



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

Case: S ECI 2020 01535  
S ECI 2020 01535  
Filed on: 31/08/2020 04:19 PM

BETWEEN

**NERITA SOMERS** (and others named in the Schedule)

First Plaintiff

and

**BOX HILL INSTITUTE**

First Defendant

and

**GOBEL AVIATION PTY LTD (t/as Soar Advanced Flight Training)**

Second Defendant

**SECOND DEFENDANT'S  
DEFENCE TO THE PLAINTIFFS' AMENDED STATEMENT OF CLAIM**

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<b>A</b>	<b>PRELIMINARY .....</b>	<b>2</b>
<b>B</b>	<b>CONTRACT.....</b>	<b>19</b>
<b>C</b>	<b>AUSTRALIAN CONSUMER LAW GUARANTEES .....</b>	<b>27</b>
<b>D</b>	<b>NEGLIGENCE .....</b>	<b>28</b>
<b>E</b>	<b>UNCONSCIONABILITY.....</b>	<b>30</b>
<b>F</b>	<b>MISLEADING OR DECEPTIVE CONDUCT .....</b>	<b>31</b>
<b>G</b>	<b>LOSS AND DAMAGE .....</b>	<b>31</b>
<b>GA</b>	<b>PROPORTIONATE LIABILITY.....</b>	<b>32</b>
<b>H</b>	<b>COMMON QUESTIONS .....</b>	<b>35</b>
<b>I</b>	<b>PROPORTIONATE LIABILITY DEFENCE.....</b>	<b>35</b>
<b>J</b>	<b>CONTRIBUTORY NEGLIGENCE DEFENCE.....</b>	<b>36</b>

Note: Headings and definitions from the plaintiffs' amended statement of claim dated 3 August 2020 (**SOC**) are used in this defence, unless the context indicates otherwise. The

first defendant is referred to as **BHI**. The second defendant is referred to as **Soar** or **SAFT**. The *Civil Aviation Safety Regulations* 1998 (Cth) in force from time to time in the relevant period are referred to as **the Regulations**.

To the SOC, Soar says as follows:

## **A PRELIMINARY**

### **Group proceeding**

1. As to paragraph 1:
  - (a) it does not admit paragraph 1, because it does not know whether the plaintiffs have the necessary characteristics to be entitled to represent the Group Members as defined; and
  - (b) it says further as set out below.
- 1.1 The CPL Diploma consisted of two substantially equivalent courses, each accredited by the Australian Skills Quality Authority (**ASQA**) under the NVETR Act, being:
  - (a) AVI50215 – Diploma of Aviation (Commercial Pilot Licence – Aeroplane), which expired on 11 August 2019; and
  - (b) AVI50219 – Diploma of Aviation (Commercial Pilot Licence – Aeroplane), which succeeded and replaced the previous course on 12 August 2019.
- 1.2 At all material times, BHI:
  - (a) was a registered training organisation (**RTO**) under s 17 the NVETR Act, with the CPL Diploma within its scope of registration; and
  - (b) was the provider of the CPL Diploma.
- 1.3 The CPL Diploma was structured in three consecutive ‘clusters’ of units, with the course fees payable in three consecutive instalments by the census date for each cluster.
- 1.4 The completion of the CPL Diploma at the conclusion of Cluster Three involved the completion of the requirements under Subpart 61.I of Part 61 of the Regulations (which requirements are defined in the ASOC as **the CASA CPL Requirements**) to support an application to CASA for the grant of a commercial pilot licence (**CPL**) under r 61.150 of Part 61 of the Regulations.
- 1.5 The students were also eligible at the completion of Clusters One and Two to obtain, respectively:
  - (a) in Cluster One, a RA-Aus recreational pilot certificate (**RPC**) as described in s

2.07, cl 1, of the RA-Aus Operations Manual, which could be converted to a CASA RPL pursuant to r 61.480 of the Regulations; and

(b) in Cluster Two, a RA-Aus RPC with a cross-country endorsement, as described in s 2.07, cl 11, of the RA-Aus Operations Manual, which could be converted to a CASA RPL with a navigation endorsement pursuant to r 61.500(5) of the Regulations.

1.6 In the period from 10 February 2016 to 26 March 2020 (**the Soar flight training period**), Soar:

(a) was an authorised Part 141 operator within the meaning of r 141.015 of the Regulations;

(b) on that basis, was authorised to conduct Part 141 flight training in an aircraft or flight simulation training device, including training for the grant of a CPL under Part 61 of the Regulations: rr 141.015, 141.050; and

(c) provided Part 141 flight training to BHI's students enrolled in the CPL Diploma.

## **BHI**

2. It admits paragraph 2.

3. As to paragraph 3:

(a) it admits paragraph 3(a);

(b) it denies paragraph 3(b);

(c) it admits paragraph 3(c);

(d) it refers to paragraphs 1.1 to 1.4 above; and

(e) it says further as set out below.

3.1 On 18 December 2019 the Australian Skills Quality Authority (**ASQA**) decided to amend the scope of BHI's registration under the NVETR Act to take effect from 30 January 2020, later extended to 24 February 2020 (**ASQA Decision**).

### **Particulars**

The ASQA Decision is contained in a letter from ASQA to BHI dated 18 December 2019.

3.2 On 7 February 2020, BHI applied for reconsideration of the ASQA Decision.

3.3 On 26 March 2020, the Plaintiffs commenced the present proceeding.

3.4 On 30 April 2020, ASQA reconsidered and varied the ASQA Decision, decided not to

amend the scope of BHI's registration, and placed a condition on BHI's registration under the NVETR Act for the CPL Diploma with effect from 8 June 2020.

### Particulars

The reconsideration decision is contained in a letter from ASQA to BHI dated 4 May 2020.

### Soar

4. As to paragraph 4:
  - (a) Soar says that, in the Soar flight training period, it provided practical flight training to BHI's students enrolled in the CPL Diploma;
  - (b) it says further that it provided such practical flight training pursuant to the following agreements between itself and BHI:
    - (i) the Agreement to Provide Aviation Training Services dated 10 February 2016 (**Initial Agreement**);
    - (ii) the Initial Agreement as varied by a deed dated 27 July 2017 entitled "Variation No. 01 to Agreement to Provide Aviation Services" (**2017 Variation Deed**);
    - (iii) the Agreement to Provide Aviation Training Services dated 20 December 2017 (**Second Agreement**);
    - (iv) the Second Agreement as varied by a deed dated 11 May 2018 entitled "Deed of Variation of Agreement to Provide Aviation Services" (**2018 Variation Deed**);
  - (c) it shall refer at trial to the full terms and effect of the documents identified in the preceding subparagraph;
  - (d) it otherwise denies paragraph 4.
5. It denies paragraph 5, and refers to paragraph 1.4 to 1.6 above.
- 5A. As to paragraph 5A:
  - (a) it refers to and repeats paragraph 4 above;
  - (b) it denies that the substance and effect of the Initial Agreement was to provide for the joint provision of the CPL Diploma by BHI and Soar;
  - (c) rather, it says that:
    - (i) the CPL Diploma was a course provided by BHI alone, and for which

BHI was the provider registered under the NVETR Act;

- (ii) in BHI's provision of the CPL Diploma to its students, BHI engaged Soar to provide the practical flight training component on its behalf;
- (d) it otherwise denies paragraph 5A; and
- (e) it says further as set out below.

5A.1 The recitals to the Initial Agreement provided relevantly as follows:

- (A) *SAFT is a provider of aviation training services.*
- (B) *BHI is a registered training organisation that offers aviation training courses.*

5A.2 The Initial Agreement contained, among other things, the following terms (adopting the definitions used therein):

- (a) The following definitions apply in this agreement:
  - (i) **AQF** means the Australian Qualifications Framework as defined in Schedule 1 to the *Higher Education Support Act 2003* (Cth): cl. 1.1.
  - (ii) **ASQA** means the Australian Skills Quality Authority, being the body established by section 155 of the NVETR Act: cl. 1.1.
  - (iii) **Objectives** means, among other things, to allow SAFT to focus more on the aviation training/practical side of delivery.
  - (iv) **Services** means the practical flight training services to be provided by BHI and SAFT to Students under this document, including the services described in Schedule 2, being curriculum developed in line with CASA regulatory standards.
  - (v) **Student** means a BHI-enrolled student who is receiving, or is eligible to receive, educational services provided by SAFT.
  - (vi) **Student Categories** means the following categories:
    1. Domestic students - full fee-paying (Victoria and New South Wales).
    2. Domestic students - VET Fee-Help and/or government funded (Victoria and New South Wales).
    3. International students - full fee paying (Victoria and New South Wales).

- (vii) **Training Programs** means the aviation training programs, as set out in item 3 of Schedule 1, being:
1. AVI50215 – Diploma of Aviation (Commercial Pilot Licence – Aeroplane); and
  2. AVI50415 – Diploma of Aviation (Instrument Flight Operations).
- (c) BHI will engage suitably qualified SAFT instructors as casual employees of BHI for delivery of the theoretical aspects of the Training Programs: cl. 3.1(a).
- (d) SAFT undertakes to provide suitably qualified training instructors to deliver the practical aspects of the Training Programs and to perform the Services for the Term upon the terms and conditions of the Initial Agreement: cl. 3.1(b).
- (e) The relationship of BHI and SAFT under the Initial Agreement is that of principal and independent contractor: cl. 3.2.
- (f) In exercising their rights and performing their obligations under the Initial Agreement, the parties agree at all times to act in good faith: cl. 3.6.
- (g) Within 30 Business Days of the Commencement Date, the parties will develop and agree a training and assessment strategy to provide for the joint delivery of the Training Programs under this document that aligns with (i) the AQF; (ii) RTO Standards; (iii) ESOS Legislation; and (iv) CASA requirements: cl. 6.2(a).
- (h) SAFT must assist BHI with the development of the Training and Assessment Strategy, as and when requested by BHI: cl. 6.2(b).
- (i) BHI is responsible for (i) all administration services relating to the fee-help admission and enrolment of Students in the Training Programs; and (ii) collecting fees from Students and providing all other support for Students as required: cl. 7.1(b).
- (j) As part of the enrolment process for each Student, BHI must confirm the relevant Student Category of each Student, each Student's eligibility to enrol in the relevant Training Program, and each Student's eligibility to obtain Skills First funding and/or VET Student Loan funding for the relevant Training Program: cl. 7.1(c)(ii).
- (k) BHI will be responsible for managing course planning, scheduling and timetabling for all Training Programs: cl. 7.4(a).
- (l) SAFT must provide the Services during the Term in accordance with the Initial

Agreement including but not limited to the obligations set out in Schedule 4 – Responsibility Matrix: cl. 8.1(a).

- (m) SAFT must ensure that:
  - (i) it has sufficient staff to carry out the Services and to provide aviation practical training to BHI students as contemplated by cl. 8.2(b)(i); and
  - (ii) all SAFT Staff engaged to carry out the Services or provide aviation theory training to BHI under cl. 8.2(b)(i) are properly trained and qualified, at SAFT's cost.
  
- (n) Without limiting cl. 8.2(a), SAFT must:
  - (i) provide and supervise flight instructor trainers against RTO Standards and CASA requirements; and
  - (ii) coordinate the professional development and currency of all flight instructor trainers,  
(cl. 8.2(b)).
  
- (o) BHI may direct SAFT to remove from the performance of the Services or from any activity connected with the Services, any person who, in the opinion of BHI acting reasonably (i) misconducts himself or herself in providing the Services; (ii) is incompetent or negligent in providing the Services; (iii) is otherwise undesirable to perform the Services: cl. 8.2(d).
  
- (p) SAFT represents and warrants that:
  - (i) in providing the Services it will comply with all relevant laws and with all relevant industry standards;
  - (ii) in providing the Services it will comply with BHI's reasonable directions;
  - (iii) the Services will be provided to a high standard in accordance with best practice;
  - (iv) the Services will be performed by members of SAFT Staff who have appropriate qualifications and skills;
  - (v) the Services will be fit for the purpose required by BHI.  
(cl. 8.7).
  
- (q) BHI must:
  - (i) perform such obligations as are set out in the Initial Agreement,

including but not limited to those set out in Schedule 4 – Matrix of Responsibilities;

- (ii) in support of the delivery of theory training as part of the Training Programs (A) engage suitably qualified aviation trainers as are recommended by SAFT on such reasonable terms as BHI may decide, or other aviation trainers as recommended by SAFT; and (B) provide all facilities and resources which are reasonably required by those trainers to deliver the theory component of the Training Programs;
- (iii) provide other facilities and resources relevant to a particular Student Category, such as accommodation or social activities, as agreed by the parties;
- (iv) provide administration and supervision for Students, including monitoring of course progress, fee payments and PRISMS reporting, as relevant;
- (v) manage and report all funding and loan scheme administration requirements; and
- (vi) promote the availability of the Training Program in accordance with cl 11.1,  
(cl. 9).
- (r) Each party must notify the other party of any formal complaints it receives in respect of the Training Program: cl. 12(a).
- (s) BHI will have primary responsibility for managing student complaints and appeals in accordance with its usual processes: cl. 12(b).
- (t) Both parties must participate jointly in any complaints processes and hearings: cl. 12(c).
- (u) BHI must ensure that, throughout the Term, it complies with all required RTO Standards: cl. 13.1(a).
- (v) Each party must participate in validation of the Training Programs in accordance with the ASQA guidelines and the Responsibility Matrix at Schedule 4: cl. 13.2.
- (w) SAFT must indemnify BHI (and each of BHI's employees, officers and agents, for whom BHI holds the benefit of this indemnity in trust) against any loss, liability or damage whatsoever:



- (i) connected with the Services (being the practical flight training services), including any loss, liability or damage caused by SAFT or its employees, agents, contractor and students in the course of the Services;
- (ii) arising from any third party claim against BHI by any of SAFT's employees, agents, contractors or Students; or
- (iii) incurred by BHI in connection with a breach of the Initial Agreement by SAFT,

except to the extent that the loss, liability or damage arises from a negligent act or omission of BHI: cl. 16.2.

5B. As to paragraph 5B:

- (a) it refers to and repeats paragraph 4 above;
- (b) it otherwise denies the allegations.

5C. As to paragraph 5C:

- (a) it refers to and repeats paragraph 4 above;
- (b) subject to reference to the full terms and effect of the relevant documents, the Second Agreement replaced the Initial Agreement as varied by the 2017 Variation Deed;
- (c) it otherwise denies the allegations; and
- (d) it says further as set out below.

5C.1 The recitals to the Second Agreement provided relevantly as follows:

*(A) SAFT is a provider of aviation training services.*

*(B) BHI is a registered training organisation that offers aviation training courses.*

...

*(D) This Agreement establishes the terms and conditions for the provision of the Training Programs by the parties, replacing the previous agreement between the parties dated 10 February 2016.*

5C.2 The Second Agreement contained, among other things, the following terms (adopting the definitions used therein):

- (a) The following definitions apply in this agreement:
- (i) **AQF** means the Australian Qualifications Framework as defined in Schedule 1 to the *Higher Education Support Act 2003* (Cth): cl. 1.1.
  - (ii) **ASQA** means the Australian Skills Quality Authority, being the body established by section 155 of the NVETR Act: cl. 1.1.
  - (iii) **Cluster** means a group of units that have a common Census Date.
  - (iv) **Cluster Census Date** means a common Census Date for all modules within a Cluster.
  - (v) **Navigation Cluster** means the navigation Cluster of a Training Program set out in Schedule 3.
  - (vi) **Objectives** means, among other things, to allow SAFT to focus more on the aviation training/practical side of delivery.
  - (vii) **Operating Manual** means the document known as the Flight Training Programs Operating Manual created under clause 6.12 (and any revisions, amendments, updates or replacements for it), and which manual must include (inter alia):
    - 1. criteria for Training Program selection.
    - 2. student enrolment and withdrawal procedures;
    - 3. criteria for the approval of teachers for practical flight training component of the Training Programs;
    - 4. completion and award requirements for Training Program and Students;
    - 5. the circumstances under which a Student can claim a refund; and
    - 6. a flight cancellation policy.
  - (viii) **RA-Aus** means Recreational Aviation Australia Incorporated, an incorporated association that is the governing body for ultralight aircraft in Australia.
  - (ix) **Services** means the practical flight training services to be provided by SAFT to Students pursuant to this Agreement, including the services described in Schedule 2, being the practical flight training component of the Training Programs.

- (x) **Student** means a BHI-enrolled student in a Training Program who is receiving, or is eligible to receive, educational services provided by SAFT.
- (xi) **Student Categories** means the following categories:
  - 1. Domestic students - full fee-paying (Victoria and New South Wales).
  - 2. Domestic students - VET Fee-Help and/or government funded (Victoria and New South Wales).
  - 3. International students - full fee paying (Victoria and New South Wales).
- (xii) **Training Programs** means the aviation training programs, as set out in item 3 of Schedule 1, being:
  - 1. AVI50215 – Diploma of Aviation (Commercial Pilot Licence – Aeroplane);
  - 2. AVI50415 – Diploma of Aviation (Instrument Flight Operations);  
and
  - 3. AVI50516 – Diploma of Aviation (Flight Instructor).
- (b) BHI engages SAFT to provide the Services in respect of the Training Programs: cl. 2.1(a).
- (c) BHI is responsible for the delivery of the theoretical aspect of the Training Programs: cl. 2.1(b).
- (d) SAFT accepts the engagement and undertakes to provide suitably trained instructors to deliver the practical aspects of the Training Programs and to perform the Services for the Term upon the terms and conditions of this Agreement: cl. 2.1(c).
- (e) BHI must ensure that it engages sufficient instructors to deliver the theoretical modules to Students: cl. 2.1(d).
- (f) The relationship between BHI and SAFT is that of principal and independent contractor: cl. 2.3.
- (g) In exercising their rights and performing their obligations under the Second Agreement, the parties agree at all times to act in good faith: cl. 2.7.
- (h) BHI is responsible for (i) all administration services relating to the fee-help

admission and enrolment of Students in the Training Programs; and (ii) collecting fees from Students and providing all other support for Students as required: cl. 5.2(b).

- (i) As part of the enrolment process for each Student, BHI must confirm the relevant Student Category of each Student, each Student's eligibility to enrol in the relevant Training Program, and each Student's eligibility to obtain Skills First funding and/or VET Student Loan funding for the relevant Training Program: cl. 5.2(c)(iv).
- (j) SAFT acknowledges and agrees that BHI shall make the final decision whether any application for recognition of prior learning and credit transfer should be accepted or rejected: clause 5.3(b).
- (k) BHI is responsible for course planning, scheduling and timetabling for all Training Programs and setting the Census Dates: clause 5.4(a).
- (l) BHI is responsible for ensuring all Training Programs are accredited and recognized by the relevant Government authorities to permit the recruitment and enrolment of students in Training Programs: cl. 5.4(c)(iii).
- (m) SAFT must at all times ensure that it has no outstanding CASA or RA-Aus non-compliance items beyond the due dates for the required compliance or rectification: clause 6.1(a)(i).
- (n) SAFT must do all things reasonably necessary to assist BHI in its compliance with its ASQA requirements in respect of the Training Programs: clause 6.1(a)(ii).
- (o) SAFT must provide the Services during the Term in accordance with this Agreement and as approved by BHI including but not limited to:
  - (i) deliver all practical training aspects of the Training Programs;
  - (ii) deliver comprehensive pre-flight and post-flight briefings to Students;
  - (iii) provide all reasonable assistance to enable Students to pass a module, including allowing Students one opportunity to re-sit a failed practical exam or test;
  - (iv) maintain up to date Student records in accordance with ASQA and CASA requirements,  
(cl. 6.1(b)).
- (p) Notwithstanding any other provision of this Agreement, SAFT is obligated to

provide the Services for (i) the term of each Training Program (described in Schedule 3) as set out in the Operating Manual and (ii) only for the designated flying hours for each Student per Cluster as set out in Schedule 3: cl. 6.1(d).

- (q) SAFT will allow a grace period of one (1) month beyond the Cluster completion date. If a Student does not complete their flying hour allocation by end of the grace period, SAFT will have no further obligation to provide training services to the Student: cl. 6.1(d).
- (r) SAFT must comply with the obligations described as “Third Party Responsibility” set out in Schedule 5 – Responsibility Matrix: cl. 6.1(f).
- (s) SAFT must ensure that:
  - (i) it has sufficient staff to carry out the Services and to provide aviation practical training to Students as contemplated by clause 6.2(b)(i); and
  - (ii) all SAFT Staff engaged to carry out the Services are properly trained and qualified, at SAFT’s cost,  
(cl. 6.2(a)).
- (t) Without limiting clause 6.2(a), SAFT must:
  - (i) provide and supervise flight instructor trainers who meet CASA requirements; and
  - (ii) coordinate the professional development and currency of all flight instructor trainers,  
(cl. 6.2(b)).
- (u) BHI may direct SAFT to remove from the performance of the Services or from any activity connected with the Services, any person who, in the opinion of BHI acting reasonably (i) misconducts himself or herself in providing the Services; (ii) is incompetent or negligent in providing the Services; (iii) is otherwise undesirable to perform the Services: cl. 6.2(e).
- (v) SAFT represents and warrants that:
  - (i) in providing the Services under this Agreement it will comply with all relevant laws and with all relevant industry standards;
  - (ii) in providing the Services it will comply with BHI’s reasonable directions;
  - (iii) the Services will be provided to a high standard in accordance with best

practice;

- (iv) the Services will be performed by SAFT Staff who have appropriate qualifications and skills;
- (v) the Services will be fit for the purpose required by BHI.

(cl. 6.7).

- (w) SAFT will develop the Operating Manual with input from BHI within 12 months of the Commencement Date and, unless and until varied as agreed by the parties, the Operating Manual will include those items set out in Schedule 7: cl. 6.12(e).

- (x) SAFT and BHI must comply with the Operating Manual in relation to:

- (i) the provision and receipt of the Services;
- (ii) the administration of students enrolled in a Training Program; and
- (iii) provision of the Training Program.

(cl. 6.12).

- (y) BHI must:

- (i) perform such obligations as are set out in this Agreement, including but not limited to, those described as "RTO Responsibility" in Schedule 5 – Matrix of Responsibilities;
- (ii) in the delivery of theory component of the Training Programs (A) engage suitably qualified aviation trainers on such reasonable terms as BHI may decide and (B) provide all necessary facilities, materials and resources which are required by those trainers to deliver the theory component of the Training Programs and for the proper performance of BHI's obligations under this Agreement;
- (iii) prepare all teaching materials, examinations and assessments required for the theory component of the Training Programs;
- (iv) use its best endeavours to provide sufficient access to Federal Government income contingent loans to provide for the Minimum Number of Students. Notwithstanding that there may be insufficient access to Federal Government income contingent loans to provide for the Minimum Number of Students, the balance of BHI's obligations continue and this clause 7.1(d) does not give rise to a right to

- terminate under this Agreement;
- (v) maintain the Training Programs on scope;
- (vi) manage and report all funding and loan scheme administration requirements;
- (vii) maintain its compliance with all ASQA requirements;
- (viii) promote the availability of the Training Programs in accordance with clause 9;
- (ix) notify SAFT within three (3) Business Days where a Student has deferred or withdrawn from any part of a course; and
- (x) provide SAFT with a list of Students currently enrolled in a Training Program by module on a monthly basis,  
(cl. 7.1)
- (z) BHI represents and warrants, inter alia, that:
  - (i) in performing its obligations under this Agreement it will comply with all relevant laws and with all relevant industry standards: cl. 7.2(a);
  - (ii) BHI's obligations under this Agreement will be performed by BHI staff who have appropriate qualifications and skills: cl. 7.2(b).
- (aa) Each party must immediately notify the other party in writing of any complaint it receives in respect of the Training program or delivery thereof: cl. 10.1(a).
- (bb) BHI will have primary responsibility for managing complaints and appeals in accordance with its student complaints resolution policy and procedures: cl. 10.1(b).
- (cc) Both parties must participate jointly in any complaints processes and hearings: cl. 10.1(c).
- (dd) SAFT must obtain BHI approval in writing prior to taking any action in relation to a complaint or suspending any Student from flying. SAFT must provide details / grounds to justify the action or suspension requested: cl 10.1(d).
- (ee) BHI must ensure that, throughout the Term, it complies with all required RTO standards and requirements: cl. 11.1.
- (ff) Each party must participate in validation of the Training Programs in accordance with the ASQA guidelines and the Responsibility Matrix at Schedule 5: cl. 11.2.

- (gg) SAFT acknowledges and agrees that BHI is responsible for determining the Course Price: cl. 12.7(a).
- (hh) SAFT must indemnify BHI (and each of BHI's employees, officers and agents, for whom BHI holds the benefit of this indemnity in trust) against any loss, liability or damage whatsoever:
  - (i) connected with the Services (being the practical flight training component of the Training Programs), including any loss, liability or damage caused by SAFT or SAFT Staff in the provision of the Services;
  - (ii) arising from any third party claim against BHI by any of SAFT's Staff; or
  - (iii) incurred by BHI in connection with a breach of this Agreement by SAFT, except to the extent that the loss, liability or damage arises from a negligent act or omission or wilful misconduct of BHI or its employees, agents and contractors: cl. 14.1.
- (ii) SAFT releases BHI from any liability whatsoever, however arising, in relation to the provision of the Services under this Agreement except to the extent that the loss, liability or damage arises from a negligent act or omission or wilful misconduct of BHI or its employees, agents and contractors: cl. 14.3.<sup>1</sup>
- (jj) SAFT's total aggregate liability arising under or in connection with this Agreement is limited to \$20 million: cl. 14.4.
- (kk) Schedule 4 stated SAFT's Key Performance Indicators (**KPIs**) for both safety compliance and Licence Pass Rates.

5D. As to paragraph 5D:

- (a) it refers to and repeats paragraph 4 above;
- (b) it otherwise admits the allegations.

5D.1 The 2018 Variation Deed amended the Agreement, inter alia, by inserting the following terms into the Second Agreement (adopting the definitions used therein):

- (a) BHI acknowledges that Students enrolled in a Training Program will be required to comply with SAFT's code of conduct (**SAFT Code of Conduct**): cl. 5.6(a).
- (b) Notwithstanding any other provision of the Second Agreement, if at any time SAFT reasonably believes that a Student is a safety risk or has repeatedly or

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<sup>1</sup> This cl. 14.3 was subsequently amended by the Second Variation, dealt with below.



in serious breach of the SAFT Code of Conduct (sic), BHI acknowledges and agrees that SAFT may (at its discretion) suspend the Student from flying: cl. 5.6(c).

- (c) SAFT will, within 14 days of the end of each Eligible Period (every 6 months), prepare and submit a report to BHI which sets out: (i) the number of hours flown in that Eligible Period; (ii) the number of Incidents (if any) that occurred in that Eligible Period; (iii) the number of Students undertaking licence tests; (iv) the number of Students successfully passing the licence test and obtaining a licence; (v) SAFT's assessment of KPI 1 and KPI 2 for the Eligible Period determined in accordance with Schedule 4: cl 6.13.
- (d) SAFT releases BHI from any liability whatsoever, however arising, in relation to the provision of the Services under this Agreement except to the extent that the loss, liability or damage arises from a negligent act or omission or wilful misconduct of BHI or its employees, agents and contractors, provided however that the foregoing general release shall not apply to this Agreement, or the transactions contemplated hereby, and shall not affect each Party's right to enforce this Agreement or any other agreement contemplated hereby in accordance with its terms: cl. 14.3 (replacing the previous cl. 14.3).
- (e) The Second Variation amended SAFT's table of KPIs as set out in Schedule 4 of the Second Agreement.

5E. As to paragraph 5E:

- (a) it refers to and repeats paragraphs 1 and 4 to 5D above;
- (b) it says further that:
  - (i) in the Soar flight training period, BHI provided to its students enrolled in the CPL Diploma both the theory component and the practical flight training component of that course;
  - (ii) it provided the practical flight training component through Soar, in Soar's capacity as a Part 141 flight training operator (or equivalent under its earlier AOC), and subject to the terms and conditions of the agreements as identified in paragraph 4 above; and
- (c) otherwise it denies the allegations.

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

6. As to paragraph 6:

- (a) it shall refer at trial to the full terms and effect of the Regulations, including reg. 61.475; and
  - (b) otherwise it admits the allegations.
- 7. As to paragraph 7:
  - (a) it shall refer at trial to the full terms and effect of the Regulations, including reg. 61.515; and
  - (b) otherwise it admits the allegations.
- 8. As to paragraph 8:
  - (a) it shall refer at trial to the full terms and effect of the Regulations, including reg. 61.580; and
  - (b) otherwise it admits the allegations.
- 9. As to paragraph 9:
  - (a) it shall refer at trial to the full terms and effect of the Part 61 Manual of Standards as made and amended during the Soar flight training period (**Part 61 MOS**), including the practical flight standards identified in Schedule 2;
  - (b) otherwise it admits the allegations.
- 10. As to paragraph 10:
  - (a) it admits the allegations; and
  - (b) says further that r 61.195 relevantly provided that the requirement for an applicant for a licence to have completed flight training for the licence will be met if:
    - (i) the applicant has received training in all of the units of competency mentioned in the Part 61 MOS for the licence in question;
    - (ii) the training is conducted by an instructor for a Part 141 operator that is authorised to conduct flight training for the licence in question;
    - (iii) the applicant has been assessed as competent in each unit of competency by the instructor or approval holder; and
    - (iv) the applicant's training provider has given the applicant a course completion certificate indicating that the requirements above have been met.
- 11. As to paragraph 11:

- (a) it shall refer at trial to the full terms and effect of the Regulations;
- (b) otherwise it admits the allegations.

12. It does not plead to paragraph 12, because there are no allegations against it.

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

13. As to paragraph 13:

- (a) it shall refer at trial to the full terms and effect of each applicable agreement between Soar and BHI, including cll 7.1(b), 7.1(c)(ii) and 9 of the Initial Agreement (as pleaded in paragraph 5A.2 above) and cll 5.2(b), 5.2(c)(iv), 7.1 and 12.7(a) of the Second Agreement (as pleaded in paragraph 5C.2 above); and
- (b) otherwise it does not admit paragraph 13, because it does not know the truth of the allegations.

## **B STUDENT CONTRACTS**

### **Terms**

14. As to paragraph 14:

- (a) it refers to and repeats paragraphs 4 to 5E above;
- (b) subject to reference to the full terms and effect of each relevant contract, it otherwise admits the allegations; and
- (c) it says further as set out below.

14.1 By completing BHI's Enrolment Form (as amended from time to time), the Plaintiffs and Group Members agreed:

- (a) that they understood that their enrolment in the CPL Diploma may be subsidised by the Victorian and Commonwealth Governments under the Skills First Program, and how enrolling in the CPL Diploma will affect their future training options and eligibility for further government subsidised training under the Skills First Program;
- (b) that the information provided on the Enrolment Form was true and correct;
- (c) to abide by the policies, procedures, regulations, Student Code of Conduct and General Conditions of Enrolment of BHI, available to be viewed at [www.boxhill.edu.au](http://www.boxhill.edu.au).

14.2 It was a further term of the Contracts that the fees for the CPL Diploma were payable

by the students to BHI in three instalments, in each case payable before the census date for each of Cluster One, Cluster Two and Cluster Three.

15. As to paragraph 15:

- (a) it refers to and repeats paragraphs 14 to 14.2 above;
- (b) it otherwise denies the allegations; and
- (c) it says further as set out below.

15.1 Whether any student could successfully complete each unit in the CPL Diploma or meet the CASA CPL Requirements was dependent on each individual student's performance.

15.2 By its nature as a course of study there was no guarantee that all students (or any individual student) would pass each unit in the CPL Diploma, or would successfully obtain a CPL on application to CASA.

15.3 Only CASA was empowered to grant a CPL, on application, to any of the students of BHI whom had satisfied the CASA CPL Requirements.

15.4 It was rationally open to the students enrolling in the CPL Diploma to either:

- (a) pursue it to completion and to obtain both the CPL Diploma and the CPL licence; or
- (b) exit after the completion of Cluster One or Cluster Two, thereby using the training they had received in order to obtain an intermediate licence as referred to in paragraph 1.5 above.

## **Breach**

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

16. As to paragraph 16:

- (a) it refers to and repeats paragraphs 4 to 5 above; and
- (b) it denies the allegations, and reserves the right to plead further to this paragraph once the Plaintiffs have exposed the material facts on which they rely and provided adequate particulars.

16.1 In further answer to paragraph 16, BHI's written course materials were consistent with the following aeronautical knowledge standards contained within Part 61 MOS:

- (a) Cluster One: BAKC (Basic aeronautical knowledge); RFRC (RPL Flight rules and air law); RMTc (RPL Meteorology); PHFC (PPL Human factors); RBKA

(Basic aeronautical knowledge – aeroplane), prescribed in Appendix G1: Aeroplane category rating (RPL);

- (b) Cluster Two: PHFC (PPL Human factors); PAKC (PPL Aeronautical knowledge); PFRC (PPL Flight rules and air law); PNVC (PPL Navigation); PMTC (PPL Meteorology); POPC (PPL Ops, performance and planning); PAKA (PPL Aeronautical knowledge – aeroplane); PFRA (PPL Flight rules and air law – aeroplane); POPA (PPL Ops, performance and planning – aeroplane), prescribed in Appendix H1: Aeroplane category rating (PPL); and
- (c) Cluster Three: CAKC (CPL Aeronautical knowledge); CADC (CPL Aerodynamics); CFRC (CPL Flight rules and air law); CHFC (CPL Human factors); CNVC (CPL Navigation); CMTC (CPL Meteorology); COPC (CPL Ops, performance and planning); CAKA (CPL Aeronautical knowledge – aeroplane); CADA (CPL Aerodynamics – aeroplane); CFRA (CPL Flight Rules and air law – aeroplane); COPA (CPL Ops, performance and planning – aeroplane), prescribed in Appendix I1: Aeroplane category rating (CPL).

17. As to paragraph 17:

- (a) it refers to and repeats paragraphs 4 to 5 above; and
- (b) it denies the allegations, and reserves the right to plead further to this paragraph once the Plaintiffs have exposed the material facts on which they rely and provided adequate particulars.

17.1 In further answer to paragraph 17, BHI's written examinations were consistent with the relevant aeronautical knowledge standards referred to in paragraph 16.1 above.

18. As to paragraph 18:

- (a) it refers to and repeats paragraphs 4 to 5 above; and
- (b) it denies the allegations, and reserves the right to plead further to this paragraph once the Plaintiffs have exposed the material facts on which they rely and provided adequate particulars.

#### *Aeronautical knowledge – the RPC Short-Cut*

19. As to paragraph 19:

- (a) it admits that the Plaintiffs and Group Members were required to become members of RA-Aus, in order to obtain the benefits of RA-Aus insurance, among other reasons;
- (b) the only licence that is offered or required as part of the CPL Diploma is the

CASA CPL;

- (c) there is no requirement to obtain either an RPL or a PPL, or any other intermediate licence, whether as a precondition to obtaining a CPL or as a requirement of the CPL Diploma;
- (d) it admits that students are encouraged, for the benefit of their own experience, to obtain the RPC and the cross-country endorsement referred to in paragraph 1.5 above;
- (e) it otherwise denies the allegations.

20. It denies paragraph 20, and says further that:

- (a) it refers to paragraphs 16 and 16.1 above;
- (b) the aeronautical knowledge standards required for the CASA RPL are set out in Schedule 1, Appendix G1 of the Part 61 MOS, and taught in Cluster One of the CPL Diploma;
- (c) the aeronautical knowledge standards required for the CASA PPL are set out in Schedule 1, Appendix H1 of the Part 61 MOS, and taught in Clusters One and Two of the CPL Diploma.

21. It denies paragraph 21 and refers to paragraph 20 above.

*Flight training – instructors, aeroplanes, monitoring systems*

22. As to paragraph 22:

- (a) it refers to and repeats paragraphs 1.4 to 1.6 and 4 to 5 above;
- (b) it denies paragraph 22(a), and say further that all of Soar's flight training instructors were required by Soar to hold a flight instructor rating under Part 61 of the Regulations;
- (c) it denies paragraph 22(b), and says further that:
  - (i) although Soar provided continuity of instructors where possible, there was no requirement that it do so;
  - (ii) any guarantee of continuity was impracticable, in light of constraints on scheduling, including the weather and the students' work and other commitments;
  - (iii) rather, consistency and continuity of instruction was achieved by, among other things, Soar's recording of detailed instructor feedback in relation to each practical flight lesson, and the use of detailed patter

notes to ensure consistency of instruction method;

- (d) generally, it says further as set out below; and
- (e) it reserves the right to plead further to this paragraph once the Plaintiffs have exposed the material facts on which they rely and provided adequate particulars.

22.1 In the period prior to 6 August 2020:

- (a) 82 Group Members successfully applied to CASA and each one was granted a CPL by CASA in accordance with r 61.195(2) and r 61.580 of the Regulations, on the basis that:
  - (i) he or she had passed the aeronautical knowledge examination for the CPL;
  - (ii) he or she had received practical flight training in all of the units of competency required by Appendix I1 of the MOS for the CPL – Aeroplane;
  - (iii) his or her flight training was conducted by a Part 141 operator;
  - (iv) he or she had been assessed as competent in each of the practical flight standards as set out in Appendix I1 of the MOS;
  - (v) he or she had passed the flight test for the CPL Aeroplane prescribed in Section I, Appendix I.1 of Schedule 5 of the MOS; and
  - (vi) he or she had met the aeronautical experience requirements prescribed by r 61.610 of the Regulations, which included:
    - 1. at least 190 hours of flight time as a pilot;
    - 2. at least 100 hours of flight time as pilot in command of an aeroplane;
    - 3. at least 20 hours of cross-country flight time as pilot in command of an aeroplane;
    - 4. at least 10 hours of instrument time; and
    - 5. at least 5 hours of instrument flight time in an aeroplane;
- (b) 313 students withdrew in Cluster One;
- (c) 65 students withdrew in Cluster Two;
- (d) 24 students withdrew in Cluster Three;

- (e) there are 263 students whose training with Soar is ongoing;
- 22.2 At all times during the period of the Second Agreement, Soar met or exceeded its licence pass rate KPIs pursuant to Schedule 4 of the Second Agreement, such that:
- (a) in the period approximately January to June 2018, 100 out of 103 students (97%) undertaking any of the available licence tests (including the RPC, cross country endorsement and the CPL itself) passed within 2 attempts;
  - (b) in the period approximately July to December 2018, 74 out of 80 students (92%) undertaking any of the applicable licence tests passed within 2 attempts;
  - (c) in the period approximately January to June 2019, 107 out of 123 students (86%) undertaking any of the applicable licence tests passed within 2 attempts; and
  - (d) in the period approximately July to December 2019, 46 out of 56 students (86%) undertaking any of the applicable licence tests passed within 2 attempts.
23. It denies paragraph 23, and says further that:
- (a) it refers to and repeats paragraphs 1.4 to 1.6 and 4 above; and
  - (b) it reserves the right to plead further to this paragraph once the Plaintiffs have exposed the material facts on which they rely and provided adequate particulars.
24. It denies paragraph 24, and refers to paragraphs 22 to 23 above.
25. It denies paragraph 25, and says further that:
- (a) Soar's fleet of aeroplanes varied in number across the relevant period, but was comprised of a mixture of the following:
    - (i) Bristell two-seater light sports aircraft;
    - (ii) Tecnam P2006T four-seater light aircraft;
    - (iii) Tecnam P2008 two-seater light aircraft;
    - (iv) Aeroprakt Foxbat A22LS two-seater light aircraft;
    - (v) Aeroprakt Vixxen A32 two-seater light aircraft; and
    - (vi) Aquila A210 two-seater light aircraft.
  - (b) Soar actively modelled and monitored its fleet of aeroplanes and the usage



demands of its students, and acquired more aeroplanes where necessary to ensure it had adequate resources; and

- (c) to the extent that students had preferences between individual aeroplanes, or for one type of aeroplane over another, there was no obligation to accommodate those preferences;
- (d) the only aspect of the training that required a particular type of aeroplane was the CPL Flight Test, which could only be taken in the Bristell, Aquila A210 and the Tecnam P2006T;
- (e) it refers to paragraph 22 above; and
- (f) it reserves the right to plead further to this paragraph once the Plaintiffs have exposed the material facts on which they rely and provided adequate particulars.

26. It denies paragraph 26, and says further that:

- (a) Soar's consistent practice was:
  - (i) for each of the students to be given a pre-flight briefing and post-flight debrief by their instructor, the latter being given both verbally and in writing; and
  - (ii) for the receipt of that feedback to be confirmed by the student entering a unique digital PIN; and
  - (iii) for the written feedback to be made available to both students and instructors as a Lesson Entry Report on the electronic Flight School Manager platform;

#### **Particulars**

For the period September 2018 onwards, this practice was recorded in Soar's Part 141 Operations Manual, at Part 3B2.2

- (b) for each of the three clusters, the practical flight training component was divided between lessons devoted to learning new competencies, and lessons devoted to remedial learning and skill consolidation;
- (c) from January 2018 onwards, pursuant to cl 6.1(c) of the Second Agreement, Soar held progress meetings with each student after their completion of their initial 20 hours of dual flying in Cluster One, including an assessment of their prospect of successfully completing the CPL Diploma, and provided reports of those meetings to both the student and to BHI; and

- (d) from about June 2018 onwards, pursuant to cl 6.13 of the Second Agreement, Soar provided BHI with reports specifying the total flying hours and status of training for each BHI student.

### *Conclusions*

27. As to paragraph 27:

- (a) it refers to paragraphs 1.4 to 1.6, 4 to 5, 15.4 and 22 above;
- (b) it denies the allegations, and reserves the right to plead further to this paragraph once the Plaintiffs have exposed the material facts on which they rely and provided adequate particulars; and
- (c) it says further as set out below.

27.1 The rate at which students complete the CPL Diploma (as differentiated from other vocational courses of study), or do so in a timely fashion, is influenced by, among other things:

- (a) the fact that the majority of students are enrolled part-time over 2 years, and frequently have other commitments or existing full-time employment;
- (b) the fact that students may find that they do not like flying, or are unsuited to flying, or unsuited to flying in a professional or commercial capacity;
- (c) the fact that students may elect to exit the CPL Diploma after they are eligible to obtain an intermediate licence (ie an RPC or RPL after finishing Cluster One), and without completing the course in its entirety or obtaining their CPL, or paying further fees to do so.

27.2 In light of the matters referred to in paragraph 27.1 above, the completion rates for the CPL Diploma, and each of its constituent Clusters, is within the ordinary and expected range for providers of flight training.

27.3 The main object of the *Civil Aviation Act 1988* (Cth), under which the CPL may be granted by CASA, is to establish a regulatory framework for maintaining, enhancing and promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents.

### **Particulars**

#### *Civil Aviation Act 1988* (Cth), s 3A

27.4 The aeronautical experience requirements for the issue of a CPL are legislated minimums, prescribed by r 61.610 of the Regulations, and there is no guarantee that

a student pilot will or ought to have achieved the necessary competencies on completion of the minimum number of hours.

### **Particulars**

The aeronautical experience requirements are set out in paragraph 22.1(a)(vi) above.

- 27.5 The issue of a CPL (Aeroplane) by CASA is also made subject to the student's achievement of a high pass standard for each of the aeronautical knowledge examinations prescribed in Appendix I.2 of Schedule 4 of the MOS, comprising:
- (a) 70% for each of the units CNAV (CPL Navigation), CMET (CPL Meteorology), CHUF (CPL Human factors), CADA (CPL Aerodynamics – aeroplane), CSYA (CPL – Aircraft General Knowledge); CFPA (CPL – Operation, performance and planning – aeroplane); and
  - (b) 80% for unit CLWA (CPL – Flight rules and air law).
28. It denies paragraph 28.

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

29. As to paragraph 29, it:
- (a) does not admit that the plaintiffs and group members were consumers within the meaning of section 3(3) of the Australian Consumer Law;
  - (b) denies that BHI provided the CPL Diploma in trade or commerce; and
  - (c) otherwise denies the allegations.

### **Statutory Guarantees**

30. It denies paragraph 30.
31. It denies paragraph 31, and says further that:
- (a) it refers to paragraph 15.4 above;
  - (b) it is a rationally available option, and does not result in a loss or disadvantage, if a student were to discontinue their studies on completion of Cluster One or Cluster Two and obtaining an intermediate licence, without completing the CPL or the CPL Diploma in its entirety; and
  - (c) it is not a given that each of the Group Members intended to complete each of the three clusters, the CPL and the CPL Diploma, or would suffer any loss as a result of not doing so.

32. It denies paragraph 32, and refers to paragraph 31 above.
33. It denies paragraph 33, and refers to paragraphs 16 to 27 above.

## **D NEGLIGENCE**

### **Duty**

34. As to paragraph 34:
- (a) it shall refer at trial to the full terms and effect of the ETR Act, including any relevant amendments;
  - (b) it otherwise admits the allegations.
35. As to paragraph 35:
- (a) it shall refer at trial to the full terms and effect of the ETR Act, including any relevant amendments;
  - (b) it otherwise admits the allegations
36. As to paragraph 36:
- (a) it shall refer at trial to the full terms and effect of the ETR Act, including any relevant amendments;
  - (b) it otherwise admits the allegations.
37. As to paragraph 37:
- (a) it shall refer at trial to the full terms and effect of the ETR Act, including any relevant amendments;
  - (b) it otherwise admits the allegations.
38. As to paragraph 38:
- (a) it shall refer at trial to the full terms and effect of the RTO Standards and the NVETR Act, including any relevant amendments; and
  - (b) it otherwise admits the allegations.
39. It does not plead to paragraph 39, because it does not contain any allegations against it.
40. It denies paragraph 40, and says further that:
- (a) if they wished to transfer to a different provider, then by reason of cl 3.5 of the RTO Standards, students were entitled to have any of their units they had completed in the CPL Diploma recognised for that purpose;

- (b) in respect of the practical flight training provided by Soar, in the event that the students switched to a different flight training operator, Soar was obliged to provide the new flight training operator with copies of their flight records, for the purposes of recognising their progress, pursuant to r 141.280 of the Regulations;
  - (c) further to paragraph 1.3 and 15.4 above, because the fees for the CPL Diploma were payable in instalments for each of the three clusters, students were entitled, without incurring further fees:
    - (i) to exit their studies at the completion of Cluster One, with the option of an RPC from RA-Aus, which could in turn be converted into a CASA RPL; or
    - (ii) to exit their studies at the completion of Cluster Two, with the option of an RPC and a cross-country endorsement, that could be converted into a CASA RPL with a navigation endorsement.
41. As to paragraph 41:
- (a) in respect of the Plaintiffs, it does not admit the allegations, because it does not know the truth of them;
  - (b) in respect of the Group Members as a whole, it denies the allegations.
42. It denies paragraph 42, and says further that:
- (a) the students themselves were responsible for:
    - (i) the degree of time and effort they devoted to the CPL Diploma;
    - (ii) whether they also worked full-time, and the extent of their other commitments;
    - (iii) whether they pursued the CPL Diploma to completion, or withdrew at an intermediate stage;
  - (b) as an RTO, BHI was required to only issue AQF certification to students in the CPL Diploma where it had assessed them as meeting the requirements of that course as accredited by ASQA (cl 3.1, RTO Standards); and
  - (c) the CPL to be obtained in the course of the CPL Diploma could only be issued by CASA, under r 61.150(1) of the Regulations.
43. It denies paragraph 43.
44. It denies paragraph 44, and says further that:

- (a) the risk that a student would fail to successfully complete either the CPL Diploma or a CPL Licence Test, or any intermediate licence test, through no fault of the providers, is an inherent risk that cannot be avoided by the exercise of reasonable care, and for which neither BHI nor Soar can be held liable, pursuant to s 55 of the *Wrongs Act 1958* (Vic);
- (b) the duty alleged is a duty to avoid pure economic loss to students;
- (c) in relation to BHI's liability, it relies upon Part XII (Liability of public authorities) of the *Wrongs Act 1958* (Vic); and
- (d) in relation to BHI, it relies upon, among other things, the statutory scheme created by the ETR Act together with the NVETR Act, the *Higher Education Support Act 2003* (Cth) and the *VET Student Loans Act 2006* (Cth).

### **Breach**

- 45. It denies paragraph 45, and refers to the matters pleaded at paragraphs 16 to 27 above.
- 46. It denies paragraph 46, and refers to the matters pleaded at paragraphs 16 to 27 above.
- 47. It denies paragraph 47, and says further that:
  - (a) the theory component of the CPL Diploma was provided by BHI, and not by Soar;
  - (b) it refers to paragraphs 16 to 27 above;
  - (c) in relation to completions of the CPL and licence test pass rates, it refers to paragraphs 22.2 and 27 above;
  - (d) it reserves the right to plead further to this paragraph once the Plaintiffs have exposed the material facts on which they rely and provided adequate particulars.
- 48. It denies paragraph 48.

### **E UNCONSCIONABILITY**

- 49. As to paragraph 49, it:
  - (a) admits that the CPL Diploma was divided into three clusters; and
  - (b) otherwise denies the allegations.
- 50. It does not admit paragraph 50, because it does not know the truth of the allegations

therein.

51. It does not admit paragraph 51, because it does not know the truth of the allegations therein.

52. It does not admit paragraph 52, because it does not know the truth of the allegations therein.

53. It denies paragraph 53.

54. It denies paragraph 54.

## **F MISLEADING OR DECEPTIVE CONDUCT**

55. It denies paragraph 55.

56. It refers to its denial of paragraph 55, and therefore denies paragraph 56.

57. It denies paragraph 57, and says further that to the extent that any of the alleged Misleading or Deceptive Representations was a representation as to future matters, there were reasonable grounds for BHI to make them.

58. It denies paragraph 58.

## **G LOSS AND DAMAGE**

59. As to paragraph 59:

- (a) it denies the allegations, and reserves the right to plead further to this paragraph once the Plaintiffs have exposed the material facts on which they rely and provided adequate particulars;
- (b) it refers further to paragraphs 40 to 44 above; and
- (c) it says further as set out below.

59.1 Any failure by the plaintiffs and/or Group Members, to successfully complete the CPL Diploma (or to do so within the expected time frame and at the expected cost), to meet the CASA CPL Requirements (or to do so within the expected time frame and for the expected cost) or to achieve any subsequent employment or income, was not the result of any deficiency in the CPL Diploma itself.

59.2 The Plaintiffs and the Group Members have obtained valuable and contracted-for benefits from their enrolment and study in the CPL Diploma, to the extent they have:

- (a) received tuition and practical flight training lessons;
- (b) completed any units of study for the purposes of the NVETR Act;
- (c) accumulated any flying hours, for the purposes of their licence eligibility;

- (d) obtained, or became eligible to obtain, any of the intermediate CASA or RA-Aus licences as referred to in paragraph 1.5 above.

59.3 To the extent that any of the Plaintiffs or Group Members has elected to withdraw from the CPL Diploma at an intermediate stage, without completing it, that person has not suffered any loss as a result of any actions by BHI or Soar.

60. It denies paragraph 60.

#### **GA PROPORTIONATE LIABILITY**

60A. In respect of paragraph 60A, it denies that either it or BHI has incurred any liability to the Plaintiffs and Group Members.

#### **Alleged breach of consumer guarantees by Soar**

60B. It denies paragraph 60B, and says further that:

- (a) as between it and the Plaintiffs or Group Members, it was not acting in trade or commerce for the purposes of the *Australian Consumer Law*;
- (b) as between it and the Plaintiffs or Group Members, it was not a supplier of services for the purposes of the *Australian Consumer Law*;
- (c) rather, its delivery of the practical flight training lessons was a service which was contracted for, and provided to, BHI.

60C. It denies paragraph 60C and refers to paragraph 60B above.

60D. It denies paragraph 60D, and refers to paragraph 31 above.

60E. It denies paragraph 60E, and refers to paragraph 60B and 60D above.

60F. It denies paragraph 60F, and refers to paragraphs 5 and 22 above.

60G. It denies paragraph 60G, and refers to paragraphs 5 and 23 above.

60H. It denies paragraph 60H, and refers to paragraphs 5 and 25 above.

60I. It denies paragraph 60I, and refers to paragraphs 5 and 26 above.

60J. It denies paragraph 60J, and refers to paragraphs 27, 59 to 59.6, 60B, 60C and 60E above.

#### **Alleged negligence by Soar**

60K. It admits paragraph 60K, but says further that:

- (a) the fact that Soar is and was (independently of BHI) an RTO under the NVETR Act is irrelevant to the existence or scope of any duties owed to BHI's



students in the course of Soar's provision of flight training services as a third party provider, because the regulatory regime under the NVETR Act did not require that any third party provider engaged by BHI for that purpose be an RTO:

- (i) during any of the Relevant Period whatsoever; or
- (ii) alternatively, during the Relevant Period prior to 1 November 2019;

#### **Particulars**

*ASQA issued General Direction – third party arrangements for training and/or assessment of VET courses on 9 August 2019, commencing for existing third party arrangements on 1 November 2019, pursuant to s 28(1) of the NVETR Act.*

- (b) the fact that Soar is and was (independently of BHI) an RTO under the NVETR Act is irrelevant to the existence or scope of any duties owed to BHI's students in the course of Soar's provision of flight training services as a Part 141 flight training operator; and
- (c) it will refer to and rely on its statutory obligations under the Regulations for their full terms and effect.

60L. As to paragraph 60L:

- (a) it admits that the RTO Standards apply to it when acting in its own capacity as an independent RTO, in respect of its registered courses and students; and
- (b) it denies that the RTO Standards applied to it in the capacity of a third-party service provider to BHI, in respect of BHI's registered courses (including the CPL Diploma) and students (including the Plaintiffs and Group Members);
- (a) it will refer to and rely on its statutory obligations under the Regulations for their full terms and effect; and
- (c) it otherwise denies the allegations.

60M. It denies paragraph 60M, and refers to paragraphs 4 to 5E above.

60N. It denies paragraph 60N, and refers to paragraphs 4 to 5E and paragraph 40 above.

60O. It denies paragraph 60O, and says further that its delivery of the practical flight training was in accordance with:

- (a) the terms of the Initial Agreement and the Second Agreement between it and

BHI; and

- (b) its obligations under Part 141 of the Regulations as a Part 141 flight training operator.

60P. As to paragraph 60P, it:

- (a) admits as a general proposition that there were aspects of its provision of practical flight training where, if it did not take reasonable care in providing that training, the Plaintiffs and Group Members might suffer loss and damage; and
- (b) otherwise denies paragraph 60P.

60Q. It denies paragraph 60S.

60R. It denies paragraph 60R.

60S. It denies paragraph 60S.

60T. It denies paragraph 60T, and refers to paragraph 59 above.

#### **Alleged misleading or deceptive conduct by Soar**

60U. It denies paragraph 60U, and says further that:

- (a) it refers to paragraphs 14 to 15, 60B and 55 to 58 above; and
- (b) if it is established that it made any of the alleged Misleading or Deceptive Representations (which is expressly denied), then:
  - (i) it had reasonable grounds to do so; and
  - (ii) it did so in good faith and in reliance on information provided by BHI.

60V. It denies paragraph 60V, and refers to paragraph 59 above.

#### **Conclusion as to proportionate liability**

60W. As to paragraph 60W, it:

- (a) admits the application of s 24AH of the *Wrongs Act 1958* (Vic) (**Wrongs Act**) to the claims alleged (but maintains its denial of those claims as pleaded above); and
- (b) otherwise denies the allegations.

60X. As to paragraph 60X, it:

- (a) refers to paragraph 60W above;
- (b) otherwise denies the allegations; and

- (c) if any liability is established against Soar (while maintaining its denials above), it refers to paragraph 65 below.

## **H COMMON QUESTIONS**

61. As to paragraph 61 (and each and every subparagraph thereto), it denies that the questions are common to each of the Plaintiffs and the Group Members, and says further that:
- (a) the Group Members commencing during the Relevant Period comprised 43 distinct cohorts of students for the CPL Diploma;
  - (b) over the course of the Relevant Period, there were changes in:
    - (i) the number and identity of the relevant staff and instructors;
    - (ii) the contractual arrangements between the students and BHI;
    - (iii) the contractual arrangements between BHI and Soar;
    - (iv) the number and composition of Soar's fleet of aeroplanes; and
    - (v) various other operational matters;
  - (c) there is no consistent and common set of facts that will apply from one course intake to another, or across the Relevant Period more generally;
  - (d) the questions in paragraphs 61(b), (c), (j), (ja), (k), (ka), (n), (o) and (p) of the ASOC are questions that are individual to each student;
  - (e) as to the question in paragraph 61(c) of the ASOC, the assumption is disputed; and
  - (f) it otherwise denies the allegations.

## **I PROPORTIONATE LIABILITY DEFENCE**

62. If (which is denied), Soar is liable to some or all of the Plaintiffs or Group Members, then the claims of the Plaintiffs and Group Members in this proceeding are apportionable claims within the meaning of s 24AF of the *Wrongs Act*.
63. By reason of the matters pleaded in the SOC against BHI, if those claims are proved against BHI, then BHI is a concurrent wrongdoer within the meaning of s 24AH of the *Wrongs Act*.
64. In the premises, and pursuant to s 24AI of the *Wrongs Act*:
- (a) Soar is not liable for any more than the amount reflecting that proportion of the loss or damage claimed by the Plaintiffs and Group Members that the

Court considers just having regard to the extent of Soar's responsibility for the loss or damage; and

(b) judgment must not be given against Soar for more than that amount.

65. In respect of the apportionment of liability between BHI and Soar (while maintaining its denials of liability above), Soar will rely on the following matters:

(a) the fact that BHI, and not Soar, is the registered provider of the CPL Diploma in accordance with the legislative regime that is established by the NVETR Act;

(b) the fact that the plaintiffs and the Group Members have contracted for the provision of the CPL Diploma with BHI, and not with Soar;

(c) the terms of the Initial Agreement and the Second Agreement between BHI and Soar; and

(d) its pleadings in respect of BHI's third party statement of claim, and its own counterclaim.

#### **J CONTRIBUTORY NEGLIGENCE DEFENCE**

66. In respect of the Plaintiffs' claims for breach of the Contract, breach of the Due Care and Skill Guarantee, and in negligence (which are expressly denied), if any liability is established, the damages recoverable by the Plaintiffs or Group Members must be reduced to such extent as the Court thinks just and equitable having regard to their own share in the responsibility for the damage, pursuant to s 26 of the *Wrongs Act*.

31 August 2020

**Robert Heath**  
**Matthew Peckham**



**Maddocks Lawyers**  
Solicitors for Soar, the Second Defendant

## SCHEDULE OF PARTIES

<b>NERITA SOMERS</b>	First Plaintiff
and	
<b>ADEL HASSANEIN</b>	Second Plaintiff
and	
<b>MATTHEW LAMONT</b>	Third Plaintiff
and	
<b>FELIX OULDANOV</b>	Fourth Plaintiff
and	
<b>BOX HILL INSTITUTE</b>	First Defendant
and	
<b>GOBEL AVIATION PTY LTD (t/as Soar Advanced Flight Training)</b>	Second Defendant