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## Higher Education Funding Amendment Bill 2001

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No. 159 2000–01

Higher Education Funding Amendment Bill 2001

Kim Jackson  
Social Policy Group  
Dy Spooner  
Law and Bills Digest Group

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# Higher Education Funding Amendment Bill 2001

**Date Introduced:** 7 June 2001

**House:** House of Representatives

**Portfolio:** Education, Training and Youth Affairs

**Commencement:** Royal Assent (except for Item 11 of Schedule 1)

## Purpose

The Bill will:

- amend the *Higher Education Funding Act 1988* (the HEFA) and other legislation to adjust Commonwealth funds for higher education; and
- amend the HEFA and the *Bankruptcy Act 1966* to provide for the effects of bankruptcy on debts incurred under the Higher Education Contribution Scheme (HECS), the Open Learning Deferred Payment Scheme (OLDPS) and the Postgraduate Education Loan Scheme (PELS); and
- amend the *Australian National University Act 1991* to reflect changes to the advisory structure of the university; and
- make minor miscellaneous amendments to the HEFA.

## Background

### Higher Education Funding<sup>1</sup>

The major sources of Commonwealth funds for higher education are Part 2.2 of the HEFA, which provides grants for universities, and the *Australian Research Council Act 2001* (the ARCA), which funds the research grant schemes administered by the Australian Research Council. The HEFA provides maximum global amounts for broad categories of expenditure on a calendar year basis. The categories include operating grants (s.17), superannuation expenses (s.20), research and other special purposes (s.23), and capital

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projects (s.27A). Allocations for individual institutions are the subject of determinations by the Minister, which are disallowable by Parliament.

This Bill assumes the passage of the Innovation and Education Legislation Amendment Bill 2001 (the Innovation and Education Bill/Act), which is currently before Parliament. The latter amends the HEFA and the ARCA to provide an additional \$102.4 million in 2002 for policies announced in the Government's Innovation Action Plan<sup>2</sup>, to transfer funding responsibilities between the two Acts, and to introduce a loan scheme for postgraduate students. Readers should consult the [Bills Digest](#)<sup>3</sup> for more background on these issues, including a detailed breakdown of the funding re-allocations between the HEFA and the ARCA.

**Item 11 of Schedule 1** of the Bill repeals the higher education funding provisions of the proposed Innovation and Education Act. **Items 3 to 10 of Schedule 1** insert new sets of funding figures in the HEFA and the ARCA. According to the Explanatory Memorandum, these new figures reflect:

- funds for an additional 670 new student places in regional universities and campuses for 2002 and 2003 (a 2001–02 Budget measure);
- additional support for people with disabilities in 2002 and 2003 (a 2001–02 Budget measure);
- supplementation for price movements;
- revised receipts for HECS contributions and superannuation liabilities;
- transfers of funding between the ARCA and the HEFA.

It is not possible to disaggregate the impact of these factors because the funding amounts in the HEFA are expressed in broad terms. In addition, funding measures contained in the Budget are described in terms of financial years, while the HEFA is based on calendar years.

According to the Budget Papers, the new regional higher education places will cost \$4.3 million in 2001–02, \$7.8 million in 2002–03, \$10.5 million in 2003–04 and \$12.6 million in 2004–05. The Budget Papers do not provide a breakdown of the cost of the assistance for people with disabilities by education sector. However, they do indicate that some 1500 higher education students will receive additional support.

## Bankruptcy and HECS

The Minister's Press Release states:

The Commonwealth received legal advice that in some cases, a person's HECS debt might be extinguished in bankruptcy, however, it would depend on when the debt was incurred in relation to when a person became bankrupt.<sup>4</sup>

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Under the *Bankruptcy Act 1966* a person can become a bankrupt either by way of a debtor's petition or a creditor's petition. Once the person becomes bankrupt, the bankrupt's property will normally vest in the Official Trustee in Bankruptcy. The Trustee receives the creditors' proofs of debt, and eventually the trustee will make a distribution of the proceeds of sale to the various creditors in the order of priority laid down in the Act. If the trustee cannot pay a class of creditors in full, they must be paid in proportion owed to each. Normally after a period of three years the bankrupt is discharged and the debtor is automatically freed from most kinds of remaining debts.<sup>5</sup>

Under Part 5A of the HEFA, the debts incurred by a person through the operation of the HECS and other student loan schemes<sup>6</sup> are categorised in two ways:

- the debts as they are incurred (called the semester debt); and
- the accumulated debts of previous years (called the accumulated HEC debt).

On the 1 June each year the debts are discharged and replaced by a new debt. The new debt is equivalent to the accumulated HEC debt indexed for inflation, plus any semester debts from the immediate preceding year. This process (ie. the annual discharge and creation of debt) has created some ambiguity in the treatment of such debts under the bankruptcy law.

In brief, the intent of the Bill is that if a person with an accumulated HEC debt or semester debt becomes a bankrupt, then those debts will be taken to be provable debts for the purposes of the *Bankruptcy Act 1966*. Debts incurred after the bankruptcy date will not be provable (**proposed subclause 106YA(3)**). **Proposed subclauses 106YA(6) and (7)** provide when pre bankruptcy debts are discharged and replaced<sup>7</sup> during the period of bankruptcy, then a proof of debt will be taken to relate only to the pre-bankruptcy part of the debts.

**Proposed subclause 106YA(4)** provides that any dividends paid to the Commonwealth under the Bankruptcy Act in respect of a HEC debt will be treated as voluntary repayments. Such repayments attract a discount under s.106PA of the HEFA.

**Proposed subclause 106YA(5)** provides that section 153 of the Bankruptcy Act (the provision relating to the release of all debts on the discharge of bankruptcy) will **not** apply to all or any part of the accumulated HEC debt or a semester debt. At the discharge of the bankruptcy, any unpaid accumulated HEC debt or the unpaid part any semester debts will still be owed. Thus, a person will not be able to become bankrupt and, as a result, be released from liability to repay pre-bankruptcy HECS debts.

The Bill does not specify whether or not a debt has to be due and payable, as section 106Q of the HEFA already provides that once a person's income level exceeds the minimum prescribed amount, then that person is liable to pay amounts to reduce his or her HECS debt. It is thus possible that a person with an income below the minimum prescribed amount may be declared bankrupt and, under **subclause 106YA(4)**, pay dividends to the

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Commonwealth in respect of the pre-bankruptcy part of the accumulated HEC debt or semester debt that they would not have been obliged to pay if they had not become bankrupt.

The proposed amendments will apply to bankruptcies after the date of introduction of the Bill, namely 7 June 2001.

### Comment

HECS debts are unlike other debts in that:

- they only have to be repaid in certain circumstances (ie. when a the debtor's income reaches a certain level); and
- they are extinguished by death (ie. no payment is made out of the estate of the deceased debtor).

Considering these differences, it might be argued that HECS debts should be treated separately in the event of bankruptcy. The Commonwealth has the lifetime of the individual in which to recoup the HECS debt. It is thus not necessary to equate HECS debts with other debts by making them provable in the event of bankruptcy. It would be sufficient to ensure that the process of bankruptcy does not extinguish the HECS debt. As the Commonwealth retains the prospect of repayment, it should not be able to claim a share of the sale of the bankrupt's assets, thus reducing the amount available to other creditors who have no future hope of repayment.

Exempting HECS debts from the operation of the bankruptcy law would also remove the inconsistency whereby a bankrupt person with an income below the HECS repayment level will, in effect, be required to repay some or all of their HECS debt whereas a non-bankrupt person on the same income would not be required to repay their HECS debt.

Considering the complexity of the Bill's provisions, it could be argued that a simpler, more effective and consistent approach would be to simply exclude all debts under HECS from the operation of the Bankruptcy Act. This would mean that a person's HECS debts were not considered when their assets are disposed of by the trustee, but that their debt remained in place and would be repayable when their income reached the required level.

### ANU Governance Arrangements

The Bill will amend the *Australian National University Act 1991* to modify the advisory structure for the Council of the Australian National University (ANU), which has already approved the measures. The ANU comprises the Institute (the research arm of the university) and the Faculties (the undergraduate teaching arm). Both the Institute and the Faculties have statutory Boards, the Chairpersons of which are ex officio members of the Council. The Bill will replace these two members with the Chairpersons of the Education Committee and the Research Committee. These two bodies will be subcommittees of an

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Academic Board to be established by the University Council under its power to make statutes.

## Main Provisions

**Item 3 of Schedule 1** amends paragraph 49(b) of the ARCA to replace the funding cap for 2002 and to insert a new funding level for 2003 in relation to the research grants made under the Act.

**Item 4 of Schedule 1** substitutes new funding caps for university operating grants made under s.17 of the HEFA for the years 2000 to 2002, and inserts a cap for 2003.

**Item 5 of Schedule 1** substitutes new funding caps for university superannuation expenses made under s.20(3) of the HEFA for the years 2000 to 2002, and inserts a cap for 2003.

**Item 7 of Schedule 1** substitutes new funding caps for university grants for special purposes under s.23(C) of the HEFA for the years 2001 and 2002, and inserts a cap for 2003.

**Item 9 of Schedule 1** substitutes a new funding cap for special capital projects made under s.27A(6) of the HEFA for the year 2002, and inserts a cap for 2003.

**Item 11 of Schedule 1** will repeal Schedule 1 of the proposed Innovation and Education Legislation Amendment Act 2001.

**Item 3 of Schedule 2** inserts a new section 106YA in the HEFA dealing with the effects of bankruptcy on debts incurred by students under the Act.

**Schedule 3** makes a number of amendments to the *Australian University Act 1991* relating to the governance of the university.

## Endnotes

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- 1 For general background on the higher education funding system, see the Parliamentary Library brief at <http://www.aph.gov.au/library/intguide/SP/HEfunding.htm>
- 2 The statement introducing the Plan was called *Backing Australia's Ability*. See the Government web site at <http://www.innovation.gov.au/iap> for more details.
- 3 Bills Digest No. 126 of 2000–01 at <http://www.aph.gov.au/library/pubs/bd/2000-01/01BD126.htm>

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- 4 Dr Kemp, Minister for Education, Training and Youth Affairs *Media Release 7 June 2001* at [http://www.detya.gov.au/ministers/kemp/june01/k127\\_070601.htm](http://www.detya.gov.au/ministers/kemp/june01/k127_070601.htm)
- 5 Dennis Rose, *Lewis' Australian Bankruptcy Law*, Eleven Edition, pp. 3–4.
- 6 The Open Learning Deferred Payment Scheme (OLDPS) and the Postgraduate Education Loan Scheme (PELS). The establishment of the PELS is dependent upon the passage of the Innovation and Education Legislation Amendment Bill 2001, which is currently before Parliament.
- 7 Under sections 106O and 106N of the *Higher Education Funding Act 1988*.

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