HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

**Productivity Partners Pty Ltd (trading 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

# APPELLANTS' REPLY SUBMISSIONS

## Part I: CERTIFICATION

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

## Part II: REPLY

***Ground 1***

2. The First Respondent's submissions (**FRS**) misstate the effect of the Appellants' argument. Section 21 creates a norm of conduct, and the term 'unconscionable' gives content to that norm (AS [18]; FRS [25]). Section 22 provides a non-exhaustive list of matters the presence or absence of which is to be considered, unless of no application in the circumstances, when determining whether conduct contravenes that norm (AS [22]; FRS [29]). Section 22 also gives content to the meaning of unconscionable. That section directs attention to the types of conduct or circumstance the absence or presence of which informs the statutory concept.

3. The two questions posed by the ACCC at FRS [3] are framed assuming that misstatement and at an unhelpful level of abstraction.[1] There are factors identified in s 22(1) not relevant to this case: for example, s 22(1)(f), although that matter is not always inapplicable to a "system" case (for example, a discriminatory system). The factors are also non-exhaustive

[1] The critique of the term "framework" is a distraction: it has been used to describe the relevant relationship: *ASIC v* ***Kobelt*** [2019] HCA 18; 267 CLR 1 at [154] (Nettle and Gordon JJ); *Paciocco v Australia & New Zealand Banking Group Ltd* (2015) 236 FCR 199 (***Paciocco Full Court***) at 272 [285].

(AS [19]; c.f. FRS [31]). The authorities confirm that the absence of applicable factors is a matter which can lead to a conclusion that conduct was not unconscionable.[2]

4. This appeal is brought in the context of a failure, reflecting the way the case was advanced by the First Respondent (**ACCC**), to apply the statutory norm in the framework of s 22; that is without reference to factors that *are* relevant (see AS [23]-[44]). The ACCC identifies the task is to administer "a normative standard of conduct…*in the totality of circumstances*" (FRS [25]) but disregards that totality by designating as less relevant factors inconsistent with its case. That is to make the error identified in *Paciocco HCA*: the statute does not leave it open to a party alleging conduct is unconscionable to "pick and choose".[3] Two further points of principle are significant.

5. *First*, while s 21(4)(b) permits a de-individualised mode of analysis, the proposition that many of the factors identified in s 22 are less relevant as they "presuppose the existence of a particular individual and transaction" (FRS [32]) should be rejected. That approach is inconsistent with the language, and ss 15AA and 23(b) of the *Acts Interpretation Act 1901* (Cth). The factors identified in s 22 are applicable to a de-individualised mode of analysis.[4] The structure of s 21 and s 22 requires that mode of analysis.

6. *Second*, while s 21 of the ACL is applied in the adversarial system (FRS [34]), the ACCC bears the onus of establishing the allegation including that the evaluative judgment of unconscionability is to be reached with regard to the gravity of the allegation.[5] Contrary to FRS [34], the question is whether the ACCC met that onus including by establishing the existence or absence of the relevant matters in s 22 which inform the judgment, and the First Appellant (**PP**) is able to point to the absence of those factors. The task is not a "mere balancing", and the presence or absence of any factor is not determinative. But repetition of multiple factors which tend against the conclusion of unconscionable conduct[6] demonstrates that conclusion of contravention should not have been reached.

7. The conclusion that the system adopted by PP meant that "unwitting or unsuitable students were being enrolled and incurring debts in increasing numbers and proportions" (TJ [356]-

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[2] *Kobelt* at [58], [59], [100], [123]; *Paciocco v ANZ Banking Group Limited* [2016] HCA 28; 258 CLR 525 (***Paciocco HCA***) at [189], [190] (Gageler J); [288], [289], [294] (Keane J).
[3] Gageler J at [189], adressing the equivalent provision in s 12CB(2) of the *ASIC Act*.
[4] *Kobelt* at [58], [72] (Kiefel CJ and Bell J), [98]-[101] (Gageler J); *Unique International College Pty Ltd v ACCC* [2018] FCAFC 155, 266 FCR 631 (***Unique Full Court***) at [177], [224], [229].
[5] *Kobelt* at [88] (Gageler J). See also *Unique Full Court* at [155].
[6] Refer: the absence of dishonesty (TJ [512], CAB 137); compliance with applicable regulations (TJ [518], CAB 138-139; FJ [189], [190], CAB 301-302); lack of colourable intent (FJ [176] CAB 292).

[357] CAB 99-100; FJ [91], CAB 261) is relied upon by the ACCC (FRS [19], [38], [43], [44]),[7] and is critical to the finding of unconscionable conduct. That finding was erroneous for the reasons identified at AS [28] and [29]; and no submission in response to the identified errors are made.[8] The conclusion involves an elision between a bad outcome and an unconscionable system; the former was established[9] but the latter was not.

8. In the circumstance of the absence of evidence that particular students were unsuitable for enrolment or were enrolled unwittingly due to agent misconduct (and did not have their enrolment withdrawn), s 22 directs attention to the facts that inform the analysis of the system: amongst other things, the system required that consumers were informed that a debt would be incurred if they failed to withdraw: TJ[290], [294], [296] CAB 84-85 (s 22(1)(i)); and a random selection of calls of fifty consumers demonstrated that each agreed to be enrolled in the course, that they said they had completed the PEQ themselves, and understood the withdrawal process: TJ [301] CAB 86 (s 22(1)(c)). Those considerations go to the voluntary character of the bargain. True it is, the lack of student engagement raises queries, looking back, as to how that willingness or intention to participate was produced: TJ [521] CAB 139-40; FJ [226], [227] CAB 317. However, factors which would vitiate the autonomy of consumers were not alleged or established: namely, ss 22(1)(a),[10] 22(1)(b), 22(1)(c) and s 22(1)(d) (save for the risk of its occurrence, addressed at [12] below).

9. Also erroneous is the conclusion that removal of the two identified protections constituted conduct "so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct offensive to conscience" (FRS [25], TJ [513], CAB 137). As the circumstances concerned an appropriate enrolment system and known risks across the industry, the conclusion that PP's conduct was unconscionable should not have been drawn absent proof that the removed protections were standard or at least commonplace (s22(1)(e)), and as they were not required by regulation (s 22(1)(g), by analogical reasoning). The matters identified in s 22(1)(b) and s 22(1)(l) are also relevant to that assessment. PP's argument is not an example of selectively identifying matters in s 22 (c.f. FRS [45]), but of identifying relevant matters that intersect to inform application of the standard.[11]

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[7] Notwithstanding that s 21(4)(b) is directed toward the *conduct of the supplier* (FRS [28]), the evaluative assessment ultimately relied upon was dependent upon characteristics of the consumers enrolled (that they were unsuitable or unwittingly enrolled).
[8] That includes at FRS [51], where it repeats the identified error by the Full Court majority.
[9] To the extent it refers to an increase in complaints of agent misconduct, AS [29] is repeated.
[10] Contrary to FRS [35], s 22(1)(a) was explicitly referenced in Ground 3 of the Notice of Appeal (CAB 210).
[11] *Kobelt* at [14] (Kiefel CJ and Bell J), citing *Paciocco Full Court* at [296] (Allsop CJ).

***Ground Two***

10. The ACCC's distilled statement (points one through five (FRS [38]-[42], point 6 is addressed above) amounts to a contention that conduct which foreseeably increases the risk of harm to consumers, when pursued for profit maximisation, was unconscionable; although consumers were informed of the potential identified harm, there was no evidence of undue pressure or disparity in bargaining power, the conduct was otherwise lawful and not inconsistent with industry practice, and there was no colourable intention.[12] Foreseeability (or knowledge) of an event or fact is necessary (s 21(3)(a)), but is not sufficient.

11. The identified factors also put the question of the consumers' responsibility in issue. The courts below rejected PP's submissions on this issue on the basis that PP ignored "the effect of the College's decision to change its enrolment process in a manner that foreseeably, indeed inevitably, inflicted harm on students" (FJ [184], CAB 300). That reasoning assumes the conclusion to the question in issue: whether the harm was "inflicted" on students, or whether consumers, made aware of the consequences, are correctly or usefully in point of analysis characterised as having harm inflicted on them.[13]

12. **The significance of "risk"**: Although PP was aware of the risks,[14] so too was the executive which made specific regulatory changes to address those risks and to which PP adhered (FJ [65]-[66] CAB 251; FJ [189], CAB 301). That regulation indicated to the market an acceptable way to address the identified risk. The decision that it was unconscionable for PP to remove two non-mandatory procedures,[15] while having other procedures directed to addressing that risk and reflecting regulatory requirement directed to that same risk, is detached from the statutory concept. That conclusion is *a fortiori* as there was no evidence any other supplier had such procedures. Contrary to FRS [47], the findings do not support a conclusion that PP understood the magnitude of the risk prior to implementing the enrolment system: it believed it was taking the necessary precautions (TJ [333], CAB 93).

13. ***PP's intention***: For a "system" case advanced without reference to the characteristics of consumers as a cohort, dishonesty and colourable intention in the design of the system take

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[12] The ACCC points to no authority in support (FRS [48]). While the majority opined that asserted novelty is no answer (FJ [173], CAB 290), foreseeability of harm is far removed from unconscionable conduct.
[13] *Paciocco HCA* at [186] (Gageler J). No consideration is given to the possibility that consumers, understanding the terms of the VFH Scheme, made a different assessment to the ACCC of the relevant harm involved.
[14] The significance of the submission that the identified risks were exacerbated by the way the College chose to conduct its business (FRS [47]) is undermined by the ACCC's failure to lead evidence directed to s 22(1)(e).
[15] Identified by the primary judge as a "critical safeguard" (TJ [496], CAB 133), and by the Full Court as a system that "materially reduced the risk" (FJ [179], CAB 295).

on particular significance.[16] The distinction between "be taken to [have] mean[t] to produce" a consequence and having "an intention" to that effect (FRS [50]) is illusory. The conclusions at FJ [176] (CAB 292), and the matters at [12] above, are inconsistent with the ACCC's submission.

14. ***PP's legitimate interests***: FRS [51] fails to engage with the issues identified at AS [25]-[29], repeating the errors made by the majority of the Full Court. Identifying the prior system as a "reasonable alternative", where that system had been identified as the reason for dramatically declining market share, is disconnected from the normative standard to be applied "in trade or commerce".

15. ***Adequacy of disclosure and student's comprehension***: The issues concerning the "unwitting or unsuitable…" argument are addressed at AS [28]-[29] and above at [8]-[9]. The findings regarding deficiencies in the process do not explain why consumers, not alleged to be suffering from any disadvantage, are to be assumed to have failed to understand the information concerning their enrolment or that they had to withdraw by a particular date to avoid the cost.

16. ***Industry regulation and conduct of competitors***: The failure by the ACCC and the Courts below to address the intersection of industry regulation and the conduct of competitors in respect of a case premised on the appropriate response to identified and known risk has been addressed in AS [34]-[37]. It amounts to a failure to grapple with the requirement to establish that the impugned conduct was "so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct offensive to conscience". The judgments below effectively hold PP to a standard for addressing those risks that has not been applied by direct executive or legislative choice.

Dated: 21 December 2023

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[16] C.f. *ASIC v National Exchange Pty Ltd* [2005] FCAFC 226; (2005) 148 FCR 132.

## ANNEXURE TO THE APPELLANTS' SUBMISSIONS

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

1. *Competition and Consumer Act 2010* (Cth), Sch 2 (Australian Consumer Law) ss 21, 22 – as at 7 September 2015
2. *Acts Interpretation Act 1901* (Cth) ss 15AA, 23(b) – current version

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