FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (trading as Captain Cook College) (No 2) [2020] FCA 863

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| File number: | NSD 2059 of 2018 |
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| Judge: | **STEWART J** |
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| Date of judgment: | 16 June 2020 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for leave to amend pleadings – whether consistent with overarching purpose in s 37M of the *Federal Court of Australia Act 1976* (Cth) – where application made during trial – whether respondents would suffer prejudice – whether sufficient explanation for delay |
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| Legislation: | *Competition and Consumer Act 2010* (Cth), Sch 2, Australian Consumer Law, s 21  *Federal Court Rules 2011* (Cth) rr 8.21, 16.53  *Federal Court of Australia Act 1976* (Cth) s 37M |
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| Cases cited: | *ACCC v v Productivity Partners Pty Ltd (trading as Captain Cook College) (No 1)* [2020] FCA 845  *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; 239 CLR 175  *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd* [2019] FCA 1284; 139 ACSR 52  *Betfair Pty Ltd v Racing New South Wales* [2010] FCAFC 133; 189 FCR 356  *Forrest v ASIC* [2012] HCA 39; 247 CLR 486  *Prysmian Cavi E Sistemi S.R.L. v Australian Competition and Consumer Commission* [2018] FCAFC 30 |
|  |  |
| Date of hearing: | 15 and 16 June 2020 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Regulator and Consumer Protection |
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| Category: | Catchwords |
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| Number of paragraphs: | 86 |
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| Counsel for the Applicant: | K Stern SC with O Bigos SC and S Patterson |
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| Solicitor for the Applicant: | Johnson Winter & Slattery |
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| Counsel for the First and Second Respondents: | J Giles SC with R Davies |
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| Solicitor for the First and Second Respondents: | MinterEllison |
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| Counsel for the Fourth Respondent: | M Hodge QC with C Schneider |
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| Solicitor for the Fourth Respondent: | HWL Ebsworth Lawyers |

ORDERS

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|  | | NSD 2059 of 2018 |
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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant | |
| AND: | PRODUCTIVITY PARTNERS PTY LTD (TRADING AS CAPTAIN COOK COLLEGE) ACN 085 570 547  First Respondent  SITE GROUP INTERNATIONAL LIMITED ACN 003 201 910  Second Respondent  BLAKE WILLS  Fourth Respondent | |

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| JUDGE: | STEWART J |
| DATE OF ORDER: | 16 June 2020 |

THE COURT ORDERS THAT:

1. Leave is granted to the applicant to amend the further amended statement of claim in the form of a second further amended statement of claim as circulated by it to the parties at approximately 11.45am on 16 June 2020.

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

ORDERS

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|  | | NSD 2059 of 2018 |
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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant | |
| AND: | PRODUCTIVITY PARTNERS PTY LTD (TRADING AS CAPTAIN COOK COLLEGE) ACN 085 570 547  First Respondent  SITE GROUP INTERNATIONAL LIMITED ACN 003 201 910  Second Respondent  BLAKE WILLS  Fourth Respondent | |

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| JUDGE: | STEWART J |
| DATE OF ORDER: | 17 June 2020 |

THE COURT ORDERS THAT:

1. Leave is granted to the applicant to amend the further amended originating process in the form of a second further amended originating process as circulated by it to the parties at approximately 5:24pm on 14 June 2020.

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

REASONS FOR JUDGMENT

STEWART J:

## Introduction

1. The applicant (**ACCC**) has sought to make a few minor amendments to its further amended originating application and a substantial number of amendments to its further amended statement of claim. The former are not opposed, and leave to amend should be granted under r 8.21 of the *Federal Court Rules 2011* (Cth) in respect of them. Most of the latter are opposed. They therefore require some consideration. That is done with reference to the ACCC’s proposed second further amended statement of claim as debated in argument on 15 June 2020 and as then further revised as indicated in the version circulated on 16 June 2020 in respect of which there was further argument on that day.
2. The nature of the case is set out in my reasons in *ACCC v v Productivity Partners Pty Ltd (trading as Captain Cook College) (No 1)* [2020] FCA 845. These reasons presuppose familiarity with paragraphs [1]-[20] of those reasons and adopt the same terms of reference.
3. The final hearing on liability in this matter was listed to commence, and it did commence, on 9 June 2020 on a four week estimate. The first two days were taken up in opening submissions by Ms Stern SC, who appears with Mr Bigos SC and Ms Patterson for the ACCC. The third day was then taken up in opening submissions by Mr Giles SC, who appears with Mr Davies for the first and second respondents, and Mr Hodge QC, who appears with Ms Schneider for the fourth respondent. The fourth day was taken up with argument about the admissibility of an expert report, which is the subject of my earlier reasons.
4. During the course of the respondents’ opening submissions a number of criticisms were made of the way in which the case has been put by the ACCC in its further amended statement of claim, and some points were made with regard to the case for the ACCC having been opened more broadly than the pleadings put the case.
5. Substantially in response to those criticisms, and in many instances, as will be seen, to clarify ambiguities that were complained of, late on 14 June 2020 the ACCC circulated a draft second further originating application and a draft second further amended statement of claim which indicate the respects in which the existing documents were sought to be amended. As indicated, a further revised version of the second further amended statement of claim was circulated on 16 June 2020 which is the version in respect of which leave to amend was ultimately sought.
6. In considering an application for an amendment in the present circumstances, it is necessary to take account of a number of factors. Drawing on ***Aon*** *Risk Services Australia Ltd v Australian National University* [2009] HCA 27; 239 CLR 175 at [5], [30], [71], [90], [93], [94], [98] and [102], these include :
7. Prejudice to other parties that cannot be adequately compensated by an award of costs, which would include the inevitable prejudice of unnecessary delay where that exists;
8. Inefficiencies in the use of the court as a publicly funded resource arising from the vacation or adjournment of trials;
9. The need to maintain public confidence in the judicial system, which has a potential to be lost where a court is seen to accede to applications made without adequate explanation or justification;
10. The objective of doing justice between the parties;
11. The objective that the pleadings identify the “real” issues between the parties;
12. The overriding purpose of the civil practice and procedure provisions in s 37M of the *Federal Court of Australia Act 1976* (Cth), namely to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible; and
13. The nature and the importance of the amendment to the party that is seeking it.
14. I am also mindful of the role of pleadings and the importance of the pleadings clearly identifying the issues in dispute between the parties, as set out or referred to in authorities referred to by the parties, namely *Betfair Pty Ltd v Racing New South Wales* [2010] FCAFC 133; 189 FCR 356 at [49]-[53] per Keane CJ, Lander and Buchanan JJ, *Prysmian Cavi E Sistemi S.R.L. v Australian Competition and Consumer Commission* [2018] FCAFC 30 at [69]-[70] per Middleton, Perram and Griffiths JJ.
15. I am also mindful of what was said in *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd* [2019] FCA 1284; 139 ACSR 52 at [2] per Allsop CJ, viz.:

The question whether a body of conduct has in all the circumstances been unconscionable in the statutory sense … is not amenable to pleading a “cause of action” constituted by “material facts”, with some distinction between them and mere “particulars” of such. Rather, the better approach is to understand what the plaintiff says are the “connected circumstances that ought to influence the determination of the case.”

1. The first complaint raised by the respondents is the lateness of the amendments, noting in particular that they come after written and oral opening submissions and after argument on the admissibility of a key expert report. It was also said that the amendments would require further unspecified investigations. However, and as turned out to be the case, it was not submitted that the amendments would cause the final hearing to have to be adjourned or otherwise delayed. It was thus not the case that the amendments would cause unfair prejudice in unnecessarily delaying the proceedings. Cf. *Aon* at [5].
2. It was also said that the reason for the amendments being sought, and in particular at this late stage, was inadequately explained. In my assessment, whilst there may be some criticism in respect of the lateness of some of the amendments, for the most part they arose from matters brought to the attention of the ACCC in the opening addresses of senior counsel for the respondents. It may be that some of those criticisms had previously been identified in correspondence, although it is also the case that much of what was said by the respondents to be new in the ACCC’s case had also been raised with them in correspondence. I do not intend to take valuable time in analysing the correspondence. The short answer is that, and as will be seen, for the most part the reason for the amendments arises out of what was said on behalf of the respondents in opening and is aimed at ensuring that the ACCC’s case is properly and clearly understood. In the circumstances of the amendments not creating any particular delay in the case, I consider that to be adequate explanation.
3. I also take into account that the ACCC is litigating, in effect, in the public interest. If it be the case that the respondents, or any of them, acted unconscionably such as to prejudice the public interest, then it is important that that public interest be vindicated. It should not be prejudiced by infelicity of pleading, provided of course that the respondents are not unduly prejudiced. There is a substantial corresponding public interest in ensuring that those who are accused of wrongdoing by regulators such as the ACCC enjoy the protection of a fair process which includes being clearly told of the case that they have to meet. Justice will be best done between the parties by ensuring that the real issues are illuminated by the pleadings.
4. In the circumstances, and balancing the various considerations, in my view whether or not leave to amend should be granted in this case ultimately boils down to what prejudice, if any, any of the respondents will face as a consequence of any particular amendment. I therefore propose to analyse each proposed amendment to determine that prejudice.

## Paragraph [88]

1. Paragraph [88] of the existing pleading pleads that from around 7 September 2015, the college implemented two changes to its processes for enrolment in and withdrawal from its online courses, namely in respect of changing from an outbound QA call to an inbound QA call and abolishing its CDWD procedure (subject to a limited discretion vested in the college’s Distance Campus Manager).
2. The proposed amendment is to delete the introductory words to the paragraph, namely “From around 7 September 2015”, and replace them with the words “As regards consumers who became enrolled in the Relevant Period”. What the pleading seeks to do is to make it plain that although the process changes were introduced at and implemented from the commencement of the relevant period, they continued beyond the relevant period. Since the inbound QA call occurs at the time of enrolment, no inbound QA calls after the end of the relevant period are caught by the proposed pleading because it is limited to QA calls in respect of students who became enrolled in the relevant period.
3. However, since the CDWD procedure necessarily occurs after enrolment, and up until at least the first census date, the implementation of the CDWD procedure that is caught by the proposed amended pleading, whilst limited to students who were enrolled in the relevant period, extends beyond the relevant period.
4. The respondents complain that this expands the period in respect of which the case is directed. I do not accept this criticism of the pleading. Since the original pleading did not provide an end date with reference to the continued implementation of the process changes, the proposed amendment does not extend or broaden the case in any respect, at least insofar as paragraph [88] itself is concerned. I will consider separately whether the proposed amendment of paragraph [88] has some prejudicial effect in respect of other parts of the pleading.
5. The fourth respondent said that the deletion of the commencement date of the process changes introduces uncertainty with regard to the CDWD process change because, apparently, there was an earlier process change in June 2015 which might or might not now be picked up in the process changes referred to and defined in paragraph [88]. I do not accept that that is the case. Paragraph [57] makes clear what the CDWD procedure was in the “earlier period”, which it will be recalled had a definite end date of 6 September 2015, and paragraph [88] pleads that that procedure was abolished, subject to one exception already identified. The abolition of the CDWD procedure which is complained of is only in respect of “consumers who became enrolled in the Relevant Period”. That could not possibly be a complaint about a change to the CDWD procedure at any time earlier than the commencement of the relevant period, because no students who became enrolled in the relevant period were, by definition, enrolled in the earlier period. The complaint is therefore without foundation.
6. In the circumstances, the ACCC should have leave to amend paragraph [88].

## Paragraph [113]

1. The existing pleading pleads that the college claimed, from the Commonwealth, “VFH Revenue” (i.e. payment in respect of VET FEE-HELP debts incurred by consumers) in respect of over 90% of consumers who became enrolled in an online course during the relevant period and who passed one or more census dates. The proposed amendment seeks to add the words “and retained such VFH Revenue as was paid by the Commonwealth.”
2. This amendment is resisted on the basis that it introduces a new case about “retaining” revenue that is said to raise a new factual issue in circumstances where the college, at least on its contention, was only paid by the Commonwealth in relation to students that the Commonwealth had determined did engage with their courses. It is also complained that it is unexplained in the pleading why it is said to be unconscionable to retain payment for a service with which the relevant cohort of students engaged.
3. In my view, the criticism misses the point. I understand that if there is a factual dispute it is an accounting or data dispute where the truth would presumably be easily ascertainable with reference to the relevant records, with regard to the revenue actually retained by the college that was earned in respect of students enrolled during the relevant period. All that the pleading does is to make it clear that the original use of the verb “claimed” was intended to mean not only “claimed once” but “continued to claim”. In other words, the college maintained its claim to be entitled to the revenue. That is the effect of adding the allegation of “retained”. That is a narrow matter, and I do not consider it to raise any prejudice.

## Paragraph [114]

1. The only amendment that is sought in this paragraph is to add the word “real” before “risk”. It is not opposed, and causes no prejudice. The ACCC should have leave to make this amendment.

## Paragraph [115]

1. In its existing form, this paragraph pleads that the college “knew, or in the alternative ought to have known, of the CA Misconduct Risk”. It then gives particulars. The proposed amendment does two things. First, it introduces a timeframe by inserting the following words at the commencement of the paragraph: “At the commencement of and/or during the period when the Process Changes were implemented”. Second, it adds “and/or it was reasonably foreseeable” at the end of the paragraph. The particulars are also sought to be amended but I do not understand there to be any difficulty with regard to that.
2. The corporate respondents object to the substantive amendments on the basis that they introduce an unintelligible range of combinations of types of knowledge over an approximately 12 month period of time during which it is alleged that the process changes were implemented. It is also said that the allegation with regard to foreseeability is by reference to the same particulars as for actual and imputed knowledge.
3. I do not consider that these criticisms give rise to any material prejudice. As argued on behalf of the corporate respondents in opening, it is not clear what the allegation of “ought to have known” brings to an unconscionable conduct case, but certainly reasonable foreseeability can be a relevant circumstance. Moreover, if the allegation of “ought to have known” is made out, then it would seem to follow that reasonable foreseeability would be established. Therefore, the addition of reasonable foreseeability does not expand the case.
4. Insofar as the time period is concerned, as I have said, the original pleading was not confined to any particular time period other than by reference to the CA misconduct risk which has always been pleaded to have been “at all material times” (paragraph [114]). The corporate respondents admitted in their defences that there was a risk that some course advisers may engage in conduct directed at enrolling students that was not permitted by the ACL “and/or the Standards” (it is not made clear what standards these are). No point was made with regard to the timeframe. Specifically with regard to paragraph [115], the corporate respondents pleaded their state of awareness “at all relevant times.”
5. In the circumstances, the introduction of a specified time period at the commencement of paragraph [115] serves, if anything, to narrow the case and in any event makes it clear just what the ACCC is asserting with regard to the material time period.
6. In the latter regard, the fourth respondent complains that “the period when the Process Changes were implemented” has an uncertain commencement point – a criticism that I have already dismissed with regard to paragraph [88] – and an uncertain endpoint. However, the endpoint is not uncertain. The process changes are defined in paragraph [88] with reference to the students who are enrolled during the relevant period. The endpoint for the period when the process changes were implemented is therefore the last point in time when the process changes could be applicable to a student enrolled in the relevant period. In respect of the QA call that would have to be before the end, or possibly at the end, of the relevant period since it takes place at the point of enrolment. In respect of the abolition of the CDWD procedure, that could extend up until the last first census date of any student enrolled in the relevant period. That is sufficiently certain.
7. The intended amendment is therefore unobjectionable and the ACCC should have leave to amend paragraph [115] in the respects indicated.

## Paragraph [116]

1. As with paragraph [114], the only proposed amendment here is to qualify the “risk” that is referred to as being a “real” risk. There is no objection to that amendment and leave should be granted.

## Paragraph [117]

1. This paragraph seeks to introduce the same amendments in relation to knowledge and foreseeability of the unsuitable enrolment risks as sought to be introduced in paragraph [115] in respect of CA misconduct risk. I have already dealt with the objections raised in relation to what was said to be a broadening of the case by introducing foreseeability.
2. One additional point of objection was raised in relation to paragraph [117] arising from the particulars to that paragraph, although it would appear that that objection would apply equally to paragraph [115]. The objection is to particular (b), which is given as a particular from which the conclusion as to the various states of knowledge would be made and stated: “Cook’s knowledge of the Unsuitable Enrolment Risk (as pleaded at paragraph 128 below) is to be attributed to CCC pursuant to s 139B (1) of the Act.” Paragraph [128] pleads that “At all material times, Cook knew of the Unsuitable Enrolment Risk.” The particulars given include the rather general particular of “Cook’s role as CEO generally.”
3. Although particular (b) and paragraph [128] are in the existing pleading and are not sought to be amended, the point of objection arises because any prejudice flowing from the generality of the particular in paragraph [128] as incorporated by reference in particular (b) of paragraph [117] (and paragraph [115]) now applies not only with respect to actual and imputed knowledge, but also with respect to foreseeability.
4. That objection is really another way of saying that the introduction of foreseeability as a third species of knowledge, or state of mind, impermissibly expands the case. I have already explained why I do not regard that criticism to be one of substance. To that I can add that since the particulars do not change, it would appear that the ACCC intends to rely on the same evidence as it previously sought to rely on with regard to Mr Cook’s knowledge. All that has changed with regard to this is a conclusion that might be pressed on the Court in reliance on that evidence, namely the conclusion of foreseeability.
5. In the circumstances, the ACCC should have leave to amend paragraph [117] in the respects indicated.

## Paragraph [118]

1. The ACCC proposes an amendment that introduces an additional subparagraph, subparagraph (aa). There is no objection to this amendment and leave should be granted.

## Paragraph [120]

1. This paragraph in the existing pleading pleads that the process changes reduced the college’s ability to mitigate the CA misconduct risk and the unsuitable enrolment risk, and it identifies in four subparagraphs the different ways in which this is said to occur. The proposed amendment seeks the introduction of, first, the word “materially” as qualifying “reduced” and, second, a further alternative within subparagraph (a).
2. There is no objection to the introduction of “materially” which can create no prejudice. Leave should accordingly be granted to make that amendment.
3. Insofar as subparagraph (a) is concerned, what is sought to be introduced is indicated by underlining in what follows:

(a) because the Inbound QA Call occurred immediately after a consumer’s Enrolment Documents had been electronically submitted:

(i) CCC had no, or alternatively minimal, opportunity to conduct any analysis of the kind described in paragraphs 56(a) to 56(c) above; and/or

(ii) consumers of the kind identified at paragraphs 116(a) to 116(c) above did not have the safeguard of the timing of the Outbound QA Call, in that it was an additional step the consumer was required to complete after the Course Advisor had left their presence, and usually occurred several hours or days after the consumer’s Enrolment Documents were electronically submitted;

1. The only objection taken is as to the invocation of the conjunction “and/or” and the many permutations that it offers, in particular taken together with other permutations offered by the pleading. However, the principal other permutations of which complaint was made were ultimately not pressed by the ACCC, so the aggregate effect of different permutations does not arise. In any event, in the subparagraph in question “and/or” does not create any prejudice – all that it indicates is that because of the feature identified in the chapeau to the subparagraph two deleterious consequences are said to arise and that the ACCC relies on whichever one is established and on both if both are established.
2. This form of pleading does not create any prejudice. It is not the sort of alternative pleading that extends “to planting a forest of frenzied contingencies” with no “path through it” or that creates “hundreds, if not thousands, of alternative and cumulative combinations of allegations” as deprecated in *Forrest v ASIC* [2012] HCA 39; 247 CLR 486 at [27] per French CJ, Gummow, Hayne and Kiefel JJ.
3. The ACCC should therefore have leave to amend paragraph [120] in the respect sought.

## Paragraph [121]

1. The matters sought to be introduced into this paragraph are indicated as underlined text in what follows:

By reason of the matters pleaded in paragraphs 114 to 119, at the commencement of and/or during the period when the Process Changes were implemented CCC knew or ought to have known, and/or it was reasonably foreseeable, that the Process Changes would materially reduce CCC’s ability to mitigate the CA Misconduct Risk and the Unsuitable Enrolment Risk, in the ways set out in paragraph 120 above.

1. The principal objection to these amendments is the introduction of “reasonable foreseeability” as a third category of knowledge which was previously not part of the ACCC’s case. For the reasons given above with regard to paragraph [115], I do not regard that to be a significant broadening of the case or to create any particular prejudice.
2. The other objection is in relation to the time period which is said, when taken together with the new paragraph [88], extends the relevant period to a period of 12 months. However, since the original paragraph was not limited in respect of time, the amendment seeks only to specify the relevant time period. This makes the ACCC’s case clearer and more precise, and does not cause any material prejudice.
3. There was no objection to the introduction of “materially”.
4. In the circumstances, the ACCC should have leave to make the proposed amendments to this paragraph.

## Paragraph [122]

1. This paragraph pleads the results of the process changes. Six such “Process Changes Results”, each set out in a separate subparagraph with its own particulars, are identified following this chapeau (with the proposed amendments indicated in strikethrough and underline):

Primarily as a result of the Process Changes, ~~in the Relevant Period,~~ when compared to the Earlier Period, as regards consumers who became enrolled in the Relevant Period there was:

1. Because of the deletion of “in the Relevant Period”, it is complained that these amendments impermissibly expand the case with regard to the applicable time period with the result that they effectively plead a new case which will require further investigation.
2. I do not accept that criticism. It is apparent from several of the process changes that are identified in the subparagraphs that the time period that was referred to in any event extended beyond the relevant period. What the amendment does is to make explicit what was in any event implicit in the original pleading, namely that the so-called relevant period is the period in which the affected students were enrolled, but the prejudicial consequences of the process changes in respect of students enrolled in that period extended in certain instances and respects beyond that period.
3. In the circumstances, I consider that the amendment makes the ACCC’s case clearer, and I do not consider that it creates any material prejudice. The respondents have not identified any particular further investigations that they might be required to undertake.
4. The other proposed amendments to paragraph [122] are to various of the particulars given in respect of the different process change results. In respect of several of them, it is said that they are impermissible as they are not particulars which relate to the “substantial increase” in the number or proportion of consumers who faced deleterious consequences as pleaded in the different subparagraphs, but rather are particulars referred to in order to further the ACCC’s expanded knowledge case. It is again submitted that that case, i.e. the case on reasonable foreseeability, is brought too late to be investigated and met.
5. I do not accept the criticism with regard to the purpose or role of the particulars, and as already dealt with above, I do not accept it with regard to the expanded knowledge case. Insofar as the former is concerned, the knowledge case as pleaded is not changed by the particulars that are pleaded in respect of a different material part of the case. In my assessment, the particulars serve to make the ACCC’s case clearer.
6. The ACCC should accordingly have leave to make the proposed amendments to this paragraph.

## Paragraph [123]

1. Omitting the particulars, the proposed amendment to this paragraph is shown in underline in what follows:

Progressively during the period the Process Changes were implemented and as the Process Changes Results were occurring, and by no later than around May 2016, CCC knew, or ought to have known, of the Process Changes Results.

1. This amendment is resisted on the basis that the addition of the word “progressively”, combined with the multiple permutations embedded within the definitions of Process Changes and Process Changes Results, and the multiple alternative knowledge claims, make the case put against the corporate respondents uncertain and indeterminable.
2. I do not consider that criticism to be valid. The proposed change makes explicit what must in any event have been implicit in the original pleading. By pleading that “by no later than around May 2016” certain things were known or ought to have been known, it was implicit that the allegation was that at some earlier time, but at the latest by the specified time, there was the relevant state of knowledge. It is also apparent from the process change results that it is alleged that they would occur progressively and become progressively apparent. Therefore, all that the pleading does is make the case clearer.
3. The ACC also seeks to amend the particulars to paragraph [123] in three respects. It is complained that it is not clear which particular allegation of knowledge, i.e. actual knowledge or imputed knowledge, the amendments relate to. However, the same was true of all the original particulars. I do not see how this gives rise to prejudice.
4. In the circumstances, the ACCC should have leave to amend paragraph [123] in the respects indicated.

## Paragraph [123A]

1. The ACCC seeks leave to introduce the following new paragraph in the section of the pleading dealing with the results of the process changes:

Further or alternatively at the commencement of and/or during the period when the Process Changes were implemented:

(b) CCC knew or ought to have known that the Process Changes would likely lead to the Process Changes Results or results of the type of the Process Changes Results; and/or

(c) the Process Changes Results were reasonably foreseeable.

1. Part of this pleading is already in the ACCC’s reply to the corporate respondents’ defences. In that regard, the defences in paragraph [124(b)] plead that the college “could not have known of the Process Changes Results or that the implementation of the Process Changes resulted in the Process Changes Results at the time that they were implemented.” The replies to that pleading, in each case, in paragraph [5(c)] plead that the college “knew or ought to have known, at the time of implementation of the Process Changes, that the Process Changes would likely lead to results of the type set out in subparagraphs (a) to (f) of paragraph 122 of the Statement of Claim.”
2. During opening submissions, senior counsel for the corporate respondents made the observation that that substantive type of pleading should more properly be in the statement of claim and not in the reply, but he quite rightly did not claim any material prejudice arising from this point of form. It was, however, apparently taken by the ACCC as an invitation to correct the error by incorporating the allegations as part of the statement of claim.
3. In those circumstances, the inclusion now in the statement of claim of what was already in the replies is unobjectionable and causes no prejudice.
4. However, what is sought to be included in the statement of claim goes further than what was in the replies in two respects. First, instead of saying that the relevant knowledge was “at the time of implementation of the Process Changes”, the pleading would now say that it was “at the commencement of and/or during the period when the Process Changes were implemented”. Secondly, it adds that the process change results were reasonably foreseeable.
5. The first objection brings to the fore a possible ambiguity in how the case was originally put by the ACCC. Its use of the word “implemented” with regard to the process changes could have been understood as a reference to the time when the changes were first made, i.e. adopted and first implemented, or it could have been understood as the whole of the time when the new process following the adoption of the changes was followed, i.e. adopted and continued to be implemented.
6. This ambiguity is apparent from paragraph [11] of the parties’ agreed list of key factual and legal issues in the proceeding dated 5 June 2020. That paragraph is in the following terms:

There is a dispute between the Applicant and the First, Second and Fourth Respondents as to the relevant question before the Court with respect to the timing of CCC’s knowledge of the “Process Changes Results” and what question accurately reflects the pleadings.

(a) The Applicant says the relevant question is: Did CCC know, or ought it to have known, of the matters the Applicant defines as the “Process Changes Results” during the Relevant Period? If not, by what date did it or ought it to have had this knowledge?

(b) The First, Second and Fourth Respondents contend that the relevant questions are: Did CCC know, or ought it have known, of the matters the Applicant defines as the Process Changes Results” when implementing the Process Changes. What is the relevance of later acquired knowledge,4 if any, to assessing the conduct of CCC in implementing the Process Changes in the period leading up to September 2015?

4 as alleged in FASOC [123].

1. That paragraph shows that the respondents fully understood that later acquired knowledge, i.e. during the period of implementation, was part of the ACCC’s case. Further, this question has already been dealt with in relation to paragraph [88]. For the reasons given there, I consider that the period in which the complained of process changes were implemented in the sense of “adopted and continued to be followed” was apparent and the proposed amendment makes that clear. There is accordingly no prejudice caused by the amendment in making this aspect of the case clearer.
2. Insofar as the second change is concerned, namely that with regard to reasonable foreseeability, I have already explained why I do not regard that to be a material expansion of the case.
3. The use of “and/or” in this paragraph is similar to that dealt with above in relation to paragraph [120]. It creates no prejudice.
4. In the circumstances, the ACCC should have leave to amend the statement of claim by introducing paragraph [123A].

## Paragraph [124]

1. In its existing form this paragraph lists five circumstances, each in a separate subparagraph, and alleges that the college engaged in a system of conduct, or a pattern of behaviour that was, “in all the circumstances”, unconscionable in contravention of s 21 of the ACL by implementing the process changes in the circumstances listed.
2. The proposed amendment would do three things, namely:
3. Qualify the implementation of the process changes by making it clear that that is “in respect of consumers [who] became enrolled in courses during the Relevant Period (which implementation, for some consumers, extended beyond the Relevant Period)”;
4. Introduce a type of conduct, in addition to implementing the process changes, that forms part of the system of conduct or pattern of behaviour that is alleged to be unconscionable, namely “in the period up to and including September 2016 (when the last census date for a consumer who became enrolled during the Relevant Period was processed by CCC), claiming (which for the avoidance of doubt includes making an ongoing claim to entitlement) the VFH Revenue in respect of over 90% of the consumers who became enrolled in an Online Course during the Relevant Period and passed one or more census dates and/or retaining such VFH Revenue as was paid by the Commonwealth”; and
5. Altering the listed circumstances in a few respects.
6. For the same reasons given above with regard to questions of timing, the qualification that is added to the implementation of the process changes serves only to make the case clearer. It does not create any prejudice.
7. With regard to the introduction of “claiming or retaining” as a form of conduct, that was in any event already alleged as circumstance (e). What is sought to be done by the amendment is to move that from being a circumstance to being a form of conduct. Initially having listed it as a circumstance rather than identifying it as a form of conduct said to be unconscionable was an unfortunate infelicity of pleading. However, the case that was asserted was clear enough, and to the extent that it might otherwise not have been clearly understood, reference to the originating application would have made it very clear. That is because the first declaration sought in the originating application is with regard to a system of conduct or pattern of behaviour which is said to be unconscionable which is identified as comprising, quite independently, the process changes and the “claiming or retaining” of VFH Revenue.
8. The alterations to the listed circumstances have the alleged vices of introducing “reasonable foreseeability” and “the period when the Process Changes were implemented”, but I have already dealt with those issues above. I do not regard them to create any prejudice.
9. In the circumstances, the ACCC should have leave to amend paragraph [124] in the respects indicated.

## Paragraphs [132]-[137AAA]

1. In this range of paragraphs there are a number of amendments to the section of the statement of claim dealing with the fourth respondent, Mr Wills’s, involvement in the college’s alleged systemic unconscionable conduct. The amendments include the introduction of two new paragraphs, [137AA] and [137AAA].
2. The principal point of objection to these amendments argued on behalf of Mr Wills concerns the commencement and end dates of the period of time within which it is said that the process changes were implemented and during which it is said that the Mr Wills had, or gained, the relevant knowledge. I have already dealt with these objections above.
3. A further objection is with regard to Mr Wills’s knowledge of the results of the process changes which is put as follows in the proposed paragraph [137AA]: “… Wills knew that the Process Changes would likely lead to the Process Changes Results or results of the type of the Process Changes Results.” The complaint is that “the type of the Process Changes Results” is too uncertain for Mr Wills to know the case against him, i.e. just what is it that it is alleged that he knew?
4. The language of “the type of the Process Changes Results” is also used against the corporate respondents, and is in the existing pleadings. Clearly what it seeks to achieve is to avoid the respondents escaping the implications of their knowledge of the results of the process changes if it is not established that they knew precisely what those results were, even if they knew the import of them.
5. In my view, this pleading does not create any undue uncertainty or prejudice. The reason is that it is clear that what is at issue is whether Mr Wills’s knowledge of the consequences of the process changes, when taken together with other pleaded facts and circumstances, was such as to justify the conclusion that by his involvement in the management and oversight of the college he was associated with, or had a practical connection with, the college’s alleged unconscionable conduct.
6. The actual state of Mr Wills’s knowledge of the results of the process changes is the fact in issue. It may be that he had knowledge of those results in detail and with precision, or it may be that he had some lesser knowledge or appreciation of those results. But whatever state of knowledge of the results of the process changes is proved will then form part of the required evaluative judgement. The language “the types of the Process Changes Results” limits the pleading against Mr Wills by excluding any results of the process changes that are not of the same type as those that are pleaded as being the Process Changes Results. Whether any particular result is of the same type or not is a matter of fact and degree that will form part of the evaluative judgement.
7. In the circumstances, the ACCC should have leave to make the indicated amendments to the identified paragraphs.

## Paragraphs [144AA]-[144AAA]

1. These paragraphs which are sought to be introduced into the statement of claim were objected to on the same basis as dealt with above in relation to the identification of the applicable time period. I have already dealt with that objection.
2. The ACCC should accordingly have leave to amend the further amended statement of claim by introducing these paragraphs.

## Conclusion

1. For the above reasons, I gave leave to the ACCC under r 16.53 of the *Federal Court Rules 2011* (Cth) to amend its further amended statement of claim in the respects shown by the draft second further amended statement of claim that was circulated by the ACCC on 16 June 2020 at approximately 11:45 am.

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| I certify that the preceding eighty-six (86) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Stewart. |

Associate:

Dated: 18 June 2020