

## NOTICE OF FILING

### Details of Filing

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File Title:	AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v RSA EXPRESS PTY LTD ACN 158 645 133
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



*Sia Lagos*

Registrar

### Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.

## Concise Statement



No. of 2023

Federal Court of Australia

District Registry: NSW

Division: General

Commercial and Corporations National Practice Area (Regulator and Consumer Protection)

### Australian Competition and Consumer Commission

Applicant

**RSA Express Pty Ltd ACN 158 645 133**

Respondent

### INTRODUCTION

1. In these proceedings, the Australian Competition and Consumer Commission (**ACCC**) alleges RSA Express Pty Ltd trading as Express Online Training (**EOT**) contravened the *Australian Consumer Law* by making false or misleading representations and engaging in misleading or deceptive conduct in relation to its online training courses by representing to consumers that they would only pay, or only be asked to pay, for online training courses after they had passed a course, and that the courses could be completed within a day, when this was not the case.

### IMPORTANT FACTS GIVING RISE TO THE CLAIM

2. EOT supplies online courses to consumers so they can obtain accreditations required to work in fields of employment, including:
  - a. a Responsible Service of Alcohol self-paced online course which, if successfully completed, certifies that a person can serve alcohol in licensed venues (**RSA Course**); and
  - b. a White Card self-paced online course which, if successfully completed, certifies that a person can work safely on construction sites (**White Card Course**).
3. Since at least 1 October 2019, the RSA Course was supplied via EOT's website at [www.eot.edu.au](http://www.eot.edu.au) (**EOT Website**) in formats specific to the statutory requirements for the course in each Australian state or territory; and the White Card Course was supplied via

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the EOT Website in Western Australia and Tasmania. EOT promoted the courses both on the EOT Website and through paid advertisements displayed on the Google and Bing online search engines.

4. The EOT Website contained a course information page for each relevant course and each state or territory, which could be accessed directly from the EOT homepage.

### **Course Completion Conduct**

5. From at least 1 October 2019 to 5 November 2023:
  - a. the course information pages on the EOT Website contained:
    - i. statements such as: “Pay Only when you have passed\*”, “Only Pay After You Pass\*”, “Pay When You Pass”, and “Best of all - with us you don’t have to pay until you pass!\*” (**Pay When You Pass Statements**);
    - ii. ‘Course Flow’ icons, which generally set out the following steps for undertaking the relevant course and obtaining the relevant certificate: (1) Sign Up & Start for FREE, (2) Pause & Resume at Any Time, (3) Complete Remaining Tasks, (4) Only Pay After You Pass\*,<sup>1</sup> (5) INSTANT Certificate Download, and (6) Print or Email Certificate;<sup>2</sup>
  - b. in order to progress from the course information page to ‘Registration’, consumers were required to click on a prominent button labelled “Start Course Now For Free”. In respect of all courses (save for the RSA course in New South Wales), following registration and acceptance of EOT’s terms and conditions, consumers were also presented with ‘Instructions’ which set out the ‘Steps’ required to complete the course. Until at least July 2022, those instructions indicated that consumers would make payment after completing the course assessments and would thereafter receive a certificate;
  - c. following registration, consumers were required to read information from the ‘Course Notes’ tabs and then correctly answer over 100 questions. According to EOT, it takes a consumer an average of 3-6 hours to complete these questions. In its correspondence with the ACCC, EOT refers to these questions as the ‘Knowledge Assessment’, though this was not a term used on the EOT Website. Rather, the EOT Website referred to those questions as “the course”; and
  - d. following the knowledge assessment, the EOT Website prompted consumers to enrol by entering their personal, contact and background details and then to select

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<sup>1</sup> From July 2022, this statement read “Pay When You Pass\*”.

<sup>2</sup> For the RSA Course in New South Wales from 1 April 2021, steps (3) and (4) were reversed. For the RSA Course in Victoria (which was available from at least 1 October 2021), steps (3) and (4) were reversed. There were also minor variations to steps (5) and (6) to account for some jurisdictional requirements.

the format of their certificate. Once they had done so, consumers were directed to the 'Make Payment' page which prompted them to pay for the course. Throughout this process, a ribbon at the top of the screen indicated that 'Make Payment' was the final step. However, after consumers paid for the course, EOT disclosed that additional assessable tasks had to be completed to obtain the certificate.

6. Throughout the steps set out in paragraph 5 above, EOT did not, or did not adequately, disclose that consumers would pay or be prompted to pay for the course prior to completing the course. Nor did EOT disclose, or adequately disclose, during those steps that, after it prompted consumers to pay, there were additional assessable tasks. Although EOT made changes to its website in July 2022 following contact from the ACCC (including to its terms and conditions and payment prompt), EOT still did not disclose, or adequately disclose, these matters. In this way the EOT Website led consumers to pay for the course before they had passed even though they had understood that they would only pay when they passed.
7. By engaging in this conduct (**Course Completion Conduct**), EOT gave or was likely to give consumers the misleading understanding or impression that when they were prompted to pay for the relevant course, they had completed the course and would receive the certificate for that course, when this was not the case.

### **Pay When You Pass Representations**

8. From at least 1 October 2019 to 5 November 2023, EOT has published the Pay When You Pass Statements and the course flow icons on each relevant course information page on the EOT Website.
9. Between at least November 2020 and 14 November 2022, EOT also used the Google and Bing online search engines to promote its courses via online advertisements containing Pay When You Pass Statements (and a further statement "Pay Only When You Pass") in a form which was supplied by EOT for use in those advertisements.
10. By publishing the statements and the course flow icons on the EOT Website and by causing those statements to be displayed in paid advertisements on online search engines, EOT represented that consumers would only pay, or only be asked to pay, for the relevant course after they had passed the course (**Pay When You Pass Representations**). The Pay When You Pass Representations were false or misleading because consumers were prompted to pay for the course prior to passing the course, and many consumers in fact paid for the course prior to passing.

### **Same Day Representations**

11. From at least November 2020 to 14 November 2022, EOT caused the display of paid advertisements for certain of its courses on online search engines containing statements

such as: “Same Day” or “SameDay Results”. It did so by supplying those statements to Google and Bing for use in advertisements generated by those search engines. Further, from at least 1 October 2019 to at least 2 December 2022, the course information page for the RSA Course in New South Wales contained the statement “Same Day Interim Certificate” or “Certificate issued same day”.

12. By making these statements, and by causing these statements to be made, EOT represented that consumers could undertake the relevant course and obtain a certificate within the same day (**Same Day Representations**). The Same Day Representations were false or misleading as the courses in respect of which the statements were made could not be, or were unlikely to be, completed within a day. After the knowledge assessment (which took substantial time to complete) consumers were required to schedule further assessments with EOT staff, which often could not be booked for the same day or even several days. EOT then took substantial time to process remaining assessments and tasks.
13. Following payment by consumers for their selected course in response to the payment prompt, EOT advised consumers that the average time it took to mark an assessment or review a document submission was up to 3 business days, but that if consumers paid for EOT’s ‘priority service’ (costing between \$105 and \$125), EOT would provide priority marking and document review in under 2 hours.

#### **RELIEF SOUGHT FROM THE COURT**

14. The ACCC seeks the relief set out in the Originating Application, which includes declarations, injunctions, pecuniary penalties, corrective notices, and consumer redress.

#### **PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT**

15. By making the Pay When You Pass Representations in the circumstances set out in paragraphs 5 and 8-10 above, and the Same Day Representations in the circumstances set out in paragraphs 11-13 above, EOT in trade or commerce, on multiple occasions:
  - a. engaged in conduct that was misleading or deceptive, or was likely to mislead or deceive, in contravention of s 18 of the ACL;
  - b. made false or misleading representations that services had performance characteristics, uses or benefits in contravention of s 29(1)(g) of the ACL;
  - c. engaged in conduct that was liable to mislead the public as to the nature, the characteristics or suitability for their purpose of services in contravention of s 34 of the ACL.
16. By engaging in the Course Completion Conduct in the circumstances set out in paragraphs 5-7 above, EOT in trade or commerce, on multiple occasions:

- a. engaged in conduct that was misleading or deceptive, or was likely to mislead or deceive, in contravention of s 18 of the ACL;
- b. engaged in conduct that was liable to mislead the public as to the nature, the characteristics or suitability for their purpose of services in contravention of s 34 of the ACL.

### **ALLEGED HARM CAUSED**

17. Consumers were likely misled into choosing a course supplied by EOT rather than another supplier and starting the RSA Course or the White Card Course offered by EOT, on the incorrect understanding that they would only pay for the course after they had completed it and that it could be completed within a day. EOT used terminology on its website and in its advertisements which targeted consumers seeking a course with those characteristics.
18. When such consumers became aware of the further assessments, they had already paid for the course and invested significant time undertaking it. Many consumers abandoned the course at this stage, including those that did not have the time to complete it or who required certification within a day. Other consumers paid the previously undisclosed priority fee (referred to in paragraph 13) to obtain their certification more quickly. Some consumers reported losing or jeopardising employment opportunities because they were unable to complete the course within the advertised timeframe. Others reported having to undertake an alternative course.

### **OTHER**

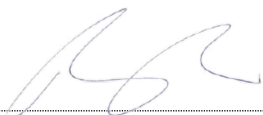
19. The Applicant does not consider that any of the issues in this Concise Statement are suitable for a report by a referee under s 54A of the *Federal Court of Australia Act 1976*.

This concise statement was prepared by Jonathan Clark and settled by David Staehli SC.

## Certificate of lawyer

I, Anna Ross, certify to the Court that, in relation to the concise statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 24 November 2023



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Signed by Anna Ross

Lawyer for the Applicant