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Enrolment Contracts Update

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LAW FOR SCHOOL BUSINESS MANAGERS NSW

Sydney

23 May 2018

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ABOUT THE AUTHOR

David Ford is the senior partner at Emil Ford Lawyers. He practises mainly in commercial and education law. He has advised educational institutions throughout Australia for over 30 years.

David is:

- Member and former President of the NSW Chapter of the Australia and New Zealand Education Law Association.
- A member of the English, American and South African Education Law Associations.
- A member of the Editorial Board of the *CCH School Principals Legal Guide*.
- The editor of *Education Law Notes*, which keep schools throughout Australia up-to-date with education law developments.
- A reviewer for the *International Journal of Law and Education*.
- A member of the Association of Workplace Investigators Inc and of the Australasian Association of Workplace Investigators.
- A Fellow of The Taxation Institute.

David has presented at conferences in the United Kingdom and elsewhere in Europe, South Africa, New Zealand and throughout Australia, and published numerous papers on topics as varied as enrolment procedures and conditions; student rights; teachers' liability; investigations; risk management; teachers, school counsellors and confidentiality; bullying (including cyber bullying); outdoor education; sport; multiculturalism in education; discrimination; transgender issues; discipline; and child protection.

David regularly presents in-school seminars for both teachers and administrators on education law matters. He also consults to schools and their boards on governance issues. David is often engaged by schools to investigate allegations against members of staff.

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Enrolment Contracts Update

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Introduction

The enrolment contract is the fundamental source of the obligations that a school has to its parents and that they have to the school. Accordingly, it is vital to ensure that:

- (a) the contract is only entered into when the school has decided that it has the resources to provide its educational offering to the student and that the parents have the resources to pay for that service; and
- (b) the contract includes appropriate and necessary terms.

I will consider the steps that lead to the formation of the enrolment contract and the importance of ensuring that marketing the school does not involve misleading and deceptive conduct. The impact of disability and sex discrimination legislation will also be considered at this point. I will show how a comprehensive enrolment policy can be an important tool to ensure that the enrolment process proceeds smoothly.

I will suggest matters that ought to be dealt with by the enrolment contract. While in most cases there will never be any need to go back to that contract during the course of a child's education, the need to do so in a few cases underlines the importance of getting it right from the outset.

Sadly, some parents will find themselves in difficult financial circumstances during the course of their children's education. Their ability to pay school fees can be affected. The enrolment contract will be the basis of any recovery action. I will consider issues related to this.

Enrolment in child safe schools

The Royal Commission into Institutional Responses to Child Sexual Abuse issued its Final Report in December 2017. In Volume 13 dealing with schools, the Commissioners wrote that it was “crucial that [schools] provide

safe environments for children to learn and thrive.”¹ At the same time, the Commissioners noted that “Parents can play a key role in reinforcing the messages of child sexual abuse prevention.”²

The Commissioners identified ten Child Safe Standards that articulate the essential elements of a child safe institution. Standard 3 deals with family involvement. Noting Article 18 of the United Nations Convention on the Rights of the Child, which states that parents, carers or significant others with caring responsibilities have the primary responsibility for the upbringing and development of their child, the Royal Commission said that families and caregivers have an important role in monitoring children’s well-being and that child safe schools will partner with them to better protect children and identify and respond to harm.³

The enrolment contract is a contract between independent schools and parents entered into at the very beginning of what, in most cases, is a long relationship between the two. It is therefore an ideal document for the school to demonstrate that it seeks to be a child safe institution and for parents to agree to support this. In my view, the enrolment contract terms should start in this area instead of the usual focus on payment of fees. This would send a powerful message to new parents about what the school values most.

The school is a business

*The [school] operates a business. It enters into contracts with parents to provide a service and parents agree to pay fees for that service.*⁴

Nevertheless, the enrolment contract is different from most business contracts where the parties negotiate hard to get the best deal for themselves. Schools and parents are not seeking the best deal for themselves; they are seeking to enter a relationship through which a child will receive an education. An enrolment contract formalises the partnership between the school and the parents to achieve the common aim of providing

¹ Royal Commission into Institutional Responses to Child Sexual Abuse Final Report Vol 13 page 215

² Royal Commission into Institutional Responses to Child Sexual Abuse Final Report Vol 13 page 218

³ Royal Commission into Institutional Responses to Child Sexual Abuse Final Report Vol 6 page 164

⁴ *Wright v Christ College Trust* [2006] TASSC 107 (15 December 2006) per Tennent J at Para 22

excellent outcomes for the student. As such, enrolment contracts should be seen as relational contracts.

This is not to say that enrolment contracts should not protect schools. The enrolment contract should, of course, deal with the payment of fees and other related issues.

Misleading and Deceptive Conduct

The Legislation

Schools must not engage in conduct that is misleading or deceptive or is likely to mislead or deceive. Section 18 of the *Australian Consumer Law*⁵, which applies to independent schools, states that:

A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

The courts have said that not-for-profit organisations can engage in trade or commerce. Schools are clearly in this category. While the actual activity of teaching students is not considered to be in trade or commerce, the conduct of the business of the school is.⁶ Therefore, schools must be mindful of these provisions when drafting their prospectus or other marketing brochures.

What must be proved?

A student or parents seeking a remedy under the misleading and deceptive conduct provisions must prove that:

1. the school made a misrepresentation; that is, that its conduct in all the circumstances conveyed a representation that was inconsistent with the truth;
2. the misrepresentation was misleading or deceptive; that is, that the school's conduct led them into error or misconception;
3. they relied on the misrepresentation; that is, they were induced to do something or refrain from doing something as a result of the misrepresentation; and

⁵ Found in Schedule 2 to the *Competition and Consumer Act 2010 (Cth)*

⁶ *Plimer v Roberts* [1997] FCA 1361 (5 December 1997)

4. as a result, they suffered loss or damage.⁷

Where it is alleged that a brochure contains misleading or deceptive representations, the test is whether what is written is misleading, deceptive or likely to mislead or deceive a reasonable person - a hypothetical person who is an ordinary or reasonable member of the class of persons who will see the brochure. Accordingly, reactions to the statements in the brochure that are extreme or fanciful are excluded as being unreasonable.⁸ Similarly, strained, false or unreasonable interpretations are rejected. One must ask how the ordinary, reasonable reader would understand the brochure. Where only a part of the brochure is relied upon as being misleading or deceptive, that part must be read in the context of the whole. It is wrong to select some words as misleading or deceptive if, in their context as a whole, they were not capable of being so.⁹

Once misrepresentation has been shown, a formal disclaimer will not be effective. If a disclaimer is to be effective, it must be by enabling the conduct as a whole (including the provision of the document containing the disclaimer) to be seen as not misleading.

It is not relevant that the school did not intend to mislead or deceive. Accordingly, there does not need to be evidence of actual deception, although that will be required before damages will be awarded.

Damages

A person who suffers loss or damage by the misleading or deceptive conduct of another person may recover the amount of the loss or damage by action against that other person.¹⁰

In assessing loss or damage, it is necessary that a comparison be made between the actual position of the person allegedly suffering loss or damage, and the position in which that person would have been but for the contravening conduct. Economic loss may take a variety of forms. But whatever the form of economic loss, when it is said that the loss was, or will probably be, caused by misleading or deceptive conduct, the person must

⁷ *Zhang v St Mark's International (General)* [2005] NSWCTTT434 (28 June, 2005);
Forwood Products Pty Ltd v Gibbett [2002] FCA 298 (20 March 2002)

⁸ *Campomar Sociedad, Limitada v Nike International Limited* [2000] HCA 12 (9 March 2000)

⁹ *Australian Competition and Consumer Commission v Dell Computers Pty Limited* [2002] FCA 847; *Tobacco Institute of Australia Limited v Australian Federation of Consumer Organisations* (1992) 38 FCR at [22]

¹⁰ Section 236 of the *Australian Consumer Law*

show that he or she has sustained (or is likely to sustain) a prejudice or disadvantage as a result of altering his or her position under the inducement of the misleading conduct.¹¹

A person who is misled suffers no prejudice or disadvantage unless it is shown that he or she could have acted in some other way (or refrained from acting in some way) which would have been of greater benefit or less detriment to him or her than the course in fact adopted.

The Application Form

This form usually contains the first information a school obtains about a prospective student and his or her parents. It is therefore important that the form be designed to obtain information which will assist the school to decide whether or not to make an offer of a place at the school for the student.

Accordingly, parents ought to be asked to:

- disclose any physical, learning or other disabilities of their child;
- disclose their marital situation; and
- provide copies of any court orders affecting them or their child.

The Application Form should have attached to it the school's current enrolment terms to which the parents will have to agree if a place is offered to their child and they accept the offer. This does not mean that the parents are agreeing to those terms when they submit their Application Form. Rather, it means that they know in advance that they will be asked to agree to those terms or to similar terms that are current when and if they are offered a place.

Parents should also be informed of the school's policies in relation to enrolment priorities (for example, for the children of former students or for siblings of current students) and fee discounts.

The school should also insist that both parents sign the Application Form.

¹¹ *Fennell v Australian National University* [1999] FCA 989 (22 July 1999) per Sackville J at Para 10

Disability Discrimination

The Legislation

Schools are bound by the *Disability Discrimination Act 1992 (Cth)* and the *Disability Standards for Education 2005*.

Section 22 of the Act provides:

- (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.*
- (2) *It is unlawful for an educational authority to discriminate against a student on the ground of the student's disability or a disability of any of the student's associates:*

 - (a) *by denying the student access, or limiting the student's access, to any benefit provided by the educational authority; or*
 - (b) *by expelling the student; or*
 - (c) *by subjecting the student to any other detriment.*
- (2A) *It is unlawful for an education provider to discriminate against a person on the ground of the person's disability or a disability of any of the person's associates:*

 - (a) *by developing curricula or training courses having a content that will either exclude the person from participation, or subject the person to any other detriment; or*
 - (b) *by accrediting curricula or training courses having such a content.*
- (3) *This section does not render it unlawful to discriminate against a person on the ground of the person's disability in respect of admission to an educational institution established wholly or primarily for students who have a particular disability where the person does not have that particular disability.*
- (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.*

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

4.2 *Enrolment standards*

- (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); and
 - (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).

Note See Part 10 for exceptions to the legal obligations set out in the standards. These include a provision that it is not unlawful for a provider to fail to comply with a standard if, and to the extent that, compliance would impose unjustifiable hardship on the provider (section 10.2).

Section 3.4 deal with reasonable adjustments:

3.4 *Reasonable adjustments*

- (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.

Note Judgements about what is reasonable for a particular student, or a group of students, with a particular disability may change over time.

- (2) In assessing whether a particular adjustment for a student is reasonable, regard should be had to all the relevant circumstances and interests, including the following:
- (a) the student's disability;
 - (b) the views 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
 - (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.

Note A detailed assessment, which might include an independent expert assessment, may be required in order to determine what adjustments are necessary for a student. The type and extent of the adjustments may vary depending on the individual requirements of the student and other relevant circumstances. Multiple adjustments may be required and may include multiple activities. Adjustments may not be required for a student with a disability in some circumstances.

The Standards generally require providers to make reasonable adjustments where necessary. There is no requirement to make unreasonable adjustments. In addition, section 10.2 provides that it is not unlawful for an education provider to fail to comply with a requirement of these Standards if, and to the extent that, compliance would impose unjustifiable hardship on the provider. The concept of unreasonable adjustment is different to the concept of unjustifiable hardship on the provider. In determining whether an adjustment is reasonable the factors in subsection 3.4 (2) are considered, including any effect of the proposed adjustment on anyone else affected, including the education provider, staff and other students, and the costs and benefits of making the adjustment. The specific concept of unjustifiable hardship is not considered. It is only when it has been determined that the adjustment is reasonable that it is necessary to go on and consider, if relevant, whether this would none-the-less impose the specific concept of unjustifiable hardship on the provider.

- (3) In assessing whether an adjustment to the course of the course or program in which the student is enrolled, or proposes 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.

Note In providing for students with disabilities, a provider may continue to ensure the integrity of its courses or programs and assessment requirements and processes, so that those on whom it confers an award can present themselves as having the appropriate knowledge, experience and expertise implicit in the holding of that particular award.

Relevance of Standards to Enrolment

The *Standards* require schools to take reasonable steps to ensure that the student is able to seek admission to, participate in or access support services

on the same basis as a prospective student without a disability and without experiencing discrimination.

Put very briefly, this means that the school must:

- (a) consult the parents (and student) about how the disability affects the student's ability to participate in the school's courses; and
- (b) in light of that consultation, decide what adjustments are required to ensure that the student can participate in the school's courses on the same basis as a student without the disability; and
- (c) if adjustments are necessary, make reasonable adjustments.

In determining whether an adjustment is reasonable, the school ought to consider:

- (a) the student's disability;
- (b) the views of the student and the parents;
- (c) the effects of the adjustment on the student and others; and
- (d) the costs and benefits of making the adjustment.

Schools do not have to make adjustments which are not reasonable. If the adjustments are reasonable, the school still need not make them if it can show that to do so would cause unjustifiable hardship.

Section 11 of the Act states that, in determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including:

- (a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and
- (b) the effect of the disability of a person concerned; and
- (c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; and
- (d) in the case of the provision of services, or the making available of facilities - an action plan given to the Commission under section 64.

The school should not rely only on the information contained in the application form when considering whether or not to offer a place. Rather, the school ought to gather further information by interviewing the parents

and prospective student, checking references, examining school reports and, in particular, finding out more about any disabilities that the prospective student has.

Schools should have a comprehensive enrolment policy dealing with these disability discrimination issues. The policy should act as a checklist for principals and enrolment officers to ensure they avoid disability discrimination claims.

Sex, Sexual Orientation and Gender Identity Discrimination

Section 21(1) and (3) of the *Sex Discrimination Act 1984 (Cth)* state that:

(1) It is unlawful for an educational authority¹² to discriminate against a person on the ground of the person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:

(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.

(3) Nothing in this section applies to or in respect of a refusal or failure to accept a person's application for admission as a student at an educational institution where:

(a) the educational institution is conducted solely for students of a different sex from the sex of the applicant; or

(b) except in the case of an institution of tertiary education, education or training at the level at which the applicant is seeking education or training is provided by the educational institution only or mainly for students of a different sex from the sex of the applicant.

The only exemption is found in section 38 (3) of the *Sex Discrimination Act* which states that nothing in section 21 makes it unlawful for a school to discriminate against a child on the ground of the child's sexual orientation or gender identity in connection with the provision of education if the school is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the school so discriminates in

¹² A school, college, university or other institution at which education or training is provided: section 4 of the *Sex Discrimination Act*

good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Without going into the fine detail of this exemption¹³, it clearly does not apply to public schools in NSW and I am not aware of any independent schools which have tried to assert that providing an education to LGBTI students offends the religious susceptibilities of adherents of their religion. Nevertheless, I acknowledge that some followers of Judaism, Christianity and Islam believe that a person's gender should correspond with their biological sex, except where there is an intersex status. Schools operated by such followers may seek to come within the section 38 (3) exemption should they wish to discriminate against a transgender child in a way that would otherwise be unlawful under section 21.¹⁴

The *Anti-Discrimination Act 1977 (NSW)* contains similar provisions although they do not apply to independent schools.

It is clear that, unless the section 38 (3) exemption in the *Sex Discrimination Act* applies, schools in NSW must not refuse to enrol students and must not expel students because they are lesbian, gay, bisexual or transgender. This is so even though, under the *Anti-Discrimination Act*, this prohibition does not extend to independent schools.

Section 21(3) makes it plain that nothing in section 21 applies to or in respect of a refusal or failure to accept a person's application for admission as a student at a school where the school is conducted solely for students of a different sex from the sex of the applicant. Therefore, a boys' school could refuse an enrolment application from a child whose sex is female but who identifies as male gender. On the other hand, if that child had been at a girls' school, the school would not be allowed to ask the child to leave. Similarly, if the child had been at a co-ed school, the school would not be allowed to ask the child to leave.

¹³ For an examination of the equivalent exemption in the *Anti-Discrimination Act*, see *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155

If a boys' school enrolled this child, it would no longer be a school conducted solely for students whose sex is male. The *Sex Discrimination Act* would then make it unlawful for the school to discriminate against future female applicants on the basis of their sex. For this reason, single sex schools should think carefully before agreeing to enrol a transgender child.

The Enrolment Contract

Making the Contract - Offer and Acceptance

Contracts are formed when one party makes an offer which is accepted by the other. The enrolment contract is no different. It is important for schools to ensure that their process is such that they are making the offer to the parents. This allows the school to dictate the terms upon which the offer is made. While in theory parents could come back with a counter offer, in practice parents will either accept the offer or reject it.

Accordingly, schools ought to ensure before making an offer that:

- (a) the parents are able to afford the school fees and other expenses of their child attending the school;
- (b) the parents are familiar with the school's culture or ethos and are comfortable for their child to be educated within it; and
- (c) the school is able to make whatever reasonable adjustments are required for students with disabilities.

Once satisfied of these things, the school normally makes an offer of a place at the school for the child to commence in a particular year. The parents are asked to accept the offer by signing a document which sets out the terms of the contract and by paying an enrolment fee. When this happens, the enrolment contract has been made.

Just as it was important to ensure that both parents signed the original Application Form, so too it is very important to ensure that both parents sign the document which accepts the school's offer of a place. If only one parent signs, the enrolment contract will be with that parent. This means that, if it becomes necessary to sue for unpaid fees, the action can only be maintained

¹⁴ For my more detailed paper about LGBTI students, go to <http://www.emilford.com.au/education-schools/free-education-law-papers-and-resources/>

against the parent who signed the acceptance. Clearly, it is in the school's interests to be able to recover unpaid fees from either or both parents.

Both parents should be asked to sign the acceptance form even if they are separated or divorced. If the Application Form is signed by only one parent, the school is on notice that it may have to contract with only one parent if it proceeds with the enrolment. The school, of course, may do this. However, it is important that the school do so deliberately and with full knowledge of the situation of the parent with whom it is dealing.

Schools must be very careful to ensure that the process of offer and acceptance, of entry into the enrolment contract, is carried out carefully. If it is not, unexpected and unfortunate consequences may follow. In a case where the local guardian of an overseas student had signed the Acceptance of Offer document, the Court said that this document did not amount to an undertaking to pay the fees as the guardian had not been a party to the arrangements with the school for the student's enrolment and the school had not previously obtained the guardian's acceptance of financial responsibility for the student. In fact, the guardian understood that the student's parents would pay the fees. Rather than an acceptance to pay school fees, the Acceptance of Offer document was held to be one touching upon the day-to-day relations between the school, the child and the guardian with whom the student lived. Thus, the guardian was not liable to pay the fees. The school had pursued the wrong person. It should have commenced proceedings against the parents. As a practical matter, recovery from people overseas is difficult. It is therefore important that a school secure its position by either getting fees paid in advance or by having a binding agreement from some local person of substance to pay the fees.¹⁵

Terms of Enrolment

Most schools already have various terms that they expect parents to agree to in the enrolment contract. Unfortunately, in some schools, these terms were prepared many years ago and no longer represent best practice or even the day-to-day practice of the particular school. It is important that the terms in the enrolment contract are reviewed regularly. For example, terms dealing with the issues dealt with in the following paragraphs should be included.

¹⁵ *Bankstown Grammar School Limited v Park* (No 2) [2000] FCA 1218 (1 September 2000)

The “Helicopter Parent” clause

Given the unfortunate tendency of some parents to hover over their child as well as their child’s school and teachers in a misguided attempt to promote the best interest of their child, it is prudent to include in the enrolment contract some terms covering the expectation that parents will abide by school rules and policies, participate appropriately in their child's education and the school's activities, and behave considerately in dealings with staff and other parents. Some schools ask parents to sign a Code of Conduct dealing with such matters.

It is also a good idea to include in the terms provisions giving the school some flexibility as to the courses it offers from time to time and noting which courses and activities are compulsory. This will usually prevent complaints from parents looking for some excuse not to pay fees.

Ending the enrolment

There ought to be some provision for the school to end the enrolment if:

- (a) the principal considers that a mutually beneficial relationship of trust and cooperation between the parents and the school has broken down;
- (b) the student has failed to meet the requirements of the NSW Education Standards Authority or has otherwise failed to make satisfactory progress in his or her academic work.

Conducting searches

Teachers may conduct searches under their general authority as teachers. That authority may be extended or limited by contractual arrangements in the case of independent schools. While it is appropriate to ask for permission, this is not strictly necessary if the authority to conduct a search has not been abolished or limited by the enrolment contract. It is even better if the right to search student’s belongings or person is specifically mentioned in the contract. It should be made clear that the right to search extends to electronic devices.

Discipline

Parents should be asked to agree to support the school's discipline policy and to acknowledge that students may be suspended or expelled for serious breaches of that policy.¹⁶

Health and Safety

A school has a duty of care to its students¹⁷ and should not try to avoid its obligations in that regard in its terms. Fortunately, it has been some time since I have seen a term like this in an enrolment contract:

We understand that while everything is done to ensure both the comfort and safety of those attending the school and whilst every care will be exercised by those who are in charge, the school and its staff are not responsible in any way for any accident or sickness which may occur or happen through any circumstances.

Those who included such terms often wrongly believed that they provided complete protection. In fact, they do not stop a student suing. The parents sign it. The child has the right to sue. Even if the child signed, it would not be effective as the child is a minor.

However, it is reasonable for a school to expect parents to co-operate with it in fulfilling the school's duty of care. Accordingly, terms should be included requiring parents to keep the school fully informed of a student's health issues or other special needs. Likewise, the principal or his or her delegate should be authorised to consent to urgent hospital and/or medical treatment (for example injections, blood transfusions, surgery) for the student.

Privacy

The *Privacy Act* only regulates videos and photographs where the identity of the individual is apparent or can be reasonably ascertained.¹⁸ Accordingly, if individuals cannot be identified from particular images, the school may use

¹⁶ Reference to procedural fairness is sensible given that it is required for school registration: see my papers *Discipline and Procedural Fairness* (2008) and *School Discipline* (2014) available at www.emilford.com.au/education-schools/free-education-law-papers-and-resources/.

¹⁷ See my paper *Tort Reform: Does it affect teachers and schools?* (2004) available at www.emilford.com.au/education-schools/free-education-law-papers-and-resources/.

¹⁸ Privacy issues for schools are explored in detail in my colleague Nathan Croot's papers *Practical Privacy Issues in Schools* (2010) and *Amendments to the Privacy Act* (2013) available at www.emilford.com.au/education-schools/free-education-law-papers-and-resources/.

them as it pleases. However, in many photos found on school websites, it is quite easy to identify individual students.

I therefore recommend that school privacy policies and enrolment contract terms include statements allowing the school to take photographs and video footage of students and parents for use in school publications, on the school's website and in other marketing and promotional material.

Amending the Terms of Enrolment

Normally, a contract cannot be unilaterally amended by one party to it. An enrolment contract will normally cover a period of six to thirteen years. During that time, a school may wish to update its terms. To ensure this is possible, the terms should include provision for amendment subject to giving parents enough notice of the change to allow them to find another school for their child if they are not happy with the change.

The Enrolment Contract - an Unfair Contract?

Under the *Australian Consumer Law*, a court can void a contract term if it is unfair.¹⁹ This applies to all standard form consumer contracts entered into or varied after 1 July 2010. The three main issues are:

- (a) whether the enrolment contract is a consumer contract;
- (b) whether it is a standard form contract; and
- (c) if so, whether a term is unfair.

A consumer contract is a contract for a supply of services to an individual whose acquisition of the services is wholly or predominantly for personal, domestic or household use or consumption.²⁰ “Services” definitely includes the services provided by independent schools. The only issue is whether such services are acquired for personal use.

When the expression “personal, domestic or household” is used in legislation, it tends to be by way of contrast with business or investment purposes. Accordingly, the acquisition of education services, at least at the school level, is likely to be considered something which is acquired for personal use.

¹⁹ Section 23 of the *Australian Consumer Law* in Schedule 2 of the *Competition and Consumer Act 2010* (Cth)

²⁰ Section 23(3) of the *Australian Consumer Law* in Schedule 2 of the *Competition and Consumer Act 2010* (Cth)

The *Australian Consumer Law* sets out six matters which a court must take into account when determining whether or not a contract is a standard form contract.²¹ Not all six matters are relevant to enrolment contracts but a court may take into account any matter which it thinks is relevant. Ultimately, school enrolment contracts are standard form contracts because:

- (a) they are prepared before any discussion with parents occurs; and
- (b) parents are not allowed to negotiate the terms.

If a parent alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless the school proves otherwise.

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

- (a) causes significant imbalance between parties; and
- (b) is not reasonably necessary to protect the school's interests; and
- (c) would cause detriment to the parents if it were to be applied or relied on.

A court will presume that a term is not reasonably necessary to protect the school's interests unless the school proves otherwise. In other words, the onus is on the school to prove the term is reasonably necessary.

In determining whether a term of a consumer contract is unfair, a court may take into account such matters as it thinks relevant but must take into account:

- (a) the extent to which the term is transparent; and
- (b) the contract as a whole.

A term is transparent if the term is expressed in reasonably plain language, legible, presented clearly and readily available to any party affected by the term.

Schools should review their enrolment conditions and consider whether any of the terms may be unfair.

²¹ Section 27(2) of the *Australian Consumer Law* in Schedule 2 of the *Competition and Consumer Act 2010* (Cth)

Recovering Fees and other Charges

Have both parents sign!

I have already mentioned the importance of having both parents sign the Application Form and the acceptance of the offer of a place for their child at the school. As stated above, the school only has a contract with the people who accept the offer. Accordingly, the school can only seek to recover unpaid fees from the people who have accepted the offer. If only one parent has accepted the offer, the school can seek to recover fees from that parent alone.

Beware the Consumer Credit Code

Although most parents have good intentions when they enrol their children, occasionally, as all schools know, they are unable to pay school fees on time. Schools are often put in the awkward position of deciding whether to end the child's enrolment or to try to come to some arrangement with the parents to pay the outstanding fees by instalments. If a school agrees to an instalment arrangement, the school ought to ensure that it enters into a new contract with the parents that complies with the *Consumer Credit Code*. This Code applies across Australia. Failure to comply with the Code can lead to civil penalties up to \$500,000 and criminal charges so it is important to understand the school's obligations under the Code.

A school provides credit under the Code if under a contract:

- (a) payment of a debt owed by one person (the debtor) to another (the credit provider) is deferred; or
- (b) one person (the debtor) incurs a deferred debt to another (the credit provider).²²

A school enters a credit contract if it enters a contract for the provision of credit to which the Code applies.²³

The Code applies to the provision of credit (and to the credit contract and related matters) if, when the credit contract is entered into, or (in the case of pre-contractual obligations) is proposed to be entered into:

- (a) the debtor is a natural person; and

²² Section 3 of *National Credit Code* as Schedule 1 to the *National Consumer Credit Protection Act 2009 (Cth)*

²³ Section 4 of *National Credit Code* as Schedule 1 to the *National Consumer Credit Protection Act 2009 (Cth)*

- (b) the credit is provided or intended to be provided wholly or predominantly ... for personal, domestic or household purposes; and
- (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 carried on in this jurisdiction or as part of or incidentally to any other business of the credit provider carried on in this jurisdiction.²⁴

In summary, if a school enters an instalment arrangement which defers the debt to a later time, it cannot charge interest or any other fee to the parents, assuming that the instalment arrangement will exceed 62 days.²⁵ Therefore, entering instalment arrangements with parents is of little benefit to schools.

However, the school will only provide credit if the debt is deferred. If the enrolment contract provides for interest or some other charge on late payments, the school may charge the interest or fee without providing credit if it does not defer the debt. Therefore, schools are better off not entering into instalment arrangements with parents.

Late Payment Fees

Schools commonly include provisions in their enrolment conditions giving them the right to charge late fees where parents do not pay school fees on time. The High Court has recently looked at this issue in the context of banks charging customers late fees.²⁶ The Court upheld an earlier decision of the Full Federal Court, finding that late payment fees charged by the ANZ Bank on consumer credit card accounts were not unenforceable as penalties. The late fee was \$20 (\$35 until 2009).

The Court asked:

- (a) whether the fee was extravagant and unconscionable in amount compared to the greatest conceivable loss; and
- (b) whether the late fee was a genuine pre-estimate of damage.

In deciding whether the fee was exorbitant or unconscionable, the Court looked to see what interest the ANZ had in its customers paying their fees

²⁴ Section 5 of *National Credit Code* as Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth)

²⁵ Section 6 of *National Credit Code* as Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth)

²⁶ *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28 (27 July 2016)

on time. The Court stated that the ANZ had a ‘legitimate’ and ‘multi-faceted’ interest in the timely performance of its customers’ payment obligations.

This was because banks like the ANZ assume financial risk by making their facilities available to customers. For example, if many borrowers fail to pay their fees on time, banks will be exposed to an increased credit risk. The Court found that the late payment fee operated as “compensation” to equalise the ANZ’s financial risk. Further, when customers repay on time, banks have the freedom to lend more money to their customers. If fees are paid late, banks lose the opportunity to profit by re-investing the funds. Since the ANZ had a legitimate interest in having their customers pay their fees on time, and because an increase in credit risk was difficult to assess, the fee was not extravagant and unconscionable.

The Court also found that the fee was a genuine pre-estimate of damage because all the ANZ’s legitimate business interests were likely to suffer.

The significance of this case for schools is that it underlines the importance of ensuring that the any late fee provisions do not act as a penalty. Although the ANZ was successful, the judgment highlights that when a school imposes a late fee it is important that the fee reflects the estimated cost to the school of the school fees being paid late and is not an amount that could be considered extravagant or unconscionable. In the words of the Court, the late fee should operate as “compensation” to equalise the school’s losses. It should not seek to penalise.

A Term’s Fees in lieu of Notice

Typically, schools, in their enrolment contract, allow parents to give a term’s notice that a student is to be withdrawn. This is followed by a statement that a term’s fees will be charged where notice is not given. Is this enforceable? The law says “No” if it is a penalty but “Yes” if it is for “liquidated damages”.

A penalty is a requirement to pay an amount of money to frighten the potential offending party into compliance. In other words, is the school threatening the parents when it says to them: “Give notice or pay up!”? Liquidated damages, on the other hand, are a *genuine pre-estimate of the damage* to the school of the parents’ failure to give notice. To determine whether the provision in the enrolment contract is a penalty or liquidated damages, one must look at the circumstances at the time the contract is

entered into, not at the time of the parents' failure to give notice which may, of course, be years later. One must construe the enrolment contract to determine whether it was the *objective* intention of the parties that the provision was to be a coercive penalty, or whether the intention was that it be a genuine pre-estimate of the value of the damage.²⁷ The *subjective* intention of the parties is irrelevant.²⁸ The name, if any, given to the payment in the enrolment contract is not determinative. In other words, to simply say that a term's fees in lieu of notice are a genuine pre-estimate of damage will not save the provision if a term's fees were not, at the time the contract was made, a genuine pre-estimate of damage.

I suspect that very few schools have inserted this provision in their enrolment contracts after giving careful consideration to the damage they will suffer if a student is withdrawn without a term's notice. Having said that, it is no obstacle to the amount stipulated being a genuine pre-estimate of damage that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. Indeed, that is just the situation when one needs to estimate the amount of the future damage. Of some comfort is that the High Court²⁹ has said that latitude must be given to genuine pre-estimates of damage and that the sum must be "out of all proportion" or "extravagant, exorbitant or unconscionable" before being declared a penalty.

Family Law Considerations

The Family Court and Fees

The Family Court makes orders directed to the parties before it, usually the parents.³⁰ These orders cannot vary the terms of the enrolment contract. For example, if the Family Court has ordered the father to pay school fees in a situation where both parents have signed the enrolment contract, the school can, despite the court order, sue one or both for any unpaid fees. If, in this situation, the school recovers some or all the fees from the mother, she may be able to recover them from the father because of the court orders but this is not the school's concern.

²⁷ *Boucaut Bay Co Ltd (in liq) v Commonwealth* (1927) 40 CLR 98, Isaacs ACJ at 107

²⁸ *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359 Deane J at 400

²⁹ *Esanda Finance Corp Ltd v Plessnig* (1989) 166 CLR 131 Wilson and Toohey JJ at 141

³⁰ For much more detail about the type of Court Orders schools should consider, see *Family Law and the Enrolment of Students* (2006) available at <http://www.emilford.com.au/education-schools/free-education-law-papers-and-resources/>.

The Family Court and School Information

Family Court orders often refer to information that should be provided to a child's school and to information that both parents have a right to be given by the child's school. Such orders are binding on the parties to the dispute. It is important that the school is made aware of the court orders. Schools should not put obstacles in the way of compliance by the parties with the orders. Indeed, schools should wherever possible facilitate a parent's access to information and material concerning the child.

However, even though schools ought to facilitate the rights of parents under Family Court orders, it is not a school's role to oversee compliance with such orders by the parents concerned. A school principal has no authority from the Court either to oversee a parent's compliance with the orders or to enforce the orders.

The Family Court and School Reports

The information in school reports is personal information and therefore its use is governed by the *Privacy Act*. Under Australian Privacy Principle 6, the use and disclosure of personal information is permitted for the primary purpose for which it was collected. The information in a school report is collected so that the school can record and follow the progress of a student. Personal information may be used for a related secondary purpose that is within the reasonable expectations of the student. Most students expect their school reports to be provided to their parents (whether or not they are living with their parents).

However, schools must be alert to particular family situations. For example, if there are orders of the Family Court directed at preventing a parent from knowing the whereabouts of a child (usually for safety reasons), the school ought not to send a school report to that parent. Hence, the importance for schools to obtain copies of current court orders from parents.

The Family Court, Schools and Sex Discrimination

Dr Hudson and his wife had separated before their child began attending a South Australian state school. It was not a happy family, having been before the Federal Magistrates Court and the Family Court 44 times before Dr Hudson brought a claim of sex discrimination against the school!³¹

³¹ *Hudson v State of South Australia* [2008] SAEOT 8 (22 May 2008)

One of the Family Court orders said that the mother had to enter the father's name and contact details as the second person to be contacted in case of emergency on any school enrolment form. The school knew of the orders. Dr Hudson complained that his telephone number was incorrectly noted on the enrolment form. The Tribunal said that the order was directed to the mother and did not impose an obligation on the school to ensure that the mother complied with the order. As noted above, schools are not enforcement agencies for the Family Court.

While it is expected that schools will respect court orders, it does not mean that wherever there has been a failure to comply with the orders by one of the parties to whom the orders are directed, resulting in a detriment or possible detriment to the other party, the school is guilty of discrimination on the ground of sex, against one of the parties. Dr Hudson lost.

The Enrolment Contract – an Opportunity!

The enrolment contract is one of a school's most important documents. Therefore:

1. Get the enrolment process right!
2. Have a comprehensive enrolment policy.
3. Understand your discrimination obligations.
4. Keep your enrolment terms up-to-date by regular review.
5. Get both parents to sign everything.

However, as I said at the outset, keep in mind that the enrolment contract is different from most business contracts. They govern a relationship between a school and parents – a relationship through which a child will receive an education. However, there is a business side to these contracts and they are intended to protect schools.

Enrolment contracts should be simple, friendly and expressed in clear language that is easy for the parents to understand.

Use your enrolment contract as an opportunity to build a strong and lasting relationship with each new family joining your school community.