HIGH COURT OF AUSTRALIA

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Details of Filing

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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 (trading as Captain Cook College) ACN 085 570 547
Second Respondent

Site Group International Limited ACN 003 201 910
Third Respondent

APPELLANT'S SUBMISSIONS

Part I: Publication

1. These submissions are in a form suitable for publication on the internet.

Part II: The issues

2. The issues that arise on the Appellant's appeal are:

    a. *First*, can a person be liable as an accessory to a contravention of the statutory prohibition on unconscionable conduct without knowing that the relevant conduct involves predation, exploitation, or lack of good faith, or otherwise bears the character that renders it against conscience?

    b. *Secondly*, can the participation element for accessorial liability be satisfied by a person engaging in conduct *before* the person has knowledge of the essential matters which make up the contravention if *after* the person acquires the requisite knowledge the person continues to hold a position of authority but does not undertake any positive act that associates the person with the contravention?

3. The First Respondent (**ACCC**) has filed a notice of contention that raises factual (and possibly pleading) issues that are not addressed in these submissions but will be addressed in reply.

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

4. The Appellant (**Mr Wills**) considers that no s 78B notice is required in this proceeding.

Part IV: Citations

5. The decision of the primary judge, Stewart J, is *ACCC v Productivity Partners Pty Ltd (trading as Captain Cook College) (No 3)* (2021) 154 ACSR 472; [2021] FCA 737 (**PJ**) (CAB 5-189).

6. The decision of the Full Court of the Federal Court (Wigney and O'Bryan JJ; Downes J dissenting) is *Productivity Partners Pty Ltd (trading as Captain Cook College) v ACCC* [2023] FCAFC 54 (**FC**) (CAB 222-405).

Part V: Facts

7. ***Background*:** Mr Wills was found by the primary judge to have been an accessory to a contravention of the prohibition on unconscionable conduct by the Second Respondent (**CCC**). CCC was a wholly owned subsidiary of the Third Respondent (**Site**). Site was an accessory to CCC's conduct by virtue of Mr Wills' liability (CAB 232; FC[5]).

8. ***The primary contravention*:** CCC offered online vocational education and training courses. CCC recruited students for these courses using third party marketing and sales agents (CAB 244; FC[40]-[41]). CCC knew that there was a risk of misconduct by these agents and a risk the agents would enrol unwitting or unsuitable students in the courses (CAB 237, 250-251; FC[17],[58]). CCC made changes to its enrolment processes that "weakened its existing safeguards against the occurrence of agent misconduct and against the enrolment of unwitting or unsuitable students" (CAB 237; FC[17]).

9. There was some ambiguity as to the ACCC's case against CCC because of the "unfortunate" (CAB 309; FC[199]) and "regrettable" (CAB 310; FC[200]) "intermingling of temporal allegations" (CAB 310; FC[200]). Ultimately, the systemic unconscionable conduct was a composite of two things: (a) implementing process changes to its enrolment and withdrawal system that increased the risk of unsuitable students being enrolled; and (b) "claiming and retaining" revenue from students enrolled after the process changes (CAB 308-309; FC[197]-[198]). The "claiming and retaining"

was found by the majority in the Full Court to have "completed the unconscionable conduct" (CAB 309; FC[198]).

10. The enrolment process changes took effect on 7 September 2015. Students were enrolled under the new process from 7 September to 18 December 2015. CCC claimed revenue up until September 2016 from the Commonwealth for students enrolled during the period 7 September to 18 December 2015 (CAB 232; FC[4]).

11. ***Accessorial liability*:** Mr Wills was an executive of Site at all relevant times. He exercised authority and supervision over the management and decision-making of CCC (CAB 337, 340, 361; FC [284], [295], [342]). He stepped in temporarily as acting CEO of CCC from 20 November 2015 to 20 January 2016 while the CEO was on leave (CAB 231, 241; FC [3], [34]).

12. The majority in the Full Court found that Mr Wills could not have known all of the matters essential to the primary contravention by CCC until he became acting CEO of CCC (CAB 362; FC[343]). It was not alleged and not found that Mr Wills had knowledge of the character of the conduct of CCC that was against conscience.

13. The majority in the Full Court found that Mr Wills was involved in the implementation of the enrolment process changes based on his conduct before 20 November 2015 (CAB 337-339; FC[286]-[293]). The majority in the Full Court found that after 20 November 2015, Mr Wills continued to "exercise authority and supervision" over CCC, "receive reports" about the implementation of the enrolment process changes and "implicitly gave his support and concurrence" to the process changes (CAB 340; FC[295]). The ACCC did not allege any positive conduct of Mr Wills on or after 20 November 2015[1], and the majority below did not identify any such conduct. The majority in the Full Court found that Mr Wills first became knowingly concerned in CCC's unconscionable conduct on 20 November 2015, when he became acting CEO of CCC, rather than 7 September 2015 (as implicitly found by the primary judge) (CAB 362; FC[344]).

[1] See [137A] of the Second Further Amended Statement of Claim (**2FASOC**); Appellant's Book of Further Materials (**ABFM**) 50-51.

Part VI: Argument

Amended Notice of Appeal

14. Mr Wills' appeal does not involve any separate challenge to the finding of a primary contravention by CCC. However, if the Court allows the appeal by CCC and Site, and concludes that there is no primary contravention, then it follows that the finding that Mr Wills was knowingly concerned in the primary contravention must be set aside.[2] This is the subject of Mr Wills' proposed amended Notice of Appeal.[3]

The first issue: the requisite knowledge

15. The first issue relates to the standard of knowledge for knowing involvement in unconscionable conduct and, in particular, whether accessorial liability requires:

    a. only that an accessory is aware of the *circumstances* which lead the Court to find that, objectively, the conduct of the primary contravenor is unconscionable; or

    b. that an accessory must know that the conduct of the primary contravenor has the character or essential quality that renders the conduct unconscionable, whether described as predation, victimisation, exploitation or something else.

16. In some cases, such as this one, the difference between those two standards will be profound. On the first standard, the *circumstances* standard, it is not necessary for an accessory to have knowledge of an essential element of the contravention – knowledge of the character of the conduct. Mr Wills' liability as found by the majority in the Full Court was expressly based on the *circumstances* standard; there are no allegations or findings that Mr Wills' knew the character of the conduct so as to satisfy the second standard, the *element* standard.

17. An accessory must have *intended* to help, encourage or induce the principal offender to bring about the forbidden result: ***Giorgianni*** *v R* (1985) 156 CLR 473 at 482. As was observed by Gibbs CJ in *Giorgianni* at 482, this means that an accessory must have both knowledge of the circumstances and an intention to aid or abet the primary contravention. An accessory cannot be liable as an "*intentional participant*" (***Yorke*** *v*

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[2] See, for example, *Mallan v Lee* (1949) 80 CLR 198 at 210 per Latham CJ; *Rural Press Limited v ACCC* (2002) 118 FCR 236; [2002] FCAFC 213 at [154] per Whitlam, Sackville and Gyles JJ.

[3] Neither of the Respondents objects to the proposed amended Notice of Appeal on the basis that Mr Wills does not seek to advance any oral or written submissions in relation to the primary contravention, and Mr Wills relies solely on the submissions made by CCC (Supplementary CAB 57-58, 60).

Lucas (1985) 158 CLR 661 at 670) in unconscionable conduct if the accessory is not aware of the unconscionable character of the conduct.

18. However, the majority judgment below concluded that knowledge of *circumstances* is sufficient. Their Honours defined the "essential matters" which Mr Wills would need to know (CAB 348-349, 356, 362; FC[318], [327] and [343]) in a way which excluded knowledge of the character of the conduct. Further, the essential matters identified by the majority were only some of the matters from which the primary judge reached his conclusion about the relevant character of CCC's conduct, being that it took advantage of consumers.

10 19. ***The authorities relating to accessorial liability for misleading or deceptive conduct:*** An analogous issue has arisen in misleading or deceptive conduct cases. The question has been whether it is necessary for an accessory to know that conduct conveys falsities or inaccuracies or whether it is sufficient to know of the *circumstances*, or background facts, that render the conduct objectively misleading or deceptive without being aware of the misleading nature of the conduct. This has recently been described by the New South Wales Court of Appeal as a "longstanding controversy"[4]. It has also been described as "[b]y far the most controversial question concerning s 75B"[5].

20. At least 22 judgments of single judges[6] and nine judgments of intermediate appellate

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[4] *Anchorage Capital Master Offshore Ltd v Sparkes* [2023] NSWCA 88 (***Anchorage***) at [329] per Ward P, Brereton JA and Griffiths AJA.

[5] Pearce, "*Accessorial liability for misleading or deceptive conduct*" (2006) ALJ 104 at 107. Other articles have also examined this question: see, for example, Dietrich, "*The (almost) redundant civil accessorial liability provisions of the Trade Practices Act*" (2008) 16 TPLJ 37; Bannan, "*Accessorial liability under the Trade Practices Act*" (2009) 83 ALJ 407; and Michael, "*Must an accessory be a know-it-all?*" (2010) 18 TPLJ 234. Also, it may be noted that Dietrich & Ridge, *Accessories in Private Law*, 2016 at [3.4.2.2] addresses the first question (and apparently reaches a different conclusion to that expressed in the earlier Dietrich article).

[6] (1) *ACCC v Francis* (2004) 142 FCR 1; [2004] FCA 487 at [84]-[85] per Gray J; (2) *ACCC v Global Prepaid Communications Pty Ltd (in liq)* (2006) ATPR 42-103; [2006] FCA 146 at [45] per Gyles J; (3) *ACCC v Michigan Group Pty Ltd* [2002] FCA 1439 at [303] per Dowsett J; (4) *ACCC v TF Woollam & Son Pty Ltd* (2011) 196 FCR 212; [2011] FCA 973 at [120] per Logan J; (5) *Addenbrooke Pty Ltd v Duncan (No 2)* [2013] FCA 820 at [4]-[6] per Jacobson J; (6) *ASIC v Big Star Energy Ltd (No 3)* (2020) 389 ALR 17; [2020] FCA 1442 at [457]-[491] per Banks-Smith J; (7) *ASIC v GetSwift Ltd (Liability Hearing)* [2021] FCA 1384 at [1805] per Lee J; (8) *ASIC v Vocation Ltd (In Liq)* (2019) 371 ALR 155; [2019] FCA 807 at [11], [616]-[619] per Nicholas J; (9) *Business and Professional Leasing Pty Ltd v Dannawi* [2008] NSWSC 902 at [221] per Young CJ in Eq; (10) *Caple v All Fasteners (WA) (a firm)* [2005] FCA 1558 at [19]-[22] per Nicholson J; (11) *Compumod Investments Pty Ltd v ACN 603 323 182 Ltd* [2021] FCA 915 at [61]; (12) *Crocodile Marketing Pty Ltd v Griffith Vintners Pty Ltd* (1989) 28 NSWLR 539 at 545B-8B per Cole J; (13) *Fernandez v Glev Pty Ltd* [2000] FCA 1859 at [18] per Hely J; (14) *Idoport Pty Ltd v National Australia Bank Ltd* [2000] NSWSC 599 at [40]-[42], [53] per Einstein J; (15) *In the Matter of Idylic Solutions Pty Ltd* [2012] NSWSC 1276 at [1510]-[1512] per Ward J; (16) *Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd* [2020] FCA 1018 at [74] per Derrington J; (17) *JM Kelly (Project Builders) Pty Ltd v Toga Development No 31 Pty Ltd* [2008] QSC 311 at [73]-[75] per Daubney J; (18) *McGrath v HNSW Pty Ltd* (2014) 219 FCR 489; [2014] FCA 165 at [23] per Cowdroy J; (19) *Read v Burns* [2017] ACTSC 184 at [417], [420] per Burns

Courts[7] have favoured the view that knowledge of falsity is required.

21. On the other hand, prior to the judgment of the Full Court below, there were four intermediate appellate Court judgments which suggest that it is sufficient for an accessory to have knowledge of the circumstances which the Court assessed as rendering the representation objectively false: see (1) *Medical Benefits Fund of Australia v Cassidy* (2003) 135 FCR 1 (***MBF***) at [15] per Moore J (Mansfield J agreeing at [17]; Stone J dissenting at [82]-[93]); (2) *Propell National Valuers (WA) Pty Ltd v Australian Executor Trustees* (2012) 202 FCR 158; [2012] FCAFC 31 at [121] where Collier J adopted the reasoning of Moore J in *MBF* (it was not necessary for Gilmour J to consider the issue; Stone J agreed with Collier J (at [1]) but, to the extent this involved agreement with [121], it is contrary to her Honour's detailed dissenting judgment in *MBF*); (3) *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199 at [138] per Keane JA (Williams and Atkinson JJA agreeing); and (4) *Keller v LED Technologies Pty Ltd* (2010) 185 FCR 449; [2010] FCAFC 55 at [336]-[337] per Besanko J (Emmett J and Jessup J agreeing)[8].

22. Shortly after *MBF*, in ***Quinlivan*** *v ACCC* (2004) 160 FCR 1; [2004] FCAFC 175 at [10], the Full Federal Court (Heerey, Sundberg and Dowsett JJ) concluded that knowledge of falsity is required. In each of the judgments that has expressly identified the conflict

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J; (20) *Su t/as Ausviet Travel v Direct Flights International Pty Ltd* [1999] ATPR 41-677; [1999] FCA 78 at [38] per Lehane J; (21) *The Uniting Church in Australia Property Trust (Vic) v Ian Hartley Architects Pty Ltd* [2022] VSC 233 at [104]-[105] per Delany J; (22) *Westlawn Finance Ltd v Tagg* [2018] NSWSC 1491 at [129] per Ball J.

[7] (1) *Anchorage* at [329-[343] per Ward P, Brereton JA and Griffiths AJA; (2) *Belconnen Lakeview Pty Ltd v Lloyd* [2021] FCAFC 187 at [148]-[157] per Griffiths, Davies and Moshinsky JJ; (3) *Body Bronze International Pty Ltd v Fehcorp Pty Ltd* (2011) 34 VR 536; [2011] VSCA 196 at [69]-[73] per Macaulay AJA (Harper and Hansen JJA agreeing); (4) *Hatt v Magro* (2007) 34 WAR 256; [2007] WASCA 124 at [42] per Steytler P (Wheeler and Pullin JJA agreeing); (5) *Quinlivan v ACCC* (2004) 160 FCR 1; [2004] FCAFC 175 at [10] per Heerey, Sundberg and Dowsett JJ; (6) *Rafferty v Madgwicks* (2012) 203 FCR 1; [2012] FCAFC 37 at [253] per Kenny, Stone and Logan JJ; (7) *Rinbridge Marketing Pty Ltd v Walsh* [2000] FCA 1738 at [26] per Lindgren, North and Hely JJ (where the Full Court noted that it was not in dispute that knowledge of falsity was necessary); (8) *Stewart v White* (2011) 284 ALR 432; [2011] QCA 291 at [36]-[38] per Muir JA (McMurdo P and Margaret Wilson AJA agreeing); and (9) *Zervas v Burkitt (No 2)* [2019] NSWCA 236 at [17]-[18] per Bell P (Macfarlan and McCallum JJA agreeing).

[8] It is arguable that *Wheeler Grace v Pierucci Pty Ltd* (1989) 16 IPR 189 at 209 per Neaves, Burchett and Lee JJ also supports this conclusion, although it is not clear whether their Honours were simply making the point that an accessory need not understand that conduct is misleading in the language of the legislation. Further, *Ridgway v Consolidated Energy Corporation Pty Ltd* (1986) 7 IPR 452 at 457 per Fox J arguably supports this conclusion but it was based on an incorrect premise that constructive knowledge is sufficient for accessorial liability (cf *Giorgianni v R* (1985) 156 CLR 473 at 505 per Wilson, Deane and Dawson JJ; see also *Rafferty v Madgwicks* (2012) 203 FCR 1 at [261] per Kenny, Stone and Logan JJ).

between *MBF* and *Quinlivan*, the Court has concluded that knowledge of falsity is required[9].

23. ***Resolving the conflict in the authorities:*** The logical starting point is *Yorke*. The High Court concluded that it was necessary to establish the alleged accessory knew that the representation (weekly turnover was $3,500) was false. In *Yorke* at 667-668, Mason ACJ, Wilson, Deane and Dawson JJ held that[10]:

> *Whilst Lucas was aware of the representations – indeed they were made by him – he had no knowledge of their falsity and could not* ***for that reason*** *be said to have intentionally participated in the contravention* [emphasis added].

10 24. Contrary to what was said by the majority below (CAB 343; FC[305]), it is not the case that there is "passing" reference to knowledge of falsity in *Yorke*. The central question in *Yorke* was whether knowledge of falsity was necessary. The High Court concluded that it was. The High Court explained that accessorial liability under the *Trade Practices Act 1974* (Cth) is derived from the criminal law, and liability is imposed only on those who act with *mens rea* (668-669). An accessory must know each of the elements of the principal offender's conduct that render it criminal, though it is of course not necessary that the accessory knows that the conduct is proscribed by the law because ignorance of the law is no excuse[11].

25. Also contrary to what the majority said below, it is not the case that "knowledge of the
20 falsity of the representation" is "shorthand" for knowledge of the circumstances that render the representation false (cf CAB 343; FC[305]). There is not a single reference to knowledge of "circumstances" in the plurality judgment in *Yorke*. Despite this, the majority below concluded the majority of this Court in *Yorke* was saying that Lucas did not know the essential fact of the actual turnover of the business being sold (which objectively rendered the representation false), rather than that he did not know the essential fact that the representation was false [CAB 344; FC(306]). That explanation cannot sit with the words of the plurality quoted above at paragraph 23.

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[9] *Anchorage* at [329-[343] per Ward P, Brereton JA and Griffiths AJA; *McGrath v HNSW Pty Ltd* (2014) 219 FCR 489 at [23] per Cowdroy J; *ASIC v Vocation Ltd (In Liq)* (2019) 371 ALR 155; [2019] FCA 807 at [616]-[617] per Nicholas J; *ASIC v Big Star Energy (No 3)* (2020) 389 ALR 17; [2020] FCA 1442 at [485]-[491] per Banks-Smith J; *ASIC v GetSwift* [2021] FCA 1384 at [1805] per Lee J.

[10] While this observation was directed to 75B(a), it was plain (at 669-670) that this conclusion also applies in relation to s 75B(c), the "knowingly concerned" limb (and Brennan J reached that conclusion at 677).

[11] *Giorgianni* at 494 per Mason J; at 505 per Wilson, Deane and Dawson JJ.

26. ***The authorities relating to accessorial liability for unconscionable conduct:*** There are two intermediate appellate authorities relating to accessorial liability for unconscionable conduct which are consistent with the conclusion that an accessory must understand the character or the essential quality of the conduct: (i) *Stefanovski v Digital Central Australia (Assets) Pty Ltd* (2018) 368 ALR 607; [2018] FCAFC 31 at [71], in which the Full Court stated that an accessory must have knowledge of "*at least*"[12] the relevant circumstances and then concluded that, in a trial where the unconscionability was based on a breach of good faith, it would be necessary to put to the accessory that they knew that the conduct was in breach of good faith (that is, the character of the conduct was against good faith); and (ii) *Colin R Price & Associates v Four Oaks Pty Ltd* (2017) 251 FCR 404; [2017] FCAFC 75 at [89], in which the Full Court (Rares, Murphy and Davies JJ) imposed liability because the accessories knew of the victim's vulnerability and the "*taking advantage of [the victim's] predicament*".

27. ***The authorities relating to accessorial liability for continuous disclosure breaches:*** The conclusion that it is necessary to know of the relevant character of conduct where the existence of that character is an essential element has also been reached in the context of a breach of the continuous disclosure obligation in s 674 of the *Corporations Act 2001* (Cth). It has been held that an accessory must have had actual knowledge that the information was material, and it is not sufficient that the accessory knows only:

> *… underlying facts from which the Court could infer that a reasonable person would have expected such information to be likely to influence an investor in making a decision whether to acquire or dispose of shares.*[13]

28. ***The same standard for accessorial liability applies to all primary contraventions:*** Contrary to the implicit reasoning of the majority below (CAB 346-347; FC[312]-[313]), there is no change to the standard for accessorial liability depending upon the primary contravention. The majority below said that, for a primary contravention of unconscionable conduct, requiring knowledge of the character of the conduct might allow the morally obtuse or dim-witted to escape liability. The implicit premise, unsupported

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[12] These important words were omitted in the primary judge's summary of *Stefanovski* (CAB 39; PJ [101]). They were also apparently overlooked by the majority below to the extent it was suggested (at CAB 346; FC[311] and [312]) that *Stefanovski* supports a conclusion that knowledge of circumstances is sufficient for accessorial liability.

[13] *ASIC v Vocation Ltd (In Liq)* (2019) 371 ALR 155; [2019] FCA 807 at [607], [620] per Nicholas J. See also *ASIC v Big Star Energy Ltd (No 3)* (2020) 389 ALR 17; [2020] FCA 1442 at [457]-[491] per Banks-Smith J; and *ASIC v GetSwift Ltd (Liability Hearing)* [2021] FCA 1384 at [1805] per Lee J.

by authority or reason, is that it is possible to adjust the requirements for being knowingly concerned to lower the bar for accessorial liability when a primary contravention of this kind is alleged.[14]

29. To the contrary, it has been held repeatedly that the same principles apply whenever s 2 of the *Australian Consumer Law* or a cognate provision[15] applies.

30. For example, Lehane J held in relation to accessorial liability for a contravention of the prohibition on misuse of market power: "Exactly the same principle applies here, where contravention of s 46 is alleged" (*Su t/as Ausviet Travel v Direct Flights International Pty Ltd* [1999] FCA 78 at [38]).

10 31. Similarly, in *Rafferty v Madgwicks* (2012) 203 FCR 1; [2012] FCAFC 37 at [254] – a case which concerned knowing involvement in a contravention of s 51AD of the *Trade Practices Act 1974* (Cth) that prohibited a breach of the *Franchising Code* – the Full Court (Kenny, Stone and Logan JJ) concluded that while "the terms of a legislative prohibition may mean that the essential elements involve more complex facts", it was the case that "the principles referred to in *Yorke v Lucas* continue to apply".

32. It makes no difference that an "evaluative judgment" is required in order to establish a primary contravention. That is true of many primary contraventions. An evaluative judgment is also required for misleading or deceptive conduct.[16] In *SAP Australia Pty Ltd v Sapient Australia Pty Ltd* (1999) 169 ALR 1 at [51], the Court (French, Heerey and
20 Lindgren JJ) said that the "evaluative judgment" (see [2] and [37]) in that context involves a judgment as to a notional cause and effect relationship between the conduct and the

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[14] Cases relating to equitable accessorial liability are not to the point given that actual knowledge is not required in that different context, where a lower standard applies. In that different context, liability extends to knowledge of circumstances which would indicate the facts to an honest and reasonable person; and perhaps to knowledge of circumstances which would put such a person on inquiry: *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; [2012] FCAFC 6 at [259]-[269] per Finn, Stone and Perram JJ.

[15] The definition of "involved" appears in s 2 of the Australian Consumer Law. As to cognate provisions see, for example, s 75B of the *Competition and Consumer Act 2010* (Cth) and s 79 *Corporations Act 2001* (Cth) (which also applies to the *Australian Securities & Investments Commission Act 2001* (Cth) pursuant to s 5(2)).

[16] See, for example, *SAP Australia Pty Ltd v Sapient Australia Pty Ltd* (1999) 169 ALR 1 at 14 at [2] and [37] per French, Heerey and Lindgren JJ; *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564 at [64]–[65] per French J (Beaumont and Finklestein and JJ agreeing). There is nothing in the judgment of Allsop CJ in *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421; [2016] FCAFC 186 which is inconsistent with that conclusion. His Honour simply emphasised that the applicable standard or norm is "more diffuse" for unconscionable conduct than for misleading or deceptive conduct (at [59]).

putative consumer's state of mind. There are many other examples where an evaluative judgment is required.[17]

33. In every case, the Court must undertake the same exercise of identifying the essential matters that constitute the contravention, and determining whether the accessory has the requisite knowledge of each of those matters.

34. ***Ignorance of the law is not relevant:*** It is indisputably the case that liability of an accessory does not require knowledge that the primary contravenor is contravening the law. Contrary to what the majority said, that has no bearing on the first issue in this appeal (cf CAB 341-343; FC[300]-[304]).

10 35. The majority's reliance (at CAB 343; FC[304]) on ***Rural Press*** *Ltd v ACCC* (2003) 216 CLR 53 is misplaced. *Rural Press* did not involve any consideration of whether knowledge of *circumstances* was sufficient. Rather, as is apparent from the judgment of the Full Federal Court, the accessories challenged the conclusion that an accessory need not "have appreciated that the conduct was unlawful".[18] There was no contest in relation to knowledge of the essential elements: there was no challenge to the findings that the accessories knew that River News was in competition with the Standard, and intended that incipient competition should be brought to an end.[19]

36. Knowledge that conduct is predatory or otherwise against conscience, and knowledge that conduct amounts to a contravention are "quite distinct" and should not be elided.[20] An
20 accessory need not think of conduct in statutory language or know that it contravenes the statute. Rather, because the essence of the contravention is that the conduct bears a particular character, the accessory must know of that character or "essential quality".[21]

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[17] See, for example, paragraph 27 above as to the evaluative judgment required to determine whether a non-disclosure was material. By way of further example, there are numerous evaluative judgments involved in deciding whether a person has engaged in cartel conduct (*The* ***Country Care*** *Group Pty Ltd v CDPP* (2020) 275 FCR 342; [2020] FCAFC 30 at [67] and [139] per Allsop CJ, Wigney and Abraham JJ). In that context, an accessory must appreciate that the relevant parties are in competition with each other; and that the arrangement in question contained a provision which would have the effect of fixing prices (*Country Care* [68]-[72]).

[18] See *Rural Press Limited v ACCC* (2002) 118 FCR 236; [2002] FCAFC 213 at [156] and [159] per Whitlam, Sackville and Gyles JJ; see also *Rural Press HCA* at [48] per Gummow, Hayne and Heydon JJ.

[19] *Rural Press Limited v ACCC* (2002) 118 FCR 236; [2002] FCAFC 213 at [162] per Whitlam, Sackville and Gyles JJ.

[20] *Anchorage* at [335(1)].

[21] Dietrich & Ridge, *Accessories in Private Law*, 2016 refer (at [3.4-3.7]) to the "essential quality" of the conduct that means that it constitutes a wrong (viz. that means the conduct gives rise to a contravention).

37. ***Accessorial liability requires* mens rea*:*** In order to establish accessorial liability at criminal law and thus in the present context, a person must act with *mens rea*. If the primary contravention depends upon conduct having a particular character, then this cannot be done without an appreciation of the character of the conduct. For example, if the primary contravention depends on a representation being misleading (typically "false" or some other adjective is used), then the accessory must have actual knowledge of the misleading character of the conduct (that is, knowledge of falsity). The same reasoning applies in other contexts including in the present context of statutory unconscionable conduct.

10 38. The approach of the majority in the Court below contemplates liability where a person has knowledge of facts which, "had one thought about it"[22], might have led one to conclude that the conduct was unconscionable.

39. That approach should be rejected. It involves a departure from the standard of actual knowledge and takes the law into the realm of recklessness. This is "grounded in bad law" and "is, in any event, undesirable"[23]. In the present context[24], recklessness is an insufficient basis for accessorial liability[25]. An astute person may be liable as an accessory where a morally obtuse person may not. Intentional participation based on subjective actual knowledge is required. Thus, there is force in the observation that accessorial liability in this context is "something akin to fraudulent conduct"[26].

20 40. A *primary wrongdoer* need not have knowledge of the unconscionable character of the conduct. That reflects their proximate relationship to the primary wrong. In the case of *accessorial liability*, however, a higher fault element is required because an accessory is less proximate to the wrong. In the context of attempts, for example, it has been noted that the further the law moves away from the causation of the harm prohibited, the more

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[22] *Anchorage* at [330].

[23] Prof A Simester, "*The Mental Element in Complicity*" (2006) 122 LQR 578 at 584.

[24] The position is the same in criminal cases where the common law applies, and in all cases where s 2 of the *Australian Consumer Law* or a cognate provision applies. It may be different in a criminal case where accessorial liability is regulated by statute. For example, where a person is alleged to be an accessory to a criminal cartel offence it may be sufficient to show recklessness (s 5.6(2) of the *Criminal Code Act 1995* (Cth) (**Criminal Code**)) or knowledge that a relevant circumstance may exist in the ordinary course of events (s 5.3 of the Criminal Code): see *Country Care* at [65]-[67] per Allsop CJ, Wigney and Abraham JJ.

[25] *Giorgianni* at 487-488 per Gibbs CJ; at 495 per Mason J; and at 506 per Wilson, Deane and Dawson JJ.

[26] *Sutton v AJ Thompson Pty Ltd (in liq)* (1987) 73 ALR 233 at 242 per Forster, Woodward and Wilcox JJ.

intention is insisted upon, in order to fix liability for conduct.[27] It has also been noted that the possible deficiencies in the *actus reus* of the crime means that the law insists on a greater degree of *mens rea*.[28]

41. That reasoning applies *a fortiori* to accessorial liability which may involve an even greater deficiency in the *actus reus* of the accessory – *any* positive conduct creating a practical connection with the contravention may be a sufficient basis for a finding that a person is knowingly concerned in the contravention of a penal provision and exposed to civil penalties and other relief[29].

42. Accessorial liability is not concerned with some broad notion of culpability in the sense that an alleged accessory might have done better, but with imposing criminal responsibility[30], and cases in which such liability is imposed on a person or entity other than the primary contravenor "are exceptional, and they need careful constraint"[31].

43. ***The resolution of the first issue with respect to Mr Wills:*** Finally, it is necessary to say something briefly about the consequences of a conclusion that knowledge of the essential quality of the conduct is required. While it was alleged and found that CCC took advantage of consumers,[32] there was no allegation by the ACCC, let alone a finding, that Mr Wills knew the conduct of CCC involved a taking advantage, predation or was otherwise against conscience. It follows that if this Court finds that accessorial liability for a primary contravention of unconscionable conduct requires knowledge by the accessory that the conduct of the primary contravenor possessed the character that rendered it against conscience, Mr Wills' appeal succeeds.

44. The high point of the adverse findings in relation to Mr Wills' knowledge was that he was aware of a risk of agent misconduct and that unsuitable students would be enrolled (CAB 150-151; PJ[563]-[564]), and that from 20 November 2015 he was aware that substantial

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[27] Prof A Ashworth, "Attempts" in J Deigh and D Dolinko, *Philosophy of Criminal Law* (Oxford University Press, 2011) Chapter 5 at p. 131.

[28] J Stannard, "Making Up for the Missing Element: A Sideways Look at Attempts" (1987) 7 *Legal Studies* 194.

[29] *Sent v Jet Corporation of Australia Pty Ltd* (1984) 2 FCR 201 at 207 per Smithers J (Sweeney J agreeing).

[30] Although the present context is civil, it is uncontroversial that it is the principles developed for accessorial liability at criminal law that apply. That was the very issue in *Yorke* where the appellants submitted that s 75B of the *Trade Practices Act 1974* (Cth) should not be construed in accordance with the criminal law and intention should not be required. That submission was rejected (at 667-669 per Mason ACJ, Wilson, Deane and Dawson JJ; and at 673 per Brennan J).

[31] Prof A Simester, "*The Mental Element in Complicity*" (2006) 122 LQR 578 at 589.

[32] (CAB 275, 298-299, 308-309; FC[122], [180], [198]).

numbers of students were getting nothing from CCC yet they were incurring very substantial debts to the Commonwealth (CAB 153; PJ[574]). But it was not suggested that Mr Wills knew that this situation had come about because students had been predated upon or that agents had taken advantage of students. The evidence did not establish that Mr Wills[33] 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 (CAB 82; PJ[282]; see also CAB 68; PJ[223]). Further, while Mr Wills was aware of changes to the enrolment and withdrawal processes in a general sense or at a high level, he was not aware of the details (CAB 149, 152; PJ[558], [573]). This is consistent with the fact that Mr Wills had a broad area of responsibility that extended well beyond the part of CCC's business that was the subject of the proceedings (CAB 97; PJ[348]-[349]). There were also findings that Mr Wills was seeking to improve admissions processes and student outcomes (CAB 74, 97; PJ[251], [348]), and Mr Wills was told that management was aware of the need to ensure appropriate procedures are in place to ensure "the protection of [CCC's] customers" (CAB 81; PJ[280]).

The second issue: the requisite participation

45. The second issue on Mr Wills' appeal is as to what acts are sufficient to constitute intentional participation and, in particular, whether an accessory can be liable based on conduct undertaken *before* the accessory acquired the necessary knowledge.

46. ***Knowledge and conduct must exist at the same time:*** It ought to be uncontroversial that acts undertaken without knowledge cannot support a finding of accessorial liability. The majority agreed as a matter of principle (CAB 358; FC[334]). Mr Wills cannot be found liable as an accessory if that principle is faithfully applied. That is because there is no positive conduct of Mr Wills after the date on which the majority held that Mr Wills obtained the requisite knowledge (20 November 2015); the only conduct of Mr Wills after that date is the holding of the office of acting CEO and his attendance at meetings at which information was provided (but in respect of which there was no allegation and nothing to suggest that Mr Wills took any positive step of any kind).

[33] The findings in relation to CCC – based on the knowledge of officers of CCC other than Mr Wills – went further (see, for example, CAB 134; PJ[499]).

47. It is a fundamental feature of accessorial liability that the relevant conduct and the relevant knowledge must exist at the same time. If that is not so, then there cannot be intentional participation. A later acquisition of knowledge of the essential matters is not sufficient: see, for example, *ASIC v Australian Investors Forum Pty Ltd (No 2)* [2005] NSWSC 267 at [114] per Palmer J; *Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 1456 at [234] per White J; *In the matter of Mediation & Online Dispute Resolution Operating Network Pty Ltd* [2022] NSWSC 5 at [101] per Rees J; *R v Campbell* (2008) 73 NSWLR 272; [2008] NSWCCA 214[34].

48. There is no inconsistency between a requirement that conduct and knowledge exist at the same time, and the existence of accessories before the fact. An accessory before the fact must *counsel or procure* the commission of the crime or contravention.[35] This is not possible without knowledge of the matters making up the crime or contravention.

49. The majority introduced a novel reasoning process in relation to Mr Wills' alleged participation which, if right, circumvents the requirement that participation and knowledge must co-exist. At least part of the explanation for this novel reasoning process was that the majority were grappling with the temporal defects, or what was described as "intermingling of the temporary dimensions of the impugned conduct", in the primary judge's reasons (CAB 314; FC[206])). The same difficulty did not arise for the primary judge because his Honour found that Mr Wills had the requisite knowledge from 7 September 2015 (CAB 360; FC[340]). This was the aspect of Mr Wills' appeal that was allowed: the majority concluded that Mr Wills did not have had the requisite knowledge until 20 November 2015 (CAB 362; FC[343]-[344]).

50. ***Reliance on conduct before 20 November 2015:*** The majority made detailed findings that, by virtue of five matters that occurred *before* 20 November 2015 (i.e. before Mr Wills had requisite knowledge), the primary judge was correct to find that Mr Wills was "concerned" in the implementation of the enrolment process changes (CAB 337-339; FC[286]-[293]). This was despite the fact that Mr Wills did not attend certain meetings

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[34] In *Campbell*, it was common ground that the physical and fault elements (that is, the conduct and the relevant state of mind) "*must coincide in time*" (at [44], [137] per Spigelman CJ; [180] per Weinberg AJA; and at [183] per Simpson J). The Court of Appeal unanimously concluded that the conviction of the appellant should be set aside because an alternative case was left to the jury which permitted the jury to convict on the basis that the appellant acquired the requisite state of mind *after* the relevant conduct (importation of drugs) had been completed (at [129] per Spigelman CJ at [181] per Weinberg AJA; and at [183] per Simpson J).

[35] *McAuliffe v R* (1995) 183 CLR 108 at 113 per Brennan CJ, Deane, Dawson, Toohey and Gummow JJ.

at which executives of CCC decided on changes to the enrolment processes (CAB 258, 282; FC[82], [142]-[143]) and he was not part of "Project TBA" which was responsible for redesigning and implementing the enrolment processes (CAB 356; FC[328(b)]; see also the other matters identified at CAB 356-357; FC[328]). The majority then went on to conclude that Mr Wills had "ongoing participation in the contravening conduct" up to September 2016 but the only further matters they identified as occurring on or after 20 November 2015 were:

a. Mr Wills continued to exercise authority and supervision over CCC; and

b. "in that capacity" he received reports and "continued to implicitly give his support and concurrence" to the conduct (CAB 339-340; FC[294]-[295]).

51. The majority must have been using the pre-20 November 2015 conduct to satisfy the participation requirement. This can be deduced from three matters.

a. *First*, there was no reason to make detailed findings about pre-knowledge conduct to conclude that Mr Wills was concerned in the contravening conduct unless the majority considered those findings necessary to satisfy the test for participation.

b. *Secondly*, the majority selected 20 November 2015 as the date from which both knowledge and participation existed, and the only "conduct" that occurred on the date of 20 November 2015 was that Mr Wills assumed the position of acting CEO of CCC (CAB 237; FC[18]).

c. *Finally*, the post-20 November 2015 conduct identified by the majority is, by itself, incapable of satisfying the participation requirement because it involves no active step by which Mr Wills associated himself with the contravening conduct.

52. At FC[287] to [293] (CAB 337-339), the majority identified five matters that were said to demonstrate "the primary judge was correct to find that Mr Wills was "concerned" in that part of CCC's contravening conduct that comprised the implementation of the enrolment process changes" (CAB 339; FC[293]). Those five matters are said to be decisions made by CCC which involved Mr Wills (CAB 337; FC[286]). However, all of the decisions identified in those paragraphs occurred *before* 20 November 2015.

53. Thus, despite the acknowledgment that relevant conduct and knowledge must exist at the same time, the majority took into account conduct of Mr Wills *before* he acquired the

requisite knowledge to find that he was a participant (or "concerned") in CCC's unconscionable conduct. The problem then compounded in FC[294] (CAB 339-340).

54. The majority in FC[294] (CAB 339) then says that the "evidence demonstrates that Mr Wills was relevantly involved" in ongoing contravening conduct, which is said to be "the implementation of the enrolment process changes … throughout the impugned enrolment period" and CCC claiming and retaining the "VFH revenue throughout the impugned conduct period". Indeed, the majority claims "[i]f anything, his involvement in the contravening conduct escalated during that period". It is unclear whether "that period" is referring to "the impugned enrolment period" or the "impugned conduct period". The next six sentences of FC[294] (CAB 339-340) set out pre-20 November 2015 matters. Then the last two sentences FC[294] (CAB 340) refer to matters that occurred on or after 20 November 2015. However, those last two sentences of FC[294] (CAB 340) identify no conduct of Mr Wills other than the holding of a corporate office and the (passive) receipt of reports.

55. When the majority says in the first sentence of FC[295] (CAB 340) that "those facts" are sufficient to establish Mr Wills' ongoing participation in the contravention, they are necessarily referring primarily to pre-20 November 2015 matters.

56. The ACCC's pleaded case (and the case as accepted by the primary judge) relied on conduct of Mr Wills from 1 November 2014 to 18 November 2015[36]. The only pleaded matters that the ACCC relied upon as establishing Mr Wills' participation that occurred on or after 20 November 2015 was that he held certain roles[37] and in that capacity he attended meetings where he received reports typically relating to matters such as enrolment numbers and revenue[38].

57. ***No positive conduct after 20 November 2015:*** Consistently with the absence of any allegation of positive conduct after 20 November 2015, the only "conduct" that the majority identifies after 20 November 2015 (at CAB 340; FC[295]) is Mr Wills' exercise

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[36] [137A(c)]-[137A(e)] of the 2FASOC (ABFM 50-51) ([35]-[41] (ABFM 13) relates to the period from 1 November 2014 to June 2015; [42]-[49] (ABFM 13-14) relates to the period from July 2015 to November 2016, but the only identified conduct is that Mr Wills generally attended meetings, and that reports typically relating to matters such as revenue, engagement with third party agents and enrolment numbers were tabled; [60]-[61] (ABFM 18) relates to on around 15 December 2014; [70]-[71] (ABFM 20) relates to on or around 13 May 2015; [74]-[76] (ABFM 21) relates to on or around 15 July 2015; [78]-[81] (ABFM 22-23) relates to on or around 19 August 2015; and [89]-[97] (ABFM 25-26) relates to on or around 21 October 2015 and 18 November 2015).

[37] [137A(a)]-[137A(b)] of the 2FASOC (ABFM 50).

[38] See footnote 36 above.

of authority and supervision over CCC and "in that capacity" the receipt of reports about the implementation of the enrolment process changes and its effects on enrolments and revenue; and implicit support for the process changes[39].

58. Those post-20 November 2015 matters are insufficient by themselves or cumulatively for participation as an accessory. Indeed, the limited findings by the primary judge about positive acts of Mr Wills after 20 November 2015 are *inconsistent* with the conclusion that he was an intentional participant in CCC's contravention:

    a. on 16 December 2015, Mr Wills reported an unusually high number of referrals from a particular third party course advisor (**CA**), and directed an employee of CCC to ensure that nothing unscrupulous had occurred in respect of enrolments by that CA (CAB 117; PJ[434]), and to ensure that all enrolments from that CA were put on hold pending further investigation (CAB 117; PJ[435]); and

    b. on 18 December 2015, Mr Wills reported an unusually high number of referrals from another CA, and directed an employee of CCC that all enrolments from that CA were put on hold pending further investigation (CAB 118; PJ[439]).

59. An accessory must do something to bring about, or render more likely, the commission of the offence or contravention[40]. Some encouragement, or assistance or some other positive conduct associating the accessory with the primary contravention is required; mere inaction is insufficient[41]. Accessorial liability requires intentional participation by lending assistance or encouragement.[42] An accessory must be more than a "silent observer" or a "mere passive presence".[43] "Mere inertia" is insufficient; "some positive

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[39] The final sentence of FC[295] (CAB 340) also states that participation can be shown by continuing support of and concurrence. However, no conduct that demonstrates support or concurrence is identified. At FC[342] (CAB 361-362), the majority uses different terminology to describe the conduct of Mr Wills, but does not identify any of his conduct after 20 November 2015 beyond what appears in FC[295] (CAB 340).

[40] *Giorgianni* at 493-494 per Mason J citing *R v Russell* [1933] VLR 59 at 67 per Cussen ACJ.

[41] See, for example, *R v Tannous* (1987) 10 NSWLR 303 at 307-308 per Lee J (Street CJ and Finlay J agreeing); *R v Nifadopoulos* (1988) 36 A Crim R 137 at 140 per Kirby ACJ (Maxwell and Carruthers JJ agreeing); *Giorgianni v R* (1985) 156 CLR 473 at 506 per Wilson, Deane and Dawson JJ. The only authority identified by the ACCC referring to an omission is *Ashbury v Reid* [1961] WAR 49. The Full Court (Virtue, D'Arcy and Hale JJ) only referred to an omission because that word appeared in the statute (s 54 *Forests Act 1918-1954* (WA)). In any event, even in that statutory context, the Full Court was careful to emphasise (at [51]) that a failure to act could only be sufficient if it really contributed to the commission of the offence.

[42] *Giorgianni* at 506 per Wilson, Deane and Dawson JJ.

[43] *R v Russell* [1933] VLR 59 at 71 per Cussen ACJ and at 77 per Macarthur J respectively. See also, for example, *R v Guthrie and Watt* [2003] VSC 323 at [30] per Redlich J (and the authorities cited there including *Giorgianni* at 493 per Mason J) and *Director of Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1293 at [114] per White J.

step of some nature is required"[44]. The post-20 November 2015 "conduct" identified by the majority cannot satisfy these requirements.

60. *First*, the exercise of authority and supervision is not a positive act of participation. Any person in any corporate role exercises authority and supervision. It flows from the holding of office, and it is axiomatic that the mere fact that a person holds a particular office, such as director, is insufficient for participation in a contravention[45].

61. *Secondly*, the passive presence at a meeting or the receipt of a report, may be relevant to *knowledge* but it is not capable of amounting to a positive act of *participation*. Even where a person is present when a crime or a contravention occurs, it remains necessary to identify some positive contribution to the crime or contravention.

62. In *Re Maidstone Buildings Provisions Limited* [1971] 1 WLR 1085[46], it was alleged that Mr Penney, the company secretary and an accountant, was "party to" a primary contravention by the company of carrying on business with intent to defraud creditors. Mr Penney brought a summary dismissal application and, although the statutory context was plainly different, the application was determined expressly on the basis that the accountant had the requisite knowledge (1091F). So the question that arose was whether there was sufficient conduct or participation by Mr Penney.

63. The identified conduct of Mr Penney was that he held the position of secretary and his presence at directors' meetings. In fact, the conduct went further than the present case because the evidence also established that Mr Penney engaged in positive conduct in that he advised the Board in relation to the company's finances and thus acted in some sense as its financial advisor, although he was not involved in purchasing goods or incurring credit on behalf of the company (1089G, 1092D).

64. The liquidator contended that Mr Penney was liable as an accessory on the basis that he failed to advise the company against incurring further debt. Pennycuick VC summarily

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[44] *Re Maidstone Buildings Provisions Limited* [1971] 1 WLR 1085 at 1093D (referred to with apparent approval in *Yorke v Lucas* (1983) 49 ALR 672 at 681 per Bowen CJ, Lockhart and Beaumont JJ).

[45] See, for example, FC[280] (CAB 335); *ASIC v Maxwell* (2006) 59 ACSR 373; [2006] NSWSC 1052 at [92] per Brereton J; *Motor Trade Finances Prestige Leasing Pty Ltd v Elderslie Finance Group Corporation Ltd* [2006] NSWSC 1348 at [271] per White J; *Director General, Department of Services, Technology and Administration v Veall* [2011] NSWSC 358 at [152] per Buddin J; *Re Maidstone Buildings Provisions Limited* [1971] 1 WLR 1085 at 1093C-E per Pennycuick VC.

[46] The decision was referred to with apparent approval by the Full Federal Court (Bowen CJ, Lockhart and Beaumont JJ) in *Yorke v Lucas* (1983) 49 ALR 672 at 681.

dismissed the claim because "*some positive steps of some nature*" were required (1092G), and "*mere inertia*" was insufficient (1093E). The fact that Mr Penney held the office of secretary, that he attended directors' meetings and that he provided advice in relation to the company's financial position was not sufficient.

65. Even if a person is present at the commission of a violent crime, it is necessary to establish active participation or encouragement. In *R v Clarkson* [1971] 1 WLR 1402, the accused were present during a sexual assault, but they were not liable as accessories because there was "no evidence … [they] had done any physical act or uttered any word which involved direct physical participation or encouragement".[47]

66. Mr Wills' attendance at meetings and receipt of reports that are in some way related to the impugned conduct – but where there is no allegation or evidence of any positive step taken by Mr Wills – cannot amount to the requisite participation.

67. *Thirdly*, the majority in the Full Court also relied on the notion of implicit support. The majority did not say whether it sourced this "implicit support" in the holding of a corporate office and attendance at meetings or some other unidentified conduct.

68. Before turning to the substance of "implicit support", it should be emphasised that there was no pleaded case of implicit (or indeed explicit) support and concurrence after 20 November 2015, and no finding was made by the primary judge to that effect. Mr Wills submits that that is sufficient to preclude any reliance on "implicit support", especially given the serious personal consequences where an individual is found to be involved in a contravention of the statutory prohibition on unconscionable conduct. It was not part of the case Mr Wills had to meet, and he made forensic choices (including, for example, not to give evidence) on the basis of the case advanced against him.

69. In any event, implicit support – which must necessarily mean <u>not</u> *explicitly* supporting – is not capable of amounting to a positive act of association.

70. The majority said in their reasons that accessorial liability "extends to a person who is in a position of authority and expressly *or implicitly* approves or assents to the unlawful conduct" (our emphasis) and cited the plurality judgment in *Rural Press* at [48] for the

[47] *R v Clarkson* [1971] 1 WLR 1402 at per Megaw LJ.

proposition (CAB 334-335; FC[279]). But there is no reference in *Rural Press* (at [48][48] or otherwise) to "implicit" approval, let alone an explanation of what that would involve.

71. At FC[342] (CAB 361), the majority conclude that Mr Wills "remained a participant" in the conduct (beyond 20 November 2015) "by virtue of his ongoing supervision of the management and decision-making at CCC, including during the period he was acting CEO". The only way to understand the proposition that he "remained a participant" (emphasis added) is that the majority's conclusion that Mr Wills was a participant after 20 November 2015 depended on conduct of Mr Wills *before* that date and therefore before he could have been acting with the necessary intention. Mr Wills submits that this approach was wrong as a matter of law. Alternatively, even if the reference to "remained" and reliance on pre-20 November 2015 conduct is ignored, and the majority was finding that merely receiving information and holding a corporate office is sufficient for participation in a contravention, that is also wrong as a matter of law.

Part VII: Orders sought

72. Mr Wills seeks the orders set out in his Notice of Appeal.[49]

Part VIII: Estimate of time

73. Mr Wills estimates that he will need 2.5 hours to present his argument.

Dated: 2 November 2023

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[48] At [48] Gummow, Hayne and Heydon JJ simply refer to the need for an accessory to participate in, or assent to, the primary contravention. There is nothing to suggest this is anything but a reference to the principles discussed in paragraph 59 above (an accessory must do something positive that operates to bring about, or render more likely, the commission of the offence or contravention). There was no issue in the case about the need for positive conduct. As noted at [48] of *Rural Press*, the argument was confined to a debate about whether McAuliffe and Law needed to understand that there had been a contravention in the language of the statute (see also paragraph 35 above).

[49] CAB 494. Mr Wills' proposed amended Notice of Appeal is at Supplementary CAB 51.

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, the Appellant sets out below a list of the particular constitutional provisions and statutes referred to in its submissions.

No	Description	Version date	Provisions
Commonwealth statutory provisions			
1.	*Judiciary Act 1903* (Cth)	Current (Compilation No 49, 18 February 2022 - present)	s 78B
2.	*Trade Practices Act 1974* (Cth)	No 51 of 1974 (Version 7 April 1994 - 27 November 1994)	s 46
		No 51 of 1974 (Version 25 September 2007 - 2 March 2008)	s 51AD
		No 51 of 1974 (Reprint 2, 30 June 1980 – 30 June 1982)	s 75B
3.	*Corporations Act 2001* (Cth)	Current (Compilation No 125, 21 September 2023 - present)	s 79
		No 50 of 2001 (Version 1 July 2014 - 18 December 2014)	s 674
4.	*Competition and Consumer Act 2010* (Cth)	Current (Compilation No 145, 21 September 2023 - present)	s 75B
		As at 20 November 2015 (Compilation No 100, 1 July 2015 - 24 February 2016)	Sch 2, s 2
5.	*Australian Securities & Investments Commission Act 2001* (Cth)	Current (Compilation No 95, 20 October 2023 - current)	s 5(2)
6.	*Criminal Code Act 1995* (Cth)	No 12 of 1995 (Version 27 March 2014 - 23 June 2014)	ss 5.3, 5.6(2)

No	Description	Version date	Provisions
Commonwealth statutory instruments			
7.	*Trade Practices (Industry Codes — Franchising) Regulations 1998* (Cth)	No 162 of 1998 (Version 1 October 2001 - 29 February 2008)	Sch
State / territory statutory provisions			
8.	*Forests Act 1918-1954* (WA)	No 8 of 1919 (Version 8 December 1954 - 2 October 1964)	s 54