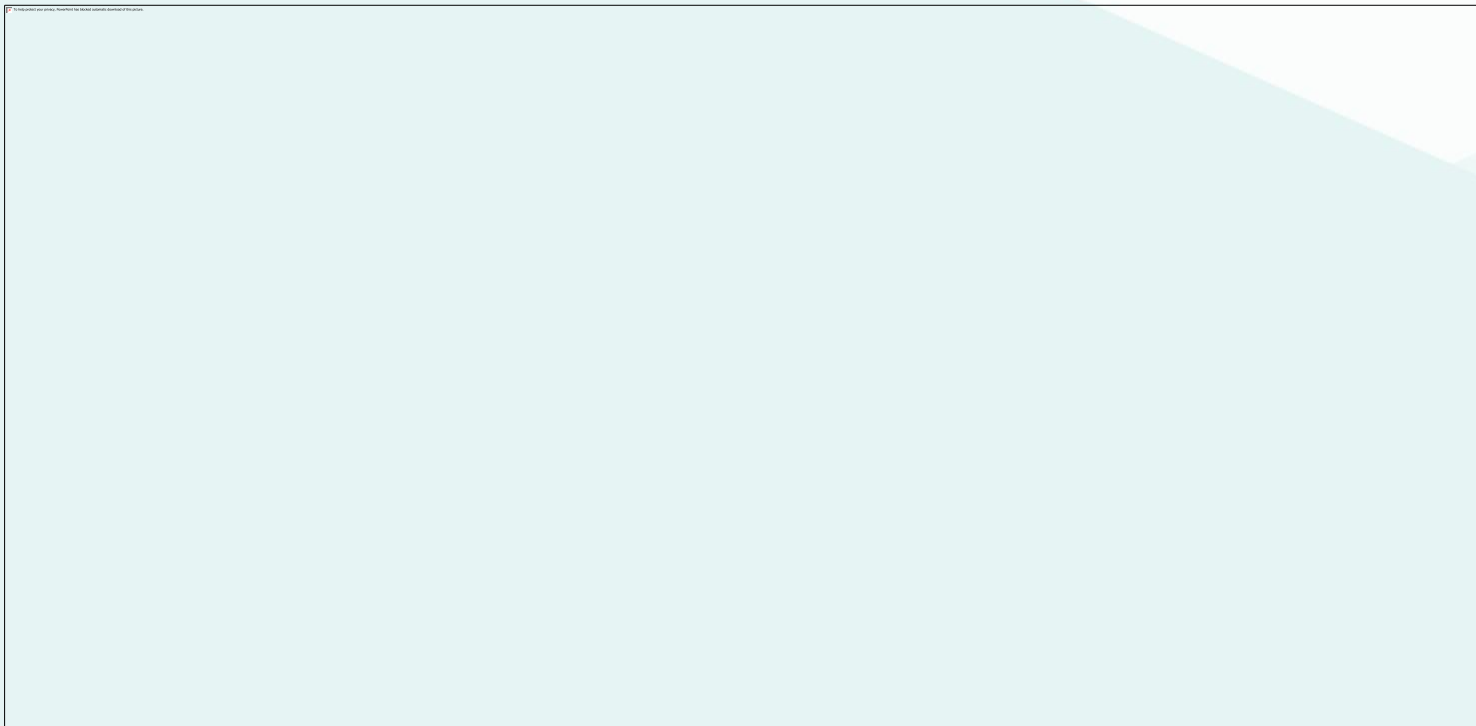


# Welcome

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## The Presenter

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- Compliance and Continuous Improvement Director at Group Colleges Australia Sydney NSW
- Member of Academic Integrity Committee, WHS Committee, SASH Committee, Executive Secretary of Board of Directors
- Current practicing solicitor in NSW
- Member of the Education Committee Australian Risk Policy Institute
- Member of Law Ninjas (online international law group)
- Member of Audit and Risk Committee – IHEA
- Former Deputy Convener Admissions and Compliance Working Group IEAA



## Disclaimer

The information provided today is not intended to constitute legal, business or other professional advice. It is provided as general information only and is not intended as a substitute for advice from a qualified professional such as a solicitor who is familiar with the facts of your particular circumstances.

As required by the NSW Law Society Professional Standards Scheme

[https://www.lawsociety.com.au/sites/default/files/2020-10/LS3447\\_Scheme\\_2020-21\\_FAQs\\_2020-6%20Oct\\_Final.pdf](https://www.lawsociety.com.au/sites/default/files/2020-10/LS3447_Scheme_2020-21_FAQs_2020-6%20Oct_Final.pdf)

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## **Written Agreements with International Students**

**“Agreements” are contracts**

**15 April 2021**

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## What is a contract?

- It is a promise or an agreement enforceable by law
- See Carlill v Carbolic Smoke Ball Co (1893) 1 QB 256 (CA)
- Minimum of two parties

## Contract Elements

- ***Offer***: refer: Carlill v Carbolic Smoke Ball (1893) 1 QB 256 (CA)
- ***Acceptance***: refer: R v Clarke [1927]HCA 47
- ***Consideration***: refer: Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd (1915) AC 847
- ***Intent***: refer: Ermogenous v Greek Orthodox Community of SA 209 CLR 95; 76 ALJR 465; 187 ALR 92
- ***Capacity***: legally able to enter into the contract.

## Contract Example

- **Offer:** “Can I mow your lawn?”
- **Acceptance:** “Yes please”
- **Consideration:** Agree to pay \$20
- **Intent:** He/she looks sincere
- If not sincere = may be ***fraud***
- **Capacity:** Did they have a lawnmower?
- if yes = capacity
- if no = no capacity and this could be ***fraud***.
- There are serious penalties for ***fraud***.



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## Fraud

- *What is fraud?*
  - Acquire property which belongs to someone else;
  - Obtain some kind of advantage financially; or
  - Cause someone else any kind of financial disadvantage.
  - See Section 192E of the Crimes Act (NSW)
  - 10 years imprisonment
- Note that Contract induced by fraud is voidable *Derry v Peek* (1889) LR 14 App Cas 337, [1889] [UKHL 1](#)

## The parties of student contract

Parties – there are at **least two** parties in every contract.

Our parties:

- The **institution**: represented by Principal Executive Officer (PEO) as mentioned in the Education Services for Overseas Students Act (ESOS).
- The **international student** represented by themselves or guardian.

## The parties of student contract

- Who is the **Principal Executive Officer** as mentioned in the Education Services for Overseas Students Act (ESOS)?
- **principal executive officer** of a provider ‘.... means the person who has executive responsibility for the operation of the provider.’ (see Section 5)

## The parties of student contract

- Who is the International Student?
- ***overseas student*** '....means a person (whether within or outside Australia) who holds a student visa.....' Section 5 of the ESOS Act.

## International Student Contract

- The Legislative Framework to the Sector
- Legislative Background
- Why are we here? (to reduce risk)
- Suggestions
- Where to go for more information

## The Legislative Framework

- **ESOS Act** (2000) compilation 37 (latest amendments 3 March 2021) see <https://www.legislation.gov.au/Details/C2021C00143> **sanctions**
- **Ombudsman Act** (1976) compilation 52 (latest amendments 24 January 2020) see <https://www.legislation.gov.au/Details/C2020C00043> **no sanctions**
- **Tertiary Education Quality and Standards Agency Act** (2011) compilation 18 (latest amendments 8 March 2021) see <https://www.legislation.gov.au/Details/C2021C00154> **no sanctions**
- **Migration Act** (1958) compilation 150 (latest amendments 22 March 2021) see <https://www.legislation.gov.au/Details/C2021C00156> **sanctions**

## Legislative Framework



- Legislation changes rapidly and we need to keep ahead of changes
- Professional development is a must.

## Legislative Background

- The Education Services for Overseas Students (ESOS) framework is underpinned by the ESOS Act 2000  
<https://www.legislation.gov.au/Details/C2017C00292> (the Act)
- The principal objects of this Act are:
  - (a) to provide tuition assurance, and refunds, for overseas students for courses for which they have paid; and
  - (b) to protect and enhance Australia's reputation for quality education and training services; and
  - (c) to **complement Australia's migration laws** by ensuring providers collect and report information relevant to the administration of the law relating to student visas.



## Legislative Background Expanded

- National Code for Providers of Education and Training to Overseas Students 2018 (the National Code)  
<https://www.legislation.gov.au/Details/F2017L01182>
- The purpose of the National Code is to set **nationally consistent standards and procedures** for registered providers and for persons who deliver education services on behalf of registered providers.
- The National Code supports the effective administration of the ESOS legislative framework by the Commonwealth and state and territory governments.

## Why the legislation?

International education affects the following agencies

– Austrade, Department of Education, Commonwealth Ombudsman, Department of Home Affairs, Prime Ministers Office, Department of Foreign Affairs, Department of Health, Australian Tax Office and maybe more.

## Why the legislation

- 1 in 50 people in Australia is an international student  
<https://www.ieaa.org.au/about-us/sector-stats>
- Additions to the workforce
- Source of tourism
- 4th largest export industry in Australia
- \$39.6 Billion in exports the others being Iron Ore, Coal and Natural Gas
- Supports more than 240 000 jobs

## Why are we here today

- Deal with risks of:
  - **written agreements for international students**
- Comply with the relevant legislation with respect to written agreements
- Suggestions for:
  - **written agreements for international students**
- Where to go for more help

## Legislation

### The ESOS Act and National Code

Student Agreements are dealt with in **Standard 3** of the National Code.

The requirements here:

<https://www.legislation.gov.au/Details/F2017L01182>

There is a Fact Sheet see:

<https://internationaleducation.gov.au/regulatory-information/Documents/National%20Code%202018%20Factsheets/Standard%203.pdf>

Note that National Code Fact Sheets are the same as the TEQSA Guidance Notes and have no legislative footing.

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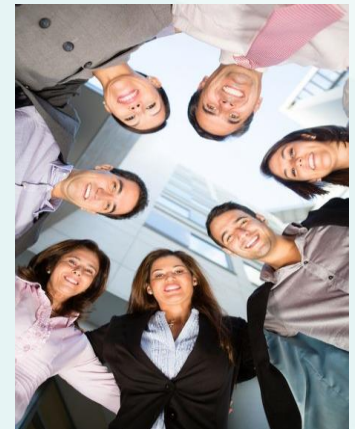
## Legislation Expanded

### Requirements under Standard 3 of the National Code

- A statement that **‘this written agreement and the right to make complaints and seek appeals of decisions and actions does not affect the rights of the student to take action under the Australian Consumer Law if the Australian Consumer Law applies’.**
- Must be written
- Details of the course
- Tuition fees and non tuition fees
- Information about external and internal complaints
- Plain English explanation of what happens in the event of the course not being delivered includes Tuition Protection Scheme (TPS).

## Risks

- International student agreements can be large and complicated.
- For instance some range from 4 pages to 64 pages.
- The agreement needs to meet the needs of all stakeholders including but not limited to: admissions, sales, students, parents, lecturers , agents.
- Agreements are read by stakeholders some of whom are not native English Speakers.
- All stakeholders need to understand the agreement.
- Question to ask is does a 'reasonable person' understand your agreement?



## Risks

- Who is a reasonable person? Does the reasonable person understand your student agreement?
- The reasonable person is:
- *‘the man on the Clapham omnibus’* *McQuire v Western Morning News* [1903] 2 K.B



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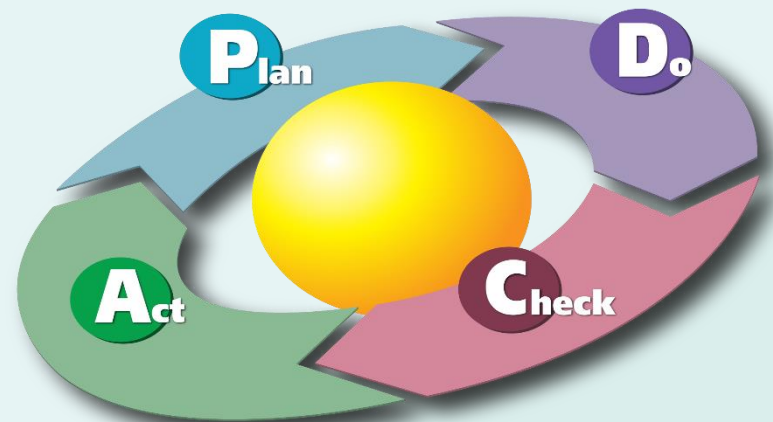
## Risks

- "the man on the Bondi tram" - an average member of society, who has various generalised attributes including risk aversion, sound judgment and a sense of self-preservation, which prevents them from walking blindly into danger see *Nomikos Papatonakis v Australian Telecommunications Commission* [\[1985\] HCA 3](#),



## Risks

- The student agreement needs to be understood by all stakeholders.
- Consider a quality circle.
- **Quality circle:** is a participation management technique to manage and improve the quality of the entire organisation.
- <https://www.toolshero.com/quality-management/quality-circle/>



## Suggestions

Your quality circle needs to include the following:



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## If we get it wrong?

- Who resolves disputes in our contracts?

### **Commonwealth Ombudsman**

- The Ombudsman is the Government approved mediator
- Their role is to investigate complaints
- Consider things in great detail

## Scandals and Risks

- In 2009 International education scandals- alleged racist attacks on Indian students.

[https://en.wikipedia.org/wiki/Violence\\_against\\_Indians\\_in\\_Australia\\_controversy](https://en.wikipedia.org/wiki/Violence_against_Indians_in_Australia_controversy)

- Collapse of Global Campus Management Group in 2008/2009

<https://www.universityworldnews.com/post.php?story=20091127122608266>

### Tenth school for overseas students collapses

By Nick O'Malley

November 7, 2009 – 12.00am

Save

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## Changes in 2011

- Education Services for Overseas Students Legislation Amendment Act 2011 led to the establishment of the Overseas Student Ombudsman.
- In 2011 the Education Services for Overseas Students (TPS Levies) Bill 2011 established the Tuition Protection Scheme.
- ***Baird Review of 2009*** into the ESOS Act see  
<https://internationaleducation.gov.au/regulatory-information/Education-Services-for-Overseas-Students-ESOS-Legislative-Framework/ESOS-Review/Pages/default.aspx>
- ***Knight Review*** into the student visa system  
<https://internationaleducation.gov.au/international-network/australia/policyupdates/Pages/Article-StudentVisaProgramReviewandGovernmentResponseAnnounced.aspx>

## Commonwealth Ombudsman Statistics

- 57% complaints from the Vocational Sector
- **21% complaints from the Higher Education Sector**
- 16% complaints from the ELICOS sector
- For more statistics see  
[https://www.ombudsman.gov.au/\\_\\_data/assets/pdf\\_file/0014/112415/Overseas-Students-Ombudsman-Quarterly-Update-Oct-Dec-2020.pdf](https://www.ombudsman.gov.au/__data/assets/pdf_file/0014/112415/Overseas-Students-Ombudsman-Quarterly-Update-Oct-Dec-2020.pdf)

# Commonwealth Ombudsman Statistics

## *Percentages of Disputes*

Between October – December 2020

- **43%:** refunds and fees.
- **13%:** transfers between registered providers.

*Note* that students need permission to transfer to a different education provider before completing the first 6 months of the principal course.



## Commonwealth Ombudsman Penalties

- Named and shamed

[https://www.ombudsman.gov.au/what-we-do/frequently-asked-questions#What\\_can\\_I\\_expect\\_from\\_the\\_Ombuds](https://www.ombudsman.gov.au/what-we-do/frequently-asked-questions#What_can_I_expect_from_the_Ombuds)

## Risks for the Organisation

- sanctions: the penalties under the ESOS Act are severe in Part 6 of the ESOS Act

*What are they?*

- Impose conditions, fines, suspend or cancel registration (under CRICOS), TEQSA is the CRICOS Agent, the Immigration Minister can give a suspension certificate, or enforceable undertakings.

A large, bold, red stamp with the word "SANCTIONS" in all caps, tilted slightly upwards to the right.

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## Risks for the Individual

- Section 25A TEQSA Act:  
‘A registered higher education provider, and each person who makes or participates in making decisions that affect the whole, or a substantial part, of the provider’s affairs, must be a fit and proper person.’
- May fail the fit and proper declaration for the Corporations Act
- Has ramifications for professional memberships, board appointments and ministerial appointments and more.

## More Risks

- No known cases under the ESOS Framework
- The regulatory action(s) affecting the sector have been dealt with under provisions of the Australian Consumer Law and Corporations Act rather than the ESOS Act
- The observation for this is that the penalties are more severe:
  - Up to 10 years imprisonment and
  - \$10,000,000 in fines (for companies) for misleading and deceptive conduct
- Naming and shaming of companies and associated staff.

## Recommendations

- The International Student Agreement is a fundamental part of our business.
- Get a lawyer to draft your international student agreement.
- Stick to your job avoid being seen to give immigration and legal advice.
- No one has been charged under the ESOS Act.
- **People have been named as not 'fit and proper' persons.**
- Ensure all your stakeholders understand the agreement.
- Remember your Quality Circle

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## Quality Circle



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## Where to go for more information?

IHEA –Independent Higher Education Australia [www.ihea.edu.au](http://www.ihea.edu.au)

International Education Association Inc (ISANA) [www.isana.org.au](http://www.isana.org.au)

International Education Association of Australia (IEAA) [www.ieaa.org.au](http://www.ieaa.org.au)

Connect with me – [anurag.kanwar@ubss.edu.au](mailto:anurag.kanwar@ubss.edu.au) or

Linkedin see <https://www.linkedin.com/in/anurag-k-26a6183/>



## Questions?

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Thank  
You

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