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INFORMATION AND RESEARCH SERVICES

Bills Digest

No. 63 2000–01

Education Services for Overseas Students  
(Assurance Fund Contributions) Bill 2000

ISSN 1328-8091

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Published by the Department of the Parliamentary Library, 2000

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No. 63 2000–01

Education Services for Overseas Students (Assurance  
Fund Contributions) Bill 2000

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31 October 2000  
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# Education Services for Overseas Students (Assurance Fund Contributions) 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, whichever occurs first.

## Purpose

### Package Overview

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

- |  |   |
|--|---|
| • <b>'the Principal Bill'</b>            | Education Services for Overseas Students Bill 2000                                  |
| • <b>'the Assurance Fund Bill'</b>       | Education Services for Overseas Students (Assurance Fund Contributions) Bill 2000   |
| • <b>'the Consequential Bill'</b>        | Education Services for Overseas Students (Consequential and Transitional) Bill 2000 |
| • <b>'the Registration Charges Bill'</b> | Education Services for Overseas Students (Registration Charges) Amendment Bill 2000 |
| • <b>'the Migration Bill'</b>            | Migration Legislation Amendment (Overseas Students) Bill 2000                       |

A complete background to the context surround this legislative package is provided in the [Bills Digest](#) to the Education Services for Overseas Students Bill 2000.

### This Bill

The purpose of this Bill is to separate from the Principal Bill the requirement to pay contributions and special levies. This is a cautionary approach based on the possibility that the annual contributions and special levies to the Overseas Students Assurance Fund (the Assurance Fund) could be characterised as taxes rather than fees for service and the constitutional requirement that taxation and other measures be separately imposed.

**Warning:**

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## Background

A complete background to the Assurance Fund is provided in the [Bills Digest](#) to the Education Services for Overseas Students Bill 2000. The main issue in this Bill is the possibility that the annual contributions and special levies could be characterised as taxes rather than fees for service. As such, the requirement must be imposed in a separate Act.

### Constitutional Limitations

It might be argued that, 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.<sup>1</sup> 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 that the Commonwealth shall not 'impose any tax on property of any kind belonging to a State'.

#### Taxes v Fees for Service

One of the difficult questions in taxation law is whether government fees or levies are characterised as taxes or fees for service. In *Airservices Australia v Canadian Airlines International Ltd*<sup>2</sup> the High Court examined a range of aeronautical charges imposed by Airservices Australia. It held that these charges were fees for service rather than taxes.

In the past, the Court had indicated that where there was a mandatory fee, there needed to be a discernible relationship between the fee and the value of the service delivered.<sup>3</sup> In the *Canadian Airlines* case, the Court indicated that a service could be mandatory and it could form part of a network of services. There must be a benefit from the service (two judges in the majority required a direct and substantial benefit to network users whereas two other judges only required an indirect benefit). The cost of that service could be distributed generally among its users in the form of a general levy provided it did not have an overall revenue making purpose. The levy could be uniform, subject to arguments from users regarding substantive differences, or discriminatory (at the macro level), subject to rational, commercial or reasonable justification.

#### Taxes on State Property

In *South Australia v Commonwealth*<sup>4</sup> the High Court held that a tax will be a 'tax on property' for the purposes of section 114 'if and only if, it was imposed upon a taxpayer by reference to a relationship between the taxpayer and the relevant property and the relationship was such that the tax represented a tax on the ownership or holding of the property in question'. In that case, a requirement to pay capital gains tax on a state superannuation fund was considered to be a tax on property. As a result, South Australia was not subject to the requirement, by virtue of section 114.

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The court was assisted by section 271(1) of the *Income Tax Assessment Act 1936* which preserved the operation of the provisions, notwithstanding that in some cases they may be unconstitutional and therefore invalid:

It is the intention of the Parliament that if, but for this section, this Part would have the effect that a law imposing taxation would impose tax on property of any kind belonging to a State within the meaning of section 114 of the Constitution, this Part shall not have that effect.

## Main Provisions

The Bill formally imposes an obligation on registered providers of education services to overseas students to pay annual contributions (**proposed section 4**) and special levies (**proposed section 5**). The amount of those contributions and levies is determined by the Fund Manager of the Education Services for Overseas Students Assurance Fund according to a process established under the Principal Bill (**proposed section 6**). There is an express reservation to prevent these measures being rendered invalid on the basis that they constitute taxes on State or Territory property (**proposed section 7**).

## Concluding Comments

The above discussion tends to suggest that the compulsory contributions and levies to the Assurance Fund would be characterised as fees for service and that the reservation in **proposed section 7** is nothing more than a precautionary measure. There would seem to be a 'discernible relationship' between the contributions and levies and the service provided by the Assurance Fund. There would seem to be a general benefit to all providers in the form of a financial guarantee against liability to overseas students.<sup>5</sup> There would also seem to be a rational discrimination amongst providers based on application of 'contributions criteria' by the Fund Manager (see generally the Digest to the Principal Bill).

However, it might be possible to argue that the contributions and levies constitute taxes. It might be argued that the Assurance Fund does not provide a direct and substantial benefit to all providers, given the incidence and adequacy of alternative assurance regimes. It might also be argued that the level of the contributions and levies is disproportionate to the benefits provided by the Assurance Fund, given the relative risk of provider failure.

It might also be possible to argue that funds held by some registered providers constitute property belonging to the State (or Territory). It may be possible to characterise funds held by public registered providers, or public grant funding held by private providers, as

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property 'belonging to the State', depending on the independence of the provider entity and the funding relationship between the entity and the government agency.

It is difficult to assess the strength of these arguments without specific information.<sup>6</sup> However, 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 the Assurance Fund Bill. It is also evidenced by the reservation in **item 7**. As such, the legislation recognises that the contributions and levies may have a discriminatory operation. 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.

In this context, it is worth noting that the regulations to the existing legislation currently exempt public providers from obligations in relation to notified trust accounts and tuition assurance schemes (see the discussion of 'exempt and non-exempt' providers in the Digest of the Principal Bill). Under the Principal Bill, the same regulations could be applied to the obligations in relation to contributions and levies to the Assurance Fund.

## Endnotes

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- 1 It provides that 'laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect'.
- 2 (1999) 67 ALR 392.
- 3 *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462.
- 4 (1992) 105 ALR 171.
- 5 In making this determination, arguably, a court would have regard to the purpose of the Assurance Fund expressed by **proposed section 46** in the Principal Bill. This provision states that the purpose is to protect the interests of overseas students by ensuring that courses and/or course monies are assured in the event that the provider cannot deliver.
- 6 Such as the contributions criteria, the relative risks of provider failure and the incidence and adequacy of alternative assurance regimes.

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