HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

Productivity Partners Pty Ltd (t/as Captain Cook College) ACN 085 570 547
First Appellant
Site Group International Ltd ACN 003 201 910
Second Appellant

and

Australian Competition and Consumer Commission
First Respondent
Blake Wills
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

PART I CERTIFICATION

1. These submissions, which respond to the appellants' submissions filed on 2 November 2023 (**PPAS**), are in a form suitable for publication on the internet.

PART II ISSUES

2. In this proceeding, the first respondent (**ACCC**) alleged,[1] the primary judge found,[2] and the majority in the Full Court affirmed,[3] that the first appellant (the **College**) engaged in systemic unconscionable conduct contrary to s 21 of the *Australian Consumer Law* (**ACL**) between 7 September 2015 and September 2016: FC [4] (CAB 229[4]). The unconscionable conduct comprised two elements: (i) implementing enrolment process changes for students that were enrolled in the College's online campus between 7 September 2015 and 18 December 2015 (**impugned enrolment period**), when the College knew both of the risk of misconduct by agents it engaged to recruit students, and that the changes increased the risk (that was already materialising regularly) that unwitting and unsuitable students would be enrolled and would thus incur significant debts to the Commonwealth, despite receiving no benefit from the College; and (ii) claiming and retaining revenue from the Commonwealth in respect of such students who enrolled during the impugned enrolment period: FC [197]-[198], [201] (CAB 305-306, 307-308).[5]

3. The ***first*** issue in this appeal raises two related questions, namely (i) must the assessment of whether conduct has contravened s 21 of the ACL be analysed by reference to the "framework" provided by the factors identified in s 22 (PPAS [21], [46], [48]); and (ii) must each of those factors be taken to "tend[] against a finding of unconscionable conduct" unless and until the opposite is proven (PPAS [48])? The answers to both those

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1 The ACCC also alleged, and the primary judge found, that the second respondent (**Mr Wills**), and through him, the second appellant (**Site**), were directly or indirectly knowingly concerned in, or a party to, the College's contravention of s 21 of the ACL: PJ [2] (CAB 14). Those findings were affirmed by the Full Court: FC [5] (CAB 229). These findings are challenged in proceeding S116 of 2023, and in ground 3 of this appeal. The issues relating to Mr Wills', and consequently Site's (PPAS [55]-[57]), involvement in the College's conduct are addressed in the ACCC's submissions in that proceeding (**WRS**).

2 *ACCC v Productivity Partners P/L (t/as) Captain Cook College (No 3)* (2021) 154 ACSR 472 (**PJ**).

3 *Productivity Partners P/L (t/as) Captain Cook College v ACCC* (2023) 297 FCR 180 (**FC**).

4 References to "CAB" are to the amended core appeal book filed in this appeal on 24 October 2023.

5 Separately, the ACCC also alleged that the College contravened ss 18, 21, 29, 78 and 79 of the ACL in respect of the enrolment of five individuals (consumers A to E) who were recruited by the College's agents, whose conduct was attributed to the College pursuant to s 139B(2) of the *Competition and Consumer Act 2010* (Cth): PJ [4]-[5]; FC [6] (CAB 14, 229). The resolution of those allegations by the courts below is not in issue in the appeal to this Court.

questions – which form the gravamen of ground 1 of the notice of appeal (CAB 491) – are "no".

4. The ***second*** issue is whether the courts below failed to analyse properly various matters in assessing whether the College's conduct was unconscionable. The courts below did not err in the ways that the appellants contend, including because the appellants downplay the extent to which consumer protections were decreased by the enrolment process changes, and ignore that the College knew this but nonetheless proceeded with the changes in the pursuit of profits at the expense of consumers. A number of these matters are relied on under both grounds of the appellants' notice of appeal,[6] but, in the interests of avoiding repetition, they are dealt with under ground 2 below.

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

5. No s 78B notice is necessary.

PART IV FACTS

6. In this Court, the appellants do not challenge the underlying findings of fact that supported the conclusions reached by the courts below. Nevertheless, the factual background set out in Part V of PPAS needs to be augmented and clarified by reference to the following relevant matters as found by the primary judge and affirmed by the Full Court majority.

7. ***The VFH scheme:***[7] The course fees that the College charged students were substantial: around $13,000-$20,000 per course: FC [44] (CAB 243). The **VFH scheme** enabled students to obtain "VET FEE-HELP loans" from the Government, to cover those course fees. The Government would pay the loan amounts directly to vocational education and training (**VET**) providers like the College; the students would then owe a debt (**VFH debt**) to the Government (of the loan amount plus a 20% loan fee) that would be repayable through the taxation system once a student earned above a specified threshold (which at the material time was c.$54,000): PJ [11]; FC [25], [29] (CAB 15-16, 236-237). The fees for a unit of study were not payable, and the student did not incur a debt to the Commonwealth, if the student withdrew from the unit of study prior to the **census date** (which could not be less than 20% of the way between the unit's commencement and its completion date): PJ [17]-[19] (CAB 17).

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6 Some of these matters are asserted by the appellants to be relevant to factors in s 22.

7 See the discussion of the VFH Scheme (which operated under the *Higher Education Support Act 2003* (Cth)) in ***Unique*** *International College Pty Ltd v ACCC* (2018) 266 FCR 631 at [5]-[9] (Allsop CJ, Middleton and Mortimer JJ).

8. ***Known risks and problems in the VFH scheme:*** In general, the VFH scheme created an opportunity for unscrupulous VET providers to exploit the scheme and make "windfall profit[s]" by allowing unsuitable students to be enrolled, and remain enrolled past the census date, because the providers could recover substantial fees in respect of each of them without having to incur the variable cost of providing the course to those students, and without the students receiving any benefit (despite the debts that they then owed to the Commonwealth): PJ [22] (CAB 18)[8] and FC [51] (CAB 246). Two features of the College's business compounded this problem.

9. ***First***, the College relied for recruitment of students, to a large extent, on sales agents (sometimes referred to as "course advisors" or "CAs"), who received a commission of 20% of the applicable course fee when students passed their census dates: PJ [31]; FC [56] (CAB 20-21, 247). ***Secondly***, the College provided courses through an online campus, which increased the difficulty of preventing unsuitable students being enrolled: the lack of face-to-face contact with enrolled students meant the College could not, in the words of an employee of the College, "build a relationship with the student[s] to determine [that] they are suitable for the course": PJ [245]; FC [57] (CAB 72-73, 247).

10. The problems generated by the structure of the VFH scheme, and the nature of the College's business, were pleaded (and considered by the Courts below) in terms of two overlapping "risks": FC [58] (CAB 247-248). ***First***, there was the risk of sales agents acting unethically when recruiting students, such as by making false or misleading statements, offering inducements (such as "free" laptops), pressuring persons to enrol, and answering questions on behalf of those persons during the enrolment process (the **CA misconduct risk**): FC [58] (CAB 247). ***Secondly***, there was the risk of "unwitting or unsuitable" students being enrolled (and thus incurring VFH debts) (the **unsuitable enrolment risk**): PJ [58] (CAB 247-248). As the majority in the Full Court explained, both categories of risk concerned persons being enrolled in online courses where they did not do so willingly and with full knowledge of the VFH debt being incurred, or where they were unsuitable for enrolment because they lacked sufficient skills (referred to collectively as "**unwitting or unsuitable students**"): FC [58] (CAB 247-248).

11. The CA misconduct risk and the unsuitable enrolment risk were not merely hypothetical for the College. The CA misconduct risk "regularly materialised" (PJ [494] (CAB 132); FC [184] (CAB 300)); and the enrolment of unwitting or unsuitable students was a

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[8] Quoting *ACCC v Australian Institute of Professional Education P/L (in liq) (No 3)* [2019] FCA 1982 at [72]-[74] (Bromwich J).

"prevalent" and "manifest problem", as powerfully demonstrated by the fact that, as at May 2015, about 50% of students were withdrawn prior to their first census date (largely by the College because they were uncontactable): FC [50], [59], [177], [227] (CAB 245, 248, 292, 318).[9] Moreover, when these risks eventuated, students suffered real harm by incurring large VFH debts, even if: (i) they were not interested in, or were incapable of, doing the course; or (ii) they had been tricked, deceived or confused into enrolling: PJ [204]; FC [70], [227] (CAB 63, 252, 318).

12. Prior to September 2015, the College was aware: (i) that the CA misconduct risk and the unsuitable enrolment risk were arising in its own business; and (ii) of the need to take steps to mitigate those problems: PJ [202]-[204], [208]-[211], [220], [281]; FC [70] (CAB 63-65, 67, 82, 252). In respect of the CA misconduct risk, the College's own complaints registers and other records identified numerous instances of CA misconduct (PJ [190]-[192], [195]; FC 61 (CAB 59-61, 249)); between 2014 and 2016, the College recorded more than 200 complaints on its registers: PJ [417]-[423] (CAB 113-114).[10] The College's internal documents referred to media reporting (from October 2014, February 2015 and September 2015) on unethical behaviour by agents in the industry: PJ [196]-[197], [200], [202]; FC [62] (CAB 61-63, 249-250). In respect of the unsuitable enrolment risk, the results of the audit of the Sero online campus, which were discussed at internal meetings in December 2014 and February 2015 (see the discussion at WRS [8]) highlighted the risk of large numbers of uncontactable students being enrolled: PJ [188] (CAB 59). That risk was also clear from the withdrawal data collated in May 2015 (see [11] above). A Senate inquiry addressing issues relevant to both risks was discussed at Advisory Board meetings in May and June 2015: PJ [198]-[199] (CAB 61-62); FC [63]-[64] (CAB 250).

13. The College's internal documents prior to September 2015 frequently emphasised the risks posed by CA misconduct and the importance of ensuring students understood the debt that they were incurring, and that their courses were suitable for them (having regard to matters such as language, literacy and numeracy skills): PJ [192], [195], [196], [205]-[213]; FC [69] (CAB 60-61, 64-65, 252). Significantly, those documents also referred to the important role that the College's enrolment processes played in testing those matters

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9 This information was included in a report that was discussed at a meeting of employees of the College (including Mr Cook) on 13 May 2015: PJ [170], [195], [221]; FC [50] (CAB 55, 61, 67, 245)

10 See, eg, a complaint from November 2015 concerning a sales agent taking advantage of a person suffering from Alzheimer's disease: see PJ [452] (CAB 121).

without the involvement (and potential distorting influence) of recruiting agents: FC [69] (CAB 252), citing PJ [192], [195], [205]-[208], [210]-[213] (CAB 60-61, 64-65).

14. ***Enrolment process prior to September 2015:*** The enrolment process that the College had in place prior to September 2015 included safeguards in respect of the CA misconduct risk and the unsuitable enrolment risk: PJ [153]-[169]; FC [47]-[49] (CAB 50-55, 244-245). The **Outbound Call**, which was one of the safeguards prior to the changes in September 2015, had the "quality assurance" purposes of (i) ensuring that the student was "genuine" and that they understood the obligations that they were accepting under the VFH scheme; and (ii) identifying any reasons why the student might not be suitable for their nominated course. This call, made by the College to the prospective student at a time when the CA would not be present, also enabled the admissions officer to test whether the answers given on a pre-enrolment quiz (**PEQ**) were the student's own, or whether the agent had completed the PEQ instead: PJ [158]-[160]; FC [47] (CAB 52, 244). Under the second safeguard (the **campus driven withdrawal** process), students who were not contactable after several attempts during the first three weeks of their courses were withdrawn prior to the first census date (so that they avoided incurring fees and a VFH debt): PJ [164]-[169]; FC [48]-[49] (CAB 53-55, 245). The College "was aware that if the campus driven withdrawal process was abolished that was likely to lead to a significant increase in the number of unengaged and uncontactable students passing through first census and incurring VFH debt": PJ [222] (CAB 67-68).

15. ***Enrolment process changes from 7 September 2015:*** The College implemented enrolment process changes with effect from 7 September 2015, which were driven by sales and marketing objectives: FC [71], [76] (CAB 252-253). The safeguards in the College's enrolment process described at [14] above were negatively affecting agents' commission revenue (because those agents received nothing if the students that they recruited did not remain enrolled through census) and had resulted in agents directing students towards other VET providers: PJ [242]; FC [71], [76], [82(b)] (CAB 71, 252-253, 255). Those safeguards – being Outbound Calls initiated by the College and campus driven withdrawals – were seen as "impediments" to prospective students becoming enrolled and passing through census; dismantling them would increase the likelihood of agents receiving commissions: FC [76] (CAB 253-254).

16. The Outbound Call was replaced with an **Inbound Call**, initiated by the CA while in the presence of the student: PJ [287]-[313]; FC [73] (CAB 83-88, 253). Under the new process (FC [84] (CAB 257-258)): (i) prospective students completed enrolment

documents on the CA's laptop or tablet, such that "there was a very real likelihood" that the agent would fill out the documents for the student; (ii) the CA's presence meant that the College officer could not "be confident that the answers given … were not influenced or prompted by the agent"; (iii) the officer would see the enrolment documents for the first time during the Inbound Call, with no real opportunity to examine the documents and identify any indicators that the student was unsuitable for the relevant course; (iv) the Inbound Calls were not used to assess a student's suitability, they were "a means of giving limited information and, in a limited way, checking that the relevant part of the PEQ had been completed by the student"; (v) because the agent initiated the call, it was possible for a student to become enrolled without ever being contacted (or contactable) directly by the College; and (vi) there was no longer any post-enrolment assessment of whether a student's language, literacy and numeracy capability rendered them unsuitable to be enrolled.

17. Campus driven withdrawals were abolished entirely (PJ [314]-[323]; FC [73], [85]-[86] (CAB 89-91, 253, 258-259)). This meant that, from September 2015, uncontactable students remained enrolled after their first census (and thus incurred a VFH debt) unless they contacted the College, or the "Campus Manager" exercised a discretion to cancel their enrolment: FC [86] (CAB 259). This change was contrary to guidance published in August 2015 by the Commonwealth **Department** of Education and Training (which administered the VFH scheme), which stated the Department's expectation that VET providers would cancel the enrolment of uncontactable and unengaged students prior to the first census date: PJ [174]-[175]; FC [67]-[68] (CAB 56, 251).

18. The enrolment process changes were discussed at two meetings of staff of the College and Site on 19 August 2015. The minutes of the first meeting, a Management Meeting held at 8.00am, record that Mr Cook advised attendees that the proposed enrolment changes were driven by feedback from sales agents: PJ [249]; FC [78(b)] (CAB 74, 254). There was a "common understanding, or expectation" among the attendees that the enrolment changes would be implemented: PJ [259]; FC [141] (CAB 76, 278-279). At the second meeting at 10.00 am, Mr Khaled Akbery gave a presentation with PowerPoint slides in which the safeguards described at [14] above were identified as problems and as "unnecessary barriers", that were preventing students from "pass[ing] through [c]ensus" dates, resulting in "significant attrition" that "causes dissatisfaction amongst [s]ales [a]gents": PJ [265]-[266]; FC [82(e), (f)] (CAB 77, 256).

19. ***Effect of the enrolment process changes:*** There were "dramatic and sharp" increases in the College's enrolments and revenue following these changes: PJ [490]; FC [87] (CAB 131, 259). Revenue and profit increased from $326,125 and $138,458 respectively in August 2015, to $18.9 million and $1.7 million respectively in December 2015: PJ [403]; FC [90], [94] (CAB 109, 260-261). Withdrawals prior to census date, which between January and August 2015 were on average about 50% of enrolled students, declined to 29% by September 2015 and 24% by October 2015: FC [91] (CAB 260-261). The primary judge found that: (i) there was nothing to suggest that the quality, suitability or level of engagement of enrolled students had improved in this period; and (ii) the increased conversion rate meant that unwitting or unsuitable students were being enrolled and incurring debts in increasing numbers and proportions: PJ [356]-[357]; FC [91] (CAB 99-100, 261).

20. At the same time, the proportion of unengaged students increased (FC [95] (CAB 261)), with only a small proportion – around 20% – actually logging into the online learning management system: PJ [348], [366]-[368]; FC [95]-[97] (CAB 97, 102, 261-262). A student support officer was only able to contact around 10% of the students that she tried to reach between October 2015 and January 2016, demonstrating that "vast numbers of uncontactable students were being enrolled": PJ [374]-[390]; FC [98] (CAB 103-107, 262-263). Analysis by employees of the College in February 2016 identified that 55% of students who had passed through the first census and incurred a VFH debt were uncontactable and had not engaged with the College (PJ [409]; FC [101] (CAB 111, 263)) and that figure reached 64% by May 2016: PJ [414]-[415]; FC [103] (CAB 113, 264). A "health check" of the College's online campus in April 2016 concluded that only 7% of the College's 5,032 students were actively engaging with its online learning management system: FC [102] (CAB 264). Uncontactable students who did not log-on to the learning management system would derive no benefit from being enrolled in an online course: PJ [222] (CAB 67). These facts vividly demonstrate that, in the words of the primary judge, the College (at PJ [499] (CAB 134)):

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

21. Two reports were adduced by the ACCC at the hearing in respect of student enrolment and engagement at the College. Both reports demonstrated the starkly different, and worse, outcomes (as regards contactability, student log-ins to their courses and

completion rates) in the period after the College implemented changes to its enrolment processes: see FC [105], [108] (CAB 264-267).

22. Although the College ceased enrolling students in its online courses on 18 December 2015 (as a result of the Commonwealth Government's introduction of a cap on loans under the VFH scheme for 2016, which the College had already exhausted): PJ [399]-[401]; FC [113]-[115] (CAB 108-109, 268-269)), the College continued to claim and retain VFH income in respect of students enrolled during the impugned enrolment period: PJ [501], [566]; FC [294] (CAB 134, 151, 336).

PART V ARGUMENT

23. The primary judge determined the unconscionability case, exactly as he would be expected to, by reference to the pleadings, evidence and argument through which both sides advanced everything they wished to put for or against the claimed finding of unconscionability. Some of those matters intersected with the s 22 factors; some went beyond them. The primary judge considered all of them and reached a carefully reasoned overall evaluative judgment that the College had contravened s 21. The Full Court was correct to uphold that finding.

24. An allegation of a contravention of s 21(1) of the ACL need not be framed, or pleaded, by reference to the factors in s 22. Contrary to the appellants' submissions, s 22 does not provide a mandatory "framework" through which a person's conduct must be assessed when applying the normative standard prescribed by s 21 (contra PPAS [21], [42], [45]-[46], [48]). Rather, the statutory task required by s 21, as informed where relevant by s 22, was for the Court to evaluate the College's system of conduct in all of the circumstances, and, if the presence or absence of any factor listed in s 22 of the ACL was relevant in the particular circumstances of the case, to take that factor into account. That is precisely what occurred.

Ground 1 – the correct approach to ss 21 and 22 of the ACL

(i) Proper construction of s 21

25. The assessment, as required under s 21(1) of the ACL, whether conduct "is, in all the circumstances, unconscionable" serves to emphasise that the Court's task is to administer a "normative standard of conduct … *in the totality of the circumstances*".[11] The provision

[11] *ASIC v* ***Kobelt*** (2019) 267 CLR 1 at [87], [89] (Gageler J) (emphasis added). See also ***Stubbings*** *v Jams 2 Pty Ltd* (2022) 96 ALJR 271 at [57] (Gordon J); ***Good Living*** *Company Pty Ltd v Kingsmede Pty Ltd* (2021) 284 FCR 424 at [8] (Allsop CJ).

requires evaluation of whether conduct is "so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience".[12] That evaluative judgment[13] must be "informed by a sense of what is right and proper according to values which can be recognised by the court to prevail within contemporary Australian society".[14] Three further points are significant:

26. ***First***, s 21(3)(a) provides that "the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention". By implication, this puts it beyond doubt that the Court "may have regard to circumstances that *were* reasonably foreseeable" at that time: FC [155] (CAB 282).

27. ***Secondly***, by s 21(4)(a), the Parliament has expressed its intention not to limit unconscionable conduct by reference to the general law. The legislative text[15] "make[s] clear that the statutory conception of unconscionable conduct is unconfined to conduct that is remediable on that basis by a court exercising jurisdiction in equity".[16] That is not to deny that "the normative standard which the section prescribes … signif[ies] the gravity of the conduct necessary to be found by a court".[17]

28. ***Thirdly***, s 21(4)(b), which was invoked here, states that s 21 "is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour". This provision confirms[18] that "the focus of the provisions is on conduct that may be said to offend conscience", rather than the specific "characteristics of any possible 'victim' of the conduct (though these may be relevant to the assessment of the conduct)".[19] It "removed the necessity for revealed disadvantage to any particular individual",[20] and thus the focus

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12 *Kobelt* (2019) 267 CLR 1 at [92] (Gageler J). See also *Stubbings* (2022) 96 ALJR 271 at [57]-[58] (Gordon J); *Good Living* (2021) 284 FCR 424 at [7]-[8] (Allsop CJ); *ACCC v* ***Quantum*** *Housing Group Pty Ltd* (2021) 285 FCR 133 at [87], [92] (Allsop CJ, Besanko and McKerracher JJ).

13 *Kobelt* (2019) 267 CLR 1 at [47] (Kiefel CJ and Bell J).

14 *Kobelt* (2019) 267 CLR 1 at [93] (Gageler J). See also *Stubbings* (2022) 96 ALJR 271 at [58] (Gordon J).

15 Section 21(4) was inserted into the ACL by item 4 of Sch 2 to the *Competition and Consumer Legislation Amendment Act 2011* (Cth). See the discussion in *Kobelt* (2019) 267 CLR 1 at [292] (Edelman J).

16 *Kobelt* (2019) 267 CLR 1 at [83], [87], [89] (Gageler J). See also [144] (Nettle and Gordon JJ), [295], [311] (Edelman J); *Stubbings* (2022) 96 ALJR 271 at [56] (Gordon J).

17 *Kobelt* (2019) 267 CLR 1 at [88] (Gageler J). See also *Unique* (2018) 266 FCR 631 at [155] (Allsop CJ, Middleton and Mortimer JJ).

18 Cf *ASIC v National Exchange Pty Ltd* (2005) 148 FCR 132 at [30] (Tamberlin, Finn and Conti JJ).

19 Explanatory Memorandum, Competition and Consumer Legislation Amendment Bill 2011 (Cth) (**EM to 2011 Bill**) at [2.21], which is cited in *Kobelt* (2019) 267 CLR 1 at [232] (Nettle and Gordon JJ). See also Australian Government (Treasury), "Strengthening statutory unconscionable conduct and the Franchising Code of Conduct" (February 2010) at 9, 33: "A system or pattern of business conduct may itself be unconscionable, without reference to individual transactions".

20 *Unique* (2018) 266 FCR 631 at [104].

is less on a "particular event" or transaction, and more on "an abstraction o[r] a generalisation as to method or structure" of the contravener's activities.[21]

(ii) Relationship between ss 21 and 22

29. Section 22(1) states that "[w]ithout limiting the matters to which the court may have regard for the purpose of determining whether a person … has contravened s 21 … the court may have regard to" various factors enumerated in that sub-section. While the factors are "mandatorily to be taken into account" when "determining the statutory question posed by" s 21(1),[22] that is only if and "to the extent that those considerations *are applicable in the circumstances*".[23]

30. The appellants seek to go beyond these propositions. Contrary to PPAS [22], it is not necessary for a plaintiff in every case to "plead and adduce evidence of facts directed to" the factors in s 22(1). Nor is there warrant for construing the factors as "statutory criteria" that set the bounds within which the normative standard prescribed by s 21(1) is to be applied. Neither the text nor context of ss 21 and 22 of the ACL, nor the authorities that have considered those provisions, provide any support for that approach.

31. ***Statutory text and context***: It is fundamental that "the courts must give effect to what Parliament has enacted" in s 21(1)[24] and it is that provision *itself* that "prescribe[s] [the] normative standard of conduct" that "the court needs to administer".[25] Further, s 21(1) directs courts to assess unconscionability "in all the circumstances" and s 22(1) states that the factors in that sub-section should be considered "[w]ithout limiting the matters" to which regard may be had. Yet the appellants' argument that the factors in s 22(1) must be treated as a "framework" when analysing whether s 21 has been contravened is expressly directed to limiting the Court's capacity to consider the totality of circumstances that might render a particular person's conduct, system of conduct, or pattern of behaviour unconscionable. Those circumstances "include",[26] but expressly are not limited to, the s 22 factors. The appellants' construction of ss 21(1) and 22(1) is therefore irreconcilable with the text of those subsections. Further, the broader context

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21 *Unique* (2018) 266 FCR 631 at [104]. See also *Kobelt* (2019) 267 CLR 1 at [143] (Nettle and Gordon JJ); *Stubbings* (2022) 96 ALJR 271 at [55] (Gordon J).

22 *Paciocco v ANZ Banking Group Ltd* (2016) 258 CLR 525 at [189] (Gageler J). See also *ACCC v Medibank Private Ltd* (2018) 267 FCR 544 at [252] (Beach J, Perram and Murphy JJ agreeing); *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421 at [72] (Besanko J).

23 *Kobelt* (2019) 267 CLR 1 at [87] (Gageler J) (emphasis added). See also *Quantum* (2021) 285 FCR 133 at [55]-[56] (Allsop CJ, Besanko and McKerracher JJ).

24 *Kobelt* (2019) 267 CLR 1 at [119] (Keane J).

25 *Kobelt* (2019) 267 CLR 1 at [87] (Gageler J).

26 *Good Living* (2021) 284 FCR 424 at [8] (Allsop CJ).

of those provisions (in particular, s 21(4)(b)) is incompatible with the appellants' construction for reasons outlined at [32] below. A prescriptive approach is also the antithesis of the mode of analysis engaged in by Courts of Equity,[27] which has been recognised as the appropriate mode of analysis where a court is performing the task of determining whether a statutory prohibition against unconscionable conduct has been contravened.

32. ***Authorities***: Statements in the case law make clear that the court makes an evaluative judgment as to whether conduct is, in all the circumstances, unconscionable, and this is not arrived at by the "mere balancing" of the factors identified in s 22(1).[28] That assessment should not be approached as if it can be made by a "process of deductive reasoning predicated on the presence or absence of fixed elements or fixed rules".[29] These statements are particularly apposite in a case of systemic unconscionability because many of the factors in s 22(1) presuppose the existence of a particular individual and transaction, whereas s 21(4)(b) invokes a de-individualised mode of analysis.[30] The correct approach, as adopted by the courts below, is to treat the factors in s 22(1) as providing "guidance as to the norms and values that are relevant" to inform the meaning of "unconscionable" in s 21(1),[31] which include "certainty in commercial transactions, honesty, the absence of trickery or sharp practice, fairness when dealing with customers, the faithful performance of bargains and promises freely made" and the protection of the vulnerable.[32]

33. Even more problematic than the suggestion that the factors in s 22(1) operate as a "framework" within which s 21(1) must be analysed is the appellants' contention that the "absence" of any one of those factors "*necessarily* informs [that] analysis": PPAS [20].

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27 ***Jenyns*** *v Public Curator (Qld)* (1953) 90 CLR 113 at 118-119 (Dixon CJ, McTiernan and Kitto JJ), quoting *The "Juliana"* (1822) 2 Dods 504 at 521; 165 ER 1560 at 1567: "Such cases do not depend upon legal categories susceptible of clear definition and giving rise to definite issues of fact readily formulated which, when found, automatically determine the validity of the disposition. ... [']A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case'." This passage was cited in *Kobelt* (2019) 267 CLR 1 at [120] (Keane J), [150] (Nettle and Gordon JJ).

28 See eg *Kobelt* (2019) 267 CLR 1 at [101] (Gageler J), [153] (Nettle and Gordon JJ).

29 *Kobelt* (2019) 267 CLR 1 at [153] (Nettle and Gordon JJ), quoting *Paciocco v ANZ Banking Group Ltd* (2015) 236 FCR 199 (***Paciocco FCA***) at [304] (Allsop CJ). See, also, *Ali v ACCC* (2021) 394 ALR 227 at [299] (Allsop CJ, Besanko and Perram JJ).

30 Compare *Paciocco* (2015) 236 FCR 199 at [299], [309] (Allsop CJ); *ACCC v ACN 117 372 915 Pty Limited (in liq) (formerly Advanced Medical Institute Pty Limited)* [2015] FCA 368 at [942] (North J). For that reason, a factor like the extent to which "the supplier and the customer acted in good faith" (s 22(1)(l)) is unlikely to be applicable in a case like the present (contra PPAS [44]).

31 *Kobelt* (2019) 267 CLR 1 at [154] (Nettle and Gordon JJ), , quoting *Paciocco FCA* (2015) 236 FCR 199 at [279] (Allsop CJ). See also *Stubbings* (2022) 96 ALJR 271 at [57] (Gordon J).

32 *Kobelt* (2019) 267 CLR 1 at [14] (Kiefel CJ and Bell J), citing *Paciocco FCA* (2015) 236 FCR 199 at [296] (Allsop CJ).

The appellants go so far as to embrace the notion that each of the factors is presumed to be absent and "tend[s] against a finding of unconscionable conduct" until a plaintiff proves otherwise: PPAS [48]. That approach, which is evident in the appellants' purported application of the factors to the facts in this case, is misguided (PPAS [23]-[46]). It must be recalled that the legislature intended s 21 of the ACL to be applied within the adversarial paradigm of curial proceedings in Australia: FC [214] (CAB 314). Within that paradigm, as the majority in the Full Court explained (at FC [218] (CAB 315)):

> The parties define the issues to be determined at trial and, in a case brought under s 21 of the ACL, identify by evidence and submissions the matters that the parties contend are relevant to the determination of the case and should be taken into account, including by reference to the matters enumerated in s 22(1).

34. It is then for the court to consider the parties' evidence and submissions and where a factor enumerated in s 22(1) is "applicable in all the circumstances" then it "must be taken into account".[33] Frequently, the evidence in a particular case will reveal that many of the factors are either neutral or not relevant. That is precisely what occurred in this case for (at least) the factors in s 22(1)(f), (h), (j)-(k). As the Full Court majority observed at FC [218]-[219] (CAB 315): (i) the primary judge *did* have regard to those matters in s 22(1) of the ACL that were relied on by the parties at trial; and (ii) the appellants have been unable to point to any submission put to the primary judge in relation to those matters which the primary judge failed to take into account. In this Court, the appellants impermissibly seek to evade that difficulty by construing the provisions in a way that presumes that all of the factors in s 22(1) weigh in their favour until proven otherwise. But that approach derives no support from the terms of either s 21 or 22.

35. For example, at PPAS [23] the appellants note that the inequality of bargaining position between the College and its customers was not an issue at trial. It is then asserted (erroneously[34]) that "the trial judge found that there was not an over-representation of disadvantaged customers" among the students enrolled in the impugned enrolment period and that, in those circumstances, "[t]he absence of a disparity in bargaining power is a factor favouring a conclusion that [the College's] conduct was not unconscionable". An erroneous conflation of the concepts of imbalance of bargaining power and exploitation of an individual's features of disadvantage is built into that submission. But even more objectionable is the notion that s 22(1)(a) of the ACL operates to support a default positive finding of the absence of any imbalance of bargaining power (being a finding for which

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33 *Kobelt* (2019) 267 CLR 1 at [83] (Gageler J).

34 In fact, the primary judge declined to find that there *was* an over-representation of disadvantaged customers (see PJ [218]-[219] (CAB 66-67)); that is not the same as a finding to the contrary.

the appellants did not contend, either at first instance or on appeal[35]). The same is true in respect of the absence of a finding that the College failed to act in good faith; s 22(1)(l) does not create a default finding in favour of the College from the absence of an adverse finding (contra PPAS [44]). These examples, in addition to the matters set out above, demonstrate the error in the appellants', and Downes J's (see FC [433] (CAB 382)), "methodological" criticism of the approach taken by the courts below, which forms the substance of ground 1: PPAS [21], [46].

36. Under ground 1, the appellants also develop various arguments that assert that the majority in the Full Court erroneously identified that numerous factors in s 22 were present or absent in this case: PPAS [22]. The true position, as the majority in the Full Court found, is that the primary judge properly addressed the matters which the appellants now contend make these factors relevant: see FC [219]-[236] (CAB 315-320). The Full Court then correctly analysed the primary judge's findings by reference to the factors in s 22(1) that the appellants alleged the primary judge had failed to consider: see FC [211] (CAB 313). In terms of the particular factors in s 22 that the appellants contend were erroneously analysed by the majority in the Full Court, so as to avoid repetition, these are dealt with under ground 2 below (with the exceptions of s 22(1)(a) and (l), which are dealt with at [35] above).[36] In short, there is no basis for the appellants' contention that the College's "system and conduct, once viewed through the prism of s 22, did not meet the statutory concept of unconscionable": PPAS [45]-[46].

Ground 2 – the systemic unconscionability on the facts in this case

(i) The conclusion contended for by the ACCC

37. It is convenient to begin with a distilled statement of why the "precise examination" of "every connected circumstance"[37] undertaken by the Courts below correctly concluded that the College engaged in a system of unconscionable conduct. The six key points, although no "substitute" for the "comprehensive view" taken by the courts below,[38] are as follows.

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35 At FC [211] (CAB 312-313), the majority in the Full Court identified the s 22(1) factors that the appellants asserted the primary judge had failed to consider, which did not include s 22(1)(a).

36 In particular, the paragraphs in which the factors are dealt with below are as follows: s 22(1)(b) (see [51]); s 22(1)(c) (see [52]); s 22(1)(d) (see [49]); s 22(1)(e) (see [54]); s 22(1)(g) (see [53]); and s 22(1)(i) (see [52]).

37 *Jenyns* (1953) 90 CLR 113 at 118-119 (Dixon CJ, McTiernan and Kitto JJ), cited in *Kobelt* (2019) 267 CLR 1 at [120] (Keane J), [150], [217] (Nettle and Gordon JJ).

38 *ASIC v **ANZ Banking Corporation (No 3)*** [2020] FCA 1421 at [15], [16] (Allsop CJ), citing *Jenyns* (1953) 90 CLR 113 at 119.

38. ***First***, in August to September 2015, when the College planned and implemented the enrolment process changes described at [15]-[18] above, it knew that CAs across the industry, including those acting for its own business (see [12] above), were engaging in unethical practices to recruit students: FC [121(a)] (CAB 271). It also knew that its agents were recruiting very large numbers of unwitting or unsuitable students: about 50% of students enrolled in its online campus were being withdrawn due to campus driven withdrawals (see [12] above). Further, the College knew that its existing processes "provided important safeguards against the 'CA misconduct risk' and the 'unsuitable enrolment risk'": see [12]-[14] above; FC [121(b)], [172(b)] (CAB 271, 290).

39. ***Secondly***, it was therefore clear (see FC [184], [186]-[187] (CAB 300-301)) that the effect of removing these safeguards would be that a much larger proportion of students would remain enrolled at the first census and would therefore incur VFH debts without receiving any corresponding benefit: see FC [76] (CAB 253-254). This would include students who were uncontactable, otherwise unable to engage with their courses, or victims of agent misconduct. It was apparent that the College's increase in revenue would: (i) come at the expense of such students incurring significant debts to the Commonwealth; and (ii) be extracted by the College even though those students would gain no benefit from enrolment: FC [172(e)] (CAB 290).

40. ***Thirdly***, the College nonetheless decided to remove those safeguards *because* it regarded them as impediments or barriers to prospective students becoming enrolled, passing through census dates, and thus incurring the VFH debts that were the trigger for revenue earned by the College and its CAs: see PJ [265]-[266]; FC [82(e)-(f)] (CAB 77, 256); [15], [18] above. That decision was taken with the knowledge outlined at [38]-[39] above and an awareness that abolishing campus driven withdrawals was contrary to the Department's guidance (see [17] above).

41. ***Fourthly***, the College implemented these changes so as to reverse declining enrolments and increase revenue by removing incentives for agents to "refer[] students elsewhere as a result of the College's safeguards": FC [186] (CAB 300); [18] above. In other words, the College's aim in dismantling safeguards was "profit maximisation substantially driven by budget expectations set by Site": FC [83], [121(c)] (CAB 257, 271).

42. ***Fifthly***, as a result of the changes to its enrolment processes, there were dramatic and sharp increases both in the College's enrolments and revenue, and also in the number and proportion of unengaged and uncontactable students: see [19]-[22] above. Some glaring statistics: 86.5% of the c.6,000 students who enrolled in the impugned enrolment period

and passed through the first census *never* accessed the online learning system; 98.9% of these students did not complete a single unit of their course; and 99.7% did not complete their course: see FC [108] (CAB 266-267). These were not consequences that properly could be said to be unknown to the College until they occurred. The College "made the decision to change its enrolment process in order to increase revenue, knowing the foreseeable and likely consequences of its decision and the harm that would be occasioned students": FC [187] (CAB 301).

43. ***Sixthly***, the College proceeded to claim VFH revenue "in respect of students who may have been the victims of [sales agent] misconduct, were unwitting students or unsuitable for enrolment, should not have been enrolled and who gained no benefit whatsoever": FC [121(e)], [172(e)] (CAB 272, 290). Indeed, over $46 million was claimed from the Commonwealth in respect of students enrolled in the relevant period who never accessed the online learning system: see FC [108] (CAB 266-267).

44. As the primary judge found, by: (i) setting up an enrolment process that was likely to (and in practice did) recruit unwitting or unsuitable students and persons who were the victim of misconduct by sales agents to incur VFH debts; and (ii) then claiming and retaining VFH revenue in respect of those students, the College was "driven by avarice without regard to the interests" of its students to engage in a system of conduct that was "against conscience": PJ [500] (CAB 134). Its conduct could properly be characterised as a "sharp practice" that was "manifestly unfair" to the (thousands of) uncontactable and unengaged students it allowed to progress through census and incur VFH debts: PJ [500], [502], [506]-[507] (CAB 134-136). The College took advantage of the unwitting or unsuitable students it enrolled by maintaining their enrolments and claiming the resulting VFH revenue: PJ [500]; FC [177], [198] (CAB 134, 292-293, 305-306). That is precisely the type of conduct that the statutory prohibition proscribes. Both the primary judge and the Full Court majority correctly determined that the system of conduct was, in all the circumstances, unconscionable in contravention of s 21(1) of the ACL.

(ii) Factors that the appellants contend were not correctly analysed by the courts below

45. The appellants selectively identify matters that they contend should have been approached, or weighted, differently in the evaluative assessment undertaken by the courts below. The appellants' attempt to have this Court re-engage in the evaluative exercise should be rejected. There was no error in the primary judge's or the Full Court's decisions that would justify setting those decisions aside.

46. ***The significance of "risk"***: Contrary to PPAS [32]-[33], [45], [49], the courts below did not rely on notions of risk that are alien to statutory unconscionability or which invite courts to engage in a form of hindsight reasoning on matters of "commercial judgment".

47. The appellants mischaracterise the role that risk played in the case alleged and found against the College. First, the CA misconduct risk and the unsuitable enrolment risk were not simply unavoidable features of the VFH scheme. Instead, as explained at [9] above, they were exacerbated by two features of the way the College chose to conduct its business: namely, the use of sales agents to recruit students on a commission model and the offering of courses online (contra PPAS [7], [32], [49]). Secondly, as explained at [11] above, at the time that the enrolment process changes were made, the risks in question were not mere possibilities: (i) whose likely consequences were unknown; and (ii) whose significance could only be assessed in hindsight (contra PPAS [12], [21], [49]-[50]). Rather, as set out at [38]-[39] above, there are unchallenged findings that the College knew that the CA misconduct risk and the unsuitable enrolment risk were regularly materialising in, and were a manifest problem for, its business; and the College was aware that the changes it was making involved removing safeguards that were directed at those very risks. This is not a case where it subsequently emerged that a change in operations exposed customers to an unexpected consequence. The College deliberately dismantled the mechanisms by which a well-understood problem was mediated, with the intention of increasing its revenue (which the existing safeguards were affecting adversely). Further, when the foreseeable (and foreseen: FC [187] (CAB 301)) consequences materialised, the College chose to claim and retain VFH income for students it overwhelmingly had not taught *at all* (see [42]-[43] above). Accordingly,[39] the appellants' arguments about the vice in reasoning by reference to "risks" proceed on a false premise.

48. In any event, in an appropriate case, a court may properly consider a supplier's failure to protect consumers from a risk created by its business model, which it is aware of, and from which it benefits, when assessing unconscionability. That conclusion flows directly from the inclusion of sub-paras (3)(a) and (4)(b) in s 21 (see [26] and [28] above), which contemplate that: (i) reasonably foreseeable matters may form part of the assessment of whether unconscionability is present on the facts; and (ii) systemic unconscionability will be considered at a higher level of generality that is not focussed "on the characteristics of

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[39] Notably, the features of the fact pattern identified in this paragraph are not replicated in the authorities relied on by Downes J at FC [458]-[465] (CAB 386-389).

a particular person, or the effect of the impugned conduct on that person".[40] Almost inevitably, an assessment of that kind will be capable of being characterised as concerned with "risk of wrongful behaviour" (PPAS [21]); nonetheless, it is a form of assessment clearly permitted by the terms of s 21.

49. Finally, at PPAS [32]-[33] the appellants assert that the Full Court majority erred by invoking impermissibly the factor identified in s 22(1)(d) of the ACL (whether undue influence or pressure was exerted on, or any unfair tactics were used against, a customer) to support a finding of unconscionability because the College did no more than fail to protect its students from the *risk* of such conduct by CAs. Conduct by a supplier that demonstrates indifference to the risk of undue influence or pressure, or unfair tactics, by the supplier's agent offends the same values of fairness to consumers and the absence of sharp practice that are embodied in s 22(1)(d) of the ACL and which inform the standard prescribed by s 21(1) (see [32] above).[41] The Full Court majority was correct to find that the fact that the College engaged in a system of conduct that increased the risk of students being subjected to undue influence or pressure, or unfair tactics, at the hands of its own sales agents, was highly relevant to the assessment of whether its conduct was, in all the circumstances, unconscionable: FC [229] (CAB 318).

50. ***The significance of the College's "intentions" in respect of CA misconduct***: at PPAS [13], [21], [33(c)] and [50], the appellants repeatedly contend that they did not *intend* the CA misconduct risk to eventuate. The factual basis for, and normative significance of, that assertion are both contestable. As set out above, the courts below made findings, which are uncontroverted, that the College knew that the enrolment process changes it was making would increase the number of persons who, having been the victim of CA misconduct (at the hands of the College's agents), would incur VFH debts (and thus suffer financial repercussions) as a result (see [38]-[39] above). The enrolment process changes needed to have that effect in order to remedy the fact that "the College's enrolment process was adversely affecting the agents' commission revenue" (FC [76] (CAB 253)), which needed to be fixed to "regain market share": FC [82(c)] (CAB 256). Having foreseen the "inevitable consequence" of its actions, the College could "be taken to [have] mean[t] to produce" it.[42] The College therefore had a culpable

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40 EM to 2011 Bill at [2.24].

41 *ACCC v Phoenix Institute of Australia Pty Ltd (Subject to Deed of Company Arrangement)* [2021] FCA 956 at [145] (Perry J); *ACCC v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* [2018] FCA 1408 at [751] (Gleeson J).

42 *Smith v The Queen* (2017) 259 CLR 291 at [57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

"state of mind" that was sufficient to weigh in favour of a conclusion of unconscionable conduct, regardless of whether that state of mind is described as "intention".[43]

51. ***College's "legitimate interests" in pursuing profits***: Contrary to PPAS [28], the factor identified in s 22(1)(b) concerns what is reasonably necessary "for the protection of the legitimate interests of the supplier". The *legitimate* interests of the College did not extend to enforcing contracts with students who did not enrol "willingly, with full knowledge of the obligation being incurred" and with "sufficient language, literacy or numeracy skills to undertake the course and technology skills or access to study online": FC [221] (CAB 316). In any event, in respect of any legitimate interest that the College had in seeking to enrol students "for the purpose of operating its business profitably" (PPAS [27]; cf FC [221] (CAB 315-316), it was not reasonably necessary in order to protect that interest to remove the enrolment process safeguards: the College's previous enrolment system represented an obvious "reasonable alternative".[44] Thus, the majority in the Full Court was correct to conclude that s 22(1)(b) did not assist the appellants: FC [222], [224] (CAB 316-317).

52. ***Adequacy of disclosure and students' comprehension***: At PPAS [30] and [40]-[42], the appellants re-agitate arguments which the Full Court majority rightly rejected: see FC [225]-[228], [233]-[235] (CAB 317-320). The appellants seek to rely on an impermissibly narrow view of s 22(1)(c) and (i), which pays insufficient regard to the value of transparency and fair dealing that inheres in these provisions. The primary judge made numerous unchallenged findings about the deficiencies in the College's Inbound Call process: see [16] above and PJ [299]-[300], [303]-[313]; FC [178(c)] (CAB 85-88, 294). Critically, the Full Court majority found at FC [227] (CAB 317-318) that the overwhelming inference to be drawn from the "prevalent" enrolment of "unwitting and unsuitable students" was that "large numbers of enrolled students did not understand the obligations" they incurred.

53. ***Compliance with industry regulation***: Contrary to PPAS [8], [27], [33], [37]-[38], [53] there was no error in the manner in which the primary judge and the Full Court majority addressed s 22(1)(g) and the College's compliance with industry regulation: see PJ [518],

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[43] Note also that "[t]he actual state of mind of the alleged contravener is relevant to the question of whether they have engaged in unconscionable conduct, although it should not be the sole focus": *ASIC v* ***NAB Ltd*** (2022) 164 ACSR 358 at [299], [347] (Derrington J), citing *ASIC v* ***AGM Markets*** *P/L (in liq) (No 3)* (2020) 275 FCR 57 at [362]–[379] (Beach J). See, also, in relation to the significance of "intention": *ASIC v AMP Financial Planning P/L* (2022) 164 ACSR 64 at [47] (Moshinsky J); *ASIC v AMP Superannuation Ltd* [2023] FCA 488 at [147] (Hespe J).

[44] *Kobelt* (2019) 267 CLR 1 at [219]-[229], [264] (Nettle and Gordon JJ), [304] (Edelman J).

FC [189] (CAB 138-139, 301-302). Their Honours were correct to reason that, although non-compliance with industry regulation may suggest unconscionability, the mere fact of compliance does not lead to a conclusion that conduct is not unconscionable. In this case, as the majority in the Full Court identified (at FC [189] (CAB 301-302)), the College's compliance with VFH scheme regulation is of particularly little significance, given that, by abolishing campus driven withdrawals, it acted contrary to the Department's stated expectation that VET providers would cancel the enrolments of uncontactable or unengaged students prior to their census date: see [17] above.

54. ***Conduct of competitors***: At PPAS [23], [27], [34]-[35], the appellants refer to the fact that it was not proven that other VET providers had enrolment processes that provided stronger protections for students than were provided by the College. This is said to require that s 22(1)(e) of the ACL must "point[] to the conclusion" that there was no unconscionability. That submission should be rejected for three reasons. First, as identified at FC [191], [231] (CAB 303, 319), the finding of systemic unconscionability in this case depended not just on the College's scrapping of Outbound Calls and campus driven withdrawals but on the surrounding circumstances (which may or may not have been the same for other VET providers). It follows that the safeguards in the enrolment processes of other VET providers "ha[ve] little, if any, bearing on the assessment of the College's enrolment process". Secondly, even if the appellants established that their competitors engaged in the same conduct in indistinguishable circumstances, that would not preclude a finding of unconscionability; it would merely suggest that the College chose to participate in a "race to the bottom" with its competitors: FC [224] (CAB 316-317).[45] Thirdly, the factor identified in s 22(1)(e), which focusses attention on whether a "customer could have acquired identical or equivalent services from a different supplier" is inapt in a case like this because it presupposes the existence of a class of willing customers seeking out services from rival suppliers, whereas here the vice in the College's enrolment system is that it recruited students that had no real interest in its services.

55. ***Alleged temporal incongruities***: contrary to PPAS [52], there is no "chronological flaw[]" in the conclusion on unconscionability reached by the Courts below, for the reasons given by the majority in the Full Court at FC [201]-[203] (CAB 307-309).

56. ***Miscellaneous matters***: the appellants' submissions also fail to engage with various unchallenged findings of the primary judge and/or the majority in the Full Court. First,

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45 See *NAB Ltd* (2022) 164 ACSR 358 at [299], citing *AGM Markets* (2020) 275 FCR 57 at [362]-[379]: "[i]ndustry practice is a relevant consideration" but "it is far from determinative".

the appellants refer, at PPAS [14], [21(c)], [30], [33(a)], [45], to the College having controls or safeguards other than Outbound Calls and campus driven withdrawals and complain that these were erroneously given "little weight": PPAS [30]. Those submissions ignore the unchallenged findings that: (i) these controls did not protect students; and (ii) there was no evidence that the College believed they did: PJ [525]-[528]; FC [174], [178] (CAB 141-142, 291-295). Secondly, the appellants' reliance (at PPAS [14], [29]) on having conducted some investigations into CA misconduct and reversed enrolments when misconduct was identified ignores the unchallenged findings that those investigations were deficient: PJ [421]-[422], [459]-[460]; FC [116]-[120], [178(e)] (CAB 114, 122, 269-270, 295). Thirdly, the appellants' reliance (at PPAS [11]) on the fact that some College employees always retained discretion to cancel enrolments where sales agents' behaviour was found to be inappropriate ignores the unchallenged finding that that discretion: (i) was only enlivened where there had been contact between the College and the student (or a third party looking after the student's interests); and (ii) could not be used simply because a student was uncontactable or unengaged: PJ [317]-[322], [389]-[390]; FC [86] (CAB 89-90, 106-107, 259).

PART VI NOTICE OF CONTENTION

57. The ACCC's Notice of Contention is addressed in Mr Wills' appeal (S116 of 2023) at WRS [44]-[45], because its contention concerns the time period during which Site, through Mr Wills, was knowingly concerned in the College's contravention of s 21(1) of the ACL.

PART VII ESTIMATE

58. The ACCC estimates that it will require up to 4 hours to present its combined arguments in this appeal and Mr Wills' appeal.

Dated 30 November 2023

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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. *Competition and Consumer Act 2010* (Cth), s 139B(2) – as at 7 September 2015 (Compilation No 100, 1 July 2015 – 24 February 2016).
2. *Competition and Consumer Act 2010* (Cth), Sch 2 (Australian Consumer Law), ss 18, 21, 22, 29, 78 and 79 – as at 7 September 2015 (Compilation No. 100, 1 July 2015 – 24 February 2016).
3. *Competition and Consumer Legislation Amendment Act 2011* (Cth), Sch 2, Item 4 (Act No. 184 of 2011).
4. *Higher Education Support Act 2003* (Cth) – as at 7 September 2015 (Version as in force 12 March 2014 - 30 November 2015)