ISSUES PAPER

PROBLEMS WITH WRITTEN AGREEMENTS BETWEEN OVERSEAS STUDENTS AND REGISTERED EDUCATION PROVIDERS[1]

EXECUTIVE SUMMARY

Education providers are required by the *Education Services for Overseas Students Act 2000* (ESOS Act) to enter into a written agreement with each overseas student they enrol. These agreements are required to contain a refund policy stating the amounts students will or will not be refunded should they default on their course.

The Overseas Students Ombudsman investigates complaints from intending, current and former overseas students about the actions of private registered education providers. Refund and fee disputes are the most frequent type of complaint our office receives[2]. Some fee dispute complaints relate to the fairness of common terms and conditions in written agreements, particularly terms relating to early termination and cancellation fees.

After investigating complaints we sometimes determine that a written agreement is not compliant with legal requirements and recommend that the provider pay a refund or cease pursuing a student for outstanding fees. This has a financial impact for the education provider. When a written agreement is non-compliant, unclear or poorly written, it can also be difficult for overseas students to understand their rights and responsibilities.

We consulted with peak bodies and stakeholders about written agreements between overseas students and registered providers with a view to assisting providers to increase compliance with the ESOS framework and therefore improve the quality of their written agreements. There was broad support for the development of a checklist to assist providers to assess their written agreements against the requirements of the ESOS framework. For this reason we are publishing a checklist with this Issues Paper. Although there was not broad support for the development of a model contract and standard clauses, peak bodies that have not already done so, may consider developing such tools on a sector specific basis in consultation with their members.

In this paper we:

- explore the deficiencies we commonly see in written agreements using case studies
- set out the requirements for written agreements under the ESOS Act and the 'National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007' (the National Code)
- explain the application of contract law principles to written agreements, and

1 The ESOS Act was amended in December 2015. This Issues paper, originally published in March 2015, has been updated to reflect these amendments.

2 Refund and fee dispute complaints accounted for 28 per cent of complaint issues received by the Overseas Students Ombudsman from 1 July 2013-30 June 2014.

- provide a checklist which will assist providers in developing and maintaining compliant written agreements.

The Department of Education and Training (DET) has commenced consultations on the reform of the ESOS legislative framework. We are providing input to these reforms, including sharing with the DET our observations arising from our consultations with the sector regarding written agreements.

We would like to thank the industry and student peak bodies, providers and government agencies that responded to our consultation.

1. BACKGROUND

All education providers who wish to enrol students holding a student visa must be registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS). CRICOS registered providers are obliged to comply with the ESOS Act and the National Code, along with statutory instruments made under the ESOS Act - collectively, the ESOS framework. Under the ESOS framework, each registered education provider must enter into a written agreement with each overseas student about the course that the student intends to undertake concurrently with or prior to accepting course money from the student.

The ESOS framework prescribes consequences for registered providers whose written agreements do not comply with the requirements set out in that framework.

Deficiencies in written agreements that we have seen include:

- failure to make a written agreement when required
- refund policies that do not comply with the ESOS framework requirements, including refund policies that:
    - are not included in the written agreement but merely referred to
    - do not comprehensively set out what happens to all the fees already collected when a student defaults
    - have the effect of denying a refund even though the student's visa has been refused, in which case the ESOS Act entitles the student to a refund
    - omit the required statement about the student's rights under Australian Consumer Law or the process for claiming a refund
- non-compliance with other ESOS framework requirements, including
    - failure to include itemised course monies
    - failure to ensure the letter of offer or enrolment is signed or 'otherwise accepted'
- gaps in written agreements which create ambiguity or uncertainty
- poor record keeping, and
- failure to implement the terms and conditions of the agreement.

We also receive complaints about the fairness of common terms and conditions in written agreements, particularly terms relating to early termination and cancellation fees.

Where written agreements do not comply with the requirements set out in the ESOS framework this may result in:

- the payment of refunds to students that would otherwise not be payable, or the payment of larger refunds to students than would otherwise be payable under s 47E of the ESOS Act
- possible regulatory consequences affecting registration under s 83 of the ESOS Act, and
- the imposition of a pecuniary penalty (monetary fine) for committing a strict liability offence under s 47F of the ESOS Act.

Clear and compliant written agreements increase certainty and minimise disputes and claims of unfairness.

2. THE ESOS FRAMEWORK AND WRITTEN AGREEMENTS

In assessing whether a provider has taken action that is contrary to law, our office examines the provider's actions in the context of the ESOS framework and general legal principles. The key requirements relating to written agreements between registered providers and overseas students are set out below.

Limit on collection of tuition fees before course commencement

Section 27 of the ESOS Act provides that, except in relation to courses with a duration of 25 weeks or less, registered providers must not receive more than 50% of overseas student's total tuition fees for the course before the student has started the course unless the students chooses to pay more than 50%.

The provider must be able to show that it has informed the student that he or she does not have to pay more than 50% of the course fees upfront for courses longer than 25 weeks. The provider can do this by including a note in the written agreement or the application form. In additional, the provider may also wish to include this information in its marketing material.

Where students have paid 50% of the fees before commencement for courses longer than 25 weeks, the balance of the fees may be collected when the student commences the course.

Refund and other requirements

Section 47B of the ESOS Act requires that providers must enter into a written agreement with each student that:

- sets out the refund requirements that apply if the student defaults in relation to a course at a location, and
- meets the requirements set out in the National Code.

National Code requirements

The National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students (the National Code) provides nationally consistent standards for the conduct of registered providers and the registration of their courses. The standards set out specifications and procedures to ensure that registered providers of education and training courses can clearly understand and comply with their obligations under the National Code.

Standard 3 of the National Code provides that written agreements between registered providers and overseas students must:

- identify the course or courses in which the student is to be enrolled and any conditions on his or her enrolment

- provide an itemised list of course money payable by the student
- set out the circumstances in which the student's personal information may be shared
- advise the student of his or her obligation to notify the registered provider of a change of address while enrolled in the course
- provide information about refunds of course money, which must be consistent with the requirements of the ESOS Act and include
    - amounts that may or may not be repaid to the student
    - the process for claiming a refund
    - a plain English example of what happens if a course is not delivered by the provider, and
    - a statement that 'this agreement, and the availability of complaints and appeals processes, does not remove the right of the student to take action under Australia's consumer protection laws'.

In order to comply with s 47B of the ESOS Act written agreements must comply with Standard 3 of the National Code.

Penalties for non-compliant written agreements

Section 47F provides that failure to enter into a written agreement that complies with s 47B is a strict liability offence[3] under the Act**.** This means that failure to include those things set out in Standard 3 of the National Code and listed above may also be an offence of strict liability.

As a failure to comply with 47B is a strict liability offence, it does not matter if the failure was not the provider's fault, if the provider simply made a mistake or there was an administrative error. If the agreement is non-compliant, the provider has most likely committed an offence, and could be liable to other disciplinary action by the relevant regulator.

Section 83 of the Act provides that the Minister may take regulatory action against a provider if the Minister believes, on reasonable grounds, that the registered provider is breaching or has breached the ESOS Act, the National Code or a condition of registration.

The Minister may:

- impose one or more conditions on the registered provider's registration
- suspend the registered provider's registration for any one or more specified courses for any one or more specified locations (see s 95), and
- cancel the registered provider's registration for any one or more specified courses for any one or more specified locations.

Refunds in case of student default

Section 47D of the ESOS Act states that if a student defaults, the provider must pay a refund of the amount (if any) required by the written agreement.

A student default occurs when:

- a student who has not previously withdrawn does not start the course at the location on the agreed starting day, even though the course has started
- a student withdraws from the course at the location before or after the agreed starting day, or

[3] A strict liability offence is defined in the *Criminal Code Act 1995*.

- a registered provider refuses to provide or continue to provide the course to the student because the student has failed to pay an amount owed to the provider, the student has breached a condition of his or her student visa, or because of misbehaviour by the student.

However, **s 47E** of the ESOS Act states that the provider must pay a refund under the requirements of s 47E, instead of the requirements of the written agreement, if the:

- provider has not entered into a written agreement with the student that meets the requirements of s 47B (non-compliant written agreement), or
- student fails to commence their course due to their student visa application being refused.

Refunds paid under s 47E are calculated in accordance with the Education Services for Overseas Students (Calculation of Refund) Specification 2014 made under ss 46D(7) and 47E(4) of the ESOS Act (the Specification).

In the case of a non-compliant written agreement, the provider is required to refund an amount equal to the weekly tuition fee times by the number of weeks in the default period. Refunds calculated under the Specification would usually be more generous to the defaulting student than if the provider had been able to rely on its refund policy in the written agreement.

In the case of a student default due to visa refusal, before the course commences, the provider is required to refund course fees (including tuition and non-tuition fees) received by the provider, minus the lesser of 5 per cent of the amount of course fees received before the default day or $500.

In the case of a student default due to visa refusal, after the course commences, the provider is required to refund an amount equal to the weekly tuition fee times by the number of weeks in the default period.

Please note: the requirement to refund students where a visa has been refused exists regardless of the reason the visa was refused and regardless of whether the visa refusal occurs before or after the student has commenced studying.

3. CONTRACT LAW PRINCIPLES AND WRITTEN AGREEMENTS

Written agreements between registered providers and overseas students are a type of legal contract. This means that they are governed by the general principles of contract law as well as the specific requirements of the ESOS framework.

3.1 What is a contract?

A contract is a legally binding agreement between at least two parties. A contract is created when four elements are satisfied:

- offer
- acceptance
- intention to create legal relations, and
- consideration

Provided there is consideration and intention to create legal relations, a contract is formed when one party, with capacity to do so, **accepts** an **offer** from another party.

Consideration is the price paid for a promise. For example the course money paid by the student to the provider for the promise of the course that the provider will deliver, is consideration[4]. Intention to create legal relations refers to the intention of both parties to be bound by the agreement and generally excludes arrangements of a social or domestic nature from being legally enforceable. Consideration and intention to create legal relations are rarely in issue when we analyse written agreements between registered providers and overseas students. For this reason we have concentrated on offer and acceptance and what these concepts mean for providers in forming valid agreements with providers. These concepts are explored further below.

Most contracts for everyday transactions, such as the purchase of goods in a store, do not have to be in writing. However, the ESOS Act requires enrolment agreements between overseas students and registered providers to be in writing ('written agreements') and to include certain terms.

Disputes arising from contracts are resolved by applying common law contract principles and any relevant legislation. The key legislation for contracts between overseas students and registered providers is the ESOS framework. The Australian Consumer Law[5] is also likely to apply to contracts between overseas students and registered providers.

Contract law principles are a set of rules which have evolved over time governing the formation of contracts, the enforceability of terms in contracts, and the rights and remedies of parties where another party defaults in the discharge of their obligations under a contract.

3.2 What is an offer?

As noted above, the ESOS framework requires providers to make written agreements with students that include certain terms. This means that there must be a written offer from the provider that can be accepted by the student.

An **offer**:

- is a definite promise to be bound by the terms and conditions contained within it once the offer is accepted, and
- is sufficiently clear and specific, so as to be capable of acceptance.

Conditional offers

Mr A enrolled in a package of certificate and diploma courses and ultimately had a dispute with his provider about a range of issues. This dispute led to the provider withholding qualifications and demanding outstanding fees. Mr A complained to us about the provider's actions. As part of our investigation, we asked for a copy of the written agreement between the provider and Mr A.

The provider had sent Mr A a '*conditional* letter of offer' that listed 'proposed' courses. In our view, this document did not constitute an 'offer' that was sufficiently clear and specific so as to be capable of acceptance. Therefore, no valid written agreement had been formed.

[4] A deed, made under seal does not require consideration to be a binding agreement however this is unlikely to occur in the context of agreements between overseas students and registered providers that become the subject of complaints to the OSO.

[5] The Australian Consumer Law is Schedule II of the *Competition and Consumer Act 2010*

We recommended that the provider issue the qualifications for those courses that Mr A had in fact completed and not pursue Mr A for any outstanding fees, as no valid written agreement existed.

Often the provider sends the student a 'Letter of Offer' or 'Offer of Enrolment', which is generally an acceptable form of offer, provided the document or package of documents includes everything required by the ESOS framework. However, whether something amounts to an 'offer' is determined by looking at the content of the document and the context in which it was sent to the student.

It is important that providers are clear about the significance and effect of each document provided to a student. For example, many providers require students to complete an 'application' form. The application form may contain information about the course, fees and refunds and may include other information about the policies and procedures of the provider. The application form may itself amount to an offer, which the student accepts by signing and returning it. A written agreement therefore could be formed at that stage.

However, providers often do not intend the application form to be a legally effective offer, as they have not yet decided whether to enrol the student. If the provider assesses the application after receiving it, and only then sends a 'letter of offer' or 'offer of enrolment' or similar document to the student, then it is that subsequent document that constitutes the offer to the student.[6]

Where the information provided in the application form does not form part of the written agreement, providers cannot seek to rely on this information when fee and refund disputes arise with students. If the application form contains information that the ESOS framework requires to be included in the written agreement but this information is not also included in the letter of offer, then the letter of offer (once signed or otherwise accepted) is not a compliant written agreement. This may mean that in cases of student default, the student is entitled to a refund under s 47E on the basis that the written agreement is not compliant with s 47B.

When the application form is not part of the offer
Mr B enrolled with a provider and paid 50 per cent of his fees upfront. However, his visa conditions did not permit him to study with this provider. When he realised this, Mr B withdrew and applied for a refund. The provider refused so Mr B complained to us.

We found that Mr B had signed an application form that included a refund policy. However the provider had subsequently sent Mr B a 'letter of offer', which he had also signed, that did not include the refund policy. Instead, the letter of offer referred the student back to the refund policy in the application form. The letter of offer also did not include the required statement about the student's right to take action under Australia's consumer protection laws.

In our view, the written agreement was formed when Mr B signed the letter of offer and did not incorporate the earlier application form. The written agreement therefore did not comply with s 47B, and so the student was entitled to a refund under s 47E.

[6] In legal terms, the application form would be considered to be an 'invitation to treat' – in effect, a request from the student for an 'offer' from the provider that the student can then accept.

3.3 Required terms – what needs to be in the written offer

The ESOS framework requires providers to include certain terms in written agreements[7].

Common mistakes that we have seen in written agreements include:

- required terms are left out
- terms that are inconsistent with other terms contained in the written agreement
- terms that conflict with the requirements of the National Code or the ESOS Act
- failure to itemise course fees, or course fee information that is internally inconsistent, and
- refund policies that do not include the information required by Standard 3 such as the statement regarding Australian Consumer Law.

No refund policy in written agreement
Ms C complained that her provider had refused her refund request when she withdrew after the course commenced. The provider's refund policy stated that no refund would be provided after course commencement. We considered the written agreement and found that the provider had not included its refund policy in the agreement but instead referred students to refund policy on its website. We recommend that the provider pay Ms C a refund as its written agreement was not compliant with the ESOS Act and National Code requirements.

3.4 Reasonable notice of terms

As well as the terms that are required by law to be expressly included in the agreement, providers may also wish to incorporate a range of other terms and conditions into their written agreement with a student.

Such terms can of course be expressly included in the contract. But it is also possible for providers to incorporate other terms by reference, provided that the provider gives the student **reasonable notice** of those other terms before the student accepts the offer. For example, written agreements often refer to the provider's policies available on its website which deal with matters such as student behaviour and discipline, and attendance and course progress.

Failure to give adequate notice of late payment fees
Ms D complained to our office that her provider was pursuing her for $600 of outstanding late payment fees. As part of our investigation we examined the provider's written agreement with Ms D. The written agreement did not contain any notice of late payment fees and neither did the student handbook. Students were notified about the introduction of late fees by notices on classroom notice boards, however, as all other fee notifications were electronic it was likely in our view that many students would not be aware of the introduction of late fees until they were invoiced for the late fees. We recommended that the provider cease pursuing the

[7] We note the Department of Immigration and Border Protection (DIBP) website also sets out some requirements for a letter of offer at http://www.immi.gov.au/business/pages/education-providers/roles-responsibilities.aspx.

student for the late fees and consider changing its written agreement to include reference to the late payment fees so that they clearly formed part of the agreement between the parties.

By giving reasonable notice of these policies prior to the offer being accepted, the provider can incorporate these other terms into its agreement with the student.

In order to give the student reasonable notice, the provider must ensure:

- the student is told about these other terms and conditions, and
- the student has the opportunity to access and read the relevant documents before accepting the offer.

3.5 What is acceptance?

A binding agreement is formed when an offer is accepted. The person accepting the offer generally is not bound until they have communicated that acceptance to the offeror (the provider). **Acceptance** must be a clear indication of consent to the terms proposed in the offer.

Standard 3 of the National Code provides that:

> The registered provider must enter into a written agreement with the student, signed or otherwise accepted by that student (or the student's parent or legal guardian if the student is under 18 years of age), **concurrently with or prior to** accepting course money from the student (our emphasis).

Under the ESOS framework, acceptance cannot be merely verbal, or inferred by conduct. In particular, acceptance cannot be inferred by the student paying course money.

The Explanatory Guide to the National Code explains that the 'signed or otherwise accepted' requirement means that students can sign a form, or indicate their acceptance online. The Guide goes on to explain that:

- providers using online acceptance must be able to demonstrate that the student entered into the agreement with them (verifying authenticity of acceptance), and
- providers cannot accept course money until the agreement is signed or otherwise accepted.

In our view, the language of Standard 3 and the Explanatory Guide make it clear that something more than payment is required as evidence of acceptance. We understand that this approach does not reflect the business practices of all industry stakeholders and that this concern has been raised by at least one industry peak body as part of the ESOS reform consultation process. Unless standard 3 is changed we will continue to require that written offers are accepted by a method other than the act of payment in our investigation of individual complaints.

Payment is not acceptance
Mr E withdrew from his English language course and sought a refund from his provider. The provider verbally refused to give Mr E a refund and he complained to our office.

As part of our investigation, we asked the provider for a copy of the written agreement. The provider supplied us with a copy of a signed application form,

which did not list the courses or itemise the fees, and a letter of offer. The letter of offer was issued after the application form had been signed and contained the terms and conditions of enrolment and the itemised list of fees. However, the letter of offer was unsigned by the student. The provider did not supply our office with evidence that the student had otherwise accepted the terms and conditions set out in the letter of offer. The provider instead relied on payment of the fees listed in the letter of offer as acceptance of the terms and conditions.

In our view, the payment could not constitute acceptance under the ESOS framework and therefore the provider had not made a written agreement that complied with s 47B of the Act. We recommended that the provider pay a refund to the student under s 47E.

It is also a requirement both of general contract law, and the ESOS framework, that the person accepting the offer has legal capacity to do so. Children under 18 years do not have legal capacity to enter into contracts of significance. Standard 3.1 of the National Code addresses this by requiring a parent or legal guardian to sign the agreement if the student is under 18 years of age.

This is a straightforward requirement however we see examples of non-compliance where the under-18-year-old student signs the written agreement or a provider accepts the signature of a homestay parent, relative or person nominated on a Student Guardian Visa, even though they do not have legal guardianship for the under-18-year-old student.

Minor signed written agreement
Ms F enrolled to study years 11 and 12 and paid 50 per cent of her fees upfront. Shortly after commencing the course, her family circumstances changed. She had to withdraw from the course and return to her home country. Ms F sought a refund.

When we investigated, we found that Ms F had signed the written agreement herself when she was only 16 years old. Therefore, the agreement with the provider was not valid. We recommended that the provider pay a refund to the student under s 47E.

3.6 Variation of written agreements

Providers may seek to vary agreements for a variety of reasons such as an increase in costs or because of new regulatory or admission requirements that change course content (such as additional subjects or practical experience). The provider may also review or update its policies about student behaviour, attendance or other matters.

In general terms, it is permissible for a contract to include a clause allowing one or both parties to vary the terms of the contract. However, without such a term in the contract, any changes to the agreement must be specifically agreed to by both parties.

Special offers and fee changes
Ms G enrolled in a degree course on the basis of a special offer which included a fixed price for the full degree course. This price represented a 50 per cent discount from the usual price. Shortly after Ms G enrolled and commenced studying she and other students were advised that the full price of the course was increasing and that as a result their fees, which represented a discount of 50 per cent, would also increase. We investigated and found that the written agreement included a clause

which stated that students who accepted the special promotional offer were guaranteed that the price offered at the time of enrolment would remain constant for the entire period of that course. We recommended to the provider that these students should not have their fees increased.

Changes to course duration – no variation clause
Ms H enrolled to study a diploma course. The written agreement set out a course duration of over 90 weeks. For operational reasons the provider decided to shorten the course duration to around 60 weeks which increased the attendance requirement per week and resulted in students being required to attend 5 days a week instead of 3 days a week.

This variation was not foreshadowed in the written agreement and created difficulties for the student. When the student complained to our office the provider agreed to negotiate a more suitable schedule with the student.

Change to course duration – variation only by agreement
Ms I was enrolled in a diploma of one year's duration. Days after Ms I signed the written agreement with the provider the course was superseded. Under arrangements put in place by the regulator the provider could have continued to teach out the agreed course until after the original end-date for the course specified in the written agreement with Ms I. However, for operational reasons the provider decided to shorten the course duration for Ms I resulting in more intense study requirements for her, with which she was unhappy. The written agreement contained a clause stating that it could only be varied in writing and that such a variation must signed by both parties.

When the provider was unable to come to a satisfactory arrangement with Ms I regarding course duration, we recommended that the provider consider making a partial refund as Ms I had not agreed in writing to the proposed changes to the course duration.

Providers should be mindful that clauses allowing them to unilaterally vary the terms of a written agreement must be fair. A unilateral variation clause may be fair if it:

- is clear and transparent
- is reasonably necessary in order to protect the legitimate interests of the provider
- will not cause a significant imbalance in the parties' rights and obligations, and
- will not cause detriment to one of the parties.

A unilateral variation clause is less likely to be unfair if the student has a right to terminate the agreement, without penalty, if the change to the agreement disadvantages them and the circumstances permitting variation are clearly expressed in the contract.[8]

Other types of variation can amount to a provider default under s 46A of the ESOS Act. For example, a provider who attempts to substitute one course for another course, or to change the location at which the course is to be provided, would be required to pay a refund under s 46D of the Act.

[8] A Guide to the Unfair Contract terms, a joint publication by the ACCC and state fair trading bodies, p 20
http://www.consumerlaw.gov.au/content/the_acl/downloads/unfair_contract_terms_guide.pdf

In some cases, courses are varied because of new or additional requirements of a body such as an Industry Skills Council. Generally, the regulator will deal with this situation through the use of 'teach out' provisions. A new written agreement may be required in cases where the changes require additional or subjects to be added to the course or where timeframes are extended.

Providers should be aware of their obligation to notify the DET within 31 days if the duration of a student's course changes or if a student changes course. In either case students must be issued with a new COE.

Often written agreements incorporate policies by reference such as course attendance, course progress or discipline policies which are published on the provider's website but are subject to change. A policy is incorporated by reference if it is referred to in the written agreement but its contents are not replicated in the written agreement. Providers should be aware, in the interests of transparency, of the need to give reasonable notice to students of such policies and of the fact that they are subject to change.

4. WHAT HAPPENS IF A STUDENT DEFAULTS?

A typical scenario occurs where a student withdraws from a course because his or her circumstances or study preferences have changed, or because expectations have not been met.

We receive complaints from students in this situation because:

- the student has applied for a refund of tuition fees and the provider has rejected the refund application, or
- the provider is pursuing the student for a cancellation fee such as the tuition fee for the semester following the student's withdrawal.

Where a written agreement is valid, the outcome of a defaulting student's request for a refund is determined by the provider's refund policy. In other words, if the written agreement is valid, a defaulting student will only get a refund of fees, if the refund policy set out in the written agreement says they are entitled to one.

Similarly, in relation to the pursuit of unpaid fees for future terms or semesters, the agreement must clearly set out what the student is obliged to pay, if anything, in the event of early termination.

4.1 Refunds of tuition fees paid to the provider

Refund policies must be consistent with the requirements of the ESOS Act and contain the following information:

- amounts that may or may not be repaid to the student (including any course money collected by education agents on behalf of providers)
- processes for claiming a refund
- a plain English explanation of what happens in the event of a course not being delivered, and
- a statement that 'this agreement, and the availability of complaints and appeals processes, does not remove the right of the student to take action under Australia's consumer protection laws'.

A statement that a student is not entitled to a refund of a security deposit after commencement, without setting out what the refund policy is in relation to other course fees, is not adequate to meet the requirement that providers include information about amounts that may or may not be repaid to a student on default where fees have been collected.

Although most written agreements we see do include a refund policy, we regularly identify refund policies that are not compliant with the requirements of the ESOS framework and therefore cannot be relied on by providers.

Refund policy does not include consumer law statement
Ms K complained to our office that her provider would not refund her unspent fees after she withdrew early from her course. However the refund policy did not include the statement that 'This agreement, and the availability of complaints and appeals processes, does not remove the right of the student to take action under Australia's consumer protection laws'. The refund policy was non-compliant. Therefore, we recommended that the provider refund Ms K in accordance with s 47E of the ESOS Act.

Refund policy and visa refusal
Mr L complained to our office that his provider would not refund fees after he withdrew early from his course. However the provider's refund policy stated that in all cases of student default the provider would not refund fees. The refund policy was not compliant with s 47B of the ESOS Act because it stated that any student who withdrew before commencement (for any reason) would not be entitled to a refund. This clause had the effect of denying students a refund even where their student visa application was refused. We recommended that the provider refund Mr L in accordance with s 47E.

Incomplete refund policy
Ms M enrolled in a diploma course. Her personal circumstances changed and she withdrew from the course. Ms M applied for a refund and her request was refused by the provider. When we investigated we found that the extent of the provider's refund policy was a statement that 'a non-refundable enrolment fee of $250 is required at the time of enrolment and this guarantees your place in the course'. This refund policy was not compliant with the ESOS framework as it did not explain what amounts may or may not be repaid to student in the event of student default. We recommended the provider pay a refund to Ms M under s 47E.

4.2 Cancellation Fees

If the written agreement does not explicitly include a term allowing the provider to charge a 'cancellation fee' if the student withdraws after fees already paid to the provider have been spent, then the provider has no basis on which to pursue the student for such a fee.

Inclusion of a clear and transparent cancellation clause in a written agreement increases certainty for the parties and can reduce the evidentiary burden on providers in the event of a dispute.

Furthermore, providers should not seek to rely on:

- cancellation fee terms that amount to a penalty[9], or
- terms that are unfair contract terms under s 23 of the Australian Consumer Law[10].

A written agreement that attempts to lock students into a lengthy study pathway by failing to make any allowance for withdrawal with reasonable notice could be considered unfair under the Australian Consumer Law. This is because such a clause may create an imbalance between the rights and obligations of the parties and providers would have less incentive to respond to any concerns or to complaints of 'locked in' students about quality issues.

On the other hand, providers have legitimate interests to protect from unexpected student withdrawals. Providers often invest heavily in recruiting overseas students, including paying commissions to education agents, and may not be able to fill a place left vacant in a course by a student if insufficient notice is given.

In our view, a cancellation fee that is no more than a genuine pre-estimate of the provider's actual loss is in itself unobjectionable, provided that a clear and transparent term about this is expressly included in the written agreement with the student.

One way to draw attention to important clauses is to provide a 'critical information summary'. A critical information summary is typically a one page document attached to the written agreement accurately summarising or highlighting onerous or time-critical requirements, such as cooling off periods, refund entitlements, cancellation fees or the potential for fee increases. Providers may wish to use a critical information summary to increase the transparency of their written agreements and to ensure that students better understand their rights and obligations.

4.3 Packaged courses

Particular challenges can arise in applying these principles to refund policies and cancellation fee provisions in relation to packages of courses. For example, a written agreement may provide for a student to enrol and study first in an English language course, then a foundation course, and then a Bachelor's course. Alternatively, the

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[9] A **penalty** is a fee or charge that is 'extravagant and unconscionable' compared to the greatest loss that might conceivably flow from the breach or failure to comply with a particular stipulation in a contract instead of a genuine pre-estimate of loss. Under this rule, a fee that is charged to secure the performance of a party to a contract must be a genuine pre-estimate of the loss suffered by the other party as a result of non-performance, taking into account that parties duty to mitigate their loss *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] UKLH1, *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656, *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30 and *Paciocco v Australia and New Zealand Banking Group Limited* [2014] FCA 35

[10] Section 23 of the Australian Consumer Law provides that term will be unfair if, looking at the contract as a whole and the extent to which the term is transparent:

- it would cause a significant imbalance in the parties rights and obligations arising under the contract
- it is not reasonably necessary in order to protect the legitimate interests of the party who would be disadvantaged by the term, and
- it would cause detriment (whether financial or otherwise) if it were to be applied or relied on.

student may package an English language course followed by a certificate course and a diploma course.

Under s 27 of the ESOS Act, the provider can require the student to prepay 50 per cent of the student's total tuition fee for each course in the package (or 100 per cent of any course up to 25 weeks long). In total, the tuition fees paid prior to the first course commencing can run to tens of thousands of dollars, and can relate to courses that may not be offered for some time into the future.

Often enrolment in the principal course is conditional upon successful completion of a preceding course, such as an English language course. Written agreements are often silent about what happens to deposits paid for the second or third course in a package if the student is unsuccessful in obtaining the required grades for the pre-requisite course.

We have seen written agreements that provide that students are not entitled to any refund of a deposit for subsequent courses once they have commenced the first course in the package of courses.

Providers should ensure that their refund policy operates fairly. In our view providers of packaged courses can do this by:

- ensuring that terms and conditions as to refunds, especially those affecting second or third courses are transparent and clearly presented,
- incorporating discretion into their written agreement to refund students enrolled in packaged courses in compassionate and compelling circumstances even where a student would not otherwise be entitled to a refund

In addition, providers should ensure that they meet their obligations under Standard 2.2 of the National Code to assess whether the student's qualifications, experience and English language proficiency are appropriate for the courses for which enrolment is sought, including all courses in the package.

We are engaging with the DET during the ESOS reform process about the particular issues that packaged courses raise in relation to written agreements and refunds.

5. RECORD KEEPING AND WRITTEN AGREEMENTS

Section 21 of the ESOS Act requires providers to maintain records of each accepted student enrolled with the provider, or who has paid tuition fees to the provider, including:

- the student's current residential address
- the student's mobile phone number (if any)
- the student's email address (if any), and
- any other details prescribed by the regulations.

Regulation 3.04(c) of the ESOS Regulations requires that registered providers must keep copies of written agreements to which the provider and student are parties. These records must be kept for at least two years after the person ceases to be an accepted student.

When investigating complaints from students, we have identified problems with providers' record-keeping, including:

- insufficient records to verify calculation of fees allegedly owed, and
- failure to retain a copy of the written agreement for the stipulated period.

Poor record-keeping, as well as being a breach of legislation, raises evidentiary challenges for providers seeking to recover unpaid fees from students.

No copy of written agreement
Mr N withdrew from his diploma course. The provider pursued Mr N for outstanding fees. Mr N asked the provider for a copy of the written agreement so that he could verify what he owed the provider. The provider was unable to produce the signed written agreement.

When Mr N complained to our office we asked the provider for a signed copy of the written agreement. The provider was again unable to produce a signed copy of the written agreement, having misplaced it.

We recommended that the provider reconsider its decision to pursue Mr N for outstanding fees, given it is difficult to enforce a contract without having a copy of the contract to evidence what was agreed, and given it had failed to meet its record keeping obligations under the ESOS Act.

6. HELPING PROVIDERS TO DEVELOP COMPLIANT WRITTEN AGREEMENTS

Clear and compliant written agreements protect the interests of both overseas students and registered education providers, and have the potential to minimise protracted disputes between these parties. The Overseas Student Ombudsman provides advice and suggestions to providers to assist them in complying with the obligations set out in the ESOS framework.

In 2014, we provided webinar training to registered providers through the professional development programs of the Australian Council of Private Education and Training and English Australia on common problems we have seen with written agreements.

In 2015, we developed a Written Agreement Checklist to help providers assess their written agreements to ensure they meet the requirements of the ESOS framework and to identify areas that may need rectifying. This checklist was developed in consultation with international education and government stakeholders.