the College represented a substantial proportion of Site’s consolidated revenue and profits, with the primary judge finding that the (financial) performance of the College was very significant to the performance of Site overall, and that the performance of the College would have been of key concern to Mr Wills.
8. From July 2015, the Management Meetings of the College occurred monthly. The minutes of the Management Meetings disclose that they were typically chaired and “facilitated” by Mr Wills, and were attended by the senior management of the College together with Mr Wills and Mr Dawson.
9. The close management supervision exercised by Mr Wills over the business of the College was acknowledged in two internal documents of Site. First, on 28 September 2015, Vernon Wills wrote an email to the other directors of Site, including Blake Wills, stating that during the previous 4 weeks management has pressured the College into accepting change (including the enrolment procedure) and that the early indications were that the changes to enrolment were showing significant increases in registrations and should show an upswing in the first and second census numbers (PJ [337]). Second, on 26 October 2015, Mr Wills circulated his COO report for the November meeting of the Site board in which he recorded that an urgent review of the business performance of the College was undertaken in August 2015, as a result of which “the degree of autonomy in this business unit has been reduced and integration prioritised” (PJ [351]-[352]).
10. The primary judge found that Mr Wills had high level responsibility for the College (PJ [341]). If anything, that description understates the level of responsibility that is apparent from the documentary evidence recounted by the primary judge.
11. The foregoing matters do not establish that Mr Wills participated in the contravening conduct. However, they are important facts in understanding Mr Wills’s role and authority within the Site group, which included management oversight of the College. They provide the backdrop to the decisions that were made that involved the contravening conduct. Those decisions, which involved Mr Wills, were as follows.
12. First, Mr Wills was closely involved in monitoring the College’s financial performance and, from April 2015, received reports from Mr Cook and Mr Dawson showing a decline in enrolments and revenues at the College. The primary judge found that the performance of the College would have been of key concern to Mr Wills (PJ [228]).
13. Second, Mr Wills was informed of the proposed changes to the College’s enrolment process on 18 August 2015. He received an agenda and papers for a Management Meeting of the College to be held the next day. The papers included Mr Cook’s CEO’s report which informed Mr Wills that:
14. the College had been receiving feedback from its agents regarding the enrolment process;
15. Mr Cook and Khaled Akbery had met with marketing to finalise a new enrolment process, which was included in the attached flowchart; and
16. rollout of the new enrolment process would commence 4th September.
17. The flowchart attached with the report recorded the two relevant changes to the enrolment process, being that the QA call would be initiated by the agent and that, once the QA call had been completed, the student would pass through census unless the student requested to withdraw (ie, campus driven withdrawals would be abolished). Later on 18 August 2015, Mr Cook sent the College’s monthly report for July to Mr Wills which reiterated the same messages: viz, that revenue was below expectations due to lack of volume from agents; agents had provided feedback concerning the College’s enrolment process; and that feedback was being fed into a revised enrolment process which was scheduled to commence on 4 September 2015. The primary judge found that, by 18 August 2015, the key officers of the College, including Mr Wills, understood that to address declining enrolments and agent complaints about the College’s enrolment process a revised enrolment process was being developed, which would enable prospective students to be enrolled more quickly and easily at the time that they were recruited by agents, and to ensure that they passed through census in greater numbers by abolishing campus driven withdrawals (PJ [242]-[243]).
18. Third, at the Management Meeting of the College on 19 August 2015, the above matters were discussed by both Mr Cook and Mr Wills, as reflected in the minutes. In respect of Mr Wills’s COO report, it was minuted that Mr Wills discussed that the College’s competitors had, amongst other listed advantages, “better admissions process” and Mr Wills advised that “we are in a declining state, [that] needs to be changed”. While the primary judge found that no decision was taken at the meeting to adopt the enrolment process changes, his Honour also found that there was a common understanding, or expectation, of the attendees at the meeting that, subject to further details still to be worked on, the enrolment process changes would be implemented (PJ [259]). In our view, the evidence as a whole, including particularly the minutes concerning Mr Wills’s COO Report, show that Mr Wills supported the changes that were being proposed. That is highly significant given Mr Wills’s role in the organisation, described earlier, whereby Mr Cook reported to Mr Wills.
19. Fourth, Mr Wills’s oversight of the proposed enrolment changes is demonstrated by the updates provided to him in the period leading up to the implementation of the changes. On 20 August 2015, Mr Cook circulated a further report to Mr Wills reiterating the same points and that the revised enrolment plan would commence on 4 September 2015 (PJ [278]-[280]). In the period 20 to 24 August 2015, Mr Wills was copied in on discussion about the details of changes to the enrolment portal and the PEQ (PJ [283]).
20. Fifth, by no later than 14 September 2015, Mr Wills was informed that the revised enrolment process had been implemented by the College on 4 September 2015. That occurred when Mr Cook sent him the College’s Business Unit Monthly Report for August 2015 (PJ [326]). On 15 September 2015, Mr Cook sent an email to Mr Wills showing that applications for enrolment in the week 7-13 September 2015 had increased dramatically (PJ [327]). Mr Cook circulated his CEO Report on the same day also reporting that rollout of the new enrolment process had commenced on 7 September and that the new enrolment process along with the update to the withdrawal policy should see agent numbers and student numbers increase (PJ [328]). Mr Wills attended the Management Meeting on 16 September 2015 where those matters were discussed. The primary judge inferred that Mr Wills closely followed the details of the matters that were discussed including the enrolment and withdrawal process changes (PJ [330]).
21. On the basis of the above facts, we consider that the primary judge was correct to find that Mr Wills was “concerned” in that part of the College’s contravening conduct that comprised the implementation of the enrolment process changes. The findings demonstrate that Mr Wills was in a position of authority with respect to significant decisions at the College such as the enrolment process changes, that Mr Wills was kept informed of the changes and that Mr Wills supported and concurred with the changes.
22. The implementation of the enrolment process changes continued throughout the impugned enrolment period, and the College claimed and retained the resulting VFH revenue throughout the impugned conduct period. The evidence demonstrates that Mr Wills was relevantly involved in that ongoing contravening conduct. If anything, his involvement in the contravening conduct escalated during that period. Significantly, on 30 September 2015, a decision was taken by the Site executive team (or perhaps by Mr Wills himself) that Mr Wills would be acting CEO when Mr Cook took leave on 20 November 2015 (PJ [338]). Mr Wills received the papers for and attended the Management Meetings of the College on 21 October 2015 and 18 November 2015. In each of those meetings, the changes to the enrolment process, and the effect of the changes on numbers of agents and students (and the resulting increase in VFH revenue) were the subject of reporting. As discussed earlier in these reasons, the effects were dramatic. The budgets were reforecast to take account of the anticipated large increase in VFH revenue. In the October 2015 meeting, Mohammed Akbery reported that students were not engaging in the learning management system. It can be inferred that the effects would have had the full attention of those attending the meeting, including Mr Wills. Mr Wills was acting CEO from 20 November 2015 through to 20 January 2016. In the period until September 2016, the findings of the primary judge show that Mr Wills continued to exercise authority over the College and received regular reports about the College’s revenue and student engagement (or rather lack of student engagement).
23. In our view, those facts are sufficient to establish Mr Wills’s ongoing participation in the contravening conduct. Mr Wills continued to exercise authority and supervision over the College. In that capacity, Mr Wills continued to receive reports about the implementation of the enrolment process changes and its effects on enrolments and VFH revenue, and Mr Wills continued to implicitly give his support and concurrence to the enrolment process changes and claiming and retaining the resulting VFH revenue. Where contravening conduct is continuing, participation in the contravening conduct can be shown by continuing support of and concurrence with the conduct.
24. For those reasons, we reject appeal grounds 2 and 3.

## Appeal ground 3A: requisite knowledge for accessorial liability

1. By appeal ground 3A, the appellants contend that the primary judge erred in law in concluding that knowledge of all the circumstances by which the conduct is ultimately found to have been unconscionable is sufficient to establish knowing involvement in unconscionable conduct. The appellants contend that the primary judge ought to have concluded that it is also necessary to know of the “unconscionable character” of the conduct arising from those circumstances or that the relevant conduct was in breach of the “applicable normative standard” (although it was not necessary for Mr Wills to understand that the conduct contravened the prohibition on unconscionable conduct in the ACL).
2. In written submissions, the appellants stated that it was accepted that an accessory need not understand that the conduct is unconscionable within the language of the ACL (referring to *Rural Press* at [48]), but an accessory must have actual knowledge that the conduct “possesses an unconscionable character, is against good conscience or, adopting the modern framing of the test, is contrary to the relevant norm or standard”. Precisely what was meant by this distinction was never made clear by the appellants. The appellants further submitted that the accessory must know of the predatory nature of the conduct or, adopting the language of Gageler J in *Kobelt* at [92], must know that the conduct is so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience. In the course of oral argument, Mr Wills submitted that the accessory must understand the standard of commercial behaviour, the applicable values or norms, which is required by the law and know that the impugned conduct breaches that standard. In support of this ground of appeal, the appellants sought to place reliance on cases involving misleading and deceptive conduct in which the courts have said that accessorial liability requires knowledge of the falsity of the representation, referring to the authorities collected by Cowdroy J in *McGrath v HNSW Pty Ltd* (2014) 219 FCR 489 (which included *Yorke v Lucas* (1985) 158 CLR 661 (***Yorke v Lucas***) at 667-671 per Mason ACJ and Wilson, Deane and Dawson JJ, the judgment of Stone J in *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1 (***MBF***) at [85], *Quinlivan v Australian Competition and Consumer Commission* (2004) 160 FCR 1 (***Quinlivan***) at [10] and *Australian Competition and Consumer Commission v TF Woollam & Son Pty Ltd* (2011) 196 FCR 212 at [120] per Logan J).
3. We reject those submissions. They find no support in the authorities concerning misleading and deceptive conduct, nor in any authorities concerning unconscionable conduct, and are wrong in principle. A requirement that an accessory must know that the impugned conduct breaches the standards or norms of behaviour required by the law of unconscionable conduct is in all practical senses equivalent to a requirement that an accessory must know that the impugned conduct breaches the law. Such a requirement has always been eschewed by the courts.
4. As was authoritatively determined by the High Court in *Yorke v Lucas*, accessorial liability for civil wrongs in the (then named) Trade Practices Act imports the requirements of the criminal law (at 669 per Mason ACJ, Wilson, Deane and Dawson JJ and at 673 per Brennan J). With reference to the principles established in *Giorgianni v The Queen* (1985) 156 CLR 473 (***Giorgianni***), the plurality concluded that accessorial liability required intentional participation in the wrongful conduct, and that to form the requisite intent, the accessory “must have knowledge of the essential matters which go to make up the offence whether or not [the accessory] knows that those matters amount to a crime” (at 667). Brennan J stated the same principle as requiring “knowledge of the essential facts which constitute the offence” (at 674). In the context of the prohibition of misleading and deceptive conduct, the plurality concluded that a person cannot be knowingly concerned in a contravention unless the person has knowledge of the essential facts constituting the contravention (at 670). Brennan J expressed the requirement as “knowledge of the acts constituting the contravention and of the circumstances which give those acts the character which s. 52 defines, namely, ‘misleading or deceptive or ... likely to mislead or deceive’” (at 677). There is no suggestion in the judgments of the High Court that an accessory must have knowledge of the legal standard of the prohibition against misleading conduct. Any such requirement would be contrary to the principles stated in *Giorgianni*.
5. Like the statutory prohibition of unconscionable conduct, the prohibition in s 45 of the CCA of arrangements that contain provisions that have the purpose or likely effect of substantially lessening competition involves the application of an evaluative legal standard. The requirement of knowledge for accessorial liability in respect of a contravention of s 45 was considered in the proceedings brought by the ACCC against Rural Press and two of its executives, Messrs McAuliffe and Law. At trial, Mansfield J found that Messrs McAuliffe and Law were knowingly concerned in making an arrangement that contained provisions having the purpose or likely effect of substantially lessening competition. His Honour stated the applicable principles in an orthodox manner (*Australian Competition & Consumer Commission v Rural Press Ltd* [2001] FCA 116; ATPR 41-804 at [136]):

It is necessary that each of those persons participated in, or assented to, the contraventions with actual knowledge of the essential elements constituting the contraventions: *Yorke v Lucas* (1985) 158 CLR 661 at 670; *Crocodile Marketing Ltd v Griffith Vinters Pty Ltd* (1989) 28 NSWLR 539. If it is shown that those persons had knowledge of all material circumstances and engaged in conduct which was part of the conduct constituting the commission of Rural Press, Bridge and Waikerie Printing respectively of the contraventions, those persons may be liable as accessories to the contraventions and knowingly concerned in, or party to them: *Hamilton v Whitehead* (1988) 166 CLR 121 at 128. It is not necessary that the accessory should have appreciated that the conduct was unlawful: *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd* (1999) 166 ALR 74 at 117.

1. On appeal to the Full Court (*Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236), the executives advanced an argument that bears a close similarity to the argument advanced by the appellants in the present proceeding: that accessorial liability required a finding that the executives had actual knowledge that the purpose or likely effect of the impugned arrangement would be a substantial reduction in competition in the relevant market (see at [154]). The Full Court rejected that argument for the following reasons (at [162] and [163]):

162 It may be readily accepted, as the appellants contended in the Court below and before us, that concepts underlying s 45(2)(a)(ii) and (b)(ii) of the TP Act can be elusive. In this case, however, the primary judge made findings sufficient to establish that Mr Law and Mr McAuliffe were aware of the material facts and circumstances constituting the contraventions of those provisions, even though they may not necessarily have turned their minds to the legal characterisation of those facts or circumstances or to the legality of the conduct. …

163 It was not, in our view, necessary for the primary judge to find that Mr McAuliffe and Mr Law knew and appreciated that the purpose or effect of the arrangement was substantially to reduce competition in the market ultimately identified in the judgment. The definition of the market is a mixed question of fact and law involving sophisticated economic and legal concepts. It is not to be supposed that accessory liability is to depend on issues that business people are unlikely to address and, in any event, often cannot be resolved without detailed expert evidence and fine legal analysis. In the present case, the findings and the evidence amply support the conclusion that Mr Law and Mr McAuliffe had actual knowledge of the essential elements of the contraventions by Rural Press and Bridge Printing of s 45(2)(a)(ii) and (b)(ii) of the TP Act.

1. The High Court unanimously upheld that conclusion of the trial judge and the Full Court. Gummow, Hayne and Heydon JJ observed (*Rural Press* at [48], Gleeson CJ and Callinan J agreeing at [2], Kirby J agreeing at [108], emphasis added):

The trial judge rightly held that it was necessary to find that McAuliffe and Law **participated in, or assented to, the companies’ contraventions with actual knowledge of the essential elements constituting the contraventions**. The Rural Press parties complained that he failed to make particular findings, but they are in fact inherent in his reasoning. In the end the argument was only that McAuliffe and Law “did not know that the principal’s conduct was engaged in for the purpose or had the likely effect of substantially lessening competition . . . in the market as defined”. It is wholly unrealistic to seek to characterise knowledge of circumstances in that way. Only a handful of lawyers think or speak in that fashion, and then only at a late stage of analysis of any particular problem. **In order to know the essential facts, and thus satisfy s 75B(1) of the Act and like provisions, it is not necessary to know that those facts are capable of characterisation in the language of the statute**.

1. The reasoning and conclusion in *Rural Press* is in contradiction of the appellants’ submission on ground 3A.
2. In two passages in *Yorke v Lucas*, there is passing use of the phrase “knowledge of the falsity of the representation” (see at 668 per Mason ACJ, Wilson, Deane and Dawson JJ and at 674 per Brennan J). It is clear from the context in which that phrase is used that it is a shorthand expression for the relevant knowledge requirement – it refers to knowledge of the circumstances that render the representation false. The phrase recurs in *MBF* and *Quinlivan*. The appellants seek to elevate the phrase into a statement of principle: namely, that the accessory must know that the conduct breaches the statutory standard. When analysed, those cases do not support the appellants’ contention.
3. The use of phrase “knowledge of the falsity of the representation” was considered expressly by Moore J in *MBF*. As his Honour observed (at [10]), in *Yorke v Lucas* the phrase was used against the factual background where Lucas (the alleged accessory) did not know one essential matter of fact, namely the actual turnover of the business being sold, and therefore could not have known that the representations were false or misleading. His Honour concluded that, in the case of an advertisement that conveyed a misleading representation, accessorial liability required knowledge that the advertisement conveyed the impugned representation and knowledge of the facts that rendered the representation misleading. It was not necessary, however, for the accessory to know that the representation was false or misleading (at [15]). Mansfield J agreed with the reasoning of Moore J (at [17]). Stone J expressed the matter differently, but it must be doubted whether her Honour intended any difference in approach. Her Honour observed that the critical finding in *Yorke v Lucas* was that Mr Lucas did not know that the information he was giving to the prospective purchaser was false and therefore he lacked knowledge of an essential element of the contravention (at [81]). Her Honour stated the applicable principle as follows (at [82], emphasis added):

This is not to say that to be liable as an accessory to a strict liability breach of s 52 it is necessary to know that the conduct of the principal is unlawful, or indeed to have any knowledge of the provisions of the TPA or the ASIC Act. But it is necessary to know the essential elements of the contravention, by which I understand that **one must know that which makes the conduct a contravention**; in this case, its misleading and deceptive character. Only then can one form the intention to participate in conduct of that character.

1. The appellants placed reliance on Stone J’s further statement (at [85]) that it is necessary for the accessory to know “in addition to what happened, the fact that the relevant conduct is misleading or deceptive or likely to mislead or deceive”. In context, that statement is properly understood as a shorthand description of the principles stated in [82] of her Honour’s judgment, that the accessory must know “that which makes the conduct a contravention”.
2. A variation on the phrase “knowledge of the falsity of the representation” was also used by the Full Court in *Quinlivan* (at [10]), but again the phrase should properly be understood as a shorthand expression of the principles stated in *Yorke v Lucas*. The case concerned the knowledge required by an accessory when the misleading conduct involved a representation as to a future matter where there were no reasonable grounds for making the representation. The Full Court relevantly concluded that, for accessorial liability, it would be necessary to establish that the accessory had knowledge that the representation was made and that the corporation (making the representation) had no reasonable grounds for making it (at [15]).
3. Later decisions of the Full Court are consistent with the foregoing explanation of the applicable principles. For example, in *Keller v LED Technologies Pty Ltd* (2010) 185 FCR 449, Besanko J observed (at [336], Jessup J agreeing at [354] and Emmett J reaching a similar conclusion at [138]-[143]):

In a case concerning representations, the essential elements of the contravention are the fact that the representation was made and that, in a case such as the present, it was misleading or deceptive, or likely to mislead or deceive (s 52) or was false (s 53(a) and (c)). To establish accessorial liability it must be established that the relevant person knew the representation was made and the facts which made it misleading or deceptive, or likely to mislead or deceive, or false. It need not be shown that the relevant person actually drew the conclusion that the representation was misleading or deceptive, or likely to mislead or deceive, or was false.

1. In *Rafferty v Madgwicks* (2012) 203 FCR 1, the Full Court (Kenny, Stone and Logan JJ) considered the requirements for accessorial liability under the (then named) Trade Practices Act in respect of s 51AD which provided that a corporation must not contravene an applicable industry code. The Franchising Code was such a code. After referring to the principles stated in *Giorgianni* and *Yorke v Lucas*, the Full Court said (at [252]-[255]):

252 … *Yorke v Lucas* thus stands for the proposition that for a person to aid, abet, counsel, procure, or be knowingly concerned in, a relevant contravention under s 75B(1), he or she must have knowledge of the essential elements of the TPA contravention.

253 The essential elements constituting a TPA contravention will necessarily depend upon the terms of the provision that has been contravened. In many cases, the essential elements constituting the contravention in question will be simple matters of fact. For example, in *Yorke v Lucas* the relevant essential element of a breach of s 52 was the falsity of the representation in question; and in *Giorgianni* the relevant essential element of the offence of aiding and abetting culpable driving was the defective condition of the brakes.

254 In other cases, as *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 (*Rural Press v ACCC*) illustrates, the terms of a legislative prohibition may mean that the essential elements involve more complex facts. Although this can make the identification of the essential facts less than straightforward, the principles referred to in *Yorke v Lucas* continue to apply. … In determining whether the regional manager and the general manager of Rural Press were “involved” in the corporate contraventions of ss 45 and 46 of the TPA under s 75B(1), the trial judge required the general and regional manager to be aware of each of the relevant essential elements of the offences, but did not require them to have undertaken a more specific analysis in terms of the legislative prohibitions: see *Australian Competition and Consumer Commission v Rural Press Ltd* [2001] FCA 116 at [138]. The High Court later upheld his Honour’s approach. Hence, whilst the identification of the elements of a contravention requires careful legal analysis, “[i]n order to know the essential facts, and thus satisfy s 75B(1) … and like provisions, it is not necessary to know those facts are capable of characterisation in the language of the statute”: see *Rural Press v ACCC* at [48]. This is another aspect of the longstanding principle that it is not necessary for a person to “recognize” the contravention as such, or explicitly to think about the relevant legislation that their actions may contravene: see *Giorgianni* at 506 and *Yorke v Lucas* at 676 per Brennan J, citing *Johnson v Youden* [1950] 1 KB 544 at 546.

255 Whether there is any merit in the Rafferty parties’ submission that it was unnecessary for them to establish that Madgwicks knew the Code applied depends in the first place upon the correct identification of the essential elements constituting the contraventions of s 51AD of the TPA by T2SA and Embleton. … we consider that these elements were: (1) a corporation (2) acting in trade and commerce (3) entering a franchise agreement (4) without giving a copy of the Code and a disclosure document to the prospective franchisee 14 days before the franchisee enters the franchise agreement; and/or (5) without receiving written statements from the prospective franchisee to the effect that the franchisee has received, read and had a reasonable opportunity to understand the disclosure document and the Code, and has been given advice by an independent lawyer, business advisor or accountant about the proposed franchise agreement, or has been told that that kind of advice should be sought and has decided not to seek it.

1. So too, in *Stefanovski v Digital Central Australia (Assets) Pty Ltd* [2018] FCAFC 31; 368 ALR 607, the Full Court (McKerracher, Robertson and Derrington JJ) considered the requirements for accessorial liability for a contravention of the statutory prohibition of unconscionable conduct in the CCA. The Full Court observed (at [71]):

It should be added that where a claim is pursued that a person was “knowingly concerned” in unconscionable conduct in contravention of a legislative prohibition of that activity, particular difficulties arise. The existence of unconscionable conduct is often divined from all of the circumstances of a particular case and, especially, from the relationship between the entities involved. For a person to be liable as being “knowingly concerned” in such it would have to be pleaded and proved that they were aware of, at least, all of those circumstances. In a trial where the claim of unconscionability is based upon a breach of a duty of good faith the applicant would have to put to the respondents that they were aware of the obligation of good faith and that the conduct on which they relied was in breach of that obligation.

1. The same conclusion was expressed by Heerey J in *Coggin v Telstar Finance Company (Q) Pty Ltd* [2006] FCA 191; ASAL 55-156 (***Coggin***), a case concerning unconscionable conduct under the then s 51AC of the Trade Practices Act. Relying upon the statements of the High Court in *Rural Press* referred to earlier in these reasons, Heerey J concluded that it was not necessary to show that the accessory personally characterised or recognised the facts constituting the contravention as unconscionable (at [72]). His Honour observed (at [73]):

Since, as already noted, the assessment of conduct as unconscionable or not under s 51AC may involve the consideration and weighting of 13 statutory criteria, and an infinite number of other criteria which appear relevant to the judge, it would be quite unworkable to suppose that there could be no finding of accessorial liability unless the individual, at the time of the contravention, considered the same factors, and gave them the same weight, as did the judge at the subsequent trial. Apart from anything else, the morally obtuse would have an undeserved advantage.

1. All of the above authorities are consistent with the principle that accessorial liability is dependent upon knowledge of facts, not knowledge of legal obligations or the content of legal standards. Otherwise, persons who are ignorant of the law, or ignorant of the standards or norms of behaviour required by the law, would avoid liability for their participation in wrongful conduct. Consistently with the observation of Heerey J in *Coggin*, it would be perverse if the morally obtuse avoided liability for their involvement in unconscionable conduct by reason that they subjectively lacked a sufficient commercial conscience.
2. For those reasons, we reject ground 3A.

## Appeal ground 3B: absence of relevant knowledge

1. By appeal ground 3B, the appellants contend that the primary judge erred in finding that Mr Wills was knowingly concerned in or party to the College’s contravention of s 21 because the findings of fact made by the primary judge were not capable of satisfying the knowledge element of being knowingly involved. The findings of fact referred to by the appellants in the ground of appeal were the following:
2. Mr Wills was aware of a plan to implement the enrolment and withdrawal process changes and then the implementation of those changes (PJ [557]-[558]);
3. Mr Wills was aware of a profit maximising purpose in respect of the enrolment and withdrawal process changes (PJ [559]-[560]);
4. Mr Wills was aware of the “CA misconduct risk”, being a risk that consumers who had been subjected to agent misconduct would become enrolled in an online course and remain enrolled past the census date or dates in the course, and thereby incur a VFH debt (PJ [562]);
5. Mr Wills was aware of an “unsuitable enrolment risk”, being a risk that agents would recruit for enrolment in the online courses persons who would not be contactable by the College, and/or who would have no or minimal engagement with their online course, and/or who did not in fact wish to enrol in an online course, and/or who are otherwise not suitable for enrolment including by reason of lacking sufficient language, literacy and numeracy skills (PJ [563]);
6. Mr Wills was aware that the abolition of the outbound QA call and campus driven withdrawals would remove mechanisms to mitigate CA misconduct risk (PJ [564]);
7. Mr Wills was aware that there was a substantial increase in the number of students who became enrolled in an online course, in the number and proportion of students who passed at least census 1, and in the revenue of the College (PJ [565]);
8. Mr Wills was aware that the College claimed and/or retained from the Commonwealth VFH revenue (PJ [566]); and
9. Mr Wills knew that substantial numbers and proportion of students were getting nothing from the College yet they were incurring very substantial debts to the Commonwealth (PJ [574]-[575]).
10. As noted earlier, appeal ground 10 concerns the time at which Mr Wills knew certain matters. In effect, it is a contention that the primary judge erred in failing to properly identify the time at which Mr Wills knew the essential matters by which the College’s conduct was unconscionable. For the purposes of analysis of the grounds of appeal, it is simpler to keep the two grounds separate. Therefore, timing of knowledge will not be addressed expressly in this section of the reasons, but will be addressed in the next section which considers ground 10.
11. The appellants’ first argument on this ground of appeal concerns knowledge of risk. The appellants submitted that, for the purpose of accessorial liability, it is necessary to distinguish between general and specific knowledge, and that the latter is required (referring to Simester A, *The Mental Element in Complicity* (2006) 122 LQR 578-601 at 590). The appellants further submitted that, even if it were possible to establish that an alleged accessory was reckless in the face of risks, this would not be sufficient to establish accessorial liability, referring to *Giorgianni* at 495.
12. *Giorgianni* does not stand for the proposition that knowledge of risks is insufficient to establish accessorial liability; it stands for the proposition that an accessory must have knowledge of the essential matters which go to make up the offence. It can be accepted that if the offence is engaging in conduct in particular circumstances (such as driving with more than the prescribed quantity of alcohol in the blood), accessorial liability is not established if the accessory merely suspected (short of wilful blindness) that those circumstances existed or that there was a risk that those circumstances existed (see *Giorgianni* at 486 per Gibbs CJ, at 506-7 per Wilson, Deane and Dawson JJ). However, if the offence is engaging in conduct in a way that creates a serious risk of harm, then the accessory must have knowledge of the circumstances that create the serious risk of harm: see *Giorgianni* at 482 per Gibbs CJ. In each case, it is necessary to have regard to what are the essential matters which go to make up the contravention. In the present case, the essential matters included: (a) the risks of agent misconduct and the enrolment of unwitting and unsuitable students; (b) the processes that the College had in place to safeguard consumers against those risks; and (c) the changing of those processes in a manner that removed the significant safeguards.
13. The appellants’ second argument was to the effect that, on the primary judge’s findings, Mr Wills was not aware of two essential matters. The appellants submitted that:
14. first, unlike other officers of the College, the evidence did not establish that Mr Wills was aware that a poor student conversion rate (the proportion of enrolled students who passed through the first census date) prior to the enrolment process changes was because of the high proportion of students who were uncontactable and therefore subject to campus driven withdrawals (relying upon PJ [223] and [282]); and
15. second, while Mr Wills was aware of changes to the enrolment processes in a general sense or at a high level, he was not aware of the details (relying upon PJ [558] and [573]).
16. The appellants submitted that, while Mr Wills knew that the College had a poor conversion rate prior to the process changes and while he knew that campus driven withdrawals existed, he did not appreciate that the use of campus driven withdrawals was the reason for the poor conversion rate. Accordingly, even if Mr Wills subsequently acquired knowledge that campus driven withdrawals were no longer to be used by the College, that could not amount to knowledge that their removal increased the risk of unsuitable enrolments, let alone that it was predatory or contrary to some other norm. Indeed, in circumstances where Mr Wills did not know of its impact on conversion rates, there is no basis to conclude that Mr Wills would have regarded campus driven withdrawals as a significant issue. This is especially so given that Mr Wills was not aware of the details of the changes to enrolment processes.
17. It should be noted that the above submissions beg many questions about Mr Wills’s knowledge at different points in time. However, that will be addressed in the context of ground 10.
18. The above findings made by the primary judge are favourable to Mr Wills. The findings would be exculpatory of Mr Wills’s knowing involvement in the College’s unconscionable conduct if the findings concerned matters that were essential to the conclusion that the College’s conduct was unconscionable. The appellants’ submission seeks to cast the findings as essential. Plainly, the primary judge did not consider the matters to be essential. In our view, the primary judge’s evaluation was correct when regard is had to all of the facts and circumstances known by Mr Wills. In turning to the facts as found by the primary judge, we note again that Mr Wills chose not to give evidence in the proceeding to explain his role in the contravening conduct and the primary judge drew a *Jones v Dunkel* inference from his failure to give evidence. The primary judge’s findings with respect to Mr Wills’s knowledge were based on inferences drawn from the documentary evidence.
19. The first finding on which the appellants focus only concerns the connection between the College’s poor conversion rate (the proportion of enrolled students who passed through the first census date) and campus driven withdrawals; in other words, the proportion of students who did not pass the first census date because of the campus driven withdrawal policy. It is not a finding that Mr Wills was unaware of the College’s poor conversion rate; nor that he was unaware of the campus driven withdrawal policy; nor that he was unaware of the risks and problem of agent misconduct and unwitting and unsuitable student enrolments. The primary judge made significant findings of fact relevant to Mr Wills’s awareness of those matters. The following can be noted:
20. First, Mr Wills participated in a number of meetings which reported on and discussed the events at the Sero campus (a “co-provider” delivering the College’s online courses) in the period up to November 2014. Sero was a forerunner of what ultimately occurred at the College. Sero demonstrated what would occur if a VET provider outsourced the recruitment of students to agents, where the agents took charge of testing for language literacy, and numeracy, and where there was no campus driven withdrawal process for enrolled students who were uncontactable by the VET provider – some 85% of enrolled students passed the first census and incurred a VFH debt but never accessed their learning management system (see PJ [181]-[182]). A meeting was held between senior College staff, including Mr Cook, and senior executives of Site, including Mr Wills and Mr Dawson, on 15 December 2014. The minutes of the meeting record that Mr Cook provided the meeting with the background to Sero learning and the audit and specifically the problem that Sero was “not doing campus driven withdrawal and just processing through census regardless” and that, of the 340 students, 65 are engaged, 35 want to engage, 36 want to withdraw and “200 yet to be in contact with” (PJ [184], with reference to the minute). The same issue was discussed at Advisory Board meetings held on 17 December 2014 and 18 February 2015, of which Mr Wills was the meeting facilitator and in attendance (PJ [185]-[187]). The primary judge found (at PJ [188]):

The relevance of the above events in relation to Sero is that they demonstrate the awareness of not only the college but also the Advisory Board (including Mr Wills for Site) of the importance of a rigorous QA process with respect to enrolments to ensure that unsuitable students are not enrolled and a campus driven withdrawal process to ensure that if unsuitable students are enrolled they are withdrawn prior to incurring a VFH debt. It was apparent from the Sero experience that there was a risk of substantial numbers (or proportion) of students being enrolled who would be uncontactable by the college, who would get no benefit from their enrolment and who would incur a VFH debt unless there was a campus driven withdrawal process.

1. Second, Mr Wills sent or received regular communications concerning agent misconduct, which the evidence showed was prevalent and publicly known. Some communications concerned the College’s own agents (see for example PJ [191]); other communications concerned media investigations of agent misconduct (see for example PJ [197], [200] and [202]); other communications concerned government enquiries with respect to the VFH scheme and agent misconduct (see for example PJ [198]); other communications concerned government regulation to curb agent misconduct (see for example PJ [201] and [233]). It is significant that, on 16 June 2015, Mr Wills circulated a set of board papers for a meeting of the Advisory Board which attached the second interim report of the Senate Education and Employment References Committee inquiry into “Operation, regulation and funding of private vocational education and training (VET) providers in Australia” and which documented “aggressive marketing techniques” used by VET providers and their “brokers”. The primary judge found that this indicated that the attention of Mr Wills was being drawn to the problems and risks of agent misconduct (PJ [198]). The primary judge found (at PJ [204]):

The evidence identified above establishes that all the key personnel at the college, and Blake Wills at Site, were well aware that there was an ongoing risk of CA misconduct and that that misconduct could significantly harm the interests of substantial numbers of consumers. The harm included that consumers might be enrolled as students even though they were unsuitable or not genuinely interested in doing the course for which they were enrolled, or had in some way been tricked, deceived or confused into enrolling.

1. Third, the primary judge found that the College was well aware of the risk of unsuitable students being enrolled in their courses and the need to take steps to mitigate that risk, and that Mr Wills was also aware of this risk from, at least, the discussion of the Senate Committee enquiry in the Advisory Board on 12 May 2015 (PJ [199]) and the circulation of the Senate Committee’s second interim report by him on 16 June 2015 (PJ [198]).
2. Fourth, Mr Wills received the papers for and participated in the Management Meeting of the College on 19 August 2015 which concerned the College’s declining revenue and the actions proposed to stem the decline – viz, the changes to the enrolment process. The primary judge made the following findings with respect to the knowledge of the key officers of the College and Mr Wills (at PJ [242]-[243]):

242 By that point it was apparent to the key officers of the college that declining enrolments, which was negatively affecting revenue and EBITDA, and feedback from CAs that the enrolment process was too cumbersome – and from which I infer it was also less lucrative to the CAs – were key drivers for the revised enrolment process that was being developed. In short, the idea was to enable consumers to be enrolled as students more quickly and easily at the time that they were recruited by CAs, and to ensure that they passed through census in greater numbers by abolishing a significant contribution to attrition, namely campus driven withdrawals.

243 Mr Wills also had knowledge of those matter through the delivery of reports to him which he must be taken to have read and understood due to his key interest in the performance of the college, his responsibility on behalf of Site to oversee the college and his membership of and participation in the Advisory Board. These are not matters of detail that might be thought to have escaped Mr Will’s attention or to have been beneath his level of interest. They are important strategic issues which I infer that he would have been well alive to.

1. Sixth, Mr Wills received Mr Makar’s draft “Agent Management Review Report” on 1 October 2015 which identified that there was a risk of students being enrolled without the controls and support programs in place with some agents and that such enrolments represented a risk to the College with limited control over how they were recruited (PJ [343]).
2. Seventh, Mr Wills attended the Management Meeting of the College on 21 October 2015. The papers for the meeting showed a dramatic increase in enrolments and a consequential increase in VFH revenue. In his report, Mr Cook attributed the increase to the enrolment process changes (PJ [346]). At the meeting, Ms Edwards and Mohammed Akbery reported that students were not engaging with their courses (by logging into the learning management system) (PJ [348]).
3. Eighth, on 26 October 2015 Mr Wills circulated an email that discussed the VFH Guideline which included the FAQ which recorded the Department’s expectation that “if students could not be contacted and/or they had not participated in the unit before the census date, a provider would cancel the enrolment to avoid the student incurring the debt.” The primary judge inferred that Mr Wills read and understood that FAQ (PJ [350]).
4. Ninth, Mr Wills attended a Site board meeting on 3 November 2015 (PJ [358]). The papers included a First Quarter Review 2015/2016 that was authored by Vernon Wills, Mr Dawson and Mr Wills (PJ [356]). The Review included a bar graph showing the monthly figures for the College from January to October 2015 of the number of students enrolled and the number passing through first census (PJ [357]). In the months from January to August the conversion rate varied between a minimum of 46% and a maximum of 66% with the average appearing to be somewhere a little above 50% (ie, about half the enrolled students withdrew or were withdrawn prior to first census). By September, the conversion rate had increased to 71% and by October to 76%. Thus, after the enrolment process changes, including the abolition of campus driven withdrawals, the number of students withdrawing before first census decreased to about a third in September and a quarter in October. These figures were collated by Mr Wills and presented by him to the Site board.
5. Tenth, Mr Wills attended the Management Meeting of the College on 18 November 2015 (PJ [363]). The papers for the meeting again showed a dramatic increase in enrolments and a consequential increase in VFH revenue. In his report, Mr Cook attributed the increase to the enrolment process changes (PJ [360]).
6. Eleventh, documents prepared by or for Mr Wills in mid-November 2015 reflected an assumption that student engagement (logging into the learning management system) was forecast to be as low as 20% (PJ [366] and [367]).
7. The second finding on which the appellants focus concerns Mr Wills’s knowledge of the details of the changes to the enrolment processes. The primary judge’s finding was as follows (at PJ [558]):

While I have said that the email at [325] above suggests that at as at 13 September 2015, Mr Wills may not have been aware of the details of the changes to the enrolment and withdrawal processes that had commenced, it does not mean he was not aware of the changes in a more general sense (see [259] above). I have already inferred that he was aware of them by the Management Meeting of 16 September 2015 (at [330] above). Given this, I do not accept the general submissions about Mr Wills not reading the material he was sent in these instances. I therefore find that Mr Wills was aware of the matters pleaded at SOC [132] and given his attendance at the meeting and his role, was practically connected with them.

1. The finding about “details” must be understood in the context of his Honour’s reasons as a whole and the express cross-reference to the finding made at PJ [325]. The following matters can be noted:
2. First, as a result of receiving the papers for the Management Meeting of the College on 19 August 2015 and attending that meeting, the primary judge found that Mr Wills knew that a revised enrolment process was being developed to address complaints from agents, which would enable students to be enrolled more quickly and easily at the time they were recruited by agents and to ensure that they pass through census in greater numbers by abolishing campus driven withdrawals (PJ [242] and [243]). The minutes record that, at the meeting, Mr Cook discussed the problem of the current enrolment process “slowing down conversions” and both Mr Cook and Mr Wills discussed the plans being put in place to change the admissions process (PJ [249]-[252]).
3. Second, on 20 August 2015 Mr Wills received a follow up report from Mr Cook about the College’s underperformance and the steps being taken to address the underperformance. Significantly, the report commenced with a reference to work that had been done by Mr Wills to review the College’s competitors, including with respect to their admissions process. On the topic of admissions, Mr Cook’s report reiterated that a revised enrolment process was due to commence on 4 September 2015 (PJ [278]‑[280]).
4. Third, between 20 and 24 August 2015, Mr Wills was copied to emails concerning the details of some of the process changes, which included details of the proposed enrolment portal (PJ [283]).
5. Fourth, the primary judge inferred that, by September 2015, Mr Wills was aware of the essential elements of the proposed changes. His Honour found (at PJ [282]):

He was certainly aware that the enrolment and withdrawal processes were going to be changed, and I infer that he was aware of the essential elements of those changes, namely the change from an outbound QA call to an inbound call in the presence of the CA and the abolition of campus driven withdrawals before first census. That is the most probable inference to be drawn from the reports to the Management Meeting on 19 August 2015, the discussions at that meeting and Mr Wills’s responsibility for, and proven involvement in, oversight of the college as a business unit including for planning and accountability. It is also consistent with what he himself on more than one occasion described as reduction of the college’s autonomy from Site and its increased integration since June 2015.

1. Fifth, the primary judge found that the enrolment process changes were clearly driven by an analysis on the part of the College and Mr Wills (PJ [284]). The College’s enrolment processes were seen as uncompetitive in the market in the sense that agents were insufficiently motivated to recruit for the College as opposed to its competitors. That in turn meant that the College’s levels of enrolment were far lower than had been expected and on which the College’s budget had been prepared. There was a strong financial driver to the changes as Site had the expectation that the College should meet its budgeted revenue and EBITDA. There was a dominant concern to “streamline” the enrolment processes and increase the conversion rate so as to better incentivise agents. It is those concerns that led, respectively, to the enrolment process changes.
2. The primary judge’s specific finding with respect to the “details” of the changes to the enrolment processes (at PJ [325]) was made with respect to an email sent by Mr Wills to Mr Cook (copied to Vernon Wills) on 13 September 2015. The email commented on the College’s financial results for August 2015 which showed a loss for the month of approximately $300,000. In that context, Mr Wills’s email stated that “we [which we infer was a reference to Site] need to understand what has been achieved in the past four weeks in the following areas which were discussed in the July Management meeting with significant emphasis and urgency”. The email listed the topics that appeared in Mr Cook’s report on 20 August 2015, including “Admission Process”. While the primary judge found that the email suggested that, at that stage, Mr Wills may not have been aware of the details of the changes to the enrolment processes that had commenced one week earlier, but that Mr Wills was signalling an intention to get into the detail to ensure that the financial position of the College turned around. With respect to the primary judge, it is difficult to understand why the email suggested that. The email suggests that Mr Wills was seeking to understand whether and to what extent the performance of the College had altered (improved) since the changes had been implemented. That conclusion is supported by the immediate responses from Mr Cook. On 14 September 2015, Mr Cook sent Mr Wills the College’s “Business Unit Monthly Report” for August 2015 in which Mr Cook noted that “implementation of the revised enrolment process on September 4, 2015 has increased sales volume…” (PJ [326]). On 15 September 2015, Mr Cook sent an email to Mr Wills showing that applications for enrolment in the week 7-13 September 2015 had increased dramatically which he characterised as “showing early signs of recovery” (PJ [327]). At the Management Meeting held on 16 September 2015, which Mr Wills attended by Skype, the minutes record that Mr Cook “advised the new enrolment system is working well, it presents well, increased headcount and have re-recruited old CAs” (PJ [329]). Read in context, the primary judge’s finding with respect to the “details” of the changes to the enrolment processes provides little if any support for the appellants’ contention that Mr Wills did not have knowledge of the essential matters that comprise the contravention.
3. The primary judge ultimately found that Mr Wills was aware of: the agent misconduct risk (at PJ [562]); of the unsuitable enrolment risk (at PJ [563]); the implementation of the enrolment process changes (the abolishment of the outbound QA call and campus driven withdrawal processes) (at PJ [557]-[558]); that those changes would remove mechanisms to mitigate the agent misconduct risk and the unsuitable enrolment risk (at PJ [564]); and that the changes would likely lead to a substantial increase in the number of students who became enrolled in an online course, in the number and proportion of students who passed at least the first census and in the revenue of the College (at PJ [565]). In our view, having regard to the extensive findings of primary fact made by the primary judge, there is no error in those ultimate findings. Further, they are the essential matters showing that the College engaged in a system of conduct that was unconscionable.
4. For the most part, the appellants contest the primary judge’s ultimate findings by pointing to other findings that may be regarded as somewhat favourable to Mr Wills. In written submissions, the appellants referred to the following:
5. the College had four on-site campuses and also provided courses online and, while the ACCC’s case was concerned with the online campus, Mr Wills had a broad area of responsibility that extended well beyond that part of the business (PJ [348]-[349]);
6. Mr Wills was not part of the Distance Campus Management & Leadership Team (PJ [276]), nor was he part of 'Project TBA' which was responsible for redesigning and implementing the enrolment processes (PJ [258]);
7. the rationale identified to Mr Wills for the enrolment process changes on 19 August 2015 was that the complexity of the enrolment process was slowing down conversions (PJ [249]);
8. at the meeting on 19 August 2015, Mr Wills expressed the view that competitors enjoyed an advantage because they had “better admissions processes” (PJ [251]);
9. a report of Mr Cook dated 20 August 2015 noted that Mr Wills had referred to excellent admissions processes of competitors (PJ [279]-[280]);
10. that report also referred to a need to ensure that “the appropriate measures are in place to ensure the quality of our services, and the protection of our customers” (PJ [200]);
11. the report also stated that a review of enrolment processes was underway to ensure “we are competitive in marketplace yet remain compliant” (PJ [280]);
12. at or around that time, Mr Wills was informed that the combination of a language, literacy and numeracy and pre-enrolment evaluation would “guide advice to the applicants as to their suitability or capacity and capability” (PJ [213]);
13. on 20 September 2015 Mr Wills was copied on an email in which Mr Cook stated that “I will add, while these adjustments in process are necessary given the current environment, they are adding to what is already a very robust and rigorous agent selection, on boarding, and monitoring process that we currently have in place” (PJ [333], with reference to the email);
14. in October 2015 Mr Wills was informed that strategies to increase revenue were having the desired effect, and also that one full time equivalent employee had been assigned to monitor the performance, behaviour and activities of course advisers (PJ [346]); and
15. on 21 October 2015, Mr Wills made a number of strategic recommendations directed to “improving student outcomes” (PJ [348]).
16. In their submissions, the appellants relied on two further asserted facts:
17. that on 19 September 2015, Mr Wills was copied on an email which revealed that an additional three questions had been added to the QA call, that additional requirements had been imposed on sales agent tracking and that the College had commenced a continuous improvement process in relation to sales agent training; and
18. that on 11 December 2015, Mr Wills sent emails to WA Consumer Protection in connection with the Looma investigation in which he stated, amongst other things, that “Our organisation has filters in place to identify poor sales behaviour and students who are not appropriate to undertake study” and that “Our admissions system is designed to ensure that the student has a thorough understanding of the course, what it costs & what level of commitment is required”.
19. Those two asserted facts were not findings made by the primary judge, and there was no ground of appeal directed to the failure of the primary judge to make those findings or consider those matters. In those circumstances, we disregard those matters.
20. The matters listed by the appellants that were the subject of findings by the primary judge are, unsurprisingly, a carefully chosen list of facts that may be considered to be favourable to Mr Wills. However, each must be considered in context, in light of all other facts and circumstances. When considered in context, most of them are broadly neutral on the question to be determined and none contradict the ultimate findings made by the primary judge. They were all matters considered by the primary judge in evaluating whether the system of conduct of the College was unconscionable in all of the circumstances. For the reasons given earlier, we are not persuaded that there was any error in the primary judge’s overall evaluation. That conclusion has been reached after conducting a review of the evidence put before this Court, while also recognising the “natural limitations” that exist in the case of any appellate court proceeding wholly or substantially on the record, as explained in *Fox v Percy*. For the same reason, we are not persuaded that there was any error in the primary judge’s overall evaluation that Mr Wills had knowledge of all of the essential matters that rendered the College’s system of conduct unconscionable.
21. For the above reasons, we reject appeal ground 3B.

## Appeal ground 10: timing of knowledge

1. By appeal ground 10, the appellants contend that the primary judge erred in finding that Mr Wills was knowingly involved in the College’s contravention of s 21 of the ACL as the primary judge did not find, and it was not available on the evidence for the primary judge to find, that Mr Wills knew of all of the essential elements of the College’s contravention, as identified in paragraph 1 of the declaration made on 4 August 2021, at the time that Mr Wills engaged in the conduct found by the primary judge to satisfy the conduct element of being knowingly involved (PJ [576]).
2. The appellants submitted, and it is uncontroversial, that accessorial liability requires that the relevant conduct and the relevant knowledge must exist at the same time. The appellants argued that, in the present case, the primary judge had regard to knowledge obtained by Mr Wills after the end of the impugned enrolment period on 18 December 2015.
3. The issue raised by this ground of appeal is similar to that raised by ground 2 of the appeal by the College and Site. It is necessary to recap the conclusions reached earlier with respect to that ground:
4. First, the ACCC’s case was that the conduct of the College that was unconscionable had two composite elements: implementing the enrolment process changes during the impugned enrolment period and claiming and retaining the VFH revenue in respect of students who enrolled during the impugned enrolment period.
5. Second, the ACCC’s case was also that the conduct of the College was unconscionable from its initial implementation, and the conduct remained unconscionable throughout the impugned conduct period (being the period through to September 2016 during which the College claimed and retained VFH revenue that was derived from student enrolments that occurred during the impugned enrolment period).
6. Third, the ACCC’s case was based on alternative allegations: that the impugned conduct was unconscionable from its inception having regard to the College’s awareness of facts and matters at the commencement of the period when the enrolment process changes were made, and remained unconscionable throughout the impugned conduct period; or that the impugned conduct became unconscionable at a point in time during the impugned conduct period when the College became sufficiently aware of the consequences of the changes.
7. Fourth, the ultimate findings of the primary judge were based on the first of the two alternatives: that that the impugned conduct was unconscionable from its inception and remained unconscionable throughout the impugned conduct period.
8. The primary judge found that Mr Wills was knowingly concerned in the entirety of the College’s unconscionable conduct. That is made clear by his Honour’s findings at PJ [575] and [576]:

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

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

1. It is also confirmed by paragraph 2 of the declarations made by the primary judge on 4 August 2021 which was in the following form:

Blake Alan Wills (**Wills**) was knowingly concerned in, or a party to, CCC’s contravention of s 21 of the ACL as set out in paragraph 1 above

1. To have been an accessory to the College’s unconscionable system of conduct from its inception, Mr Wills must have known the essential matters that rendered the conduct unconscionable at that time (ie, at or about late August 2021). As summarised in the context of the appeal by the College and Site, the essential matters that rendered the College’s conduct unconscionable at its inception were: the College knew of the risks of agent misconduct and unwitting and unsuitable students being enrolled; the College knew that the outbound QA call procedure and the campus driven withdrawal process were important safeguards to protect the interests of students who were enrolled unwittingly or who were unsuitable for the course in which they were enrolled; to counter declining enrolment and declining revenue, brought about by agents referring students to other VET providers, the College implemented the enrolment process changes (the so-called profit maximising purpose) knowing that it increased the risk of the enrolment of unwitting and unsuitable students (which was already occurring regularly at the College); and the College knew, or ought to have been aware, of the immediate consequences of the changes, which was to escalate the numbers of students who were enrolled unwittingly or who were unsuitable for the course in which they were enrolled. The relevant question is whether Mr Wills knew all of those matters at the time that the changes were implemented (7 September 2015), or whether he knew them at a later point in time during the impugned conduct period.
2. We consider that the primary judge’s findings do not support a conclusion that Mr Wills knew all of the above matters as at 7 September 2015. The primary judge’s findings support a conclusion that Mr Wills knew most of those matters as at late August 2015. Specifically, Mr Wills knew: of the agent misconduct risk (PJ [562]); of the unsuitable enrolment risk (PJ [563]); of the implementation of the enrolment process changes (the abolishment of the outbound QA call and campus driven withdrawal processes) (at PJ [557]-[558]); that those changes were being made to reverse the College’s declining enrolments and conversion rate (at PJ [559]-[560]); and that the changes would likely lead to a substantial increase in the number of students who became enrolled in an online course, in the number and proportion of students who passed at least the first census, and in the revenue of the College (at PJ [565]).
3. However, we do not consider that the primary judge’s findings support a conclusion that, as at 7 September 2015, Mr Wills had a sufficient awareness of the extent to which the outbound QA call procedure and the campus driven withdrawal process were important safeguards to protect the interests of students who were enrolled unwittingly or who were unsuitable for the course in which they were enrolled. This is an important fact that rendered the College’s conduct unconscionable. Certainly, it can be inferred that Mr Wills had some awareness of that fact by virtue of the Sero campus investigation. However, we consider that to be an insufficient basis to infer that Mr Wills had a real appreciation, as at 7 September 2015, of the full consequences of the changes.
4. The primary judge’s findings do support a conclusion, however, that Mr Wills had a sufficient awareness of the extent to which the outbound QA call procedure and the campus driven withdrawal process were important safeguards for students, and the effect of removing those safeguards, by the time Mr Wills became acting CEO of the College on 20 November 2015. The full consequences of the changes were apparent at that time. As set out earlier:
5. On 1 October 2015 Mr Wills received a report identifying the risk of students being enrolled without the controls and support programs in place and that such enrolments represented a risk to the College with limited control over how they were recruited.
6. At the Management Meeting of the College on 21 October 2015, it was apparent that the changes had produced a dramatic increase in enrolments and Ms Edwards and Mohammed Akbery reported that students were not engaging with their courses.
7. By 26 October 2015, Mr Wills was aware of the Department’s expectation that “if students could not be contacted and/or they had not participated in the unit before the census date, a provider would cancel the enrolment to avoid the student incurring the debt.”
8. By 3 November 2015, Mr Wills had produced an analysis of enrolment conversion rates at the College which showed a dramatic increase after the implementation of the enrolment process changes.
9. By mid-November 2015, both the College and Mr Wills were adopting an assumption that student engagement (logging into the learning management system) was forecast to be as low as 20%.
10. Having regard to the above matters, we consider that Mr Wills was knowingly concerned in the College’s unconscionable conduct from the time Mr Wills became acting CEO of the College on 20 November 2015. The fact that the College had engaged in unconscionable conduct from an earlier point in time (viz, from the implementation of the enrolment process changes) does not negative a conclusion that Mr Wills became a knowing participant in the conduct at a later point in time. As discussed earlier, Mr Wills had been a participant in the conduct through his support for the proposed changes. Mr Wills remained a participant in the conduct throughout by virtue of his ongoing supervision of the management and decision-making at the College, including during the period he was acting CEO. But his knowledge of an essential matter, the extent to which the outbound QA call procedure and the campus driven withdrawal process were important safeguards to protect the interests of students who were enrolled unwittingly or who were unsuitable for the course in which they were enrolled, was gained in the period from late August to 20 November 2015.
11. In respect of the period following the implementation of the enrolment process changes and throughout the impugned conduct period, his Honour found that the College knew that its dramatic increase in revenue and turnaround in profits was substantially built on VFH revenue from the enrolment of unwitting and unsuitable students who would gain no benefit from their enrolment but who incurred very substantial debts to the Commonwealth as a result of their enrolment. Having regard to the same factual findings made by the primary judge, we consider that Mr Wills was aware of those matters from the time Mr Wills became acting CEO of the College on 20 November 2015. It is also the fact that Mr Wills’s knowledge continued to grow from that point onwards, starting with the receipt of a letter from the ACCC on 14 January 2016 (PJ [407]).
12. For those reasons, we would allow ground 10 in part. We would replace the primary judge’s implicit finding that Mr Wills was knowingly concerned in the College’s unconscionable conduct from the date of implementation of the enrolment process changes, to a finding that Mr Wills was knowingly concerned in the College’s unconscionable conduct from the date he became acting CEO of the College on 20 November 2015.

## Appeal grounds 3C to 9: miscellaneous challenges to factual findings

1. Appeal grounds 3C to 9 consist of miscellaneous challenges to the findings of fact made by the primary judge. In the appellants’ written submissions, they were addressed *seriatim*.
2. For the most part, the matters raised by these grounds have been addressed earlier in these reasons. They will be dealt with briefly.
3. By ground 3C, the appellants contend that the primary judge erred (at PJ [557]-[558]) in finding that Mr Wills knew of the plan to implement the enrolment process changes and then the implementation of those changes. The appellants’ argument is based on his Honour’s finding that Mr Wills may not have known the “details” of the changes. That has been addressed earlier. We consider that there is no error in the primary judge’s findings. To the extent there is any error by the primary judge, it is in understating the extent of Mr Wills’s knowledge.
4. By ground 4, the appellants contend that the primary judge erred in finding that, by reason of reports delivered to him in August 2015, Mr Wills knew that the key drivers for implementing the enrolment process changes was to enable consumers to be enrolled as students more quickly and easily at the time they were recruited by agents, and to ensure that they pass through census in greater numbers by abolishing a significant contribution to attribution, namely campus driven withdrawals (PJ [242]-[243]). The appellants relied on their submissions with respect to ground 3B, which have been addressed earlier. Again, we consider that there is no error in the primary judge’s findings.
5. By appeal ground 5, the appellants contend that the primary judge erred in finding that, from about August 2015, Mr Wills knew that the enrolment process changes were being made for the “Profit Maximising Purpose”. In submissions, the appellants acknowledged that the “real vice” in the finding is that it depended on knowledge of the enrolment process changes which is challenged by ground 3C. We reject this ground for the same reason as ground 3C.
6. By appeal ground 6, the appellants contend that the primary judge erred in drawing an inference that Mr Wills was aware that the abolishment of the outbound QA call and campus driven withdrawal processes would remove mechanisms to mitigate the agent misconduct risk. Appeal ground 7 is to the same effect, that the primary judge erred in finding that Mr Wills knew that the enrolment process changes that were introduced had the effect of weakening the protections that the College otherwise had in place against agent misconduct and unsuitable enrolment risks. That matter has been addressed earlier. We consider that there is no error in the primary judge’s findings, other than as to the timing of the requisite knowledge.
7. By appeal ground 8, the appellants contend that the primary judge erred in finding that Mr Wills was aware that the enrolment process changes would likely lead to the “process changes results”. Appeal ground 9 is to the same effect, that the primary judge erred in finding that Mr Wills was aware of the process change results. Again, that matter has been addressed earlier and we consider that there is no error in the primary judge’s findings, other than as to the timing of the requisite knowledge.

# F. appeal concerning consumers a to e

## Overview

1. Grounds 7 and 8 of the notice of appeal of the College and Site concern the primary judge’s findings that the conduct of the recruitment agents who recruited Consumers A to E was unconscionable in contravention of s 21 of the ACL and misleading or deceptive or likely to mislead or deceive in contravention of s 18(1) of the ACL, and/or included false or misleading representations in contravention of ss 29(1)(i) or (m) of the ACL, and that the conduct of the agents is taken to be the conduct of the College by reason of s 139B(2) of the CCA such that the College is taken to have contravened ss 18, 21 and 29 of the ACL.

## Appeal ground 7

1. By appeal ground 7, the College contends that the primary judge erred in finding that the conduct of the agents who recruited Consumers A, B, D and E was conduct engaged in “on behalf of” the College within the meaning of s 139B(2) of the CCA.
2. The College submitted that the primary judge correctly identified that the relevant conduct was outside each agent’s actual authority (PJ [619], [657], [723], [754]). The College submitted that the primary judge erred, however, in finding that the relevant conduct was within the apparent authority of each agent. The College argued that s 139B(2) invokes principles of the law of agency: in cases where a transaction is prima facie contrary to the principal's interests, lacks an evident connection to the principal's interests or when the third party has knowledge that the agent's motives are inconsistent with its duty to the principal, the agent's actions usually fall outside ostensible authority (referring to Dal Pont GE, *Law of Agency* (3rd ed, LexisNexis Butterworths, 2014) [20.45], [20.48]-[20.49] at pp 484-86 and the cases cited therein). In the present case, the College argued that the findings of the primary judge show that the agent was subverting the College’s processes and that this would have been apparent to Consumers A, B, D and E. In that regard, the College relied upon the evidence given by Consumers A, B, D and E that they were “coached” by the agent when giving answers during the inbound QA call (PJ [602], [603], [605], [641], [648], [708], [743] and [744]).
3. The College’s ground of appeal, and its submissions, elide two separate concepts within s 139B(2). The subsection provides (relevantly) as follows:

(2) 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) …

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

1. It can be seen that the subsection contains two elements. First, it applies to conduct engaged in on behalf of a body corporate. If the conduct is not engaged in on behalf of the body corporate, the subsection has no application. Second, the subsection applies to such conduct if it is engaged in 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. Again, if the conduct is not engaged in by such a person within that authority, the subsection has no application.
2. Section 139B(2) of the CCA derives from s 84(2) (see the Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) at [18.35]). The principles applicable to s 84(2) are equally applicable to s 139B(2): *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* [2018] FCA 1408 at [280] (Gleeson J). Drawing upon the principles established with respect to s 84(2) of the CCA, the primary judge discussed the meaning of the two phrases “on behalf of the body corporate” and “within the scope of the actual or apparent authority” at PJ [110]-[115]. The principles were also recently discussed in *Australian Competition and Consumer Commission v BlueScope Limited (No 5)* [2022] FCA 1475 (***BlueScope***) (at [154]‑[160]). Drawing upon the discussion in the primary judgment and in *BlueScope* (and relying upon the authorities referred to therein), the following matters can be noted:
3. First, the phrase “on behalf of the body corporate” conveys a meaning similar to the phrase “in the course of the body corporate’s affairs or activities”.
4. Second, the phrase “within the scope of the person’s actual or apparent authority” invokes common law principles concerning the authority of employees and agents.
5. Third, the scope of a person’s actual authority (whether as employee or agent) is ascertained from the terms of the contract governing the relationship.
6. Fourth, apparent (or ostensible) authority arises from a representation made by the principal as to the scope of authority. The representation which creates the apparent authority may take a variety of forms of which the most common is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal’s business with other persons.
7. Fifth, it will usually be the case that the actual authority of an employee or agent does not extend to the commission of unlawful acts. Nevertheless, s 139B(2) will apply where the unlawful conduct is within the scope of the apparent authority of the employee or agent. This will be so where the employee or agent has authority to enter into transactions of the sort in question.
8. The misleading and unconscionable conduct engaged in by the recruitment agents with respect to Consumers A, B, D and E was summarised earlier in these reasons. It was undertaken in the course of signing up the student for enrolment. One part of the conduct, but only one part, related to the inbound QA call.
9. The primary judge was correct to find that the misleading and unconscionable conduct engaged in by the recruitment agents with respect to Consumers A, B, D and E was conduct engaged on behalf of the College. The agents were contracted by the College to promote and market the courses offered by the College. As found by the primary judge, the conduct engaged in by the agents was undertaken for the purpose of signing up Consumers A, B, D and E to the College’s courses for the benefit of the College (PJ [619], [657], [724], [754]). As such, the conduct was undertaken in the course of the College’s affairs or activities.
10. The primary judge was also correct to find that the misleading and unconscionable conduct engaged in by the recruitment agents with respect to Consumers A, B, D and E was conduct within the scope of the agent’s apparent authority (also at PJ [619], [657], [724], [754]). The bases for the primary judge’s conclusion were that:
11. the relevant agency agreements required the agent to ensure that prospective students were informed that the agent was providing sales services “as an agent” for the College;
12. by styling the agent as a “course advisor” for the College and sending the agent into the field as such, the College held out to the world that the agent would have the usual or expected authority of a course advisor, which gave the agent the apparent authority to make representations on behalf of the College with regard to enrolment; and
13. the contravening conduct occurred in the course of recruiting persons as students, which was conduct the agent was authorised to engage in.
14. The College’s only answer to that reasoning is that, during the inbound QA calls, the respective agents coached Consumers A, B, D and E as to the answers to be given. The College submitted that Consumers A, B, D and E should have been on notice that, by coaching the answers given during the call, the agents were not acting with the authority of the College and that the agents were subverting the College’s processes. We reject that submission. The evidence shows that Consumers A, B, D and E were both misled and pressured by the agents during the sales process. Consumers A, B, D and E had no prior information about the College’s enrolment processes and could not have known that the agent should not be coaching them. It is clear from the evidence that Consumers A, B, D and E were entirely confused by the whole process. As the inbound QA call occurred at the end of the sales process and was initiated by the agents, Consumers A, B, D and E were entitled to assume that the College had given the agents authority to assist them in answering the questions that were asked. That conclusion is not altered by the fact that Consumer B was suspicious of the process during the call (see PJ [641]). The recruiting agent told Consumer B that the call was with her “supervisor” (PJ [641]), which objectively indicated that the agent was acting with the authority of the College.
15. For those reasons, we reject appeal ground 7.

## Appeal ground 8

1. By appeal ground 8, the College contends that the trial judge erred in finding that the College engaged in conduct that was unconscionable “in all the circumstances” in relation to Consumers B to E in circumstances where, upon learning of the conduct to which Consumers B to E were subjected, the College withdrew Consumers B to E from the courses they had enrolled in and remitted all VFH fees or debt. The College submitted that, once the College became aware of the agents' misconduct, it cancelled the enrolments of Consumers B to E and reversed their VFH debts (PJ [654], [690], [719]-[720] and [751]). The College argued that, by paragraph 22(1)(j) of the ACL, conduct engaged in after a contract has been entered into is a relevant consideration. In those circumstances, the primary judge should have held that the College did not act unconscionably in respect of those persons.
2. It can be accepted that the College’s actions in cancelling the enrolments of Consumers B to E and reversing their VFH debts is a relevant consideration in assessing whether the College’s conduct was unconscionable in all of the circumstances. As observed by the College, s 22(1)(j)(iv) provides that, if there is a contract between the supplier and the customer for the supply of the relevant goods or services, the court must have regard to any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract.
3. The primary judge recognised that the actions taken by the College to protect students from agent misconduct are relevant considerations in the assessment of whether the College engaged in unconscionable conduct in all the circumstances. In the context of the allegation of systemic unconscionable conduct, his Honour observed that the unconscionability of the conduct could have been cured, or at least ameliorated, by the College not claiming or retaining the revenue derived from the conduct and reversing the students’ debts (PJ [507]). So too, in respect of Consumers B to E, the primary judge considered whether the reversal of their debts should lead to the conclusion that the conduct of the College, in all of the circumstances, was not unconscionable. His Honour concluded that it did not (PJ [663], [697], [729], [758]). Although not expressed at any length, we understand his Honour’s reasoning to be that the cancellation of the enrolment did not remove the fact that unconscionable conduct had occurred during the enrolment process and that the enrolment caused distress to those persons.
4. Respectfully, we are unable to agree with his Honour’s evaluation of the conduct of the College with respect to Consumers B to E. We consider that the College’s conduct with respect to those persons, taken as a whole and having regard to all the circumstances, cannot be characterised as unconscionable.
5. As summarised earlier in these reasons, Consumers B to E were the victim of both misleading and unconscionable conduct by the agents who recruited them for enrolment at the College. The College’s decision to cancel their enrolments does not affect the conclusion that misleading conduct occurred, and the misleading conduct is taken to be conduct of the College. The decision to cancel their enrolment did, however, mitigate the harm suffered by those persons.
6. The position is different in respect of the unconscionable conduct. The College’s decision to cancel the enrolments of Consumers B to E does not affect the conclusion that the agents engaged in unconscionable conduct. If proceedings had been brought against the recruiting agents, a finding would have been made that the recruiting agents had engaged in unconscionable conduct. Nor does it affect the conclusion that the conduct of the agents is taken to be conduct of the College. However, the decision to cancel the enrolments of Consumers B to E is also part of the relevant conduct of the College that must be taken into account. In our view, it is highly relevant that, when the College learned of the unconscionable treatment of Consumers B to E by its recruiting agents, the College acted swiftly to remedy the situation and cancel their enrolments. The findings of the primary judge indicate that there was no material delay in taking action and the College did not occasion Consumers B to E any further harm or stress in responding to their complaints. To ignore the remedial action taken by the College would be to fail to take into account all relevant circumstances in assessing whether the College engaged in unconscionable conduct.
7. For those reasons, we would uphold appeal ground 8. The appropriate order is to set aside paragraphs 8, 11, 14 and 17 of the declarations made on 4 August 2021.
8. For completeness, it should be observed that the circumstances of Consumers B to E, involving cases of individual unconscionable conduct, are entirely different to the circumstances concerning the College’s systemic unconscionable conduct. As discussed earlier in these reasons, the College sought to place reliance on the “precautions” it took against the risk of agent misconduct, which included reversing enrolments or reimbursing students’ VFH debts in cases in which the College thought agent misconduct had occurred. In respect of those so‑called “precautions”, the primary judge found that they were insufficient to protect students and there was no evidence from the corporate respondents to support any finding that any officer on behalf of the corporate respondents believed that they operated effectively to protect students (PJ [526]). In respect of the College’s actions to investigate complaints of agent misconduct, the primary judge’s findings demonstrated that the College’s actions in this respect were wanting. Overall, the primary judge concluded that the quality and nature of complaint handling and investigations was not such as to have justified any belief that it contributed significantly to reducing the risk of agent misconduct or unsuitable enrolment (PJ [460]).

# G. conclusion and orders

1. For the reasons given above, in our view both appeals should be dismissed save in three respects.
2. First, as discussed in the context of ground 2 of the appeal by the College and Site, paragraph 1 of the declarations made by the primary judge does not aptly reflect his Honour’s findings in that it might be taken to suggest that the impugned conduct was unconscionable from its inception on the basis of facts and circumstances that occurred at a later point in time. As the matter has been raised by the appeal, the appropriate order is to vary or set aside the first declaration.
3. Declarations are commonly made at the conclusion of civil regulatory proceedings. As observed by the Full Court in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 at [93]:

Declarations relating to contraventions of legislative provisions are likely to be appropriate where they serve to record the Court’s disapproval of the contravening conduct, vindicate the regulator’s claim that the respondent contravened the provisions, assist the regulator to carry out its duties, and deter other persons from contravening the provisions: *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2006] FCA 1730; (2007) ATPR 42-140 at [6], and the cases there cited; *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at [95].

1. To have utility in the context civil regulatory proceedings, the declaration should indicate the gist of the findings that identify the contravention of the applicable statutory prohibition: *Rural Press Ltd* at [89] (Gummow, Hayne and Heydon JJ). In *Australian Competition and Consumer Commission v Danoz Direct Pty Ltd* [2003] FCA 881; 60 IPR 296 (***Danoz Direct***), Dowsett J observed (at [260]):

…It is important that any declaration be framed so as to convey a limited and accurate message to those who have an interest in its subject matter. It is unlikely that any good purpose will be served by numerous declarations which merely reflect the various misrepresentations and the various occasions on which they were made. The most effective form of declaration will accurately reflect the impugned conduct in a concise way.

1. Dowsett J's observations have been referred to in many decisions, including *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* [2006] FCA 1427; 236 ALR 665 at [63] (Kiefel J) and *Australian Securities and Investments Commission v Westpac Banking Corporation (No 3)* [2018] FCA 1701; 131 ACSR 585 at [38] (Beach J). To similar effect are the statements of Gordon J in *Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd* [2015] FCA 274 that declarations must be “informative as to the basis on which the Court declares that a contravention has occurred” and “should contain appropriate and adequate particulars of how and why the impugned conduct is a contravention of the Act” (at [83]).
2. On occasions, there are difficulties in framing a declaration that states, in a concise yet informative way, the Court’s finding that a person has contravened a statutory prohibition, particularly in cases such as the present involving a contravention of s 21 of the ACL. The conclusion that a person has contravened s 21 requires an examination of all relevant circumstances, and frequently those circumstances are extensive. The purpose of a declaration is not to provide a summary of the Court’s findings. The purpose is to declare the Court’s determination of a right, duty or liability that was the subject of controversy between the parties: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582 (Mason CJ, Dawson, Toohey and Gaudron JJ).
3. In our view, a real question arises whether the Court’s finding in the present case should be recorded in the form of a declaration. A declaration in the context of a civil regulatory proceeding only has utility in so far as it is capable of succinctly identifying the contravening conduct. Unless that can be done, the declaration will not serve its intended purpose of recording the Court’s disapproval of the contravening conduct or deter other persons from contravening the provisions. A more succinct statement of the key integers of the College’s contravening conduct might be as follows:

In circumstances where:

(a) the first respondent, Productivity Partners Pty Ltd (ACN 085 570 547) trading as Captain Cook College (**CCC**) was a registered training organisation under the *Higher Education Support Act 2003* (Cth) and supplied vocational education and training (**VET**) courses to students through an “online” campus under the Commonwealth’s Vocational Education and Training Fee Higher Education Loan Program (**VFH scheme**);

(b) CCC engaged marketing and sales agents (**recruitment agents**) on a commission basis to recruit students to enrol in its online courses;

(c) CCC knew that there was a real risk, that regularly materialised, that recruitment agents would engage in unethical conduct in the recruitment of students with the result that students became enrolled at CCC in circumstances where the student did not do so willingly and with full knowledge of the obligations being incurred under the VFH scheme or where the student was unsuitable for enrolment because they lacked sufficient language, literacy or numeracy skills or access to technology;

(d) CCC had previously taken steps to reduce the risk referred to in paragraph (c) by:

(i) confirming the students’ enrolment through an outbound quality assurance (**QA**) telephone call which would generally occur 48 hours after the submission of enrolment documents to ensure that the student understood the obligations they were incurring under the VFH scheme and to identify any reasons that suggested the student may not have the ability to undertake the course; and

(ii) withdrawing a student’s enrolment prior to the first or subsequent census date if the student was not contactable by CCC, or the student was not engaged in their course, or if CCC staff otherwise concluded that the consumer was not suitable for their course (a procedure referred to by CCC as the campus driven withdrawal process);

(e) recruitment agents were dissatisfied with CCC’s enrolment processes and began referring students to other VET providers with the result that CCC began to experience declining enrolments,

CCC engaged in conduct that was unconscionable in contravention of s 21 of the ACL in connection with the supply or possible supply of online VET courses to students whose enrolment was processed during the period 7 September 2015 to 18 December 2015 (**Enrolment Period**) by:

(f) implementing, and maintaining during the Enrolment Period, changes to its enrolment processes such that:

(i) CCC ceased making outbound QA calls and instead allowed recruitment agents to make inbound QA calls to CCC; and

(ii) CCC ceased its campus driven withdrawal procedure,

thereby increasing, to the knowledge of CCC, the risk of students being enrolled in circumstances where the student did not do so willingly and with full knowledge of the obligations being incurred or where the student was unsuitable for enrolment because they lacked sufficient language, literacy or numeracy skills or access to technology; and

 (g) claiming and retaining the course fees payable by the Commonwealth under the VFH scheme in respect of the enrolments,

with the purpose of increasing enrolments and the associated VFH revenue.

1. At the hearing of the appeal, the parties were not given an opportunity to address the Court on any variation to the form of the declaration or whether a declaratory order is appropriate in the present case having regard to the nature of the contravention. As we consider that most grounds of appeal should be dismissed, with the result that the matter will return to the primary judge for the further hearing of the ACCC’s application for the imposition of pecuniary penalties and other relief, we consider that the question of whether a declaratory order should be made and the form of that order should be remitted to the primary judge for consideration.
2. Paragraphs 2 and 3 of the declarations made on 4 August 2021, which declare that Mr Wills and Site were knowingly concerned in or party to the College’s contravention of s 21, cross-refer to paragraph 1 of the declarations. As a result, a necessary consequence of setting aside paragraph 1 of the declarations is that paragraphs 2 and 3 must also be set aside. The question of whether a declaratory order should be made in respect of Mr Wills and Site and the form of that order should also be remitted to the primary judge for consideration.
3. Second, we would allow ground 8 of the appeal by the College and Site, which requires that paragraphs 8, 11, 14 and 17 of the declarations made on 4 August 2021 be set aside.
4. Third, we would allow ground 10 of the appeal by Mr Wills in part. We would replace the primary judge’s implicit finding that Mr Wills was knowingly concerned in the College’s unconscionable conduct from the date of implementation of the enrolment process changes, to a finding that Mr Wills was knowingly concerned in the College’s unconscionable conduct from the date he became acting CEO of the College on 20 November 2015. That conclusion provides a further reason for setting aside paragraph 2 of the declarations made by the primary judge and remitting to the primary judge the question of whether a declaratory order should be made in respect of Mr Wills and the form of that order.
5. The primary judge ordered the respondents (at trial) to pay the ACCC’s costs. The effect of upholding appeal ground 8 is that a part of the ACCC’s case against the College in respect of Consumers B to E has been unsuccessful. The College should be afforded an opportunity, if it so chooses, of seeking an adjustment to the costs order made by the primary judge to reflect its (limited) success on this appeal. Whether any adjustment should be made is most appropriately determined by the primary judge in the exercise of his Honour’s discretion in accordance with the usual principles. While Mr Wills has had some limited success on this appeal, confining the period in which he is found to have been knowingly concerned in the College’s unconscionable conduct, we do not consider that that should lead to any adjustment of the costs order made against him by the primary judge.
6. As to the costs of the appeal, the appellants have been overwhelmingly unsuccessful on their appeals. To recognise their limited degree of success, we would order in each appeal that the appellants pay 95% of the ACCC’s costs of the appeal.
7. Accordingly, the orders that should be made are:
8. to set aside paragraphs 1, 2 and 3 of the orders of the Court made on 4 August 2021;
9. to remit to the primary judge the question of what declaratory relief, if any, ought be made in place of those paragraphs;
10. to set aside paragraphs 8, 11, 14 and 17 of the orders of the Court made on 4 August 2021;
11. to remit to the primary judge the question of whether any adjustment should be made to paragraph 19 of the orders of the Court made on 4 August 2021;
12. that the appeals be otherwise dismissed;
13. that the College and Site pay 95% of the ACCC’s costs of their appeal; and
14. that Mr Blake Wills pay 95% of the ACCC’s costs of his appeal.

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| I certify that the preceding three hundred and eighty-four (384) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Wigney and O’Bryan. |

Associate:

Date: 6 April 2023

REASONS FOR JUDGMENT

DOWNES J:

# Synopsis

1. One of the appellants, which traded as Captain Cook **College**, offered vocational education and training. As part of this, it operated a distance learning campus.
2. The College’s students were recruited by course advisers (described as **CAs**), who were its marketing agents. The CAs were formally engaged by the College to source prospective students, promote the courses offered by the College and assist the student to enrol in a course.
3. Other suppliers of similar educational services also utilised the services of the CAs, who were not engaged exclusively by the College.
4. If a student was enrolled and that enrolment continued past a particular date (described as a census date, of which there could be more than one), the College would earn revenue pursuant to the Vocational Education and Training Fee Higher Education Loan Program (**VFH**) scheme from the Commonwealth, the CA would earn a commission and the student would incur a debt to the Commonwealth.
5. Prior to 7 September 2015, some CAs were known by those in the industry (including, relevantly, the Commonwealth and the College) to have engaged in misconduct when recruiting students. Such conduct included telling prospective students that the courses were free, failing to properly advise them that they would incur a debt if they enrolled in a course and completing enrolment documents for them which contained incorrect information. The risk of such conduct being engaged in was described by the primary judge as the CA misconduct risk.
6. Another matter which was known to the College was that consumers would be enrolled but, for various reasons, would not actually do the online course. Those reasons were identified by the primary judge as including that they would not be contactable by the College, they would have no or minimal engagement with their online course and they did not wish in fact to enrol in an online course. The risk that a consumer would be enrolled but then, for whatever reason, not complete the course or engage with it was described by the primary judge as the unsuitable enrolment risk.
7. It was found by the primary judge that the College’s enrolment processes were not static; rather, they changed and developed over time.
8. Commencing in November 2014, the College implemented a process called the campus driven withdrawal process. This process was implemented when an enrolled student did not attend the online course in the first week and, following unsuccessful attempts to contact them, the student was withdrawn from the course by the College prior to the first census date. This process ceased to be used by the College on 7 September 2015, less than a year later.
9. Prior to 7 September 2015, the College also engaged in a process pursuant to which it contacted the prospective student after receipt of the enrolment documents and asked a number of questions. This was described as the outbound call process. The process included the College asking the prospective student whether they understood the financial liability to the Commonwealth which they would be assuming. It also involved a discussion about the student’s abilities to undertake the course. Further steps were taken by the College if the person did not present as someone who would be able to undertake the course.
10. Neither of these processes was required to be done by the Commonwealth regulatory framework which was associated with the VFH scheme.
11. The College perceived that these processes exceeded that which others in the market did (and that it was less competitive as a consequence) and that for this and other reasons, the CAs were preferring the College’s competitors. The College was also aware that its recent financial performance was poor and its market share had been reduced, which it attributed to the conduct of the CAs in preferring its competitors. As a consequence of these matters, the College ceased to carry out the outbound call process and the campus driven withdrawal process from 7 September 2015.
12. After 7 September 2015, the College continued to speak to the prospective student but this was done by a call made by the consumer to the College, usually with the CA present. This was described as the inbound call or inbound call process.
13. The College ceased taking enrolments on 18 December 2015 because of a cap imposed by the Commonwealth as to the VFH fees it could charge in the 2016 calendar year, but continued to claim fees for students enrolled prior to that date.
14. The Australian Competition and Consumer Commission (**ACCC**) brought these proceedings against the College, the College’s holding company, **Site** Group International Ltd and Mr Blake Wills. Mr Wills was a senior employee of Site until October 2017, and had previously acted as chief executive officer for the College from November 2015 until January 2016.
15. In summary, the ACCC’s case was that the College changed its enrolment and withdrawal processes when it knew, or ought to have known, that the changes would significantly reduce protections for consumers, would lead to a materially increased risk of both unsuitable consumers being enrolled in its online courses and of misconduct by its sales agents (the CAs) and would materially diminish the prospect of this being identified. The ACCC claimed that the changes were calculated to increase the College’s profits by increasing the number and proportion of consumers enrolled by the College and who passed a census date. It also claimed that, as a consequence of the changes, the College claimed and retained very significant increased revenue from the Commonwealth, and that the vast majority of consumers did not receive any vocational benefit despite incurring a substantial debt. This was said by the ACCC to amount to a system of conduct or pattern of behaviour as referred to in s 21(4)(b) of the *Australian Consumer Law* (being Schedule 2 to the *Competition and Consumer Act 2010* (Cth)) (**ACL**), and was thus systemic unconscionable conduct proscribed by s 21(1).
16. Section 22 of the ACL provides that the court may have regard to certain matters for the purpose of determining whether a supplier has contravened s 21. However, the use of the word “may” in this context imports a requirement and, as correctly observed by the primary judge, regard must be had to all considerations listed in s 22(1) to the extent that they are applicable. That is, the non-exhaustive considerations in s 22(1) provide part of the framework within which the relevant conduct is to be assessed.
17. The ACCC’s approach before the primary judge was flawed in that it neither adduced evidence about nor addressed all relevant matters listed in s 22 of the ACL (including to justify the ultimate finding of unconscionability sought by it in the absence of evidence about such matters).
18. Such an approach is contrary to authority. Further, it was taken in circumstances where an allegation of unconscionability is a serious allegation, sufficient to warrant censure for the purpose of deterrence by the imposition of a civil penalty: *Australian Competition and Consumer Commission v Mazda Australia Pty Limited* [2023] FCAFC 45 at [486] (Mortimer J (as her Honour then was) and Halley J, with whom Lee J agreed) citing *Unique International College Pty Ltd v Australian Competition and Consumer Commission* (2018) 266 FCR 631; [2018] FCAFC 155 at [155] (Allsop CJ, Middleton J and Mortimer J (as her Honour then was)).
19. For the reasons which follow, this approach led the primary judge into error, with the consequence that both appeals should be allowed.

# Issues on the appeal

1. The central issue which arises in both appeals is whether, by implementing the changes to the processes during the relevant period and by subsequently claiming the VFH fees associated with that period, the College engaged in a system of conduct, or pattern of behaviour, which was unconscionable in contravention of s 21(1) of the ACL.
2. A further issue raised in the appeal brought by Mr Wills is whether he was directly or indirectly knowingly concerned in, or a party to, the contravention by the College. By its appeal, Site also challenged the finding that it was knowingly concerned in the unconscionable system identified by the primary judge. Because of the success of the appellants on the central issue referred to above, it was unnecessary to address this aspect of the appeals.
3. Finally, grounds 7 and 8 of the appeal brought by the College and Site concern findings in relation to individual consumers.

# The approach required to be taken to ss 21 and 22 of the ACL

1. Section 21 of the ACL relevantly provides that a person must not, in trade or commerce, in connection with the supply of services to a person, engage in conduct that is, in all the circumstances, unconscionable.
2. Section 22 of the ACL lists a series of matters to which the court may have regard for the purpose of determining whether a supplier has contravened s 21 in connection with the supply of services to a customer.
3. As has been observed already, regard must be had to all of the considerations listed in s 22(1) to the extent that they are relevant to the particular case: see *Australian Competition and Consumer Commission v* ***Medibank*** *Private Ltd* (2018) 267 FCR 544; [2018] FCAFC 235 at [252] (Beach J, with whom Perram and Murphy JJ agreed); *Australian Competition and Consumer Commission v* ***Quantum******Housing*** *Group Pty Ltd* (2021) 285 FCR 133; [2021] FCAFC 40 at [55]–[56] (Allsop CJ, Besanko and McKerracher JJ); *Wade v J Daniels and Associates Pty Ltd* [2020] FCA 1708 at [389] (O’Bryan J); *Australian Competition and Consumer Commission v* ***Phoenix*** *Institute of Australia Pty Ltd (Subject to Deed of Company Arrangement)* [2021] FCA 956 at [134] (Perry J). See also *Australian Securities and Investments Commission v Westpac Banking Corporation (Omnibus)*(2022) 159 ACSR 381; [2022] FCA 515 (***Westpac (Omnibus)***) at [23] and [32] (Beach J) (by reference to equivalent provisions in the *Australian Securities and Investments Commission Act 2001* (Cth) (***ASIC Act***)).
4. This proposition was recently endorsed by a judge of this Court in *Xiamen Huadian Switchgear Co Ltd v Powins Pty Ltd* (2022) 169 IPR 77; [2022] FCA 1159, in which Halley J stated at [583] (by reference to the *ASIC Act*):

In this context the Full Court in *Quantum* referred at [55] to Gageler J’s observations in *Australian Securities and Investments Commission* *v* *Kobelt* (2019) 267 CLR 1; 368 ALR 1; [2019] HCA 18 (*Kobelt*) at [87], drawn from *Australian Competition and Consumer Commission* *v Lux Distributors Pty Ltd* [2013] FCAFC 90 (*Lux*) at [23] and [41] (Allsop CJ, Jacobson and Gordon JJ):

The correct perspective is that s 12CB [s 21] operates to prescribe a normative standard of conduct which the section itself marks out and makes applicable in connection with the supply or possible supply of financial services. The function of a court exercising jurisdiction in a matter arising under the section is to recognise and administer that normative standard of conduct. The court needs to administer that standard in the totality of circumstances taking account of each of the considerations identified in s 12CC [s 22] if and to the extent that those considerations are applicable in the circumstances.

1. In *Medibank*,Beach J observed at [252]–[253]:

…in terms of the technical operation of s 22(1), it is necessary to consider each of the non-exhaustive list of matters set out in s 22(1) if relevant. The word “may” in s 22(1) is conditional rather than permissive. If any matter in the list is potentially relevant to the conduct under consideration, it must be considered. As Gageler J expressed it in relation to cognate provisions of the ASIC Act (at [189]):

The word “may” in s 12CB(2) of the ASIC Act was not permissive, but conditional. The import of s 12CB(2) was to spell out that circumstances relevant to the determination of whether conduct was objectively to be characterised as “unconscionable” according to the ordinary meaning of that term might or might not include, in respect of particular conduct, all or any of the particular matters referred to in s 12CB(2). The provision made clear that, where any one or more of those matters existed in respect of particular conduct, each of those extant matters was to form part of the totality of the circumstances mandatorily to be taken into account for the purpose of determining the statutory question posed by s 12CB(1). The provision did not leave it open to a consumer who alleged that conduct of a supplier was in breach of s 12CB(1) to pick and choose. The customers could not choose to rely on matters referred to in s 12CB(2)(a) and (b), yet to ignore matters referred to in s 12CB(2)(c), (d) and (e).

Further, it is inappropriate to focus on one or more of the applicable matters listed in s 22(1) to the exclusion or unjustifiable expense of others.

1. In a similar vein, Besanko J stated in *Commonwealth Bank of Australia v* ***Kojic***(2016) 249 FCR 421; [2016] FCAFC 186 at [72]:

… Unconscionable conduct under a statute such as the *Trade Practices Act* (now the *Competition and Consumer Act 2010* (Cth)) extends beyond that in equity, is to be determined by reference to all the circumstances and is informed, and will continue to be informed, by the factors identified by Parliament in the statute. For example, one matter which will inform the determination in any particular case is the extent to which each party has acted in good faith, a matter which clearly goes to the substance of the doctrine. The list of matters, although they received little attention in this case, are important. They must be considered where they are relevant on the facts (ie, the “may” is conditional not permissive) (*Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525 (*Paciocco*) at [189] per Gageler J) and the risk of error increases if the focus is on one or two matters at the expense of the others and all the circumstances (*Paciocco* at [293]–[294] per Keane J).

1. In *Paciocco v Australia and New Zealand Banking Group Limited* (2016) 258 CLR 525; [2016] HCA 28 (***Paciocco (HC)***),Gageler J considered the prohibition against unconscionable conduct in connection with the supply of financial services as contained in s 12CB of the *ASIC Act*, which, by s 12CB(2) (as it then was), contained a similar provision to s 22. In that case, Gageler J stated at [189] that:

The word “may” in s 12CB(2) of the ASIC Act was not permissive, but conditional. The import of s 12CB(2) was to spell out that circumstances relevant to the determination of whether conduct was objectively to be characterised as “unconscionable” according to the ordinary meaning of that term might or might not include, in respect of particular conduct, all or any of the particular matters referred to in s 12CB(2). The provision made clear that, where any one or more of those matters existed in respect of particular conduct, each of those extant matters was to form part of the totality of the circumstances mandatorily to be taken into account for the purpose of determining the statutory question posed by s 12CB(1). The provision did not leave it open to a consumer who alleged that conduct of a supplier was in breach of s 12CB(1) to pick and choose. The customers could not choose to rely on matters referred to in s 12CB(2)(a) and (b), yet to ignore matters referred to in s 12CB(2)(c), (d) and (e).

1. At [294] of *Paciocco (HC)*, Keane J rejected an approach whereby a party focused on some matters in the list of relevant considerations in s 12CB(2) but without regard to other provisions which may have been relevant.
2. In ***Stubbings*** *v Jams 2 Pty Ltd* (2022) 96 ALJR 271; [2022] HCA 6, Gordon J also considered s 12CB of the *ASIC Act*. At [57]–[58], her Honour stated that:

Section 12CB of the ASIC Act, like equity, requires a focus on all the circumstances. The court must take into account each of the considerations identified in s 12CC if and to the extent that they apply in the circumstances. The considerations listed in s 12CC are non-exhaustive, but they provide “express guidance as to the norms and values that are relevant to inform the meaning of unconscionability and its practical application”. They assist in “setting a framework for the values that lie behind the notion of conscience identified in s 12CB”. “The assessment of whether conduct is unconscionable within the meaning of s 12CB involves the evaluation of facts by reference to the values and norms recognised by the statute, and thus, as it has been said, a normative standard of conscience which is permeated with accepted and acceptable community standards. It is by reference to those generally accepted standards and community values that each matter must be judged”.

Put in different terms, the s 12CC considerations assist in evaluating whether the conduct in question is “outside societal norms of acceptable commercial behaviour [so] as to warrant condemnation as conduct that is offensive to conscience”. A court should take the serious step of denouncing conduct as unconscionable only when it is satisfied that the conduct is “offensive to a conscience informed by a sense of what is right and proper according to values which can be recognised by the court to prevail within contemporary Australian society”.

(citations omitted)

1. In *Australian Securities and Investments Commission v* ***Kobelt***(2019) 267 CLR 1; [2019] HCA 18 at [154], Nettle and Gordon JJ referred to s 12CC of the *ASIC Act* (being the equivalent of s 22 of the ACL) as providing “express guidance as to the norms and values that are relevant to inform the meaning of unconscionability and its practical application” and stated that the list of factors assists in setting a framework for the values that lie behind the notion of conscience identified in s 12CB, citing *Kojic, Paciocco v Australia and New Zealand Banking Group Limited* (2015) 236 FCR 199; [2015] FCAFC 50 (***Paciocco (FC)***) and *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] ATPR 42-447; [2013] FCAFC 90*.*
2. In *Good Living Company Pty Ltd v Kingsmede Pty Ltd* (2021) 284 FCR 424; [2021] FCAFC 33, Allsop CJ observed at [7]–[8] that:

… The words “conscionable” and “unconscionable” may not be words of daily parlance of many, but they have an ordinary meaning derived from an inner human sense of doing right. The human values that can be seen in s 22 and in the common law and equity as set out in *Lux* [2013] ATPR 42-447 at [23] and *Paciocco* 236 FCR 199 at [296] inform the concept. These are basal values familiar to business people and ordinary people and, along with the circumstances in s 22, find their place in the text, structure and context of the legislation.

[Section 21] (like s 12CB of the ASIC Act) prescribes a statutory normative standard of conduct by proscribing conduct which is “unconscionable”. As the Full Court said in *National Exchange* 148 FCR 132 at [33], “unconscionable conduct, on its ordinary and natural interpretation, means doing what should not be done in good conscience”. **The function of the Court is to recognise and administer that normative standard in the totality of the circumstances. Those circumstances include the considerations identified in s 22** and in the values of the common law and equity in which context the statute sits. …

(emphasis added)

1. In *Phoenix*, Perry J observed at [135]–[136] that:

In this regard, Kiefel CJ and Bell J explained in *Kobelt* at [14] that the values which inform the standard of conscience set by s 12CB(1) of the ASIC Act (and by analogy, s 22(1) of the ACL) include those identified by Allsop CJ in *Paciocco (FCAFC)* at [296] and quoted above. Thus, Allsop CJ observed in *Paciocco (FCAFC)* at [285] that the matters in s 12CC of the ASIC Act “assist in setting a framework for the values that lie behind the notion of the relevant conscience of the parties in trade or commerce identified in s 12CB. Those values and conceptions can be seen as: fairness and equality: see paras (a), (b), (d)–(k); a lack of understanding or ignorance of a party: para (c); the risk and worth of the bargain: paras (e) and (i); and good faith and fair dealing: para (l).”

Furthermore, the matters specified by s 22(1) of the ACL “[have] the potential to bear positively or negatively on the characterisation of conduct as conduct that is or is not unconscionable” (*Kobelt* at [83] (Gageler J); see also eg *National Exchange* at [40] (the Court)). Equally the ***absence*** of any of the matters listed in s 22(1), such as the absence of undue influence, pressure, unfair tactics, or dishonesty, will also bear upon the assessment of whether the supplier’s conduct involves such a departure from accepted community standards as to render it unconscionable (*Kobelt* at [58]–[59] (Kiefel CJ and Bell J)). In this regard, it must be borne in mind that the statutory proscription does not require suppliers to act in an altruistic or disinterested way with consumers; nor necessarily in their customers’ best interests (*Kobelt* at [75] (Kiefel CJ and Bell J), [100] (Gageler J), [117] (Keane J)) …

(emphasis omitted)

1. The importance of s 22 of the ACL in any determination of whether there has been unconscionable conduct is therefore well accepted, and the ACCC did not submit otherwise.

# The approach taken by the primary judge

## Overview

1. On 2 July 2021, the primary judge handed down his judgment: *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (trading as Captain Cook College (No 3)* (2021) 154 ACSR 472; [2021] FCA 737 (**J**). Subsequently, the primary judge made declarations and orders on 4 August 2021.
2. Commencing at [49] J, the High Court decision of *Kobelt* was cited by the primary judge and then discussed with express reference made to the requirement that each of the considerations within, in effect, s 22 of the ACL is to be taken into account if and to the extent that those considerations are applicable in the circumstances: [56] J. That there is such a requirement was repeated at [69] J by reference to the Full Court decision of *Quantum Housing*.
3. No party submitted that this statement of the legal principles by the primary judge was incorrect and it is accepted as being the correct approach.
4. If this approach is not taken, then there is a risk that a finding of unconscionable conduct is made which falls outside of the scope of s 21, and has instead been undertaken by reference to values or norms disembodied from, or unconnected with, the meaning of unconscionable within that section: cf *Paciocco (FC)* at [262]. Such an approach would give rise to commercial uncertainty in circumstances where certainty goes to the heart of the conception of the rule of law: *Paciocco (FC)* at [265].
5. In this case, the primary judge made a series of findings of fact, culminating in a section with the heading “CONCLUSIONS ON THE SYSTEM CASE AGAINST THE COLLEGE”. That section commences at [493] J:

Thus far in these reasons for judgment I have set out much of the evidence and made factual findings on that evidence. It is now necessary to draw those findings together and analyse whether the ACCC’s system case against the college is established. For that purpose it is worthwhile summarising some key findings.

1. Those key findings are contained in [494]–[499] J, none of which refer to a consideration of the presence or absence of the matters listed in s 22 of the ACL:

During the earlier period and the relevant period, the college (through its key officers being Mr Cook, Mohammed Akbery and Ms Edwards) knew of the CA misconduct risk and the unsuitable enrolment risk. That is to say, they knew that there was a real risk, that regularly materialised, that CAs would use a range of prohibited or deceptive stratagems to pressurise or trick consumers to enrol in courses at the college with the result that unsuitable consumers became enrolled as students. The prohibited or deceptive stratagems might include making false and misleading statements to consumers to the effect that the online courses were free, failing to properly inform consumers that they would incur VFH debts if they enrolled in online courses or the circumstances in which the debts would have to be repaid, pressuring consumers to enrol in online courses, offering consumers inducements, such as free laptops or other devices, to enrol in an online course, completing consumers’ enrolment documents including the PEQ for them, and coaching consumers during the course of the inbound QA call.

Consumers might be unsuitable for enrolment for various reasons including, for example, that they would not be contactable by the college, they would have no or minimal engagement with their online courses, they did not in fact wish to enrol in an online course, or by reason of lacking sufficient LLN skills, computer skills, or access to technology required to undertake online courses.

It was known by the college that the outbound QA call enrolment procedure and the campus driven withdrawal procedure, both of which were applied during the earlier period, provided important safeguards against CA misconduct risk and unsuitable enrolment risk. Notwithstanding the safeguard of the outbound QA call, and other safeguards such as CA training and monitoring, it was known to the college that a substantial proportion of applications for enrolment were in respect of consumers who were unsuitable for enrolment, in particular because they were uncontactable by the college and did not engage with their courses by logging in to the LMS at all. The result was that the safeguard of campus driven withdrawals before first census was a critical safeguard against the enrolment of such consumers as students, and those students incurring VFH debts for which they would get absolutely no benefit.

Notwithstanding that knowledge and appreciation, for the purpose of profit maximisation substantially driven by budget expectations set by Site, the college devised and introduced the enrolment process and withdrawal changes that were applied during the relevant period. Notably, the college knew that the inbound QA call procedure offered less of a safeguard against CA misconduct risk than the previous outbound procedure – indeed, the college knew that it increased that risk. Notwithstanding that, and notwithstanding the absence of the introduction of alternative rigorous safeguards which might mitigate that increased risk, the college abolished the campus driven withdrawal procedure.

To the knowledge of the college, the changes to the enrolment process and the abolition of campus driven withdrawals had a number of immediate consequences. In particular, the number of enrolments at the college increased very significantly, very quickly. The number and proportion of such enrolments that were unsuitable, in one or more of the ways already identified but in particular because they were uncontactable by the college and failed to login to the LMS or otherwise engage with their courses, rapidly escalated. To the extent that the college was not aware of the escalating numbers and proportion of unsuitable enrolments, it should readily have had that awareness. That arises from the fact that its systems meant that it could at any time see whether students were logging in to the LMS, it knew how many students were not able to be contacted, it knew of the increased risk of CA misconduct and unsuitable enrolment because of the enrolment process changes and the abolition of campus driven withdrawals, and it knew of the dramatic escalation in enrolments bringing windfall revenue and profits.

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

1. At [500] J, the following critical finding of breach of s 21 of the ACL is made:

**In those circumstances**, the college took advantage of the consumers who were enrolled as a result of CA misconduct or who were unsuitable for enrolment by maintaining their enrolment and claiming VFH revenue from the Commonwealth or both. That is particularly the case in respect of consumers who, subsequent to applying for enrolment through the inbound QA call process in the presence of a CA, were not able to be contacted by the college and failed to login to the LMS. By allowing such consumers to progress through census so that the college could claim the VFH revenue from the Commonwealth was to act against conscience; it was a sharp practice that was manifestly unfair to such consumers; it was driven by avarice without regard to the interests of such consumers; it preyed on their vulnerability (being their being prey to CA misconduct, their unsuitability or their uncontactability). **In the result, the college engaged in a system of conduct in connection with the supply of services to consumers that was, in all the circumstances, unconscionable within the meaning of s 21 of the ACL.**

(emphasis added)

1. After making his finding at [500] J, the primary judge made a further critical finding of unconscionable conduct. This finding appears at [507] J:

Although it adds little to the case at the end of the day, which may be reflected in any penalties that might be imposed, my view is that if the system of conduct or pattern of behaviour that is complained of is unconscionable, then to claim and retain the windfall benefits of that conduct is also unconscionable. That is because the unconscionability of the conduct could have been cured, or at least ameliorated, by not claiming or retaining the revenue derived from the conduct and thereby reverse the consumers’ debts.

1. After making the findings at [500] and [507] J, the reasons then proceed to consider submissions made against the ACCC as to why the conduct was not unconscionable.
2. However, as was recognised by the primary judge earlier in the reasons, the analysis of whether the conduct alleged by the ACCC breached s 21 was required to be decided within the framework provided by s 22 to the extent that any considerations within that latter section were relevant when deciding whether there was unconscionable conduct at all.
3. Further, the primary judge was also required to take into account whether, and the extent to which, any of the relevant considerations in s 22 did not arise, or had not been the subject of evidence adduced by the ACCC, as these were matters which could tell against a finding of unconscionable conduct.
4. Neither of these things was done by the primary judge as part of the analysis of whether s 21 had been contravened. For this reason and contrary to the ACCC’s submissions on this appeal, the approach taken by the primary judge was not orthodox and was contrary to the approach required to be taken.

## Relevant factors within s 22 which were not considered

1. In circumstances where the case involved, at its heart, the entry by the College into contracts with consumers, certain factors within s 22 were relevant (and plainly so) and required consideration.
2. As submitted by the College, which submission I accept:

[The primary judge] did not approach that task in manner which reflected that he had weighed the various statutory criteria. The criteria in ACL, s 22(1) are conditional, not permissive. Where it is evident that there *would be* evidence in respect of factors identified in s 22(1), but evidence going to that issue is not led by the moving party, that fact does not render the factor neutral or irrelevant. The provision does not leave it open to the moving party to pick and choose, relying on matters weighing in favour of one outcome but ignoring those against that party. The absence of relevant evidence of the identified criteria, where that evidence would have been readily available if it pointed to unconscionable conduct, is itself a factor to be weighed.

1. The ACCC did not assert that the College was prevented from making such a submission on this appeal, or from asserting error by the primary judge by reference to the failure to consider relevant matters within s 22(1) of the ACL, because of its submissions made at trial (which were not before the Full Court on this appeal in any event).
2. The relevant s 22 considerations which were not considered by the primary judge will now be addressed.

### Section 22(1)(a) – the relative strengths of the bargaining positions of the supplier and customer

1. This factor relates to “asymmetry of power; such asymmetries are sometimes ruthlessly exploited in a manner that may offend the commercial conscience”: *Paciocco (FC)* at [286].
2. It was not part of the ACCC’s case below that there was a disparity in bargaining power between the students and the College. Further, during the hearing of the appeal, senior counsel for the ACCC also submitted that “this wasn’t a case that was run on the basis of identifying characteristics of the cohort”.
3. Although it was found by the primary judge that the liberalisation of the VFH scheme in early 2012 was for the express purpose of addressing low participation rates from identified demographic groups, including people from non-English speaking backgrounds, the primary judge refused to make the finding sought by the ACCC that there was an “overrepresentation” compared to “what one would expect in a community more broadly” of students from disadvantaged backgrounds at the distance campus and amongst the enrolments referred by CAs at the distance campus. The ACCC did not challenge that refusal on this appeal.
4. The reasons of the primary judge included a finding that allowing consumers who were not able to be contacted by the College and who failed to “login” to the “LMS” to progress through to census “preyed on their vulnerability” (they being prey to CA misconduct, their unsuitability or their uncontactability). However, this finding was directed at the College’s conduct after the bargain had been entered and was not directed at consideration of a comparison of the respective bargaining powers of the College and the consumers for the purposes of s 22(1)(a).
5. Having regard to the case as advanced by the ACCC below and the primary judge’s refusal to make the finding sought by the ACCC, the absence of evidence in support of this factor tells against a finding of unconscionable conduct within the meaning of s 21 of the ACL: see *Paciocco (HC)* at [294]; *Phoenix* at [136]. The failure to consider this as part of his analysis as to whether s 21(1) had been contravened was an error by the primary judge.

### Section 22(1)(b) – compliance by customer with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier

1. Section 22(1)(b) refers to 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.
2. There is no finding (and it was not part of the ACCC’s case) that consumers were required to comply with conditions of the kind described in s 22(1)(b).
3. As recognised by Gordon J in *Stubbings* at [80], when assessing whether a system is unconscionable, it is relevant to consider whether the system was reasonably necessary to protect the legitimate interest of the supplier.
4. The College had a legitimate interest in attracting students to the College for the purposes of operating its business profitably. It also had a legitimate interest in maximising the profits which it made from the operation of its business.
5. Indeed, as observed by Keane J in *Kobelt* at [117]:

Insofar as the trial judge found that the respondent was at all relevant times aware of, and pursued, his own interests, it must be borne in mind that the purpose of s 12CB of the ASIC Act is to regulate commerce. The pursuit by those engaged in commerce of their own advantage is an omnipresent feature of legitimate commerce. A trader does not, generally speaking, stand in a fiduciary relationship with his or her customers, and good conscience does not require a trader to act in the interests of others. To say that the respondent was pursuing his own commercial interests with a view to profit is to state the obvious, but also to say very little as to whether he engaged in unconscionable conduct. In particular, it does not assist in discerning whether the conduct in question exhibits those features which distinguish unconscionable conduct from the legitimate pursuit of self-interest.

(citations omitted)

1. The absence of evidence concerning this factor tells against a finding of unconscionable conduct within the meaning of s 21 of the ACL. The failure to consider this as part of his analysis as to whether s 21(1) had been contravened was an error by the primary judge.

### Section 22(1)(c) – whether the customer was able to understand any documents

1. Section 22(1)(c) refers to whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services.
2. There is no finding (or evidence adduced by the ACCC) that any consumers were unable to understand any documents provided to them in connection with their enrolment in the College and the conditions associated with that enrolment, including that a debt would be incurred by them to the Commonwealth.
3. To the contrary, the pre-enrolment quiz or **PEQ** which the consumer was required to complete advised the consumer in plain terms that they were applying for a loan and that they may wish to seek independent financial advice. It required the consumer to read the VET FEE-HELP **Information Guide**. The PEQ also advised that:

**WITHDRAWALS**

If you do not formally withdraw ON or BEFORE any Census Date within your course you will be fully committed to the VET FEE-HELP loan debt for that Unit of Study. You must contact your campus administration and notify them if you wish to formally withdraw.

1. The Information Guide referred to in the PEQ was a booklet of over 30 pages which contained detailed information including about the loan which the consumer was obtaining, the loan fee, the manner in which the loan would be required to be repaid, what a census date was and that the consumer should contact the relevant institution if they wished to withdraw by the census date. The Information Guide also identified telephone numbers and websites for further information, including about withdrawal procedures. The Information Guide was provided in an orientation pack which was emailed to the consumer.
2. That consumers were provided with this information or that this information was made available to them, in circumstances where there was no finding that they could not understand that information, tells against a finding of unconscionable conduct. The failure to consider this as part of his analysis as to whether s 21(1) had been contravened was an error by the primary judge.

### Section 22(1)(d) – whether any undue influence, pressure or unfair tactics

1. Section 22(1)(d) refers to 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.
2. No actual instance of undue influence, pressure or unfair tactics in relation to any identified consumer was pleaded or relied upon by the ACCC and such conduct was not proven as having occurred in fact and systemically in relation to the enrolments during the relevant period.
3. After submissions were made which directed attention to the absence of such evidence and after making the critical findings at [500] and [507] J, the primary judge stated as follows (at [513] J):

It is not so easy to accept the notion that there was an absence of undue influence, pressure or unfair tactics. A form of CA misconduct risk was the risk that CAs might use undue influence, pressure or unfair tactics on unsuspecting consumers, and indeed the evidence bore out that that form of CA misconduct risk materialised from time to time. Moreover, the college knew of that. It nevertheless introduced enrolment and withdrawal process changes that weakened the protections against those risks materialising, or if they did materialise, against the college saving consumers from the debt consequences of being victims of such misconduct. For the reasons I have already given, the conduct of the college was sufficiently egregious to be unconscionable.

1. That is, the primary judge found that there was a known risk that CAs *might* use undue influence, pressure or unfair tactics on consumers, and the College’s process changes weakened the protections against that risk, which risk was shown to have materialised from time to time, *prior to* but not *during* the relevant period.
2. In making this finding, the primary judge bypassed consideration of s 22(1)(d). That is because s 22(1)(d) speaks in terms of something having occurred in fact (such as that undue influence has been exerted) and not to conduct which merely increases the risk of that event occurring.
3. An alteration by a supplier of its systems, which has the consequence that there is an increased risk that misconduct by the supplier’s agent will not be detected, does not, without more, achieve the required “moral obloquy” required to amount to a contravention of s 21(1) of the ACL. This observation finds support in earlier case law in which statutory unconscionability was alleged against a principal by reason of an agent’s conduct.
4. In ***Tonto*** *Home Loans Australia Pty Ltd v Tavares* (2011) 15 BPR 29,699; [2011] NSWCA 389, two lenders used “mortgage originators” which in turn used their own network of so-called “sub-introducers” to find and bring forward potential borrowers. Tonto HL was a mortgage originator. The Streetwise group of companies were sub-introducers, and were found at trial to have engaged in dishonest conduct that resulted in loan and mortgage transactions. It was contended that the conduct of Tonto HL and through it, the lender, was unconscionable within the meaning of ss 12CB and 12CC of the *ASIC Act*. Allsop P (as his Honour then was), with whose reasons the Court of Appeal agreed, stated at [288]:

The person whose conduct is to be characterised as unconscionable is Tonto HL and through it the lenders. It is important to bear this in mind. It is not a matter of concluding that a contract induced by fraud of Streetwise is unjust and assessing whether in all the circumstances that unjustness should be seen to taint the agreement such that relief should flow against the lenders. It is the conduct of the lenders, through Tonto HL that is to be attributed with the characterisation as unconscionable. The submissions of ASIC and the respondents recognised this. This unconscionability could, of course, arise from the actions and knowledge of the lenders. Notice of the conduct of Streetwise may well have led to the conclusion that Tonto HL and the lender acted unconscionably. That, however, was not shown.

1. His Honour continued at [292]:

I do not propose to rehearse once again the totality of the conduct. Streetwise was not Tonto HL’s agent. That is of great importance in this inquiry. Not only does it remove attribution of the conduct of Streetwise and its knowledge, but it also removes the finding of asset lending in the way his Honour found it. There remain the breaches of the guidelines and the lack of attention and care to serviceability and suitability based upon primary reliance upon security. There also remains the objective risk that existed by the employment of a company such as Streetwise together with the additional arrangement of not approaching borrowers. While these are facts which all amount to circumstances and conduct which, for the reasons I have already given, are sufficient to justify relief being given against the lenders under the CRA, they do not in my view amount to unconscionability. There is no real suggestion in the argument or the evidence that those at Tonto HL understood the actuality of the trickery and lies that were being undertaken by Streetwise or had any notice of them.I do not think that the structural creation of risk and the heightening of that risk by the arrangements with Streetwise meet the notion of moral obloquy required. The true facts are now known, but in circumstances where those at Tonto HL were innocent of the conduct at the time it is not unconscionable to be seeking to maintain the transaction.

1. This reasoning was applied in *Perpetual Trustees Victoria Limited v* ***Xiao***[2015] VSC 21 which case also involved the use by lenders of agents to identify prospective borrowers, collect relevant information from them and submit loan applications. At [156]–[158], Hargrave J stated that:

Ms Xiao contends that Perpetual’s business model created a structural risk of fraud, and that the use of such a business model falls within the notion of moral obloquy required for statutory unconscionability. This contention was based on the contractual arrangements between Perpetual, Interstar and originators, such as Capital, which involve the delegation to originators of tasks such as identifying prospective borrowers, collecting relevant information from them, and completing and submitting loan applications. **Although originators are, under the contractual arrangements, obliged to comply with a detailed Lending Manual, they are remunerated by commission in respect of submitted loan applications that are approved, which increases the prospects of fraudulent conduct or sloppy lending practices.** This risk is increased further by interposing a trust manager (Interstar) between Perpetual and the originator, and the existence of contractual arrangements between Interstar and originators like Capital which entitle Interstar to rely upon the accuracy of the information provided by the originator when determining whether to put a loan application forward for Perpetual’s final approval.

**I do not accept that the creation of structural risk by such a business model constitutes the necessary ‘moral obloquy’ required for a finding of statutory unconscionability.** In *Tonto Home Loans Australia Pty Ltd v Tavares*, Allsop P (as he then was) considered and rejected a similar argument in circumstances where the lender did not know the relevant facts constituting the unconscionable conduct by the entity in the position of Capital in this case (Streetwise) …

I respectfully adopt Allsop P’s reasoning in the circumstances of this case.

(emphasis added; citations omitted)

1. In *Perpetual Trustee Company Ltd v* ***Burniston*** *(No 2)* (2012) 271 FLR 122; [2012] WASC 383, a loan was made to pensioners as a consequence of unlawful conduct by a broker. One of the contentions by the borrowers, who were sued on the loan, was that the lender had engaged in unconscionable conduct. The allegations related to facts which gave rise to a structural creation of risk and a heightening of that risk including by the implementation of the lending scheme by the lender. The allegations relied upon to allege unconscionable conduct included that there had been a failure by the lender to have any direct discussions with the borrowers or to check the accuracy or veracity of information provided by the broker.
2. In that case, Edelman J observed that:

[322] Each of the complaints at [313](ii)–(vi) above involves carelessness by [the lender] and, to a lesser extent, the creation of structural risk by the lender. **But carelessness by itself, or the creation of risk, will rarely be unconscionable conduct.** **Nor is it unconscionable within the meaning of s 12CB of the ASIC Act that the risk was created, and heightened, by the “lo doc” lending scheme used by [the lender].**

[323] The submissions by the borrowers concerning unconscionable conduct appeared to invite the application of a broad, and unconstrained, judicial discretion. The language of s 12CB might be thought to encourage that view. The word “unconscionable” is not defined. In equity, there have been cases where the passive receipt of a benefit, obtained from a person labouring under some special disadvantage, has been characterised as unconscionable without any degree of moral disapprobation. But without any limiting factor, and without any need for moral disapprobation, a conception that conduct is against conscience would introduce a general discretion for a judge to invoke a wide range of remedies, which discretion would be almost unreviewable.

[324] For this reason, in a line of cases intermediate courts of appeal have insisted upon the presence of a “high”, or perhaps “significant” or “real”, degree of moral obloquy. The references to moral obloquy are not a substitute for the statutory language of unconscionability in s 12CB. But they serve to emphasise the base norm of the section which strips the doctrine of the equitable element of some special disadvantage which equity would protect from exploitation. Without some moral yardstick against which to measure the relevant factors in the section, the discretion would be unreviewable and conceptually identical cases could be decided differently. Whilst not embodied in the statutory language, the reference to moral obloquy is a useful yardstick for evaluation.

[325] **The conduct by the lender involved the creation of some systemic risk and also some carelessness in the implementation of the loan to the borrowers. But this conduct was not sufficient to attract significant moral censure.**

[326] **Perhaps, more importantly, few of the legislative indicia of unconscionable conduct were met.** Although little attention was given in submissions to the particular statutory factors enumerated in s 12CB, I note that these factors do not generally support any conclusion of unconscionable conduct in this case. In particular:

(i) The borrowers’ entry into the loan and mortgage was not a consequence of their inferior bargaining position to the lender. The borrowers also had a number of opportunities to detect the misrepresentations … in relation to the loan application.

(ii) There was no suggestion that the borrowers were required by the lender to comply with conditions which were not reasonably necessary for the protection of the legitimate interests of the lender.

(iii) Although the borrowers were not given, nor did they insist upon, the opportunity to read the loan and mortgage documents before signing them, the borrowers would have been able to understand the documents provided by the lender.

(iv) No undue influence or pressure or unfair tactics were used by the lender against the borrowers (absent any agency).

(v) There was no suggestion that the interest rate for the loan was any less favourable than that for which, in the circumstances, the borrowers might have obtained identical or equivalent services. Indeed, the effect of the broker’s misrepresentations may have been that the loan was made available at a market rate in circumstances in which no other lender would have made it available.

[327] The borrowers’ claims of unconscionable conduct by the lender … must fail.

(emphasis added; citations omitted)

1. The ACCC relied upon the statement of Gordon J in *Stubbings* at [77] to support the proposition that “the fact that a step was taken to diminish protection against risk can be relevant to a court’s evaluation of conduct as unconscionable.” However, the relevant passage in *Stubbings* stated:

What can be significant is that **the conduct targeted a group to take advantage of their likely, although not certain, vulnerability** or, as in this case, that the lenders recognised a likely, although not certain, vulnerability and yet designed a system of lending against a guarantor’s property, suspecting that they had no income or capacity to service the loan, and deliberately avoiding information as to the guarantor’s financial or personal circumstances in order to “immunise” themselves from knowledge of the vulnerability.

(emphasis added)

1. The circumstances identified by Gordon J in *Stubbings* differ from the circumstances in this case. This was not a case in which there was conduct which targeted a group to take advantage of their likely, although not certain, vulnerability, and senior counsel for the ACCC accepted this, as referred to earlier in these reasons.
2. It follows from the reasoning in *Tonto*, *Xiao* and *Burniston*, with which I respectfully agree, that a finding that there is a *risk* of undue influence, pressure or unfair tactics, or that there has been conduct which *reduces protection against such a risk*, does not support a conclusion of statutory unconscionability where few of the legislative indicia of unconscionable conduct in s 22 have been met or considered.
3. A similar approach to that taken in [513] J is taken by the primary judge elsewhere in the reasons, which infects the ultimate conclusion with error, namely when the primary judge found that the College knew of the risks of CA misconduct: [494] J; that the outbound call process and campus driven withdrawal process provided important safeguards against that risk: [496] J; that the inbound call process increased the CA misconduct risk: [497] J; which resulted in the conclusion that, amongst other things, the “dramatic increase in revenue and turnaround in profits” was “substantially” built on VFH revenue in respect of students who “may have been” the victims of CA misconduct: [499] J.
4. Yet, no matter how many safeguards were put in place by the College, there was always going to be *some risk* of CA misconduct. That there were students who “may have been” victims of CA misconduct because of the changes in its systems as made by the College and which increased the risk of that misconduct is not sufficient to attract significant moral censure, without more.
5. Further, the failure to properly consider the factor listed in s 22(1)(d), as part of his analysis as to whether s 21(1) had been contravened, was an error by the primary judge.

### Section 22(1)(e) – the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent services from a different supplier

1. Section 22(1)(e) refers to 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.
2. What other suppliers of the same services as the College were doing by way of their enrolment and withdrawal processes form part of the totality of the circumstances which ought to have been considered by the primary judge as part of a determination of the normative standard of conduct against which the conduct was to be assessed: see *Medibank* at [248]–[249]; see also *Westpac (Omnibus)* at [29].
3. In *Kobelt* at [123], Keane J stated (by reference to similar provisions in the *ASIC Act*) that:

Significantly in this regard, s 12CC(1)(e) expressly contemplates that, for the purpose of determining whether a supplier of financial services has contravened s 12CB, the court may have regard to “the amount for which, and the circumstances under which, the service recipient could have acquired identical or equivalent financial services from a person other than the supplier”. Attention is thereby directed to the prospective financial disadvantage to the customer. **Accordingly, although the absence of proof that actual disadvantage has been suffered by an individual consumer or individual consumers may not be a fatal deficit in a case alleging a contravention of s 12CB, the circumstance that it is not apparent that a consumer could have acquired identical or equivalent financial services from a person other than the supplier on terms more advantageous to the recipient points to the conclusion that the supplier has not contravened s 12CB.**

(emphasis added)

1. In this case, it was not established by the evidence adduced by the ACCC that any consumer could have acquired services from a different supplier in circumstances where the enrolment processes undertaken by that alternative supplier would have included the outbound call process and the campus driven withdrawal process, or other processes which contained equivalent safeguards to the ones that the primary judge found that the College should have maintained.
2. The absence of such evidence was a serious deficit in the ACCC’s case and tells against a finding of unconscionable conduct within the meaning of s 21 of the ACL.
3. Indeed, the evidence which was adduced below demonstrated that the change from the outbound call process to the inbound call process was done to align the College’s processes with that of its competitors, so as to make the College more attractive to the CAs. This provides some evidence that consumers were likely to be able to acquire services from suppliers other than the College in circumstances where that supplier did not undertake the outbound call process. This is a relevant consideration which tells against a finding of unconscionable conduct.
4. It is no answer for the ACCC to say, which the primary judge appeared to accept at [517] J, that a comparison of the systems used at other colleges was unhelpful because “it may be that other such colleges also had unconscionable systems”. That is because, on this reasoning, s 22(1)(e) would have no work to do because it would always be *possible* that other suppliers might have unconscionable systems. Such an approach has the further flaw of being hypothetical: it was not proved by the ACCC that the industry as a whole behaved unconscionably.
5. In *Paciocco (HC)*, Keane J (with whom French CJ and Kiefel J (as her Honour then was) agreed) stated at [290] that:

The appellants seek to stigmatise as unconscionable or unfair or unjust an activity in the marketplace in which nothing materially distinguishes the situation and conduct of either Mr Paciocco or ANZ from any of the other participants in that activity. It may be said that ANZ and its competitors have dealt “unconscionably” or “unfairly” or “unjustly” with all of their customers in that, in a careless or partisan use of language, all banks may be said to do so as a matter of course. **But to argue that conduct by one participant in a market, which is an unremarkable example of conduct engaged in by all participants in that market, is unconscionable, or unjust or unfair, in breach of the statutory norms, without any suggestion that the market itself is unlawfully skewed, is something of a stretch**. ….

(emphasis added)

1. That the ACCC failed to adduce evidence about the amount for which, and the circumstances under which, the consumers could have acquired identical or equivalent services from other suppliers, was a significant deficiency in its case. The failure to consider this as part of the analysis was an error by the primary judge.

### Section 22(1)(g) – the requirements of any applicable industry code

1. It was not part of the ACCC’s case that the College had failed to comply with the VET Guidelines and the *Higher Education Support Act 2003* (Cth) (**HES Act**), which did not require the College to include the outbound call process or the campus driven withdrawal process in its enrolment and withdrawal systems.
2. Section 22(1)(g) of the ACL refers to the requirements of any applicable industry code as being a relevant matter. While the VET Guidelines and the HES Act cannot be regarded as an industry code, the requirements are, by analogy, a relevant consideration when determining the statutory norm of conduct required by s 21.
3. As observed in *Medibank* at [250], the boundaries and content of the relevant statutory regime applying to the industry is also important context within which to assess statutory unconscionability: see also *Westpac (Omnibus)* at [30].
4. Although the primary judge found that the Department of Education never required Registered Training Organisations to have a campus driven withdrawal process (at [171] J), no weight was then placed by the primary judge on this fact, and it was not described as a key finding when reaching the conclusion of unconscionable conduct.
5. Further, the VFH scheme did not require that the College have the outbound call process, but no weight was placed on this fact by the primary judge, and it was not otherwise addressed in the reasons.
6. In the circumstances of this case, it was of particular significance that the applicable regulatory regime did not require the College to have a campus driven withdrawal process or an outbound call process. This fact provided a strong argument against a conclusion of unconscionable conduct insofar as it related to these processes. The failure by the primary judge to take this into account was an error.
7. To hold the College to a different standard than the regulatory scheme in respect of the management of known risks stretches the concept of statutory unconscionability too far, and creates commercial uncertainty. Such an approach is not supported by the text of the legislation or the authorities.
8. As submitted by the College and Site, “That approach is close to converting the [concept of statutory unconscionability] into retrospective court made regulation, an outcome which is particularly problematic where there is no evidence that any other [supplier], operating in the same market, had equivalent policies in place”.

### Section 22(1)(i) – the extent to which the supplier unreasonably failed to make disclosure

1. Section 22(1)(i) refers to the extent to which the supplier unreasonably failed to disclose to the customer any intended conduct of the supplier that might affect the interests of the customer and any risks to the customer arising from the supplier’s intended conduct.
2. There was no allegation made by the ACCC or finding by the primary judge that the College had failed to disclose any intended conduct that might affect the interests of the consumers. In particular, it was not alleged that the College had failed to disclose to the consumers that, if the consumer did not take steps to withdraw themselves from the course before the census date, then they would be liable for the loan debt because the College would not itself take any steps to withdraw them.
3. Instead, the disclosure to the consumers made plain that the onus was on the consumer to withdraw from the course before the census date if they wished to avoid incurring a debt. The fact that there was disclosure to the consumers, with no finding that the information could not be understood by them, is a further factor against a finding of unconscionable conduct. The primary judge failed to consider this, which was an error.

### Section 22(1)(l) – the extent to which the supplier and the customer acted in good faith

1. Consideration of what it means to act in good faith was addressed in relation to equivalent provisions in the *ASIC Act* in *Paciocco (FC)*. In that case, Allsop CJ stated at [288]–[290] that:

The usual content of the obligation of good faith … is an obligation to act honestly and with a fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.

None of these obligations requires the interests of a contracting party to be subordinated to those of the other. It is good faith or fair dealing between the parties by reference to the bargain and its terms that is called for, be they both commercial parties or business dealing with consumers. As Posner J said in *Market Street Associates Ltd Partnership v Frey* 941 F (2d) 588 (1991) the contractual notion of good faith varies in what is required for its satisfaction by reference to the nature of the contract. But the notion is rooted in the bargain and requires behaviour to support it, not undermine it, and not to take advantage of oversight, slips and the like in it. To do so is akin to theft, and if permitted by the law led to over-elaborate contracts, and defensive and mistrustful attitudes among contracting parties. …

The standard of fair dealing or reasonableness that is to be expected in any given case must recognise the nature of the contract or relationship, the different interests of the parties and the lack of necessity for parties to subordinate their own interests to those of the counterparty. …

1. The absence of dishonesty or moral taint is material in determining whether conduct involves such a departure from community standards as to warrant the characterisation that it is unconscionable: see *Kobelt* per Kiefel CJ and Bell J at [58]–[59].
2. In this case, the fact that the College complied (and sought to comply) with the requirements of the VET Guidelines and the HES Act (and the circumstances surrounding the manner of its compliance) supported a finding that the College acted in good faith when it made the changes to its systems.
3. This is especially so having regard to the following unchallenged findings of the primary judge:
4. dishonesty had not been established or alleged: see [512] J;
5. the risks which formed the premise of the key findings by the primary judge were known to and were sought to be addressed by the Commonwealth government through the changes which it had made to the VFH scheme following a Senate inquiry: see, eg, [172], [193], [201] J;
6. Mr Cook, the director of the College, was advised of certain changes being made to the scheme in March 2015 which the Commonwealth regarded as “critical in protecting students and taxpayers as well as the reputation of the entire national vocational education and training sector”. The primary judge found that “Mr Cook might also reasonably have concluded that the changes that the government was introducing to the scheme would alleviate [the risk that unscrupulous agents and brokers might engage in unethical behaviour], at least to a significant extent”: [194] J;
7. the College kept itself informed of the manner in which the Commonwealth was considering and addressing the risks, and took active steps to comply with the VFH scheme including any changes as they came through: see, eg, [166]–[168], [176], [198]–[199], [201], [202], [214]–[215], [230] and [233] J.
8. In addition, the College’s own internal documents and communications demonstrated that it had no intention of taking advantage of any misconduct by the CAs, that it wanted to implement (and believed that it had implemented) a system which complied with the requirements of the VFH scheme and that it was “taking what we believe are the necessary precautions”: [193]–[194], [196], [197], [200], [212]–[213], [244], [245], [332], [333], [335] and [346(1)] J.
9. The precautions taken by the College included the following:
10. including contractual obligations in its contracts that required CAs to carry out sales honestly and fairly, to provide accurate information to consumers and to comply with all applicable legislation and regulatory obligations: [525(1)] J;
11. an agent induction and on-boarding process aimed at training agents to act appropriately: [525(2)], [527] J;
12. speaking directly to consumers during the inbound call to confirm the consumer’s contact details and provide information, including withdrawal information, and ascertaining whether consumers completed the PEQ: [292] and [296] J. And although the primary judge was critical of the inbound call process, it was also found by the primary judge at [515] J that a system of enrolment that has an inbound call in materially the same form and circumstances as that adopted by the College in the relevant period would not on its own be unconscionable;
13. terminating relationships with marketing partners or individual agents when misconduct had been established: [426] J;
14. implementing a campus driven withdrawal in respect of students enrolled by a CA who had engaged in misconduct: [427], [428] J.
15. Although the primary judge was critical of the College’s motives and purposes in making the changes to its enrolment processes, a determination as to whether the College acted in good faith in making these changes and in light of the evidence and findings referred to above did not form part of the primary judge’s analysis which culminated in the critical finding of unconscionable conduct, which was an error.
16. Further, the primary judge erred at [526] J when finding that there was no evidence from the corporate appellants to support a finding that any of their officers believed that the components of the overall system operated effectively to protect consumers. The same error is made at [528] J. Not only was there evidence below, but the primary judge referred to it at [333] J.

## Conclusion

1. To focus on one or more particular factors within s 22 of the ACL without addressing other relevant factors (or the absence of evidence about such factors) can result in a failure to consider the totality of the circumstances when deciding whether there has been unconscionable conduct within the meaning of s 21(1) of the ACL. That is what occurred in this case, which was the wrong approach.

# Ground 7

1. Ground 7 of the Notice of Appeal asserts an error by the primary judge in finding that the conduct of the CAs who enrolled Consumers A, B, D and E was conduct engaged in “on behalf of” the College in circumstances where:
2. the identified conduct was in breach of each CA’s actual authority (as found by the primary judge);
3. the identified conduct was found to be within the apparent authority of each CA in circumstances where the information provided to Consumers A, B, D and E during their inbound call; and the conduct of each CA in advising Consumers A, B, D and E to subvert the College’s enrolment process by not listening to questions, or not answering questions honestly and just saying yes or what the CA said to say, was in each case a sufficient circumstance to alert Consumers A, B, D and E that the CA was not acting with the authority of the College with respect to information provided by the CA which was inconsistent with the information provided by the College.
4. This was in circumstances where, for the College to be liable for the conduct of the CAs in relation to these consumers, the ACCC relied upon s 139B(2) of the *Competition and Consumer Act* which relevantly provided that any conduct engaged in on behalf of a body corporate by an agent within the scope of their actual or apparent authority is taken, for the purposes of the ACL, to have been engaged in also by the body corporate.
5. The question raised by ground 7 is not whether the CAs had apparent authority, but whether the CA in each instance acted within the scope of their apparent authority within the meaning of s 139B(2) in relation to the circumstances surrounding the enrolment of each of Consumers A, B, D and E.
6. Contrary to the submissions of the ACCC, the notion that the wrongful conduct of an agent (including conduct in breach of provisions of the ACL) can be attributable to the principal was not in dispute. However, the fact that the wrongful conduct of an agent *can* be attributed to the principal does not mean that any such wrongful conduct, including a breach of provisions of the ACL, *will* be attributed to the principal by reason of s 139B(2).
7. Whether any attribution is made under s 139B(2) is dependent on the relevant circumstances of the case.
8. In *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* [2018] FCA 1408, Gleeson J stated at [302]–[304]:

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 [sic] is liable if the agent does an act of the class authorised notwithstanding that it is done mistakenly, negligently or wrongfully; and a principle [sic] 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.

1. This passage was cited with approval by Bromwich J in *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)* [2019] FCA 1982 (***AIPE***) at [31]. When dealing with the facts of that case, Bromwich J observed at [32]:

I am satisfied, as was Gleeson J in *Empower* 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**.

(emphasis added)

1. The proposition that extreme or aberrant behaviour would likely fall outside an agent’s authority is consistent with the following statement in Dal Pont, *Law of Agency* (4th ed, LexisNexis Butterworths, 2020) at [20.45]:

The nature of the transaction (to be) effected by an agent is relevant to an inquiry into whether the third party reasonably relied on a principal’s holding out of an agent as authorised to effect that transaction. Where, in facilitating the transaction, an agent acts within the usual authority of a person in that position, a third party is normally not expected to inquire as to the details of the agent’s authority unless something in the nature of the transaction raises suspicion. A transaction prima facie contrary to the principal’s interests, that otherwise lacks an evident connection to the principal’s interests or that without explanation involves the payment of money due to the principal to someone else, is one that a reasonable third party cannot assume to be authorised, and so usually falls outside ostensible authority. The same may be said of an illegal transaction.

Beyond the foregoing, the significance of the transaction to the principal, or its novelty, impacts on the reasonableness of a third party’s reliance. References to ‘extraordinary’ or ‘novel’ transactions in this context reflect, it has been said, ‘an excessive distance between the transaction and what reasonably appears to be the agent’s authority to bind the principal unilaterally’. The relevant inquiry may be ‘whether the transaction is so fundamental or unusual for the type of principal that a reasonable third party would question the agent’s broad discretion’, even if the transaction appears to serve the principal’s interests.

(citations omitted)

1. As to whether the CA had apparent authority in relation to their conduct concerning Consumer A, the primary judge made the following findings at [619] J:

… While I accept that the CA did not solicit consumer A’s enrolment in the college’s prescribed way, and in that sense it may be said to be in breach of or beyond the CA’s actual express authority, the conduct was nonetheless for the purpose of signing up consumer A to a college course for the college’s benefit (being conduct in an authorised class) and therefore within the CAs apparent authority. Importantly also, by styling the CA as a “Course Advisor” for the college and sending the CA into the field as such, the college held out to the world that the CA would have the usual or expected authority of a course advisor. That gave the CA the apparent authority to make representations on behalf of the college with regard to recruitment. It is these representations about which the ACCC complains. The conduct is therefore taken to be on behalf of the college …

1. The reasons at [619] J regarding apparent authority were referred to and relied upon in respect of Consumer B (at [657] J), Consumer D (at [724] J) and Consumer E (at [754] J).
2. The primary judge was correct to find that the College held out to the world that the CA would have the usual or expected authority of a CA. However, the “usual or expected authority” of a CA does not include assisting a consumer to make false statements to the College. That is because it is or ought to be obvious that such conduct is contrary to the interests of the College and, for this reason, it would or ought to cause a consumer to suspect that the CA was not acting within the scope of their authority. Such conduct is the kind of “extreme or aberrant behaviour” referred to by Bromwich J in *AIPE*.
3. For example, the conduct of the CA described in [602] J of nodding and shaking his head during the inbound call and gesturing to an answer sheet indicated, or ought to have indicated to Consumer A, that the CA was subverting the College’s processes by encouraging Consumer A to tell lies to the College. These facts ought to have caused Consumer A to be concerned as to whether the CA was acting within the scope of their authority.
4. Similarly, the respective CA’s conduct when dealing with each of Consumers B, D and E was outside the “usual or expected authority” of a CA because it encouraged these consumers to lie to the College in order to become enrolled as students. In particular:
5. the CA prompted Consumer B’s answers during the inbound call, including by pointing to the answer in an exercise book which contained a list of questions and answers. Consumer B said he did not feel like he could get out of it but was nonetheless suspicious and questioned it in his head at the time: [641] J;
6. the CA said to Consumer D before the inbound call that “when you are asked any questions you just need to say ‘yes, yes, yes’”: [708] J. Consumer D said she was “uncomfortable” saying “yes” while speaking to the college admissions officer; she had not actually filled out the loan application form but said “yes” because the CA was prompting her to do so; and said she filled out a PEQ but had not actually done so: [711] J;
7. the CA told Consumer E before the inbound call to “just say ‘yes’ to everything” and prompted Consumer E during the call: [743] J. Although Consumer E did not do any paper work, he told the college admissions officer that he had completed the PEQ on his own as well as the loan equipment forms, which answers were prompted by the CA: [742] and [746] J.
8. For these reasons, the conduct engaged in by the CAs in relation to each of Consumers A, B, D and E was not within the scope of their apparent authority, and, as it was also not within their actual authority, it was not conduct which was engaged in by the College within the meaning of s 139B(2) of the *Competition and Consumer Act*.
9. It follows that, in my view, the declarations made by the Court on 4 August 2021 in relation to Consumers A, B, D and E to the effect that each CA was acting within the scope of their authority within s 139B(2)(a) of the *Competition and Consumer Act* should be set aside, namely 4(b), 5(b), 7(b), 8(b), 13(b), 14(b), 16(b) and 17(b). The declarations in 4(c), 5(c), 7(c), 8(c), 13(c), 14(c), 16(c) and 17(c) should also be set aside as they are premised on the declarations in 4(b), 5(b), 7(b), 8(b), 13(b), 14(b), 16(b) and 17(b) having been made.

# Ground 8

1. Ground 8 of the Notice of Appeal filed by the College and Site relevantly complains that the primary judge erred in finding that the College engaged in conduct that was unconscionable “in all the circumstances” in relation to Consumers B to E in circumstances where, upon learning of the conduct to which Consumers B to E had been subjected, the College withdrew those consumers from the courses they had enrolled in and remitted all VFH fees or debt.
2. Reliance was placed on s 22(1)(j)(iv) of the ACL, which refers to any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered the contract.
3. The College and Site submit that the primary judge correctly held in relation to the system case that “the unconscionability of the conduct could have been cured, or at least ameliorated, by not claiming or retaining the revenue derived from the conduct and thereby reverse the consumers’ debts” (at [507] J).
4. They also submit that, in relation to Consumers B to E, once the College became aware of the agent’s conduct, it cancelled their enrolments and reversed their VFH debts (B:[654] J, C:[690] J, D:[719]–[720] J, E:[751] J) and that post-contract conduct is a relevant consideration by reason of s 22(1)(j)(iv) of the ACL. They submit that, in those circumstances, the primary judge should have held that the College did not act unconscionably.
5. The primary judge relevantly stated at [663] J in relation to Consumer B:

There is also a submission that because consumer B’s enrolment was reversed that this should count against a finding of unconscionable conduct in all the circumstances. I find this submission unpersuasive because the fact that the college cancelled his enrolment and reversed his VFH debt does not do away with conclusion that there was unconscionable conduct, nor does it take back the distress caused to consumer B.

1. The primary judge took this matter into account in relation to Consumer B but, taking into account other factors, was not persuaded that the College’s conduct had not been unconscionable (leaving aside the issue of whether the College was liable for the conduct of the CA by reason of s 139B(2) of the *Competition and Consumer Act*).
2. That one factor tells against a finding of unconscionable conduct is not necessarily determinative and does not mean that a finding of unconscionable conduct should not have been made: *Westpac (Omnibus)* at [19].
3. No error has been shown in relation to Consumer B.
4. However, the same cannot be said for Consumers C, D and E. For each of these consumers, factual findings were made by the primary judge as follows:
5. in relation to Consumer C – that the College’s communications log records that Consumer C was withdrawn from her course after her support worker called the College on 5 February 2016. On the same day, the VFH debt Consumer C had incurred was reversed and she was sent a letter and a new Commonwealth Assistance Notice or **CAN** recording the cancellation of her enrolment and the re-credit of the debt: [690] J;
6. in relation to Consumer D – that Consumer D received a letter, dated 11 July 2016, advising her that “upon review” the College had elected to reverse the CAN issued on 23 December 2015 meaning that Consumer D had not incurred a VFH debt: [720] J;
7. in relation to Consumer E – that, on 9 December 2015, Consumer E told the College that he wished to withdraw from the course. The College subsequently received information confirming Consumer E’s unsuitability for a diploma-level course. The College then re-credited Consumer E’s VFH debt: [751] J.
8. However, when consideration was given by the primary judge as to whether the conduct of the College was unconscionable in all of the circumstances, no consideration was given by the primary judge to these facts. I refer in particular to [696]–[697] J (Consumer C), [728]–[729] J (Consumer D) and [757]–[758] J (Consumer E).
9. For the reasons given above, this post-contractual conduct by the College was required to be considered by dint of s 22(1)(j)(iv) of the ACL. It cannot be assumed, as the ACCC appears to submit, that the primary judge would have applied the same reasoning to these consumers had this matter been considered, especially as the facts relating to the enrolment of these consumers were different to those concerning Consumer B.
10. In my view and for these reasons, ground 8 should succeed in relation to Consumers C, D and E, and the declarations made by the primary judge on 4 August 2021 in 11(c), 14(c) and 17(c) set aside.

# Disposition

1. In the appeal brought by the College and Site, I would make the following orders:
2. The appeal is allowed.
3. Orders 1, 2, 3, 4(b), 4(c), 5(b), 5(c), 7(b), 7(c), 8(b), 8(c), 11(c), 13(b), 13(c), 14(b), 14(c), 16(b), 16(c), 17(b), 17(c) and 19 made by the Court on 4 August 2021 are set aside.
4. The first respondent pay the costs of the first appellant and second appellant of the appeal.
5. The matter be remitted for hearing on remedies and costs of the liability hearing.
6. In the appeal brought by Mr Wills, I would make the following orders:
7. The appeal is allowed.
8. Order 2 made by the Court on 4 August 2021 is set aside.
9. The proceedings against the appellant are dismissed.
10. The first respondent pay the appellant’s costs of the appeal, and of the proceedings below.

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| I certify that the preceding one hundred and forty-two (142) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Downes. |

Associate:

Dated: 6 April 2023