

Copyright Governance

**A Risk and
Compliance Guide**
for HE, VET and
ELICOS providers

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Copyright Agency is an Australian not-for-profit organisation that represents over 37,000 members across the publishing, media, visual arts, education and surveying sectors.

We have been appointed by the Australian Government to administer the Statutory Education Licence, which enables educational institutions to legally reuse content created by others, and be confident that creators are being compensated fairly for their work – thus practising Good Copyright Governance. Licensing revenue is distributed to our members, ensuring the Australian creative economy remains strong.

copyright.com.au

Introduction



Copyright governance

The values and ethical behaviour of HE, VET & ELICOS* providers are under increased scrutiny following the Australian Government's calls to fully review and reform the sectors.

When reviewing values and ethical behaviour in an organisation, consideration should be given to copyright compliance.

An organisation's practice of good copyright governance is an important step towards building a strong internal culture of ethical behaviour and compliance. The following document sets out the regulatory framework for using works subject to copyright; provides key indicators for assessment of copyright compliance gaps; and solutions for bridging these gaps.

Copyright law and good corporate governance

Under s180 of the *Corporations Act 2001 (Cth)*, directors and other officers of an organisation have a responsibility to discharge their duties with a degree of care and diligence – which includes the duty to examine and comply with all laws, codes and practices which affect their organisation.

There are also obligations for RTOs, ELICOS providers and Higher Education providers to comply with relevant local legislation.¹ This would include an organisation's obligations under the *Copyright Act 1968 (Cth)*. Alongside the statutory requirements, copyright and practising good copyright governance sits firmly within an organisation's corporate social responsibility.

The Australian Government's Corporations and Markets Advisory Committee examined the extent to which Australian companies should adopt corporate social responsibility. The report concluded that corporate social responsibility can be an important means for companies to manage non-financial risks and maximise their long-term financial value.

Copyright governance should be assessed as part of an organisation's adherence to corporate social responsibility as there is an economic and social impact upon content creators, if they are continually not remunerated for the use of their works by organisations. This continual non-payment impacts upon the economy by driving down the reasonably expected return on investment for creators. Recent Australia Council research showed that, on average, 35 percent of content creators/rightsholders in Australia relied upon royalties and advances from their works as a source of income.²

Core copyright industries (including press, literature, music, art and broadcast) contributed approximately \$124.1 billion to the Australian economy in 2018 and employed over 1 million people.³ The impact of continual non-payment of royalty or licensing fees on this industry will see a decline in the types and quality of content being created as revenue streams are eroded.

“... a well-managed company will generally see it as being in its own commercial interests, in terms of enhancing corporate value or opportunity, or managing risks to its business, to assess and, where appropriate, respond to the impact of its activities on the environmental and social context in which it operates. Companies that fail to do so appropriately may jeopardise their commercial future.”¹

* HE refers to Higher Education, VET refers to Vocational Education and Training, ELICOS refers to English Language Intensive Courses for Overseas Students.

¹ Please refer to Appendix A for these Standards.

² CAMAC, Corporations and Markets Advisory Committee 2006, *The Social Responsibility of Companies*, December, Sydney, p78.

³ *Making Art Work: An economic study of professional artists in Australia* Chapter 10, Income and Expenditure © David Throsby and Katya Petetskaya, 2017 p105–106.

⁴ PwC 2020, *The Economic Contribution of Australia's Copyright Industries, 2006–2018*, p4.

Copyright works



Use in an educational context

Employees at educational institutions interact with copyright protected works every day. Contrary to popular belief, these employees usually have no ‘automatic’ right to copy and communicate a portion of text or an image for educational purposes.

Direct permission usually needs to be sought from the copyright owners, or the Statutory Education Licence needs to be in place for the institution.

Copyright protection is generally afforded to all literary and artistic works including visual art, photographs, illustrations and survey plans. **Many educational institutions have revised their delivery methods during the COVID-19 pandemic to switch to online teaching.** In light of this change, it's timely to put the focus on copyright compliance when using text and images digitally in this new environment, in addition to material copied and shared in more traditional ways.

Common examples of uses of copyright works in educational institutions

Primary content consumers	Copyright works
Educators, Course Coordinators, Unit Coordinators	<ul style="list-style-type: none"> • Photocopying, scanning or taking a digital screenshot of news and opinion pieces to share with students • Content saved to desktop, tablets, phones and servers for course preparation purposes • Uploading a scanned book chapter or journal article to the institution's learning management system or student intranet • Copying and pasting an image from a 'Google Images search' into a class PowerPoint for illustration purposes • Sharing an excerpt of third party text or an image with a colleague for course preparation purposes • Taking a screenshot of text or an image from a website to include in course material • Sharing a scanned third party work privately with a student via email, social media channels or instant messaging services such as Facebook, Slack etc • Digitally copying a useful graph from a website for inclusion in course material
Library staff	<ul style="list-style-type: none"> • Creating a PDF version of a book chapter or journal article at the request of academic staff • Forwarding a digital news article via email to an educator or other staff member to assist with course preparation • Combining a selection of copied extracts from different sources (books, journals, newspapers, websites etc) to create a physical or digital course pack of reading material for students

Subscriptions, terms and conditions of use

Many institutions use subscription services to access content. These may include:

- direct subscriptions to a publisher's website and/or publications
- subscriptions to a content aggregator or database
- subscriptions to image libraries such as Shutterstock or Getty Images
- agreements with a media monitoring organisation or a media analytics service.

The terms and conditions of use for these services will generally be restricted to a nominated number of internal users and may additionally provide rights for limited copying or sharing of content within an organisation.

Where content is shared beyond the terms of use of a subscription or service agreement, alongside breaching the terms of the agreement, the organisation runs the risk of copyright infringement.

Use of personal accounts within an institution
– opportunity for internal risk

In addition to subscriptions that may be held by an institution, many educators will hold their own personal subscriptions to certain content. This can pose an additional risk for institutions as often the terms and conditions of a personal account will be limited to the purchaser and use by the educational institution may result in an infringement. Even with awareness, employees are increasingly expected to act quickly and often terms and conditions are overlooked in the interests of expediency.

Data Storage

Digitally storing copyright works without a licence or permission on desktops, servers, storage devices, emails etc, is also a copyright risk as the copy is often created outside the terms of use and without an additional permission or licence. Any subsequent use of such copies in internal workflows could mean additional infringement takes place.

It is easy for employees to share and reuse copyright content without awareness of copyright, or concern for the publisher/services terms and conditions.

Copyright and risk



Quantifying copyright risk

The reuse of copyright works, without permission or a licence from an owner of works, gives rise to both an operational risk and a reputational risk within an organisation's framework of risk management.

Compliant use of copyright works can be further defined as ethical and responsible behaviour.

The **operational risk** for an organisation centres on two different components – the potential financial damages payable for a breach of copyright, and separately the potential loss of ASQA/VRQA or WA TAC registration for RTOs, and/or the loss of TEQSA registration for higher education providers. A quarter of content creators believe their copyright has been infringed; with the highest proportion of infringement reported by writers and visual artists. Where a creator has acted to stop copyright infringement or to seek compensation for unlicensed use, 60 percent of actions undertaken by Australian content creators/rightsholders have been successful.⁴

Exposure can escalate from an employee's or contractor's unwitting conduct into reputation risk. An organisation's digital footprint amplifies its risk.

⁴ *Making Art Work: An economic study of professional artists in Australia* Chapter 10, Income and Expenditure © David Throsby and Katya Petetskaya, 2017, p105–106.

Risk appetite for reusing copyright works may be common amongst organisations for the following reasons:

- perceived low chance of external exposure/**reputational risk**
- perception that third party copyright works are never used for educational purposes within the institution
- misunderstanding of copyright legislation and failure to seek expert legal advice on the matter
- assumption that educational institutions can rely on fair dealing exceptions which exist to cover student and research activity only
- assumption that educators within the institution only ever provide approved material to students via controlled platforms (such as a learning management system), and a failure to take into account other common methods of delivery, such as social media platforms.

Organisations may believe they are adopting a low-risk position with low-risk appetite for copyright compliance, when, in fact, the risk exposure could be moderate to high. This is compounded by the belief in common copyright myths by many individuals within an organisation.

As examples of possible **operational risk** and **reputational risk**, see the following two case studies of organisations caught using copyright works without a licence. Financial remediation and public apologies were key components in settling both cases.

Case studies

Copyright Agency has settled hundreds of matters involving the unlicensed use of our members' content. The below case studies highlight some examples of reputational and operational risk of copyright infringement in an organisation.

Case study 1 – Strathfield Council (NSW)

This recent case study on actions undertaken by an Australian local council highlights both the **operational risk** and **reputation risk** faced by an organisation that is not copyright compliant. An IT contractor for Strathfield Council inadvertently placed copyright works on an externally facing website without a licence or permission from the rightsholder. This was both a breach of copyright and a breach of the terms and conditions of the council's licence for the use of content supplied by a media monitoring organisation.

Following discussions with the Copyright Agency, Strathfield Council agreed to pay for an annual copyright licence, and to make a payment for past use, as well as issuing a public statement of apology published in the *Daily Telegraph*, *Sydney Morning Herald* and the *Inner West Courier*.

Case study 2 – Australian Hotels Association (NSW)

This recent case of an association highlights the **reputation risk** and **financial risk** faced by organisations that are not copyright compliant. The association had posted newspaper articles to their website without permission or a licence from the relevant publishers. This was both a breach of copyright and a breach of the terms of their agreement with their media monitoring organisation. Following conversations with the Copyright Agency, Australian Hotels Association (NSW) obtained an ongoing annual copyright licence, made payment towards their past unlicensed use of content and published an apology in *The Australian*, *Sydney Morning Herald* and *The Daily Telegraph*.

Governance



Achieving good copyright governance

Simple steps can help ensure your organisation is hitting a benchmark for copyright compliance and fairly supporting Australian content creators.

Understand the risk

- 1 Conduct regular audits of information policies and controls to understand how third party content is used within an organisation
- 2 Assess how different types of content flows into an organisation
- 3 Review how content is used and archived internally across all departments
- 4 Understand how content is shared with students
- 5 Review, or implement, organisation-wide copyright policies to ensure they reflect current content use and business practises

Follow best practice

Consider the following:

- 1 Does your organisation have an existing remuneration agreement in place with Copyright Agency to access the Statutory Education Licence?
- 2 Is any material that you are using being solely copied and/or shared for educational purposes?
- 3 Does your organisation limit copying and/or sharing of third party text and images to a reasonable portion only?
- 4 Are systems or processes in place generally to ensure legislative and regulatory obligations are met?
- 5 Is someone in your organisation responsible for managing copyright and obtaining relevant permissions where necessary?
- 6 Does everyone in your organisation know when and where to obtain permissions?

Look into a one-step licensing solution

Copyright is a complex topic and common myths and misconceptions can leave considerable compliance gaps, putting your organisation at risk of being brought into a copyright dispute.

The Statutory Education Licence sits behind the scenes, like a safety net, enabling educators to carry out their day-to-day use and reuse of copyright text and image without having to seek permission from content creators individually – thus enabling faster workflows and a compliant culture. Key benefits include:



Tools that assist with managing copyright compliance

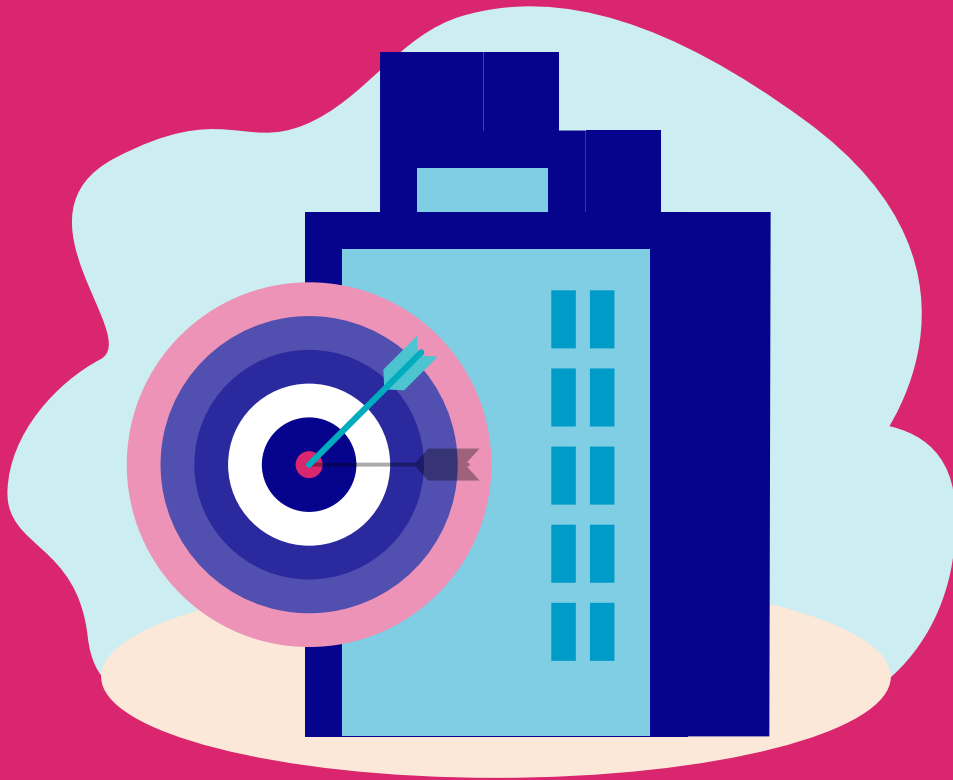
There are a number of tools available to assist institutions in managing copyright compliance. For example, FLEX – a Copyright Agency developed and administered platform – complements the Statutory Education Licence.

FLEX is an automated copyright compliance tool that manages reading material that your institution uses for educational purposes. Its centralised copyright monitoring workflow ensures that any use of third party book and journal excerpts does not exceed the limits of the Statutory Education Licence.

Using a tool such as FLEX can provide another layer of copyright compliance protection for your institution. FLEX comes with the Statutory Education Licence for HE, VET & ELICOS providers.

⁵ Terms, conditions, limits and exclusions apply. Refer to the licence agreement for full terms and conditions.

Summary



Copyright risk is manageable

Organisations are required to publish governance statements declaring their employees' commitment to operate in the relevant regulatory regime.

This must include the obligation, as set out in Australia's *Corporations Act 2001 (Cth)*, to evaluate codes of conduct against employee practices.

When employees are required to use information from a range of copyright sources for educational purposes, with little time to assess permission or licensing criteria for reuse, the Statutory Education Licence is an easy way to provide enterprise-wide compliance.

Copyright Agency's Statutory Education Licence fosters a culture of trust and respect, as it exemplifies an organisation's willingness to provide fair compensation to the creators of the material it relies on.

Educational institutions can apply for access to the Statutory Education Licence via Copyright Agency's RightsPortal at rightsportal.copyright.com.au/licensing/education.

Appendix A

Legislative framework

It's important for organisations to familiarise themselves with the legislation and standards that pertain to their obligations. In addition to legislative requirements under the *Corporations Act 2001*, nearly all standards that specifically apply to HE, VET and ELICOS providers require compliance to relevant Australian legislation, including the *Copyright Act 1968 (Cth)*.

Copyright Act 1968 (Cth)

31 Nature of copyright in original works

- (1) For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a work, is the exclusive right:
 - (a) in the case of a literary, dramatic or musical work, to do all or any of the following acts:
 - (i) to reproduce the work in a material form;
 - (ii) to publish the work;
 - (iii) to perform the work in public;
 - (iv) to communicate the work to the public;
 - (vi) to make an adaptation of the work;
 - (vii) to do, in relation to a work that is an adaptation of the first mentioned work, any of the acts specified in relation to the first mentioned work in subparagraphs (i) to (iv), inclusive; and
 - (b) in the case of an artistic work, to do all or any of the following acts:
 - (i) to reproduce the work in a material form;
 - (ii) to publish the work;
 - (iii) to communicate the work to the public; and

36 Infringement by doing acts comprised in the copyright

- (1) Subject to this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.

Australian copyright law in context

Copyright protection under the *Copyright Act 1968 (Cth)* extends to literary, artistic, dramatic and musical works, as well as broadcasts and performances, sound recordings, survey plans, compilations such as anthologies, and published editions. Copyright does not protect ideas, concepts, styles, techniques or pure information.

Under s36 of the *Copyright Act 1968 (Cth)*, copyright infringement occurs where someone who is not the rightsholder, exercises any of the exclusive rights (contained in s31) of the copyright holder without permission or a licence. Organisations may be held vicariously liable for their employees' or contractors' copyright infringement.

Division 4 of Part IVA of the *Copyright Act 1968 (Cth)* allows for educational institutions to copy and communicate certain copyright material for educational purposes if the body administering the educational institution agrees to pay equitable remuneration to the appointed collecting society. Copyright Agency refers to this as the Statutory Education Licence. Copyright Agency is the appointed collecting society for text and image for the Statutory Education Licence.

Permission or a licence is not required where a fair dealing exception applies. **“Fair dealing” exceptions** in Australian copyright law allow the use of copyright material for a narrowly defined set of purposes:

- research or study⁶
- criticism or review
- parody or satire
- reporting the news
- access by a person with a disability or an organisation assisting a person with a disability
- giving of professional advice by a lawyer, patent attorney or trademarks attorney.

In considering whether the dealing with the work is fair, the courts will look at whether an objective person would consider:

- that the use of the work is genuinely for one of the fair dealing exceptions in the act, and
- the use of the work is fair in that context.

Fairness considerations

Considerations would include whether there was a negative financial impact upon the rightsholder, including whether the work was being used for commercial purposes. However, even where an organisation’s use of the work did not result in a profit, it would not necessarily make the use in question fair.

In an educational context, this means regular day-to-day activities, such as those below, would usually require either the Statutory Education Licence via an agreement with Copyright Agency, or direct permission from the rightsholder(s):

- scanning a hardcopy work into a digital format
- making a hardcopy of a work either by printing or photocopying
- copying and pasting an image, graph or table into a presentation or report
- copying and pasting text from a book or research paper into a report
- emailing an article to a student or colleague
- posting an article on an intranet, secure extranet or Learning Management System
- saving copyright works on a server or hard drive.

⁶ note that ‘fair dealing for the purposes of research or study’ is intended as an exception to permit individual research or study only, and would not usually extend to copying and communication for the educational purposes of an educational institution.

Corporations Act 2001 (Cth)

Division 1 – General duties

180 Care and diligence – civil obligation only

Care and diligence – directors and other officers

- (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
 - (a) were a director or officer of a corporation in the corporation’s circumstances; and
 - (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

Note: This subsection is a civil penalty provision (see section 1317E).

Business judgment rule

- (2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:
 - (a) make the judgment in good faith for a proper purpose; and
 - (b) do not have a material personal interest in the subject matter of the judgment; and
 - (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
 - (d) rationally believe that the judgment is in the best interests of the corporation.

The director’s or officer’s belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

Note: This subsection only operates in relation to duties under this section and their equivalent duties at common law or in equity (including the duty of care that arises under the common law principles governing liability for negligence) – it does not operate in relation to duties under any other provision of this Act or under any other laws.

- (3) In this section:

Business judgment means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

Standards for Registered Training Organisations (RTOs) 2015 made under subsection 185(1) and subsection 186(1) of the National Vocational Education and Training Regulator Act 2011

Standard 8 The RTO cooperates with the VET Regulator and is legally compliant at all times.

Context:

RTOs need to comply with the requirements of the RTO Standards as well as other relevant Commonwealth, State and Territory legislation. This is critical if RTOs are to deliver training products that have integrity and which fulfil their obligations to their clients.

It is important that third party arrangements are documented and transparent to facilitate the Regulator's knowledge that such arrangements exist. This will enable them to factor this into the risk profile they apply when enforcing compliance with the Standards and to review, in the context of RTO audits, the terms of the third party arrangements and the effectiveness of the arrangements in facilitating compliance with these Standards.

To be compliant with Standard 8 the RTO must meet the following:

8.1 The RTO cooperates with the VET Regulator:

- (a) by providing accurate and truthful responses to information requests from the VET Regulator relevant to the RTO's registration;
- (b) in the conduct of audits and the monitoring of its operations;
- (c) by providing quality/performance indicator data;
- (d) by providing information about substantial changes to its operations or any event that would significantly affect the RTO's ability to comply with these standards within 90 calendar days of the change occurring;
- (e) by providing information about significant changes to its ownership within 90 calendar days of the change occurring; and
- (f) in the retention, archiving, retrieval and transfer of records.

8.2 The RTO ensures that any third party delivering services on its behalf is required under written agreement to cooperate with the VET Regulator:

- (a) by providing accurate and factual responses to information requests from the VET Regulator relevant to the delivery of services; and
- (b) in the conduct of audits and the monitoring of its operations.

8.3 The RTO notifies the Regulator:

- (a) of any written agreement entered into under Clause 2.3 for the delivery of services on its behalf within 30 calendar days of that agreement being entered into or prior to the obligations under the agreement taking effect, whichever occurs first; and
- (b) within 30 calendar days of the agreement coming to an end.

8.4 The RTO provides an annual declaration on compliance with these Standards to the VET Regulator and in particular whether it:

- (a) currently meets the requirements of the Standards across all its scope of registration and has met the requirements of the Standards for all AQF certification documentation it has issued in the previous 12 months; and
- (b) has training and assessment strategies and practices in place that ensure that all current and prospective learners will be trained and assessed in accordance with the requirements of the Standards.

8.5 The RTO complies with Commonwealth, State and Territory legislation and regulatory requirements relevant to its operations.

8.6 The RTO ensures its staff and clients are informed of any changes to legislative and regulatory requirements that affect the services delivered.

Higher Education Standards Framework (Threshold Standards) 2015 made under subsection 58(1) of the Tertiary Education Quality and Standards Agency Act 2011 (TEQSA Act 2011)

6. Governance and Accountability

6.2 Corporate Monitoring and Accountability

1. The provider is able to demonstrate, and the corporate governing body assures itself, that the provider is operating effectively and sustainably, including:
 - (a) the governing body and the entity comply with the requirements of the legislation under which the provider is established, recognised or incorporated, any other legislative requirements and the entity's constitution or equivalent
 - (b) the provider's future directions in higher education have been determined, realistic performance targets have been established, progress against targets is monitored and action is taken to correct under performance
 - (c) the provider is financially viable and applies, and has the capacity to continue to apply, sufficient financial and other resources to maintain the viability of the entity and its business model, to meet and continue to meet the requirements of the Higher Education Standards Framework, to achieve the provider's higher education objectives and performance targets and to sustain the quality of higher education that is offered
 - (d) the financial position, financial performance and cash flows of the entity are monitored regularly and understood, financial reporting is materially accurate, financial management meets Australian accounting standards, effective financial safeguards and controls are operating and financial statements are audited independently by a qualified auditor against Australian accounting and auditing standards
 - (e) risks to higher education operations have been identified and material risks are being managed and mitigated effectively
 - (f) mechanisms for competent academic governance and leadership of higher education provision and other academic activities have been implemented and these are operating according to an institutional academic governance policy framework and are effective in maintaining the quality of higher education offered
 - (g) educational policies and practices support participation by Aboriginal and Torres Strait Islander people and are sensitive to Aboriginal and Torres Strait Islander knowledge and cultures
 - (h) qualifications are awarded legitimately

- (i) there are credible business continuity plans and adequately resourced financial and tuition safeguards to mitigate disadvantage to students who are unable to progress in a course of study due to unexpected changes to the higher education provider's operations, including if the provider is unable to provide a course of study, ceases to operate as a provider, loses professional accreditation for a course of study or is otherwise not able to offer a course of study
- (j) the occurrence and nature of formal complaints, allegations of misconduct, breaches of academic or research integrity and critical incidents are monitored and action is taken to address underlying causes, and
- (k) lapses in compliance with the Higher Education Standards Framework are identified and monitored, and prompt corrective action is taken.

ELICOS Standards 2018 made under subsection 176B(1) of the Education Services for Overseas Students Act 2000.

Standard P8 – Business management

The operations of the provider are supported by effective management actions.

P8.1 A registered provider must:

- (a) comply with relevant Commonwealth, state or territory legislation and other regulatory requirements that are relevant to its operations
- (b) ensure that its staff, students and other clients are fully informed of all regulatory requirements where they affect their duties or participation in ELICOS education.

P8.2 A registered provider must hold public liability insurance throughout its registration period.

P8.3 A registered ELICOS provider must:

- (a) have its accounts prepared to Australian Accounting and Auditing Standards, at least annually
- (b) provide the certificate of accounts to the ESOS agency on request
- (c) provide a full audit report of its financial accounts from a qualified and independent auditor, if the ESOS agency reasonably deems this necessary
- (d) provide other business management documents as requested by the ESOS agency, if reasonably deemed necessary.

P8.4 A registered provider must have management systems that are responsive to the needs of students, staff and stakeholders and the environment in which the provider operates, including:

- (a) a systematic and continuous improvement approach to managing its operations
- (b) management of records to ensure their accuracy and integrity.



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