HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

**Blake Wills**
Appellant

and

**Australian Competition and Consumer Commission**
First Respondent
**Productivity Partners Pty Ltd (t/as Captain Cook College) ACN 085 570 547**
Second Respondent
**Site Group International Ltd ACN 003 201 910**
Third Respondent

# FIRST RESPONDENT'S SUBMISSIONS

## PART I CERTIFICATION

1. These submissions, which respond to the submissions of the appellant (**Mr Wills**) filed on 2 November 2023 (**WAS**), are in a form suitable for publication on the internet.

## PART II ISSUES

2. The issues that arise on the appeal are best formulated as follows (cf WAS [2]):

   2.1. ***First***, in order to establish that a person was "knowingly concerned" in a contravention of s 21 of the ACL, is it sufficient that the person knew the circumstances which rendered the primary contravener's conduct unconscionable, or is it necessary to prove that the person subjectively determined[1] that the primary contravener's conduct had the "essential quality" of being against conscience? (see [15]-[41] below).

   2.2. ***Secondly***, did Mr Wills have the requisite knowledge from 7 September 2015 onwards? (see [42]-[46] below).

   2.3. ***Thirdly***, if the second issue is resolved in Mr Wills' favour, was Mr Wills' conduct after 20 November 2015 sufficient to implicate or involve him in the breach by the second respondent (the **College**) of s 21 of the ACL? (see [47]-[50] below).

## PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. No s 78B notice is necessary.

## PART IV FACTS

4. ***Mr Wills' role****:* Mr Wills was the Chief Operating Officer of the third respondent (**Site**) (the parent company of the College) from around November 2010 to October 2017. In that capacity, the CEO of the College reported to him: FC [35] (CAB 238).[2] Mr Wills was also the acting CEO of the College from 20 November 2015 to 18 January 2016, when the CEO was on leave: PJ [118]; FC [3] (CAB 44, 228).

5. ***Mr Wills' failure to give evidence***: At trial Mr Wills did not give evidence and called no witnesses: PJ [139] (CAB 47). The ACCC's case against Mr Wills was documentary,

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1 On Mr Wills' case, proof of such a subjective determination must be necessary, for it is expressly said to be insufficient to prove knowledge of facts that, "had one thought about it", might have led to the conclusion that the conduct was unconscionable: WAS [38].

2 Note that, in order to avoid the Court being referred to multiple versions of the (very similar) core appeal books in the two appeals, all references to "CAB" are to the amended core appeal book filed on 24 October 2023 in the Productivity Partners appeal. Any references to the core appeal book filed in the Wills appeal (on 19 October 2023) specifically refer to "**WCAB**".

largely consisting of emails and documents sent to him and "his presence at meetings, as recorded in the minutes, but which do not necessarily record the extent of his participation in any particular discussion": PJ [139] (CAB 47). Mr Wills' failure to give evidence led to "the inference … that his evidence would not have assisted his case"[3] and, in particular, that he "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" he attended: PJ [144] (CAB 48). Those inferences are not challenged. In those circumstances, it is not now open to him to characterise his tenure as acting CEO as involving only "passive presence" at meetings (cf WAS [60]-[61]).

6. ***Mr Wills' role in respect of the College***: The uncontroverted findings were that at all relevant times, and increasingly over time, Mr Wills had "considerable authority" over the College and its senior management: FC [283] (CAB 333-334). The College represented a substantial proportion of Site's revenue and earnings (budgeted at 39% and 61% respectively in 2016), and its financial performance would have been of key concern to Mr Wills: PJ [225], [228]; FC [36] (CAB 68-69, 238). An Advisory Board (of which Mr Wills was a member) and then, from July 2015, management meetings (typically chaired and "facilitated" by Mr Wills) oversaw the key financial and operational aspects of the College's business: PJ [254]; FC [37]-[38], [283] (CAB 74, 238-240, 333-334). In late September 2015, Site's CEO reported to Site's board that Site management had pressured the College into accepting changes to enrolment procedures. In October 2015, Mr Wills reported to the Site board that in August 2015, due to the perceived poor financial performance of the College, Site's management had undertaken an "urgent review" of the College's business performance and had reduced its autonomy: PJ [351]-[353]; FC [284] (CAB 98, 334). Mr Wills said that becoming acting CEO of the College from November would allow him "to take the additional responsibility [himself] to facilitate integration & monitor key issues": PJ [338] (CAB 94).

7. ***Mr Wills' knowledge of CA misconduct risk and unsuitable enrolment risk***: By September 2015, Mr Wills knew of the CA misconduct risk and the unsuitable enrolment risk: for an explanation of those risks, see the ACCC's submissions in the Productivity Partners appeal (**PPRS**) [10]-[13];[4] PJ [204], [220] (CAB 63, 67). He was aware that the

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3 *Jones v Dunkel* (1959) 101 CLR 298 at 308 (Kitto J), 312 (Menzies J), 320-321 (Windeyer J). That inference is available in cases where a civil penalty is sought: see ***Adler*** *v ASIC* (2003) 179 FLR 1 at [661] (Giles JA; Mason P and Beazley JA agreeing); *Adams v Director of the Fair Work Building Industry Inspectorate* (2017) 258 FCR 257 at [147] (North, Dowsett and Rares JJ).

4 Note that terms that are defined in the PPRS are adopted for the purposes of these submissions.

prospect of identifying misconduct by CAs during telephone calls was lessened where the CA was present with the prospective student. Mr Wills was also aware that abolition of campus driven withdrawals removed an "important safeguard" against both these risks, resulting in a greater number and proportion of students enrolling and being burdened with debt without benefiting at all: PJ [281]-[282], [562]-[563]; FC [323(a)-(c)] (CAB 82, 150, 347-348).

8. An important source of Mr Wills' knowledge – particularly with respect to: (i) the relationship between the unsuitable enrolment risk and campus driven withdrawals; and (ii) quality assurance (**QA**) processes – was the series of meetings that he attended, on 15 and 17 December 2014 and 18 February 2015, at which the results of an audit of an online campus operated by a co-provider of the College's online courses, **Sero** Learning Pty Ltd, were discussed: PJ [184]-[185], [187], [231]; FC [60] (CAB 58-59, 69-70, 248-249). A report on this audit, discussed at the second meeting, identified that: (i) Sero had no campus driven withdrawal process and no mechanism for assessing whether agents were recruiting unsuitable students; and (ii) the proportion of Sero's students that passed their census date without ever accessing the learning management system was four times as high as the College's (84% vs 21%): PJ [181]-[182], [186] (CAB 57-59); RBFM 7, 15, 17-18, 20. At the 15 December meeting, Mr Cook (the College's CEO) explained that Sero had not been doing campus driven withdrawals, and had been "just processing through census regardless": RBFM 25. He also pointed out that the College's own "rigorous QA process" with its "centralised QA point with the Admissions Team" meant that such students would never have been put through its enrolment process: PJ [184] (CAB 58); RBFM 25. The "Sero experience" made apparent that: (i) a rigorous QA process was important in relation to enrolments to ensure unsuitable students were not enrolled; and (ii) without a campus driven withdrawal process, "there was a risk of substantial numbers (or proportion) of students being enrolled who would be uncontactable" and "get no benefit from their enrolment" but would nonetheless incur VFH debts: PJ [188] (CAB 59). Mr Wills also knew about these matters (and in particular the CA misconduct risk) because he sent or received regular communications relating to CA misconduct and the risk of unsuitable students being enrolled: see PPRS [12]; PJ [204], [220]; FC [323(b)-(c)] (CAB 63, 67, 348).[5]

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[5] Additionally, on 26 October 2015 Mr Wills sent an email in which he commented on a document setting out the Department's guidance to VET providers, which included the statement that the Department's expectation was that the enrolment of uncontactable and unengaged students would be cancelled before their census dates, to avoid such students incurring VFH debts: see PPRS [17]; PJ [350] (CAB 98).

9. ***Mr Wills' involvement in and knowledge of enrolment process changes***: Mr Wills was a "key driver" of the changes to the College's enrolment and withdrawal processes: PJ [282], [573] (CAB 82, 152-153). He was the chair and "facilitator" of the first meeting on 19 August 2015 that discussed enrolment process changes (see PPRS [18] and PJ [249]; FC [78] (CAB 73-74, 254-255)), and was aware of the "essential elements" of the changes, being the shift from Outbound Calls to Inbound Calls in the presence of a sales agent, and the abolition of campus driven withdrawals: PJ [282] (CAB 82). He "supported the changes that were being proposed": FC [290] (CAB 335). He knew that they were meant "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": PJ [242]-[243]; FC [289] (CAB 71-72, 335).

10. ***Mr Wills' knowledge of effects of the changes***: On 13 September 2015, Mr Wills stated that he was putting these changes "under the microscope": PJ [325], [549] (CAB 91, 147). In advance of taking over as acting CEO, he said he would have a "continued watchful eye over PP's operations": PJ [341], [549] (CAB 95, 148). Mr Wills was aware of the "dramatic turnaround" in the College's financial position, which resulted from equally dramatic enrolment increases: see PPRS [19]; PJ [565], [574] (CAB 151, 153).

11. At a management meeting on 21 October 2015, which Mr Wills attended, the changes to the enrolment process, and the dramatic effect of those changes on numbers of agents and students and VFH revenue, were discussed: FC [294], [323(f)] (CAB 336-337, 349). Further, other employees at the meeting raised the fact that many students were not engaging with the online learning system: PJ [348]; FC [95], [294] (CAB 97, 261-262, 336-337). Documents sent to and prepared by Mr Wills in November 2015 indicated that the College expected significant numbers of enrolled students to remain uncontactable and estimated that only 20% of students would engage: PJ [364]-[367]; FC [96] (CAB 101-102, 262). By that time, Mr Wills was aware that the proportion of students who remained enrolled past their census date (the "conversion rate") had increased from about 50% before the changes to about 76% in October. This implied "that increased numbers of unsuitable students were being enrolled": PJ [551] (CAB 148).

12. ***Mr Wills' role from 20 November 2015*****:** Mr Wills' decision to take the role of acting CEO was the "culmination of his increased involvement in the affairs of the [C]ollege"; he wanted to "manage changes" he knew were being implemented: PJ [567]-[568] (CAB 151-152). As acting CEO, Mr Wills provided feedback on the College's admissions

checklist, which contained the script used during the Inbound Call. He was across the "intricate details of the enrolment process": PJ [371] (CAB 103). He was also involved in investigations of the CAs: PJ [424], [434], [439], [444], [551] (CAB 115-119, 148). Mr Wills knew that substantial numbers and proportion of students were getting nothing from the College but were incurring very substantial VFH debts. Mr Wills was the executive responsible for overseeing the process by which students, including those who had not engaged with the College and were not contactable by it, continued to progress through the censuses: PJ [400]-[401], [552]-[553], [574] (CAB 109, 148-149, 153). This continued even after the Commonwealth put a cap on VFH loans for 2016 (during Mr Wills' tenure as acting CEO) (see PPRS [22]). In December 2015, under Mr Wills' leadership, the College claimed $18.9 million in VFH income: PJ [403] (CAB 109).

13. Mr Wills received material in February and May 2016, referred to at PPRS [20], showing that 55% (February) and then 64% (May) of students who had passed through first census and incurred VFH debts were uncontactable and had not engaged with their courses. He considered this information and responded to it by making inquiries about its "resourcing implications": PJ [410] (CAB 112). In early May 2016, he also received a "health check" of the College's online campus (undertaken in April) showing that only 361 of the College's 5,032 students (i.e. 7%) were actively engaging with the online learning portal: PJ [410], [413]-[415]; FC [101]-[103] (CAB 112-113, 263-264). "[T]o Mr Wills' knowledge, the [C]ollege maintained the enrolment of … uncontactable and disengaged students and continued to claim VFH revenue in respect of them": PJ [554] (CAB 149).

## PART V ARGUMENT

### Introduction

14. This appeal should be rejected as a further attempt by Mr Wills "to avoid personal responsibility for the decisions that he was intimately involved in": FC [18] (CAB 234).

### Ground 1 – the knowledge requirement

#### *(i) "Involvement" under the ACL – the applicable legislative scheme*

15. The relief under the ACL sought against Mr Wills includes: (i) civil pecuniary penalties (s 224(1)); and (ii) a disqualification order under s 248: FC [264] (CAB 327).[6] Relevantly, under s 224(1)(e) a court may order a person to pay a pecuniary penalty if it

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6 The relief sought against Site includes a civil penalty under s 224, and non-punitive orders under s 246. There is no issue about whether Mr Wills' state of mind and conduct are attributable to Site by operation of s 139B of the *Competition and Consumer Act 2010* (Cth) (**CCA**): PPAS [55].

is satisfied that the person "has been in any way, directly or indirectly, knowingly concerned in, or a party to" another person's contravention of various provisions of the ACL (including s 21). Under s 248(1), "[a] court may, on application of the regulator, make an order disqualifying a person from managing corporations for a period that the court considers appropriate if … the court is satisfied that the person … has been involved in a contravention" of various provisions of the ACL (including 21).[7]

16. The word "involved" is defined in s 2 of the ACL, which relevantly provides (in sub-para (c)) that "a person is involved, in a contravention of a provision of [the ACL] or in conduct that constitutes such a contravention, if the person … has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention" (the **knowingly concerned test**). Accordingly, the ACCC's case against Mr Wills (and Site) turns on the question of whether that test is satisfied in respect of the College's contravention of s 21.

17. Other provisions of the ACL, either directly or when read with s 2, authorise the grant of remedies in respect of persons that have been "directly or indirectly, knowingly concerned in" a contravention.[8] The same language can also be found in other parts of the CCA[9] and across the Commonwealth statute book.[10] Consequently, the knowingly concerned test, along with very similar wording in other statutes,[11] is an important mechanism used in Commonwealth legislation to impose accessorial liability in respect of contraventions of

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7 Similarly, s 246(1) (under which relief is sought against Site) authorises a court to make a non-punitive order "in relation to a person who has engaged in conduct that … constitutes an involvement in a contravention" of various provisions of the ACL (including s 21).

8 See, eg, s 232(1) (injunctions); s 236(1) (damages); s 237-238 (other relief, such as an order declaring a contract, or part of it, to be void – see, also, s 243(a)); and s 239(2)(a) (consumer redress orders).

9 See CCA, s 44ZZD(2)-(3) (enforcement of determinations); s 44ZZE (enforcement of the prohibition on hindering access); s 51ACA(1); s 75B(1)(c); s 76(1)(e) (pecuniary penalties); s 80(1)(e) (injunctions); s 82 (damages awards); s 86E(1)(a) (disqualification orders); s 87(1)-(1A) (other orders, such as an order declaring a contract, or part of it, to be void); s 151BW(c); s 152BCQ(4)(c); s 152BBA(6)(c); s 152BDH(4)(c).

10 See, eg, *Regulatory Powers (Standard Provisions) Act 2014* (Cth), s 92(1)(d) (which in turn is incorporated into a large number of Commonwealth statutes); Sch 2 to the *Banking Act 1959* (Cth), s 3; *Do Not Call Register Act 2006* (Cth), ss 11(7)(c), 12(2)(c), 12B(8)(c), 12C(2)(c); *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 484(1)(c); Sch 1 to the *Insurance Act 1973* (Cth), s 3(1)(c); *Navigation Act 2012* (Cth), s 301(1)(d); *Telecommunications Act 1997* (Cth), ss 68(2)(c), 101(2)(c), 121(3)(c), 128(2)(c), 139(2)(c), 142C(4)(c), 143(5)(c), 143B(2)(c), 151ZA(4)(c), 151ZB(5)(c), 151ZD(2)(c), 151ZF(5)(c), 151ZG(4)(c), 151ZH(3)(c), 151ZI(2)(c), 317ZA(2)(c), 372B(6)(c), 372C(6)(c), 372E(5)(c), 372F(5)(c), 372G(6)(c), 372L(9)(c), 389B(2)(c), 577K(3)(c), 577L(3)(c) and s 45(3)(c) of Sch 3A.

11 Both s 79(c) of the *Corporations Act 2001* (Cth) and s 550(2)(c) of the *Fair Work Act 2009* (Cth) provide that a person is involved in a contravention of those Acts "if, and only if, the person … [inter alia] has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or a party to the contravention". For discussion of the history of this language in the context of accessorial liability for criminal offences, see Commonwealth, *Review of Commonwealth Criminal Law – Interim Report: Principles of Criminal Responsibility and Other Matters* (July 1990) at [16.59]; *R v* ***Campbell*** (2008) 73 NSWLR 272 at [152]-[174] (Weinberg A-JA).

federal law, both civil and criminal. Acceptance of the narrow approach urged by the appellant could therefore have ramifications across the statute book.

***(ii) Yorke v Lucas* (1985) 158 CLR 661**

18. ***Legislative background***: At the time of its enactment, ss 76 and 80 of the *Trade Practices Act 1974* (Cth) (**TPA**) authorised the making of pecuniary penalty orders and the granting of injunctions against persons who were knowingly concerned in respect of contraventions by another person of a provision of Pt IV (for pecuniary penalties and injunctions) and Pt V (in the case of injunctions only).[12] The knowingly concerned test in ss 76 and 80 of the TPA was taken from (the almost identically worded) s 5 of the *Crimes Act 1914* (Cth). The same wording was later included in s 75B of the TPA, which was inserted by the *Trade Practices Amendment Act 1977* (Cth) (**1977 Act**). Section 75B was a definitional provision that stated that a person is "involved in a contravention of Pt IV or V" where (inter alia) they satisfy the knowingly concerned test. The 1977 Act also gave courts powers to make a broader range of remedial orders against persons involved in contraventions of Pts IV and V (see ss 80A, 82 and 87).[13] These provisions (and the knowingly concerned test) arose for consideration in *Yorke v Lucas*.

19. ***Facts***: Mr Lucas was the managing director of the agent for **Treasureway** Stores Pty Ltd in the sale of that company's business to Mr and Mrs Yorke.[14] Treasureway had represented to the Yorkes (both directly and through Mr Lucas) that the average weekly turnover of its business was $3,500, but that representation was not accurate.[15] Mr Lucas had obtained written confirmation of the turnover figure from Treasureway at least three times, and he did not know that it was inaccurate when he relayed it to the Yorkes.[16] The question was whether Mr Lucas was "involved" (within the meaning of s 75B of the TPA) in Treasureway's misleading or deceptive conduct (which contravened s 52 of the TPA) such that he was liable in damages under s 82.

20. ***Critical elements of the reasoning***: Mason A-CJ, Wilson, Deane and Dawson JJ observed that contravention of s 52 of the TPA "does not require an intent to mislead or deceive"

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12 At that time, Pt IV of the TPA dealt with restrictive trade practices and Pt V contained prohibitions directed toward consumer protection (including the prohibition on misleading or deceptive conduct). At that point, the TPA contained no prohibitions on unconscionable conduct. A prohibition on statutory unconscionable conduct (s 52A, later renumbered to s 51AB) was introduced in 1986, and a prohibition (s 51AA) on unconscionable conduct within the meaning of the unwritten law was introduced in 1992: *ACCC v Samton Holdings P/L* (2002) 117 FCR 301 at [39]-[42] (Gray, French and Stone JJ).

13 See *Yorke v Lucas* (1985) 158 CLR 661 at 669.

14 *Yorke v Lucas* (1985) 158 CLR 661 at 664.

15 *Yorke v Lucas* (1985) 158 CLR 661 at 664-665.

16 *Yorke v Lucas* (1985) 158 CLR 661 at 665.

on the part of the primary contravener.[17] Their Honours: (i) noted that Mr Lucas was alleged to be involved in Treasureway's contraventions of s 52 on the basis that he had "aided, abetted, counselled or procured that contravention" or had been "directly or indirectly, knowingly concerned in, or party to, the contravention"; and (ii) emphasised that the "derivation" of both verbal formulae can "be found in the criminal law".[18] Further, although these concepts were now "operat[ing] as an adjunct to the imposition of civil liability" they should not "be given a new or special meaning".[19] For that reason, for an accessory to have either "aided, abetted, counselled or procured" or been "knowingly concerned" in a contravention of s 52 they must have "intentionally participate[d] in it".[20] In both cases, consistent with the "requirements of the criminal law", as articulated in ***Giorgianni*** *v The Queen* (1985) 156 CLR 473, the "necessary intent" must be "based upon knowledge of the essential elements of the contravention".[21] That is, in order for an accessory to satisfy the knowingly concerned test they must have "knowledge of the essential facts constituting the contravention".[22]

21. When the plurality came to explain what was required under this test on the facts in *Giorgianni*, they stated that the "essential matters" that the accessory needed to know, in order to be complicit in the offence of culpable driving, "included the defective condition of the brakes upon the vehicle being driven, because the culpable driving alleged consisted of the driving of that vehicle with defective brakes".[23] There was no suggestion that the accessory needed to have subjectively determined that driving with defective brakes would amount to driving culpably or "in a manner dangerous to the public" (which was the norm prescribed by the *Crimes Act 1900* (NSW)).[24]

22. In concurring reasons, Brennan J said that "intentional participation"[25] was required for accessorial liability under the TPA and quoted the plurality judgment in *Giorgianni*:[26]

> The necessary intent is absent if the person alleged to be a secondary participant does not know or believe that what he is assisting or encouraging is something which *goes to make up the facts which constitute the commission of the relevant criminal offence*. He need not

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17 *Yorke v Lucas* (1985) 158 CLR 661 at 666.
18 *Yorke v Lucas* (1985) 158 CLR 661 at 669.
19 *Yorke v Lucas* (1985) 158 CLR 661 at 669.
20 *Yorke v Lucas* (1985) 158 CLR 661 at 667, 670.
21 *Yorke v Lucas* (1985) 158 CLR 661 at 670.
22 *Yorke v Lucas* (1985) 158 CLR 661 at 670.
23 *Yorke v Lucas* (1985) 158 CLR 661 at 667.
24 See *Giorgianni* (1985) 156 CLR 473 at 498; cf *Medical Benefits Fund of Australia Ltd v* ***Cassidy*** (2003) 135 FCR 1 at [12] (Moore J).
25 *Yorke v Lucas* (1985) 158 CLR 661 at 676.
26 (1985) 156 CLR 473 at 506 (Wilson, Deane and Dawson JJ) (emphasis added).

> recognize the criminal offence as such, but his participation must be intentionally aimed at the commission of the acts which constitute it.

23. Brennan J concluded that a person will only have "aided, abetted, counselled or procured" a contravention of s 52 of the TPA if they have "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'".[27] The knowledge requirement for a person to be "knowingly concerned" in a contravention of s 52 was "no less stringent". On the facts before the Court, Mr Lucas did not know that Treasureway's representations as to the turnover of the business were incorrect; thus he lacked the knowledge to be "involved" in the primary contravention.[28]

24. ***The correct approach distilled***: The present terms of the relevant provisions of ACL are relevantly identical to s 75B of the TPA as it stood at the time when *Yorke v Lucas* was decided. Drawing on the judgments in that case, and the relevant principles of the criminal law, the correct approach is as follows.

25. ***First***, an accessory must engage in conduct that "implicate[s] or involve[s]" them in the primary contravention.[29] This requires there to be a "practical connexion" between the accessory and the primary contravention.[30] They need not "physically do anything to further the contravention";[31] it will suffice if the accessory has "assented to"[32] or "become associated with"[33] the conduct that amounts to the primary contravention.

26. ***Secondly***, the alleged accessory must have *intentionally* engaged in the conduct that implicates or involves them in the primary contravention.[34]

27. ***Thirdly***, that intention cannot be present unless the conduct is engaged in by the accessory with "knowledge of the essential facts constituting the contravention",[35] meaning "all the essential facts or circumstances which must be established … in order to show" that the

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27 *Yorke v Lucas* (1985) 158 CLR 661 at 677 (emphasis added).
28 See *Yorke v Lucas* (1985) 158 CLR 661 at 670-671 (Mason A-CJ, Wilson, Deane and Dawson JJ), 674 (Brennan J).
29 *R v* ***Tannous*** (1987) 10 NSWLR 303 at 307-308 (Lee J; Street CJ and Finlay J agreeing), quoting ***Ashbury*** *v Reid* [1961] WAR 49 at 51 (Virtue, D'Arcy and Hale JJ).
30 *Ashbury* [1961] WAR 49 at 51; ***Leighton Contractors*** *P/L v CFMEU* (2006) 154 IR 228 at [29] (Le Miere J).
31 *Leighton Contractors* (2006) 154 IR 228 at [29].
32 ***Rural Press*** *Ltd v ACCC* (2003) 216 CLR 53 at [48] (Gummow, Hayne and Heydon JJ).
33 *Tannous* (1987) 10 NSWLR 303 at 308.
34 *Giorgianni* (1985) 156 CLR 473 at 482, 487-488 (Gibbs CJ), 500, 505 (Wilson, Deane, Dawson JJ); *R v* ***Stokes*** (1990) 51 A Crim R 25 at 37-38, 41 (Hunt J; Wood and McInerney JJ agreeing).
35 *Yorke v Lucas* (1985) 158 CLR 661 at 670 (Mason A-CJ, Wilson, Deane and Dawson JJ).

primary contravention was committed.[36] In this regard it must be appreciated that:

(a) the essential facts of which the accessory must have knowledge[37] are "all the circumstances which made what was done [unlawful]",[38] including knowledge of the relevant conduct[39] and, where applicable,[40] "the existence of any state of mind on the part of" the primary contravener that must be established for the primary contravention to occur.[41] While that test is constant, its operation may differ markedly depending upon the elements of the primary contravention in issue.[42]

(b) the accessory need not know: (i) that the primary contravener's conduct amounted to a contravention of the law;[43] or (ii) of the consequences that result from the primary contravener's conduct;[44]

(c) where an accessory expected that a primary contravener would engage in certain conduct they need not have known in advance all the details of that conduct as it in fact occurred[45] – it is sufficient if the accessory knew that the primary contravener would engage in conduct (where applicable with the requisite state of mind) that would, had it occurred, have amounted to a contravention of the law "in the same

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36 *Stokes* (1990) 51 A Crim R 25 at 38, citing *Giorgianni* (1985) 156 CLR 473 at 487-488 (Gibbs CJ), 494 (Mason J), 500, 504-505, 506-507 (Wilson, Deane and Dawson JJ). This requirement has elsewhere been expressed as requiring the accessory to "see that the act constituting the crime is, or will be done, in the circumstances disclosing its criminality": P Gillies, *The Law of Criminal Complicity* (LawBook Co, 1980) at 59.

37 Note that where the primary contravention *does* require intention on the part of the primary contravener, the accessory is only required to have: (i) knowledge that the primary contravener has that intention; and (ii) intended to engage in the conduct that involves or implicates them in the primary contravener's conduct with that knowledge. There is no requirement that the accessory must have *shared* the state of mind of the primary contravener: see *Benford v Sims* [1898] 2 QB 641; *Stokes* (1990) 51 A Crim R 25 at 42; *R v Le Broc* (2000) 2 VR 43 at [61]-[62] (Phillips CJ, Batt JA and Cummins A-JA); Gillies, *The Law of Criminal Complicity* at 59-61.

38 *Giorgianni* (1985) 156 CLR 473 at 479 (Gibbs CJ). See, also, *Hamilton v Whitehead* (1988) 166 CLR 121 at 128 (Mason CJ, Wilson and Toohey JJ).

39 In this regard, note that s 2 of the ACL is concerned not only with involvement in contraventions but also involvement in "conduct that constitutes such a contravention".

40 In the context of the ACL, see, eg, ss 32(1) and 154(1)(c).

41 *Stokes* (1990) 51 A Crim R 25 at 38. See also *Edwards v The Queen* (1992) 173 CLR 653 at 657-658 (Mason CJ, Brennan, Gaudron and McHugh JJ); *R v Phan* (2001) 53 NSWLR 480 at [105].

42 See, eg, ***Rafferty*** *v Madgwicks* (2012) 203 FCR 1 at [253]-[254] (Kenny, Stone and Logan JJ).

43 *Giorgianni* (1985) 156 CLR 473 at 500. See, also 506 and 494 (Mason J); *Johnson v Youden* [1950] 1 KB 544 at 546-547 (Lord Goddard CJ); *Thomas v Lindop* [1950] 1 All ER 966 at 968 (Lord Goddard CJ); *R v* ***McCarthy*** (1993) 71 A Crim R 395 at 409 (Hunt CJ at CL; Wood and Smart JJ agreeing); *R v Buckett* (1995) 79 A Crim R 302 at 309 (Hunt CJ at CL; Bruce J agreeing).

44 *Giorgianni* (1985) 156 CLR 473 at 495 (Mason J), at 502-503 (Wilson, Deane and Dawson JJ); *Stokes* (1990) 51 A Crim R 25 at 38-39.

45 *McCarthy* (1993) 71 A Crim R 395 at 410 (Hunt CJ at CL; Wood and Smart JJ agreeing); *HIH Insurance Limited (in liq) v Adler* [2007] NSWSC 633 at [50] (Einstein J); *Sweeney v Western Australia* [2006] WASCA 118 at [192]-[193] (Roberts-Smith JA; Pullin and Buss JJA agreeing).

type and category" as the primary contravention that did actually occur;[46] and

(d) where the authorities speak of "knowledge" of these matters, actual knowledge is required (though such knowledge may, in certain circumstances, be "inferred from the circumstances surrounding the commission" of the participatory conduct[47]); recklessness or mere suspicion is insufficient.[48] This means that it will not suffice if the accessory merely has access to data which, if analysed, would reveal the essential facts that render conduct unlawful; he, she or it must *know* those matters.[49]

***(iii) Mr Wills' suggested approach represents a wrong-turn***

28. The Court should reject Mr Wills' submission that the knowingly concerned test requires the accessory to have known not only the essential elements of the contravention, but also to have reflected on those elements and have formed a subjective normative judgment about the character of the primary contravener's conduct (see WAS [17], [24], [37], [38]). That is so for five reasons.

29. ***First***, the "knowledge" aspect of the knowingly concerned test is properly understood as concerned with knowledge of the *existence of facts*. That is distinct from a requirement to have *formed a normative judgment about facts* (see WAS [16]-[17], [37]).[50] A conclusion that certain conduct "is predatory or otherwise against conscience" (see WAS [36]) cannot be arrived at by deduction from factual premises alone; it requires "the evaluation *of facts* by reference to … values and norms".[51] Mr Wills' assertion that an accessory must *subjectively know* (WAS [39]) that the primary contravener's conduct

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46 *Bruce v Williams* (1989) 46 A Crim R 122 at 129-30 (Priestley JA; Samuels and Meagher JJA agreeing). See, also, *R v Bainbridge* [1960] 1 QB 129 at 133-134 (Lord Parker CJ; Byrne and Winn JJ agreeing); *DPP (Northern Ireland) v Maxwell* [1978] 3 All ER 1140 at 1147-8 (Lord Hailsham), 1150 (Lord Fraser of Tullybelton), 1150-1 (Lord Scarman); *Ancuta v The Queen* (1990) 49 A Crim R 307 at 311-313 (Lee J; McPherson and Mackenzie JJ agreeing); *Cavallaro v Waterfall* (1988) 8 MVR 271 at 278 (Carruthers J); *Danishyar v The Queen; R v Danishyar* [2023] NSWCCA 300 at [25]-[27] (Dhanji J; Simpson A-JA and McNaughton J agreeing).

47 *Pereira v DPP* (1988) 63 ALJR 1 at 3 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

48 *Giorgianni* (1985) 156 CLR 473 at 483, 486-488 (Gibbs CJ), 495, 505-506 (Wilson, Deane and Dawson JJ); *Stokes* (1990) 51 A Crim R 25 at 42 (Hunt J; Wood and McInerney JJ agreeing).

49 For example an accessory to the offence under s 45AF(1) of the CCA must: (i) know that the primary contravener made a contract; (ii) know that the contract contained the provision that is later asserted to be a "cartel provision" within the meaning of s 45AD of the CCA; (iii) understand the operation of that provision; and (iv) know that the primary contravener had the requisite state of mind: see s 45AF(2). It would not suffice that the accessory merely had a copy of the contract: cf *DPP v Citigroup Global Markets Australia P/L (No 5)* (2021) 293 A Crim R 331 at [94]-[96] (Wigney J).

50 cf *Rural Press* (2003) 216 CLR 53 at [48] (Gummow, Hayne and Heydon JJ). A philosopher would say that this is an example of the "fact-value distinction": see, eg, DF Norton, "Hume, human nature, and the foundations of morality" in DF Norton (ed), *The Cambridge Companion to Hume* (CUP, 1993) at 169.

51 *Kobelt* (2019) 267 CLR 1 at [234] (Nettle and Gordon JJ) (emphasis added). See, also, [97] (Gageler J); *Paciocco v ANZ Banking Group Ltd* (2015) 236 FCR 199 at [298], [304] (Allsop CJ; Besanko and Middleton JJ agreeing); J Allsop AO, "Geoff Masel Lecture" (10 June 2020) at 3, 9, 11.

offends conscience fails to distinguish between knowledge about the facts and circumstances that make up the primary contravention (the knowledge that is required), and the *accessory* having made a judgment that the primary contravener's conduct violates the applicable norm of behaviour. Whether the accessory has made a judgment of that latter kind is irrelevant to whether a primary contravention has occurred. It is likewise irrelevant to whether the accessory is knowingly concerned in such a contravention, because (particularly in the context of ss 21 and 22 of the ACL) to require such a judgment to be made would be in substance to require the accessory to characterise the primary contravener's conduct in terms of the applicable legal test. That would be contrary to "the longstanding principle that it is not necessary for a person to 'recognize' the contravention as such, or explicitly to think about the relevant legislation that their actions may contravene".[52]

30. ***Secondly***, Mr Wills' approach is foreclosed by the decision of this Court in *Rural Press*. Contrary to WAS [35]-[36], the appellants' argument in that case was *not* limited to a contention that the executives of the publishing company that were alleged to be accessories did not know that, in entering into an arrangement under which a rival publisher would withdraw from a particular geographic area, the company contravened s 45(2) of the TPA. Rather, before the Full Federal Court, the executives argued that they did not know that: (i) the primary contravener's conduct could be characterised in the language of the statute;[53] or (ii) it contravened the law.[54] Both arguments were rejected by the Full Court,[55] which, in respect of the first argument, concluded that it was not "necessary for the primary judge to find that [the executives] knew *and appreciated* that the purpose or effect of the arrangement was substantially to reduce competition in the market ultimately identified in the judgment".[56] The Commonwealth Law Reports record that the first argument, which is not distinguishable from Mr Wills' argument, was re agitated by the executives in this Court.[57] The plurality rejected the argument as being premised (like Mr Wills' argument) on a "wholly unrealistic" conception of what is meant by the requirement that an accessory must have "knowledge of [the] circumstances".[58]

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52 *Rafferty* (2012) 203 FCR 1 at [254] (Kenny, Stone and Logan JJ).
53 *Rural Press Ltd v ACCC* (2002) 118 FCR 236 (***Rural Press FCA***) at [154] (Whitlam, Sackville and Gyles JJ).
54 *Rural Press FCA* (2002) 118 FCR 236 at [156].
55 *Rural Press FCA* (2002) 118 FCR 236 at [160]-[163].
56 *Rural Press FCA* (2002) 118 FCR 236 at [163] (emphasis added).
57 *Rural Press* (2003) 216 CLR 53 at 57-58.
58 *Rural Press* (2003) 216 CLR 53 at [48] (Gummow, Hayne and Heydon JJ; Gleeson CJ and Callinan J agreeing at [2]; Kirby J agreeing at [108]).

Their Honours endorsed the Full Court's approach and re-affirmed that "[i]n order to know the essential facts … it is not necessary to know that those facts are capable of characterisation in the language of the statute".

31. ***Thirdly***, Mr Wills' construction would be unworkable in practice, and therefore is not one that the Parliament should be taken to have intended. Mr Wills offers no explanation as to how a putative accessory would identify the "character" or "essential quality" of the conduct that is prohibited by any given provision of the ACL (or the numerous other pieces of Commonwealth legislation that include the knowingly concerned test). He also offers no explanation of how a regulator could ever prove that the putative accessory did subjectively know of the "character" or "essential quality" of the primary contravention, bearing in mind that individual defendants are entitled to rely on the penalty privilege and can elect not to go into evidence. In effect, he seeks to write accessorial liability out of the ACL, at least for contraventions of ss 21 and 22, because under Mr Wills' approach the requisite knowledge would be particularly hard to prove in the context of those provisions. It would require an accessory, first, to have identified the "standards or norms of behaviour required by s 21" (informed by the factors in s 22 to the extent that they are relevant) and then, second, to have considered whether the primary contravener's conduct is consistent with those standards or norms: FC [299] (CAB 338). In practice, that is not distinguishable from "a requirement that an accessory must know that the impugned conduct breaches the law": FC [299] (CAB 338).

32. Of course, most statutory prohibitions are not "expressed [in terms of] values";[59] they simply proscribe specified conduct without requiring any assessment of its character.[60] For laws of that (extremely large) category, a requirement that an accessory must have determined that the primary contravener's conduct has the "character" that is forbidden by statute will be precisely the same as a requirement of knowledge that the conduct breaches the law. It follows that: (i) Mr Wills' proposed approach *does* elevate "ignorance of the law" to a defence (contrary to WAS [34] and the authorities cited at [27(b)] above); or (ii) Mr Wills' approach can only be applied to cases of accessorial liability for contravention of legislative provisions that are framed in terms of "moral values" (cf WAS [28]-[33]).[61]

33. ***Fourthly***, *Yorke v Lucas* imposes no such requirement. Mr Wills seeks to focus on

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59 J Allsop AO, "Geoff Masel Lecture" (10 June 2020) at 3.
60 See, eg (in the context of the ACL alone): ss 79, 106, 136 and 204.
61 J Allsop AO, "Geoff Masel Lecture" (10 June 2020) at 11.

particular words in the plurality's reasons (see WAS [23]-[25]) by elevating to a statement of principle what was in fact their Honours' application of principle to the facts of the case: FC [305] (CAB 340). The plurality in *Yorke v Lucas* expressly applied the law concerning the knowledge required by the accessory as set out in *Giorgianni* (see [21] above). Yet, as noted above, there was no suggestion that, in the earlier case, the accessory needed to have subjectively determined that driving in the circumstances in issue in that case was culpable, in order to establish accessorial liability.

34. ***Fifthly***, as Mr Wills acknowledges (see WAS [39]), his approach introduces a requirement to prove that an accessory *subjectively* determined that the primary contravener's conduct offended the applicable norm of behaviour. He cites no case in which such a requirement has been recognised as a precondition to accessorial liability in respect of criminal offences.[62] It is reminiscent of the test that, for a time, was suggested to govern liability for dishonest assistance in equity under English law, under which the accessory needed to have been subjectively "conscious[] that [they were] transgressing ordinary standards of honest behaviour".[63] That approach: (i) never found favour in Australia;[64] and (ii) has since been comprehensively rejected in England, as the purpose of law "is to set the standards of behaviour which are acceptable" such that it should not be that "the more warped the defendant's standards of honesty are, the less likely it is" that they will be found to have contravened the law.[65]

35. The majority in the Full Court identified the same consideration as weighing against Mr Wills' construction of the relevant provisions of the ACL, stating that "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": FC [313] (CAB 344).[66] Yet in this Court Mr Wills embraces that "perverse" outcome (at WAS [39]) as a necessary result because it is not "possible to adjust the requirements for being knowingly concerned" for s 21 of the ACL alone: WAS [28]. That submission ignores that the same issue may arise for all provisions framed in terms of moral values.[67]

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62 cf [21] above; *Hamilton v Whitehead* (1988) 166 CLR 121 at 127-128.

63 *Twinsectra Limited v Yardley* [2002] 2 AC 164 at [20] (Lord Hoffmann); cf [27]-[38] (Lord Hutton), [114]-[134] (Lord Millett). See, also, J Dietrich and P Ridge, *Accessories in Private Law* (CUP, 2015) at 262-263.

64 *Farah Constructions P/L v Say-Dee P/L* (2007) 230 CLR 89 at [163]-[164] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

65 *Ivey v* ***Genting Casinos*** *(UK) Ltd t/a Crockfords* [2018] AC 391 at [57], [59], [62] (Lord Hughes; Lord Neuberger, Lady Hale and Lords Kerr and Thomas agreeing). See, also, *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476 at [15]-[16] (Lord Hoffmann).

66 See, also, ***Coggin*** *v Telstar Finance Company (Q) P/L* [2006] FCA 191 at [72]-[73] (Heerey J).

67 The observation of Lord Hughes that the capacity to convince oneself "is frequently the stock in trade of the confidence trickster" is apposite: *Genting Casinos* [2018] AC 391 at [59].

Further, to accept Mr Wills' submission would depart from fundamental principle, which has been expressed as follows:[68]

> If the defendant intends to do an act which for moral reasons falls within a legal concept, the fact that the defendant does not properly understand the concept cannot exonerate him [or her]. The fact that the defendant has made a moral mistake in failing to appreciate that his [or her] conduct falls within the appropriate definition cannot be exculpatory.

36. As to the suggestion that a subjective appreciation of the wrongfulness of a primary contravener's conduct is justified because "recklessness is an insufficient basis for accessorial liability" (WAS [39]), the point goes nowhere, because the correct approach requires an accessory to have *intended to* (in the sense of "mean[t] to"[69]) engage in participatory conduct.[70]

37. For the above reasons, in order to establish that a person was "knowingly concerned" in a contravention of s 21 of the ACL, it is sufficient that the person knew the circumstances which rendered the primary contravener's conduct unconscionable. It is unnecessary to prove that the person subjectively determined that the primary contravener's conduct had the "essential quality" of being against conscience (cf WAS [38]-[39]). The Full Federal Court correctly so held.

***(iv) Previous intermediate appellate and first-instance decisions***

38. ***Unconscionable conduct***: The only case on accessorial liability for statutory unconscionability in which the issue in this appeal was considered expressly is *Coggin* (contra WAS [26]).[71] There, Heerey J firmly rejected the approach contended for by Mr Wills. Other decisions in which accessorial liability for statutory unconscionability was alleged have stated that an accessory must have knowledge of "all of the *circumstances* of [the] particular case" (e.g. that there has been a *breach of a contractual duty* of good faith; cf WAS [26])[72] and that it is not necessary to show that an alleged accessory "knew or recognised that the facts constituted unconscionable conduct".[73]

39. ***Misleading or deceptive conduct***: Mr Wills places considerable emphasis (at WAS [19]-[25]) on various intermediate appellate and first instance decisions concerning accessorial liability for breaches of s 18 of the ACL (and its predecessor and cognate provisions).

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68 V Tadros, *Criminal Responsibility* (OUP, 2005) at 221. See, also, D Hume, *Commentaries on the Law of Scotland Respecting Crimes* (BR Bell, 1844), vol 1 at 25.

69 See *R v Tang* (2008) 237 CLR 1 at [47] (Gleeson CJ).

70 cf *Stokes* (1990) 51 A Crim R 25 at 42.

71 [2006] FCA 191 at [71]-[73] (Heerey J).

72 *Stefanovski v Digital Central Australia (Assets) P/L* (2018) 368 ALR 607 at [71] (McKerracher, Robertson and Derrington JJ) (emphasis added). See FC [311] (CAB 343).

73 *Colin R Price & Associates v Four Oaks P/L* (2017) 251 FCR 404 at [89] (Rares, Murphy and Davies JJ).

The state of these authorities is confused, and they are in any event of limited assistance in this appeal due to the obvious difference between knowing that a statement is *false* (a fact) and knowing that conduct is *unconscionable* (an evaluative normative judgment, which in the ACL is guided by statutory criteria, and which is not something that can be "known").[74] Further, many cases in this line focus on the phrase "falsity of the representation[]" in the judgment of the plurality in *Yorke v Lucas*, which at its highest requires knowledge of a fact.[75] In addition, many assert that it is necessary for an accessory to know the "misleading nature" of a statement, but do not engage with the question of what precisely must be known in order to meet that requirement (i.e. is knowledge of the facts that render a representation false enough, or is consciousness that a representation has that character required).[76]

40. The dearth of analysis of the exact scope of the knowledge requirement in those cases is probably explicable on the basis there may be "no real difference" between the two approaches in the standard case where misleading conduct consists of "a simple statement of fact (that is false)" made to an individual.[77] This is because, in that straight-forward case, knowledge of the underlying circumstances will "almost inevitably result in the alleged accessory also knowing [that] the representations were false".[78]

41. The decision in which these issues were most fulsomely considered is *Cassidy*.[79] In that case, Moore J (with whom Mansfield J agreed) observed that a requirement that an accessory must have assessed the truth of a representation "in some subjective sense": (i) was rejected in a number of earlier decisions;[80] (ii) was not required by *Yorke v Lucas*;

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74 Compare *Adler* (2003) 179 FLR 1 at [333] (Giles JA; Mason P and Beazley JA agreeing); *ASIC v Rent 2 Own Cars Australia P/L* (2020) 147 ACSR 598 at [230]-[231], [247], [263]-[264] and [272]-[273] (Greenwood J).

75 *Quinlivan v ACCC* (2004) 160 FCR 1 at [10] (Heerey, Sundberg and Dowsett JJ), on which Mr Wills places considerable emphasis at WAS [22], falls into this category. See, also, amongst many examples, *Stewart v White* (2011) 284 ALR 432 at [36]-[38]; *The Uniting Church in Australia Property Trust (Vic) v Ian Hartley Architects P/L* [2022] VSC 233 at [104]-[105].

76 See, eg, *Zervas v Burkitt (No 2)* [2019] NSWCA 236 at [17]-[18]; *ACCC v Michigan Group Pty Ltd* [2002] FCA 1439 at [303].

77 *Cassidy* (2003) 135 FCR 1 at [15] (Moore J).

78 Dietrich, "The (almost) redundant civil accessorial liability provisions of the Trade Practices Act" (2008) 16 *TPLJ* 37 at 42. See, also, B Michael, "Must an accessory be a know-it-all?" (2010) 18 *TPLJ* 234 at 236; M Pearce, "Accessorial liability for misleading or deceptive conduct" (2006) 80 *ALJ* 104 at 110.

79 *Cassidy* (2003) 135 FCR 1 at [5]- [7], [15].

80 Citing cases including *Paper Products P/L v Tomlinsons (Rochdale) Ltd* (1994) ATPR 41-315 at 42,204 (French J); *Wheeler Grace v Pierucci P/L v Wright* (1989) 16 IPR 189 at 209 (Lee J; Neaves and Burchett JJ agreeing); *Westbay Seafoods (Aust) P/L v Transpacific Standardbred Agency P/L* [1996] FCA 1535 at [6] (Burchett, Whitlam and Sundberg JJ); *Heydon v NRMA Ltd* (2000) 51 NSWLR 1 at [436] (McPherson A-JA; Ormiston A-JA relevantly agreeing); *Adler* (2003) 179 FLR 1 at [331]-[342] (Giles JA; Mason P and Beazley JA agreeing). See, also, *Butt v Tingey* [1993] FCA 369 at [8] (Neaves and Beazley JJ); *Kovan Engineering (Aust) P/L v Gold Peg International P/L* (2006) 234 ALR 241 at [114] (Heerey and Weinberg JJ; Allsop J agreeing).

and (iii) was "inapt" in those cases "where representations are made to the public, and the question of whether they are misleading or deceptive is to be approached at a level of abstraction".[81] That reasoning has been followed in a number of subsequent cases.[82] While there are decisions that take a contrary approach, if this Court decides to consider this issue (which, for the reasons addressed above at [39], it need not do) then Moore J's judgment in *Cassidy* should be held to be correct for the reasons outlined above.

***(v) Mr Wills satisfied the knowingly concerned test***

42. Having regard to the factual matters summarised at [4]-[13] above, Mr Wills had actual knowledge of all the essential facts and circumstances that rendered the College's conduct unconscionable, from 7 September 2015 (see [44] below) or, in any event by no later than 20 November 2015: cf FC [338]-[343] (CAB 356-359). The essential facts and circumstances of the primary contravention are summarised at PPRS [38]-[43].

43. In summary, from the beginning of the impugned enrolment period onwards, as Mr Wills acknowledges (at WAS [44]), he was aware: (i) of the CA misconduct risk and the unsuitable enrolment risk (see [7]-[8] above; PPRS [38]); and (ii) that the enrolment process changes were motivated by a desire to maximise profits (indeed it was Mr Wills whose analysis suggested that change was desirable for that purpose, see PJ [279]-[280] (CAB 81); PPRS [40]-[41]). From 26 October 2015 he also knew that the Department's expectation was that the enrolment of uncontactable students would be cancelled (see [8] above; PPRS [17]).

44. As to Mr Wills' knowledge as to what the likely consequences of removing the safeguards were (see PPRS [39]), the Court ought to reject, as did the Full Court majority (at FC [320]-[323] (CAB 346-350)), Mr Wills' submission at WAS [44] that the evidence did not establish that he "was aware that a poor student conversion rate prior to the enrolment process changes was because of the high proportion of students who were uncontactable and therefore subject to campus driven withdrawals". That argument ignores the knowledge Mr Wills had as a result of the Sero audit (see [8] above). The materials relating to that audit, and the minutes of meetings about the audit (in which, it was inferred, Mr Wills participated) drew a clear comparison between Sero and the

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81 *Cassidy* (2003) 135 FCR 1 at [16].

82 See, eg, *Downey v Carlson Hotels Asia Pacific P/L* [2005] QCA 199 at [138] (Keane JA; Williams and Atkinson JJA agreeing); *Keller v LED Technologies P/L* (2010) 185 FCR 449 at [336]-[337] (Besanko J; Jessup J agreeing); *Propell National* Valuers *(WA) P/L v Australian Executor Trustees* (2012) 202 FCR 158 at [121] (Collier J: Stone J agreeing); *ASIC v Active Super P/L (in liq)* (2015) 235 FCR 181 at [456] (White J); *CellOS Software Ltd v Huber* (2018) 132 ACSR 468 at [1044] (Beach J); *Miletich v Murchie* (2012) 297 ALR 566 at [95] (Gray J).

College in terms of what the absence of campus driven withdrawals did to levels of student engagement and the student conversion rate. The majority in the Full Court correctly identified (at FC [323(a)] (CAB 347-348)) that the Sero audit information was highly relevant because, as the primary judge found (at PJ [188] (CAB 59)): (i) it made apparent the importance of a rigorous QA process in ensuring unsuitable students were not enrolled;[83] and (ii) it demonstrated that without a campus driven withdrawal process, there was a risk of substantial numbers of students being enrolled that were uncontactable, and would get no benefit from their enrolment, but would still incur a VFH debt.

45. ***Knowledge at 7 September 2015***: The Full Court majority erred in failing to conclude that the above evidence – specifically the extent to which Sero and the College's processes were *expressly compared* in these materials and meetings – was sufficient to prove that, at the commencement of the impugned enrolment period, Mr Wills knew that "the outbound call procedure and the campus driven withdrawal process were important safeguards to protect the interests of students": FC [340]; see also [16(c)], [339], [341]-[343], [350], [351], [381] (CAB 234, 357-360, 369). For that reason, the ACCC's notice of contention (WCAB 497-498), which deals with the only element of knowledge found by the Full Court to have been missing as at 7 September 2015, should be upheld.

46. ***Knowledge by 20 November 2015***: In any event, the Full Court majority correctly found that Mr Wills had the requisite knowledge by 20 November 2015: at FC [341] (CAB 358); see also [10]-[11] above.[84] By then, Mr Wills knew that the enrolment changes to remove the safeguards had resulted in the realisation of the CA misconduct risk and the unsuitable enrolment risk in the College's business. He also knew that the College was claiming and retaining very large amounts of VFH income for a student population the overwhelming majority of whom were disengaged or uncontactable students who were receiving no benefits from the College but who were incurring substantial debts: see [10]-[13] above; PPRS [42]-[43]. As to Mr Wills' contention (at WAS [44]) that he was "not aware of the details" of the enrolment process changes, that was correctly rejected at FC [325]-[326], [347] (CAB 350-352, 359).

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83 As did an email that Mr Wills received from Mr Neville Coward in August 2015: PJ [213] (CAB 65).

84 Note also that neither PPAS [43]-[44] nor Mr Wills' grounds of appeal (WCAB 494-495) challenge the findings of the Full Court majority that Mr Wills had knowledge of the requisite matters by 20 November 2015 (if knowledge that the College's conduct offended conscience was *not* required),

**Ground 2 – the participation requirement**

47. This ground falls away if the ACCC's notice of contention is upheld. The submissions below are therefore advanced in the alternative.

48. The conduct required to satisfy the knowingly concerned test is summarised at [25] above: see also FC [279]-[280] (CAB 331-332). The relevant conduct must be engaged in at a time when the accessory has the requisite knowledge.[85] However, even if (contrary to [44]-[45] above) Mr Wills had that knowledge only from 20 November 2015, there is nothing problematic about the majority in the Full Court having made findings about Mr Wills' involvement in the College's business prior to that date (contra WAS [50]-[56]). Those findings "provide the backdrop" to his involvement in the College's contraventions and explain how he came to acquire the requisite knowledge by 20 November 2015: FC [286] (CAB 334). They do not imply a finding that Mr Wills engaged in no conduct that implicated him in the College's contravention after 20 November 2015 (contra WAS [51]).

49. The findings below (summarised at [12]-[13] above) establish that Mr Wills decided to take on the role of acting CEO in order to manage the enrolment process changes that he knew were being implemented. In that role, Mr Wills was the senior executive running the College. He proceeded, with knowledge of the vast numbers and proportion of students who were being enrolled but who were uncontactable or unengaged, to oversee the progression of such students through censuses (such that they incurred VFH debts) and the claiming by the College of very large amounts of VFH revenue (reflecting a reversal of the declining revenue and market share that precipitated the enrolment process changes). In this period, he also: (i) adjusted the details of the enrolment process; and (ii) acknowledged that the College would be claiming VFH revenue in respect of students enrolled in the impugned enrolment period in email communications: PJ [401] (CAB 109). These matters amply demonstrate Mr Wills' participation in – in the sense of association with or assent to (see [25] above) – the College's conduct.

50. Three further points should be noted. ***First***, at WAS [59], Mr Wills seeks to deploy various statements of principle drawn from authorities on what is required to "aid, abet, counsel, or procure" the commission of an offence. The ACCC submits that the matters identified at [49] would be sufficient to satisfy these tests but, in any event, the correct

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[85] See *Campbell* (2008) 73 NSWLR 272 at [44] (Spigelman CJ), [137], [180] (Weinberg A-JA), [183] (Simpson J) and the other authorities cited at WAS [47].

approach is as stated at [25] above.[86] ***Secondly***, at WAS [59]-[66] Mr Wills contends that he did not relevantly participate because he was no more than a "passive presence" at meetings and a "silent observer" in his role as a senior executive of Site and the College. As the majority in the Full Court explained at FC [280]-[281] (CAB 332-333), it is not open to Mr Wills to seek to characterise his attendance at meetings and role as acting CEO in this fashion in light of: (i) the matters identified at [49] above; and (ii) his failure to give evidence. The identified conduct goes beyond omissions on Mr Wills' part;[87] establishes that he was more than a "mere" holder of a directorship;[88] and demonstrates that his support for the College's conduct was much more than "implicit". ***Thirdly***, at WAS [58], Mr Wills denies that he participated in the College's contravention on the basis that for a time he supervised the College's "weak[]" and "flaw[ed]" complaint handling and investigations process: PJ [460]; FC [119], [261] (CAB 122, 270, 327). Mr Wills' involvement in that process further evidences his knowledge (see PJ [563], [565] (CAB 150, 151)) and undermines his claims to have been an entirely hands-off CEO. In any event, this conduct cannot – given the inadequacies of that process (see also PPRS [56]) – make up for, or erase, the participatory conduct identified at [49] above.

## PART VI NOTICE OF CONTENTION

51. See [45] above.

## PART VII ESTIMATE

52. The ACCC estimates that it will require up to 4 hours to present its combined arguments in this appeal and the Productivity Partners appeal.

Dated 30 November 2023

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86 See, also, *TPC v Australia Meat Holdings P/L* (1988) 83 ALR 299 at 357-8 (Wilcox J).

87 cf *Director, Fair Work Building Industry Inspectorate v CFMEU* [2015] FCA 1293 at [111]-[115] (White J).

88 FC [280] (CAB 335), citing *ASIC v* ***Maxwell*** [2006] NSWSC 1052 at [92] (Brereton J). In *Maxwell* the purported accessory was a director alleged to be complicit solely on the basis that he had received a copy of a misleading information memorandum issued by the primary contravener. That is far from the present case. Similarly, Mr Wills' role as acting CEO goes well beyond the conduct of Mr Penney in *Re Maidstone Building Provisions Ltd* [1971] 1 WLR 1085 (cf WAS [62]-[64]).

## ANNEXURE TO THE FIRST RESPONDENT'S SUBMISSIONS

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

1. *Banking Act 1959* (Cth), Sch 2, s 3 – current (Compilation No. 63, 2 November 2023 – present).
2. *Competition and Consumer Act 2010* (Cth), s 139B – as at 7 September 2015 (Compilation No 100, 1 July 2015 - 24 February 2016).
3. *Competition and Consumer Act 2010* (Cth), ss 44ZZD(2)-(3), 44ZZE, 45AD, 45AF, 51ACA(1), 75B(1)(c), 76(1)(e), 80(1)(e), 82, 86E(1)(a), 87(1)-(1A), 151BW(c), 152BBA(6)(c), 152BCQ(4)(c) and 152BDH(4)(c) – current (Compilation No. 146, 5 November 2023 – present).
4. *Competition and Consumer Act 2010* (Cth), Sch 2 (Australian Consumer Law), ss 2, 18, 21, 22, 224(1), 246(1) and 248(1) – as at 7 September 2015 (Compilation No. 100, 1 July 2015 - 24 February 2016).
5. *Competition and Consumer Act 2010* (Cth), Sch 2 (Australian Consumer Law), ss 32(1), 79, 106, 136, 154(1), 204, 232(1), 236(1), 237, 238, 239(2)(a), 243(a) – current (Compilation No. 146, 5 November 2023 – present).
6. *Corporations Act 2001* (Cth), s79(c) – current (Compilation No. 126, 13 November 2023 – present).
7. *Crimes Act 1914* (Cth), s 5 – as at 24 August 1974 (Reprinted as at 19 December 1973, version in force 31 December 1973 – 30 June 1975).
8. *Do Not Call Register Act 2006* (Cth), ss 11(7)(c), 12(2)(c), 12B(8)(c), 12C(2)(c) – current (Compilation No. 16, 21 September 2021 – present).
9. *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 484(1)(c) – current (Compilation No. 61, 8 September 2023 – present).
10. *Fair Work Act 2009* (Cth), s 550(2)(c) – current (Compilation No. 52, 21 October 2023 – present).
11. *Insurance Act 1973* (Cth), Sch 1, s 3(1)(c) – current (Compilation No. 67, 27 October 2023 – present).
12. *Navigation Act 2012* (Cth), s 301(1)(d) – current (Compilation No. 11, 13 September 2019 – present).

13. *Regulatory Powers (Standard Provisions) Act 2014* (Cth), s 92(1)(d) – current (Compilation No. 3, 7 November 2021 – present).

14. *Telecommunications Act 1997* (Cth), ss 68(2)(c), 101(2)(c), 121(3)(c), 128(2)(c), 139(2)(c), 142C(4)(c), 143(5)(c), 143B(2)(c), 151ZA(4)(c), 151ZB(5)(c), 151ZD(2)(c), 151ZF(5)(c), 151ZG(4)(c), 151ZH(3)(c), 151ZI(2)(c), 317ZA(2)(c), 372B(6)(c), 372C(6)(c), 372E(5)(c), 372F(5)(c), 372G(6)(c), 372L(9)(c), 389B(2)(c), 577K(3)(c), 577L(3)(c) and Sch 3A, s 45(3)(c) – current (Compilation No. 109, 27 October 2023 – present).

15. *Trade Practices Act 1974* (Cth), s 45 – as at July 1997 (Reprint No. 8, version in force 30 April 1997 – 31 December 1997).

16. *Trade Practices Act 1974* (Cth), s 75B – as at 19 December 1980 (Compilation taking into account amendments up to 30 June 1980).

17. *Trade Practices Amendment Act 1977* (Cth) (Act No. 81 of 1977).