

**Department of Education, Employment and Workplace Relations
Part 1 Submission to the Inquiry into the
Education Services for Overseas Students Legislation Amendment (Tuition Protection
Service and Other Measures) Bill 2011
Education Services for Overseas Students (Registration Charges) Amendment (Tuition
Protection Service) Bill 2011
Education Services for Overseas Students (TPS Levies) Bill 2011**

1. Background

The provision of education and training services to overseas students in Australia is regulated by the Education Services for Overseas Students (ESOS) legislative framework. It comprises:

- *Education Services for Overseas Students Act 2000* (ESOS Act)
- *Education Services for Overseas Students Regulations 2001* (ESOS Regulations)
- National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007 (National Code)
- *Education Services for Overseas Students (Registration Charges) Act 1997*
- *Education Services for Overseas Students (Assurance Fund Contributions) Act 2000*

The ESOS Act and the ESOS Regulations set out the Commonwealth legislative requirements for the registration of providers, obligations on registered providers, the operation of the ESOS Assurance Fund, enforcement of the ESOS legislative framework and the establishment of the National Code. The principal objects of the ESOS Act are to:

- protect and enhance Australia's reputation for quality education and training services;
- provide financial and tuition assurance to overseas students for courses for which they have paid; and
- complement Australia's migration laws by ensuring providers collect and report information relevant to the administration of the laws relating to student visas.

ESOS Review

In August 2009, the Government asked the Hon Bruce Baird AM to review the ESOS legislative framework and report back to Government with changes designed to ensure Australia continues to offer world-class quality international education (the Baird review).

The Baird review considered the need for enhancements to the ESOS legal framework in four key areas: supporting the interests of students; delivering quality as the cornerstone of Australian education; effective regulation; and sustainability of the international education sector.

In March 2010, following his review of ESOS, Mr Baird recommended immediate changes to improve the experience of international students choosing to study and live in Australia.

Mr Baird's report, *Stronger, simpler, smarter ESOS: supporting international students*, makes 19 recommendations along the following themes:

- more support for international students and improved information;
- stronger consumer protection mechanisms to ensure students are protected from unscrupulous operators;
- improved regulation of Australia's international education sector, including better risk management and streamlining regulation with domestic quality assurance frameworks; and
- improved complaints and appeals mechanisms.

The recommendations followed extensive consultation with international students, education providers, state and territory governments, regulatory bodies, student organisations, international education professionals, education unions, industry bodies and diplomatic missions.

In releasing the report, the then Minister for Education, the Hon Julia Gillard MP, indicated a staged approach to implementation.

The Government's first phase response to the review, *the Education Services for Overseas Students Legislation Amendment Act 2011*, was enacted on 8 April 2011.

Changes to the *Education Services for Overseas Students (Registration Charges) Act 1997* were enacted on 26 September 2011 to rebase the Annual Registration Charge (ARC) according to provider risk.

The focus of this submission is the amendments to the ESOS legislative framework introduced in Parliament on 22 September 2011.

2. Summary of the amendments

The Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Bill 2011, Education Services for Overseas Students (Registration Charges) Amendment (Tuition Protection Service) Bill 2011 and Education Services for Overseas Students (TPS Levies) Bill 2011, [the Spring 2011 ESOS Amendment Bills] were introduced on 22 September 2011 as the Government's second phase response to the Baird Review.

The Spring 2011 ESOS Amendment Bills are intended to:

1. **Establish a new Tuition Protection Service (TPS)** as a single mechanism to place students when a provider cannot meet its obligations, or as a last resort, to provide refunds of unexpended course monies. (relates to Baird recommendation 16);
2. **Limit refunds of pre-paid course fees** to the portion of the course not delivered or assessed in the event of a provider closure (relates to Baird recommendation 17);

3. **Limit the amount of pre-paid course fees** that may be collected by providers in order to reduce the potential refund (relates to Baird recommendation 17);
4. Set up a requirement on non-exempt providers to keep initial **pre-paid fees in a separate account** until a student commences study. This is to ensure refunds are made when a visa is refused and reduces the potential refund liability on the TPS (relates to Baird recommendation 17);
5. **Strengthen record keeping obligations** related to student contact details and academic progress to support placements and refunds (relates to Baird recommendation 17);
6. Establish a **national registration system** of multi-jurisdictional providers, with assessments of the suitability and capacity of individual courses at each location (relates to Baird recommendation 6a); and
7. Undertake a number of **technical amendments**. The Act will be amended to: repeal the re-registration provision, as this process has been completed; clarify the definition of tuition fees and accepted students; and introduce a number of minor changes to strengthen enforcement and monitoring options (relates to Baird recommendation 5b).

3. Rationale for the amendments

The purpose of the Spring 2011 ESOS Amendment Bills is to make amendments to the *Education Services for Overseas Students Act 2000*; the *Education Services for Overseas Students (Registration Charges) Act 1997*; the *Ombudsman Act 1976*; and the *Tertiary Education Quality and Standards Agency Act 2011* and will repeal the *Education Services for Overseas Students (Assurance Fund Contributions) Act 2000* to address the recommendations from the Baird review. A Regulation Impact Statement was not included as part of the Explanatory Memorandum as the Office of Best Practice Regulation advised that it was not required.

Tuition Protection Service

The proposed TPS, which is a universal scheme created in response to a key recommendation of the Baird Review, will strengthen tuition protection by offering:

- a single point of placement (or refund as a last resort service), which will provide a larger pool of resources and greater ability to deal with any closures;
- a full range of placement options and greater student choice;
- a more efficient and flexible service with one contact point for students, one set of fees for providers and greater accountability to Government;
- a more robust and sustainable system which will ensure enhanced reputational benefits for all providers across the sector and no future requirement for Government financial assistance;
- provider benefits through placing students affected by a closure; and
- improved sustainability and accountability mechanisms.

The proposed TPS arrangements will remove all current exemptions and all providers will pay an annual TPS Levy to the Overseas Students Tuition Fund (OSTF). In circumstances where an international education provider does not meet their legislative responsibilities

under the ESOS Act, monies from the OSTF will be used to facilitate the placement of students in an alternative course or as a last resort pay a refund to students equivalent to the portion of the course paid for but not yet delivered. Students will be required to meet any extra costs associated with a higher value course in which they seek placement.

The TPS Director will set the annual TPS levy, and will be advised by a TPS Advisory Board, comprising representatives from across the sector and relevant Commonwealth agencies. In addition to stipulated government representatives the Minister will appoint up to 7 other members with relevant qualifications or experience. This combination of sector and government representatives is aimed at ensuring a diverse range of views are factored into the decision-making process regarding the annual TPS Levy.

Those providers who are assessed as having a lower level risk profile (i.e. public Universities, TAFEs and State schools), will be exempt from paying the risk rated premium component of the TPS Levy. When the estimated TPS Levy collection is considered in conjunction with the restructuring and rebasing of the ARC, the financial impact on the vast majority of these low risk providers will be reduced from current levels. It is expected that the restructuring and rebasing of the ARC will see an overall reduction of approximately \$8 million in charges across the international education sector in 2012, giving considerable relief to many providers.

In addition, private providers currently required to be members of a Tuition Assurance Scheme (TAS), will no longer have to separately pay for and meet the conditions of membership imposed by their respective TAS provider. Approximately 700 providers are currently members of a TAS.

The replacement of the current layered TAS and ESOS Assurance Fund placement process by the TPS supported by an on-line facility will bring greater student choice, control and responsibility in the placement process. Students unable to find a place will be able to seek a refund at the end of the prescribed placement period. All this should lead to a more efficient and effective outcome for students and the sector as a whole.

Under the existing arrangements, the ESOS Assurance Fund is unsustainable and has not served the best interests of the sector as a whole. The international education sector as a whole will therefore benefit from improved sustainability and accountability mechanisms built into the proposed TPS model.

Introducing partial refunds

The introduction of partial refunds will support the TPS and encourage providers to meet their responsibilities in the case of provider default. In the past, if a provider closed in the last weeks of a student's study, the student would receive a full refund, even though the provider had incurred significant costs in delivering the course to that point and the student could usually obtain credit for completed units of study. Refunds will now be limited to the portion of the course paid for but not yet delivered. This change will reduce delays for students in receiving a refund. It will also support the sustainability of the TPS by significantly reducing

the liability on the OSTF where provider TPS levies are held, both in the number of calls made and the individual refund amounts.

Limiting pre-paid fees and designated accounts

The ESOS Act will be further amended to include a limit on the collection of pre-paid course fees to no more than 50% of the total course fees before the course commences and after the course commences no more than one study period in advance (up to 24 weeks or one semester in duration). Currently, in some cases 100 per cent of course fees are paid up-front. All but the lowest risk providers will be required to keep the pre-paid fees for the first study period in a designated account until the student commences study. This will ensure providers are able to meet their refund requirements should the provider default or the student's visa application be refused and will assist in encouraging sustainable business practices. This proposal will also make study in Australia more affordable for students as they will no longer be required to pay large amounts of course fees up front to their provider.

Requirements to limit pre-paid fees and place pre-paid fees into designated accounts seek to balance policy objectives related to protecting the interest of students and the sustainability of the tuition protection framework, against what may be considered a reasonable regulatory impost on providers given the significant amounts of money involved. The number of providers impacted by these measures will be minimal given that the requirement to place pre-paid fees into designated accounts will be targeted according to risk and providers in receipt of recurrent government funding will be exempt.

Overall, for courses of more than one semester, only seven per cent of students currently pay more than a semester in pre-paid fees. Proportionally, this is higher in the English Language Intensive Courses for Overseas Students (ELICOS) and the schools sector. These measures appear to be reasonable in the light of recent experience which has identified serious consequences for students, government and the sector when providers have unsustainable business models heavily reliant on pre-paid fees and do not meet their refund obligations.

Strengthening record keeping

To support these tuition protection arrangements, student records must be kept up-to-date. While this is already required under the ESOS Act, the new provisions will strengthen these requirements. The Act will now require providers to have documented procedures in place to update student contact details and maintain assessment records. This will help to ensure, in the case of provider default, that students can be easily contacted and placed with another provider in a timely manner. It will also support the welfare of students; particularly those aged under 18, and better manage issues relating to pre paid fees.

Record keeping requirements will not be a regulatory burden on most providers who already keep accurate and comprehensive records. It is a reasonable expectation that providers keep accurate records and are active in ensuring they are up-to-date. This was an issue raised by Greens Senator Hanson-Young in the context of a previous ESOS Amendment Bill. Given the change to partial refunds and the issues raised about delays in placing students affected by a

closure, it is imperative that student records support early contact and recognition of prior learning so that students can obtain a suitable alternative place in a timely way.

National registration

The proposed amendments, will allow for national registration for providers operating in more than one state or territory, or across a number of locations within one state.

The ESOS Act currently requires providers to be registered to provide a specific course for each state which has meant a provider may have multiple registrations on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS). This amendment will reduce duplication of effort as well as support risk management and simplify processes for providers. The change will allow for more flexibility by the regulators to reduce unnecessary regulatory burden, however it will not limit the existing ability of the regulator to impose conditions or take compliance action against any or all of the provider's operations. National registration will facilitate a smoother transfer of ESOS functions to the national regulators, the Tertiary Education Quality and Standards Agency (TEQSA) and the Australian Skills Quality Authority (ASQA).

Technical amendments

The Act will also be amended to repeal redundant provisions, such as, the re-registration provision as this one-off process has now been completed. Definition of 'tuition fees' and 'accepted students' will be refined to remove any ambiguity and provisions related to risk based conditions and limits on registration will also be clarified. Amendments will introduce a number of minor changes to strengthen enforcement and monitoring options including the introduction of stronger penalties for non-compliance around reporting and the misuse of pre-paid fees and the ability to request timely information, such as student records, from the administrator of a provider that has defaulted.

Tightening of the definition of tuition fees is essential in defining the liabilities of the TPS. The issue of whether students affected by a closure should be covered for consequential costs such as pre-paid accommodation fees was raised in the context of Parliamentary debate on the re-registration ESOS Amendment Bill. At that time the then Minister for Education questioned the potential fiscal impact of such a measure and referred the matter to the then not completed Baird Review. An amendment to the ESOS Act enacted on 8 April 2011 implements the relevant Baird recommendation (4a) by allowing the delegate to place a condition on a provider to prohibit collecting pre-paid accommodation fees according to an assessment of risk. This proposed amendment further clarifies for students and providers that only tuition fees are protected through the ESOS legislative framework and provides for more detail to be prescribed in the ESOS regulations.

4. Related initiatives

Education Services for Overseas Students Amendment (Re-registration of Providers and Other Measures) Act 2010

On 3 March 2010, the *Education Services for Overseas Students Amendment (Re-registration of Providers and Other Measures) Act 2010* (ESOS Amendment Act 2010) received Royal Assent. The ESOS Amendment Act 2010 provided for the re-registration of all providers of education to overseas students under strengthened criteria by 31 December 2010.

The re-registration process was guided by a risk-managed approach to ensure national consistency in assessing providers for re-registration to minimise the regulatory impost on low risk providers.

Under the ESOS Amendment Act 2010, all new and existing providers are subject to strengthened registration criteria for CRICOS registration purposes. These are:

- the principal purpose of the provider is to provide education; and
- the provider has demonstrated capacity to provide education of a satisfactory standard.

Other measures include a requirement for providers to publicly list the education agents they use. The amendments also include technical changes to improve the operation of the ESOS Act, such as exemptions from provider default obligations where the legal entity changes without practical impact on courses delivered or students.

Phase 1 response to the Baird Review

An amendment to the ESOS Act enacted on 8 April 2011, builds on the strengthened registration criteria and the re-registration measure, to support quality and manage risk to reinforce the reputation and stability of the international education sector.

The changes to the ESOS Act 2000 and Ombudsman Act 1976 include:

- further strengthening the registration requirements of education providers delivering to overseas students with a specific focus on business sustainability;
- introducing a consistent risk management approach to the regulation of international education;
- limiting the period of registration and allowing conditions to be placed on a provider's registration according to risk;
- extending the range of non-compliant behaviour that could attract financial penalties to strengthen regulation;
- publishing targets and regularly reporting on regulatory activities undertaken; and
- expanding the role of the Commonwealth Ombudsman for external complaints relating to private providers.

Rebasing the Annual Registration Charge

Revised charging arrangements set out in the ESOS (Registration Charges) Amendment Act 2011, which commenced on 31 October 2011, were in response to recommendations from the Baird review that regulators adopt a risk assessment and management approach to the registration of education providers delivering courses to international students, including the costs to apply at registration and throughout the period of registration.

The restructured and rebased ARC reflects extensive industry stakeholder consultations and actuarial advice.

The revised ARC is risk focussed and based on the following four components:

1. Flat fee: The first tier is a flat per provider charge to cover the administrative costs of the registration process. This fee is \$1,300.
2. Size fee: The second tier is intended to cover the costs of on-going regulatory activity based on the size of that task. The Size Fee is comprised of a charge per student enrolment, \$10, and a charge per registered course for each provider, \$100.
3. Compliance history fee: The third tier is a flat fee imposed in circumstances where the Minister has in the past 12 months taken action against a provider under section 83 of the ESOS Act. This fee is \$1000 and reflects the additional supervisory activity that is involved in relation to these providers.
4. Entry to the market fee: Evidence suggests that providers with a shorter history of registration present a greater risk and therefore the greater regulatory and supervisory burden. On this basis, new providers will be charged a fixed fee for each of the first three years of registration. These fees are:
 - \$7,500 at the time the provider first becomes registered;
 - \$5,000 on the first anniversary of the day on which the provider was registered; and
 - \$2,500 on the second anniversary of the day on which the provider was registered.

Overall there will be a reduction of approximately \$8 million in the level of the ARC for the sector as a whole resulting in many existing international education providers seeing a sizeable reduction in their ARC.

Australian Quality Training Framework 2010

New Essential Conditions and Standards for Initial Registration and Continuing Registration of Training Organisations have been approved by the Ministerial Council for Tertiary Education and Employment and came into effect from 1 July 2010.

The Conditions and Standards were revised to strengthen the Australian Quality Training Framework (AQTF) and provide additional protection for all students undertaking Vocational Education and Training in Australia.

Key changes to the Essential Conditions and Standards include:

- clear requirements for the initial registration of new providers and strengthened requirements for continuing registration, including stronger financial viability, financial management, fee protection and governance conditions;
- compliance with the Conditions of Registration which will now be audited in the same way that compliance with the Standards is audited;
- compliance for an application with the Essential Conditions and Standards for Continuing Registration at the date that it is approved for registration; and
- non-compliance with the new Essential Conditions and Standards may result in a range of sanctions being placed on the Registered Training Organisation (RTO), which may include additional conditions being placed on an RTO's registration, an RTO being de-registered, or an application for registration being rejected.

TEQSA and the National VET Regulator

In March 2009, the then Minister for Education, the Hon Julia Gillard MP, announced that, in response to the Bradley review, a national regulatory and quality agency for higher education would be established, TEQSA. On 30 July 2011 the *Tertiary Education Quality and Standards Agency Act 2011* established TEQSA as an agency and the *Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Act 2011* provided for the transition to the new higher education regulatory and quality arrangements. TEQSA will begin its regulatory functions in January 2012.

In 2009, the Council of Australian Governments (COAG) separately announced agreement to establish a national regulator for the vocational education and training (VET) sector in 2011. On 24 March 2011, ASQA was established as the national regulator for Australia's VET sector. The VET Quality Framework came into effect from 1 July 2011 and transition to ASQA for registration is occurring as a phased process. National regulation aims to promote a more consistent, enhanced and streamlined approach to the domestic quality assurance of education providers.

The national regulators will take over a number of regulatory functions currently performed by the Commonwealth and the States for Higher Education and VET providers delivering education services for overseas students under ESOS. The details of this transfer of functions are still to be finalised.

International Students Strategy for Australia

On 29 October 2010, Senator Chris Evans, Minister for Tertiary Education, Skills, Jobs and Workplace Relations, released COAG's International Students Strategy for Australia (ISSA). The strategy outlines twelve initiatives to address the four key areas of international student wellbeing, quality of international education, consumer protection and the availability of better information for international students.

The ISSA complements the Government's response to the Baird review of the ESOS Act. Key initiatives already implemented include:

- a student information portal launched on 1 July 2010;
- stronger health cover arrangements commencing 1 July 2010;
- a national community engagement strategy;
- an international student roundtable and biannual international student survey;
- a statutorily independent complaints mechanism for all international students through amendments to the Commonwealth Ombudsman Act.

Also included in the ISSA is the research project undertaken by the Australian Institute of Criminology in 2010 to determine the extent to which international students are victims of crime compared to the broader population. The final report was released on 11 August 2011.

5. Consultation

In preparing the final report, Mr Baird spoke to nearly 200 students and education providers from the tertiary, school and English language sectors at consultation forums held in major capital cities. He also met with provider and student peak bodies, regulators, state and territory government officials, diplomatic missions, education industry bodies and Members of Parliament. The Baird review received approximately 150 formal submissions and more than 300 people registered with the online discussion forum. Mr Baird also considered suggestions from the International Student Roundtable held in September 2009.

Following publication of the Baird review and implementation of the first phase of the Government's response through the legislative reforms introduced into Parliament on 27 October 2010 (and since enacted in April 2011), the Government released a discussion paper to seek feedback on the second phase of its response. The paper, entitled *Reforming ESOS: Consultations to build a stronger, simpler, smarter framework for international education in Australia* was released on 7 December 2010. Stakeholders, including education peak bodies, regulators, providers, students and agents, were given until 21 January 2011 to provide feedback on options for taking forward the remaining Baird review recommendations.

Specifically the consultation paper focused on risk assessment and management of the registration and ongoing monitoring of education providers delivering to overseas students; a strengthened tuition protection framework; a range of recommendations for making ESOS stronger, simpler and smarter; and the regulatory effect on providers of these proposals and recommendations.

Fifty-two submissions were received from a wide range of stakeholders including state regulatory bodies, public and private providers from all sectors, peak bodies, migration agents, homestay associations and student representative bodies.

Additionally, individual consultations were conducted over February to September 2011 with all major peak body stakeholders and regulators to further discuss proposed reforms, in particular the proposed TPS.

Consultation feedback

The consultation feedback showed general support for reform across the different stakeholder groups. Overall, feedback from stakeholders to the Baird review recommendations addressed in the second phase ESOS amendment bills has been positive. Support was shown for improved risk management across the international education sector which would lead to a more effective targeted enforcement of ESOS requirements. This would include a defined risk criterion for greater transparency and consistency in regulation and a risk based approach to industry charges and levies on a provider. That deliberate and consistent non-compliance indicated high risk was a strong message as well as the need for consistent approach to testing for financial viability. Views around the need for stronger governance, better information sharing and harmonisation of registration processes with domestic quality assurance frameworks were also shared across the sector.

While stakeholders were not asked to comment on a particular TPS model, the consultation paper explored many of the elements which have now been brought together to form the proposed TPS model. As well as highlighting shortcomings in the current tuition protection arrangements, the consultation feedback indicated widespread support for a simpler and more sustainable model. Feedback also indicated strong support for a single decision making body and a single contact point with respect to the information that is provided to students.

The recommendation to limit refunds to the unexpended portion of pre-paid fees instead of the current requirement for a full refund was well supported. Providers, peak bodies and regulatory bodies agreed that the requirement to refund all course monies is unreasonable.

Stakeholders showed strong support for measures to manage pre-paid fees to ensure that providers who cannot meet their obligations are not able to shift their responsibilities to the TPS. The idea of trust accounts for pre-paid fees which may be at risk was an option put forward by stakeholders including English Australia.

The majority of responses agreed that providers should be required to provide student records and there was also strong support for providers to store student details in electronic form and to keep these records up-to-date. National registration was generally well supported with most respondents agreeing that a national system of registration would minimise regulatory inconsistencies across jurisdictions and would support the introduction of the national regulators for the VET and Higher Education sectors.

6. Implementation

Subject to passage of legislation, work to establish the new TPS framework will occur in 2012 ahead of the commencement of the TPS on 1 July 2012. During this period there is likely to be ongoing placement and refund activities being undertaken through the existing tuition protection framework, including through the ESOS Assurance Fund mechanisms.

As a consequence, the six months to 1 July 2012 will be used as a transitional period to move the industry's tuition protection arrangements from the ESOS Fund and TAS placements to the new TPS on 1 July 2012.

A communication campaign is to be rolled out following the passage of legislation to inform the sector of changes. As the major changes around the TPS levy will not be implemented until 2013 there will also be ample opportunities to inform the sector of changes.

Wherever possible all students referred from provider defaults and with claims will be managed and finalised by the ESOS Fund Manager prior to the commencement of the TPS framework on 1 July 2012. After this date, all provider defaults and student claims will be managed under the new TPS framework. Where a student claim from a default is not able to be finalised prior to the commencement of the TPS framework on 1 July 2012, that claim will be managed by the TPS Director under the rules as they existed on 30 June 2012. In order to ensure a timely resolution of these claims, the TPS Director will be required to determine those claims within 30 days unless exceptional circumstances exist.

To facilitate the transition from the current ESOS Assurance Fund arrangements to the new TPS framework, the current contract between the Commonwealth and the ESOS Fund Manager will need to be extended (the existing arrangements expire on 31 December 2011).

Reasonable transition periods will be built into the implementation phase for all remaining measures so that providers will have specified timeframes to be compliant with the new requirements. National registration will be managed through the movement of existing CRICOS registrations to a single national registration as they expire, with the option for providers to apply to merge registrations at any time before the expiry of their existing registration.