

FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (trading as Captain Cook College) (in administration) (No 6) [2025] FCA 542

File number: NSD 2059 of 2018

Judgment of: **STEWART J**

Date of judgment: 27 May 2025

Catchwords: **CONSUMER LAW** – remedies – assessment of appropriate civil penalties against two corporate respondents in administration and one individual respondent – whether findings of systemic unconscionable conduct constitute a single contravention or multiple contraventions for the purpose of calculating the maximum penalty – whether disqualification order should be made against individual respondent and if so, determination of the appropriate period – where non-indemnification (or personal payment) order sought – whether the Court has power to make a non-indemnification order – whether a non-indemnification order should be made in the circumstances

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth), s 12CB(1)
Competition and Consumer Act 2010 (Cth), ss 76(1), 139B, Sch 2 (*Australian Consumer Law*) ss 18, 21, 29, 78, 79, 224, 248
Corporations Act 2001 (Cth), ss 206A, 206EA, 440D
Fair Work Act 2009 (Cth), s 546(1)
Higher Education Support Act 2003 (Cth)

Cases cited: *ACCC v Air New Zealand Ltd (No 15)* [2018] FCA 1166
ACCC v Australian Institute of Professional Education Pty Ltd (in liq) (No 5) [2021] FCA 1516; 397 ALR 208
ACCC v BlueScope Steel Ltd (No 6) [2023] FCA 1029
ACCC v Cabcharge Australia Ltd [2010] FCA 1261
ACCC v Cornerstone Investment Aust Pty Ltd (in liq) (No 5) [2019] FCA 1544
ACCC v Employsure Pty Ltd [2023] FCAFC 5; 407 ALR 302
ACCC v Ford Motor Company of Australia Pty Ltd [2018]

FCA 703; 360 ALR 124
ACCC v Get Qualified Australia Pty Ltd (in liq) (No 3)
[2017] FCA 1018
ACCC v Leahy Petroleum Pty Ltd (No 2) [2005] FCA 254;
215 ALR 281
ACCC v Phoenix Institute of Australia Pty Ltd (No 3)
[2023] FCA 859
ACCC v Phoenix Institute of Australia Pty Ltd [2021] FCA
956
ACCC v Productivity Partners Pty Ltd (No 3) [2021] FCA
737; 154 ACSR 472
ACCC v Productivity Partners Pty Ltd (No 4) [2021] FCA
752
ACCC v Productivity Partners Pty Ltd (No 5) [2021] FCA
919
ACCC v Reckitt Benckiser (Australia) Pty Ltd [2016]
FCAFC 181; 340 ALR 25
ACCC v Renegade Gas Pty Ltd (t/as Supagas NSW) [2014]
FCA 1135; ATPR 42-485
ACCC v TPG Internet Pty Ltd [2013] HCA 54; 250 CLR
640
ACCC v Yazaki Corporation [2018] FCAFC 73; 262 FCR
243
Ainsworth v Criminal Justice Commission [1992] HCA 10;
175 CLR 564
ASIC v Holista Colltech Ltd [2024] FCA 244
ASIC v Kobelt [2017] FCA 387
ASIC v Kobelt [2019] HCA 18; 267 CLR 1
ASIC v Wooldridge [2019] FCAFC 172
ASIC v AGM Markets Pty Ltd (in liq) (No 4) [2020] FCA
1499; 148 ACSR 511
*Australian Building and Construction Commissioner v
CFMEU* [2017] FCAFC 113; 254 FCR 68
*Australian Building and Construction Commissioner v
CFMEU* [2018] HCA 3; 262 CLR 157
*Australian Building and Construction Commissioner v
Pattinson* [2022] HCA 13; 274 CLR 450
CFMEU v Cahill [2010] FCAFC 39; 269 ALR 1
*Commonwealth v Director, Fair Work Building Industry
Inspectorate* [2015] HCA 46; 258 CLR 482
Cruickshank v ASIC [2022] FCAFC 128; 292 FCR 627
Green v The Queen [2011] HCA 49; 244 CLR 462
Lowe v The Queen [1984] HCA 46; 154 CLR 606
NW Frozen Foods Pty Ltd v ACCC [1996] FCA 1134; 71

FCR 285

Productivity Partners Pty Ltd v ACCC [2023] FCAFC 54;
297 FCR 180

Productivity Partners Pty Ltd v ACCC [2024] HCA 27; 419
ALR 30

Rich v ASIC [2004] HCA 42; 220 CLR 129

Rural Press Ltd v ACCC [2003] HCA 75; 216 CLR 53

Schneider Electric (Australia) Pty Ltd v ACCC [2003]
FCAFC 2; 127 FCR 170

Singtel Optus Pty Ltd v ACCC [2012] FCAFC 20; 287 ALR
249

Trade Practices Commission v CSR Ltd [1990] FCA 521;
(1991) ATPR 41-076

Valve Corporation v ACCC [2017] FCAFC 224; 258 FCR
190

viagogo AG v ACCC [2022] FCAFC 87

Volkswagen Aktiengesellschaft v ACCC [2021] FCAFC 49;
284 FCR 24

Bathurst T F, “Insurance Law – A view from the Bench”
(2014) 25(3) *Insurance Law Journal* 216

Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	131
Date of hearing:	1 April 2025
Counsel for the Applicant:	O Bigos KC and S Patterson
Solicitor for the Applicant:	Johnson Winter Slattery
Counsel for the First and Second Respondents:	No appearance
Solicitor for the First and Second Respondents:	No appearance
Counsel for the Fourth Respondent:	M R Hodge KC and A S Vial

Solicitor for the Fourth
Respondent:

HWL Ebsworth Lawyers

ORDERS

NSD 2059 of 2018

BETWEEN: **AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION**
Applicant

AND: **PRODUCTIVITY PARTNERS PTY LTD (TRADING AS
CAPTAIN COOK COLLEGE) ACN 085 570 547 (IN
ADMINISTRATION)**
First Respondent

**SITE GROUP INTERNATIONAL LTD ACN 003 201 910 (IN
ADMINISTRATION)**
Second Respondent

BLAKE WILLS
Fourth Respondent

ORDER MADE BY: STEWART J

DATE OF ORDER: 27 MAY 2025

THE COURT DECLARES THAT:

1. In circumstances where:
 - (a) the first respondent, Productivity Partners Pty Ltd (ACN 085 570 547) trading as Captain Cook College (the **College**) was a registered training organisation under the *Higher Education Support Act 2003* (Cth) and supplied vocational education and training (**VET**) courses to students through an “online” campus under the Commonwealth’s Vocational Education and Training Fee Higher Education Loan Program (**VFH scheme**);
 - (b) the College engaged marketing and sales agents (**recruitment agents**) on a commission basis to recruit students to enrol in its online courses;
 - (c) the College knew that there was a real risk, that regularly materialised, that recruitment agents would engage in unethical conduct in the recruitment of students with the result that students became enrolled at the College in circumstances where the student did not do so willingly and with full knowledge of the obligations being incurred under the VFH scheme or where the student

was unsuitable for enrolment because they lacked sufficient language, literacy or numeracy skills or access to technology;

- (d) the College had previously taken steps to reduce the risk referred to in paragraph (c) by:
 - (i) confirming the students' enrolment through an outbound quality assurance (QA) telephone call which would generally occur 48 hours after the submission of enrolment documents to ensure that the student understood the obligations they were incurring under the VFH scheme and to identify any reasons that suggested the student may not have the ability to undertake the course; and
 - (ii) withdrawing a student's enrolment prior to the first or subsequent census date if the student was not contactable by the College, or the student was not engaged in their course, or if the College staff otherwise concluded that the consumer was not suitable for their course (a procedure referred to by the College as the campus driven withdrawal process);
- (e) recruitment agents were dissatisfied with the College's enrolment processes and began referring students to other VET providers with the result that the College began to experience declining enrolments,

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

- (f) implementing, and maintaining during the Enrolment Period, changes to its enrolment processes such that:
 - (i) the College ceased making outbound QA calls and instead allowed recruitment agents to make inbound QA calls to the College; and
 - (ii) the College ceased its campus driven withdrawal procedure, thereby increasing, to the knowledge of the College, the risk of each such student being enrolled in circumstances where the student did not do so willingly and with full knowledge of the obligations being incurred or where the student was unsuitable for enrolment because they lacked sufficient language, literacy or numeracy skills or access to technology; and

- (g) claiming and retaining the course fees payable by the Commonwealth under the VFH scheme in respect of each such student,
with the purpose of increasing enrolments and the associated VFH revenue.
2. The fourth respondent, Blake Alan Wills (**Wills**) was knowingly concerned in, or a party to, the College's contravention of s 21 of the ACL as set out in paragraph 1 above.
 3. By reasons of Wills's knowledge and conduct being attributable to the second respondent, Site Group International Ltd (**Site**), Site was knowingly concerned in, or a party to, the College's contravention of s 21 of the ACL as set out in paragraph 1 above.

THE COURT ORDERS THAT:

First respondent

4. Pursuant to s 224 of the ACL, the College pay the Commonwealth of Australia, within 60 days:
 - (a) a pecuniary penalty in the total amount of \$20 million in respect of its contravention of s 21 of the ACL the subject of the declaration in paragraph 1 above; and
 - (b) pecuniary penalties in the total amount of \$750,000 in respect of its contraventions of ss 21, 29, 78 and 79 of the ACL the subject of the declarations in paragraphs 4, 5, 6, 7, 9, 10, 12, 13, 15, 16 and 18 of the orders and declarations made on 4 August 2021.

Second respondent

5. Pursuant to s 224 of the ACL, Site pay to the Commonwealth of Australia, within 60 days, a pecuniary penalty in the total amount of \$10 million in respect of its conduct the subject of the declaration in paragraph 3 above.

Fourth respondent

6. Pursuant to s 248 of the ACL, Wills be disqualified from managing corporations for a period of three years from the date of this Order.
7. Pursuant to s 224 of the ACL, Wills pay to the Commonwealth of Australia, within 60 days, a pecuniary penalty in the total amount of \$400,000 in respect of his conduct the subject of the declaration in paragraph 2 above.

Costs

8. The respondents pay the applicant's costs, as agreed or assessed (to the extent they are not already covered by the order for costs made in paragraph 19 of the orders made on 4 August 2021).

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

REASONS FOR JUDGMENT

STEWART J:

Introduction

- 1 These reasons for judgment concern declarations, penalties and related relief sought by the Australian Competition and Consumer Commission (ACCC) against the first, second and fourth respondents following the exhaustion of those respondents' appeals against the liability findings against them. The third respondent settled the case against him two months prior to the first instance liability hearing and thus played no further part in the proceeding.
- 2 The relevant conduct concerned the provision of online vocational education and training (VET) by the first respondent, Productivity Partners Pty Ltd which traded as Captain Cook College. It is convenient to refer to it as the **College**. Its shares were wholly owned by the second respondent, **Site** Group International Ltd. The third respondent, Ian Cook, was the Chief Executive Officer (CEO) of the College. The fourth respondent, Blake Wills, was the Chief Operating Officer (COO) of Site and, between November 2015 and January 2016, acting CEO of the College.
- 3 In *ACCC v Productivity Partners Pty Ltd (No 3)* [2021] FCA 737; 154 ACSR 472 (which I shall refer to as the liability judgment or **LJ**), I found that the College engaged in a system of conduct, or a pattern of behaviour, in respect of people who were enrolled in online courses in the period from 7 September 2015 to 18 December 2015 which was, in all the circumstances, unconscionable in contravention of s 21 of the *Australian Consumer Law (ACL)* (sch 2 of the *Competition and Consumer Act 2010 (Cth) (CCA)*). I found that Mr Wills and, through him, Site, were knowingly concerned in the College's systemic unconscionable conduct and therefore also liable for that conduct by operation of s 224(1)(e) of the ACL and s 139B of the CCA.
- 4 The principally relevant conduct was that, during the impugned enrolment period, the College changed its process for enrolment of students by removing two system controls. Those controls had previously ameliorated known risks of unwitting or unsuitable persons becoming enrolled and remaining enrolled at the date on which VET fees became claimable by the College from the Commonwealth in respect of their enrolment under the VET Fee Higher Education Loan Program (the **VFH scheme**). Further, the College claimed VET fees from the Commonwealth under the VFH scheme in respect of people enrolled in the impugned enrolment period with

the consequence that, given the structure of the VFH scheme, those people incurred a VFH debt to the Commonwealth in the amount of the VET fees paid plus a 20% “loan fee”.

5 I also found that the College had contravened ss 18, 21, 29, 78 and 79 of the ACL in respect of five individual consumers, Consumers A to E.

6 I made declarations essentially as proposed by the parties to record the findings of contraventions and postponed dealing with further relief until after any appeal processes had been exhausted: *ACCC v Productivity Partners Pty Ltd (No 5)* [2021] FCA 919.

7 On appeals by the College, Site and Mr Wills, the Full Court by majority (Wigney and O’Byrne JJ, Downes J dissenting) upheld the conclusion of systemic unconscionable conduct in *Productivity Partners Pty Ltd v ACCC* [2023] FCAFC 54; 297 FCR 180 (FC), save in one respect concerning the date from which Mr Wills and, through him, Site were knowingly concerned in the College’s contravention of s 21 of the ACL. I had found that date to be 7 September 2015 with reference to Mr Wills’s involvement in the adoption of the process changes as part of his oversight of the College by Site. The majority in the Full Court found that date to be 20 November 2015, being the date on which Mr Wills became the acting CEO of the College. The Full Court set aside the declarations in relation to systemic unconscionability and remitted the question of relief.

8 The Full Court upheld the appeal of the College in respect of the findings of contraventions of s 21 of the ACL in respect of the individual consumers B to E, leaving the remaining findings of contraventions, and the resultant declarations in respect of them, intact. That is to say, the other grounds of appeal in relation to the individual consumers were dismissed (see FC [16]-17)). The appeal was upheld on the limited basis that the unconscionable conduct of the course advisors in recruiting consumers B to E was not unconscionable conduct by the College because once that conduct in relation to those students was brought to the College’s attention it withdrew them from the courses they had enrolled in and remitted all VFH fees or debt (FC [368]). The High Court granted special leave to appeal both to the College and Site, and separately to Mr Wills, but no appeal to the High Court was pursued in relation to the contraventions relating to the individual consumers, one way or the other.

9 The High Court dismissed the appeals of the College, Site and Mr Wills in *Productivity Partners Pty Ltd v ACCC* [2024] HCA 27; 419 ALR 30 (HC). The High Court also upheld the ACCC’s notice of contention by restoring the first instance finding that Mr Wills and, through

him, Site were knowingly concerned in the systemic unconscionable conduct from 7 September 2015 (see HC [13], [93]-[94], [159], [193], [275]-[276], [341]).

10 As the Full Court had set aside the declarations in relation to systemic unconscionability that had been made following the liability judgment and remitted the matter to me on the question of relief, the effect of the High Court's dismissal of the appeals was to allow that remittal to proceed. That is what is now before me.

11 Finally by way of introduction, Bromwich J approved the settlement of the ACCC's claim against Mr Cook: *ACCC v Productivity Partners Pty Ltd (No 4)* [2021] FCA 752 (**Cook penalty judgment**). Relevantly, it was declared that Mr Cook was knowingly concerned in, or a party to, the College's contravention of s 21 of the ACL in respect of the same enrolment process changes and claiming and retaining VFH revenue from the Commonwealth. Mr Cook was ordered to pay a pecuniary penalty pursuant to ACL s 224 of \$250,000 and a contribution to the ACCC's costs fixed in the amount of \$250,000, and he was disqualified from managing corporations pursuant to ACL s 248 for a period of three years from 3 June 2020 which is the date that the disqualification order was made.

The College and Site are placed into administration

12 The College and Site were placed into administration on 5 March 2025, less than a month before the penalty hearing. At the commencement of the penalty hearing on 1 April 2025, I granted leave to the ACCC, nunc pro tunc, under s 440D of the *Corporations Act 2001* (Cth) for the proceeding to continue against the companies in administration, on the condition that the ACCC did not enforce any relief without further leave of the Court. The administrators had consented to that course. They withdrew the companies' solicitors' retainer, and they elected not to appear at the hearing. There was therefore no representation for the companies at the hearing.

13 However, prior to the companies going into administration, written submissions prepared by Jeremy Giles and Rob Davies, of senior counsel and counsel respectively, on the instructions of MinterEllison, were filed on behalf of the companies. I have had regard to those helpful submissions in preparing these reasons even though they were not formally relied on by the companies.

The declarations

- 14 Following the liability judgment, the parties were given the opportunity to try to agree the terms of declarations to be made recording the terms in which the controversy between the parties as to the contraventions of the ACL had been quelled by the reasons for judgment. The parties reached substantial agreement, and I made declarations in the terms proposed by the College and Site as furnished to my Chambers by email on 30 July 2021. That notwithstanding, before the Full Court the College and Site levelled criticisms at the declarations as to systemic unconscionability as made (FC [204]), in particular on the basis that they did not aptly reflect my findings in that they might be taken to suggest that the impugned conduct was unconscionable from its inception on the basis of facts and circumstances that occurred at a later point in time (FC [372]). As a consequence of the Full Court upholding those criticisms, and because Mr Wills's appeal, and hence Site's, were successful with respect to the question of when their relevant knowledge commenced which meant that the declarations had to be revisited in any event, the Full Court set aside the declarations (FC [379], [381]).
- 15 It is to be noted that the declarations as to the contraventions of the ACL by the College in respect of consumers A to E, other than to the limited extent identified at [8] above, were not set aside by the Full Court. The result is that those declarations remain and do not need to be considered any further in these reasons. However, for ease of reference they are set out in the annexure to these reasons for judgment.
- 16 In its discussion of the declarations, the Full Court majority helpfully set out possible declarations which, in its view, properly or adequately capture the gist of the findings of systemic unconscionability although it did not seek to prescribe whether declarations should be made or in what terms (FC [377]). The parties have accepted that declarations in the terms postulated by the majority of the Full Court should be made, save that the ACCC submits that small changes should be made to record that the finding of systemic unconscionable conduct is in respect of each student who was enrolled in the College during the relevant period. The reason for that is that there is a dispute, the details of which will shortly become apparent, about whether, for the purposes of determining the maximum penalty, there was a single contravention or the number of contraventions equal to the number of students enrolled in the relevant period. That is to say, the ACCC wishes, by the terms of the declarations, to resolve the dispute about the maximum penalty.

17 To my mind there is no need for the declarations to refer to the contravention being in respect of each relevant student, whatever the proper resolution is of the dispute between the parties with regard to the maximum applicable penalty. I can, and will, determine that question separately.

18 I am satisfied that the making of declarations serves a valuable purpose in declaring the liability that was the subject of the controversy between the parties: *Ainsworth v Criminal Justice Commission* [1992] HCA 10; 175 CLR 564 at 582, cited at FC [376]. The declarations also serve to record the Court’s disapproval of the contravening conduct, vindicate the regulator’s claim, assist the regulator perform its duties, and deter others from contravening the law: *Australian Building and Construction Commissioner v CFMEU* [2017] FCAFC 113; 254 FCR 68 (*CFMEU FC*) at [93] per Dowsett, Greenwood and Wigney JJ. Declarations in the form that are sought record the “gist of the findings” that identify the contravention: *Rural Press Ltd v ACCC* [2003] HCA 75; 216 CLR 53 at [89].

19 I therefore propose to make the declarations as sought by the parties without the amendments sought by the ACCC. I will make declarations as follows, noting that paragraphs 2 and 3 were not postulated by the majority of the Full Court because its postulated orders dealt only with the contravention by the College and not the knowing involvement of Mr Wills and Site in that contravention:

1. In circumstances where:

- (a) the first respondent, Productivity Partners Pty Ltd (ACN 085 570 547) trading as Captain Cook College (the **College**) was a registered training organisation under the *Higher Education Support Act 2003* (Cth) and supplied vocational education and training (**VET**) courses to students through an “online” campus under the Commonwealth’s Vocational Education and Training Fee Higher Education Loan Program (**VFH scheme**);
- (b) the College engaged marketing and sales agents (**recruitment agents**) on a commission basis to recruit students to enrol in its online courses;
- (c) the College knew that there was a real risk, that regularly materialised, that recruitment agents would engage in unethical conduct in the recruitment of students with the result that students became enrolled at the College in circumstances where the student did not do so willingly and with full knowledge of the obligations being incurred under the VFH scheme or where the student was unsuitable for enrolment because they lacked sufficient language, literacy or numeracy skills or access to technology;
- (d) the College had previously taken steps to reduce the risk referred to in paragraph (c) by:

- (i) confirming the students' enrolment through an outbound quality assurance (QA) telephone call which would generally occur 48 hours after the submission of enrolment documents to ensure that the student understood the obligations they were incurring under the VFH scheme and to identify any reasons that suggested the student may not have the ability to undertake the course; and
 - (ii) withdrawing a student's enrolment prior to the first or subsequent census date if the student was not contactable by the College, or the student was not engaged in their course, or if the College staff otherwise concluded that the consumer was not suitable for their course (a procedure referred to by the College as the campus driven withdrawal process);
- (e) recruitment agents were dissatisfied with the College's enrolment processes and began referring students to other VET providers with the result that the College began to experience declining enrolments,

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

- (f) implementing, and maintaining during the Enrolment Period, changes to its enrolment processes such that:
 - (i) the College ceased making outbound QA calls and instead allowed recruitment agents to make inbound QA calls to the College; and
 - (ii) the College ceased its campus driven withdrawal procedure, thereby increasing, to the knowledge of the College, the risk of students being enrolled in circumstances where the student did not do so willingly and with full knowledge of the obligations being incurred or where the student was unsuitable for enrolment because they lacked sufficient language, literacy or numeracy skills or access to technology; and
- (g) claiming and retaining the course fees payable by the Commonwealth under the VFH scheme in respect of each such student,

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

2. The fourth respondent, Blake Alan Wills (**Wills**) was knowingly concerned in, or a party to, the College's contravention of s 21 of the ACL as set out in paragraph 1 above.
3. By reasons of Wills' knowledge and conduct being attributable to the fourth [sic] respondent, Site Group International Ltd (**Site**), Site was knowingly concerned in, or a party to, the College's contravention of s 21 of the ACL as set out in paragraph 1 above.

20 The form of paragraphs 2 and 3 pick up the date of the commencement of Mr Wills's knowing concern in the College's contravention in accordance with the original finding in that respect

as restored by the High Court by referring to “the College’s contravention” as set out in paragraph 1.

Summary of the contravening conduct

- 21 The contraventions by each of the respondents having now been finally established, there is no point in repeating a description of what that conduct is, the circumstances in which it took place and the harm that it caused – there are already eight judgments that deal with that (not counting the dissenting judgment in the Full Court). However, it is necessary to summarise the relevant findings, at least at a high level, because the nature and seriousness of the conduct, and the harm that it caused, is relevant to the question of what further relief should be granted.
- 22 For present purposes, the important point to draw from the declarations in the terms set out above is that there are two components to the systemic unconscionable conduct captured in paragraphs 1(f) and (g): first, implementing and maintaining the enrolment process changes and, secondly, claiming and retaining the course fees payable under the VFH scheme. I shall return to these two components in the discussion of the maximum penalty.
- 23 The contravening conduct resulted from a “deliberate decision” by the College to change its enrolment process when it knew of the “foreseeable and likely consequences of its decision and the harm that would be occasioned” (FC [187]). Further, the College maintained a claim to dramatically increased VFH revenue that it knew was substantially built on revenue attributable to unwitting or unsuitable consumers who never should have been enrolled (LJ [499]). As a direct consequence of the process changes, the College enjoyed dramatically increased earnings. Its VFH income and EBITDA (meaning earnings before interest, taxes, depreciation and amortisation, used as a proxy for operating profit) rose from \$326,125 and \$138,458, respectively, in August 2015 to \$13,931,625 and \$4,730,762 in November 2015 (LJ [403]).
- 24 The College’s contravening conduct was not an isolated incident. The College persisted in applying its unlawful enrolment process for a period of over three months. It ceased enrolling students only after 18 December 2015 as a consequence of the Commonwealth imposing a cap on VFH loans for 2016 (LJ [396]-[401]). The contravening conduct also comprised the College then continuing to claim VFH revenue until September 2016 in respect of consumers enrolled as a result of that process as they subsequently remained enrolled and passed census dates in their courses.

25 Very senior officers were responsible for the contraventions. Among them were Mr Cook, the College’s CEO, and Mr Wills, the COO of the College’s parent, Site (in which role he maintained a “continued watchful eye over [the College’s] operations” (HC [183]) and the acting CEO of the College from November 2015 to January 2016.

26 The College’s unconscionable conduct took advantage of the vulnerability of consumers (HC [325]) and caused harm to the thousands of consumers who should never have been enrolled (FC [17], [184]) in the form of unwittingly incurring very substantial VFH debts while obtaining no benefit from their enrolment (LJ [499]; HC [67]). The scale of this harm can be measured by observing that of the 6,032 consumers who were enrolled in the relevant period and who passed at least one census date, 86.5% never logged on to their online course, 98.9% never completed any unit of competency, and 99.7% did not complete the course (FC [108]).

27 The contravening conduct in relation to consumers A to E can be summarised as follows.

28 Consumer A was enrolled at the College in October 2015 following a conversation with a recruiting agent for the College at a family gathering held at Consumer A’s mother’s house (her mother having previously been enrolled by the same recruiter). During that conversation, the recruiter failed to disclose to Consumer A the cost of the course in which she had enrolled and failed to explain to Consumer A her ability to withdraw from the course prior to the census date. The recruiter also failed to explain key aspects of the VFH scheme to Consumer A, including the need to cancel on or before the census date to avoid incurring a debt, and had filled out the enrolment documents himself rather than ensuring Consumer A filled them out herself. The recruiter also let Consumer A believe that she could keep a laptop given to her by the recruiter despite inducements to enrol being inconsistent with the VET Guidelines. Further, during an inbound quality assurance call to validate her enrolment, information was conveyed at high speed with no attempt made to ensure Consumer A understood the information, while the recruiter also told Consumer A the answers she should give to some of the questions.

29 The conduct of the recruiter was taken to be conduct engaged in by the College pursuant to s 139B(2)(a) of the CCA, and by the conduct summarised above the College was found to have made a false or misleading representation in contravention of ACL s 29(1)(i), engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of ACL s 18, and engaged in unconscionable conduct in contravention of ACL s 21.

30 Consumer B was enrolled at the College in November 2015 following a conversation with a recruiting agent for the College who had knocked on his door, un-prompted. In that conversation, Consumer B was advised by the recruiter that the course he was signing up to was free, and that if he signed up to the course he would get a laptop for free despite the laptop only being available for loan.

31 Consumer C was enrolled at the College in November 2015 following a conversation with recruiting agents for the College in a park, where a friend of Consumer C's had directed her to speak with the recruiters who would "give you a free laptop if you do a course". In the course of that conversation, the recruiters represented to Consumer C that the course she was being signed up for would help her become a flight attendant. The recruiters also told Consumer C that the course was free if she was on Centrelink, and that she would get a free laptop that she could keep.

32 Consumer D was enrolled at the College in December 2015 following a conversation with a recruiting agent for the College who had visited her home. In that conversation, the recruiter told Consumer D that the course she was signing up for was free, and that she would get a free laptop for signing up, which she could keep even if she did not do the course. The recruiter also told Consumer D that she could cancel her course at any time.

33 Consumer E was enrolled at the College in November 2015 following a conversation with recruiting agents for the College who had knocked on his door, unprompted. During that conversation, the recruiters told Consumer E that he would get a free laptop if he signed up to a course offered by the College, and also failed to disclose to Consumer E the cost of the course in which he enrolled.

34 In respect of each of Consumers B – E, the conduct of the recruiters summarised above was also taken to be conduct engaged in by the College pursuant to s 139B(2)(a) of the CCA. By this conduct, in each case the College was found to have made false and misleading representations in contravention of ACL ss 29(1)(i) and (m) (as well as contravening s 29(1)(g) in respect of Consumer C only) and engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of ACL s 18.

35 In addition, having entered into an agreement with each of Consumers A – E during the course of enrolment, each of which was an unsolicited consumer agreement within the meaning of ACL s 69(1), the College did not properly inform any of Consumers A – E of their right to

terminate the agreement by inserting a notice on the front page of the agreement or providing a notice which could be used to terminate the agreement, and was thereby found to have contravened ss 79(b) and (c) of the ACL. In respect of Consumers B and E, the College also did not provide the agreement documentation, being a Training Plan and/or Letter of Offer, to the Consumers in a lawful form – the documentation was sent to Consumer B through a fictitious email address that the recruiter had made up for him, while Consumer E had not consented to signing up for any course at all and therefore did not consent to receiving the documentation by his (genuine) email address. As such, the College was found to have also contravened s 78(2) of the ACL in respect of Consumers B and E.

Civil penalties: applicable principles

36 The ACCC seeks civil penalties against the College (\$35 million), Site (\$17.5 million) and Mr Wills (\$500,000). It is convenient to identify some matters common to the consideration of penalties for all the respondents before coming back to consider each of them individually.

37 There is no controversy before me with respect to the applicable principles. The ACCC has set them out in summary form in its written submissions which the respondents accept, although they supplement them in minor respects. The following is drawn principally from the ACCC's submissions to which I have added the supplementation referred to.

38 Under the ACL, the court has power to order the payment of civil penalties pursuant to s 224(1)(a)(i) (for contraventions of s 21), s 224(1)(a)(ii) (for contraventions of s 29) and s 224(1)(a)(iv) (for contraventions of ss 78 and 79). Also, the Court has power, under s 224(1)(e), to order a person who has been knowingly involved in contraventions of s 21 of the ACL to pay civil penalties. There is no provision for imposing civil penalties for contraventions of ACL s 18.

Deterrence, not retribution

39 Unlike criminal sentences, a civil penalty is “primarily if not wholly protective in promoting the public interest in compliance”: *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 (***Commonwealth v Fair Work***) at [55]. “[C]ivil penalties are imposed primarily, if not solely, for the purpose of deterrence”: *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 274 CLR 450 (***Pattinson***) at [15]. That principle has been applied in the context of civil penalties under the ACL: *viagogo AG v ACCC* [2022] FCAFC 87 at [129] per Yates, Abraham and Cheeseman JJ;

ACCC v Employsure Pty Ltd [2023] FCAFC 5; 407 ALR 302 (***Employsure***) at [49] per Rares, Stewart and Abraham JJ.

40 Civil penalties are not concerned with retribution: *Commonwealth v Fair Work* at [55]. Also, the objective of general deterrence can be served by both penalty and non-penalty consequences: *ASIC v AGM Markets Pty Ltd (in liq) (No 4)* [2020] FCA 1499; 148 ACSR 511 (***AGM Markets Penalty***) at [31] per Beach J.

41 In considering an appropriate penalty, it is necessary to endeavour to “put a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act”: *Volkswagen Aktiengesellschaft v ACCC* [2021] FCAFC 49; 284 FCR 24 at [147] (***Volkswagen***) per Wigney, Beach and O’Bryan JJ, quoting *Trade Practices Commission v CSR Ltd* [1990] FCA 521; (1991) ATPR 41-076 at [40] per French J. That price can be described as the “sting or burden” of the penalty; the greater the sting or burden, the more likely it will be that the contravener will seek to avoid the risk of subjection to further penalties, the more potent the example for would-be contraveners, and the greater the penalty’s specific and general deterrent effect: *Australian Building and Construction Commissioner v CFMEU* [2018] HCA 3; 262 CLR 157 (***CFMEU HCA***) at [116]. Ultimately, if a penalty is devoid of sting or burden, it may not have much, if any, specific or general deterrent effect: *CFMEU HCA* at [116].

42 It is necessary to ensure that the penalty “is not such as to be regarded by that offender or others as an acceptable cost of doing business” and that it will deter them “from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention”: *ACCC v TPG Internet Pty Ltd* [2013] HCA 54; 250 CLR 640 at [66], quoting *Singtel Optus Pty Ltd v ACCC* [2012] FCAFC 20; 287 ALR 249 at [62]-[63] per Keane CJ, Finn and Gilmour JJ; *Pattinson* at [17]. In a case such as the present in relation to the corporate respondents which are in external administration, specific deterrence has little relevance; general deterrence is the critical component: *ACCC v Australian Institute of Professional Education Pty Ltd (in liq) (No 5)* [2021] FCA 1516; 397 ALR 208 (***AIPE No 5***) at [11] per Bromwich J.

Statutory maximum, including in this case

43 In the present case, the statutory maximum is relevant only to the systemic unconscionability in contravention of s 21 in Pt 2-2 of the ACL. The relevant provisions with regard to penalties are in s 224, which, at the time of the contravening conduct, provided as follows:

224 Pecuniary penalties

- (1) If a court is satisfied that a person:
- (a) has *contravened* any of the following provisions:
 - (i) a provision of Part 2-2 (which is about unconscionable conduct);
 - ...
- the court may order the person to pay to the Commonwealth, State or Territory, as the case may be, such pecuniary penalty, *in respect of each act or omission by the person to which this section applies*, as the court determines to be appropriate.
- ...
- (3) The pecuniary penalty payable under subsection (1) is not to exceed the amount worked out using the following table:

Amount of pecuniary penalty		
Item	For each act or omission to which this section applies that relates to ...	the pecuniary penalty is not to exceed ...
1	a provision of Part 2-2	(a) if the person is a body corporate—\$1.1 million; or (b) if the person is not a body corporate—\$220,000.

...

(Emphasis added.)

44 It is apparent that the maximum penalty is to be calculated with reference to each act or omission “to which this section applies”. The section applies to the conduct that constitutes the relevant contravention.

45 The prohibition in s 21(1) is, relevantly, that “a person must not, in trade or commerce, in connection with ... the supply or possible supply of ... services ... engage in conduct that is, in all the circumstances, unconscionable”. Section 21(4)(b) provides 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”. It follows, as a matter of construction, that it is each “act or omission” constituting the unconscionable system of conduct or pattern of behaviour, that can attract a penalty up to the maximum amount.

46 A system case contemplated by s 21(4) can give rise to multiple contraventions and hence a maximum penalty multiple times the amounts specified in the table in s 224(3): *ACCC v Get*

Qualified Australia Pty Ltd (in liq) (No 3) [2017] FCA 1018 (**Get Qualified**) at [47] per Beach J; *ACCC v Ford Motor Company of Australia Pty Ltd* [2018] FCA 703; 360 ALR 124 (**Ford**) at [54] and [73] per Middleton J; *ACCC v Cornerstone Investment Aust Pty Ltd (in liq) (No 5)* [2019] FCA 1544 at [46]-[48] per Gleeson J; *AGM Markets Penalty* at [58(b)] and [62] per Beach J; *ACCC v Phoenix Institute of Australia Pty Ltd* [2021] FCA 956 at [1353] per Perry J; *AIPE (No 5)* at [12]. Justice Bromwich also accepted that there were multiple contraventions by Mr Cook in dealing with the same unconscionable system as I am dealing with, although that was apparently accepted by Mr Cook so it was not the subject of contest: Cook penalty judgment at [70(b)].

47 The respondents contend that each case will turn on its own facts, and in particular how the case is pleaded and run. For example, in *ASIC v Kobelt* [2017] FCA 387, White J held that there was a single contravention arising from the systemic unconscionable conduct of Mr Kobelt's book up system (at [26]-[27], [36]), despite finding that Mr Kobelt had contravened s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (the equivalent of ACL s 21) for a period of at least seven years regarding financial services supplied to at least 117 customers (at [5]). ASIC contended for at least 59 separate contraventions (at [7]). Although the judgment on liability was ultimately overturned (see *ASIC v Kobelt* [2019] HCA 18; 267 CLR 1), the respondents submit that since the reasoning with respect to the appropriate penalty was not the subject of appeal it remains instructive. Crucially, White J concluded that there was a single contravention because ASIC's case "did not turn on the circumstances of any identified individual customer" (at [28]).

48 That analysis draws attention to what the relevant acts or omissions are that amount to the relevant system of conduct or pattern of behaviour and how the case was run. The present case is not based on omissions; it is the relevant acts constituting the unconscionable system that must be identified. As dealt with earlier, the relevant acts were the implementation of the process changes and the claiming and retaining of the VFH revenue earned as a consequence of enrolments under the process changes. Although the process changes can be regarded as applying generally, which is to say not to any particular student or even any student if none had been enrolled, the claiming and retaining of the revenue was done on a per student basis. As such, for each student who enrolled during the relevant period the College's act of claiming and retaining the revenue amounted to an act to which s 21 applied. It follows that, in my view, as a matter of construction applied to the facts of the present case, the maximum penalty is to

be calculated with reference to the number of students who were enrolled during the relevant period.

49 The respondents resist that conclusion. With reference to the pleadings, the ACCC's opening submissions at trial and the terms of the parties' agreed declarations that I made following the trial (but which were subsequently set aside by the Full Court as explained above at [0]), they submit that the case was always run on the basis that there was only one contravention. For that reason, they submit that the maximum penalty to be imposed is \$1.1 million in the case of the corporate respondents and \$220,000 in the case of Mr Wills.

50 I am not persuaded by that submission. Although in the second further amended originating application the declarations that are sought refer to a "contravention" in the singular, they include the averments that "approximately 7,200 consumers" were enrolled in the relevant period which was a substantial increase "as a result of the Process Changes". Similarly, the concise statement refers to a "contravention" in the singular, but also to the College's claiming and retaining the revenue "in respect of the majority of consumers" who enrolled during the relevant period (at [1]). It also states that "around 5,500 consumers" who enrolled in the relevant period failed to complete a unit of study (at [19]). The second further amended statement of claim pleads that the unconscionable conduct was constituted by the process changes *and* the claiming and retaining of the VFH revenue in respect of 90% of the consumers who became enrolled during the relevant period (at [124]). The opening submissions on behalf of the ACCC were consistent with those pleadings.

51 The point is that although the singular "contravention" was used, it was always clear that the ACCC's case was that many thousands of consumers had been adversely affected by the contravention and that an element of the unconscionable system was the claiming and retaining of the VFH revenue in respect of those consumers. It was never in issue in the case that thousands of students were enrolled during the relevant period.

52 For those reasons, I am satisfied that for the purposes of a maximum penalty there were the number of relevant acts resulting in the unconscionable system as there were students enrolled in the relevant period.

53 There is no point in calculating the maximum penalty when it is thousands of times the maximum for a single contravention: *ACCC v Reckitt Benckiser (Australia) Pty Ltd* [2016]

FCAFC 181; 340 ALR 25 at [157] per Jagot, Yates and Bromwich JJ; *Get Qualified* at [32]; *AIPE (No 5)* at [14].

Factors informing the appropriate penalties

54 Section 224(2) of the ACL provides that, in determining the appropriate penalty, the court must have regard to “all relevant matters”, including the nature and extent of the act or omission and of any loss or damage suffered as a result, the circumstances in which the act or omission took place, and whether the contravener has previously been found by a court to have engaged in similar conduct.

55 These factors are not to be treated as a rigid checklist and each factor may not necessarily be relevant or important in every case; some of the factors relate to the objective nature and seriousness of the contravention, and others concern the particular circumstances of the contravener in question: *CFMEU FC* at [101]-[102].

56 Factors relating to the objective seriousness of the contravention include: the extent to which the contravention was the result of deliberate, covert or reckless conduct, as opposed to negligence or carelessness; whether the contravention comprised isolated conduct, or was systematic or occurred over a period of time; if the contravener is a corporation, the seniority of the officers responsible for the contravention; the existence, within the corporation, of compliance systems and whether there was a culture of compliance at the corporation; the impact or consequences of the contravention on the market or innocent third parties; and the extent of any profit or benefit derived as a result of the contravention: *CFMEU FC* at [103].

57 Factors that concern the particular circumstances of the contravener, particularly where the contravener is a corporation, generally include: the size and financial position of the contravener; whether the contravener has been found to have engaged in similar conduct in the past; whether the contravener has improved or modified its compliance systems since the contravention; whether the company (through its senior officers) has demonstrated contrition and remorse; whether the contravener had disgorged any profit or benefit received as a result of the contravention, or made reparation; whether the contravener has cooperated with and assisted the relevant regulatory authority in the investigation and prosecution of the contravention; and whether the contravener has suffered any extra-curial punishment or detriment arising from the finding that it had contravened the law: *CFMEU FC* at [104].

Course of conduct and totality

58 The “course of conduct” principle is a tool of analysis which considers whether multiple contraventions “arise out of the same course of conduct or the one transaction”, to determine whether it is appropriate that a “concurrent” or single penalty should be imposed: *ACCC v Yazaki Corporation* [2018] FCAFC 73; 262 FCR 243 at [234] per Allsop CJ, Middleton and Robertson JJ. This principle guards against the risk of double punishment in respect of those aspects of legally distinct contraventions that involve overlap in wrongdoing: *Employsure* at [51]; see also *CFMEU v Cahill* [2010] FCAFC 39; 269 ALR 1 at [39] and [41] per Middleton and Gordon JJ.

59 Separately, under the principle of “totality”, the court may conduct a “final check” of the penalties to be imposed, considered as a whole, to “ensure that the total penalty does not exceed what is proper for the entire contravening conduct”: *Employsure* at [52].

Relief against the College

Systemic unconscionability contravention

60 In summary, the ACCC makes the following points in favour of the penalty of \$35 million that it submits should be imposed on the College in respect of the finding of systemic unconscionable conduct contrary to ACL s 21.

61 First, it submits that the benefit of the impugned conduct should set the floor, not the ceiling, of the penalty since the revenue that was obtained was wholly attributable to that conduct, relying on *AIPE No 5* at [20] and *ACCC v Phoenix Institute of Australia Pty Ltd (No 3)* [2023] FCA 859 (*Phoenix No 3*) at [113] per Perry J. Further, it submits that the cost of earning that benefit should be ignored, ie that profit is not the correct yardstick but rather gross revenue, because the costs incurred by the College were in aid of an illegal enterprise, relying on *AIPE No 5* at [20]; see also *Phoenix No 3* at [124].

62 I am doubtful that as a general statement of principle it is the gross revenue rather than net revenue (ie profit) that is the appropriate yardstick by which to determine the appropriate penalty. It seems to me that the cost of doing business, even if the conduct of that business is relevantly unconscionable, should be deducted from revenue in order to arrive at a figure for the benefit obtained from the unconscionable conduct, and that it is that benefit that sets the floor for an appropriate penalty. To do otherwise would run the risk of grossly overstating the benefit obtained from the unconscionable conduct and thereby set an unreasonably, and

unjustifiably, high floor. That approach is also consistent with the references to “any profit or benefit” in *CFMEU FC* at [103]-[104].

63 In my reading of the reasons for judgment, what was said in *AIPE No 5* about ignoring the costs of obtaining the relevant benefit is to be understood in the context of that particular case, rather than as a statement of overarching governing principle. In that case, the relevant benefit of the unconscionable conduct was obtained without any significant corresponding increase in expenses (see [19(c)]), and any increase in expenditure that did occur was incurred as part of the *design* to unconscionably obtain public money (see [19(b)]). Those elements are not present here where it was found that dishonesty was neither alleged nor established (LJ [512]) and that the College was not a sham organisation (FC [176]); while knowledge of the elements or nature of the conduct that made it unconscionable was established, it was not established that there was knowledge, consciousness or appreciation that the conduct was unconscionable.

64 Similar considerations as those in *AIPE No 5* were applied in *Phoenix No 3* at [124] where what had been said in *AIPE No 5* was adopted. That is to say, in *Phoenix No 3* it was relevant that the expenditure was directed towards the illicit object of rorting the VFH scheme and then covering up the rort. Those elements are not present in this case.

65 The result is that the penalty floor is to be set with reference to the operating profit earned by the College in the relevant period rather than the gross revenue. That profit was \$9,749,860 which is calculated by adding the EBITDA for each of the relevant months as set out in the table at LJ [403].

66 Nevertheless, it is relevant to also consider that the revenue generated for the College in the relevant period was \$25,228,875. That figure was calculated by the ACCC’s expert witness, Ms Janine Thompson of McGrathNicol, as set out in her further supplementary report of 22 November 2024, by subtracting from the amount claimed by the College (ie \$54,165,875 – see LJ [485(6)], FC [108(6)]) the amount that the Department of Education and Training (DET) refused to pay the College (ie \$28,937,000).

67 The second matter raised by the ACCC in support of its proposed \$35m penalty is that the College’s systemic unconscionable conduct is objectively very serious contravening conduct which demonstrates the need for a significant civil penalty to be imposed in order to meet the deterrence objective. I accept that submission, particularly with reference to the matters summarised above (at [23]-[26]).

68 Thirdly, the ACCC submits, and I accept, that the College was a substantial operation at the time of the contraventions. With reference to the parties' statement of agreed facts (SOAF), in the relevant financial year, FY2016, the College's revenue was \$42 million, operating profit was \$19.5 million, its profit after tax was \$14.4 million and net assets were \$33 million. On 6 March 2017, it was announced by Site that the College would cease its operations. I infer that the reason for that was the changes to the VFH Scheme and the Department's refusal to pay the College's claims because of the conduct that was later found to be unconscionable: see generally LJ [396]-[402].

69 Fourthly, the ACCC submits, and I accept, that the conduct by the College was a "rort" (as previously described by me at LJ [517]) and that it improperly took unconscientious advantage of thousands of students and of the public purse.

70 Finally, the ACCC submits, and I accept, that the College never demonstrated any remorse or contrition for its conduct.

71 Three further factors are relevant to consider, in favour of the College.

72 I take into account that the College has not previously been found to have engaged in contravention of the ACL, the CCA or its predecessor.

73 Secondly, as mentioned, no dishonesty attributable to the College was alleged or established, and neither was knowledge or consciousness of unconscionability (LJ [512]). The conduct was developed in response to a tightening commercial situation and the College's worsening financial position (LJ [282] and [284]).

74 Finally, to its credit the College undertook investigations of consumer complaints and on being satisfied of unethical conduct by its agents (the course advisors) it reversed the affected enrolments (FC [119], SOAF [14]).

75 Taking all the above into account and attempting an appropriate synthesis of the various factors including the application of the course of conduct and totality principles, I consider that the appropriate penalty for the systemic unconscionable conduct in this case is \$20 million.

Individual consumer contraventions

76 The ACCC summarises the aggregate statutory maximum penalties for the contraventions in respect of the five individual consumers as follows:

Consumer	ACL contraventions found (see LJ [765] – [769])
Consumer A	s 29(1)(i) – false & misleading representation re price (x1) s 21 – unconscionable conduct s 79(b) & (c) – agreement did not contain notice of termination rights Statutory maximum aggregate penalties: \$2.3 million
Consumer B	s 29(1)(i) & (m) – false & misleading representations (x2) s 78 – failure to send documents evidencing the agreement s 79(b) & (c) – agreement did not contain notice of termination rights Statutory maximum aggregate penalties: \$2.3 million
Consumer C	s 29(1)(g), (i), (m) – false & misleading representation re price (x3) s 79(b) & (c) – agreement did not contain notice of termination rights Statutory maximum aggregate penalties: \$3.4 million
Consumer D	s 29(1)(i) & (m) – false & misleading representation re price (x3) s 79(b) & (c) – agreement did not contain notice of termination rights Statutory maximum aggregate penalties: \$3.4 million
Consumer E	s 29(1)(i) – false & misleading representation re price (x1) s 78 – failure to send documents evidencing the agreement s 79(b) and (c) – agreement did not contain notice of termination rights Statutory maximum aggregate penalties: \$1.25 million

77 The ACCC notes that for each individual consumer, the College’s several contraventions occurred in the course of a single episode of the consumer being recruited by a course advisor and then enrolled. Further, those individual enrolments each occurred during the period when the College was engaging in the systemic unconscionable conduct. That meant that the enrolment process at that time lacked protections that it had previously had against course advisor misconduct.

78 The ACCC accepts that those matters mean that the course of conduct and totality principles, as discussed above (see [0]-[0]), have an important ameliorating role to play in the determination of an appropriate civil penalty.

79 The ACCC submits that in all the circumstances the appropriate civil penalties are, in the aggregate, \$150,000 in respect of each individual consumer. That amounts to a total civil penalty of \$750,000 in relation to the individual consumer contraventions.

80 In introductory remarks, the written submissions filed on behalf of the College submit that the ACCC incorrectly equates the contraventions in respect of each of the individual consumers, noting that the Full Court set aside the declarations of unconscionable conduct in relation to four out of the five individual consumers (see above at [0] and [0]; FC [366]-[370]). In the substantive part of the submissions on pecuniary penalties, the submissions record that the College does not wish to say anything specific in response to the submissions of the ACCC with regard to the individual consumer contraventions aside from those introductory comments. The draft orders annexed to those submissions provide for a penalty of \$750,000.

In the result, I do not take the College, at the time that it was still represented, to oppose such a combined penalty.

81 In all the circumstances, I accept the submissions of the ACCC in respect of the appropriate penalties for the consumer contraventions. I will therefore impose a penalty of \$150,000 for the College's contraventions in respect of each individual consumer.

Summation in relation to the College

82 The result is that the penalties to be imposed on the College amount to a total of \$20,750,000 as follows:

- (1) \$20 million for the systemic unconscionable conduct; and
- (2) \$150,000 for the several contraventions in respect of each of the five individual consumers.

Relief against Site

Pecuniary penalty

83 The general principles applicable to the determination of an appropriate civil penalty identified above apply equally in the case of a penalty for Site on the basis of its knowing involvement (through Mr Wills) in the contravention. That means that the matters identified above with regard to the nature and seriousness of the conduct apply equally to Site.

84 The ACCC identifies a number of other matters peculiar to Site in addition to those matters in support of its submission that a penalty of \$17.5 million should be imposed on Site.

85 First, Site, through Mr Wills as Site's COO, played a central role in the College's serious contravening conduct. Mr Wills was a "key driver" of the process changes (LJ [282], [573]). Site pressured the College into accepting changes to its enrolment procedures, after having, in August 2015, undertaken an "urgent review" of the College's business performance and reduced its autonomy (LJ [337], [351]-[353]; see FC [284]). Mr Wills's decision to take the role of acting CEO of the College was the "culmination of his increased involvement in the affairs of the college" (LJ [567]), and in that role he oversaw the process of the College continuing to progress students through census dates (LJ [574]).

86 To those matters I would add that the financial success of the College was very significant to the performance of Site overall and was therefore a matter of key concern to Mr Wills at all times (LJ [228], [568]; FC [36], [287]).

87 Secondly, as the parent company of the College, it was Site that ultimately stood to enjoy the financial benefits of the College's systemic unconscionable conduct. In FY2016, of Site's total revenue of \$64,186,852, \$42,583,715 was attributable to the tertiary education division which incorporated the College (SOAF [23], [31(b)]). The College's contribution to that revenue was apparently \$42,156,993 (SOAF [24]).

88 Thirdly, in FY2016 Site was a sizeable public company with over \$49 million in net assets and profits of over \$9.4 million (SOAF [29]). The ACCC submits with reference to *ASIC v Holista Colltech Ltd* [2024] FCA 244 at [135] per Sarah C Derrington J that it is the financial position of the company at the time of the contravening conduct that is relevant, rather than its position at the time of imposing a penalty. That submission is correct insofar as it is relevant to identify companies of a comparable size for the purpose of taking account of general deterrence in setting an appropriate penalty. The point is that general deterrence operates with reference to the expected quantum of the penalty for the offending conduct so as to deter others from engaging in similar contravening conduct in the future: *ACCC v Leahy Petroleum Pty Ltd (No 2)* [2005] FCA 254; 215 ALR 281 at [9] per Merkel J. That was the point being made in *ASIC v Holista Colltech Ltd*.

89 In circumstances where specific deterrence has a significant role to play, the financial position or size of the company at the time that the penalty is imposed and the company's ability to pay the penalty will be relevant. That much is apparent from cases such as *Volkswagen* at [37]-[38] and *Valve Corporation v ACCC* [2017] FCAFC 224; 258 FCR 190 at [218] per Dowsett, McKerracher and Moshinsky JJ. However, as I will come to, similar to the College (see above at [0]), given the current financial position of Site, specific deterrence has little role to play and the emphasis must be on general deterrence: see *AIPE No 5* at [11].

90 Fourthly, Site has not demonstrated any contrition or remorse and has not disgorged the financial benefits of the College's systemic unconscionable conduct. Further, Site's annual reports from 2019 to 2024 demonstrate that until the High Court's decision on 16 August 2024, Site maintained that it (or the College) was entitled to the millions of dollars in VFH revenue that the DET had refused to pay and intended to pursue recovery of it (SOAF [8]-[10]).

91 Fifthly, the ACCC places some emphasis on the importance of specific deterrence in this case. However, given the fact that Site is now in external administration and – as appears to be common ground – is likely to face liquidation as a consequence of any substantial penalties in

this case, it seems to me that the role for specific deterrence is relatively minor: see *AIPE No 5* at [11]. However, the role of general deterrence is acute.

92 The written submissions filed on behalf of Site engage most extensively on the question of the number of contraventions and consequently the maximum penalty. I have already dealt with that, having concluded that the maximum penalty plays little role in the present case because it is meaninglessly large: see [0] above and the authorities cited therein. There is no contest that the contraventions in question, in which Site had a knowing involvement, are objectively serious.

93 In addition to the above matters, I take into account that Site has not previously been found to have engaged in conduct in contravention of the ACL, the CCA or its predecessor (SOAF [57]). The other mitigatory matters identified at [0]-[0] above apply equally to Site.

94 Taking all those matters into account, in my view an appropriate penalty for Site in respect of its knowing involvement in the College's contravening conduct is \$10 million.

Compliance program

95 The ACCC also seeks an order that Site undertake a compliance program that meets certain stipulated requirements, and that it maintain that program for three years. There are two reasons why I am not persuaded that I should make such an order. First, given the penalty that I am imposing on Site, there is little if any prospect that it will avoid liquidation so a compliance order will be futile. Secondly, the ACCC has adduced no evidence, referred to no authority and made no meaningful submissions in support of such an order with the result that I cannot be satisfied that an order in the terms that it seeks would even be a model order having an appropriate general deterrent effect.

Relief against Mr Wills

96 It will be recalled that the ACCC seeks a penalty against Mr Wills of \$500,000, an order prohibiting Mr Wills from seeking or accepting any indemnity under an insurance policy in respect of the penalty and an order pursuant to ACL s 248 disqualifying Mr Wills from managing corporations for a period of five years.

97 As explained above, Mr Wills opposed the case brought against him not only at first instance and by appealing to the Full Court, but also by pursuing an appeal to the High Court to finality. Thereafter, in the context of the hearing on penalties, Mr Wills has deposed that he accepts the

Court’s findings in relation to liability. He has stated that he is disappointed in himself that he did not do more to protect vulnerable students, that he accepts the findings in the liability judgment and is mortified that he broke the law, and that he sincerely apologises to the vulnerable students affected.

98 His personal circumstances are that he is 35 years of age, is married and has two children under the age of six. He has been unemployed since April 2024 and is currently the primary carer for his children, his wife being the family income earner.

99 When the ACCC commenced proceedings against Mr Wills in November 2018, he was working as the CEO of Microba Life Sciences Ltd (**Microba**) and was later appointed an Executive Director of Microba. On the day that the liability judgment was delivered, 2 July 2021, Mr Wills notified his resignation from those roles at Microba in accordance with a previously agreed arrangement. That resignation took effect on 5 July 2021. I accept that Mr Wills was upset and disappointed about having to resign from those roles of which he was proud and which meant a lot to him.

100 In September 2021, Mr Wills was appointed to the role of “Advisor – Strategic Alliances” at Microba. He later resigned from Microba with effect from 3 April 2024. Since then, he has been unemployed. He has faced difficulty in finding subsequent employment because of the findings against him in this case.

101 Mr Wills has been the subject of negative media coverage arising from the findings in this case. I accept that that has been hard on him.

102 Mr Wills has not previously been accused of, or found to have engaged in, conduct in contravention of the ACL, the CCA or any other relevant statutory regime. He has no criminal record.

The parity principle

103 With reference to the approval by Bromwich J of the settlement with Mr Cook, the ACCC draws attention to the parity principle, ie that persons liable in respect of similar contraventions should incur similar penalties, all other things being equal. See, for example, *ACCC v Air New Zealand Ltd (No 15)* [2018] FCA 1166 at [67]-[71] per Gleeson J. Mr Wills accepts the importance of the application of the parity principle.

- 104 In that regard, there is an “important public policy involved in promoting predictability of outcome in civil penalty proceedings”: *Commonwealth v Fair Work* at [46]. This is because a “hallmark of justice is equality before the law” and, all things being equal, similar contraventions should incur similar penalties: *NW Frozen Foods Pty Ltd v ACCC* [1996] FCA 1134; 71 FCR 285 at 295 per Burchett and Kiefel JJ.
- 105 Parity of penalties against other contraveners is an important objective in assessing penalty: *ACCC v Cabcharge Australia Ltd* [2010] FCA 1261 at [54] per Finkelstein J; *Lowe v The Queen* [1984] HCA 46; 154 CLR 606 at 610-611 per Mason J. With “equal justice” as its “foundation”, the parity principle allows for different penalties to be imposed upon like contraveners to “reflect different degrees of culpability and/or different circumstances”: *Green v The Queen* [2011] HCA 49; 244 CLR 462 at [28].
- 106 That said, it does not offend the parity principle to impose on a contravener whose capacity to pay is not in doubt a penalty greater than that imposed on a contravener whose conduct is similar but who could not bear the higher penalty without being subjected to financial hardship: *Schneider Electric (Australia) Pty Ltd v ACCC* [2003] FCAFC 2; 127 FCR 170 at [13] per Sackville J and [58] per Merkel J, Black CJ agreeing.
- 107 In the Cook penalty judgment, Bromwich J accepted (at [12]) that the imposition of a civil penalty of \$250,000 on Mr Cook was appropriate although his Honour expressed the view that a “considerably larger penalty would also have been appropriate”. His Honour also imposed a three-year disqualification order on Mr Cook and observed (at [13]) that “[n]ot much longer periods of disqualification have been imposed for conduct that is considerably more serious, including following criminal convictions”, referring to *ACCC v Renegade Gas Pty Ltd (t/as Supagas NSW)* [2014] FCA 1135; ATPR 42-485 (*Supagas*) at [91] per Gordon J.
- 108 It is necessary to deal with the disqualification order before considering a penalty because any disqualification order may be relevant to the determination of the penalty: *ASIC v Wooldridge* [2019] FCAFC 172 at [56]-[58] per Greenwood, Middleton and Foster JJ; *Cruickshank v ASIC* [2022] FCAFC 128; 292 FCR 627 at [143]-[145] per Allsop CJ, Jackson and Anderson JJ.

The disqualification order

- 109 There is no dispute that the Court can make an order under ACL s 248(1)(a)(i) that Mr Wills be disqualified from managing a corporation for a specified period of time. Section 206EA of the Corporations Act provides that a person is disqualified from managing corporations if such

an order is in force under ACL s 248. Section 206A(1) of the Corporations Act sets out what it means to manage a corporation. In that way, a disqualification order under the ACL is given force and meaning. There is no dispute with regard to the relevant principles.

110 Section 248(2) of the ACL provides that in determining whether disqualification is justified, the Court may have regard to the person’s conduct in relation to “the management, business or property of any corporation”, and any other matters the Court considers appropriate.

111 The following principles are relevant to this case.

112 First, disqualification orders are designed to protect the public from the harmful use of a corporate structure or from use that is contrary to proper commercial standards: *Supagas* at [92]-[94]. Such orders are imposed for a specific and general deterrence and can be imposed even as punishment: *Supagas* at [90]-[91].

113 Secondly, in exercising the discretion to impose a disqualification order, courts take into account a wide variety of factors in determining whether any and, if so, what period of disqualification should be imposed. It is not only the present and future fitness of the relevant respondent to manage corporations that is taken into account. Factors such as the size of any losses suffered by the corporation, its creditors and consumers, legislative objectives of personal and general deterrence, contrition on the part of the respondent, the gravity of the misconduct, the respondent’s previous good character, prejudice to the respondent’s business interests, personal hardship and the willingness of the respondent to render assistance to statutory authorities and administrators may all be relevant. See *Rich v ASIC* [2004] HCA 42; 220 CLR 129 at [43] per McHugh J.

114 The ACCC draws attention to a number of matters which it says justifies imposing a disqualification order on Mr Wills for a period of five years.

115 First, it says that the contravening conduct which Mr Wills was involved in was deliberate, occurred over a sustained period and caused harm to thousands of consumers.

116 Secondly, it points to the senior position held and the central role played by Mr Wills in the College’s contravening conduct, including that he was a “key driver” of the changes to the enrolment process (as found at LJ [282], [573]).

117 Thirdly, the ACCC points to evidence that had the DET not intervened and withheld payments that had been claimed by the College, through an incentive scheme Mr Wills stood to benefit

from the conduct in question. That would have been in the amount of \$87,500 arising from the College's improved financial performance. Further, at the time of his involvement in the College's contravening conduct, Mr Wills held a significant number of shares in Site and additional Site shares were held in escrow for Mr Wills under the Site Employee Share Plan. He thus stood to benefit from any increase in the value of Site shares that might have resulted from the increased profit generated from the College's conduct.

118 Fourthly, unlike Mr Wills, Mr Cook demonstrated a high level of contrition and provided a high degree of cooperation to the ACCC. Those were very significant mitigating factors, which reduced the need for specific deterrence and punishment and thus justified a reduction in the period of disqualification relative to what otherwise would be warranted by reason of the nature and seriousness of the contravening conduct.

119 Against that, Mr Wills submits that the period of time that he has been stood down from directorship or management of corporations after the initial liability finding against him should be taken into account, as should the hardships that he has already faced as a consequence of the liability finding.

120 I am satisfied that a period of disqualification from the management of corporations of three years is reasonable, justified and appropriate in the case of Mr Wills. In that regard, I take into account the significant role that he played in the relevant conduct as identified in the liability judgment and as canvassed at [0]-[0] above in relation to Site, including that he was knowingly involved in that conduct several months prior to him taking on the role of Acting CEO of the College. Further, as already identified, the conduct caused substantial losses to the Commonwealth and severely prejudiced a large number of consumers. It was engaged in for the purpose of enhancing the financial position of the College and, through that, Site, and Mr Wills himself stood to benefit financially as identified by the ACCC. Also, unlike Mr Cook, Mr Wills did not show relatively early contrition.

121 However, I also accept that Mr Wills has faced significant hardship as a consequence of the liability finding and that he was stood down from management responsibility in relation to the corporation for which he worked at that time. Given Mr Wills's current position of unemployment, and the likely difficulty that he will face finding employment of the nature that includes management of a corporation in the foreseeable future, I consider that specific deterrence plays relatively little role in considering whether a disqualification order should be made and the length of time for which it should be made. To put it another way, I consider that

Mr Wills has substantially learned his lesson and is unlikely to contravene again. However, general deterrence nonetheless plays an important role in this case, and I take into account the parity principle and that Mr Cook was disqualified for a period of three years.

Non-indemnification or personal payment order

122 Mr Wills is insured under a directors and officers insurance policy issued to Site by Chubb Insurance Australia Ltd. He has made a claim under the policy in respect of this proceeding. The “Chubb Elite II” policy wording includes indemnity in respect of “civil penalties which an Insured is legally obligated to pay including but not limited to civil fines or civil penalties imposed pursuant to ... the Competition and Consumer Act 2010 (Cth)”.

123 The ACCC refers to *CFMEU HCA* at [116] and submits that the effect of Mr Wills being indemnified under the insurance policy for any penalties that he has to pay will render the penalty devoid of any sting or burden and thus remove, or at least drastically reduce, any specific or general deterrent effect of the penalty. With reference to that case, the ACCC submits that the Court has the power to order that Mr Wills not claim or accept any indemnification under the policy.

124 In *CFMEU HCA*, a majority of the High Court held that there is to be implied from the power in s 546(1) of the *Fair Work Act 2009* (Cth) to impose a pecuniary penalty for contravening a “civil remedy provision” the power to make such other orders as are necessary for or facilitative of the type of orders expressly provided for (at [115] per Keane, Nettle and Gordon JJ) or to make orders which are reasonably required or legally necessary to the accomplishment of what is specifically provided to be done (at [40] per Kiefel CJ). That implied power under s 546 was held by Keane, Nettle and Gordon JJ to include power to make an order that a contravener pay a pecuniary penalty personally and not seek or accept indemnity from a co-contravener, otherwise known as a “personal payment order” (at [115]).

125 The ACCC also refers to *ACCC v BlueScope Steel Ltd (No 6)* [2023] FCA 1029 at [166]-[167] where O’Byrne J held that there is a similar implied power under s 76(1) of the CCA. That issue is currently the subject of appeal in that case. There is no authority on whether there is such an implied power under ACL s 224. The ACCC submits that there is, and Mr Wills submits that there is not.

126 I am prepared to assume for present purposes (without deciding) that there is such a power, but I am not persuaded that it should be exercised. That is because although Mr Wills’s conduct

was deliberate in the sense that he consciously and deliberately engaged in it, and he was aware of each of the elements of it which gave rise to it being unconscionable, he was not aware that it was unconscionable conduct and in that sense he did not deliberately engage in unconscionable conduct and hence the conduct was not wilful. Also, Mr Wills was not dishonest and he did not intend to cause harm. Mr Wills's conduct can be contrasted with the wilful and furtive misconduct of Mr Ellis in *Bluescope* where a personal payment order was made.

127 A rationale for directors and officers insurance is that “[i]n its absence, capable and talented individuals may be unwilling to join boards of directors, particularly as non-executive directors, or may become excessively risk averse on boards, to the detriment of the individual company and the broader commercial community”: Bathurst T F, “Insurance Law – A view from the Bench” (2014) 25(3) *Insurance Law Journal* 216 at 217. It would undermine that rationale, and the utility of such insurance, if courts too readily made orders preventing someone from having the benefit of it. In particular, in circumstances where the relevant conduct is not wilful or dishonest, I do not consider that it is correct or fair to make such an order.

128 I consider that it would not be fair on Mr Wills to deny him the benefit of Site's directors and officers insurance in his favour. I therefore decline to make the personal payment order sought by the ACCC.

Civil penalty

129 To my mind, a penalty of \$400,000 on Mr Wills is reasonable, justified and appropriate. It is considerably more than that imposed on Mr Cook, which is appropriate considering the mitigatory factors present for Mr Cook but not for Mr Wills. Such a penalty is sufficient to serve the interests of general deterrence, and it recognises the seriousness of the conduct in question. However, it takes account of Mr Wills being of relatively modest means – if he had to pay the penalty himself, he would not to be able to do so from his existing assets without selling his matrimonial home, but even then, his share of equity in the home after discharge of the mortgage liability is only about \$300,000.

130 Moreover, as dealt with above (see [0]-[0], [0]), Mr Wills has not only faced a significant period of unemployment, but I am imposing on him a three-year disqualification order. He has already faced significant hardship because of the liability finding aside from the penalties now imposed upon him.

Costs

- 131 There is no reason why the respondents should not pay the costs of the hearing on penalties.
No submission was made against such an order.

I certify that the preceding one hundred and thirty-one (131) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stewart.

Associate:

Dated: 27 May 2025

ANNEXURE

Declarations made on 4 August 2021 in relation to the individual consumers A to E that were not set aside by orders of the Full Court on 6 April 2023

Consumer A

4. In around October 2015:
 - (a) a course advisor (**Recruiter A**) who was engaged to market and promote CCC's courses to consumers, during the course of signing up Consumer A to a course offered by CCC (**Sign-Up Meeting A**):
 - (i) failed to tell Consumer A the cost of the course in which she was enrolled; and
 - (ii) failed to explain to Consumer A her ability to withdraw prior to the census date and the relevance of census dates;
 - (b) Recruiter A engaged in the conduct described in sub-paragraph 0 above on behalf of CCC, and as an agent of CCC acting within the scope of his authority, such that Recruiter A's conduct is taken, by reason of s 139B(2)(a) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) to be conduct engaged in by CCC; and
 - (c) CCC thereby:
 - (i) in respect of sub-paragraph 0, made a false or misleading representation as to the price of the course, in contravention of s 29(1)(i) of the ACL; and
 - (ii) in respect of sub-paragraph 0, engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL.
5. During Sign-Up Meeting A:
 - (a) Recruiter A's conduct in relation to Consumer A:
 - (i) involved the conduct referred to in sub-paragraph 0 above;
 - (ii) was engaged in in circumstances where:

- A. Recruiter A had failed to explain key aspects of the VFH scheme to Consumer A, such as the need to cancel on or before the census date to avoid incurring a debt;
 - B. Recruiter A had filled out the enrolment documents (including a pre-enrolment quiz (**PEQ**)), rather than ensuring Consumer A filled them out herself;
 - C. Recruiter A let Consumer A believe she could keep a laptop he gave her when offering inducements to enrol was inconsistent with cl 4.4 of the VET Guidelines 2015; and
 - D. Recruiter A told Consumer A the answers she should give to some questions during the inbound call, which meant that a procedure which may have, or should have, protected Consumer A's interests was subverted; and
 - E. the inbound call procedure used by CCC was unsatisfactory because information about the course, the consumer's right to withdraw from the course and her liability for VFH debt was conveyed at high speed making it difficult to understand or digest, and no attempt was made to ensure that she understood the information and the consequences of her enrolment.
- (b) Recruiter A engaged in the conduct described in sub-paragraph 0 above on behalf of CCC, and as an agent of CCC acting within the scope of his authority, such that Recruiter A's conduct is taken, by reason of s 139B(2)(a) of the CCA to be conduct engaged in by CCC; and
 - (c) CCC engaged in conduct that was, in the circumstances outlined in sub-paragraph 0 above, unconscionable, in contravention of s 21 of the ACL.
6. An agreement was formed between CCC and Consumer A for the supply by CCC of a course during the course of the inbound call between CCC and Consumer A, and that agreement:
- (a) was an unsolicited consumer agreement within the meaning of s 69(1) of the ACL; and
 - (b) the agreement did not contain:

- (i) on the front page, a notice that conspicuously and prominently informed Consumer A of her right to terminate the agreement; or
 - (ii) a notice which she could use to terminate the agreement,
- and CCC thereby contravened s 79(b) and s 79(c) respectively of the ACL.

Consumer B

7. In around November 2015:

- (a) a course advisor (**Recruiter B**) who was engaged to market and promote CCC's courses to consumers, during the course of signing up Consumer B to a course offered by CCC (**Sign-Up Meeting B**):
 - (i) told Consumer B that the course he was signing up to was free; and
 - (ii) told Consumer B that if he signed up to the course he would get a laptop for free, when in fact the laptop was available only on a loan basis;
- (b) Recruiter B engaged in the conduct described in sub-paragraph 0 above on behalf of CCC, and as an agent of CCC acting within the scope of her authority, such that Recruiter B's conduct is taken, by reason of s 139B(2)(a) of the CCA to be conduct engaged in by CCC; and
- (c) CCC thereby:
 - (i) in respect of sub-paragraph 0, made a false or misleading representation as to the cost of the course in contravention of s 29(1)(i) of the ACL and engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and
 - (ii) in respect of sub-paragraph 0, made a false or misleading representation as to the existence of a condition, in contravention of s 29(1)(m) of the ACL.

8. [Set aside by the Full Court]

9. An agreement was formed between CCC and Consumer B for the supply by CCC of a course during the course of the inbound call between CCC and Consumer B, and that agreement:

- (a) was an unsolicited consumer agreement within the meaning of s 69(1) of the ACL;

- (b) CCC did not send the documents evidencing that agreement (being a Training Plan and/or a Letter of Offer) to Consumer B by a method permitted by s 78(2) of the ACL, and CCC thereby contravened s 78(2) of the ACL; and
- (c) the agreement did not contain:
 - (i) on the front page, a notice that conspicuously and prominently informed Consumer B of his right to terminate the agreement; or
 - (ii) a notice which he could use to terminate the agreement,and CCC thereby contravened s 79(b) and s 79(c) respectively of the ACL.

Consumer C

10. In around November 2015:

- (a) course advisors (**Recruiters C**), who were engaged to market and promote CCC's courses to consumers, during the course of signing up Consumer C to a course offered by CCC (**Sign-Up Meeting C**):
 - (i) represented to Consumer C that the course she was being signed up for would help her become a flight attendant;
 - (ii) told Consumer C that the course was free if she was on Centrelink; and
 - (iii) told Consumer C that she would get a free laptop that she could keep;
- (b) Recruiters C engaged in the conduct described in sub-paragraph 0 above on behalf of CCC, and as agents of CCC acting within the scope of their authority, such that Recruiters C's conduct is taken, by reason of s 139B(2)(a) of the CCA to be conduct engaged in by CCC; and
- (c) CCC thereby:
 - (i) in respect of sub-paragraph 0 above, made a false or misleading representation in contravention of s 29(1)(g) of the ACL and engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL.
 - (ii) in respect of sub-paragraph 0 above, made a false or misleading representation in contravention of s 29(1)(i) of the ACL and engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL;

- (iii) in respect of sub-paragraph 0 above, made a false or misleading representation in contravention of s 29(1)(m) of the ACL and engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and
11. [Set aside by the Full Court]
12. An agreement was formed between CCC and Consumer C for the supply by CCC of a course during the course of the inbound call between CCC and Consumer C, and that agreement:
- (a) was an unsolicited consumer agreement within the meaning of s 69(1) of the ACL; and
 - (b) the agreement did not contain:
 - (i) on the front page, a notice that conspicuously and prominently informed Consumer C of her right to terminate the agreement; or
 - (ii) a notice which she could use to terminate the agreement, and CCC thereby contravened s 79(b) and s 79(c) respectively of the ACL.

Consumer D

13. In around December 2015:
- (a) a course advisor (**Recruiter D**), who was engaged to market and promote CCC's courses to consumers, during the course of signing up Consumer D to a course offered by CCC (**Sign-Up Meeting D**):
 - (i) told Consumer D that the course was free;
 - (ii) told Consumer D that she would get a free laptop for signing up, which she could keep even if she did not do the course; and
 - (iii) told Consumer D that she could cancel her course at any time;
 - (b) Recruiter D engaged in the conduct described in sub-paragraph 0 above on behalf of CCC, and as an agent of CCC acting within the scope of his authority, such that Recruiter D's conduct is taken, by reason of s 139B(2)(a) of the CCA to be conduct engaged in by CCC; and
 - (c) CCC thereby:
 - (i) in respect of sub-paragraph 0 above, made a false or misleading representation in contravention of s 29(1)(i) of the ACL and engaged in

conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL;

- (ii) in respect of sub-paragraph 0, made a false or misleading representation in contravention of s 29(1)(m) of the ACL and engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL; and
- (iii) in respect of sub-paragraph 0, made a false or misleading representation in contravention of s 29(1)(i) of the ACL and engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL.

14. [Set aside by the Full Court]

15. An agreement was formed between CCC and Consumer D for the supply by CCC of a course during the course of the inbound call between CCC and Consumer D, and that agreement:

- (a) was an unsolicited consumer agreement within the meaning of s 69(1) of the ACL; and
- (b) the agreement did not contain:
 - (i) on the front page, a notice that conspicuously and prominently informed Consumer D of her right to terminate the agreement; or
 - (ii) a notice which she could use to terminate the agreement,and CCC thereby contravened s 79(b) and s 79(c) respectively of the ACL.

Consumer E

16. In around November 2015:

- (a) course advisors (**Recruiters E**), who were engaged to market and promote CCC's courses to consumers, during the course of signing up Consumer E to a course offered by CCC (**Sign-Up Meeting E**) told Consumer E that he would get a free laptop if he signed up and failed to disclose to Consumer E the cost of the course in which he enrolled;
- (b) Recruiters E engaged in the conduct described in sub-paragraph 0 above on behalf of CCC, and as agents of CCC acting within the scope of their authority,

such that Recruiter E's conduct is taken, by reason of s 139B(2)(a) of the CCA to be conduct engaged in by CCC; and

- (c) CCC thereby made a false or misleading representation in contravention of ss 29(1)(i) and 29(1)(m) of the ACL, and engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the ACL.

17. [Set aside by the Full Court]

18. An agreement was formed between CCC and Consumer E for the supply by CCC of a course during the course of the inbound call between CCC and Consumer E, and that agreement:

- (a) was an unsolicited consumer agreement within the meaning of s 69(1) of the ACL; and
- (b) CCC did not send the documents evidencing that agreement (being a training plan and/or a letter of offer) to Consumer E by a method permitted by s 78(2) of the ACL, and CCC thereby contravened s 78(2) of the ACL; and
- (c) the agreement did not contain:
 - (i) on the front page, a notice that conspicuously and prominently informed Consumer E of his right to terminate the agreement; or
 - (ii) a notice which he could use to terminate the agreement,and CCC thereby contravened s 79(b) and s 79(c) respectively of the ACL.