Federal Court of Australia

 Commonwealth of Australia v Rose Training Australia Pty Ltd [2022] FCA 36

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| File number: |  |
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| Judgment of: | **COLLIER J** |
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| Date of judgment: | 1 February 2022 |
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| Catchwords: | **EDUCATION** – penalties – where multiple contraventions of ss 94 and 96 of the *National Vocational Education and Training Regulator Act 2011* (Cth) – where respondent provided, or offered to provide, vocational education and training (**VET**) courses, and purported to issue VET qualifications in relation to a VET course that was not within the scope of its registration – where respondent admitted contraventions and cooperated in production of statement of agreed facts and joint submissions on appropriate range of penalties. |
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| Legislation: | *National Vocational Education and Training Regulator Act 2011* (Cth) ss 94, 96)  |
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| Cases cited: | *Commonwealth of Australia v Harrison (No. 2)* [2020] FCA 786*Commonwealth of Australia v King* [2019] FCA 787*Commonwealth of Australia v Wright Solution Qld Pty* Ltd [2018] FCA 1575 |
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| Division: | General Division |
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| Registry: | Queensland |
|  |  |
| National Practice Area: |  |
|  |  |
| Number of paragraphs: | 35 |
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| Date of last submissions: | 14 July 2021 |
|  |  |
| Date of hearing: | Determined on the papers  |
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| Counsel for the Applicant: | Ms Claire Schneider |
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| Solicitor for the Applicant: | Australian Government Solicitor |
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| Counsel for the Respondent: | Mr Matthew Jones |
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| Solicitor for the Respondent: | Cooper Grace Ward |

ORDERS

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|  | QUD 233 of 2020 |
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| BETWEEN: | COMMONWEALTH OF AUSTRALIAApplicant |
| AND: | ROSE TRAINING AUSTRALIA PTY LTDRespondent |

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| order made by: | COLLIER J |
| DATE OF ORDER: | 1 February 2022 |

UPON HEARING JOINT SUBMISSIONS AND AN AGREED STATEMENT OF FACTS BY THE PARTIES THE COURT DECLARES BY CONSENT THAT:

1. The Respondent contravened s 96 of the *National Vocational Education and Training Regulator Act 2011* (Cth) (**NVR Act**) on a total of 8 occasions by purporting on each occasion to issue a vocational educational training (**VET**) qualification in relation to a VET course that was not within the scope of Rose Training’s registration as an NVR registered training organisation, as follows:
	1. on 25 October 2017, purporting to issue to Kimberley Proudlock:
		1. a testamur stating that Ms Proudlock had satisfied the requirements of TAE50111 Diploma of Vocational Education and Training;
		2. a testamur stating that Ms Proudlock had satisfied the requirements of TAE50211 Diploma of Training Design and Development;
	2. On 11 June 2018, purporting to issue to Angela Cush a testamur stating that Ms Cush had satisfied the requirements of TAE50111 Diploma of Vocational Education and Training;
	3. on 27 April 2018, purporting to issue to Paul Norris a testamur stating that Mr Norris had satisfied the requirements of TAE50211 Diploma of Training Design and Development;
	4. on 19 December 2018, purporting to issue to Patricia Saltmer a testamur stating that Ms Saltmer had satisfied the requirements of TAE50111 Diploma of Vocational Education and Training;
	5. in 2018, purporting to issue to Andrew Grafton a testamur stating that Mr Grafton had satisfied the requirements of TAE50211 Diploma of Training Design and Development;
	6. on 11 January 2019, purporting to issue to Peter Wilson a testamur stating that Mr Wilson had satisfied the requirements of TAE50111 Diploma of Vocational Education and Training; and
	7. on 6 February 2019, purporting to issue to Michael Dwyer a testamur stating that Mr Dwyer had satisfied the requirements of TAE50111 Diploma of Vocational Education and Training.
2. The Respondent contravened s 94 of the NVR Act on a total of 3 occasions by providing part of a VET course at a time when that VET course was not within the scope of Rose Training’s registration as an NVR registered training organisation, as follows:
	1. in or after December 2017, receiving and assessing coursework submitted by Patricia Saltmer for TAE50111 Diploma of Vocational Education and Training;
	2. on or after 14 December 2017, receiving and assessing coursework submitted by Peter Wilson for TAE50111 Diploma of Vocational Education and Training; and
	3. in or after March 2018, receiving and assessing coursework submitted by Michael Dwyer for TAE50111 Diploma of Vocational Education and Training.

**THE COURT ORDERS BY CONSENT THAT:**

1. The Respondent pay to the Commonwealth of Australia, a pecuniary penalty pursuant to s 137 of the NVR Act in the total sum of $23,000 within 30 days of the date of this order.
2. Pursuant to s 43 of the *Federal Court of Australia Act 1976* (Cth) and r 40.02 of the *Federal Court Rules 2011* (Cth), the Respondent pay the Applicant’s costs in the lump sum of $45,000 within 30 days of the date of this order.

**THE COURT NOTES THAT:**

1. The Respondent has provided an enforceable undertaking, within the meaning of s 146 of the NVR Act, to the Australian Skills and Quality Authority, which is to the effect outlined in the Statement of Agreed Facts and Joint Submissions filed by the parties on 17 February 2021.

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

REASONS FOR JUDGMENT

COLLIER J:

1. Before the Court is an amended originating application filed by the Commonwealth of Australia on behalf of the Australian Skills Quality Authority (**Authority**) on 23 February 2021. The application was made under ss 19 and 21 of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**) and s 137(1) of the *National Vocational Education and Training Regulator Act 2011* (Cth) (**NVR Act**), and seeks declarations of contraventions of the NVR Act, pecuniary penalty orders, and costs.
2. On 17 February 2021, the parties filed a statement of agreed facts and joint submissions. Annexed to the statement of agreed facts and joint submissions were proposed consent orders sought by the parties.
3. The matter was listed for hearing before me on 14 July 2021.
4. On 13 July 2021, my Chambers contacted the parties by email, seeking their views on vacating the hearing listed on 14 July 2021 and having the matter determined on the papers. By reply email that same day, the solicitors for the applicant advised that the parties consented to vacating the hearing, and the matter being determined on the papers. By agreement, the parties attached to the email updated proposed consent orders (**proposed orders**) for my consideration.
5. Relevantly, those proposed orders were as follows:

**UPON HEARING JOINT SUBMISSIONS AND AN AGREED STATEMENT OF FACTS BY THE PARTIES THE COURT DECLARES BY CONSENT THAT:**

1. The Respondent contravened s 96 of the National Vocational Education and Training Regulator Act 2011 (Cth) (NVR Act) on a total of 8 occasions by purporting on each occasion to issue a vocational educational training (VET) qualification in relation to a VET course that was not within the scope of Rose Training’s registration as an NVR registered training organisation, as follows:

1.1. on 25 October 2017, purporting to issue to Kimberley Proudlock:

(i) a testamur stating that Ms Proudlock had satisfied the requirements of TAE50111 Diploma of Vocational Education and Training;

(ii) a testamur stating that Ms Proudlock had satisfied the requirements of TAE50211 Diploma of Training Design and Development;

1.2. on 11 June 2018, purporting to issue to Angela Cush a testamur stating that Ms Cush had satisfied the requirements of TAE50111 Diploma of Vocational Education and Training;

1.3. on 27 April 2018, purporting to issue to Paul Norris a testamur stating that Mr Norris had satisfied the requirements of TAE50211 Diploma of Training Design and Development;

1.4. on 19 December 2018, purporting to issue to Patricia Saltmer a testamur stating that Ms Saltmer had satisfied the requirements of TAE50111 Diploma of Vocational Education and Training;

1.5. in 2018, purporting to issue to Andrew Grafton a testamur stating that Mr Grafton had satisfied the requirements of TAE50211 Diploma of Training Design and Development;

1.6. on 11 January 2019, purporting to issue to Peter Wilson a testamur stating that Mr Wilson had satisfied the requirements of TAE50111 Diploma of Vocational Education and Training; and

1.7. on 6 February 2019, purporting to issue to Michael Dwyer a testamur stating that Mr Dwyer had satisfied the requirements of TAE50111 Diploma of Vocational Education and Training.

2. The Respondent contravened s 94 of the NVR Act on a total of 3 occasions by providing part of a VET course at a time when that VET course was not within the scope of Rose Training’s registration as an NVR registered training organisation, as follows:

2.1. in or after December 2017, receiving and assessing coursework submitted by Patricia Saltmer for TAE50111 Diploma of Vocational Education and Training;

2.2. on or after 14 December 2017, receiving and assessing coursework submitted by Peter Wilson for TAE50111 Diploma of Vocational Education and Training; and

2.3. in or after March 2018, receiving and assessing coursework submitted by Michael Dwyer for TAE50111 Diploma of Vocational Education and Training.

**THE COURT ORDERS THAT:**

3. The Respondent pay to the Commonwealth of Australia, a pecuniary penalty pursuant to s 137 of the NVR Act in the total sum of $23,000 within 30 days of the date of this order.

4. Pursuant to s 43 of the Federal Court Act 1976 (Cth) and r 40.02 of the Federal Court Rules 2011 (Cth), the Respondent pay the Applicant’s costs in the lump sum of $45,000 within 30 days of the date of this order.

**THE COURT NOTES THAT:**

5. The Respondent has provided an enforceable undertaking, within the meaning of s 146 of the NVR Act, to the Australian Skills and Quality Authority, which is to the effect outlined in the Statement of Agreed Facts and Joint Submissions filed by the parties on 16 February 2021.

1. I note that the grant of relief sought by the applicant remains at the discretion of the Court.

# Background

## Scope of Rose Training’s Registration

1. On 27 February 2009, the respondent became a Registered Training Organisation (**RTO**) within the meaning of s 3 of the NVR Act.
2. Between 24 April 2013 and 5 October 2017, the respondent was registered to deliver, assess and issue qualifications for the following VET courses:
* TAE50111 Diploma of Vocational Education and Training (**Original Diploma of Vocational Education**); and
* TAE50211 Diploma of Training Design and Development (**Original Diploma of Training Design**).
1. On 6 April 2016, the Original Diploma of Vocational Education and the Original Diploma of Training Design were respectively superseded by the following replacement VET courses:
* TAE50116 Diploma of Vocational Education and Training (**New Diploma of Vocational Education**); and
* TAE50216 Diploma of Training Design and Development (**New Diploma of Training Design**).
1. On 12 April 2016, the New Diploma of Training Design was added to Rose Training’s scope of registration. The New Diploma of Training Design remained within Rose Training’s scope of registration until 10 April 2018.
2. The New Diploma of Vocational Education was not equivalent to the Original Diploma of Vocational Education, in the sense that the substantive requirements of the New Diploma of Vocational Education were different to those of the Original Diploma of Vocational Education. One unit had been added to the core list of units, and one unit had been removed. The changes made to meet the Standards for Training Packages were applied across the Training and Education (**TAE**) Training Package as a whole, and included more detailed assessment requirements.

## Contravening Conduct

1. At para [2] of the statement of agreed facts and submissions, the respondent admitted that it had contravened s 94 of the NVR Act on three occasions and s 96 of the NVR Act on eight occasions. The contraventions occurred between 25 October 2017 and 6 February 2019 (**relevant period**).
2. Section 94 of the NVR Act provides:

**94 Civil penalty—providing all or part of VET course outside scope of registration**

An NVR registered training organisation contravenes this section if:

(a) the organisation provides all or part of a VET course; and

(b) the VET course, or part of the VET course, is not within the organisation’s scope of registration.

Civil penalty: 240 penalty units.

1. Section 96 of the NVR Act provides:

**96 Civil penalty—issuing VET qualification outside scope of registration**

An NVR registered training organisation contravenes this section if:

(a) the organisation purports to issue a VET qualification; and

(b) the qualification relates to a VET course that is not within the organisation’s scope of registration.

Civil penalty: 600 penalty units.

1. The respondent’s contraventions occurred in the context of the Vocational Education and Training (**VET**) framework and involved the assessment of coursework and issuing of qualifications by the respondent at a time when the respondent’s registration in respect of the relevant VET courses had lapsed and the courses were no longer within the scope of registration. The VET courses that were not within the respondent’s scope of registration at the time of contravention were:
* the Original Diploma of Vocational Education; and
* the Original Diploma of Training Design.
1. The respondent delivered in-person training of the Original Diploma of Vocational Education and the Original Diploma of Training and Design as a “Dual Diploma” at the Queensland Police Service (**QPS**) Academy between 20 and 31 March 2017 (**March 2017 training**), 15 and 26 May 2017 (**May 2017 training**), and 4 and 15 September 2017 (**September 2017 training**).
2. The training was provided to QPS officers and was funded by the QPS at a cost of $1,800 to $2,000 per student. The QPS officers attended the training during paid work time and also completed assessments during paid work time.
3. Each of the seven students named in paras [1.1] to [1.7] of the amended originating application filed on 23 February 2021 (also named at paras [1.1] to [1.7] of the proposed orders) attended one of the in-person training periods. The March 2017 training was attended by Ms Proudlock and Mr Norris, the May 2017 training was attended by Mr Grafton, and the September 2017 training was attended by Mr Wilson, Ms Cush, Ms Saltmer and Mr Dwyer.
4. In around November 2016 to February 2017, Mr Dwyer made inquiries with the respondent regarding the delivery of training in the Dual Diploma to QPS officers in March and May 2017.
5. On 19 June 2019, Mr Dwyer received an email from the Chief Executive Officer of the respondent at that time, Mr Gary Rose, which relevantly stated:
* The Original Diploma of Vocational Education (i.e., TAE50111) had been superseded by a New Diploma of Vocational Education (i.e., TAE50116).
* The end of the teach out period for the Original Diploma of Vocational Education was approaching.
* Rose Training had the New Diploma of Training Design (i.e., TAE50216) on scope and had applied [to the Authority] for “the other diploma course”, meaning the New Diploma of Vocational Education.
1. No such application was received by the Authority in relation to the New Diploma of Vocational Education.
2. I note that a “teach out period” is the transition period (generally a period of one year) for a superseded VET course. In the present case, the Authority extended the transition period for the Original Diploma of Vocational Education and the Original Diploma of Training Design by a further six months, to 5 October 2017. As a result, the Original Diploma of Vocational Education and the Original Diploma of Training Design were removed from the scope of the respondent’s registration on 6 October 2017, and were outside the scope of the respondent’s registration for the duration of the relevant period.
3. During the relevant period, the respondent provided the **affected students** (being those students referred to at paras [1.1] to [1.7] of the proposed orders) with three types of documents:
4. A document titled “Diploma” which stated that it was a “testamur to certify attainment of a VET qualification”, and that it “certif[ies] that [the student] has fulfilled the requirements for [the relevant TAE course]”. These documents were signed by the CEO of the respondent and were printed with a date (**testamur**).
5. A document titled “Record of Results” which stated the student’s name, the relevant qualification/s, listed the units enrolled in and the student’s results in each unit. These documents were signed by the CEO of the respondent and were printed with a date of issue (**record of results**).
6. A document titled “Marking Guide” which stated the course codes, and set out the student’s assessment against the relevant marking criteria. These documents were signed by the assessor and were printed with a date of assessment (**marking guide**).
7. The specific conduct in respect of each of the affected students was summarised by the parties at paras [57] to [104] of the statement of agreed facts and submissions.

**Students who attended the March 2017 Training**

***Kimberley Proudlock***

57. Ms Proudlock attended in-person training conducted by Rose Training during the March 2017 Training. On around 27 September 2017, Ms Proudlock submitted her coursework for assessment by Rose Training.

58. On 25 October 2017, Rose Training issued by email to Ms Proudlock:

58.1. a Testamur for the Original Diploma of Vocational Education;

58.2. a Record of Results for the Original Diploma of Vocational Education;

58.3. a Testamur for the Original Diploma of Training Design; and

58.4. a Marking Guide said to be for Ms Proudlock’s coursework submitted for the Original Diploma of Vocational Education and the Original Diploma of Training Design which recorded that the “date of assessment” was 4 October 2017, and stated that Ms Proudlock’s coursework was “satisfactory”. In the concise statement, ASQA does not make any allegation about the quality or accuracy of Rose Training’s assessment of the coursework for any of the affected students.

59. In issuing the Testamurs described in paragraphs 58.1 and 58.3 to Ms Proudlock on 25 October 2017, Rose Training purported to issue a VET qualification for the Original Diploma of Vocational Education and a VET qualification for the Original Diploma of Training Design to Ms Proudlock at a time when the Original Diploma of Vocational Education and the Original Diploma of Training Design were not within Rose Training’s scope of registration (with the Original Diploma of Vocational Education and the Original Diploma of Training Design having been removed from Rose Training’s scope of registration almost three weeks earlier, on 6 October 2017). At the time Rose Training issued the Testamur referred to in paragraph 58.3 above (for the Original Diploma of Training Design), Rose Training was, however, registered to provide the New Diploma of Training Design. However, ASQA contends – and Rose Training agrees – that this registration in relation to the New Diploma of Training Design did not entitle Rose Training to issue the Original Diploma of Training Design to Ms Proudlock in the circumstances described in paragraph 58.3 above.

60. Further, although they were issued by Rose Training on 25 October 2017, the Testamurs, Record of Results, and Marking Guide for the Original Diploma of Vocational Education and Original Diploma of Training Design described in paragraph 58 were each dated 4 October 2017, which was:

60.1. the “date of assessment” recorded on the Marking Guide for Ms Proudlock’s coursework submitted for the Original Diploma of Vocational Education and the Original Diploma of Training Design (described in paragraph 58.4 above);

60.2. the second last day before the Original Diploma of Vocational Education and Original Diploma of Training Design were removed from Rose Training’s scope of registration; and

60.3. three weeks before Rose Training issued the Testamurs, Record of Results, and Marking Guide to Ms Proudlock.

***Paul Norris***

61. Mr Norris attended in-person training provided by Rose Training during the March 2017 Training. On or around 28 February 2018, Mr Norris submitted his coursework for assessment by Rose Training.

62. On 27 April 2018, Mr Norris sent an email to Rose Training inquiring about the timing for the assessment of his coursework and issuing of his Testamurs. Mr Norris had previously made inquiries of Rose Training about these matters by phone but had not received any substantive response.

63. Later on 27 April 2018, Rose Training issued by email to Mr Norris:

63.1. a Testamur for the Original Diploma of Training Design;

63.2. a Record of Results for the New Diploma of Training Design which recorded Mr Norris as being “competent” in each of the enrolled units. In the concise statement, ASQA does not make any allegation about the quality or accuracy of Rose Training’s assessment of the coursework for any of the affected students.

64. In issuing the Testamur for the Original Diploma of Training Design to Mr Norris on 27 April 2018 as described in paragraph 63.1 above, Rose Training purported to issue a VET qualification for the Original Diploma of Training Design at a time when the Original Diploma of Training Design was not within its scope of registration (with the Original Diploma of Training Design having been removed from the scope of Rose Training’s registration almost seven months earlier, on 6 October 2017). As at 27 April 2018, the New Diploma of Training Design was also not within Rose Training’s scope of registration having been removed from scope on 10 April 2018. For the avoidance of doubt, ASQA contends – at Rose Training agrees – that even if Rose Training’s registration for the New Diploma of Training had been current (which it was not), Rose Training would not have been entitled to issue the Original Diploma of Training Design to Mr Norris as described in paragraph 63.1 above.

65. Further, although they were issued by Rose Training on 27 April 2018, both the Testamur for the Original Diploma of Training Design and Record of Results for the New Diploma of Training Design described in paragraph 63 above were dated 9 April 2018, which was:

65.1. just over 6 months after the Original Diploma of Training Design and been removed from Rose Training’s scope of registration;

65.2. the last day before the New Diploma of Training Design was removed from Rose Training’s scope of registration (as described in paragraph 43 above); and 65.3. just under 3 weeks before Rose Training issued the Testamur and Record of Results to Mr Norris.

**Student who attended the May 2017 Training**

***Andrew Grafton***

66. Mr Grafton attended in-person training provided by Rose Training during the May 2017 Training. On around 29 March 2018, Mr Grafton submitted his coursework for assessment by Rose Training.

67. On a subsequent date in 2018, Rose Training issued by email to Mr Grafton:

67.1. a Testamur for the Original Diploma of Training Design;

67.2. a Record of Results for the Original Diploma of Training Design which recorded Mr Grafton as being “competent” in each of the enrolled units. In the concise statement, ASQA does not make any allegation about the quality or accuracy of Rose Training’s assessment of the coursework for any of the affected students.

68. In issuing the Testamur for the Original Diploma of Training Design to Mr Grafton in 2018 as described in paragraph 67 above, Rose Training purported to issue a VET qualification for the Original Diploma of Training Design to Mr Grafton at a time when the Original Diploma of Training Design was not within its scope of registration.

69. Both the Testamur and Record of Results for the Original Diploma of Training Design that Rose Training issued to Mr Grafton as described in paragraph 67 above were dated 11 April 2018, which was more than 6 months after the Original Diploma of Training Design had been removed from Rose Training’s scope of registration.

**Students who attended September 2017 Training**

***Angela Cush***

70. Ms Cush attended in-person training provided by Rose Training during the September 2017 Training. On or around 16 October 2017, Ms Cush submitted her coursework for assessment by Rose Training.

71. On 2 November 2017, Rose Training provided to Ms Cush by email a completed Marking Guide for the Original Diploma of Vocational Education and the Original Diploma of Training Design which:

71.1. stated that the “Date of Assessment” for Ms Cush for both courses was 26 October 2017; and

71.2. recorded that Ms Cush’s coursework had been assessed as being “satisfactory”. In the concise statement, ASQA does not make any allegation about the quality or accuracy of Rose Training’s assessment of the coursework for any of the affected students.

72. In that same email, an employee of Rose Training stated: “your Vocational Education and Training [i.e. the Original Diploma of Vocational Education] certificate will be coming later when Rose Training gets it on scope.”

73. Between about 5 and 6 June 2018, Ms Cush sent two emails to Rose Training asking about the issue of her Original Diploma of Vocational Education.

74. On 11 June 2018, Rose Training issued by email to Ms Cush:

74.1. a Testamur for the Original Diploma of Vocational Education; and

74.2. a Record of Results for the Original Diploma of Vocational Education.

75. In issuing the Testamur for the Original Diploma of Vocational Education to Ms Cush as described in paragraph 74 above, Rose Training purported to issue a VET qualification for the Original Diploma of Vocational Education to Ms Cush at a time when the Original Diploma of Vocational Education was not within its scope of registration (the Original Diploma of Vocational Education having been removed from Rose Training’s scope of registration just over eight months earlier, on 6 October 2017).

76. Further, although they were issued by Rose Training on 11 June 2018, the Testamur and the Record of Results for the Original Diploma of Vocational Education described in paragraph 74 above were each dated 23 September 2017, which was:

76.1. just over three weeks before Ms Cush had submitted her coursework for that course to Rose Training (as described in paragraph 70 above);

76.2. over one month before the “Date of Assessment” of Ms Cush’s coursework in relation to the course (as recorded by Rose Training in the Marking Guide described in paragraph 71 above);

76.3. 13 days before the Original Diploma of Vocational Education was removed from Rose Training’s scope of registration; and

76.4. over eight months before the Testamur and Record of Results were issued to Ms Cush.

77. In issuing the Testamur and Record of Results described in paragraph 74 above in the circumstances described in in paragraphs 70 to 76 above, Rose Training admits that, its conduct in relation to Ms Cush is more serious than the conduct in relation to Ms Proudlock, Mr Norris, Mr Grafton and Mr Dwyer. This is addressed in paragraphs 135 to 140 below.

***Patricia Saltmer***

78. Ms Saltmer attended in-person training provided by Rose Training during the September 2017 Training.

79. In December 2017, Ms Saltmer submitted her coursework including for the Original Diploma of Vocational Education to Rose Training for assessment. Rose Training assessed Ms Saltmer’s coursework for the Original Diploma of Vocational Education after it received them, and at a time when the Original Diploma of Vocational Education was not within its scope of registration (the Original Diploma of Vocational Education having been removed from the scope of Rose Training’s registration on 6 October 2017).

80. In around January to March 2018, Ms Saltmer made inquiries by phone and email asking Rose Training for a response to the coursework she had submitted in December 2017.

81. Ms Saltmer sent one such inquiry by email on 5 February 2018. After sending this email, Ms Saltmer received a phone call from a representative of Rose Training who told her that:

81.1. Rose Training no longer has the scope to cover the Diploma of Vocational Education and Training;

81.2. Rose Training expected that this VET course would be re-added to Rose Training’s scope; and 81.3. once this VET course was re-added to Rose Training’s scope, Rose Training would issue a Testamur for this VET course to Ms Salter.

82. On 20 March 2018, Ms Saltmer sent a further email to Rose Training, requesting her certificates to be forwarded to her email address. Later that day, Rose Training provided by email to Ms Saltmer a Testamur and Record of Results for the New Diploma of Training Design. The Record of Results attached to that email recorded Ms Saltmer as being “competent” in each of the enrolled units for the New Diploma of Training Design. In that email, Rose Training stated that it had previously sent these documents to an incorrect email for Ms Saltmer.

83. On 19 December 2018, Ms Saltmer sent a further email to Rose Training asking whether she would be receiving the second diploma (i.e., the Diploma of Vocational Education).

84. Later on 19 December 2018, Rose Training issued by email to Ms Saltmer:

84.1. a Testamur for the Original Diploma of Vocational Education;

84.2. a Record of Results for the Original Diploma of Vocational Education which recorded Ms Saltmer as being “competent” in each of the enrolled units. In the concise statement, ASQA does not make any allegation about the quality or accuracy of Rose Training’s assessment of the coursework for any of the affected students.

85. In issuing the Testamur for the Original Diploma of Vocational Education to Ms Saltmer as described in paragraph 84 above, Rose Training purported to issue a VET qualification for the Original Diploma of Vocational Education to Ms Saltmer at a time when the Original Diploma of Vocational Education was not within its scope of registration (the Original Diploma of Vocational Education having been removed from Rose Training’s scope of registration just over 14 months earlier, on 6 October 2017).

86. Further, although they were issued by Rose Training on 19 December 2018, the Testamur and Record of Results of the Original Diploma of Vocational Education described in paragraph 84 above were each dated 4 October 2017, being:

86.1. about two months before Ms Saltmer submitted her coursework for that course to Rose Training for assessment;

86.2. the second last day before the Original Diploma of Vocational Education was removed from Rose Training’s scope of registration; and 86.3. more than 14 months before the Testamur and Record of Results were issued by Rose Training to Ms Saltmer.

87. In issuing the Testamur and Record of Results described in paragraph 84 above in the circumstances described in paragraphs 78 to 86 above, Rose Training admits that its conduct in relation to Ms Saltmer is more serious than the conduct in relation to Ms Proudlock, Mr Norris, Mr Grafton and Mr Dwyer. This is addressed in paragraphs 135 to 140 below.

***Peter Wilson***

88. Mr Wilson attended in-person training provided by Rose Training during the September 2017 Training.

89. On about 14 December 2017, Mr Wilson submitted his coursework including for the Original Diploma of Vocational Education to Rose Training for assessment. Rose Training assessed Mr Wilson’s coursework for the Original Diploma of Vocational Education after it received them, and at a time when the Original Diploma of Vocational Education was not within its scope of registration (the Original Diploma of Vocational Education having been removed from the scope of Rose Training’s registration on 6 October 2017).

90. On 20 December 2017, an employee of Rose Training sent an email to Mr Wilson providing him with a Testamur for the New Diploma of Training Design dated 20 December 2017. That email stated (relevantly): “Please note that you will not be issued your additional certificate until we have it on scope again, as previously discussed with your superiors.”

91. On 20 December 2017, Mr Wilson responded by email to Rose Training asking whether that was a reference to the Diploma of Vocational Education and Training, and if so when he could expect further advice about that.

92. On 19 December 2018, Mr Wilson sent an email to Rose Training asking if his Diploma of Vocational Education and Training could be issued.

93. On 11 January 2019, Rose Training issued by email to Mr Wilson:

93.1. a Testamur for the Original Diploma of Vocational Education; and

93.2. a Record of Results for the Original Diploma of Vocational Education which recorded Mr Wilson as being “competent” in each of the enrolled units. In the concise statement, ASQA does not make any allegation about the quality or accuracy of Rose Training’s assessment of the coursework for any of the affected students.

94. In issuing the Testamur for the Original Diploma of Vocational Education as described in paragraph 93 above, Rose Training purported to issue a VET qualification for the Original Diploma of Vocational Education to Mr Wilson at a time when the Original Diploma of Vocational Education was not within its scope of registration (the Original Diploma of Vocational Education having been removed from Rose Training’s scope of registration over 15 months earlier, on 6 October 2017).

95. Further, although they were issued by Rose Training on 11 January 2019, the Testamur and Record of Results for the Original Diploma of Vocational Education described in paragraph 93 above were each dated 4 October 2017, being:

95.1. more than two months before Mr Wilson had in fact submitted his coursework for that course to Rose Training for assessment; and

95.2. the second last day before the Original Diploma of Vocational Education was removed from Rose Training’s scope of registration.

96. In issuing the Testamur and Record of Results described in paragraph 93 above in the circumstances described in paragraphs 88 to 95 above, Rose Training admits that its conduct in relation to Mr Wilson is more serious than the conduct in relation to Ms Proudlock, Mr Norris, Mr Grafton and Mr Dwyer. This is addressed in paragraphs 135 to 140 below).

***Michael Dwyer***

97. Mr Dwyer attended in-person training provided by Rose Training during the September 2017 Training.

98. In around March 2018, Mr Dwyer submitted his coursework including for the Original Diploma of Vocational Education to Rose Training for assessment. Rose Training assessed Mr Dwyer’s coursework for the Original Diploma of Vocational Education after it received them, and at a time when the Original Diploma of Vocational Education was not within its scope of registration (the Original Diploma of Vocational Education having been removed from the scope of Rose Training’s registration on 6 October 2017).

99. On 5 April 2018, Rose Training issued by email to Mr Dwyer:

99.1. a Testamur for the New Diploma of Training Design; and

99.2. a Record of Results for the New Diploma of Training Design which recorded Mr Dwyer as being “competent” in each of the enrolled units. In the concise statement, ASQA does not make any allegation about the quality or accuracy of Rose Training’s assessment of the coursework for any of the affected students.

100. On 6 February 2019 at 11:00am, following enquiries Mr Dwyer had made about incorrect units of competency being stated on his Record of Results described in paragraph 99.2 above, Rose Training issued by email to Mr Dwyer a revised version of his Record of Results for the New Diploma of Training Design and a Testamur for the Original Diploma of Vocational Education, dated 3 October 2017.

101. Mr Dwyer called Rose Training’s office and told them that the Testamur for the Original Diploma of Vocational Education that he had received was for the incorrect Diploma.

102. On 6 February 2019 at 3:13pm, following the enquiries Mr Dwyer had made about errors in the Testamur described in paragraph 100 above, Rose Training issued by email to Mr Dwyer a Testamur for the New Diploma of Training Design. This Testamur was marked with the same “Document Number” as the Testamur issued to Mr Dwyer on 5 April 2018 which is referred to in paragraph 99.1 above. In that same email, an employee of Rose Training stated that the Testamur for the Original Diploma of Vocational Education issued earlier that day was the wrong qualification and that it had been sent by accident.

103. Notwithstanding that, in the email sent to Mr Dwyer on 6 February 2019, Rose Training stated that the Testamur (for the Original Diploma of Vocational Education) sent to Mr Dwyer earlier that day (as described in paragraph 100 above) had been sent by accident, Rose Training admits that, in issuing that Testamur described in paragraph 100 above, Rose Training purported to issue a VET qualification for the Original Diploma of Vocational Education at a time when the Original Diploma of Vocational Education was not within its scope of registration (the Original Diploma of Vocational Education having been removed from Rose Training’s scope of registration 16 months earlier on 6 October 2017).

104. Further, although it was issued by Rose Training on 6 February 2019, the Testamur described in paragraph 100 above was dated 3 October 2017, which was the third last day before the Original Diploma of Vocational Education was removed from Rose Training’s scope of registration.

# Joint submissions

1. The parties jointly submitted that it was appropriate to make the declarations as to the admitted contraventions as set out in paras [1] and [2] of the proposed orders, in summary, for the following reasons:
* The Court has a wide discretionary power to make declarations under s 21 of the Federal Court Act.
* There is a direct and important question as to whether the respondent contravened ss 94 and 96 of the NVR Act by acting beyond the scope of its registration in respect of the affected students.
* The Authority has an obvious interest, as the statutory regulator of the VET sector, in bringing the proceedings.
* The respondent, as the entity sought to be declared as having contravened the law, has an interest in opposing the relief. This remains so notwithstanding its admissions.
* The declarations sought are desirable and appropriate because they would:
	+ record the Court’s disapproval of the conduct;
	+ assist the Authority in carrying out its functions; and
	+ make clear to other RTOs that such conduct is unlawful.
1. Specifically, in relation to the respondent’s contraventions of s 94 of the NVR Act, the parties submitted, in summary:
* The respondent continued to provide part of the Original Diploma of Vocational Education after the expiry of its registration of that course (on 6 October 2017), by receiving and assessing coursework resulting in the purported issue of a VET qualification to three of the affected students, namely:
	+ Ms Saltmer, who submitted coursework for assessment in December 2017;
	+ Mr Wilson, who submitted coursework for assessment on 14 December 2017; and
	+ Mr Dwyer, who submitted coursework for assessment in around March 2018.
* Because the respondent continued to provide part of the Original Diploma of Vocational Education by receiving and assessing coursework after 6 October 2017, the respondent contravened s 94 of the NVR Act on three occasions.
1. Specifically, in relation to the respondent’s contraventions of s 96 of the NVR Act, the parties submitted, in summary:
* When the respondent provided testamurs to the affected students, it purported to issue VET qualifications within the meaning of the NVR Act.
* After the expiry of its registration on 6 October 2017, the respondent issued testamurs relating to the Original Diploma of Vocational Education and the Original Diploma of Training Design on eight occasions.
* The respondent’s contravening conduct was caused by decisions taken within the respondent seeking to deal with the affected students who had received training but had not been assessed and/or received testamurs prior to the removal of the old qualifications from the scope of the respondent’s registration following the conclusion of the extended teach our period.
* In relation to the testamurs issued to Ms Cush, Ms Saltmer, and Mr Wilson, the testamurs were not only issued in breach of s 96 of the NVR Act, but would convey to a third party recipient that those students had been issued, awarded or conferred the VET qualification on a date on which they had not met the requirements. This contravening conduct was more serious because, in summary:
	+ third parties would be entitled to assume that the date on the testamur was the date of issue, award or conferral, and that the student had met the requirements of the qualification on or before that date;
	+ the length of time that a person has held a qualification is often considered a relevant matter by industry; and
	+ it is important that testamurs accurately represent the date on which a student was issued, awarded or conferred the qualification, having met the necessary requirements.
1. In relation to the appropriate penalties to be imposed under s 137(2) of the NVR Act, the parties submitted, *inter alia*:
* The contraventions should attract penalties that would act as strong general deterrents for the following reasons:
	+ Public confidence in the value of VET training and qualification may be undermined where they are provided by RTOs acting outside the scope of their registration.
	+ The VET sector is so large that there is a substantial risk that contraventions of the NVR Act may go undetected. The prospect that breaches may go undetected may tempt persons to make money by wrongly conducting business outside the scope of the RTO registration. Penalties must be set at a level which will deter a commercial calculation about the risk of non-compliance versus the cope for profit.
	+ The inappropriate provision of VET training and assessment creates a risk that the quality will fall below the necessary standards, and may even result in risks of harm to those relying upon quality training.
	+ If the costs of compliance are avoided by non-compliant operators, this may discourage other operators from incurring the necessary costs to ensure regulatory compliance.
	+ The VET sector is large and the regulatory framework places significant responsivity on RTOs, including in relation to transition obligations which arise when changes are made to training packages that require RTOs to apply to add to their scope of registration. It should be clear to RTOs that compliance with these obligations is not optional.
	+ The scale and the nature of the industry means it is partly self-regulating and there is a need to ensure confidence in the integrity of the industry.
* The conduct for which penalties are sought gave rise to eleven separate contraventions which, although legally distinct, were in some cases closely factually interrelated. It is appropriate to group the respondent’s contraventions in the following way:
	+ the three contraventions of s 94 of the NVR Act;
	+ the three contraventions of s 96 of the NVR Act which were more serious; and
	+ the five remaining contraventions of s 96 of the NVR Act.
* The above grouping takes into account the significantly overlapping nature of each of those categories of contravention, and the interrelationship between such contraventions in terms of their nature and circumstances, harms suffered, and gains achieved.
* Each of the contraventions gave rise to the risks of the broader harms to the integrity of the VET sector and, moreover, to the following harms:
	+ Contrary to their expectations, the affected students received VET qualifications that were liable to be cancelled by the Authority pursuant to s 56(1)(c) of the NVR Act. That section relevantly provides that the Authority may cancel a VET qualification if satisfied on reasonable grounds that it was outside the organisation’s scope of registration to issue the qualification.
	+ The affected students have been deprived of the certainty of having properly issued VET qualifications.
	+ The affected students attended training during paid work time and completed some assessments during paid work time, without obtaining the full benefit of a properly issued VET qualification. This is also a harm to their employer, QPS, which funded the training at $1,800-$2,000 per student. Students who wish to ‘make up’ the equivalent qualification may be required to complete further units of competency to obtain the current TAE qualification (or at a minimum, provide evidence of their skills and experience demonstrating that they satisfy the requirements).
	+ The affected students completed their training in March, May and September 2017. There has been a delay in resolving this matter for the affected students, which is currently ongoing.
* The respondent has agreed to undertake remediation. As of the date of filing of the statement of agreed facts and joint submissions (17 February 2021), this had not yet been completed.
* The respondent will voluntarily provide the Authority with an enforceable undertaking within seven days of the date of the statement of agreed facts, stating that it will:
	+ pay the course fees for any of the affected students who wish to attend make-up units of competency necessary to obtain the current TAE qualification; and
	+ pay the QPS $500 per affected student to compensate for any lost time or wages.
* In its twelve years of operation, the respondent has not previously been found by a Court to have contravened the NVR Act.
* Following an audit of the respondent by the Authority in 2019, non-compliances with the NVR Act were identified, and the respondent was issued with a written direction under s 35A(1) of the NVR Act to remedy those non-compliances. The Authority did not impose any sanctions on the respondent. In a subsequent audit in 2020 as part of the respondent’s registration renewal, the respondent was found to be compliant in relation to the VET courses that it is currently delivering.
* The respondent financially benefitted from the provision of training in circumstances where it would continue to provide part of a VET course and issue VET qualifications after the relevant VET courses were off scope.
* The penalty figure agreed upon by the parties and proposed to the Court exceeds the total of the fees received by the respondent for the provision of training to the affected students.
* The respondent accepted that its conducted amounted to the contraventions.
* The respondent has cooperated with the authority in this proceeding by:
	+ participating in the Authority’s investigation and corresponding constructively with the Authority in relation to this proceeding and its possible resolution;
	+ agreeing to a statement of agreed facts and to a penalty at an early stage in the proceeding, and making joint submissions on the orders to be sought; and
	+ agreeing to pay the Authority’s costs in a lump sum amount.
* If the respondent had not cooperated in the ways described above and had instead contested the proceedings, the time and cost involved would have been significantly greater.
* The parties agree that having regard to all the circumstances, the respondent should be given a discount for cooperation in the order of 25%.
1. The parties submitted that, in view of the above, the proposed penalty of $23,000 (comprising an approximate 25% discount for cooperation) was just and appropriate in all the circumstances of the case. The proposed penalty comprised of:
* $5,100 for the three contraventions of s 94 of the NVR Act;
* $18,900 for the three contraventions of s 96 of the NVR Act, which the parties agreed involved contravening conduct that was more serious in nature; and
* $6,500 for the remaining five contraventions of s 96 of the NVR Act.

# Admissions

1. In the statement of agreed facts and joint submissions, the respondent admitted the following:
* The respondent contravened s 96 of the NVR Act on eight occasions and s 94 of the NVR Act on three occasions (para [2]).
* In issuing the testamur to Mr Dwyer, the respondent purported to issue a VET qualification for the Original Diploma of Vocational Education at a time when the Original Diploma of Vocational Education was not within its scope of registration (para [103]).
* In issuing testamurs to Ms Proudlock, Mr Norris, Mr Grafton, Ms Cush, Ms Saltmer, Mr Wilson and Mr Dwyer, the respondent contravened s 96 of the NVR Act on eight occasions (para [130]).
* During the relevant period, the respondent knew that:
	+ The Original Diploma of Vocational Education had been superseded by the New Diploma of Vocational Education, and the Original Diploma of Training Design had been superseded by the New Diploma of Training Design.
	+ The respondent was not able to issue testamurs for the Original Diploma of Vocational Education and the Original Diploma of Training Design, as those courses were no longer within the respondent’s scope of registration.
	+ Although the New Diploma of Training Design had been added to the respondent’s scope of registration on about 12 April 2016, the New Diploma of Vocational Education had not been added to the respondent’s scope of registration and the respondent would have to apply to the Authority for registration in relation to the New Diploma of Vocational Education, but had not done so (para [131]).
* The respondent incorrectly and mistakenly believed that its conduct was an acceptable way of dealing with its failure to complete the assessment and issuing of testamurs to the affected students before the expiry of the extended teach out period. This conduct was not acceptable and was in contravention of the NVR Act (paras [134], [169]).
* The contravening conduct in respect of Ms Cush, Ms Saltmer, and Mr Wilson was more serious due to the incorrect information about the status of the students’ qualification conveyed by the testamur issued by the respondent (paras [77], [87], [96], [138], [140]).
1. Further, in in the statement of agreed facts and joint submissions, the respondent accepted the following:
* It is fundamental to the integrity of the VET framework that RTOs act strictly within their scope of registration (para [27]).
* The respondent’s conduct the subject of this proceeding was not the result of inadvertent administrative error, in the sense that the contravening conduct was not merely typographical errors, incorrect data entry or computer generated errors (para [133]).

# Consideration

1. The respondent has admitted to the conduct alleged, and that that conduct constituted contraventions of the NVR Act. I understand that, at all material times, the parties were legally represented.
2. There are numerous authorities whereby this Court has imposed penalties in respect of contraventions of the NVR Act, and examined relevant principles in so doing. In particular I note *Commonwealth of Australia v Harrison (No. 2)* [2020] FCA 786, *Commonwealth of Australia v King* [2019] FCA 787 and *Commonwealth of Australia v Wright Solution Qld Pty* Ltd [2018] FCA 1575.
3. The joint submissions of the parties comprehensively and accurately address the issues in this case, in particular, the appropriateness of the penalties sought, and that the Court ought be satisfied that this is a proper case to impose those penalties. In my view there is nothing of substance for me to add to those submissions, which I adopt and incorporate into these reasons for judgment.
4. For the reasons set out in the joint submissions of the parties, and again in light of the principles articulated in such cases as *Harrison (No. 2)*, *King* and *Wright Solution Qld Pty Ltd*, I am prepared to make the orders sought by the parties in this case.

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| I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Collier. |

Associate:

Dated: 1 February 2022