

## Written Agreement Checklist

December 2015

### Purpose of this checklist

This checklist is designed to assist registered education providers to develop and maintain written agreements which comply with the ESOS framework as at **December 2015** including:

- [Education Services for Overseas Students Act 2000 \(ESOS Act\)](#)
- [National Code of practice for Registration Authorities and providers of Education and Training to Overseas Students 2007 \(the National Code\)](#)
- National Code Explanatory Guide
- [Education Services for Overseas Students \(Calculation of Refund\) Specification 2014](#)

**Please note:** The information contained in this document is general information only. There may be things not raised in the checklist which can affect the validity or enforceability of written agreements between registered providers and overseas students. **If you have concerns about your written agreement or parts of your written agreement, please seek legal advice.**

The requirements listed in Questions 1 to 5 are information that is required to be included in written agreements between overseas students and their providers. **If you answer “No” to any of these questions then the agreement does not comply with the legislation.** If the non-compliance affects the interpretation or application of the refund policy then your refund policy cannot be applied. Other potential consequences also flow from non-compliance such as regulatory consequences, which may affect registration.

The requirements set out in Questions 6 and 7 are less absolute and require more qualitative analysis. However, in minimising disputes and ensuring that the terms and conditions of the written agreement are enforceable, these things can be just as important.

The document reference column allows users of the checklist to insert the relevant clause number from the written agreement to demonstrate compliance.

| Legislative reference   | Question                         | <u>Document reference</u> | <u>Yes/No</u> |
|---|----------------------------------|---------------------------|---------------|
| <b>PART A: DOES THE WRITTEN AGREEMENT COMPLY WITH THE ESOS FRAMEWORK?</b> |                                  |                           |               |
| ESOS Act s.47B; ESOS National Code (NC) standard 3                        | 1. Is there a written agreement? |                           |               |

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| NC 3.1   | a) Was a document with the terms and conditions of enrolment (an offer) provided to the student?  |  |  |
| General Law  | b) Was it intended that both parties would be bound by the terms and conditions in this document once the student signed or accepted the document? If so;<br>i) is it clear from the offer itself that it is intended to be a binding agreement once signed by the student? |  |  |
| NC- 3.1  | c) Is the agreement signed by the right person?<br>Note the agreement must be signed by the student - or by the student's parent or legal guardian if the student is under 18?  |  |  |
| NC-3.1   | d) If the document was not signed, was there some other means of acceptance, such as online acceptance? <b>Please note:</b> Payment alone is not acceptance.  |  |  |
| <b>2. Does the written agreement meet the requirements of standard 3.1 of the National Code?</b> |   |  |  |
| NC -3.1 (a)  | a) Does it identify the course/s in which the student enrolled/is to be enrolled and any conditions on the enrolment?   |  |  |
| NC-3.1(b)  | b) Does it provide an itemised list of course money payable by the student? This list should identify and categorise tuition and non-tuition fees.  |  |  |
| NC-3.1 (c)   | c) Does it provide information in relation to refunds of course money rather than just a link to the refund policy?   |  |  |
| NC -3.1 (d)  | d) Does it set out the circumstances in which personal information may be shared between the registered provider and the Australian Government and designated authorities and, if relevant, the Tuition Protection Service? <sup>ii</sup> .                                 |  |  |
| NC -3.1(e)   | e) Does it advise the student of his or her obligation to notify the registered provider of a change of address <sup>iii</sup> ?  |  |  |
| <b>3. Does the written agreement meet the requirements of s 47B of the ESOS Act?</b>             |   |  |  |
| Act s.47B(a)   | a) Does it set out the refund requirements if a student defaults in relation to a course at a location?   |  |  |
| <b>4. Does the written agreement comply with Standard 3.2 of the National Code?</b>              |   |  |  |
| NC-3.2 and 3.2(a)  | a) Does it set out amounts that may or may not be repaid to the student if the student defaults and if the provider defaults and does it do this in relation to all <b>course money</b> received <sup>iv</sup> ?  |  |  |
| NC -3.2(b)   | b) Does it set out the processes for claiming a refund in the case of a student and/or a provider default?  |  |  |

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|---|---|--|--|
| NC -3.2(c)  | c) Does it include a plain English explanation of what happens if a course is not delivered?  |  |  |
| NC-3.2 (d)  | d) Does it include 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”?   |  |  |
| NC-3.2  | <b>5. Are the things listed in question 5 above actually contained in the written agreement with the student? Note: a link to the refund policy is not enough<sup>v</sup></b>   |  |  |
| If the answer to any questions in PART A is “NO” the agreement is not compliant with the ESOS Framework – Please See PART C of the checklist. |   |  |  |
| <b>Part B: CONSISTENCY, TRANSPARENCY, FAIRNESS AND RECORD KEEPING</b>   |   |  |  |
|   | <b>6. Is the written agreement easy to understand?</b>  |  |  |
|   | a) Does the written agreement use language and provide definitions which are internally consistent and which are consistent with the definitions in the legislation <sup>vi</sup> ?   |  |  |
|   | b) Is the meaning of each clause clear and does it say what you mean it to say?   |  |  |
|   | c) Is the agreement set out in a transparent way – have headings been used appropriately, and have any unusual terms or onerous terms, such as cancellation fees, been given sufficient prominence within the document? Have you considered using a critical information summary <sup>vii</sup> ?               |  |  |
|   | d) Do any of the terms and conditions conflict with other terms or conditions in the written agreement?   |  |  |
|   | <b>7. Is your written agreement fair and reasonable?</b>  |  |  |
| s.23 of the Australian Consumer Law and General Law   | a). If you intend to charge a cancellation fee <sup>viii</sup> or any late fees does the written agreement allow this and :<br>i) do the fees reflect the provider’s losses due to the student default?, <sup>ix</sup> ?<br>ii) are any such fees clearly and transparently presented in the written agreement? |  |  |
| s.23 of the Australian Consumer Law   | Is the refund policy fair and reasonable so that it could not be considered to include any unfair contract terms <sup>x</sup> under the Australian Consumer Law?  |  |  |
|   | <b>8. Record keeping</b>  |  |  |

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|--|--|-------------|---------------|
| Act s.21 and regulation 3.04(c) of the ESOS Regulations  | (a) Do you have and comply with processes for ensuring that copies of all written agreements entered into with students are kept at least two years after students cease to study at your institution? |             |               |
| If the answer to question 6, 7 or 8 is <b>NO</b> this could affect the implementation of the refund policy and/or the outcome of fee disputes.   |  |             |               |
| <b>PART C: WHAT DO TO IF THE WRITTEN AGREEMENT DOES NOT COMPLY WITH ESOS REQUIREMENTS.</b>   |  |             |               |
| If the written agreement does not comply with the ESOS Act or National Code or there is no written agreement, s 47E of the ESOS Act will usually apply. When 47E applies defaulting student must be refunded, within four weeks of the default day, in accordance with regulations made under s.47E rather than under the terms and conditions of the written agreement.   |  |             |               |
| 10. If the student defaulted between 1 July 2012 – 30 June 2014 students must be refunded in accordance with <i>Education Services for Overseas Students (Calculation of unspent pre-paid fees – other cases) Determination 2012 (No. 1)</i> . The refund should be as the total amount of unspent pre-paid tuition fees minus the lesser of <ul style="list-style-type: none"> <li>5 per cent of the total pre-paid tuition fees OR \$500.</li> </ul> | Student default date   | Refund date | Refund amount |
|  |  |             |               |
| 11. If the student defaulted after 1 July 2014 the refund must be calculated according to Section 8 of the <i>Education Services for Overseas Students (Calculation of Refund) Specification 2014</i><br>Refund amount = weekly tuition fee x weeks in default period  |  |             |               |

<sup>i</sup> For example if a document contains “indicative” pricing only, or “proposed” course dates then it is not a final offer capable of acceptance. Generally an application form would not be a final offer unless it a) contains all the required information (eg itemised course fees) and states very clearly that by signing the document the student is accepting the terms and conditions contained within it.

<sup>ii</sup> This information includes personal and contact details, course enrolment details and changes, and the circumstance of any suspected breach by the student of a student visa condition.

<sup>iii</sup> If an overseas student is under 18 and their education provider approved their accommodation, support and general welfare arrangements then the student must not change these arrangements, including their address, without the written approval of their education provider.

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<sup>iv</sup> “tuition fees” are defined in s7 of the ESOS Act as money a provider receives directly or indirectly from an overseas students or intending overseas student or another person who pays fees on behalf of an overseas student or intending overseas student, that are directly related to the provision of a course that the provider is providing, or offering to provide, to the student. This includes classes of fees prescribed by regulations. According to the National Code it includes tuition fees, any amount received by the provider for overseas student health cover, and any other amount that the student had to pay to the provider in order to undertake the course.

<sup>v</sup> These things must be in the written agreement itself. It is not enough to simply incorporate the refund requirements by reference. An agreement which refers a student to a refund policy on internet website, or to a document provided with an application form, is not a compliant written agreement.

<sup>vi</sup> Please check, in particular, your use of the following terms – “study periods, term, semester, course fee, tuition fee, and course” to make sure they are consistent.

<sup>vii</sup> 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.

<sup>viii</sup> A written agreement does not have to include a cancellation fee. However if a provider wishes to charge a cancellation fee when a student withdraws before completing the course then the written agreement must include a clause setting out a cancellation fee . A provider cannot apply its refund policy to a cancellation of enrolment scenario.

<sup>ix</sup> A cancellation fee clause that is a penalty (greater than the provider’s estimated loss) is not enforceable –it must be a genuine pre- estimate of the provider’s loss when a student defaults, bearing in mind the provider’s duty to mitigate their loss. **Please note:** this checklist is not intended to provide definitive guidance on what amounts to an unfair contract term or a penalty.

<sup>x</sup> Under s.23 of the Australian Consumer Law, unfair contract terms are not enforceable. An unfair contract term is one which causes a significant imbalance to the parties’ rights and obligations, is not reasonably necessary to protect the provider’s legitimate interests, AND would cause detriment to the student. In deciding whether or not a term is unfair a court would also consider how transparent the term is.