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No. 66 2000–01

Migration Legislation Amendment (Overseas  
Students) Bill 2000

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I N F O R M A T I O N   A N D   R E S E A R C H   S E R V I C E S

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No. 66 2000–01

Migration Legislation Amendment (Overseas Students) Bill  
2000

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Law and Bills Digest Group  
31 October 2000

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# Migration Legislation Amendment (Overseas Students) Bill 2000

**Date Introduced:** 30 August 2000

**House:** House of Representatives

**Portfolio:** Immigration and Multicultural Affairs

**Commencement:** Sections 1 and 2 commence on Royal Assent. The remaining provisions commence on 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 amend the *Migration Act 1958* to provide for automatic cancellation where overseas students breach conditions of student visas and to create an enforcement regime which mirrors the regime established in the Principal Bill.

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## Background

The *Migration Act 1958* provides for cancellation of visas on various grounds (section 116). For example, visas may be cancelled if any circumstances which gave rise to the visa cease to exist, if a condition of the visa has not been met or if a prescribed ground exists for cancelling the visa. Ordinarily, a visa is cancelled by the Minister 'causing a record of [the cancellation] to be made' (section 138). This allows cancellation to occur immediately following the exercise of an administrative function by the Minister or his delegate.<sup>1</sup> There do not appear to be any existing provisions for automatic cancellation.

Division 3 of the Act contains various provisions which govern the grant of visas and additional visas. For example, the regulations may impose special conditions on visas, including a condition so that the visa holder may not be granted a substantive visa while they are in Australia (paragraph 41(2)(a)). Where the holder of a prescribed visa applies for a substantive visa, rather than a temporary visa such as a protection visa or a bridging visa, the application will be invalid (paragraph 46(1)(e)). The Minister is not to consider an invalid visa application (sub-section 47(3)).

## Main Provisions

### Automatic Cancellation of Visas

**Item 2** inserts **proposed new Subdivision GB** in Division 3, Part 2.

Under the Principal Bill, 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 notice must require the student to attend an interview with an immigration officer for the purposes of the *Migration Act 1958* (**proposed section 20**).

### Automatic Cancellation

Under this Bill, where a notice is sent, although not necessarily *received*, and the student either does not attend the interview or otherwise explain the alleged breach<sup>2</sup> within 28 days, the visa is automatically cancelled (**proposed section 137J**). Section 138 will not apply to cancellation under **proposed section 137J (item 3)**. A cancelled visa ceases to be in effect (section 82).<sup>3</sup> The student may apply in writing to have the visa reinstated unless:

- the visa would otherwise have ceased to be in effect<sup>4</sup>
- the student is outside the migration zone and has not applied within 28 days
- the student has been detained and has not applied within 2 days (or has not indicated an intention in writing to apply within 2 days and applied within a further 5 days),<sup>5</sup> or

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- the student has made a previous unsuccessful application (**proposed section 137K**).

(Significantly, where the student has been detained there is provision to ensure that the student is made aware of the provisions of **proposed section 137K (item 7)**.)

On application, the Minister may reinstate the visa if he or she is satisfied that there was no breach or that it was due to exceptional circumstances beyond the student's control. He or she must not reinstate the visa on the basis that the student was unaware of the notice or its effect. Other conditions for reinstatement may be prescribed (**proposed section 137L**).

The effect of reinstatement is that the cancellation is taken never to have occurred. However, any detention occurring during the cancellation period, whether or not as a result of the cancellation, is deemed to be lawful and the student is not entitled to take any legal action (for example, for false imprisonment) (**proposed section 137P**).

The decision to reject an application may be reviewed by the Migration Review Tribunal (**item 11**). Where the application is rejected, the student must be notified in writing of the grounds for the decision and the opportunity for merits review (**proposed section 137M**).

If all else fails, the student may, subject to the regulations, apply for another visa, but only a visa of a class prescribed in the regulations (**item 1**).<sup>6</sup> If a student is detained he or she must be removed as soon as reasonably practicable if he or she does not apply to have the visa reinstated or another visa issued (**item 8**) or if the application for reinstatement (or another visa)<sup>7</sup> is refused or cannot be granted (**item 9**).

#### Discretionary Cancellation

On his or her own initiative, the Minister may reinstate the visa if he or she is satisfied that it is in the public interest to do so (**proposed section 137N**). The Minister must exercise this discretion personally but may not be compelled to consider the issue.

#### Other Discretionary Cancellation

Despite section 116, if a visa is cancelled under **proposed section 137J**,<sup>8</sup> and reinstated under **proposed paragraphs 137L(1)(a) or (b)**, the specific breach or alleged breach may not be used as a ground for cancellation under section 116. But, this does not limit the power to cancel for any of the other grounds listed in section 116. Nor does it limit the power to cancel where a visa has been reinstated under **proposed paragraph 137L(1)(c)**. Thus, a visa might be cancelled and reinstated for a matter prescribed in the regulations. But it may be subsequently cancelled under section 116 even though, *in theory*, the subsequent cancellation might relate back to the matters prescribed in regulations.

#### Miscellaneous

Where the student visa is cancelled, any visa which is held by another person and contingent on the student visa is also cancelled (**items 4 and 5**). Likewise where the student visa is reinstated, the contingent visa is reinstated (**item 6**).

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## Enforcement Regime

**Schedule 2** seeks to establish an enforcement regime which substantially mirrors the enforcement regime in the Principal Bill. As in that Bill, Schedule 2 deals with production and attendance notices and searching education provider's premises. Largely these provisions have the same structure and operation as those in the Principal Bill. (Appendix 1 contains a comparative table showing the corresponding main provisions.)

It is worth noting that the enforcement powers in the Bills address different purposes. The powers in the Principal Bill are referenced according to 'monitoring purposes'. These are directed at compliance with the proposed *Education Services for Overseas Students Act 2000* and the National Code. By contrast, the regime in the Migration Bill are referenced according to 'visa monitoring purposes'. These are directed at compliance with visa conditions under the *Migration Act 1958* (**proposed section 268AA**).

## Miscellaneous

**Schedule 3** amends the *Migration Act 1958* to change the framework for applications for additional visas.

**Item 1** proposes to enable the regulations to extend the prohibition in paragraph 41(2)(a). Thus, the regulations may provide that the holder of a prescribed visa may be not be granted a substantive visa or 'a temporary visa of a specified kind'. This amendment applies to visas granted after the commencement of **Schedule 3 (item 7)**.

**Item 5** repeals and replaces paragraph 46(1)(e) to include, in more clear and general language, the extension in **item 1** of the prohibition to specified temporary visas. **Items 2** to **4** make the necessary consequential amendments.

## Concluding Comments

It should be noted that while the bulk of this Bill deals with overseas students, **Schedule 3** is of more general application. Specifically, the extended prohibition is not limited in its application to student visas. Thus, the regulations may prohibit access to specified temporary visas where a person already has a prescribed visa, thereby limiting the options available to visa holders in certain prescribed situations.

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## Appendix: Comparative Table of Main Provisions

| <i>Matter</i>                                      | <i>Proposed Section</i> |                       |
|--|-------------------------|-----------------------|
|  | <i>Migration Bill</i>   | <i>Principal Bill</i> |
| <b>Notices</b>                                     |                         |                       |
| production notices                                 | 268BA                   | 113                   |
| contents of production notices                     | 268BB                   | 114                   |
| serving production notices                         | 268BC                   | 115                   |
| attendance notices                                 | 268BD                   | 116                   |
| contents of attendance notices                     | 268BE                   | 117                   |
| <b>Compensation</b>                                |                         |                       |
| scales of expenses                                 | 268BF                   | 118                   |
| reasonable compensation                            | 268BG                   | 119                   |
| <b>Offences</b>                                    |                         |                       |
| failure to comply with notice                      | 268BH                   | 120                   |
| giving false or misleading information             | 268BI                   | 121                   |
| giving false or misleading document                | 268BJ                   | 122                   |
| incriminating information                          | 268BK                   | 123                   |
| <b>Use of Documents</b>                            |                         |                       |
| copies of documents                                | 268BL                   | 124                   |
| officer may retain documents                       | 268BM                   | 125                   |
| owner must be given copy                           | 268BN                   | 126                   |
| retaining documents                                | 268BO                   | 127                   |
| application for extension of retention period      | 268BP                   | 128                   |
| order for extension of retention period            | 268BQ                   | 129                   |
| <b>Searching and Warrants</b>                      |                         |                       |
| entering premises for visa monitoring purpose      | 268CA                   | 130                   |
| being on premises with occupier's consent          | 268CB                   | 156                   |
| consent of occupier                                | 268CC                   | 157                   |
| application for warrant                            | 268CD                   | 137                   |
| issue of warrant by magistrate, etc                | 268CE                   | 138                   |
| request for further information by magistrate, etc | 268CF                   | 139                   |

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|   |        |     |
|---|--------|-----|
| contents of warrant                               | 268CG  | 140 |
| use of reasonable force and assistance            | 268CH  | 147 |
| monitoring powers                                 | 268CI  | 131 |
| asking questions by consent                       | 268CJ  | 132 |
| asking questions under warrant                    | 268CK  | 133 |
| <b>Offences</b>                                   |        |     |
| failure to answer question                        | 268CL  | 134 |
| giving false or misleading information            | 268CM  | 135 |
| giving false or misleading documents              | 268CN  | 136 |
| use of electronic equipment                       | 268CO  | 143 |
| use of electronic equipment by experts            | 268CP  | 149 |
| extension of period for use by experts            | 268CQ  | 150 |
| <b>Emergency Situations</b>                       |        |     |
| powers without warrant in emergency situations    | 268CR  | 151 |
| <b>Use of Documents</b>                           |        |     |
| retaining seized things                           | 268CS  | 152 |
| application for extension of retention period     | 268CT  | 153 |
| order for extension of retention period           | 268CU  | 154 |
| <b>Miscellaneous</b>                              |        |     |
| occupier to facilitate and assist                 | 268CV  | 155 |
| announcement before entry                         | 268CW  | 158 |
| copy of warrant to occupier                       | 268CX  | 159 |
| damage to electronic equipment or data            | 268CY  | 160 |
| occupier entitled to be present                   | 268CZ  | 161 |
| identity cards                                    | 268CZA | 162 |
| requirement to wear identity cards                | 268CZB | 163 |
| application for telephone warrant                 | 268CZC | 164 |
| issue of telephone warrant by magistrate, etc     | 268CZD | 165 |
| procedure for issue of telephone warrant          | 268CZE | 166 |
| procedure after telephone warrant ends            | 268CZF | 167 |
| presumption against validity of telephone warrant | 268CZH | 169 |

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## Endnotes

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- 1 When section 138 was introduced (as proposed section 50E), the rationale was that it 'fixes the time that cancellation of a visa, or revocation of cancellation occurs'. The provision chose the time when the Minister 'causes a record of the cancellation or revocation [to be] made'. It could have chosen a later time, such as the time when a notice was sent to the visa holder, etc: Migration Reform Bill 1992, *Explanatory Memorandum*, p. 41.
- 2 The student must explain the alleged breach in person to an officer in an 'office of Immigration': **proposed sub-section 137J(2)**.
- 3 Section 82.
- 4 For example, because another substantive visa had been issued or the visa period expired: *ibid*.
- 5 This provision mirrors a more general provision in section 195.
- 6 **Item 1** adds student visas to the class of visas referred to in sub-paragraph 48(1)(b)(ii). Where these visas are cancelled, a person may, while in the 'migration zone', apply for a prescribed visa.
- 7 This is already dealt within section 198.
- 8 **Proposed section 137L** does not refer to **proposed section 137J**. Strictly **proposed section 137L** should read '[o]n an application under section 137K, the Minister may revoke the cancellation *under section 137J* if, and only if, the applicant satisfies the Minister ...'

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