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SESSION 2: CONTRACT OF ENROLMENT – A LEGAL AND MANAGEMENT PLANNING TOOL

A paper to be presented on Thursday 25 October 2018

The Second Annual Gold Coast Schools Law and Regulation Conference

Palazzo Versace, Gold Coast

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INTRODUCTION

The Enrolment Contract is the foundation document which establishes the ongoing relationship between schools and parents. Thorough and well-managed enrolment processes, together with a well-drafted enrolment contract, will give the school a head start in providing excellent care for its students, while effectively managing the ongoing relationship with their families.

Enrolment contracts are legally binding documents, formalizing the partnership between the school and parents and setting out the respective obligations of the parties. In particular, the obligations pertaining to the payment of fees and their recovery are vitally important for the school; however, the enrolment contract should also cover a broad range of issues including privacy, health and safety obligations, discipline and requirements for students with special needs. Ideally, a well-drafted enrolment contract will be clear, simple and easy to understand for parents while reflecting the ethos of the school.

THE ENROLMENT PROCESS - OFFER AND ACCEPTANCE

Enrolment contracts, like all contracts, are made when one party makes an offer which is accepted by the other. At its heart, the relationship between parents and a school is a contractual one for the provision of educational services. An understanding of the basic concepts of contract formation is therefore helpful to ensure that, at the outset, the contractual relationship between the school and parents is solid.

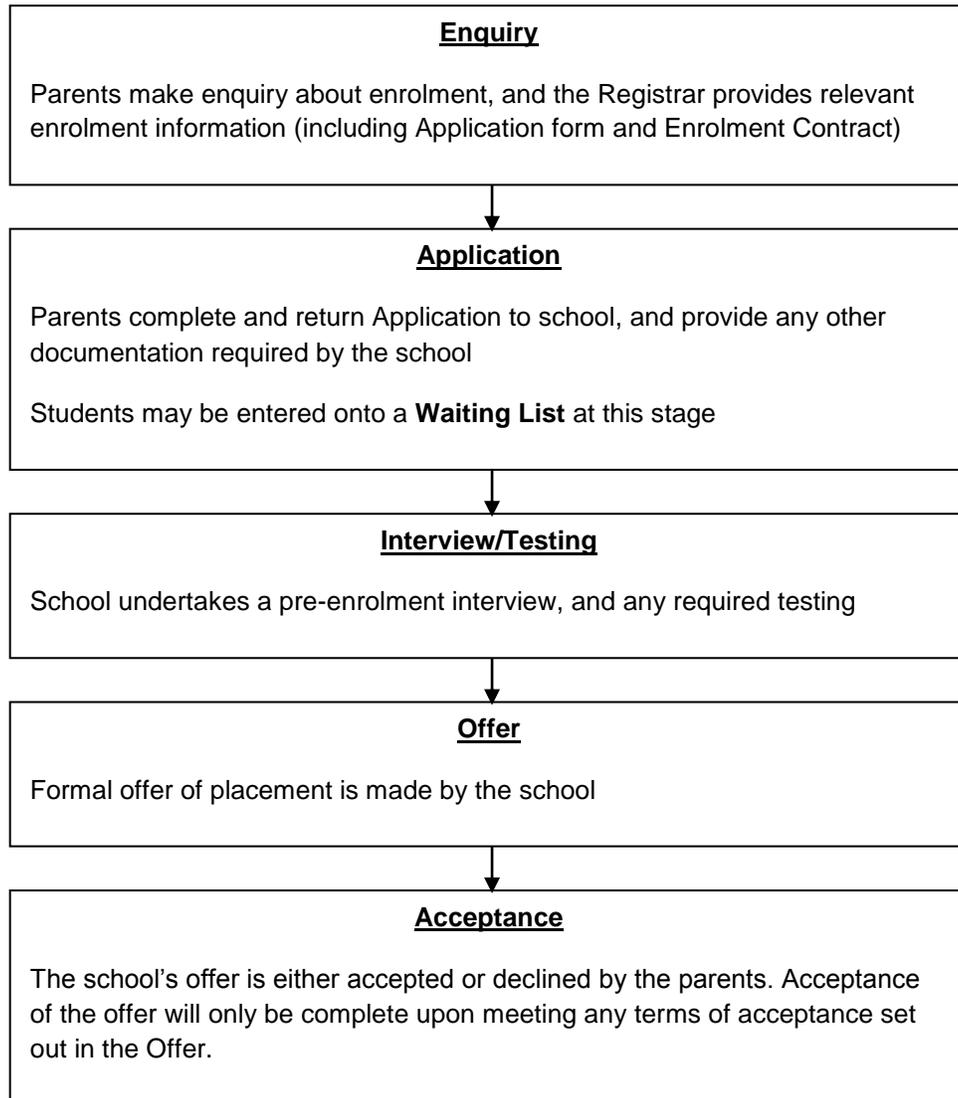
Essential relationship is that of contract

A contract is more than an agreement between two people. There must be an offer made and acceptance of that offer. Both parties must intend to create a legally binding relationship, and pay a price (not necessarily money). They must have a legal capacity to enter a contract of their own free will and proper understanding and consent of what is involved. Any duress, false statements, undue influence or unconscionable dealings could make a contract illegal and void.

By virtue of payment in the enrolment process, there is generally a contractual relationship brought into existence between the school and the parents regarding the provision of education services to their child or children. As a result, all of these elements apply to an enrolment contract in much the same way as any other type of contract.

Process outline

Effectively, the enrolment process should flow as follows to ensure contract formation occurs in the proper manner:



Further discussion of key stages is provided below.

Application Stage

Schools must ensure that, prior to making any formal offer of enrolment, they have sufficient information from the parents of the prospective student as is required to make an informed decision regarding whether or not to enrol the student. Application forms are used to collect information for this purpose - schools can (and should) use these forms to collect information about any matters that may be relevant to the enrolment of the student and their ongoing educational needs – for example, whether parents are able to afford the school fees and other expenses of their child attending the school, and whether families are comfortable with the ethos of the school (particularly relevant for schools with a religious affiliation).

Given the often challenging implications of separated families on the day-to-day operations of schools, parents ought to be asked to disclose their marital status, and living arrangements for the child if parents are separated, and whether there are any Orders of the Family Courts in place regarding the child. If any such orders exist, copies should be sought at the application stage.

Additionally, information regarding the child's educational needs – including any physical, learning or other disabilities – should be sought from families at the application stage. Disclosure of any such matters will require consideration by the school regarding reasonable adjustments that may be required in order to cater for the student's educational needs, which may impact upon the school's ability to offer a position for enrolment. Practically speaking, seeking copies of previous school reports, or consent to conducting appropriate testing, will assist schools in gathering the required information in this regard.

There are a variety of methods that schools may gather the information required at the application stage. What is essential at this stage is that all relevant information is obtained by schools prior to any offer being made to parents and that, throughout the application process, the school does not make any commitments to the family which they may be contractually obliged to fulfil. For this reason, the application form should not require parents to agree to the terms of enrolment (although the terms of enrolment should be available to parents at this stage, for reference and consideration).

Ideally, both parents should sign the original application form for each student – this demonstrates to the school that both parents desire to enrol the child at the school. The application form should also include a warranty that all relevant information to the application has been provided and that the information provided in the application is truthful, with an acknowledgement that the school is relying on this in considering the application for enrolment.

Interview/Testing

At the application stage, parents should be made aware that an offer of placement will not be made without an enrolment interview being conducted (ideally by the Principal, or their delegate such as the school's Registrar or a Head of Department), and appropriate testing being conducted if necessary. The purpose of these steps is to allow the school an opportunity to verify the information provided by the parents at the application stage in relation to the child and their educational needs, and the family's 'fit' for the school, prior to an offer being made.

A note on waiting lists

We understand that where high demand exists for enrolment placements, schools will often implement 'waiting lists' to manage potential students. In doing so, schools should be careful to include a statement in its application documentation that placement of a student's name on a waiting list does not create any legal obligation upon the school to make a place available or make an offer of placement in any particular order.

Offer and Acceptance

Once the school is satisfied that they can appropriately cater for the student, and that the parents will be able to satisfy the conditions of enrolment, the school may choose to make an offer of enrolment. This offer should be set out in writing, and refer to the terms of which the offer is made – including, but not limited to, the requirement of formal acceptance of the offer by the parents through payment of any enrolment fee and return of a signed enrolment contract to the school.

Although only one parent is *required* to sign a child's enrolment to effectively accept an offer of enrolment, a school should consider it vitally important that both parents (if indeed there are two parents with responsibility for the child – discussed further below) sign the enrolment contract. This is of particular importance with respect to recovery of fees – if only one parent signs the document, the contract may only be enforced against that particular parent, which may significantly limit the school's ability to recover fees if necessary. The enrolment contract itself should provide that the parties to the contract are jointly and severally liable for the payment of fees.

Complexities arise in this regard, particularly for separated families – these are discussed further below.

Who is the appropriate contracting party?

In our experience it is sometimes difficult to identify the correct contracting parties to the contract of enrolment. With regards to the school, the enrolment contract should reflect the legal name of the school's operating entity. However, there are a number of complexities with determining the appropriate parent contracting parties, particularly where blended family dynamics are involved.

Where the child to be enrolled comes from a home with two natural parents living together then, quite obviously, both parents would be party to the contract.

In circumstances where the parents have separated, it is important to ensure that the parent's that have decision making responsibility are the parent/s who sign the enrolment contract. Documents that you should look at to make sure that the right people are parties to the contract include Court Orders made about parenting matters, or Parenting Plans.

It is unusual for a Court to order that 1 parent has sole parental responsibility for a child – but if they do, that is the ONLY parent that can make a decision about a major long term issue like education or health. In those circumstances, the school must have that parent as a party to the enrolment contract (and usually, the only party).

Where the Court makes an Order that the parents have equal shared parental responsibility, it is a requirement that decisions about major long term issues for the children must then be made jointly. This means the parents should be sharing information with each other relevant to the decision, consulting with each other and making a genuine effort to agree.

Additionally, where there is an Order for Equal Shared Parental Responsibility, there can be no decision made about a major long term issue unless both parties agree. However, section 65 DAC(4) states that:

“To avoid doubt, this section does not require any other person to establish, before acting on a decision about the child communicated by one of those persons, that the decision has been made jointly”.

This means that it is not a responsibility of an organization to ensure that the decision is joint –an organisation is entitled to rely on a parent's decision as communicated as if it is a joint decision of the parents.

Despite this, if one parent makes a decision that is not communicated to the other parent, or that the other parent expressly opposes, the organisation may be caught in the cross-fire. The best practice is that if the parents both communicate conflicting instructions in relation to a major long term issue, the College cannot pick a side – they must require the parents to resolve the dispute between them.

If there are no Orders, or the Orders do not make mention of parental responsibility, then each parent has all of the responsibility to make decisions in relation to a child jointly and severally. Practically speaking, both parents can make decisions. It is possible for both parents, for example, to enroll a child in 2 different schools!

Other special circumstances sometimes arise – for example where a child has a guardian appointed by a Will, or where the child is in the care of the Department of Communities (Child Safety). If in doubt, seek specific advice prior to making an offer of enrolment at the school.

Copies of all documentation that establishes the right to make decisions for the child, including Wills, Court Orders, Parenting Plans and the like, should always be retained on file with the signed enrolment contract documents.

Students over the age of 18 years

As contracts of enrolment are typically entered between school and a parent party there is potential to introduce an unknown element into the arrangements when a student turns 18. It is thereafter possible for legal relationships to exist in a more direct fashion between the college and the mature student, noting that adult students may challenge the notion that their parents are in control of their education and that information must be reported to their parents.

These aspects are included for interest only at this stage but advice should be sought at an early stage if considerations involving potential conflict between mature age students and parents arise, particularly in relation to the provision of report information. At this stage it may represent an overabundance of caution to seek to make the mature age student an additional party between the parent and the college.

There is a general presumption at law that minors (ie. those under the age of 18) do not have capacity to enter into contracts, and any contract made with a minor is voidable. However, an exception to this general presumption applies to 'contracts for necessities', or necessary goods and services.¹ Education

¹ See *Nash v Inman* [1908] 2 KB 1.

may be included in this category, if it can be argued that education is a necessary service suitable to the child's condition in life, and necessary to their requirements at the time that the contract is entered into. On this basis, an older student (ie. 16 years or above) may seek to have the school terminate the enrolment contract with their parents and contract with the school in their personal capacity (for example, for privacy reasons). Whether or not this is appropriate for the school will depend on the individual circumstances of the student, and we would suggest that the school seeks specific advice if any such request is made.

ESSENTIAL TERMS OF THE CONTRACT

The essential terms that a school expects parents to agree to should be set out comprehensively in the enrolment contract. Unfortunately, in many schools, standard form enrolment contracts in use are dated and no longer represent best practice or even the usual day-to-day practice of the particular school. It is therefore important that the terms of enrolment contracts are reviewed regularly.

In particular, we note the following areas where a review may be necessary to ensure that your school complies with current best practice and is adequately protected against common issues.

Discipline and behaviour management

The discipline of students is a key area in which the enrolment contract can be used as a management tool – as a condition of enrolment, parents should be required to agree to support the school's discipline policy, and acknowledge that discipline action (including suspension or expulsion) may be taken at the discretion of the school for serious breaches of that policy.

We note that the behaviour management and discipline policy of the school should be a separate document from the enrolment contract. Specifying within the enrolment contract that the policy will be amended from time to time at the discretion of the school will allow for amendments to be made without amounting to an amendment to the enrolment contract (which would require the parent's consent). This also ensures that every student is subject to the same policies at any given time.

Difficult parents

Often, it is not only the bad behaviour of students that affects schools – parents behaving badly are an increasing problem for schools to deal with on a day to day basis. Whilst it is common for schools to

include a clause in enrolment contracts that allows the school to terminate the enrolment contract if the relationship of 'mutual trust and confidence' between the parties breaks down, schools will be assisted in actually exercising their rights under this clause if a parent code of conduct exists to set out the appropriate behaviour that is expected of parents, and including an additional clause in the enrolment contract which obliges parents to comply with the parent code of conduct. That code of conduct may address such issues as:

- Refraining from actions or behaviour that constitutes bullying, harassment, discrimination or vilification;
- Refraining from offensive, insulting or derogatory language or conduct;
- Not attending school events if affected by alcohol or any other intoxicant;
- Communicating with staff, students and other parents in a courteous and respectful manner.

Particularly in recent years, it is becoming increasingly common for parents to utilise social media to air grievances with the school or otherwise bring damage to the reputation of the school. The parent code of conduct could also specifically address these issues, requiring parents to:

- Not discuss the school, its staff or members of the school community in a negative or defamatory way;
- Not posting photographs of students without the consent of the child or their parent;
- Not posting photos of students in school uniform if they have the potential to negatively impact the reputation of the school.

We have also observed in recent years that parents may commence private social media groups in connection with the school, which become difficult to manage when the school becomes aware that negative or defamatory matters are being discussed or the group's members are otherwise acting inappropriately and in contravention of the parent code of conduct. To manage this, we would suggest including a specific clause in the enrolment agreement requiring parents to agree that they will not commence any social media page or group which uses the school name (or implies any association with the school) unless it is set up with the express permission of the school and one of the administrators of the page/group is a school staff member.

Health and Safety

It is well understood that schools owe a duty of care to students. Previously, schools may have sought to contract out of this duty of care by including terms which remove the responsibility of the school and its staff for any accident or sickness which may occur or happen through any circumstances. Such clauses are not legally effective. Rather than seeking to limit its liability under the enrolment contract, schools would be well-advised to seek extensive insurance cover which will sufficiently cover the school's costs in defending any claim for breach of duty of care, including any damages payable.

However, it is important that the enrolment contract requires that parents co-operate with the school in fulfilling its duty of care. Although information regarding a student's health issues or other special needs will have been collected by the school at the application stage, the enrolment contract should include a term which requires that parents keep the school fully informed of any changes to these needs over time. Further, the enrolment contract should require parents to consent to the school's Principal or their delegate consenting to urgent medical treatment for the student (for example, emergency surgery or blood transfusions) where reasonable attempts to contact the enrolling parents fail or are impractical.

Privacy

Given that Personal Information and Sensitive Information within the definitions of the *Privacy Act 1988* (Cth) will be collected in relation to potential students and their families during the application and enrolment process, it is important that schools are aware of the requirements for the collection, storage, use and disclosure of that information.

Amendments to the Privacy Act came into force on 12 March 2014, and were effective immediately. Among other changes, the amendments:

- Broadened the definition of sensitive information;
- Added more stringent requirements in relation to the collection, storage and use of sensitive information;
- Added additional requirements in relation to where personal information was stored (eg. on overseas cloud-based facilities); and
- Imposed significant obligations upon people to make disclosures about the collection, storage, use and disclosure of personal information.

Most schools have now updated their privacy policy to comply with these amendments, however it is important to also ensure that your school's application form and enrolment documents are also compliant. The enrolment contract should note that the school has a privacy policy in place, but the provisions of this policy do not form part of the contract and may be amended from time to time. However, the enrolment contract should require the parent to acknowledge that, by virtue of making an application for enrolment, they have consented to Personal Information (including Sensitive Information) being collected by the school for the primary purpose of providing education to the student.

Under the Privacy Act, a person must specifically consent to Personal Information being stored by electronic means including on servers which may be located overseas. If this is likely (consult with your IT department to determine this), a specific clause should be included in the enrolment contract acknowledging that the parent consents to information being stored in this manner.

Fee Payment

The enrolment contract should address the matter of fee payment broadly, addressing both the requirement for parents to pay and the consequences of non-payment. Finer details, such as methods of payment, due dates or fees and payment plan options, should be comprehensively addressed in the school's fee policy. This will allow the school to amend its fee policy from time to time as required (for example, annually to increase the school fees, as is common practice) without requiring an amendment to the enrolment contracts of previously enrolled students.

Termination

The termination of the enrolment contract will practically result in the removal of the student from the school. Whilst this may be necessitated for any number of reasons, a party to a contract will only have the right to terminate the contract under principles of contract law, if:

- The party has a right to terminate under the terms of the contract; or
- The other party breaches the contract.

Not all breaches of contract will give rise to a right to terminate – the breach must be sufficiently serious to warrant this outcome. However, schools are generally best protected against common issues where the contract provides express rights of termination in certain circumstances. These may include:

- The parent terminating the enrolment of their child (for any reason) with appropriate notice (or paying fees in lieu of notice);
- The school taking discipline action against the student in accordance with its behaviour management and discipline policy which results in termination of the enrolment contract (ie. expulsion);
- The school terminating the enrolment contract on the basis on unpaid fees; or
- Either party terminating the enrolment contract on the basis that the relationship of mutual trust and confidence between the parties has broken down.

If the enrolment contract contains these express rights of termination, it should also contain provisions that set out how these rights may be exercised. For example, the enrolment contract may require that if a parent wishes to terminate the enrolment contract for any reason, that a minimum of one term's notice is required and such notice must be communicated in writing to the Principal of the school. Principles of natural justice should be employed by the school in determining whether termination of the contract by the school is appropriate in the circumstances or determining the appropriate response to a parent purporting to terminate the contract, and the enrolment contract should set out procedures which will give effect to this.

UNFAIR CONTRACTS REGIME – DOES THIS AFFECT ENROLMENT CONTRACTS?

The introduction of the *Australian Consumer Law* under the *Competition and Consumer Act 2010* (Cth) (for this section, "the Act") substantially changed the ground rules for consumer contracts, by making unfair terms in standard form contracts void. Given that school enrolment contracts are generally standard form contracts, the terms of the *Australian Consumer Law* will potentially apply.

The amendments apply to 'consumer contracts; being a contract for:

- (a) the supply of goods or services; or
- (b) a sale or grant of an interest in land (eg. a lease)

to an individual whose acquisition... is wholly or predominantly for personal, domestic or household use or consumption (section 2).

As a threshold issue, we note that this definition requires the supply to be to an individual – as an enrolment contract is entered into with the parents/guardians of the student, this requirement is satisfied. The acquisition must also be for the *whole or predominant* purpose of *personal, domestic or household use or consumption*, making it clear that the legislative intent is to regulate ‘consumer law’ and not ‘business to business’ supplies.

In our view, the supply of tuition services to parents (as the contracting party on behalf of their child) is an acquisition for personal use and, as a result, enrolment contracts must be considered a ‘consumer contract’ for the purpose of the *Australian Consumer Law*.

Implications of the Act applying to enrolment contracts

Suppliers to a customer under a consumer contract must consider whether:

- (a) The term is *unfair* [to that extent the contract will be void] and
- (b) The contract is a *standard form contract* [which for schools it almost certainly will be].

A term of a consumer contract is ***unfair*** if:

- (a) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
- (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term [the burden of proof is on the supplier to show it is reasonably necessary]; and
- (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.” (s3(1) the Act – emphasis added)

The Act provides a non-exhaustive list of **specific examples of unfair terms**, including:

- (a) a term that permits one party (but not another party) to avoid or limit performance of the contract;
- (b) a term that permits one party (but not another party) to terminate the contract;
- (c) a term that penalizes one party (but not another party) for a breach of the contract;
- (d) a term that permit, one party (but not another party) to vary the terms of the contract;
- (e) a term that permits one party (but not another party) to renew or not renew the contract;
- (f) a term that permits one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
- (g) “a term that permits one party unilaterally to vary the characteristics of the goods or services to be supplied under the contract”;
- (h) a term that permits one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
- (i) a term that limits one party’s vicarious liability for its agents;
- (j) a term that permits one party to assign the contract to the detriment of another party without that other party’s consent;
- (k) a term that limits one party’s right to sue another party.

Transparency (clear expression) reduces the risk of unfairness

In the process of determining if a term is *unfair*, a court can take into account any matter that it thinks relevant, but it must take into account the extent to which the term is *transparent*. A term, is *transparent* (s 3(3) the Act) if it is:

- (a) Expressed in reasonably plain language;
- (b) Legible;
- (c) Presented clearly; and
- (d) Readily available by any party affected by the term.

School enrolment contracts should be reviewed with this in mind. Common terms that might be unfair under the regime could include:

- The payment of a significant penalty for early termination (ie. more than one term);
- The ability to vary the contract unilaterally.

AMENDING TERMS OF ENROLMENT

Whilst a school may seek to amend their enrolment contract at any time, this will only affect the terms of enrolment for *new students* – the terms of enrolment for existing students will still be governed by the contract signed by the parents at the time of enrolment.

Principles of contract law dictate that, once a contract is formed, it may only be amended by mutual agreement or as permitted under the terms of the original contract. It is therefore ideal that a clause containing mechanisms for the contract to be amended be included in any enrolment contract.

Of course, existing contracts may not contain such a clause. However, it may be possible for schools to amend a contract by giving parents notice of the amendments, and providing a sufficient period of time for the parents to find a new school for their children if they do not agree to the amended terms. If a

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sufficiently long period of time is provided for parents to object to the amendments, the school can include in this notice that parents will impliedly consent to the new terms if they continue to send their children to school. In our view, sufficient notice in this regard would need to be more than one term – for example, notice may be provided to parents in Term 3 regarding amended terms for the following school year, and parents will impliedly consent to those new terms if their child returns to the school the following year.

Any such notice to parents would need to be carefully drafted, and we suggest that schools take specific advice on this if seeking to amend the terms of enrolment for all existing students.

Incorporating School Policies

Some enrolment contracts seek to incorporate school policies into the enrolment contract. The effect of this is that either:

1. If the contract does not provide that updated policies will be incorporated, and therefore amend the enrolment contract, a school is bound to comply with the contract (and therefore the policies as it existed when it was signed - which could be an administrative nightmare across a Prep – Grade 12 school; or
2. Alternatively, if the contract does provide that updated policies will be incorporated into the enrolment contract, then each time a policy is updated, they will change the terms of the contract.

Critically, if the school's policies are incorporated into the contract and the school does not follow those policies to the letter, this could be considered to be breach of the enrolment contract and give the parents rights of termination or damages as a consequence of the breach.

For this reason, schools should avoid incorporating policies into the contract, and should only refer to policies as is absolutely necessary and where the policy imposes obligations on parents – for example, the fee payment policy, discipline policy and parent code of conduct. Others (for example, the child protection policy) which do not impose obligations on parents should not be mentioned in the enrolment contract, to avoid any argument that those policies are incorporated.

Even where policies are referred to in the enrolment contract, the enrolment contract should seek to make clear that the terms of policies referred to are not incorporated into the contract by including a specific clause to this effect. Any references to policies should also be carefully drafted and reviewed to make sure they are appropriate.

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SPECIAL REQUIREMENTS ON FEES AND THEIR RECOVERY

Both parents to sign enrolment contract

Ideally, both parents should sign the original *application form* for each student – this demonstrates to the school that both parents desire to enrol the child at the school. However, it is essential that if two parents have responsibility for the child (see above regarding parental responsibility), both parents sign the *enrolment contract*.

Under principles of contract law, a contract can only be enforced against parties to that contract. Practically speaking therefore, if only one parent signs the enrolment form, the school can only seek to recover fees against that parent. If unpaid fees threaten to jeopardise a student's ongoing enrolment at the school, it is clearly in the school's best interests to recover unpaid fees from either or both parents. In this regard, the enrolment contract should also contain a clause which states that the obligation of the parents to pay fees under the contract is 'joint and several' – that is, can be enforced against either parent separately.

Of course, the school may enter into an enrolment contract with only one parent (either because there is only one parent with responsibility for the child's education, or otherwise where it is only desirable for the school to contract with one party only – although these circumstances will be rare). In these circumstances, the school should take extra steps to satisfy itself that the contracting parent will solely be able to meet the school's fees.

Unpaid fees

Where fees remain unpaid, schools may be forced to commence legal proceedings against the parents for breach of the enrolment contract. Again, proceedings may only be commenced against a contracting party, which reinforces the importance of both parents signing the enrolment contract for the child.

Legal proceedings for debt recovery should be considered a 'last resort' option for schools, after a more relational approach is attempted and a payment plan is implemented (if necessary – but see below regarding issues relating to the Consumer Credit Code for deferred debt contracts).

Fees in lieu of notice on termination

Schools commonly seek to include a clause in their enrolment contracts which impose a requirement for parents to provide one term's notice that they will be withdrawing their student from the school, effectively terminating the enrolment contract. If sufficient notice is not given in accordance with this clause, the enrolment contract will typically provide that a term's fees may be charged in lieu of notice. Whether or not such a clause is enforceable is a common question from school clients, and will largely depend on whether the fees in lieu of notice constitute a penalty or liquidated damages.

Whereas a penalty is a requirement to pay a sum designed to coerce a party into compliance with the contract, liquidated damages are a genuine pre-estimate of damage incurred by the school as a result of the parent's failure to provide sufficient notice. As schools commit resources on the basis of confirmed enrolments, some degree of damage when a student is abruptly withdrawn is to be expected – the question here is, what is a genuine pre-estimate of that damage? In our view, a term's fees is not excessive, given that it is likely to take many schools approximately one term to fill an available position made vacant by an abrupt departure.

Avoiding the National Credit Code – payment plans

It is inevitable that occasionally, parents will be unable to pay their school fees on time. In such circumstances, schools often enter into payment plan arrangements with parents as an alternative to terminating the child's enrolment. However, schools must take care to ensure that any payment plan entered into does not continue a credit contract which invokes the obligations under the *National Credit Code* (for this section, "the Code").² If the code applies, failure to comply can lead to significant civil penalties (up to \$500,000) and criminal charges.

Under the Code, credit is provided if under a contract:

- a) Payment of a debt owed by one person (the debtor) to another is *deferred*; and
- b) One person (the debtor) incurs a deferred debt to another (the credit provider).³

A credit contract will be created if a school enters into a contract for the provision of credit to which the code applies.⁴

² National Consumer Credit Protection Act 2009 (Cth) – Schedule 1.

³ *Ibid*, section 3.

The Code will apply to a provision of credit if (relevantly), when the credit contract is entered into:

- a) The debtor is a natural person;
- b) The credit is provided wholly or predominantly for *personal*, domestic or household purposes;
- c) A charge is or may be made for providing the credit; and
- d) The credit provider provides the credit in the course of a business of providing credit, or *incidentally to any other business of the credit provider*.⁵

In our view, the provision of education falls within the scope of 'personal purposes' and although a school would not be considered to be 'in the business of providing credit', any payment plan arrangement would be considered 'incidental to any other business' conducted by the school. It is therefore likely that a school may be considered to enter into a credit contract to which the code applies if certain payment plan conditions are entered into.

Of course, any such arrangement is best avoided by the school. We would therefore suggest that, as a preliminary measure, enrolment contracts contain a specific clause requiring parents to acknowledge that the school is not a provider of credit, and that any unexpected financial difficulties which will impact the parent's ability to pay fees on time must be discussed promptly with the school so that appropriate arrangements must be made. At the time that these arrangements are made, the school must be careful to ensure that the actual terms of the arrangements do not fall within the ambit of the Code. If payment arrangements are entered into before a debt is incurred, the debt will not be considered 'deferred' and will therefore not fall within the ambit of the Code.

If any such arrangements are not made in advance, the school may seek to ensure that any repayment terms fall within the exceptions available under the Code – for example, the Code does not apply to the provision of 'short term credit', where under the credit contract:

- a) The provision of credit is limited to a total period that does not exceed 62 days;
- b) The maximum fees and charges imposed do not exceed 5% of the amount of credit; and
- c) The maximum interest charges do not exceed 24% per annum.⁶

⁴ Ibid, section 4.

⁵ Ibid, section 5.

⁶ Ibid, section 6.

In summary, schools should take care with any arrangements for repayment of parent debts to ensure that the school does not become considered a 'credit provider' within the meaning of the Code. Specific advice should be taken if managing any significant parent debts which are being deferred in any way to ensure that the school does not inadvertently subject itself to the obligations of the Code.

THE ENROLMENT PROCESS AND SPECIAL NEEDS STUDENTS

Schools are bound by the *Disability Discrimination Act 1992 (Cth)* (for this section, "the Act") and the *Disability Standards Education 2005* when dealing with the enrolment of students with a disability or special needs. Additionally, state-based antidiscrimination legislation may apply – for example, in Queensland the *Anti-Discrimination Act 1991 (Qld)* prohibits discrimination on the basis of protected attributes, including 'impairment'.⁷

Prohibition against discrimination under the Act

Section 22 of the Act provides for the prohibition of discrimination in the education area, stating as follows (extracted as relevant to the enrolment process):

(1) *It is unlawful for an educational authority to discriminate against a person on the ground of the person's disability or a disability of any of the other person's associates:*

- (a) ***By refusing or failing to accept the person's application for admission as a student; or***
- (b) ***In the terms or conditions on which it is prepared to admit the person as a student.***

...

(4) *This section does not make it unlawful for an education provider to discriminate against a person or student as described in subsection (1), (2) or (2A) on the ground of the disability of the person or student or a disability of any associate of the person or student if avoidance of that discrimination would **impose an unjustifiable hardship on the education provider** concerned.*

Disability is defined in section 4 of the Act as:

- (a) total or partial loss of the person's bodily or mental functions; or

⁷ *Anti-Discrimination Act 1991 (Qld)*, section 7.

- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness; or
- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person's body; or
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;

and includes a disability that

- (h) presently exists; or
- (i) previously existed but no longer exists; or
- (j) may exist in the future (including because of a genetic predisposition to that disability); or
- (k) is imputed to a person.

Considerations that are relevant for schools in processing applications for enrolment of students who may have a disability within the definition under the Act are set out below.

Prohibition against discrimination in the Standards

In addition to the Act, schools are bound by the *Disability Standards for Education 2005* (for this section, “the Standards”), which were developed alongside the Act to clarify the obligations of education providers, and seek to ensure that students with a disability can access and participate in education on the same basis as other students.

Part 4 of the *Standards* deal with students with disabilities seeking to enrol at a school. Section 4.2 is relevant to this discussion:

- (1) The education provider must take reasonable steps to ensure that the prospective student is able to seek admission to, or apply for enrolment in, the institution on the same basis as a prospective student without a disability, and without experiencing discrimination.
- (2) The provider must ensure that, in making the decision whether or not to offer the prospective student a place in the institution, or in a particular course or program applied for by the prospective student, the prospective student is treated on the same basis as a prospective student without a disability, and without experiencing discrimination.

(3) The provider must:

- a. consult the prospective student, or an associate of the prospective student, about whether the disability affects the prospective student's ability to seek admission to, or apply for enrolment in, the institution; and,
- b. in the light of the consultation, decide whether it is necessary to make an adjustment to ensure that the prospective student is able to seek admission to, or apply for enrolment in the institution, on the same basis as a prospective student without a disability; and
- c. if:
 - i. an adjustment is necessary to achieve the aim mentioned in paragraph (b);
 - ii. a reasonable adjustment can be identified in relation to that aim;

Make a reasonable adjustment for the student in accordance with Part 3.

(4) For this section, the provider has taken reasonable steps to comply with subsection (1) if the provider has complied with subsection (3).

'Adjustment' is defined in Standard 3.3 to include:

- A measure or action that has the effect of assisting a student with a disability to apply for admission or enrolment, to participate in a course or program, to use facilities and services, on the same basis as another student without a disability; and
- Facilitating for support services to be accessed by students with a disability.

Standard 3.4 addresses reasonable adjustments, and the considerations that a school must have regard to when determine whether an adjustment is 'reasonable' for a student:

- (1) For these standards, an adjustment is **reasonable** in relation to a student with a disability if it balances the interests of all parties affected.
- (2) In assessing whether a particular adjustment for a student is reasonable, regard should be had to all the relevant circumstances and interest, including the following:
 - a. the student's disability;
 - b. the view of the student or the student's associate, given under section 3.5;
 - c. the effect of the adjustment on the student, including the effect on the student's:
 - i. ability to achieve learning outcomes; and
 - ii. ability to participate in courses or programs; and

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- iii. independence;
 - d. the effect of the proposed adjustment on anyone else affected, including the education provider, staff and other students;
 - e. the costs and benefits of making the adjustment.
- (3) In assessing whether an adjustment to the course of the course of program in which the student is enrolled, or proposed to be enrolled, is reasonable, the provider is entitled to maintain the academic requirements of the course or program, and other requirements or components that are inherent in or essential to its nature.

The notes on this Standard contemplate that a detailed assessment (including, potentially, an independent expert assessment) may be required to determine what adjustments are necessary for the student. If the school believes that assessments are required, this should be conducted after a formal application for enrolment is received but before an offer of enrolment is made by the school.

Implication of the Act and Standards on enrolment

It is essential to note that the Act and Standards do not include any *express* obligation on schools to enrol a student with a disability or special needs, and the Act itself does not contain any *express* obligations for a school to make reasonable adjustments for the child. However, the Standards note as follows:

*“The Standards **generally** require providers to make reasonable adjustments where necessary. There is no requirement to make unreasonable adjustments”.*⁸

Therefore, if a school chooses not to admit a student with a disability or agree to make reasonable adjustments for them upon their enrolment, it must be able to rely upon the defence available under the Act that it would be an unjustifiable hardship on the school to accept the student’s application for enrolment. In order to rely upon this exemption, it would suggest that the school should have at least considered the scope of reasonable adjustments that would be required, should the child be enrolled at the school.

Practically speaking, this requires schools (at the application and interview stages of enrolment) to:

⁸ *Disability Standards for Education 2005* (Cth), notes to standard 3.4

- Consult with the parents and student, and gather information (such as school or medical reports, or conduct testing) to determine how the disability affects the student's ability to participate in the courses of education provided by the school;
- Following this period of consultation, make a decision about the adjustments that will be required to ensure that the student can participate in the school's courses on the same basis as a student without the disability; and
- Make reasonable adjustments, if necessary.

It is essential that enrolments staff appropriately collaborate with the prospective student and their families, and consult with school staff and independent experts where appropriate, to avoid claims of discrimination in the enrolment process. Schools should also ensure that a comprehensive enrolment policy is in place, which includes a compliance checklist for dealing with special needs students to assist enrolments staff in understanding their obligations and recognising risks in relation to disability discrimination.