



IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION  
MAJOR TORTS LIST

No.

Case: S ECI 2020 01535

Filed on: 26/03/2020 03:01 PM

BETWEEN:

**NERITA SOMERS** and others according to the attached schedule

First Plaintiff

and

**BOX HILL INSTITUTE**

Defendant

### WRIT

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Date of document: 26 March 2020

Filed on behalf of: The Plaintiff

Prepared by:

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Attention: Andrew Grech

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#### TO THE DEFENDANT

**TAKE NOTICE** that this proceeding has been brought against you by the plaintiff for the claim set out in this writ.

**IF YOU INTEND TO DEFEND** the proceeding, or if you have a claim against the plaintiff which you wish to have taken into account at the trial, **YOU MUST GIVE NOTICE** of your intention by filing an appearance within the proper time for appearance stated below.

**YOU OR YOUR SOLICITOR** may file the appearance. An appearance is filed by—

- (a) filing a "Notice of Appearance" in the Prothonotary's office, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and
- (b) on the day you file the Notice, serving a copy, sealed by the Court, at the plaintiff's address for service, which is set out at the end of this writ.

**IF YOU FAIL** to file an appearance within the proper time, the plaintiff may **OBTAIN JUDGMENT AGAINST YOU on the claim without further notice.**

**\*THE PROPER TIME TO FILE AN APPEARANCE** is as follows—

- (a) where you are served with the writ in Victoria, within 10 days after service;
- (b) where you are served with the writ out of Victoria and in another part of Australia, within 21 days after service;
- (c) where you are served with the writ in Papua New Guinea, within 28 days after service;

(d) where you are served with the writ in New Zealand under Part 2 of the Trans-Tasman Proceedings Act 2010 of the Commonwealth, within 30 working days (within the meaning of that Act) after service or, if a shorter or longer period has been fixed by the Court under section 13(1)(b) of that Act, the period so fixed;

(e) in any other case, within 42 days after service of the writ.

IF the plaintiff claims a debt only and you pay that debt, namely, \$ and \$ for legal costs to the plaintiff or the plaintiff's solicitor within the proper time for appearance, this proceeding will come to an end. Notwithstanding the payment you may have the costs taxed by the Court.

**FILED** 26 March 2020

Prothonotary

**THIS WRIT** is to be served within one year from the date it is filed or within such further period as the Court orders.

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION  
MAJOR TORTS LIST

No.

BETWEEN:

**NERITA SOMERS** and others according to the attached schedule

First Plaintiff

and

**BOX HILL INSTITUTE**

Defendant

### STATEMENT OF CLAIM

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Date of document: 26 March 2020

Filed on behalf of: The Plaintiff

Prepared by:

Gordon Legal

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Melbourne VIC 3000

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Telephone: +61 3 9603 3037

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Attention: Andrew Grech

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#### A. PRELIMINARY

##### Group proceeding

1. The Plaintiffs bring this proceeding as a representative proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) on behalf of themselves and all persons who enrolled between 6 December 2015 and the date of the commencement of this proceeding (**the Relevant Period**) with the Defendant as students to study a Diploma of Aviation (Commercial Pilot Licence – Aeroplane) (**CPL Diploma**) (**Group Members**).

##### The Defendant

2. At all relevant times, the Defendant was:

- a. established under section 3.1.11 of the *Education and Training Reform Act 2006* (Vic) (**ETR Act**);
  - b. a body corporate capable of being sued by reason of section 3.1.12 of the ETR Act.
3. At all relevant times, the Defendant was:
- a. registered as an NVR registered training organisation under the *National Vocational Education and Training Regulator Act 2011* (Cth) (**NVETR Act**);
  - b. except from 17 December 2019, registered to deliver the CPL Diploma;
  - c. required to comply with the Standards for Registered Training Organisations (RTOs) 2015 (**Standards for RTOs**) by reason of section 22 of the NVETR Act.

### **Soar**

4. At all relevant times, Gobel Aviation Pty Ltd (**Soar**) was the Defendant's agent for the purposes of delivering the CPL Course (as defined in paragraph 15.a below) to the Plaintiffs and the Group Members.

### **Particulars**

There was a contract between the Defendant and Soar under which Soar was engaged to deliver the CPL Course on the Defendant's behalf.

Further particulars may be provided after discovery.

5. At all relevant times, Soar was the holder of a Part 141 certificate granted under the *Civil Aviation Safety Regulations 1998* (**the Regulations**) by the Civil Aviation Safety Authority (**CASA**).

### **CASA requirements for obtaining pilot's licences, ratings and endorsements**

6. At all relevant times, there were requirements for a person seeking to obtain a Recreational Pilot's Licence (**RPL**) that the person have:
- a. passed the aeronautical knowledge examination;

- b. completed the flight training;
- c. met the aeronautical experience requirements; and
- d. passed the flight test;

each prescribed in Subpart 61.G of the Regulations (**the CASA RPL Requirements**).

7. At all relevant times, there were requirements for a person seeking to obtain a Private Pilot's Licence (**PPL**) that the person have:

- a. passed the aeronautical knowledge examination;
- b. completed the flight training;
- c. met the aeronautical experience requirements; and
- d. passed the flight test;

each prescribed in Subpart 61.H of the Regulations (**the CASA PPL Requirements**).

8. At all relevant times, there were requirements for a person seeking to obtain a Commercial Pilot's Licence (**CPL**) that the person have:

- a. passed the aeronautical knowledge examination;
- b. completed the flight training;
- c. met the aeronautical experience requirements; and
- d. passed the flight test;

each prescribed in Subpart 61.I of the Regulations (**the CASA CPL Requirements**).

9. At all relevant times, CASA had set:

- a. minimum standards of knowledge for persons to pass the aeronautical knowledge examinations;
- b. minimum standards of knowledge for persons to complete the flight training; and

- c. minimum competencies for persons to pass the flight tests;

necessary to meet the CASA RPL Requirements, CASA PPL Requirements and CASA CPL Requirements (**the CASA Minimum Standards**).

#### **Particulars**

The standards of knowledge and competencies were set out in the 'Manual of Standards' prescribed under Part 61 of the Regulations, and known as the *Part 61 Manual of Standards Instrument 2014*.

10. At all relevant times, it was a requirement that flight training be conducted in the manner prescribed under reg 61.195 of the Regulations.
11. At all relevant times, if the person was the holder of a pilot certificate (**PC**) issued by Recreational Aviation Australia (**RA Aus**), then because of reg 61.480 of the Regulations, the person was taken to have passed the aeronautical knowledge examination and flight test aspects of the CASA RPL Requirements.
12. At all relevant times, the Defendant knew or ought to have known of each of the matters in paragraphs 6-11 above.

#### **Particulars**

The matters were prescribed under Part 61 of the Regulations.

#### **VET FEE-HELP and VET Student Loans**

13. Any Plaintiff or Group Member able to access Commonwealth government subsidies known as VET FEE-HELP (from the start of the Relevant Period to 31 December 2016) and VET Student Loans (from 1 January 2017 to the end of the Relevant Period) (together, **Student Loans**), was able to apply proceeds from those Student Loans to fund their study with the Defendant towards the CPL Diploma.

## B. CONTRACT

### Terms

14. During the Relevant Period, the Plaintiffs and Group Members each entered into contracts with the Defendant (**Contracts**) under which the Defendant was to deliver to the student tuition for the CPL Diploma.

### Particulars

- (a) The contracts were express in writing, and partly implied.
- (b) Insofar as the Contracts were express in writing, and insofar as the Plaintiffs and Group Members can say prior to discovery, they were comprised of:
  - a. enrolment forms for the Plaintiffs and Group Members;
  - b. the document entitled 'AVI50215 Diploma of Aviation (Commercial Pilot Licence – Aeroplane) Overview', as amended by the Defendant during the Relevant Period from time to time;
  - c. the document entitled 'UNI PLAN / CLUSTER PLAN', as amended by the Defendant during the Relevant Period from time to time;
  - d. the document entitled 'Diploma of Aviation (Commercial Pilot Licence – Aeroplane)', as amended by the Defendant during the Relevant Period from time to time;
  - e. the page entitled 'Diploma of Aviation (Commercial Pilot Licence – Aeroplane)' on the Defendant's website, as amended by the Defendant during the Relevant Period from time to time.
- (c) Insofar as the Contracts were implied, the implication arises from statements made in the documents above and on the websites of and marketing brochures published by Soar and the Defendant about the CPL Diploma, and the need to give business efficacy to the Contracts.

(d) The First Plaintiff entered into her contract on or around 11 July 2017. The Second Plaintiff entered into his contract on or around October 2016. The Third Plaintiff entered into his contract on or around 24 June 2016. The Fourth Plaintiff entered into his contract on or around 16 January 2017. Particulars of the circumstances of the Group Members entering into their contracts with the Defendant will be provided after the trial of the Plaintiffs' claims.

15. Each of the Contracts had terms that:

a. the Defendant would assume the Plaintiffs and Group Members had no prior knowledge of how to fly an aeroplane at the time of their enrolment, and provide them with the necessary aeronautical knowledge and flight training that would, within 2 years of their commencement of part-time study or 14 months of full-time study (as the case may have been) **(the Scheduled Course Duration)**:

i. result in them being awarded the CPL Diploma; and

ii. meeting the CASA CPL Requirements;

**(the CPL Course)**;

b. the Defendant would facilitate the Plaintiffs and Group Members wishing to apply for Student Loans from the Commonwealth Government to pay their fees for the CPL Course to apply for such loans;

c. the Defendant would assume the Plaintiffs and Group Members had no prior knowledge of how to fly an aeroplane at the time of their enrolment, and would deliver the CPL Course in such a way that each of the Plaintiffs and Group Members enrolled would have, within the Scheduled Course Duration:

i. been given the tuition necessary to pass the aeronautical knowledge examination;

ii. completed the flight training;

iii. met the aeronautical experience requirements; and

iv. been given the necessary flight training to pass the flight test;

each as prescribed in the CASA CPL Requirements, to be eligible to apply to CASA for a CPL;

**Particulars to subparagraphs a-c**

The terms were partly express and partly implied from statements made in the documents referred to in the particulars to paragraph 14 above, and the Defendant's purported compliance with Standards 1.1, 1.3, 1.7, 1.8, 1.9, 1.13-1.25, 2.1, 2.2, 2.4, 4.1(a), 5.1 and 8.4 of the Standards for RTOs. Copies of the statements and brochures may be inspected at the offices of the Plaintiff's solicitor.

- d. the Defendant would provide the Plaintiffs and Group Members with written course materials adequate for them to learn the theory necessary for the aeronautical knowledge examinations prescribed in the CASA CPL Requirements (**Prescribed Knowledge Examinations**);
- e. the Defendant would assess the progress of the Plaintiffs and Group Members by setting the examinations it administered at a standard comparable to the Prescribed Knowledge Examinations;
- f. the Defendant would have in place proper systems to monitor the progress of the Plaintiffs and Group Members in learning the theory necessary for the Prescribed Knowledge Examinations and provide any remedial tuition required;
- g. the Defendant would provide a fleet of aeroplanes that was appropriate to the flight training needs of the Plaintiffs and Group Members and sufficiently proportionate to the number of students enrolled:
  - i. for completion of the flight training that was necessary to pass the flight tests prescribed in the CASA CPL Requirements (**Prescribed Flight Tests**);
  - ii. for meeting the aeronautical experience requirements that were prescribed in the CASA CPL Requirements (**Prescribed Aeronautical Experience Requirements**);

- h. the Defendant would provide appropriately trained and experienced flight instructors sufficiently proportionate to the number of students enrolled, to provide the flight training that was necessary for the Prescribed Flight Tests;
- i. the Defendant would have in place proper systems to monitor the progress of the Plaintiffs and Group Members in their flight training that was necessary for the Prescribed Flight Tests and provide any remedial training required;
- j. the Defendant would not act or omit to act in such a way that would result in it being or becoming prohibited from delivering the CPL Course.

#### **Particulars to subparagraphs e-j**

The terms were implied from the documents referred to in the particulars to paragraph 14 above, and the Defendant's purported compliance with Standards 1.1, 1.3, 1.7, 1.8, 1.9, 1.13-1.25, 2.1, 2.2, 2.4, 4.1(a), 5.1 and 8.4 of the Standards for RTOs. Copies of the statements and brochures may be inspected at the offices of the Plaintiff's solicitor.

#### **Breach**

##### *Aeronautical knowledge—materials, examination standards, monitoring systems*

- 16. The written course materials which the Defendant provided the Plaintiffs and Group Members did not contain content that met the CASA Minimum Standards.
- 17. The examinations that the Defendant set for the Plaintiffs and Group Members were set to a standard lower than that of the Prescribed Knowledge Examinations.
- 18. The Defendant did not have in place any proper system to monitor the progress of the Plaintiffs and the Group Members in learning the theory necessary for the Prescribed Knowledge Examinations, or provide any remedial tuition required.

#### **Particulars**

The Defendant did not have any system under which:

- (a) the Plaintiffs and Group Members were provided with feedback on the progress of their learning;

- (b) the Plaintiffs and Group Members were provided with feedback on their performance in the examinations the Defendant set, because it was a requirement of the Defendant that Group Members mark their own examinations;
- (c) the Defendant could readily identify the underlying cause of poor progress of the Plaintiffs and Group Members.

Further particulars may be provided after discovery and expert evidence.

*Aeronautical knowledge—the RPC Short-Cut*

- 19. The Defendant sought to persuade or require the Plaintiffs and Group Members to become members of RA Aus and obtain from it a PC, and have that PC converted to a RPL by application to CASA (**the RPL Short-Cut**).
- 20. The RPL Short-Cut to obtain a RPL meant that for those who undertook it, the Defendant did not teach, and the Plaintiffs and Group Members were not required to have learnt, the CASA Minimum Standards for the RPL that would have been required if they obtained a RPL other than by the RPL Short-Cut.
- 21. The CASA Minimum Standards for the RPL that were not taught and learnt, as referred to in paragraph 20 above, was knowledge that was required to pass the aeronautical knowledge examination prescribed in the CASA CPL Licence Requirements.

*Flight training—instructors, aeroplanes, monitoring systems*

- 22. For the numbers of students enrolled, the Defendant did not engage a sufficient number of persons who:
  - a. held a flight instructor rating under Part 61 of the Regulations (**Flight Instructors**); and
  - b. were adequately trained and experienced so as to able to provide the flight training necessary for the Plaintiffs and Group Members to meet the CASA Minimum Standards.

**Particulars**

The number of Flight Instructors was not sufficient in that:

- (a) the Plaintiffs and Group Members did not have continuity with the Flight Instructors who were assigned to provide them with flight training;
- (b) the Plaintiffs' and Group Members' flight training sessions were often cancelled due to Flight Instructor unavailability;
- (c) the Plaintiffs' and Group Members' sessions were not scheduled at a frequency necessary for any learning of skills to be retained.

Further particulars may be provided after discovery and expert evidence.

- 23. The Defendant did not have any proper system under which it monitored whether the Flight Instructors it engaged held valid instructor proficiency checks under reg 61.1180 of the Regulations when those Flight Instructors were providing flight training to the Plaintiffs and Group Members.
- 24. By reason of Flight Instructors not having valid instructor proficiency checks, any flight training conducted by such Flight Instructors could not have lawfully counted towards the flight training requirements in the CASA RPL Requirements, CASA PPL Requirements or CASA CPL Requirements.

#### **Particulars**

The flight training requirements are set out in reg 61.195 of the Regulations. Further particulars may be provided after expert evidence.

- 25. For the number of persons enrolled, the Defendant did not have sufficient aeroplanes to provide the Plaintiffs and Group Members with the flight training necessary for them to meet the CASA Minimum Standards.

#### **Particulars**

The number of aeroplanes was not sufficient in that:

- (a) the Plaintiffs' and Group Members' flight training sessions were often cancelled due to aeroplane unavailability;
- (b) the Plaintiffs and Group Members were not given adequate flight training in aeroplanes that had the characteristics necessary to give them the experience required to pass the

flight test prescribed in the CASA CPL Licence Requirements;

- (c) flights could not be scheduled at a frequency necessary for any learning of skills to be retained.

Further particulars may be provided after discovery and expert evidence.

- 26. The Defendant did not have in place any proper system to monitor the progress of the Plaintiffs and Group Members in their flight training necessary for the Prescribed Flight Tests or provide any remedial training required.

#### **Particulars**

The Defendant did not have any system under which:

- (a) the Plaintiffs or Group Members were provided with feedback after each flight taken;
- (b) the Plaintiffs or Group Members had continuity with the Flight Instructors they were assigned;
- (c) the Defendant could readily identify the underlying cause of poor progress of the Plaintiffs or Group Members;
- (d) it would have known that the ratio of dual to solo lessons undertaken by the Plaintiffs and Group Members was indicative that they were not making progress in completing the flight training necessary for the Prescribed Flight Tests.

Further particulars may be provided after discovery and expert evidence.

#### *Conclusion*

- 27. It was never practicable for any Plaintiff or Group Member, in the circumstances set out at paragraphs 16 to 26, to meet the CASA CPL Requirements within the Scheduled Course Duration.

#### **Particulars**

Particulars will be provided after expert evidence.

28. By reason of the matters in paragraphs 16 to 27, the Defendant breached the Contracts **(Breach of Contract)**.

### **C. AUSTRALIAN CONSUMER LAW GUARANTEES**

29. Further or in the alternative to the matters in paragraph 28, the CPL Course was a service acquired by the Plaintiffs and Group Members as consumers, and supplied by the Defendant in trade or commerce.

#### **Statutory Guarantees**

30. The Defendant guaranteed to the Plaintiffs and Group Members that the supply of the CPL Course would be rendered with due care and skill **(Due Care and Skill Guarantee)**.

#### **Particulars**

The guarantee arises by operation of s 60 of the *Australian Consumer Law* (Victoria).

31. Further or in the alternative to paragraph 30, each of the Plaintiffs and Group Members made known to the Defendant that they were acquiring, in circumstances where the Defendant was assuming they had no prior knowledge of how to fly aeroplanes at the time of the commencement of the acquisition of the CPL Course, the CPL Course for the purpose or result of:
- a. obtaining the tuition necessary to pass the aeronautical knowledge examination;
  - b. completing the flight training;
  - c. meet the aeronautical experience requirements; and
  - d. obtaining the necessary flight training to pass the flight test;

each as prescribed in the CASA CPL Requirements, to be eligible to apply to CASA for a CPL, within the Scheduled Course Duration.

### Particulars

The Plaintiffs and Group Members made known the purpose and result by implication, arising from the promotional material published by the Defendant and Soar that was relied upon by the Plaintiffs and Group Members which contained statements that the Defendant would provide the Plaintiffs and Group Members with the necessary aeronautical knowledge and flight training that would permit them to obtain the CPL within the Scheduled Course Duration. Copies of the promotional material may be inspected at the offices of the Plaintiff's solicitor.

32. The Defendant guaranteed to the Plaintiffs and Group Members that the supply of the CPL Course to each of them would be fit for the particular purpose and result pleaded above (**Fitness for Purpose Guarantee**).

### Particulars

The guarantee arises by operation of s 61 of the *Australian Consumer Law* (Victoria).

33. By reason of the matters in paragraphs 16 to 27, the Defendant breached:
- a. the Due Care and Skill Guarantee (**Due Care and Skill Guarantee Breach**);
  - b. the Fitness for Purpose Guarantee (**Fitness for Purpose Guarantee Breach**).

## D. NEGLIGENCE

### Duty

34. Further or in the alternative to the matters in paragraphs 28 to 33, the Defendant had statutory objectives under section 3.1.12A of the ETR Act which included:
- a. facilitating student learning, knowledge acquisition, skills for employment and vocational education and training through excellent teaching, innovation and educational leadership that delivers quality outcomes; and
  - b. collaborating as part of a strong public training provider network which is mutually and commercially beneficial to enable the institute to offer or provide

educational services that meet the needs of industry partners and communities, including persons and groups that have particular education needs.

35. The Defendant had statutory functions under section 3.1.12B of the ETR Act which included:
- a. the provision of efficient and effective technical and further education; and
  - b. the offering and conduct of courses of study leading to the conferral of higher education awards.
36. The CPL Diploma was a higher education award, within the meaning of the ETR Act.
37. The Defendant had an Institute Board, the statutory functions of which under section 3.1.13 of the ETR Act included:
- a. overseeing and governing the Defendant efficiently and effectively;
  - b. providing for the proper, efficient and effective performance of the Defendant's functions and powers; and
  - c. giving proper direction to, and exercise proper control over, the chief executive officer of the Defendant and other staff employed by the Defendant and to monitor that they are carrying out their functions in a fit and proper manner.
38. The Defendant was required to comply with Standards 1.1, 1.3, 1.7, 1.8, 1.9, 1.13-1.25, 2.1, 2.2, 2.4, 4.1(a), 5.1, and 8.4 of the Standards for RTOs.

### **Particulars**

The Plaintiffs refer to the matters in paragraph 3.

39. The Defendant had the responsibility for and control over, to the exclusion of the Plaintiffs and Group Members, the way in which the CPL Course was to be delivered to them, and they were required to undertake the course as directed by the Defendant.

40. The Plaintiffs and Group Members were each in a vulnerable position to the Defendant in that:
- a. the Defendant agreed to enrol each Plaintiff and Group Member into the CPL Course and at all times knew after enrolment that each Plaintiff and Group Member would pay substantial sums of money to participate in the course;
  - b. the Plaintiff and Group Members each committed themselves to study for the Scheduled Course Duration with the Defendant, in circumstances where any learning acquired from the Defendant would not have been recognised by another institution teaching the CPL Diploma whose students could obtain a Student Loan;
  - c. the Defendant did not require as a prerequisite that the Plaintiff or Group Members have any prior experience in aviation or the CASA requirements necessary to obtain the CPL.

#### **Particulars**

- (a) Each of the Plaintiffs and Group Members were after enrolling, liable to pay the Defendant, or be indebted to the Commonwealth as the result of obtaining a Student Loan for, a sum in excess of \$75,000.
  - (b) Further particulars may be provided after discovery.
  - (c) Particulars in relation to the Group Members will be provided after the trial of the Group Members' individual claims.
41. The Plaintiffs and Group Members had no prior experience in aviation or the CASA requirements necessary to obtain the CPL and were reliant on the purported expertise and standing of the Defendant as a TAFE institute established under the ETR Act and registered under the NVETR Act in properly delivering the CPL Course.
42. The Defendant assumed responsibility for the progress of the Plaintiffs and Group Members in the CPL Course:
- a. in requiring that each student pass an entrance examination;

### **Particulars**

The Defendant administered a computer-based entrance examination in respect of each of the Plaintiffs and Group Members, and advised each of them that they passed such examination.

Further particulars may be provided after discovery.

- b. by administering from time to time examinations that were self-assessed by Group Members;
  - c. by purporting to have remedial tuition available, including by reason of its purported compliance with its obligations under Standard 1.7 of the Standards for RTOs.
43. The Defendant knew or ought to have known that if it did not take reasonable care to ensure that the CPL Course was delivered to the Plaintiffs and Group Members with due care and skill, the Plaintiffs and Group Members would suffer loss and damage.

### **Particulars**

The Plaintiffs refer to the particulars to paragraph 59.

44. By reason of the matters in paragraphs 34 to 43, the Defendant owed each of the Plaintiffs and Group Members a duty to take reasonable care that the CPL Course would be supplied with due care and skill (**Duty**).

### **Breach**

45. The Defendant failed to:
- a. have proper systems for developing written course materials that contained content that met the CASA Minimum Standards;
  - b. have proper systems for setting examinations to a standard equal or greater than that of the Prescribed Knowledge Examinations;
  - c. have proper systems for monitoring the progress of the students in learning the theory necessary for the Prescribed Knowledge Examinations, or providing any remedial tuition required;

- d. refrain from inducing students, or prevent students from being induced by Soar, to become members of RA Aus and obtain from RA Aus a PC, and have that RPC converted to a RPL by application to CASA, and in doing so, avoid teaching students the CASA Minimum Standards for the RPL that otherwise would have been required;
- e. have proper systems for ensuring that it engaged a sufficient number of Flight Instructors who were adequately trained and experienced so as to able to provide the flight training necessary to meet the CASA Minimum Standards;
- f. have proper systems under which it monitored whether the Flight Instructors it engaged held valid instructor proficiency checks when those Flight Instructors were providing flight training to the students;
- g. have proper systems for ensuring that it had sufficient aeroplanes to provide the students with the flight training necessary for them to meet the CASA Minimum Standards;
- h. have proper systems for monitoring the progress of the students in their flight training necessary for the Prescribed Flight Tests or provide any remedial training required.

#### **Particulars**

The Plaintiffs repeat the matters in paragraphs 16 to 27.

46. The Defendant ought not to have engaged Soar to deliver the CPL Course.

#### **Particulars**

If the Defendant had conducted due diligence on Soar prior to engaging it, the Defendant would have known that:

- (a) Soar did not have proper systems of the kinds referred to in subparagraphs 45.a-c and e-h;
- (b) Soar was engaging in the practice referred to in subparagraph 45.d;
- (c) reliance on Soar in these circumstances would cause the Defendant to breach its Duty.

47. The Defendant failed to monitor Soar's delivery of the CPL Course, which, if it had occurred, would have meant the Defendant would have known that:
- a. there was a systemic issue in that the Plaintiffs and Group Members:
    - i. were not achieving the CASA Minimum Standards;
    - ii. were taking longer than reasonably necessary to meet the CASA Minimum Standards; and/or
    - iii. would not meet the CASA Minimum Standards within the Scheduled Course Duration;
  - b. there was a systemic issue in that the Plaintiffs and Group Members were not making progress in learning the theory necessary for the Prescribed Knowledge Examinations;
  - c. there was a systemic issue in that the Plaintiffs and Group Members were not making progress in their flight training necessary for the Prescribed Flight Tests;
  - d. the Defendant ought to have then taken remedial action.

**Particulars**

The Plaintiff refers to and repeats the matters in paragraphs 18-27.

Further particulars may be provided after discovery and expert evidence.

48. The Defendant breached the Duty (**Duty Breach**).

**Particulars**

The Plaintiff refers to and repeats the matters in paragraphs 18-27 and 45-47.

**E. UNCONSCIONABILITY**

49. Further or in the alternative to the matters in paragraphs 28 to 48, for the purposes of the Defendant's administration of the tuition fees for the Plaintiffs and Group Members, the Defendant divided the CPL Course into three clusters, being:

- a. the RPL cluster, to align with the Defendant purportedly teaching the CASA RPL Requirements;
- b. the PPL cluster, to align with the Defendant purportedly teaching the CASA PPL Requirements; and
- c. the CPL cluster, to align with the Defendant purportedly teaching the CASA CPL Requirements;

**(the Billing Clusters).**

50. Upon each Plaintiff and Group Member being determined by the Defendant to have commenced one of the Billing Clusters:

- a. in respect of those Plaintiffs and Group Members who had taken out a Student Loan to pay his or her tuition fees for the CPL Course, the Defendant sent an invoice to the Secretary of the Commonwealth Department of Education, Skills and Employment (as is now known), asserting that it was entitled to payment from the Secretary for the tuition fees for that Billing Cluster, payable out of proceeds of the Plaintiff's or Group Member's Student Loan;
- b. in respect of all other Plaintiffs and Group Members, the Defendant sent an invoice to that person, asserting that it was entitled to payment for the tuition fees for that Billing Cluster.

51. The Plaintiffs and Group Members became indebted:

- a. to the Commonwealth for the invoiced amount because of the Student Loan that he or she held, upon the Defendant sending an invoice as referred to in paragraph 50.a; or

- b. to the Defendant for the invoiced amount, upon the Defendant sending an invoice as referred to in paragraph 50.b.

**Particulars**

The Plaintiffs refer to ss 110-1 and 137-10 of the *Higher Education Support Act 2003* (Cth) and to ss 19 and 23BA of the *VET Student Loans Act 2016* (Cth). Further particulars may be provided after discovery.

52. The Defendant permitted the Plaintiffs and Group Members to commence the PPL and CPL Billing Clusters without the Defendant giving any consideration to the academic progress of that Plaintiff or Group Member.

**Particulars**

Particulars may be provided after discovery.

53. In the circumstances in paragraphs 16-27, 45-48 and 49-52, it was unconscionable for the Defendant to have demanded or received payment from the Plaintiffs and Group Members for tuition fees in respect of the PPL and CPL Billing Clusters (**Unconscionable Conduct**).

**Particulars**

Particulars may be provided after discovery and expert evidence.

54. The Unconscionable Conduct was engaged in by the Defendant:
- a. in trade or commerce; and/or
  - b. in connection with the supply of the CPL Course.

**F. MISLEADING OR DECEPTIVE CONDUCT**

55. Further or in the alternative to the matters in paragraphs 27 to 48, the Defendant made each of the representations set out in paragraph 15 (**Representations**) in trade or commerce.

**Particulars**

The representations are the terms alleged in paragraph 15, and the Plaintiffs repeat the particulars to that paragraph.

56. The Representations were each, when they were made, representations as to future matters.
57. In the circumstances in paragraphs 16 to 27, and/or 46-48, the representations were misleading or deceptive or likely to mislead or deceive (**Misleading or Deceptive Representations**).
58. The Plaintiffs and Group Members each relied on the Misleading or Deceptive Representations in enrolling with the Defendant to study the CPL Diploma.

**Particulars**

- (a) Each of the Plaintiffs received the documents referred to in paragraph 14, and enrolled with the Defendant on the assumption that the Representations were correct.
- (b) Particulars in relation to the Group Members will be provided after the trial of the Group Members' individual claims.

**G. LOSS AND DAMAGE**

59. As a result of the:
  - a. Breach of Contract;
  - b. Due Care and Skill Breach;
  - c. Fitness for Purpose Guarantee Breach;
  - d. Duty Breach;
  - e. Unconscionable Conduct; and/or
  - f. Misleading or Deceptive Representations;

the Plaintiffs and Group Members have suffered loss and damage.

**Particulars**

The loss and damage includes the tuition fees paid by the Plaintiffs and Group Members, the costs associated with further tuition and flight training to prepare Plaintiffs and Group

Members to meet the CASA CPL Requirements, the costs associated with CASA examination fees for examinations that were not passed due to the breaches, lost or delayed opportunity to earn income as a commercial pilot, and lost time.

Further particulars of the Plaintiffs' loss and damage will be provided prior to trial.

Further particulars of each the Group Members' loss and damage will be provided after the trial of the Plaintiffs' claims.

60. The loss and damage referred to above was reasonably foreseeable as a consequence of the:
- a. Breach of Contract;
  - b. Due Care and Skill Breach;
  - c. Fitness for Purpose Guarantee Breach;
  - d. Duty Breach;
  - e. Unconscionable Conduct; and/or
  - f. Misleading or Deceptive Representations.

## **H. COMMON QUESTIONS**

61. The common questions of fact and law are:
- a. did the Contracts contain the terms alleged in paragraph 15 of the Statement of Claim?
  - b. did the Defendant provide the Plaintiffs and Group Members with the necessary aeronautical knowledge and flight training that would permit them to, within the Scheduled Course Duration, obtain the CPL Diploma and CPL?
  - c. did the Defendant deliver the CPL Course in such a way that the Plaintiffs and Group Members, within the Scheduled Course Duration, assuming no prior

knowledge of how to fly an aeroplane at time of enrolment, would have met the CASA CPL Licence Requirements to be able to apply to CASA for a CPL?

- d. did the Defendant provide the Plaintiffs and Group Members with written course materials adequate for them to learn the theory necessary for the Prescribed Knowledge Examinations?
- e. did the Defendant assess the progress of the Plaintiffs and Group Members by setting the examinations it administered at a standard comparable to the Prescribed Knowledge Examinations?
- f. did the Defendant have in place proper systems to monitor the progress of the Plaintiffs and Group Members in learning the theory necessary for the Prescribed Knowledge Examinations and provide any remedial tuition required?
- g. did the Defendant provide a fleet of aeroplanes that was appropriate to the flight training needs of the Plaintiffs and Group Members and proportionate sufficiently to the number of students enrolled, for delivery of the flight training necessary for the Prescribed Flight Tests?
- h. did the Defendant provide appropriately trained and experienced flight instructors sufficiently proportionate to the number of students enrolled, to provide the flight training necessary for the Prescribed Flight Tests?
- i. did the Defendant have in place proper systems to monitor the progress of the Plaintiffs and Group Members in their flight training necessary for the Prescribed Flight Tests and provide any remedial training required?
- j. did the Defendant breach the Due Care and Skill Guarantee?
- k. did the Defendant breach the Fitness for Purpose Guarantee?
- l. did the Defendant owe the Group Members the Duty?
- m. if the answer to question l is 'yes':
  - i. did the Defendant fail to have proper systems of the kinds referred to in subparagraphs 45.a-c and e-h of the Statement of Claim;

- ii. did the Defendant refrain from inducing students, or prevent students from being induced by Soar, to become members of RA Aus and obtain from RA Aus a RPC, and have that RPC converted to a RPL by application to CASA, and in doing so, avoid teaching students the CASA Minimum Standards for the RPL that otherwise would have been required?
- iii. ought the Defendant not have engaged Soar to deliver the CPL Course?
- iv. did the Defendant fail to monitor Soar's delivery of the CPL Course Course?
- v. did the Defendant breach the Duty?
- n. was it unconscionable for the Defendant to have demanded or received payment from the Group Members for the PPL and CPL Billing Clusters?
- o. did the Defendant make the Representations to the Group Members?
- p. if the answer to question o is 'yes', were the Representations misleading or deceptive or likely to mislead or deceive?
- q. what are the principles for assessing the loss of the Group Members?

THE PLAINTIFFS CLAIM ON BEHALF OF THEMSELVES AND THE GROUP MEMBERS:

- A. Damages, including damages pursuant to sections 236 and 267(3)(b) and 267(4) of the *Australian Consumer Law* (Victoria).
- B. Interest.
- C. Costs.
- D. Such other order as the Court deems appropriate.

26 March 2020

J T Rush

M W Guo

A handwritten signature in blue ink that reads "Gordon Legal". The signature is written in a cursive, flowing style.

Gordon Legal  
**Solicitors for the Plaintiffs**

1. Place of trial—Melbourne.
2. Mode of trial—Judge.
3. This writ was filed for the Plaintiff by Gordon Legal, Level 22, 181 William Street, Melbourne VIC 3000.
4. The address of the First Plaintiff is Unit 3, 42-44 Verdon Street, Williamstown VIC 3016.
5. The address of the Second Plaintiff is Unit 4, 23-25 Wood Street, Long Gully, Bendigo VIC 3550
6. The address of the Third Plaintiff is 1/13 Elm Street, Bayswater VIC 3153.
7. The address of the Fourth Plaintiff is 1/1 Simmons Court, South Yarra VIC 3141.
8. The address for service of the Plaintiffs is c/- Gordon Legal, Level 22, 181 William Street, Melbourne VIC 3000.
9. The email address for service of the Plaintiffs is agrech@gordonlegal.com.au.
10. The address of the Defendant is 465 Elgar Road, Box Hill VIC 3128.

**SCHEDULE OF PARTIES**

BETWEEN:

**NERITA SOMERS**

First Plaintiff

and

**ADEL HASSANEIN**

Second Plaintiff

and

**MATTHEW LAMONT**

Third Plaintiff

and

**FELIX OULDANOV**

Fourth Plaintiff

and

**BOX HILL INSTITUTE**

Defendant