

# NOTICE OF PROPOSED SETTLEMENT

## SUPREME COURT OF VICTORIA

### BHI Student Pilot Class Action

**THIS NOTICE IS IMPORTANT**  
**PLEASE READ IT CAREFULLY AS IT MAY AFFECT YOUR LEGAL RIGHTS**

#### 1. WHAT IS THIS NOTICE?

- 1.1. The parties to the Box Hill Institute Student Pilot Class Action (**the Class Action**) have agreed to resolve the case without a trial. This is called a ‘settlement’. The settlement will only take effect if it is approved by the Court.
- 1.2. The Supreme Court has ordered that this notice be sent to all Group Members, and you have been identified as a Group Member. The purpose of this notice is to explain the proposed settlement, how the proposed settlement terms apply to Group Members generally, and what options you can take in relation to the proposed settlement.
- 1.3. It is important that you read the notice carefully because it contains information about:
  - (a) what you need to do if you wish to **register** to participate in the proposed settlement of the Class Action;
  - (b) what you need to do if you wish to remove yourself from the Class Action and the proposed settlement (this is called an ‘**Opt Out**’); and
  - (c) what you need to do if you wish to **object** to the proposed settlement.
- 1.4. If there is anything in this notice which you do not understand, you should contact Gordon Legal whose contact details are at page 10 paragraph 10.1, of the notice, or alternatively seek your own legal advice. **Please do not contact the Court with inquiries regarding this notice.**

#### 2. THE CLASS ACTION

- 2.1. The Class Action has been commenced by Nerita Somers and other Representative Plaintiff Student Pilots (**the Plaintiffs**) on their own behalf and on behalf of all persons who are “Group Members” as defined in the Class Action (see paragraph 3 of this notice). The Class Action was lodged in the Supreme Court on 26 March 2020 against Box Hill Institute. Gobel Aviation Pty Ltd (trading as Soar Advanced Flight Training) (**Soar**) was added as a second defendant on 22 July 2020. The Plaintiffs are legally represented by Gordon Legal.

2.2. The Plaintiffs allege in the statement of claim in the Class Action that:

- (a) Box Hill Institute breached its contract to deliver the Diploma of Aviation (Commercial Pilot Licence – Aeroplane) (**CPL Diploma**) with due care and skill to enable the plaintiffs and Group Members to obtain their commercial pilots licence (**CPL**) through the Civil Aviation Safety Authority (**CASA**) within 2 years studying part time or 14 months full time as represented;
- (b) Box Hill Institute breached its duty of care to put in place proper systems to monitor the delivery of the CPL Diploma to ensure that the course materials, theoretical training and practical training was appropriate to enable the plaintiffs and Group Members to meet the objectives of the CPL Diploma within the represented time frames;
- (c) Box Hill Institute breached its statutory guarantee to deliver the CPL Diploma with due care and skill in breach of s 60 of the *Australian Consumer Law* (Victoria);
- (d) Box Hill Institute breached its statutory guarantee to deliver the CPL Diploma in a manner which was fit for purpose in breach of s 61 of the *Australian Consumer Law* (Victoria);
- (e) Box Hill Institute engaged in unconscionable conduct through the manner in which it billed the plaintiffs and Group Members for theoretical and practical training throughout the CPL Diploma course; and
- (f) Box Hill Institute engaged in misleading and deceptive conduct by misrepresenting to the plaintiffs and Group Members that the CPL Diploma had been designed to enable the plaintiffs and Group Members to obtain their CPL through CASA within 2 years of part time study or 14 months of full time study.

2.3 The Plaintiffs make similar allegations against Soar. Further information about the claim against Soar is at paragraph 4.3 of this notice.

2.4 The Plaintiffs claim, on behalf of themselves and the Group Members, common law damages and damages pursuant to sections 236 and 267(3)(b) and section 267(4) of the *Australian Consumer Law* (Victoria).

2.5 The Defendants have denied each of the breaches and contraventions alleged by the Plaintiffs.

### 3. WHO IS A GROUP MEMBER?

- 3.1. You are a Group Member if you enrolled with Box Hill Institute to study a Diploma of Aviation (Commercial Pilot Licence – Aviation) (**CPL Diploma**) between 6 December 2015 and 26 March 2020.
- 3.2. If you are unsure whether you are a group member, you should contact Gordon Legal on (03) 9603 3000 or email [bhisoar@gordonlegal.com.au](mailto:bhisoar@gordonlegal.com.au) or seek your own legal advice.

### 4. THE SETTLEMENT

- 4.1. The Plaintiffs and Box Hill Institute have agreed to settle the Class Action and are asking the Supreme Court to approve the terms of the settlement so that it can take effect. The key terms of the settlement with Box Hill Institute are that:

(a) Box Hill Institute will pay an all-inclusive amount of \$33 million (**Resolution Sum**);

(b) from the Resolution Sum:

1. legal costs that the Plaintiffs incurred in the commencement and conduct of the Class Action (as approved by the Court) will be deducted;
2. an amount in respect of the costs of administering the Settlement Scheme and distributing of the Resolution Sum by the Scheme Administrator to the Plaintiffs and Group Members (also as approved by the Court) will be deducted;
3. the costs of a Special Referee (**Costs Referee**), which will be appointed by the Court to inquire into and report to the Court (**Report**) stating, with reasons, the Costs Referee's opinion on matters specified by the Court, will also be deducted from the Resolution Sum;
4. a small amount (not exceeding \$70,000 in total) will be proposed to be deducted from the Resolution Sum to compensate the Plaintiffs for the reimbursement of their time and out-of-pocket expenses in performing their role as representatives of Group Members in the conduct of the Class Action; and
5. an amount of \$15,000 will be proposed to be paid to Soar's liquidator, as explained in paragraph 4.4 of this notice.

- (c) taking into account the deductions to be made referred to above, the balance of the Resolution Sum, together with any interest that accrues on the Resolution Sum, will represent the compensation payment to the Plaintiffs and Group Members (to be distributed according to the process described below);
  - (d) in return, the Plaintiffs and Group Members will give Box Hill Institute releases in relation to the subject matter of the Class Action (other than for damages for personal injury, with the exception of the claims for distress, inconvenience and vexation that are made in the Class Action) and agree not to make or pursue any claims with the Commonwealth Department of Education, Skills and Employment against Box Hill Institute in respect of any VET FEE-HELP or VET Student Loans they have taken out (and indemnify Box Hill Institute in respect of any claim they may have already made or might make in the future). The specific details are the subject of a deed between the Plaintiffs and Box Hill Institute, a copy of which you can obtain via the details below.
- 4.2. The settlement has been agreed between the Plaintiffs and Box Hill Institute and approval will be sought on the basis that it is without any admission by Box Hill Institute as to the occurrence of the alleged breaches and contraventions or that they are in any way liable or under an obligation to do so, but instead, for the purpose of avoiding ongoing and costly litigation.
- 4.3. In addition to the settlement with Box Hill Institute, a settlement has been agreed with Soar, also subject to court approval. Soar was joined to the Class Action in July 2020, as a third party by Box Hill Institute. As a result, an Amended Statement of Claim was filed on 3 August 2020, in which the Plaintiffs made similar allegations against Soar as they had against Box Hill Institute, with Soar becoming the second defendant. Soar was subsequently placed into liquidation, having entered into voluntary administration on 29 December 2020.
- 4.4. The settlement with Soar involves the claim against Soar being discontinued, with \$15,000 being paid to Soar's liquidator for part of its legal costs, pursuant to a previous order of the Court, and which the Plaintiffs will ask the Court for approval to pay from the Settlement Sum. These costs were associated with the Plaintiffs obtaining information from Soar's liquidators to test what assets Soar might have had to contribute to any settlement. Having obtained that information, the Plaintiffs now consider that pursuing Soar further is pointless because Soar is extremely unlikely to have any assets to enable it to contribute to any settlement.

## 5. SETTLEMENT PAYMENT PROCESS

- 5.1. Mr Andrew Grech, Partner of Gordon Legal, will be appointed as the administrator of the Settlement Scheme (**Scheme Administrator**).
- 5.2. The Settlement Scheme is the scheme set out in Annexure A of the Settlement Deed. The settlement payment process will be conducted in two stages. First, the Scheme Administrator (or staff under his supervision from the firm Gordon Legal) will assess claims made by Group Members in accordance with a Court-approved claims assessment process (**Claims Assessment Process**). Second, where a claim is successfully established, the Scheme Administrator will pay the claims of Group Members (the **Settlement Process**).
- 5.3. The Claims Assessment Process is performed by reference to:
- (a) A Notice of Claim being filed by or on behalf of a Group Member with Gordon Legal (see Option A in paragraph 8 at page 8 of this notice for further details).
  - (b) Once the Notice of Claims have been filed, the Scheme Administrator will determine whether a Group Member is “an "Eligible Claimant", being someone who:
    - i. enrolled in the CPL Diploma during the period between 6 December 2015 and 26 March 2020;
    - ii. incurred fees either as an upfront payment or as a VET FEE-HELP or VET Student Loan;
    - iii. did not successfully complete the CPL Diploma or, alternatively, did complete the CPL Diploma but (1) in a longer time than what was represented, (2) with an additional number of flight hours than what was represented and/or (3) without the ancillary qualifications that it was represented they would receive; and
    - iv. files a Notice of Claim (see Option A in paragraph 8 at page 8 of this notice for further details) (together, the **Eligibility Criteria**);
  - (c) The Scheme Administrator then considering:
    - i. Whether the Eligible Claimant was withdrawn from the CPL Diploma, is still enrolled in the CPL Diploma or who has graduated from the course, having met the complete requirements of a CPL Diploma and have had a CPL Diploma conferred to them;
    - ii. Whether the Eligible Claimant suffered loss and damage;
    - iii. The categories of loss and damage suffered by the Eligible Claimant;

- iv. What caused the loss and damage suffered by the Eligible Claimant; and
  - v. The extent to which the Eligible Claimant has produced to the Scheme Administrator the evidence of the loss and damage they have suffered. Eligible Claimants will need to provide evidence in support of their claim for loss and damage. The Scheme Administrator will provide each Eligible Claimant with written guidance on the type of evidence the Eligible Claimant will need to provide in support of each category of loss and damage and how to obtain this evidence. If evidence is not provided in support of a claim for loss and damage, the Scheme Administrator may apply a discount of 100% for that claim.
- 5.4. The purpose of the Claims Assessment Process, including the Eligibility Criteria, is to efficiently decide the claims made by Eligible Claimants and allow the Scheme Administrator to assess the merit of the Eligible Claimant's claim.
  - 5.5. The Scheme Administrator will issue a Notice of Decision to each Eligible Claimant whose claim it has assessed. A Notice of Decision will specify the amount of the settlement payment that the Eligible Claimant is entitled to, based on the Scheme Administrator's assessment of their claim. The Notice of Decision will also set out a summary of the claim and explain how it was assessed.
  - 5.6. An Eligible Claimant can accept the Notice of Decision or they can request that the Scheme Administrator reconsider their claim.
  - 5.7. As a result of any claim that has been reconsidered by the Scheme Administrator, the Eligible Claimant can accept the re-issued Notice of Decision or they can request that the Scheme Administrator have their claim referred to a Review Panel, comprised of a barrister or barristers agreed between the Plaintiffs and Box Hill Institute, for their review and consideration. The determination of the Review Panel would be final and binding with no right of further review.
  - 5.8. Once the claims of all Eligible Claimants have been determined, the Scheme Administrator will calculate the total value of the assessed claims made by Eligible Claimants by adding the value of all Notices of Decision.
  - 5.9. Once the above calculations have been completed, the Scheme Administrator will make payments to each Eligible Claimant from the amount which represents the balance of the Resolution Sum. The payments to be made to each Eligible Claimant will be the assessed settlement payment amount in their Notice of Decision, unless the total value of all Notices of Decision exceeds the balance of the Resolution Sum, in which case a proportionate

discount will be applied to the assessed settlement payment amount for each Eligible Claimant and that discounted amount will be paid to each Eligible Claimant. It is anticipated that the settlement payment process will take between 6 and 8 months to complete, but no longer than 12 months.

- 5.10. The features of the proposed settlement described above will replace the rights that are ordinarily available for a current or former student of the CPL Diploma making a claim against Box Hill Institute arising from or related to the subject matter of the class action. This means that as a result of either (1) participating in the proposed settlement by filing a Notice of Claim or (2) not opting out of the Class Action and not filing a Notice of Claim, Group Members will not be able to commence legal proceedings in relation to their claim against Box Hill Institute. The parties consider that this is a fair compromise for participating Group Members because, in exchange for giving up this right, Group Members will have the opportunity to make a claim and have it assessed through the settlement payment process, where they can either accept the decision of the Scheme Administrator, ask the Scheme Administrator to reconsider its decision or seek a review of the Scheme Administrator's reconsideration of its decision by a Review Panel which will finally determine the Group Member's claim.

## **6. LEGAL AND SCHEME ADMINISTRATION COSTS**

- 6.1. If the proposed settlement is approved, legal costs that the Plaintiffs incurred in the commencement and conduct of the Class Action for work already done and up to the settlement approval hearing (as approved by the Court) will be deducted from the Resolution Sum as explained in paragraph 4.1(b)(i) of this notice. This amount is estimated by Gordon Legal to be an amount not exceeding \$5,455,000. This amount is subject to approval by the Court.
- 6.2. If the proposed settlement is approved, an amount in respect of the costs of work to be done for the administration and distribution of the Resolution Sum by the Scheme Administrator to the Plaintiffs and Group Members (also as approved by the Court) will be deducted from the Resolution Sum as explained in paragraph 4.1(b)(ii) of this notice. This amount is estimated by Gordon Legal to be an amount not exceeding \$4,826,200. This amount is subject to approval by the Court.

## **7. THE PROCESS FOR APPROVAL OF THE SETTLEMENT**

- 7.1. The settlement is subject to the approval of the Supreme Court. The Court will only approve the proposed settlement if it decides that it is fair and reasonable and in the interests of the Group Members as a whole.

- 7.2. In order to assist it to determine if the proposed settlement is fair and reasonable and in the interests of the Group Members as a whole, the Court will appoint a Costs Referee in relation to the reasonableness of the legal costs.
- 7.3. In deciding the approval hearing the Court will receive and consider submissions from the Plaintiffs, Box Hill Institute and the report of the Costs Referee. The Court will also consider any objections filed by Group Members. Information about how to object to the proposed settlement is at paragraph 8 of this notice.
- 7.4. The Court is holding a hearing for it to determine the application for approval of the proposed settlement on 17 November 2022 at the Supreme Court of Victoria in Melbourne, located at 210 William Street, Melbourne VIC 3000.

## **8. WHAT OPTIONS ARE AVAILABLE FOR GROUP MEMBERS?**

- 8.1. There are four options that Group Members may choose to take in relation to the proposed settlement. The option that you take will affect if and how you can receive a financial benefit in relation to your claim. The four options, and the consequences of each option, are set out below.

### **Option A: register to participate in the proposed settlement**

- Group Members who wish to participate in the proposed settlement must file a “Notice of Claim”.
- A Notice of Claim is a form that has been filed by or on behalf of a Group Member giving notice to Gordon Legal of their intention to make a claim under the Settlement Scheme.
- A Notice of Claim can be filed (1) by going to <https://www.bhiclassaction.com.au>, or (2) by emailing the Notice of Claim to [bhisoar@gordonlegal.com.au](mailto:bhisoar@gordonlegal.com.au) or (3) by providing a Notice of Claim to the solicitors for the Plaintiffs at its registered address being Level 22, 181 William Street Melbourne 3000.
- All claims must be registered by the Group Member with the Scheme Administrator by 4.00pm on 21 October 2022. See Annexure B at page 11 of this notice if you wish to file a Notice of Claim in hard copy to Gordon Legal.
- You will be eligible to receive a settlement payment if the Scheme Administrator decides that you are an Eligible Claimant and it or the Review Panel issues a Notice of Decision in relation to your Notice of Claim as set out in the Deed of Settlement.



- Group Members who register to participate by providing a Notice of Claim to the Scheme Administrator will have their claim finally determined through the settlement and will not be able to commence legal proceedings in relation to their claim.

**Option B: Opt Out of the Class Action**

- The deadline to Opt Out of the Class Action expired on 18 November 2020.
- If you have already Opted Out, the Court has a discretionary power to reinstate you as a Group Member in the Class Action under s 33J(6) of the *Supreme Court Act 1986* (Vic) on such terms as the Court thinks fit upon an application of a Group Member. If you wish to be reinstated as a Group Member and seek to receive any payment under the proposed settlement, you will need to make such an application to the Supreme Court by 4.00pm on 21 October 2022. A copy of the Notice of Reinstatement of Group Member is available from <https://www.bhiclassaction.com.au> and at Annexure E at page 16 of this notice.
- The Court also has a discretionary power to permit a Group Member to Opt Out late under s 33J(3) of the *Supreme Court Act 1986* (Vic) on the application of a Group Member. You will need to make such an application if you wish to Opt Out but have not already done so by 4.00pm on 21 October 2022 by completing an Opt Out Application Notice and providing the Opt Out Notice to the Supreme Court. A copy of the Opt Out Application Notice is available from <https://www.bhiclassaction.com.au> and at Annexure C at page 13 of this notice.
- Group Members who Opt Out of the Class Action will not be bound by the outcome of the Class Action, and will not be entitled to receive any settlement payment that might result from the proposed settlement.
- Group Members who Opt Out of the Class Actions may still be able to pursue their claim against Box Hill Institute.

**Option C: object to the proposed settlement**

- Group Members have the right to make submissions to the Court as to whether or not the proposed settlement should be approved and take effect. If you do not wish for the proposed settlement to go ahead, you can object to the settlement by filling in the Objection Notice, which is available from <https://www.bhiclassaction.com.au/> at Annexure D at page 15 of this notice, and providing the Objection Notice by email to the registry of the Supreme Court of Victoria at the email address [cldgroupproceedings@supcourt.vic.gov.au](mailto:cldgroupproceedings@supcourt.vic.gov.au) or by post to the postal address:

Box Hill Institute Student Pilot Class Action  
Principal Registry  
Supreme Court of Victoria  
210 William Street  
Melbourne Victoria 3000

- The Court will consider any objections filed by Group Members when it considers whether to approve the proposed settlement at the hearing on 17 November 2022 at the Supreme Court in Melbourne, commencing at 10.15am.
- Group Members may object to the settlement even if they have registered pursuant to Option A above, but not if they have opted out pursuant to Option B above.
- Any Notice of Objection must be filed with the Court by no later than 4.00pm on 21 October 2022 and any written submissions or evidence in support of any Notice of Objection must be provided to the Court by 4.00pm on 4 November 2022.

**Option D: do nothing**

- Group Members who neither register to participate in the proposed settlement nor Opt Out will remain as Group Members in the Class Action, but will not, unless the Court determines otherwise, be entitled to participate in the proposed settlement. This means that a Group Member who does not register a claim will not be able to have their claim assessed through the settlement payment process.
- Group Members who do nothing will also be bound by the proposed settlement. This means that a Group Member who does not register or Opt Out will not be able to have their claim against Box Hill Institute assessed, either as part of the proposed settlement or otherwise.

**9. COPIES OF THE RELEVANT DOCUMENTS**

- 9.1. Copies of relevant documents, including the statement of claim, defences and the settlement deed with Box Hill Institute may be downloaded from Gordon Legal's website ([www.gordonlegal.com.au](http://www.gordonlegal.com.au)) or provided to a Group Member by another way if requested by a Group Member.

**10. FURTHER INFORMATION**

- 10.1. If there is anything of which you are unsure, you should check Gordon Legal's website for more information. You can also call Gordon Legal on (03) 9603 3000 or email [bhisoar@gordonlegal.com.au](mailto:bhisoar@gordonlegal.com.au) or seek your own legal advice.