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Education Services for Overseas Students Bill 2000

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Education Services for Overseas Students Bill 2000

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Social Policy and Law and Bills Digest Groups
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Contents

Education Services for Overseas Students Bill 2000

Date Introduced: 30 August 2000

House: House of Representatives

Portfolio: Education, Training and Youth Affairs

Commencement: Proclamation or six months after Royal Assent which ever occurs first.

Purpose

This package of legislation aims to strengthen the regulatory framework for the education and training export industry so as to ensure:

- that education providers meet their obligations regarding the financial protection of students and the reporting of student activities
- that States and Territories operate within accepted uniform standards, and
- that the Commonwealth has powers to deal with suspect providers.

Package Overview

This Bill is associated with a number of related Bills. The whole package is as follows:

• '**the Principal Bill**'	Education Services for Overseas Students Bill 2000
• '**the Assurance Fund Bill**'	Education Services for Overseas Students (Assurance Fund Contributions) Bill 2000
• '**the Consequential Bill**'	Education Services for Overseas Students (Consequential and Transitional) Bill 2000
• '**the Registration Charges Bill**'	Education Services for Overseas Students (Registration Charges) Amendment Bill 2000
• '**the Migration Bill**'	Migration Legislation Amendment (Overseas Students) Bill 2000

(An index for the related Bills is provided at the end of this Bills Digest.)

The package of legislation will repeal the *Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991* (the ESOS Act) and replaces it with the Education Services for Overseas Students Bill 2000; amends the *ESOS (Registration Charges) Act 1997*; and introduces new Bills dealing with contributions and levies for an assurance fund and migration issues.

Background

Education as an Export Industry

In the last decade the Australian education and training export industry has grown in size and economic importance. The industry has been estimated to be worth $3 billion per annum to Australia and to be the fifth largest export industry.[1] Overseas student numbers (students in Australia on a student visa) have grown from an estimated 50,000 in 1990 to 150,000 in 1999.[2] To service this industry the number of private education providers has expanded to approximately 1000. In the publicly administered and funded education sector, reliance on overseas students as a source of revenue has also increased. In the higher education sector where 50 per cent of overseas students are enrolled, fee-paying overseas students now account for 8.3 per cent of revenue.

The ESOS Act

In 1991 the original ESOS Act was introduced to protect Australia's reputation as an exporter of education services in response to problems experienced following the closure of a number of private education providers. The reduction in student numbers on account of government visa processing backlogs and tighter visa entry requirements to control the high incidence of visa non-compliance, had affected the viability of some of these providers. Many were non-financial when they closed, and unable to refund pre paid fees. This incurred a significant cost to the Commonwealth Government when it stepped in to provide refunds in the aftermath.

Overview

Consequently, the focus of the ESOS Act is on the regulation of providers of education services to overseas students. The objectives were to ensure that providers shouldered the responsibility for the protection of students' educational and financial interests, with minimum cost to the Commonwealth Government. The main measures are:

- the registration of providers of education services to overseas students and of their courses, on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS)
- provider responsibility to refrain from misleading or deceptive recruitment
- provider responsibility for the refund of student fees in cases of closure through a provider managed trust account, the Notified Trust Account (NTA), requiring the provider to deposit pre-paid course fees
- provider membership of a tuition assurance scheme (TAS) to ensure student access to alternative tuition in cases of provider closure, and
- penalties of suspension and cancellation from CRICOS.[3]

The ESOS Act is one of three tiers in the regulatory framework for the education export industry. The other two are:

- State and Territory legislation and policy setting standards and requirements for provider and course quality, prerequisites for CRICOS registration (State and Territory education and training authorities therefore have primary responsibility for quality assurance), and
- Industry level voluntary codes of practice governing provider conduct.

Exempt and Non-Exempt Providers

The ESOS Act provides that the regulations may exempt providers from the obligation to operate an NTA,[4] or to maintain membership of a TAS.[5] The ESOS Regulations automatically exempt two categories of providers from the NTA and TAS obligations: providers that are administered by State or Territory education authorities and providers that are entitled to recurrent funding from the Commonwealth.[6] Other providers may be exempted from certain obligations, if they comply with various conditions.[7] Thus, the majority of exempt providers are public sector providers.

Sunset Clause

The original ESOS Act was subject to a sunset clause for 1 January 1994.[8] This clause has been extended a number of times.[9] An extension in 1996 followed Senate inquiries on the operation of the Act in 1992 and 1993. In those inquiries it was considered that the extension was necessary in order to provide a 'stable policy environment' and a last chance for States and Territories to put in place 'an appropriate regulatory environment'[10] and to pass complementary legislation[11] in the context of likely damage to Australia's reputation.

The last extension in 1998 was made in response to a perceived need to ensure 'continued confidence and maintained stability in Australia's international education industry' in light of the Asian economic downturn.[12] A Senate inquiry endorsed this approach citing, among

other things, lack of coordination among Commonwealth, State and Territory agencies and inadequacies and administrative shortcomings in relation to the ESOS Act.[13]

Immigration

While Commonwealth regulation of providers in the education export industry is the responsibility of the Department of Education, Training and Youth Affairs (DETYA), immigration matters relating to overseas students are the responsibility of the Department of Immigration and Multicultural Affairs (DIMA). These two regulatory regimes are interlinked. Conditions for student visa eligibility and compliance include enrolment with a CRICOS registered provider and course, minimum course attendance requirements and/or educational achievements, and limitations on paid work. Information flows and collaboration between DIMA, Commonwealth, State and Territory education authorities and providers are therefore critical for the effective regulation of providers and control of overseas students.

External Commentary

History

There have been a number of inquiries into the ESOS Act since its enactment in 1991. For example, the Senate Employment, Workplace Relations, Small Business and Education Committee and its predecessors have tabled six reports on the ESOS Act.[14] Issues addressed included in the inquiries included:

- appropriate form of regulation
- scope of regulation in relation to overseas student and provider categories
- coordination between Commonwealth, State and Territory Governments (see above)
- extension of the sunset clause (see above)
- establishment of and access to notified trust accounts, and
- financial reporting and accountability.[15]

Recent Concerns

During the last few years the closure of a number of colleges, together with the high incidence of visa breaches in specific colleges, has drawn attention to the performance of this regulatory framework. The focus of concern this time however, has been more on allegations that some education providers are facilitating visa fraud and illegal immigration, than on student protection. This package of legislation, together with some administrative changes already initiated, follow the completion of a DIMA review of the

overseas student visa program in late 1998 and a DETYA review of the ESOS Act which commenced in August 1999.

The DETYA review process identified the following as regulatory weaknesses:

- the failure of the NTA (Notified Trust Account) and insurance arrangements to protect students fees against risk of provider closure[16]
- the voluntary nature of many of the responsibilities of providers such as reporting on student non-attendance, which have made it difficult to monitor visa breaches
- insufficient Commonwealth powers to deal with unscrupulous education providers, and
- inconsistencies in the quality assurance and registration standards and practices of State and Territory education and training authorities.

These are the proposed legislative changes:

- Compulsory membership of, and risk assessed contributions to, an assurance fund for all providers in order to secure funds to pay for student tuition in cases of provider collapse, subject to the same exemptions as currently exist for the NTA and TAS[17]
- Increased reporting obligations on providers eg. in relation to disclosure of provider activities such as previous breaches or breaches of associates, and in relation to student breaches
- A compulsory National Code which will include standards and benchmarks for the registration of providers and their courses, to be followed by States and Territories
- Compulsory compliance with, and new sanctions for being in breach of both the Act and the National Code, and
- New Commonwealth powers to investigate providers, impose sanctions and remove non *bona fide* operators including:
  - the issuing of an Immigration Minister's suspension certificate to a registered provider
  - the issuing of production and attendance notices by the Secretary of the Department to providers who it is believed have access to information/documents relevant to the monitoring purpose
  - monitoring powers to authorised DETYA employees which enable them to enter a premises to search, examine, take photos and extracts, secure a thing, ask questions etc. for a monitoring purpose. This can be done either with the consent of the provider or under a monitoring warrant, and

- search powers to authorised DETYA employees which enable them to enter a premises to search and examine, take photos and extracts, seize, ask questions etc for the purpose of looking for evidential material. This can be done either with the consent of the provider or under a search warrant.

Other identified shortcomings are being addressed through administrative changes. Misuse of the current paper-based Confirmation of Enrolment (CoE), a requirement for visa eligibility, is to be reduced with the development of an electronic system. In a second stage of its development, the database will enable the tracking of student progress and of provider enrolments, providing the regulatory agencies with better information to detect visa breaches.

Position of significant interest groups/press commentary

This package of legislation follows a review of the ESOS Act which involved consultations between Commonwealth, State and Territory authorities, industry groups and education providers. The Explanatory Memorandum states that there is agreement that the regulatory framework is deficient and requires change to ensure the industry's integrity.[18]

However, the Australian Council for Private Education and Training (ACPET) has criticised the proposed changes. ACPET believes the ESOS Act is flawed and proposed attempts to 'fix' it inappropriate. It regards the ESOS Act as part of the problem. It is critical of Commonwealth and State authorities for not acting on complaints and failing to de-register or prosecute suspect providers. ACPET supports a co-regulatory model with industry associations playing a key role.[19]

Possible Issues[20]

Changing Policy Priorities and A Complex Regulating Environment

The regulation of education providers with the introduction of the original ESOS Act in 1991, and the tightening of visa eligibility conditions at that time, marked a change in the policy balance which arguably had favoured the development of Australia's export education industry at the risk of the immigration program. The sensitivity of some providers to restrictions on the supply of students following visa tightening, is indicative of this. Regulatory emphasis and administrative effort may therefore depend on changing policy priorities for the education export industry and the immigration program, at both the Commonwealth and State level.

The driving imperative for regulation of the education export industry in 1991 following the provider closures was to ensure student protection, at minimum cost to the Commonwealth Government. Other regulatory measures put in place also required education providers to assist government agencies in the monitoring of student visa

conditions by reporting on student non-attendance. Registration and quality assurance of providers was left largely to the States and Territories.

Today there are still some concerns about the adequacy of student protection measures. However, the main focus of current concern, as reflected in media coverage and parliamentary scrutiny, appears to be the ongoing problems with visa breaches and the higher risk of these given the registration of some education providers who appear to be more intent on facilitating students in the breach of their visas, than on delivering education services[21].

The ESOS Act has been effective in providing student protection. It has minimised the risk to students of provider collapse through its financial and tuition assurance measures. The Principal Bill would further reduce this risk. However, neither the ESOS Act nor the Principal Bill alone deal directly with overseas student visa non-compliance and the registration of providers engaged in facilitating visa breaches. While the proposed changes to the ESOS Act will strengthen the obligation on providers to assist in the monitoring of student activities to identify visa breaches, action on visa breaches is likely to be dependent on the priority placed by Government on DIMA's overseas student visa compliance monitoring activities. The proposed ESOS changes may also more clearly define the standards for State and Territory registration procedures so as to avoid the need for the Commonwealth to exercise its additional powers. However, the success of these measures is still dependent on complementary priorities and regulatory and administrative responses by State and Territory education authorities.

How much regulation?

The issue of the suitability and level of Commonwealth regulation has been debated since the ESOS regulatory regime was introduced in 1991 and the then Opposition sought the inclusion of a sunset clause. This reflected its concerns about the costs of regulation, the impact of these on the international competitiveness of the Australian industry and the complexity associated with the overlapping roles of the Commonwealth and State and Territory governments.[22] The sunset clause has in the past provided a trigger for continuous review of the regulatory framework. This legislation would repeal the sunset clause.[23]

The Explanatory Memorandum canvasses a range of alternative regulatory and non-regulatory measures including maintaining the status quo, self-regulation, co-regulation, and sole regulation by States and Territories. The Government has ruled these out in preference for regulatory strengthening. The reasons provided in the Explanatory Memorandum are that where elements of these occur within the current arrangements they have operated poorly, or that Commonwealth interests in trade and immigration need to be preserved through ongoing Commonwealth regulatory involvement. While the Commonwealth is seeking to increase its powers to deal with suspect providers, it has delineated its interests by ruling out a larger role for itself in relation to quality assurance

and registration.[24] This will continue to remain the responsibility of the States and Territories.

However, there is a view that some of the problems are indicative of administrative shortcomings rather than regulatory weakness and could be addressed through better administration and better resourcing. ACPET points to administrative failure in its criticisms of Commonwealth agencies for failing to act on complaints and of not using their current powers to de-register and prosecute. It also expresses doubts about State and Territory administrative efficiency and of their understanding of the education export industry.[25]

There is also evidence that administrative bolstering by DIMA following its review, such as the channelling of additional resources to check student compliance, has met with considerable success. There has been an increase in visa cancellations.[26] The proposed improvements in the student database and data sharing between regulators are also likely to enhance the regulators' abilities to spot visa breaches and identify suspect providers. Given that under the proposed new arrangements the States and Territories will still carry primary responsibility for quality assurance and provider registration, the quality of State and Territory administrations is going to continue to be critical.

On the other hand, regulatory strengthening will provide a safeguard by considerably increasing the Commonwealth's powers to intervene should States and Territories fail to deal with problem providers. Perhaps more constructively however, it may also contribute to minimising the likelihood of this failure by improving the management of these problems. By making providers' obligations compulsory, and defining more clearly the standards for the States and Territories, it may serve to sharpen the practices of providers and of the State and Territory authorities and equip DETYA with better information to place it in a more pro-active regulatory role. This would minimise the need for more intrusive Commonwealth intervention and the application of sanctions.

To facilitate a national approach to quality assurance, the legislation provides for a National Code which will govern States and Territories in their quality assurance role. It also provides for sanctions for being in breach of the Act and the National Code. However, the text of the National Code is not part of the legislation. It is being developed in consultation with the States and Territories before being gazetted. Those who favour stronger regulation may be of the view that the details of the National Code should be more clearly defined in the legislation given that it is intended to provide details of the standards, procedures and rules relating to the operations of providers.

Trust account or assurance fund

Under current arrangements non-exempt education providers can arrange for student financial protection either through a bank guarantee, insurance or a provider controlled Notified Trust Account (NTA) which requires the deposit of pre paid course fees on which the provider can draw as education services are delivered. Public providers are exempt from this requirement as they are considered to be of little risk. There have, however, been

some problems with these financial assurance measures. Bank guarantees have been unobtainable, settlement of insurance payouts have been protracted, and NTAs have not proven to be a fail-safe way to provide financial security[27]. The Government has responded with the proposal that non-exempt providers (i.e. private providers) contribute to an assurance fund managed by a Fund Manager with the power to require providers to pay special levies (see the discussion of 'exemptions' in Concluding Comments below).

There is always likely to be a risk of provider closure. Education providers, whether *bona fide* or not, can be subject to closures. The Explanatory Memorandum cites 11 cases of collapse or voluntary liquidation since 1995. This would appear to be a small number in an industry of 1000. Arguably, the risk to the students could be assessed as even smaller. In 7 of these cases, though NTA funds were not available, alternative tuition was provided through the Tuition Assurance Scheme (TAS); in two there were insurance payouts, though not timely; and in the other two cases there were no students. Nevertheless this level of risk may be unacceptable to both the industry and to government. The proposed changes seek to eliminate altogether the risk to students of provider collapse. However, it will be a cost borne by non-exempt, private providers (see also the 'Costs - who pays' section of this Digest, the discussion of 'sanctions and exemptions' in Main Provisions and the discussion of 'taxation and incidence' in Concluding Comments below).

An alternative may have been the Government increasing its regulation of NTAs. The failure of NTAs has been attributed to regulatory shortcomings and provider abuse. They include infrequent auditing, inadequate coverage of costs other than tuition fees, and operators' ability to drain the accounts in times of financial difficulty.[28] While there have also been concerns about the administrative costs to providers of managing the NTAs, they have given providers a considerable amount of control over managing their own risk. Despite the advantages of NTAs to providers, the Government has rejected the option on the grounds that increased monitoring and auditing by the Commonwealth will be too costly to both the Commonwealth and to providers.

While ACPET favours the introduction of a fidelity fund, it believes that it should be managed by the industry. ACPET sees the contributions to the assurance fund as an additional charge on non-exempt providers given that many will also have membership of a TAS. As with the NTA public providers are exempt from having to pay contributions to the assurance fund. The Government supports its introduction of an assurance fund with the argument that the costs to the industry will be offset by the freeing up of NTA funds, and the reduction in the administrative burden of maintaining these. In addition, to minimise the cost to providers, contributions to the fund will be risk assessed and will take into account membership of a TAS. However, ACPET believes that the risk assessment process is likely to impose other administrative costs on providers.[29]

Costs - who pays?

The mix of policy instruments to address the various immigration and education industry problems and risks has implications for where the costs are borne in this multi-tiered regulatory regime. Assessments about what constitutes a reasonable risk and how the costs of the risks to students, to the education export industry and to Australia's immigration program should be distributed, are likely to vary given the number of different stakeholders and the potential for shifts in policy priorities.

The ESOS Act has ensured that education providers share in the costs associated with the regulation and protection of the education export industry and of students. Registration charges, financial and tuition assurance arrangements, and student activity reporting requirements have contributed to both the cash and administrative expenses of providers. The proposed regulatory strengthening will further add to these costs. All providers will pay increased registration charges, the tightening of student reporting requirements requiring compulsory record keeping is likely to add to their administrative costs, and non-exempt providers will be required to make compulsory contributions to an assurance fund.[30]

Under the proposed arrangements States and Territories will continue to have a critical role in assessing the credentials and monitoring the activities of education providers. To the extent that they will have to engage in administrative bolstering to weed out bogus providers and to meet the standards required by the National Code, they are likely to face substantial cost increases.

The Commonwealth will defray the increased costs associated with its stronger regulatory role by increasing registration charges. It has also chosen to introduce an assurance fund to guarantee student financial assurance in preference to the option, more costly to the Commonwealth, of increasing its own effort in auditing NTAs. The Explanatory Memorandum indicates that some of the savings from this will contribute to the development of the Confirmation of Enrolment (CoE) database. The estimated costs to DETYA are an increase from the current running costs of $1.1m to $2m.[31] Some of these costs will be recovered by the increase in the registration charge provided for in the Registration Charges Bill which will raise revenue from $1m to $1.5m.[32] The extent to which the Commonwealth funds its activities independent of industry contributions may be viewed as a measure of some of the costs it bears in protecting its immigration and trade interests.

Private education providers appear to accept the need to insure against private risks such as that of provider collapse. However, there are indications that they are likely to be sensitive to increased charges to finance what may, in their view, be administrative shortfalls in minimising the risks of visa non compliance and bogus providers. The industry expressed concerns about the administrative costs of the ESOS Act before the Senate Employment, Education and Training Legislation Committee in 1998. It asked for a breakdown of administrative costs so that savings could be identified and more effective regulatory mechanisms put in place. It also raised concerns about the effects of

Department of Employment, Education and Training (DEETYA) cost saving measures involving staff cuts to its monitoring function.[33] As earlier mentioned, the industry has also been critical of the Commonwealth Government's failure to act on complaints, and of State and Territory registration procedures.

The private, non-exempt sector's concern about the charges and potential levies associated with the assurance fund, and its preference for an industry managed fidelity fund, can be understood against these concerns about the quality of administration. The assurance fund will now involve them in sharing in the risk of collapse of other providers. This is likely to heighten their criticism of Commonwealth and State/Territory administrations should they fail to identify and deal with suspect or non-viable providers. To the extent that some provider closure is related to financially risky activity, this measure will involve financially sound providers in sharing the risk of those who are not. It therefore also opens up the question about the extent to which provider financial viability should be a concern to the registering authorities as opposed to the providers and the industry. What should be the role of government in scrutinising the financial viability of commercial providers?

ACPET has therefore expressed the concern that the increased costs of the proposed changes on non-exempt providers in particular, will make *bona fide* providers less internationally competitive, and risk driving some of them out of business. Adding to the sensitivity about who bears the cost, is the view that private, non-exempt providers are also bearing a disproportionate burden of the costs associated with minimising risks shared by the whole industry, such as those of student visa breaches. There is concern that though the proposed ESOS Act places the same student reporting requirements on public and private providers, the private sector's standards, practices and procedures for monitoring student activity such as the maintenance of attendance records and role calls, may not be matched by the public providers. Protecting the integrity of the industry against the risk of student visa breaches is arguably a responsibility of all providers.

Commonwealth powers

It seems fairly clear that the measures in the Bill fall within the constitutional power of the Commonwealth Parliament. An appendix is attached which addresses this issue.

Main Provisions

Registration

Registration of Approved Providers

All persons or companies providing courses to overseas students must be registered.

Process

The Bill provides for the establishment of the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) (**proposed section 10**). CRICOS is a public register containing the name and/or principal executive officer of each provider in each State, a registration number and any other information prescribed by regulations.

A 'provider' may be registered following approval and recommendation by a designated State authority (**proposed section 9**). Before a recommendation may be made, the provider must advise the authority and the Secretary if the provider or an associate has:

- been convicted of an offence under the ESOS Act or this Bill in the last 5 years
- ever had their registration cancelled or suspended under the ESOS Act or this Bill
- ever been issued with a 'suspension certificate' (see 'Enforcement' below)
- ever had a condition imposed on their registration
- been involved in providing a course with another provider in these circumstances (**proposed section 11**).

The Secretary must register a provider if it is:

- registered in Australia
- exempt or has paid its first annual contribution to the 'ESOS Assurance Fund'
- certified by the designated State authority as complying with the 'national code', and
- not liable for any due and unpaid registration charges or associated imposts

and if the Secretary has 'no reason to believe' that the provider is not or *will not* comply with the Bill or the national code (**proposed section 9**).

Before registration, the Fund Manager may require any additional information that is relevant to the provider's annual Fund contribution (**proposed section 13**). The position of Fund Manager is dealt with under 'Administration' in 'The Assurance Fund' below.

Review

In deciding whether to register a provider, the Secretary does not have a 'duty to inquire' in relation to any of the registration criteria. Arguably, neither does he or she have a 'procedural fairness' obligation to the provider. In effect, he or she is able to take at face value the information presented by the provider and the designated State authority. In relation to the compliance issue, the Secretary may rely on *any* information, provided he or she has passed the information to the designated authority and given them an opportunity to respond within 7 days (**proposed section 14**).

A provider may 'appeal' a registration decision to the Administrative Appeals Tribunal (AAT) (**proposed section 176**). (**Schedule 4** of the Consequential Bill makes consequential amendments pending the restructure of the AAT proposed in the Administrative Review Tribunal Bill 2000.)

Obligations on Registered Providers

General Burdens and Obligations

Registered providers are subject to a number of burdens and obligations. They must be Australian residents (**proposed section 16**). If any associate fails any of the tests in **proposed section 11**, registered providers must advise the Secretary as soon as practicable (**proposed section 17**). They must not engage in deceptive or misleading conduct in connection with attracting students or providing courses (**proposed section 15**). (Nor must a provider who provides a course with them: see **proposed sub-section 83(2)**.) They must advise the Secretary within 14 days of various details regarding 'accepted students'[34] including expected commencement and duration of courses and any irregularities such as absences or terminations (**proposed section 19(1)**). (The Secretary may authorise any person to have access to any electronic database prepared by the provider for the purpose of recording and reporting these details (**proposed section 109**)).[35] They must keep for at least two years records of the details of each accepted student who has been enrolled or paid course fees (**proposed section 21**). While registered providers may provide courses jointly with other providers, no arrangement may permit an overseas student to pay course fees otherwise than to a registered provider (**proposed section 18**). Each registered provider must be a member of a 'tuition assurance scheme' (**proposed section 22**). [36]

Visa Conditions

There are particular notification requirements related to visa conditions. Registered providers must notify 'accepted students' as soon as practicable of any breaches of student visa conditions related to attendance or satisfactory academic performance. The notification must be a form approved by the Secretary of DIMA and must require the student to attend an interview with an immigration officer for the purposes of the *Migration Act 1958* (**proposed section 20**). The providers must also advise the Secretary of DETYA as soon as practicable of the details of any breaches (**proposed section 19(2)**).

(Application)[37]

The application of **proposed sections 19**, **20** and **21** is governed by the Consequential Bill. Thus, while all of these provisions commence on a day to be fixed by proclamation, the actual obligations to provide information (**proposed section 19**), to send notices of student visa breaches (**proposed section 20**) and to keep records of accepted students (**proposed section 21**) only arise in accordance with **Schedule 2** of the Consequential Bill.

(Issues for Students)

Where a student has breached a visa condition, the Migration Bill provides for automatic cancellation where overseas students breach conditions of student visas. There do not appear to be any existing provisions for automatic cancellation.

Registration Charges

The *Education Services for Overseas Students (Registration Charges) Act 1997* imposes initial and annual registration charges on providers. **Proposed section 12** requires that providers pay the initial charge within 28 days of being notified of registration. **Proposed section 23** requires that they pay the annual charge by the last business day in February. Increases in the charges are proposed in the Registration Charges Bill.

Offences

It is an offence for a person to provide, or to make an offer, invitation or representation regarding the provision of a course to an 'overseas student' except where the person is a 'registered provider' (subject to a maximum penalty of 2 years imprisonment) (**proposed sub-section 8(1)**). It is also an offence for a person to make a written offer, invitation or representation to an overseas or intending student if it fails to identify the registered provider, the provider's number (see below) or any other prescribed information (subject to a maximum penalty of 6 months imprisonment) (**proposed section 107**). It is not an offence to conduct surveys or negotiate with other institutions or bodies to assess demand or design or develop courses where no representations or invitations are made or money received under the guise of providing a course to students (**proposed sub-section 8(3)**).

(Broadly, an 'overseas student' is a person, whether inside or outside Australia, who holds a student visa (**proposed section 5**). A 'provider' is an institution or body in Australia that provides or seeks to provide a course to overseas students (**proposed section 5**). A 'registered provider' is a provider registered under CRICOS (see below)).

It is an offence for a person to provide, purport to provide or offer to provide a course to overseas students, knowing that is not a 'genuine' course, to facilitate, either intentionally or recklessly, a breach of a student visa condition (**proposed section 110**). A course is not genuine if it is a sham or is not based on 'reasonable standards of education and training'. The maximum penalty is 100 penalty units or imprisonment for 2 years *or both*.

A registered provider that fails to notify the Secretary of details regarding 'accepted students' or visa breaches, or fails to notify students of visa breaches, is guilty of an offence (**proposed section 104**). (Failure to notify the Secretary of details regarding 'accepted students' is a strict liability offence: the actual knowledge or intention of the provider is irrelevant but he or she may be able to claim an honest and reasonable mistake of fact.) A registered provider that fails to keep records of enrolments, etc is also guilty of an offence (**proposed section 105**). The maximum penalty is 60 penalty units. (One penalty unit is currently $110.)[38] The regulations may allow the Minister, by agreement with the provider, to substitute an administrative penalty as an alternative to prosecution, being 12 penalty units for individuals and 60 units for companies (**proposed section 106**).

It is an offence for a person to provide false or misleading information in relation to 'accepted students' details, student visa breach notices and the provision of information to the Fund Manager for the purpose of setting the contribution rate (**proposed section 108**).

The Assurance Fund

Overview

Proposed Part 5 establishes the ESOS Assurance Fund. Its purpose is to ensure that overseas students who have paid for a course have access to suitable courses or a refund in the event that a provider in unable to provide the course (**proposed section 46**).

Basic Aspects

The purpose of the Assurance Fund is described in **proposed section 46**:

> [T]o protect the interest of overseas students of registered providers by ensuring that the students are provided with suitable alternative courses, or have their course money refunded, if the provider cannot provide the courses that the students have paid for.

The Assurance Fund will comprise annual contributions, special levies, monies recovered from defaulting providers and late payment penalties and review fees. It may also be comprised of proceeds from investments or borrowings by the Fund Manager and appropriations by Parliament (**proposed section 47**). Fund monies are held in trust for the benefit of overseas students and may only be paid out for calls on the fund (see below), insurance premiums or purposes associated with the receipts above (**proposed section 48**).

Administration

The Fund is administered by the Fund Manager which may be an individual or a company. In addition to being a trustee, the Fund Manager is responsible for determining and collecting contributions of and for arranging alternative courses for overseas students. It has the power to do all things 'necessary and convenient for or in connection with' the performance of these functions (**proposed section 50**). The Fund Manager is responsible

to the Commonwealth but is not personally liable to any beneficiaries in respect of acts or omissions in good faith in performance of these functions (**proposed section 53**).

The Fund Manager will be assisted by a part-time Contributions Review Panel. The Panel will comprise 10 members appointed by the Minister although at least 5 members must, in the Minister's opinion, represent the interests of providers. (Once the initial Panel is appointed, and following consultation with provider representatives, the composition of subsequent Panels may be amended by regulation) (**proposed section 54**). The Panel is responsible for developing the contributions criteria to be applied by the Fund Manager. It is also responsible for hearing appeals related to contribution determinations. The Panel has a similar width of powers as the Fund Manager (**proposed section 55**).

The Panel's basic procedures are to be prescribed in regulations (**proposed section 57**).

Annual Contributions

Requirement

The Principal Bill requires registered providers to pay an annual contribution (**proposed section 24**) to the Fund Manager of the ESOS Assurance Fund. Registered providers must, as soon as practicable, disclose any matter that may cause the Fund Manager to increase the contribution rate and must comply with the Fund Manager's requests for information (**proposed section 26**).

While the Principal Bill requires providers to pay contributions and levies in relation to the Assurance Fund, the actual legal requirement is imposed in the Assurance Fund Bill. The separation arises by virtue of constitutional limitations. Arguably, the contributions and levies constitute 'taxes' for the purposes of the Commonwealth *Constitution*. Section 55 of the *Constitution* effectively requires that laws imposing taxes only deal with those taxes and may not deal with any other matter. It is also worth noting that the contributions and levies may constitute 'taxes on the property' of the States (and Territories). Section 114 of the *Constitution* provides, among other things, that the Commonwealth shall not 'impose any tax on property of any kind belonging to a State'. Hence the reservation in **item 7** of the Assurance Fund Bill. These issues are discussed in the Bills Digest to that Bill.

Level

The Fund Manager must determine the amount of annual contribution to be paid by each provider per financial year in accordance with the contributions criteria (**proposed section 58**). Ordinarily, the criteria are drafted by the Fund Manager and approved by the Panel.[39] They must reflect the purposes of the Fund and provide a basis by which contributions reflect the risk of calls being made on the Fund by each provider (**proposed section 60**). The criteria must take into account whether a provider is a member of a 'tuition assurance scheme' and may take into account whether a provider is willing to have their assets secured. The criteria must be publicly available (**proposed section 62**).

The Fund Manager must advise each provider of their fund contribution liability. An applicant provider will not be registered until their contribution is paid. A registered provider must be given at least 14 days to pay (**proposed section 63**). A contribution may be increased during a year on the basis of new information (**proposed section 65**).

Review

A provider may seek review of a contribution determination by the Fund Manager. The application for review must be lodged in writing within 14 days of the determination and does not affect the liability to pay the contribution in the first instance (**proposed section 66**). The provider may not challenge the contribution criteria, only their application. There is no statutory timeframe for review, however the Fund Manager must provide a written decision which includes a statement of reasons (**proposed section 67**). A provider may effectively 'appeal' this decision to the Panel which may effectively give binding directions to the Fund Manager as to the correct and preferable decision (**proposed section 69**).

The regulations may impose application fees in relation to review but the fees must not amount to 'taxation' (**proposed section 70**). That is, there must be a reasonable or discernible relationship between the fee and the cost of providing the review service.[40]

While the Bill provides for AAT review for registration decisions and enforcement action, it does not provide for AAT review in relation to decisions regarding contributions.

Special Levies

Registered providers must, where required, pay a special levy (**proposed section 25**). The levy may be required if at any time the Fund Manager considers that the Fund is or will be unable to meet liabilities (**proposed section 72**). The levy payable by each provider must be proportionate to the share that their annual contribution comprises of the total annual contributions (**proposed section 73**).

Sanctions and Exemptions

The Fund Manager must give reminder notices to registered providers who have not paid annual contributions or special levies (**proposed section 75**). A provider who fails to comply with a reminder notice is automatically suspended until the amount is paid (**proposed section 90**). The regulations may exempt certain providers from the obligation to pay annual contributions (and effectively special levies) (**proposed section 24**). (As indicated above, a similar exemption is currently applied in relation to public providers).

Refund Obligations

A call may be made on the fund where there is an obligation to refund course monies.

Part 3 Division 2 deals with refunds of course monies. A registered provider will be obliged to make a refund to overseas *or* intending students where there has been:

- 'provider default', where a course does not commence or ceases to run as a result of the provider's actions or enforcement action, or
- 'student default', where a student does not start or withdraws during a course.

Ordinarily, the refund for a student will be the sum, prior to the default day, of the course monies and prescribed provider expenses in respect of that student (**proposed section 29**). (The regulations may prescribe different amounts for students in different circumstances). However, for 'student defaults' the refund, and any particular conditions regarding payment, may be determined by written agreement (**proposed section 28**). The refund must be made within 2 weeks (for provider defaults) or 4 weeks (for student defaults). The refund, along with any other liability under law, may be recovered by the student in any Federal, State or Territory of competent jurisdiction (**proposed section 30**). Any provider that fails to comply or 'becomes aware that it will not be able to comply' with a refund obligations must notify the Fund Manager as soon as practicable (**proposed section 32**).

However, the provider and the student may agree on an alternative arrangement whereby another course or part-course is provided at the provider's expense. Such an agreement will absolve the provider of any refund obligations (**proposed section 31**).

Calls on the Fund

The Fund Manager may make a call on the fund where he or she determines that the provider is unable to comply with a refund obligation and the overseas *or* intending student is unable to be 'placed promptly in a suitable alternative course', for example under a 'tuition assurance scheme'. A call is not made where the provider is an 'exempt provider' (ie is exempt from making contributions and levies) (**proposed section 76**).

(A 'tuition assurance scheme' is any scheme whose 'main objects include ensuring that overseas students receive the course they have paid for' (**proposed section 5**).)

If a call is made, the Fund Manager must 'in consultation with' the student place him or her in a course which the Fund Manager regards as 'a suitable alternative course'. In doing so, the Fund Manager may spend more than the refund amount if he or she 'considers that to do so would best promote the purpose of the Fund'. Failing this, the Fund Manager must pay the student the refund amount (**proposed section 77**). In making a payment, the Fund Manager assumes the rights of the student as against the provider. The refund liability is a debt due to the Commonwealth. The Fund Manager may take legal action to recover the debt and enforce any securities over the provider's assets (**proposed section 78**).

Miscellaneous

The Fund Manager may invest fund monies in various ways including 'any…manner that is consistent with sound commercial practice' (**proposed section 79**). There is a requirement for annual external audit reporting and provision for other financial reports to be prepared in accordance with requests by the Minister (**proposed section 80**). The Fund

Manager is exempt from income tax in relation to contributions and levies (**proposed section 81**). There is a requirement to return surplus fund monies to providers on cessation of the fund, although the strength of this requirement is unclear (**proposed section 82**).[41]

(Application)

Generally, the requirements above apply to 2001 and later years. However, the Minister may postpone these requirements so that they commence in 2002 (but not before **Proposed Part 5** commences). These issues are addressed in the Consequential Bill.

Enforcement

Restriction, Suspension and Cancellation

Part 6, Division 1 deals with restriction, suspension and cancellation of registration.

The Minister may restrict,[42] suspend or cancel registration where he or she reasonably believes that a registered provider or associate has breached the Act, the National Code, or a condition of registration (**proposed section 83**). He may also take such action in relation to misleading or deceptive conduct by providers in providing a course with a registered provider (**proposed section 83(2)** see also **proposed section 15**). These sanctions are available in addition to any other action that may be taken under the Act (**proposed section 84**) and may relate to conduct occurring before registration (**proposed section 85**).

In addition, the Minister may suspend registration if he or she reasonably believes that a registered provider might not be able to provide a course or meet a refund obligation because of financial difficulty (**proposed section 87**). A suspended provider may not recruit or enrol students, receive course monies or permit students to begin courses (**proposed section 95**). The Minister may cancel registration if a suspended provider fails to provide a course to existing students (**proposed section 88**).

The Bill provides for automatic suspension and cancellation.

Registration is suspended if a designated authority suspends approval for a course (**proposed section 89**) or if the provider fails to comply with a reminder notice for late payment of a contribution or levy (**proposed section 90**). Where these circumstances have been remedied, the Minister may, in the former case, and must, in the latter case, reinstate registration. (A provider must pay a $100 'reinstatement fee' (indexed to CPI) which is provided for in **proposed section 171**.) Registration is cancelled if a designated authority withdraws its approval (**proposed section 91**) or if the provider becomes bankrupt or is wound up (**proposed section 92**). Where the action is based on action taken by a designated authority, the suspension or cancellation only applies within the relevant State. Where it is based on breach, the suspension or cancellation applies in all States.

The Minister must give a written notice to the provider, including reasons for the proposed action, which gives the provider any opportunity to make written submissions within 7

days or 24 hours where the conduct involves a breach under **proposed section 83** (**proposed section 87**).

Suspension and Immigration

Part 6, Division 2 deals with suspension for immigration purposes.

The Immigration Minister may effectively suspend registration where he or she is of the opinion that a 'significant number' of overseas or intending students associated with the provider are entering or remaining in Australia 'for purposes not contemplated by their visas' (**proposed section 97**). While the circumstances may vary, the Immigration Minister is entitled to consider in respect of students associated with the provider, to what extent:

- visa applications, involving fraudulent statements, have been refused
- visa holders have breached visa conditions, and
- students have remained in Australia unlawfully after finishing courses.

Other matters may be prescribed in regulations (**proposed section 97(2)(d)**) or may be considered where relevant (**proposed section 97(3)**). Arguably, there are a wide range of considerations which may be relevant which is reflected in the requirement that the power be exercised personally by the Immigration Minister (**proposed section 97(5)**).

Before issuing a suspension certificate the Immigration Minister must give a written notice similar to the notice in **proposed section 87** (**proposed section 98**). A copy of the certificate must be tabled in parliament within 15 sitting days (**proposed section 98(3)**).

A suspension certificate is effective for 6 months unless revoked (**proposed section 100**). Further certificates may be issued summarily[43] and indefinitely[44] if the registered provider is unable to change the mind of the Immigration Minister (**proposed section 102**). (While the onus is on the registered provider, there are no criteria which he or she is required to address. He or she is simply required to satisfy the Immigration Minister 'that he or she should not be given a further certificate' (for whatever reason).)

A 'suspended' provider must not engage in any recruitment activities. Moreover, it is an offence for *any* person to make a positive offer, invitation or representation to an overseas or intending student (or a 'prescribed non-citizen')[45] in relation to a course to be run by a suspended provider in *any* State (**proposed section 101**).

The maximum penalty is imprisonment for 2 years.

Monitoring and Searching

Production and Attendance Notices

The Secretary may issue production notices to registered providers, or associated persons,[46] if he or she reasonably believes that the person has or has access to information or documents 'relevant to a monitoring purpose' (**proposed section 113**). These notices effectively require the recipient to provide documents or copies of documents that might otherwise have been obtained under a subpoena or in executing a search warrant. The recipient may be required to respond within 24 hours[47] (**proposed section 115(2)**).

He or she may also issue attendance notices in the same circumstances. The recipient may be required to attend within 14 days (**proposed section 116**).

It is an offence for the recipient of a notice not to comply with a notice (if practicable within the period allowed) (**proposed section 120**). It is also an offence to provide false or misleading information (**proposed section 121**) or documents (unless the person notes the false or misleading aspect(s)) (**proposed section 122**). The maximum penalty is 6 months for non-compliance and 12 months for false or misleading information or documents. There is no 'defence against self-incrimination' although, if the notice is directed at an individual, any information and documents obtained, whether directly or indirectly as a result of the notice, is not admissible in subsequent criminal proceedings against the person (**proposed section 123**).

The recipient must be reasonably compensated for expenses associated with producing copied documents (**proposed section 119**). Although there is no requirement, the regulations may provide for scales of expenses in relation to production of documents or provision of information (**proposed section 118**). Documents may be retained by officers of the Department for up to 60 days (**proposed section 125**) or longer if authorised by an order made by a magistrate or tribunal member[48] (**proposed sections 128** and **129**) or by a law or court order of the Commonwealth or a State (**proposed section 127(3)(b)**). Otherwise reasonable steps must be taken for return of the documents.

Monitoring Warrants

An authorised employee may apply to a magistrate or tribunal member for a monitoring warrant. Ordinarily, the application must be made in writing and must be accompanied by information upon oath (or affirmation) setting out its grounds (**proposed section 137**). (There is provision for applications to be made and warrants issued by telephone, etc if the magistrate or tribunal member considers that this is 'reasonably necessary' (**proposed section 164–167**).) The warrant may be issued where the magistrate or tribunal member is satisfied 'that it is reasonably necessary' for the authorised employee(s) to have access to the relevant premises (**proposed section 138**). (For search warrants see below.)

The requirements regarding contents of warrants are contained in **proposed section 140**. In issuing a monitoring warrant, there is no particular statutory requirement to describe the

premises or the authorised employee.[49] Nor is there a requirement to describe any offences that are suspected to have been committed or the documents or information to be seized, etc. The only requirement is to state 'the purpose for which the warrant is issued'.[50]

An authorised employee may, pursuant to a 'monitoring warrant' *or* by consent, enter and exercise 'monitoring powers' in any premises which are occupied by a registered provider, or might reasonably contain things or activities associated with the provider which are relevant to a 'monitoring purpose' (**proposed section 130**). A 'monitoring purpose' is a purpose related to identifying a breach of the Act or the National Code or assessing capacity to provide courses or meet refund obligations (**proposed section 5**). Broadly, 'monitoring powers' relate to searching premises for anything that 'might be relevant' to a monitoring purpose and extend to examining or inspecting and seizing or recording any such documents, information or activities (**proposed section 131**).

A thing may not be 'seized' without a search warrant, but it may be 'secured' until one is obtained if the employee reasonably believes it is 'evidential material' that would be lost, destroyed or altered before a warrant could be obtained (**proposed paragraph 131(1)(h)**). It will be 'evidential material' if there are reasonable grounds to suspect that it will provide evidence of an offence or that it will be used in an offence (**proposed section 5**).

Once on premises, an authorised employee may ask any questions of occupiers or persons, or ask for any documents, that are relevant to a monitoring purpose (**proposed sections 132** and **133**). Where the employee has entered premises pursuant to a warrant, the person is required to answer the question or produce the document (**proposed section 134**). Failure to comply is an offence (**proposed section 134**). In either case, it is an offence to provide false or misleading information (**proposed section 135**) or documents (unless the person notes the false or misleading aspect(s)) (**proposed section 136**).

There is wide provision for 'chance discovery'.[51] A thing may be 'secured' pending a search warrant if an employee reasonably believes that it might provide evidence of an offence against the *Crimes Act 1914* or the *Criminal Code* (**proposed section 131(1)**).

Search Warrants

An authorised officer may also apply for a search warrant. The form and substance is largely the same as for monitoring warrants. However, there must be reasonable grounds for suspecting that there may be 'evidential material' on the premises on the part of the authorised officer (**proposed section 141**) and the magistrate or tribunal member (**proposed section 144**). The powers under the warrant ultimately extend to seizure.

At face value, a search warrant is narrower than a monitoring warrant. There are fewer 'search powers' than 'monitoring powers'. Whereas an authorised employee may search for any material relevant to a 'monitoring purpose' under a monitoring warrant, he or she may only search for and seize 'evidential material' under a search warrant. But any 'thing' may be 'secured' pending a search warrant in the same circumstances as above. Arguably, the search warrant is only confined in respect of the power to seize 'evidential material'.

Common Rules

An occupier must provide 'all facilities and assistance' for the execution of a warrant (**proposed section 155**). An authorised employee may use reasonable force in executing a warrant (**proposed section 147**). He or she may secure electronic equipment that might contain relevant information for use by experts (**proposed section 149**).

In emergencies, an authorised employee may enter premises and exercise any monitoring or search powers as if a warrant was in force (**proposed section 151**). In order to enter premises and exercise these powers he or she must reasonably suspect:

- that a thing is on the premises which relates to any offence[52]
- it is necessary in order to prevent the thing being concealed, lost or destroyed, and
- it is necessary because the circumstances are 'so serious and urgent'.

(Migration Powers)

Substantially the same powers of search and seizure are conferred on Immigration Officers under the Migration Bill. However, while the powers above are referenced according to 'monitoring purposes', directed at compliance with the proposed *Education Services for Overseas Students Act 2000* and the National Code, the powers under the Migration Bill are referenced according to 'visa monitoring purposes', directed at compliance with visa conditions under the *Migration Act 1958*.

Concluding Comments

Policy mix and co-ordination

It seems clear that the interests of all the stakeholders in this regulatory framework – the education industry, the students and the regulators – are likely to be served by the development of a quality export education industry which attracts *bona fide* overseas students without threatening the integrity of Australia's immigration program. However, in practice this balance is difficult to achieve and the ESOS Act is likely to be only one part of the policy mix. There appear to be unresolved issues associated with how the costs of managing the different risks are distributed and with administrative efficiency and accountability. There are also likely to be ongoing tensions between education policy objectives of attracting fee paying overseas students, and immigration policy objectives of minimising the risk of illegal immigration through tougher student screening. Lastly there are challenges in achieving cohesion in policy, administrative effort and resourcing within and across portfolios and jurisdictions.

Possible Concerns

Production, Search and Seizure

Traditionally, the common law has sought to prescribe narrow powers of entry, search and seizure. It generally accepts that privacy is a fundamental right and should not be violated without compelling reasons.[53] Thus the common law 'was, and remains, hostile to any greater degree of generality'.[54] For example, it is critical of 'general warrants' or warrants which are unlimited with respect to place, time or the offences to which they relate. They have been widely criticised on the basis that they lack certainty[55] and suffer from a lack of independent scrutiny in relation to the particular circumstances of each offence.[56]

It is also critical of powers for 'warrantless searches' or search powers which may be exercised in the absence of a formal warrant. They have been criticised for the absence of independent scrutiny. For example, the Canadian Law Reform Commission commented that 'a warrantless power of search and seizure represents a relatively discretionary mode of authorisation, legal control and review of which are substantially diminished'.[57] Similarly, the Australian Law Reform Commission recommended that all warrantless searches should be unlawful, unless exercised 'in response to circumstance of such seriousness and urgency as to require and justify immediate action'.[58]

Ordinarily, warrants are issued by the judiciary and not the executive.[59] It is assumed that in issuing a search warrant a justice will be able to 'stand between the police and the citizen' and give 'real attention to the question whether the information proffered by the police does justify the intrusion they desire to make into the privacy of the citizen'.[60]

Given this background, the powers for production, search and seizure described above seem to be unusual and may be seen by some to be inappropriate in the education context:

- *Monitoring warrants*: as indicated, search warrants may be issued by tribunal members. Tribunal members are empowered to issue warrants for listening devices in the context of customs,[61] telecommunications,[62] and federal police.[63] However, the power for tribunal members to issue monitoring warrants would seem to be an unusual approach which may require specific protection measures. Significantly, in the previous examples, the Minister must nominate members in advance and may only nominate those members who have been lawyers for more than 5 years.

- *General warrants*: as indicated, a monitoring warrant need not describe offences or documents but only the 'purpose for which the warrant is issued'. Also, once on premises, an authorised employee may require a person to produce *any* document which is relevant to a monitoring purpose. To some degree these provisions may conflict with the general aversion that the common law has to 'general warrants'.

- *Warrantless searches*: as indicated, where an authorised employee considers it necessary he or she may enter premises, conduct searches and seize property as if a monitoring warrant or search warrant existed. Examples exist in the context of police powers,[64] customs,[65] excise,[66] aged care,[67] wildlife protection,[68] and quarantine.[69]

However, historically there has been some reluctance in permitting or enlarging such powers. For example, in introducing the relevant amendment in the context of police powers, concern was expressed regarding the subjective nature of what constitutes an emergency and the fact that nearly all cases could be dealt with by normal procedure.[70]

- *Production notices*: as indicated, the Secretary may issue a notice to registered providers requiring them to produce documents or information. While there are many examples in the judicial sphere there are fewer examples of notices in the executive domain (examples exist in the context of customs,[71] taxation,[72] civil aviation safety,[73] consumer protection,[74] companies and securities regulation,[75] therapeutic goods,[76] social security,[77] workplace relations,[78] national security,[79] and immigration.[80])

As indicated, a similar suite of powers are conferred on Immigration Officers under the Migration Bill. Arguably, such powers are appropriate in the immigration context, given the existence of related powers. But, to the extent that the powers are considered appropriate in the education context, it may be seen by some to be desirable to redraft the powers, and the associated offences, to more closely link the enforcement regime with immigration fraud.

Exemptions

Another possible issue relates to the incidence of exemptions from contributions and levies to the ESOS Assurance Fund. As indicated above, the regulations to the ESOS Act currently exempt public providers from obligations in relation to notified trust accounts and tuition assurance schemes. Apparently, these exemptions were criticised in consultations preceding the Bill, specifically in relation to their discrimination in favour of public providers. However, as indicated, it is proposed that the exemptions will continue to apply to the obligations in relation to contributions and levies to the Assurance Fund. The rationale is that they are 'unlikely to be a significant concern from a competitive neutrality perspective', that 'the accountability measures applying to government-funded providers' are adequate and that there is a 'negligible risk of them collapsing'.[81]

Taxation and Incidence

To some extent, the incidence issue may be underscored by a constitutional limitation. As indicated above, the legislation tacitly or impliedly acknowledges that the contributions and levies *might* constitute taxes for constitutional purposes. So much is evidenced by the existence of a separate Assurance Fund Bill. It is also evidenced by the reservation in **item 7** of that Bill to the effect that the contributions and levies should not operate so as to impose a tax on the property of the States. As such, the legislation recognises that the contributions and levies may have a discriminatory effect. If they do constitute taxes, and if public funds held by service providers are found to be the property of the States, then **item 7** of the Assurance Fund Bill prevents the contributions and levies from being imposed on these providers. Arguably, public service providers will be exempt and the burden will be borne by the bulk of private providers.

Miscellaneous

As indicated, in making a call on the Assurance Fund, the Fund Manager may place an overseas student into a 'suitable alternative course' after having consulted with the student. There is no requirement for agreement between the Fund Manager and the student.

As indicated, registration may be cancelled where a provider becomes bankrupt or is 'wound up'. However, the threat of failure may arise well before a provider company is formally wound up. It may be more appropriate to cancel registration where a provider company is in administration.

Appendix: Commonwealth Constitutional Powers

Principal Powers

The Commonwealth does not have a constitutional power over education.[82] Traditionally, education has been considered a matter for the States. Thus, it was only discussed incidentally in the Constitutional Conventions on the basis that the issue was not mutually acceptable or politically sensitive enough to be included in the Constitution.[83] It was only dissatisfaction with the provision of education by the States, and the perceived need for uniformity, that ever caused the issue to be raised in relation to Commonwealth powers.[84]

Despite these constitutional limitations, the Commonwealth has been able to obtain a prominent position in the field of education. It has used other constitutional powers in order to achieve its objectives, such as the power to provide benefits to students (section 51(xxiiiA) and the power to make special payments to the States (section 96).

The extent to which it may expand its involvement has been the subject of conjecture. Generally, commentators have pointed to use of the external affairs power (section 51(xxix)) to implement a range of international conventions and recommendations.[85] Largely, these deal with the right to education[86] and education without discrimination.[87] However, in the context of education for overseas students, other powers might be used. Generally, powers with respect to corporations (section 51(xx)), aliens (section 51(xix)), immigration (section 51(xxvii)) and overseas trade and commerce (section 51(i)) may be relevant. In terms of contributions and levies, so might the taxation power (section 51(ii)).

The subject matters of the powers listed above would seem to accommodate one or other aspects of education services to overseas students. As a general proposition, parliament may validly prohibit, regulate or authorise those aspects for any reason. Thus, parliament may, under the immigration power, impose conditions on entry for temporary or permanent residents.[88] It may, under the aliens power, impose any conditions on admission, stay or deportation of persons who have not been naturalised. Under the corporations power it may regulate trading and related activities of trading corporations. Under the trade and commerce power, it may regulate the recruitment of students overseas and perhaps also the provision of services to overseas students while they are in Australia.

Specifically, parliament may pass a law that prohibits a third party from conduct that is directed at a person or entity over which the Commonwealth has constitutional power. Thus, in *Actors and Announcers Equity v Fontana Films*,[89] the High Court found that the Commonwealth could legislate[90] to protect a trading corporation by banning secondary boycotts. The Court found that such law, while it was addressed to acts of third parties, was a law with respect to a trading corporation and thus valid. Various judges observed that the proposition could be applied to other constitutional powers of the Commonwealth. For example, Stephen J suggested that the power with respect to aliens encompassed a power to regulate the conduct of third parties which was intended and likely to harm

aliens: 'the intended object of another's conduct is not less central, no less significant, in bestowing a character upon a law than is the actor to whom the law directly speaks'.[91]

Incidental Power

In general, the Commonwealth has an 'implied incidental power' which allows it to pass laws on subject matters that are incidental to a subject matter otherwise within power.[92] It also has an 'express incidental power' to pass laws which are necessary to give effect to a valid law or executive power.[93] The express power permits the Commonwealth to pass laws which are referable to the context, nature and subject of the main power. The implied power permits the Commonwealth to pass a law which is reasonably necessary for its effective exercise. For present purposes these powers are roughly equivalent.[94]

Whether a court would consider a law to be 'incidental' depends on the circumstances. It need not be demonstrated that the law is necessary to effect a purpose within power. Conversely, a law may be invalid if it exceeds rather than expands the main power. Concepts such as reasonableness or proportionality are relevant.

Conclusion

Arguably, three of the powers above would be sufficient to justify virtually any measure designed to control the activities of education service providers to overseas students. Assuming that most of the providers were incorporated bodies, the corporations power would seem to provide a sufficient basis for such measures. To the extent that providers were not incorporated, the aliens power, adopting the protective principle in *Actors Equity*, would seem to justify such measures in order to protect the interests of overseas students. Assuming that education services could be characterised as an 'export', the trade and commerce power would also seem to provide a fairly strong basis for such measures.[95] To the extent that these powers leave some deficit, it might be covered by the express or implied incidental powers, depending on notions of proportionality.

Endnotes

1 Estimate made in a submission by the Australian Council for Private Education and Training to the Senate Employment, Education and Training Legislation Committee, *Consideration of the provisions of the Education Services for Overseas Students (Registration of Providers and Financial regulation) Amendment Bill 1998,* August 1998, p. 4.

2 Appendix B in the Explanatory Memorandum provides an overview of the education export industry.

3 The Explanatory Memorandum provides a more detailed overview of the current arrangements pp. 6–8.

4 Sub-section 6A(5).

5 Sub-section 7A(3).

6 Education Services for Overseas Students (Registration of Providers and Financial Regulation) Regulations, Regulation 8.

7 Regulations 6A (payment into trust account), 9 (membership of TAS), 18A (reporting requirements for TAS).

8 Section 20.

9 The extensions were from the original 1994 to 1997 (*Education Services for Overseas Students (Registration of Providers and Financial Regulation) Amendment Act 1993* No. 114, 1993, s 13), from 1997 to 1999 (*Education Services for Overseas Students (Registration of Providers and Financial Regulation) Amendment Act (No. 1) 1996* No. 41, 1996, Schedule 1, item 1) from 1999 to 2002 (*Education Services for Overseas Students (Registration of Providers and Financial Regulation) Amendment Act 1998* No. 115, 1998, Schedule 1, item 1).

10 Senate Standing Committee on Employment, Education and Training, *Inquiry into the Operation of the Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991,* December 1992, p. 22.

11 Senate Standing Committee on Employment, Education and Training, *The Efficacy of the Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991 in the light of the collapse of the Australian Business College in Perth in January 1993,* August 1993, p. 21.

12 Education Services for Overseas Students (Registration of Providers and Financial Regulation) Amendment Bill 1998, Explanatory Memorandum, p. 8.

13 Senate Employment, Education and Training Legislation Committee, *Consideration of the Provisions of the Education Services for Overseas Students (Registration of Providers and Financial Regulation) Amendment Bill 1998,* August 1998.

14 The reports were:

- *Education Services (Export Regulation) Bill 1990* (tabled 7 May 1991)

- *Operation of the Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991 (ESOS Act)* (tabled 1 December 1992)
- *The Efficacy of the Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991 in the light of the collapse of the Australian Business College in Perth in January 1993* (tabled 19 August 1993)
- *Overseas Students Tuition Assurance Levy Bill 1993 and Education Services for Overseas Students (Registration of Providers and Financial Regulation) Amendment Bill 1993* (tabled 9 December 1993)
- *The Nature, Implementation and Effects of the Statutory Rules 1994 Nos 146 and 154 – Being Regulations Pertaining to the Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991* (tabled 28 June 1994)
- *Consideration of the Provisions of the Education Services for Overseas Students (Registration of Providers and Financial Regulation) Amendment Bill 1998* (August 1998).

15 A useful summary of the reports is contained in *Consideration of the Provisions of the Education Services for Overseas Students (Registration of Providers and Financial Regulation) Amendment Bill 1998* (August 1998) at http://www.aph.gov.au/senate/committee/legislation/doc/eet_esos-doc.zip [27/10/00].

16 For details see Explanatory Memorandum, p. 9.

17 Explanatory Memorandum, p 20.

18 Explanatory Memorandum, p 9.

19 Graham, Clive, 'DETYA paper lacks vision', *Campus review*, April 5–11, 2000, p. 23.

20 Also see pp 18-19 of the Explanatory Memorandum for DETYA's assessment of the costs and benefits to all stakeholders.

21 Examples of this line of coverage include 'DIMA unable to track visa students', *Campus review*, 15-21 December, 1999; 'Expert warns of student visa rorts', *Canberra Times*, 11 February, 2000; 'Private colleges a study in back-door immigration', *Sun-Herald*, 12 March 2000; 'Promise of action on visa rorts', *Australian*, 12 January 2000.

22 See *Senate Hansard*, Senator Tierney, 6 June 1991, p 4585 and 18 June 1991, p 4796 and Senator Teague, 6 June, 1991, p. 4579.

23 The *Explanatory Memorandum* explains that this measure is to ensure the commercial integrity of the assurance fund, p. 15.

24 See Regulation Impact Statement in the *Explanatory Memorandum*, pp. 11–12 and p. 15.

25 Graham, Clive, op cit. Reference is made to State and Territory backlogs in the registration of Registered Training Organisations (RTOs).

26 Departmental evidence presented at Senate hearings and reported in C*ampus Review*, 15-21 December, 1999, 'DIMA unable to track visa students', states that there has been a 34 per cent

increase in student visa cancellations between 1997-98 to 1998-99 as a result of the allocation of additional resources following the DIMA review.

27 See the *Explanatory Memorandum*, p. 9.

28 Senate Employment, Education and Training Legislation Committee, op cit, p. 11.

29 Graham, Clive, op cit.

30 See generally Department of Education, Training and Youth Affairs, 'Strengthening the regulatory framework for the education /training export industry', *Position Paper*, undated, at http://www.detya.gov.au/iae/documents/international/esos2.pdf [27/10/00]. See also 'The Assurance Fund' in Main Provisions (below).

31 *Explanatory Memorandum*, p. 16.

32 ibid.

33 op cit, Senate Employment, Education and Training Legislation Committee, p. 12.

Reference is made here to a 50% reduction in the number of staff responsible for the administration of the ESOS Act.

34 An 'accepted student' is a person who is enrolled or accepted for enrolment and will require a student visa to undertake or continue the course (**proposed section 5**).

35 The Secretary may impose conditions on access (**proposed section 109(3)**). It is an offence to intentionally breach any access condition imposed by the Secretary subject to a maximum penalty of 6 months imprisonment (**proposed section 109(4)**).

36 A 'tuition assurance scheme' is a scheme established in accordance with the regulations 'whose main objects include ensuring that overseas students receive the course they paid for' (**proposed section 5**).

37 This issue and other issues in brackets are dealt with more fully in Digests of the related Bills.

38 *Crimes Act 1914*, s 4AA.

39 Allowance is made for drafting revisions, however, in the event of a stalemate, the Panel may draft its own criteria (**proposed section 59**). In addition, the Fund Manager or the Panel may initiate a revision of the criteria once per year (**proposed section 61**).

40 See the discussion of taxes and fees for services in the Digest for the Assurance Fund Bill.

41 The requirement arises where 'the Parliament passes an Act providing for the cessation of the Fund'. Clearly, it is open for a subsequent Parliament to alter the repayment obligations and arrangements.

42 The Bill gives examples of the conditions which may be imposed (**proposed section 86**).

43 The certificate must still be tabled in parliament (**proposed section 102(3)**).

44 **Proposed section 102(4)** operates to allow successive certificates in the same circumstances.

45 A 'prescribed non-citizen' is a person prescribed in the Migration Regulations *for the purposes of* **proposed section 101** of the Bill.

46 That is, any officers, employees, consultants or partners of the providers.

47 The provider may respond within 72 hours in respect of information or documents from previous financial years or which are not held on the premises.

48 That is, a member of the Administrative Appeals Tribunal: **proposed section 5**.

49 See **proposed section 140**.

50 **Proposed section 140(1)(d)**.

51 Strictly, it may be inaccurate to use the expression 'chance discovery'. The 'chance discovery' principle operates to permit a police officer to seize without warrant documents or things found by chance in the process of lawful activity which an officer might reasonably suspect are connected with an offence: *Chic Fashions v Jones* [1968] 1 All ER 229; *Ghani v Jones* [1970] 1 QB 693; *Reynolds v Commissioner of Police of the Metropolis* [1985] 2 WLR 93. The principle has been generally adopted in Australia (see generally *Parker v Churchill* (1985) 63 ALR 326) but not without criticism (*Challenge Plastics Pty Ltd v Collector of Customs* (1993) 42 FCR 397, per Heerey J at p 405). The fact that things are merely 'secured' in advance of being 'seized' under a search warrant may resolve any issues or concerns.

52 That is, any offence against the Bill *or* the *Crimes Act 1914* or the *Criminal Code*.

53 See generally, Keith Tronic, Cliff Crawford and Doug Smith, *Search and Seizure in Australia and New Zealand*, Law Book Company, Sydney, 1996, Chapter 1.

54 Australian Law Reform Commission, *Criminal Investigation: An interim report*, AGPS, Canberra, 1975, Chapter 7, Keith Tronic, Cliff Crawford and Doug Smith, *Search and Seizure in Australia and New Zealand*, Law Book Company, Sydney, 1996, Chapter 1.

55 ALRC, op cit, para 191-192; Tronic, et al, op cit, pp. 58–62.

56 'There is no requirement…that before the powers are exercised an independent judicial mind should consider the circumstances of the *particular case*, weighing the public interest as against that of the individual…Nor is there any effective way in which any of the powers once exercised can be the subject of *ex post facto* judicial review': ALRC, op cit, para 192.

57 Canadian Law Reform Commission, *Report on Search and Seizure*, 1984, p 10 quoted in Tronic, et al, op cit, p. 48.

58 Australian Law Reform Commission, *Criminal Investigation: An interim report*, AGPS, Canberra, 1975, para 197.

59 Strictly, they are issued by the officer in their personal capacity and not their judicial capacity.

60 *Parker v Churchill* (1985) 9 FCR 316 per Burchett J at p 322, quoted with approval by the High Court in *George v Rockett* (1990) 93 ALR 483.

61 *Customs Act 1901*, s 219AB.

62 *Telecommunications (Interception) Act 1979*, s 6DA.

63 *Australian Federal Police Act 1979*, s 12DA.

64 *Crimes Act*, s 3T (search of conveyances).

65 *Customs Act 1901*, Division XII, Subdivision B and C (search of vessels).

66 *Excise Act 1901*, s 104.

67 *Aged Care Act 1997*, s 92.5.

68 *Wildlife Protection (Regulation of Exports and Imports) Act 1982*, s 64Q; *Environment Protection and Biodiversity Conservation Act 1999*, s 429.

69 *Imported Food Control Act 1992*, s 28.

70 'In considering legislation of this nature, one must strive to balance the competing interests of the citizen to be protected from illegal or irregular invasion of his or her liberties by the authorities and the interests of government in preventing the commission of a crime, or in obtaining evidence to assist the prosecution of offenders': The Hon. Ian Wilson (representing Mr Peacock), Crimes Amendment Bill 1991, Second Reading Debate, House of Representatives, *Debates*, 9/9/1991, p 933.

71 *Customs Act 1901*, ss 64AE & 214B; *Fisheries Management Act 1991*, s 84; *Torres Strait Fisheries Act 1984*, s 42.

72 *Income Tax Assessment Act 1997*, s 900–175.

73 *Civil Aviation (Carrier's Liability) Act 1959*, s 41C.

74 *Trade Practices Act 1974*, s 155 (general), s 65Q (documents held by organisations supplying dangerous goods), s 75AY (documents relating to price monitoring), s 46 (documents relating to misuse of market power); *Prices Surveillance Act 1983*, s 32.

75 *Australian Securities and Investment Commission Act 1989*, ss 30–33. See also *Insurance Acquisitions and Takeovers Act 1991*, s 73.

76 *Therapeutic Goods Act 1989*, s 40 (holders of therapeutic goods licences).

77 *Social Security (Administration) Act 1999*, Part 5, Div 1; *Veterans Entitlements Act 1986*, s 128 (general), ss 54AA & 54F (recipients); *Health Insurance Act 1973*, s 89B; *Farm Household Support Act 1992*, s 54; *Child Support (Registration and Collection) Act 1988*, s 120; *Child Support (Assessment) Act 1989*, s 161.

78 *Workplace Relations Act 1996*, ss 83BH, 86, 280B.

79 *National Crime Authority Act 1984*, s 29; *Inspector General of Intelligence and Security Act 1986*, s 18.

80 *Migration Act 1958*, s 18 (documents relating to unlawful non-citizens), ss 306D–F (documents held by migration agents).

81 Explanatory Memorandum, p 20.

82 Except in relation to the Northern Territory and the Australian Capital Territory, by virtue of the virtually plenary power in section 122 of the Commonwealth *Constitution*.

83 I. Birch, *Constitutional Responsibility for Education in Australia*, Australian National University Press, Canberra, 1975, Chapter 2.

84 See generally the discussion on the background to the 'benefits for students' provision in section 51(xxiiiA) of the *Constitution* in Birch, op cit, Chapter 4.

85 Jane Edwards, 'Education and the Constitution', in Jane Edwards, Andrew Knott and Dan Riley, *Australian Schools and The Law*, Law Book Company, North Ryde, 1997; Mike Salvaris, 'Public Education, Citizenship and Constitutional Reform', *Constitutional Guarantees for Public Education, Discussion Paper No. 2*, Australian Education Union, 1995.

86 International Covenant on Economic and Social Rights, *Australian Treaty Series 1976 No. 5*, Art. 13 at http://www.austlii.edu.au/au/other/dfat/treaties/1976/5.html [10/10/00]; Convention on the Rights of the Child, *Australian Treaty Series 1991 No. 4*, at http://www.austlii.edu.au/au/other/dfat/treaties/1991/4.html; International Covenant on Civil and Political Rights, *Australian Treaty Series 1980 No. 23*, Art. 18 (religious and moral education) at http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html [10/10/00].

87 Convention Against Discrimination in Education; International Convention on the Elimination of all Forms of Racial Discrimination, *Australian Treaty Series 1975 No 40*, Art. 5, at http://www.austlii.edu.au/au/other/dfat/treaties/1975/40.html [10/10/00].

88 Together these powers form the basis of the *Migration Act 1958*.

89. (1981-82) 150 CLR 169.

90. The relevant law was subsection 45D(1) of the *Trade Practices Act 1974*.

91. For example, Stephen J said at 195 that 'a law forbidding certain acts of third parties for the reason that they were both intended, and likely, to harm aliens would surely be as central to the grant of a power with respect to aliens as a law which required aliens to do or refrain from particular conduct'.

92 See generally *Cunliffe v Commonwealth* (1994) 182 CLR 272.

93 *Constitution*, section 51(xxix).

94 See generally Patrick Lane, *Lane's Commentary on the Australian Constitution*, 2nd Ed, Law Book Company, 1997, pp 367-373.

95 It is perhaps significant that the Bill which preceded the existing legislation was entitled: Education Services (Export Regulation) Bill 1990.

Index of Related Bills