COMMONWEALTH OMBUDSMAN

Issues Paper

Improving fairness in written agreements between international students and Australian education providers

Introduction

As the Overseas Students Ombudsman, the Office of the Commonwealth Ombudsman (the Office) considers complaints from international students about private education providers.

The most common issue international students raise in complaints to the Office is their provider's reliance on terms in their written agreement to determine what money (if any) is to be returned to the student after the student has withdrawn from studies.[1] Between 1 January 2018 and 30 June 2022, 41 per cent of all complaint issues international students raised with us concerned terms in written agreements (2432 out of 5982 complaint issues). In the same period, we finalised 587 investigations into written agreement issues.

In those 587 investigations, we found that:

- in 36.5 per cent of cases, providers had given outcomes that appeared substantially compliant, fair and reasonable,[2] and
- in 48.5 per cent of cases, providers had given outcomes that did not appear substantially compliant, fair and reasonable.[3]

In the remaining 15 per cent of cases, we did not form a view about that complaint issue, for example because the provider and student resolved the issue between themselves.

Most of these complaints were about refunds the student requested but their provider refused, or where they provided less than expected. In our investigations, we observed a lack of fairness by some providers who took a strict approach to application of refund terms in their written agreements.

[1] Since the commencement of the *National Code of Practice for Providers of Education and Training to Overseas Students 2018*.
[2] The compliance of the outcome is assessed against the requirements of the *Education Services for Overseas Students Act 2000* and its instruments, especially the *National Code of Practice for Providers of Education and Training to Overseas Students 2018*.
[3] This only relates to complaints we investigated. Education providers make a range of decisions based on written agreements that do not result in complaints to the Office. Many of those are likely to result in compliant, fair and reasonable outcomes.

This lack of fairness became more apparent during the COVID-19 pandemic when many international students needed to leave Australia or could not travel to Australia to commence or continue an intended course of study.

Refund requirements – international versus domestic students

For international students to be eligible for a substantial refund of fees they pre-paid, they may need to notify their provider of their withdrawal within a certain period *before* their course is due to commence. This is especially common if the student is enrolled with a private education provider.

In contrast, some domestic students enrolled in programs of higher education and vocational education and training (VET) can withdraw from units without incurring liability if they notify their provider before their census dates, which occur *after* their units have commenced. The Office is aware that some public education providers apply the same system to international students, allowing them to withdraw without incurring liability before census dates. Some private education providers may do the same, but the Office has not observed this in written agreements we have analysed.

The Office understands that many education providers choose to include terms in written agreements that protect against losses they may incur if an international student withdraws. However, we observed some outcomes which appear unfair and unreasonable when providers rely on those terms to deny what, in our view, appear to be reasonable refund applications.

In forming our views that these refund outcomes were unfair and unreasonable, we balanced community expectations (that is, what the average person may think is appropriate) with our understanding of the costs education providers incur when assessing and accepting international students.[4]

Throughout this issues paper, we explore the concepts of fairness and reasonableness as they apply to written agreements with international students. Our exploration is guided by the Australian Consumer Law (ACL), especially in relation to Unfair Contract Terms (UCTs).

Our aim in publishing this issues paper is to increase international students' trust and confidence that they can enrol with Australian education providers because:

- organisations such as the Commonwealth Ombudsman exist to monitor systemic problems and encourage improved practices,
- Australia has laws to ensure the written agreements they sign are fair, and
- they can go to external dispute resolution bodies if they feel they have not been treated fairly.

[4] Some of these costs may be particular costs incurred with respect to specific students, but other costs are generalised costs that the provider would incur in providing and marketing their services regardless of uptake by particular students.

This paper is structured in 5 parts:

Part 1: **Case studies**	Four case studies introduce the problem by demonstrating some potentially unfair and unreasonable outcomes this Office has observed in complaint investigations.
Part 2: **Australian Consumer Law**	This part explores how ACL applies to international student written agreements and uses UCT principles to build a framework for expectations of fair and reasonable contract terms.
Part 3: **Potentially problematic terms and other issues**	This part considers several types of terms and other drafting problems that we have observed in written agreements, which may lead to unfair or unreasonable outcomes.
Part 4: **Written agreements – better practice suggestions**	This part outlines what providers can expect in a dispute to the Office and gives 'better practice' suggestions for avoiding disputes.
Part 5: **Conclusion**	This part sums up the Office's position on fairness in written agreements, makes suggestions for further work in this space, and outlines avenues for dispute resolution.

Part 1: Case studies

The following case studies are based on complaints the Office investigated. We modified some information to avoid identifying the students and education providers involved, but the types of terms the providers relied upon in these scenarios are not unusual and appear in many written agreement templates we assess when investigating complaints from international students.

In all these scenarios, the providers relied on terms in written agreements that students had willingly signed and that met the requirements of the Education Services for Overseas Students (ESOS) Framework.[5]

Case study 1: Student withdrawing a significant time before course commencement

Before the full effects of the COVID pandemic became apparent, Josie was travelling in Australia and decided to stay longer and study a package of VET courses, ranging from a Certificate III to a Diploma, with a private education provider, ZYX College.[6]

Josie accepted ZYX's offer 4 months before the course was due to commence and paid it $5,000, which included a $300 processing fee. Josie applied for a visa, which was granted quickly. Two weeks after accepting ZYX's offer, and in light of the emerging pandemic, Josie decided not to study and instead returned to her home country.

When Josie notified ZYX she was cancelling her enrolment, it was still more than 3 months before her first course was due to commence. She requested a full refund of her pre-paid fees.

ZYX offered to deliver the course online, but Josie declined. Eventually ZYX agreed to refund her fees after deducting the following amounts based on the terms of its written agreement with Josie:

a. the non-refundable enrolment processing fee of $300
b. a $350 cancellation fee and
c. 50% of the remaining amount (the term specified that any withdrawal more than 28 days before the course commencement date would entitle the student to a 50% refund of pre-paid fees).

Application of these terms resulted in ZYX withholding $2,825 and refunding $2,175 to Josie.

How could the agreement be considered unfair?

Term c put Josie's withdrawal with 3 months' notice in the same category as students withdrawing with 28 days' notice. On top of that, a cancellation fee like term b may exceed the amount ZYX College reasonably required to deal with Josie's cancellation.

[5] *Education Services for Overseas Students Act 2000* (ESOS Act) and its instruments.
[6] All student and provider details in this issues paper have been de-identified to protect privacy.

Case study 2: Enrolment and withdrawal close to course commencement

Li enrolled in two online units of study with a provider, WVU Institute, in addition to the full-time course he was already enrolled in with another provider. The additional units of study would help Li get faster professional accreditation in his field of study.

Li accepted WVU's offer and paid $4,000 for the two units, 5 days before the course was due to commence.

On the day the course was due to commence, Li asked to cancel his enrolment and for a refund of his pre-paid fees. Li explained he had reconsidered his ability to manage the extra units given a flare-up of a medical condition, and he needed the refund to help treat the condition.

Based on the terms of its written agreement, which requires students to withdraw from studies at least 28 days before course commencement, WVU declined to provide a refund. Instead, WVU offered Li the opportunity to defer his start date and undertake the units later.

How could the agreement be considered unfair?

This term allowed WVU to deny a refund to any student who enrols in the 28 days before their course commencement, no matter how quickly after enrolling they withdraw.

Case study 3: Withdrawal after course commencement

In early 2020, Anan enrolled to study a Bachelor-level course with TSR University. Anan accepted TSR's offer and paid $24,000 for the first two study periods.

Anan's course commencement coincided with the escalation of the COVID pandemic. Anan explained he was experiencing high levels of stress and anxiety due to loss of employment and family concerns in his home country arising from the pandemic. Anan experienced difficulties with his studies in the first study period and did not pass any subjects.

Anan emailed TSR shortly before the commencement of the second study period requesting to withdraw and receive a refund of $12,000 in unspent tuition. TSR declined the request for refund, based on a term in its written agreement which stated that, if a student withdraws on or after the course commencement date, or at any time during the course, it will not refund any pre-paid tuition fees.

How could the agreement be considered unfair?

This term allowed TSR to retain any fees pre-paid for future study periods as soon as the course has commenced. Anan withdrew very close to the start of the second semester so it seems reasonable for TSR to retain some fees, but retaining the full amount may be excessive, especially given Anan's circumstances and the potential for TSR to mitigate some loss.

Case study 4: Change of circumstances during visa assessment process

Alex enrolled in a Foundation and Bachelor course package with QPO University. She pre-paid $10,000 for the Foundation course, received her Confirmation of Enrolment (CoE) from QPO, and applied for her student visa so she could travel to Australia.

The visa took a long time to be processed. During this time, QPO deferred Alex's start date several times. After about 10 months waiting for her visa outcome, the value of Alex's home country's currency crashed. Alex realised that she would not be able to support herself in Australia given the value of her available funds had significantly reduced.

As Alex's student visa application had not been finalised, Alex withdrew the visa application. Alex also notified QPO she was withdrawing and requested a refund of her pre-paid fees.

QPO declined to refund any of Alex's fees, based on a term in its written agreement stating that no refund would be payable after the initial course commencement date.

How could the agreement be considered unfair?

QPO appears to have received a windfall because Alex withdrew her visa application rather than waiting for it to be refused.[7] *If her visa had been refused, QPO would have needed to pay a refund of around $9,500.*[8] *All international education providers need to plan for and mitigate the risks of long visa processing times and unfavourable outcomes.*

[7] Alex could no longer meet the requirements for grant of a student visa as she didn't have sufficient funds to support herself in Australia: *Migration Regulations 1994*, Schedule 2, section 500.214

[8] ESOS Act, s 47E, and *ESOS (Calculation of Refund) Specification 2014* s 9 (2).

Part 2: Australian Consumer Law

Except for some explicit scenarios where providers must give students a certain level of refund – for example when a provider does not deliver a course as agreed (provider default), or if a student's visa application is refused – providers must set out student fee liabilities and refund entitlements in written agreements.[9] [10]

As written agreements drafted by Australian education providers generally do not give students the opportunity to negotiate terms, they are usually considered 'standard form contracts' and therefore subject to ACL provisions about UCTs.[11]

Unfair contract terms

There are some key principles which can help determine if a contract term may be inconsistent with ACL. However, terms also need to be considered as part of the whole contract to determine if they are unfair.

A contract term will be considered unfair if:

1. it would cause a **significant imbalance** in the parties' rights and obligations arising under the contract, and
2. it is **not reasonably necessary to protect the legitimate interests** of the party who would be advantaged by the term, and
3. it would **cause detriment** (whether financial or otherwise) to a party if it were to be relied on. [12] [13]

1. Imbalance in parties' rights

Fee and refund terms in contracts between education providers and international students may be inherently balanced in favour of the provider. We observed some written agreements where providers impose obligations on a student in default by including terms enabling them to:

- recover expenses they may have incurred in recruiting the student
- recover expenses they may incur in preparing to deliver the course to the student, and
- obtain compensation for some loss of earnings.

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[9] *National Code of Practice for Providers of Education and Training to Overseas Students 2018*, Standard 3.4.
[10] ESOS Act, s 46D details obligations on providers in case of provider default, and ss 47B and 47D require providers to enter into written agreements and to provide refunds in accordance with those written agreements.
[11] *Competition and Consumer Act 2010*, Volume 3, Schedule 2, Chapter 2, Part 2-3.
[12] Australian Competition and Consumer Commission (ACCC), *Determining whether a contract term is unfair*, accessed 8 July 2022.
[13] *Competition and Consumer Act 2010*, Volume 3, Schedule 2, Chapter 2, Part 2-3, Cl 24.

The use of these clauses may create an imbalance in the parties' rights, as the consequences of default fall entirely on the student.

If the situation is reversed and the provider defaults (does not deliver the course in the way it was advertised or promoted i.e. virtual -v- in person), the student may incur significant costs which, in contrast, may not be recoverable by the student under the terms of a provider's written agreement. These may include costs relating to travel, accommodation, health insurance, medical reports and visa applications. The student may need to expend further significant sums to continue or commence studies with another provider. Under the *Education Services for Overseas Students Act 2000* (ESOS Act), international students are only entitled to a refund of 'unspent' tuition fees if a provider defaults.[14]

The Office has not observed any written agreements which go further to balance students' rights by, in the event of provider default, allowing students to recover related expenses they may incur in reliance on the provider's agreement.

2. Legitimate interests

The Office acknowledges education providers delivering education to international students – particularly private education providers – are seeking to run a business (or not-for-profit entity). As such, their business model must be sustainable and allow them to offer a quality service.

We recognise providers are entitled to protect these legitimate interests in their written agreements with international students.

To determine whether a contract term may be reasonably necessary to protect an education provider's legitimate interests, the Office considers the following questions may be relevant:

- Does the education provider have other means to protect its legitimate interests, which would have a less restrictive effect on the students?
- Are the fees withheld reasonably attributable to the costs the provider incurred in relation to a student withdrawing from their course?
- In considering whether the fees withheld are reasonable, has the provider taken reasonable steps to mitigate their loss (for example, have they attempted and/or been able to put another student onto the course to replace the withdrawn student)?
- Could the term be relied upon to refuse a refund in circumstances where the provider has not incurred any significant costs in relation to a particular student?
- Would the provider suffer actual loss if a refund were provided?

In the questions above, we refer to the concepts of loss and actual loss. In this context, when we refer to actual loss, we mean loss caused directly by a student accepting the agreement, which is distinct from other losses such as marketing and recruitment costs not attributable to

[14] This is worked out according to the *ESOS (Calculation of Refund) Specification 2014*. Essentially, if an education provider defaults, the student is entitled to receive the average fee they have paid per week that is not delivered. If some weeks have been delivered, the student is not entitled to a refund of fees for those weeks even if they cannot get recognition for completion of that period.

any one student. We do not consider these other losses should be legitimately recovered from students withdrawing from studies with a provider, especially when in practice a student's losses in reliance on a provider's agreement are not as extensively protected in case of provider default. However, we note that whether these would form part of recoverable losses in a dispute can only be determined by the Courts.

3. Detriment

If a provider relies on a contract term which denies a student a refund for undelivered services, it appears the student would suffer financial detriment (although detriment does not always need to be financial).

Applying the principles of imbalance, legitimate interests and detriment to international student written agreements

Most refund terms the Office has observed would likely meet 2 of the 3 conditions for UCTs above, being the imbalance in parties' rights, and detriment to the student if the terms were relied upon.

Therefore the question of whether the terms (and the outcome of their application) are fair and reasonable hinges on whether the terms are reasonably necessary to protect the provider's legitimate interests.

In applying the **legitimate interests** principle to terms which seek to limit a student's refund of pre-paid fees, the Office's view is that providers should:

- only seek to recover their losses to the extent they relate to actual expenditure on students (by reference to the direct costs incurred in that situation)
- actively take steps to mitigate the losses attributable to students, for example by recruiting another student to fill a student's place
- explore other means to protect their legitimate interests[15]
- not retain any funds that could amount to a penalty on the student withdrawing.

[15] For example, by using written agreements with education agents to ensure that commission paid for recruiting the student is contingent on the student completing a certain amount of study, and partly recoverable if the student withdraws before that point. Also, by charging an initial enrolment fee that covers the actual costs associated with assessing and accepting the student, so that this cost is transparent, and providers do not attempt to recover any gaps between the actual and charged administrative costs by retaining tuition fees.

Unconscionable Conduct

Separate to provisions about UCTs, the ACL also contains provisions requiring persons to act in good conscience and good faith when acquiring or supplying goods or services.[16]

Although it is not necessarily unconscionable to apply written agreement terms inflexibly, it could be a factor that contributes to a conclusion that a provider has acted unconscionably. There are numerous other factors which may be considered, but several appear especially relevant to international students as consumers. These include:

- the relative strengths of the bargaining positions of the supplier and customer
- whether the customer is required to comply with conditions not reasonably necessary for the protection of the supplier's legitimate interests
- whether the customer can understand any documents relating to the supply of the goods or services
- whether any undue influence, pressure or unfair tactics were employed, and
- the availability and cost of identical or equivalent goods or services the customer could have purchased.[17]

It is important to acknowledge that an assessment of unconscionable conduct requires an assessment of all the circumstances in each case.

We know that some education providers exercise discretion to give students refunds even where strict application of their contract terms does not support it. In some written agreements, we noticed terms stating the education provider may use its discretion to provide a refund even if other terms of the refund policy are not met.

We also noticed written agreements which do not have such terms. In this case, education providers can still choose not to inflexibly rely on written agreement entitlements. However, having a specific term would make the possibility apparent to students who may otherwise not be aware that they can make a request for their provider to use discretion to give a refund.

Although we consider it best practice for education providers to include a term allowing providers to consider a request for a discretionary refund, all providers should consider the circumstances of each case in assessing whether to refund a student who has withdrawn, and how much to refund. Specific circumstances may warrant providers exercising discretion rather than holding to the terms of the agreement.

[16] *Competition and Consumer Act 2010*, Volume 3, Schedule 2, Chapter 2, Part 2-2.
[17] *Competition and Consumer Act 2010*, Volume 3, Schedule 2, Chapter 2, Part 2-2, Cl 22.

Part 3: Potentially problematic terms and other issues

The Office considered complaints where the fee and refund terms in the provider's written agreement could result in potentially unreasonable or unfair outcomes under the ACL. Below is a summary of some potentially problematic terms in written agreements noted during our investigations.

Terms which may allow providers to retain more of a student's fees than they have spent on that student

For example:

> *Students withdrawing more than 28 days before their course start date will be eligible for a refund of 50% of their tuition fees.*

Such terms do not reflect the provider's obligation to mitigate their losses in other ways and allows the provider to retain half of the student's pre-paid fees even if the student withdraws 2, 6, 9 or even 12 months before commencement. This could result in a windfall for the provider at the expense of the student who would not be receiving the contracted services.

> *Students withdrawing more than 15 days but less than 28 days before their course commences can apply for a refund of 20% of their tuition fees.*
>
> *Students withdrawing less than 14 days before their course commencement date will not receive a refund.*

Depending on the amount pre-paid and the timing of the student's withdrawal, the costs incurred by the provider for a student may not be sufficient to warrant the student forfeiting 80 to 100 per cent of their pre-paid tuition fee.

This may be especially unreasonable when a student has enrolled near or during the period where their potential refund would be significantly reduced, such as in case study 2. In such situations, the provider is less likely to have expended significant amounts after the student's enrolment, as they may have already made plans and incurred related overheads to deliver the course to other students. These costs would generally represent the overall cost of a provider doing business which are not attributable to an individual student. As a result, it may be unreasonable for a provider to charge a fee for withdrawal in broad circumstances without demonstrating that those costs were incurred because of students enrolling and withdrawing in more specific circumstances.

Similarly, for some types of courses a provider may incur the same level of overheads whether a course has 15 students enrolled or 20 students. If minimum course numbers are maintained, the withdrawal of a single student may not result in the provider incurring actual losses in delivering the course.

Terms which may allow providers to keep voluntarily paid fees

For example:

> *We do not need to return fees if a student has decided to pay for future study periods in advance.*
>
> *Students are not required to pay more than 50% of their tuition fees before their course commences. Students will only be refunded a percentage of all pre-paid fees (including any voluntary payments) based on their date of withdrawal.*

Terms like these make all pre-paid fees subject to a deduction even if the student made voluntary extra payments. Retaining voluntarily paid funds would appear generally unreasonable, noting that the student would not have lost this amount if they had not made the voluntary payments. It may be reasonable, however, for providers to account for any discounts they gave the student on the basis of making the additional payments.

Terms which may allow providers to consider fees for the entire course as payable, owed, and/or non-refundable once a course has commenced

For example:

> *If a student does not formally withdraw, but they do not complete or commence a course, no refund will be made, and the full course fee will be due.*
>
> *All course fees become payable on course commencement, including fees for future study periods.*
>
> *This payment plan has been implemented to assist the student to pay their fees, however this does not remove the right for [the provider] to consider all fees owed after the course has commenced.*
>
> *If a student withdraws from study after course commencement, they are not entitled to a refund of any pre-paid fees, including fees paid for future study periods.*

Terms of this kind appear to allow providers to keep fees for future study periods, or to consider those fees due, regardless of when the provider becomes aware that the student no longer intends to study. This could result in the provider receiving or retaining more of the student's funds than is reasonable to protect its legitimate interests.

It also appears to be an example of a provider potentially imposing financial penalties on international students.

Terms which may allow providers to retain fees without incurring costs, or to charge unwarranted administration fees

For example:

> *Fees for processing applications and fees for assessing credit transfers are not refundable.*
>
> *A non-refundable application fee equal to half the first semester's course fees is due before commencement. The first semester's fees will be reduced by this amount after commencement.*

We are likely to consider as fair and reasonable any processing fees that reflect a provider's actual administration costs for enrolling a student. However, if the provider has not yet incurred costs in relation to specific pre-paid items (for example, the provider has not commenced credit transfer assessment), in our view, it would not be fair and reasonable to consider these items non-refundable.

Also, other administration charges should reflect the provider's actual administration costs. This includes but is not limited to cancellation fees, money transfer processing fees, fees for issuing CoEs, fees for processing deferments and suspensions, and fees for re-assessing submitted projects.

Terms adding unnecessary barriers to withdrawal and refund requests

For example:

> *For all withdrawal and refund requests, students must complete an application form and provide evidence indicating why they need to withdraw.*

Depending on the circumstances, it may be unreasonable for providers to place barriers on students applying for withdrawal or to have procedures that unreasonably delay actioning a withdrawal. This is different to students applying for transfer to study with another provider, which does require a separate process.[18]

Unlike an application for transferring to study with another provider, the National Code does not require a provider to assess the merits of a withdrawal request if a student is not intending to transfer. The Office will generally consider it unreasonable for providers to request supporting evidence to facilitate a withdrawal request where the student is **not** also seeking release to transfer to another provider.

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[18] The Office would support, as good practice, a process where providers first check if the student requires release to transfer to another provider. In that situation it would be appropriate for the provider to advise the student of the requirement to apply for release, before confirming that the student wishes to proceed with withdrawal.

If a student's visa is refused, providers are obliged to refund the student's pre-paid course fees (calculated according to an instrument) within 28 days.[19] Providers may consider accepting a student's request in any form, provided they are satisfied that they are paying the refund to the appropriate person.

Requiring students to provide evidence to support a refund application may be reasonable if a provider is, for discretionary reasons, assessing a request for a greater refund than the student would otherwise be entitled to under the agreement. However, the amount of information requested should still be limited to what is reasonably necessary to make the assessment.

Terms allowing providers to make changes to the agreement without seeking student consent

For example:

> *This policy may change at any time. The student's refund will be calculated according to the policy in force at the time the student notifies us of their withdrawal.*

In our view it is unreasonable to include a term that allows a provider to change its refund policy without seeking the student's agreement, and to apply that changed refund policy at the time the student needs to make a refund request. We also note that Standard 3 of the National Code requires the provider to outline their refund policy in the student's signed written agreement, rather than as supplementary material.

> *The course timing and location in this agreement are indicative only. These may change during the period of this agreement.*

While we would expect students to show some flexibility if a course is delayed by a small period of time, or if the location changes to another location nearby (with equivalent facilities), the Office may view that providers cannot rely on a term of this kind where there are no other terms balancing out the risks or effects this would have on students (for example, by supporting a student to change providers *and* giving a full refund if, in light of the changes, they didn't wish to proceed with the course). It would not be fair or reasonable to rely on a term which allows providers to make changes which have a significant impact on students, to which students have not agreed and which do not provide them any counterbalancing rights.[20]

In addition, providers have specific obligations under the ESOS Act if they are not able to deliver courses to students as agreed, which might include any changes to the agreed study

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[19] ESOS Act, ss 47E(2) and (3).

[20] The Office's view that a provider cannot rely on a term of this kind would extend to situations where the provider changes the 'location' of study from their premises to a virtual location, effectively changing the study mode from face-to-face to online.

location. If this issue arises in a complaint to the Office, we expect the provider to meet these legal obligations.[21]

Terms that are unclear, inconsistent, complex or otherwise difficult to understand

We have observed that written agreements are sometimes confusing and difficult to understand, even for native English speakers. Given that international students have varying levels of English language skills, it is especially important that education providers' written agreements are easy to read and understand.[22]

For example:

> *Should the account of an international student be in default on payment of incurred fees for a study period, access to the study environment for that semester will be suspended pending further payment or application to the Dean or Associate Dean of Faculty.*

Problems with the term above:

- the language is very formal (using 'should' instead of 'if')
- the sentence is long
- the sentence uses passive rather than active language (will be suspended, rather than 'we will suspend')
- it uses technical language such as 'in default', 'incurred', and 'pending'
- it uses unclear terms such as 'study environment'
- it appears to use different terms, such as 'study period' and 'semester' for the same concept
- it is not clear how much payment needs to be made, and
- it is not clear when access will be reinstated if requested by application.

A clearer version of the above term (which also makes the process more accessible) could read:

> *If a student does not pay their fees on time, ABC College will suspend the student's access to the online study portal. To reactivate access, the student must pay all outstanding fees.*
>
> *The student may also apply for special approval to reactivate at the Student Services office. The Dean or Associate Dean will decide within 2 working days whether to reactivate the student's access.*

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[21] ESOS Act, ss 46A-46F.
[22] Note that Standard 3.3 of the National Code also requires providers to include Plain English information in their written agreements.

Part 4: Written agreements – better practice suggestions

How we assess complaints about written agreement terms

If a student complains to the Office about a dispute over a refund with their provider, we assess whether the provider applied the fee and refund policies in their written agreements correctly; whether the policies meet the requirements in the ESOS framework; and whether their application of the policies appears fair and reasonable in the circumstances.

If we think it may be unfair or unreasonable for the provider to rely on their written agreement terms in the student's circumstances, we may ask providers to consider whether retaining the whole disputed amount is reasonable and necessary. We may consider other measures available to the provider to mitigate their loss and ask providers to respond to us with details of their consideration. We may also ask providers to demonstrate the way they calculated their costs.

Depending on the provider's response, we may suggest a different outcome for the student, such as an increased refund amount. If the provider considered the circumstances of the student's request and its decision appears fair and reasonable, we are unlikely to investigate further. If this is the case, we will explain our decision to the student.

Suggestions for written agreements

To minimise the risk of disputes and to support compliance with ACL, providers may consider the following suggestions for updating their written agreement terms:

1) Include a 'key terms' summary at the start of your written agreement to help students understand terms frequently disputed or misunderstood, especially terms relating to refunds.
2) Require students (or parents/guardians where appropriate) to wait at least 24 hours between receiving the agreement and accepting it, to highlight the importance of understanding all terms.
3) Include a provision allowing special consideration for students enrolling and withdrawing within a short period of time, as we would generally expect providers will not commit or incur significant costs in such situations. We consider including a cooling-off period represents best practice.
4) Provide that you will retain a withdrawing student's pre-paid fees only to the extent necessary to recover your actual expenditure on the student.

   This may be by reference to your average costs incurred in those circumstances, but you should avoid making the categories of circumstances too broad.

Average costs

Using average costs may be more practical than working out individual costs incurred for each withdrawing student, but providers should aim for these to be as close as possible to actual costs expended on students in the relevant circumstances.

The types of costs we would expect providers to capture in average costs include (but are not limited to) those incurred in planning for the student (including property, systems and staffing costs), and administration costs in cancelling a student's enrolment.

Deductions from average costs

Deducted from these average costs should be any mitigations available to the provider, including recruitment of other students to take the place of withdrawing students and potential savings from not needing to deliver the course to the student.

Not to be included in average costs

Costs that are not attributable to an individual student should not be included in providers' calculations of average costs. These include (but are not limited to) general corporate overheads and marketing, branding and general student recruitment costs.

Commissions, fees or incentives paid to education agents should also not be retained from the student, as these are governed by agreements between the provider and the agent, and any recovery of those fees is the provider's responsibility.

Ideally, 'pre-agreement' costs would also not be recoverable in average costs but, instead, specified as a transparent and non-refundable enrolment charge to cover reasonable administration costs from assessing the student's application for enrolment.

5) Include a provision that permits you to, where appropriate, exercise discretion if a student's request for refund would otherwise be refused.

6) Ensure your terms are clear and understandable. Some ways to do this include:

- using simple language
- applying a clear structure, including using appropriate headings
- using a minimum font size of 11pt
- ensuring adequate white space on each page
- ensuring correct grammar and spelling, and consistent tenses in lists
- ensuring terminology remains consistent throughout a document (rather than using different terms interchangeably) and
- using readability assessment tools.

7) If you intend to include terms which fully compensate you for any expenditure you undertook in reliance on a student, include balancing terms that protect the student in a similar way if you are unable to deliver the course in the way it was advertised or promoted.

Part 5: Conclusion

Many providers believe they have met all their refund obligations to a withdrawing student if they apply the terms in their written agreement. However, as this paper has discussed, the terms themselves must be fair and reasonable.

The ACL provides a useful framework for considering what a fair and reasonable term may look like in standard-form contracts. In written agreements between education providers and international students, our view is that the most important element is whether **terms are reasonably required to protect the provider's legitimate interests**.

Providers may demonstrate that terms are fair and reasonable by **seeking to compensate only for their actual expenditure on withdrawing students**. Providers should also **try to mitigate this loss in other ways**, rather than causing financial detriment to the student.

In addition, written agreements should be **easily understandable** by international students, and **provide for exercise of discretion** where appropriate. To assist with readability, providers should consider **summarising the key terms of the agreement** and placing those up front.

Potential industry-wide improvements could involve creation of standard refund terms, or a template agreement. This could be led by international education providers or government. Government could also consider expanding regulation of international student refunds, as it does in cases of visa refusal, to a broader range of situations.

Avenues for dispute resolution

International students who believe their refund outcomes under written agreement terms are unfair should appeal their provider's decision using their provider's internal appeals process, giving reasons why they think the provider should refund more of their pre-paid fees.

If students are not satisfied with the outcome after their provider's review, they have several options to seek resolution of their dispute. They may contact:

- the state or territory consumer protection body for the state or territory their education provider operates in, who may be able to negotiate an outcome on a student's behalf, or
- a small claims tribunal or magistrates court, where the student can pursue a private right of action.

Information about these bodies is available on the website of the Australian Competition and Consumer Commission (ACCC), at:

www.accc.gov.au/contact-us/other-helpful-agencies

International students may also contact an Ombudsman. If an international student has a complaint about a decision of a **private** education provider, they can contact our Office, at:

www.ombudsman.gov.au

If an international student has a complaint about a decision of a **public** education provider, they can contact the office of their state or territory ombudsman. A simple internet search with "[name of state or territory] + ombudsman" should show the appropriate office website in the results.

Changes to consumer protection legislation

On 27 October 2022, both houses of the Australian parliament passed the Treasury Laws Amendment (More Competition, Better Prices) Bill 2022. This legislation introduces penalties into the ACL for use of UCTs in standard form consumer contracts like written agreements between education providers and international students.[23]

Penalties will apply for including, applying, and relying on UCTs in a standard form contract. These changes will take effect 12 months after the Bill receives Royal Assent.

We encourage providers to review their written agreements carefully and make any changes needed to ensure the terms are fair, reasonable and fully transparent. This will minimise disputes with students, and potential complaints to the Office or other bodies assisting students with consumer issues.

Although this paper is intended to raise awareness about issues or terms that risk being viewed as unfair, providers may wish to engage specialist legal advice to ensure their written agreements are fully complaint with UCT legislation.

[23] Treasury Laws Amendment (More Competition, Better Prices) Bill 2022 – Parliament of Australia (aph.gov.au).