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## Education Services for Overseas Students Legislation Amendment (2006 Measures No. 2) Bill 2006

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## Education Services for Overseas Students Legislation Amendment (2006 Measures No. 2) Bill 2006

**Date introduced:** 6 September 2006

**House:** House of Representatives

**Portfolio:** Education, Science and Training

**Commencement:** Sections 1 to 3 commence on Royal Assent. Schedules 1, 3 and 4 and Part 1 of Schedule 2 commence on 1 January 2007 and Part 2 of Schedule 2 on 1 July 2007.

### Purpose

The Bill, like the Education Services for Overseas Students Legislation Amendment (2006 Measures No.1) Bill 2006, amends the *Education Services for Overseas Students Act 2000* to strengthen the consumer protection aspects of the regulatory framework that governs the provision of education and training to overseas students. The Bill also clarifies aspects of the administration of the legislation and updates provisions relating to the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students (the National Code).

### Background

The provision of education and training to overseas students in Australia is a responsibility shared by the Commonwealth and the State and Territory governments. The States and Territories have primary responsibility for the quality control of education providers and their courses and exercise this through their processes of approving, registering and monitoring providers and their courses.

The Commonwealth's interest is in protecting the reputation of a \$7 billion per year export industry<sup>1</sup>, maintaining the integrity of the migration program and protecting the interests of overseas students as consumers.

The regulatory framework therefore involves Commonwealth and State/Territory legislation and the administrative effort of the Commonwealth Department of Education, Science and Training (DEST) and the Commonwealth Department of Immigration and Multicultural Affairs (DIMA) and the State/Territory education and training authorities.

The [\*Education Services for Overseas Students Act 2000\*](#) (ESOS Act) and associated legislation is the legal framework governing the responsibility of education providers to overseas students who come to Australia on a student visa in the higher education, vocational education, secondary school or English language sectors. The associated legislation is the *Education Services for Overseas Students (Registration Charges) Act*

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1997, Education Services for Overseas Students Regulations 2001 and the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students (National Code).<sup>2</sup>

The ESOS Act introduced substantial changes to the Commonwealth's arrangements for strengthening the regulatory arrangements of education services to overseas students.<sup>3</sup>

The arrangements under the ESOS Act include:

- provisions for the registration of education providers and their courses on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS)
- the compulsory membership by providers of a tuition assurance scheme
- contributions by providers to an assurance fund to ensure that there are funds to pay for student tuition in cases of provider collapse
- reporting obligations on providers – for example, in relation to disclosure of provider activities such as previous breaches, or breaches by associates, and in relation to student breaches
- a compulsory national code which sets standards and benchmarks for providers and their courses in order to qualify for registration and which serves to guide States and Territories in their approval, registration and monitoring activities
- compulsory compliance with the national code, and sanctions for being in breach of both the Act and the National Code, and
- Commonwealth powers to investigate providers; impose sanctions and exclude non *bona fide* operators from the industry.

Section 176A of the ESOS Act required an independent evaluation of the operation of the Act within three years of Royal Assent. The evaluation assessed the effectiveness of the ESOS Act in achieving its objectives to

- provide nationally consistent registration of education and training providers for overseas students studying in Australia
- minimise the presence in the industry of providers lacking integrity or who facilitate student breaches of their visa conditions
- ensure students receive either alternative tuition or a refund if they are unable to receive the tuition for which they have paid, and
- support migration policy

The evaluation considered the costs imposed by the Act on governments and providers; administration of the Act; and monitoring and reporting aspects of the Act's operation.

The evaluation commenced in May 2004 and reported in June 2005. The evaluation team concluded that

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The architecture of the quality benchmarks represented by the ESOS framework is sound: standards for providers of education and training that are mandatory and operate nationally; a cooperative national regulatory model; the characterisation of the student-institution relationship in consumer terms; and the integration of export education and migration policy.<sup>4</sup>

However the evaluation team made 41 recommendations to improve the framework's effectiveness. Many of the recommendations require changes to the National Code. Others require amendments to the ESOS Act and related legislation. The amendments in the Bill are the second stage implementation of the evaluation's recommendations.<sup>5</sup>

## Financial implications

The Explanatory Memorandum states the Bill will not increase costs to the Commonwealth or the education export industry. However, there may be significant costs to education providers in complying with the strengthened regulations implemented by the Bill.<sup>6</sup>

## Main provisions

### Schedule 1

**Item 1** is a technical amendment relating to membership of a Tuition Assurance Scheme (TAS). The ESOS Act requires that all providers be a member of a TAS, unless exempt. The amendment clarifies that where TAS membership is required it must cover each course offered by the provider.

### Schedule 2 Part 1

**Item 1** amends paragraph 19(1)(d) to clarify that a provider must advise DIMA when a student's study is terminated before completing a course.

### Schedule 2 Part 2

**Items 4, 5 and 6** amend subsections 104(1), 104(3) and 104(4) relating to penalty points for offences prescribed in regulations. The amendment will reduce from 60 (\$6 600) to 50 (\$5 500) the maximum penalty points for a provider's failure to report visa breaches or provide the required information about students.<sup>7</sup> It will bring the Act into line with Commonwealth criminal law policy guidelines.

**Item 2** relates to the reporting of breaches of visa conditions. The ESOS legislation supports the integrity of the student visa programme through the provider reporting conditions. Under sections 19 and 20 of the Act, providers are obliged to report students who are not attending 'fulltime' or are not meeting course requirements. Failure on either condition is a trigger for automatic cancellation of the visa. The ESOS evaluation noted

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that this 'brings the full weight of DIMIA's compliance process into play too early in educational process that should be the responsibility of the provider'.<sup>8</sup> The ESOS evaluation concluded that:

'a gulf exists between the education system which views student participation and progress as primarily matters of educational judgement, and DIMIA which views them as facets of visa control. Given their different goals and cultures, a tension is inevitable, but it has been unnecessarily exacerbated by the lack of specificity in the Code ... The National Code standards should be rewritten in terms that fit the realities of teaching, learning and assessment in each sector.'<sup>9</sup>

**Item 2** implements recommendation 28 of the ESOS evaluation. It amends subsection 19(2) and 20(1) by deleting the words 'student visa condition relating to attendance or satisfactory academic performance' and substituting the words 'prescribed condition of the student visa'. Reporting conditions will now be clarified through Standards 10 and 11 of the National Code and providers will devise appropriate policies and procedures to monitor student progress and attendance. The visa conditions which must be reported will now be prescribed in the Education Services for Overseas Students Regulations 2001 (the ESOS Regulations) and in the Migration Regulations and will be consistent with the conditions in the National Code. This should satisfy the concerns of the universities who initially were expected, at considerable cost, to report on student attendance. Other sectors, including the TAFE sector will still be expected to monitor attendance. The extended date of implementation for Part 2 of Schedule 2 to July 2007 should assist providers in complying with the provisions.

### Schedule 3

Schedule 3 deals with refunds to students.

**Item 1** deals with the definition of 'student default'. It clarifies the circumstances for student refunds. Current provisions suggest a student default occurs where a student withdraws from a course. The amendments extend 'student default' to where a provider terminates a student's enrolment due to a student's failure to pay course fees, breach of a visa condition or misbehaviour.

**Item 4** strengthens the consumer protection aspects of the legislation. It prevents a provider from retaining a significant proportion of a student's prepaid course fees when a student is unable to commence a course due to a visa being refused.

**Item 6** inserts **new subsection 76(1A)** which introduces a twelve month sunset clause for recourse to the ESOS Assurance Fund.<sup>10</sup>

**Item 9** inserts **new subsection 77(1A)** which allows the Fund Manager<sup>11</sup> to reduce the amount of a refund where it can be demonstrated that the student is studying with a new

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provider and has obtained recognition of prior learning with the new provider for study completed with the former provider.

**Item 10** is a consequential amendment to reflect changes in item 9. The new provider will have to inform the Fund Manager of any recognition of prior learning granted. The amendments in items 9 and 10 will prevent students receiving both academic credits and a refund for completed study.

## Schedule 4

Schedule 4 deals with the National Code.

**Item 3** repeals subsection 33(1) and substitutes a **new subsection 33(1)** allowing the Minister to amend or make a new National Code by legislative instrument. Notification procedures under the *Legislative Instruments Act 2003* will apply enabling Parliamentary scrutiny of changes to the code, through the disallowable instruments provisions.<sup>12</sup> Existing section 36 provides that State and Territory Governments and education industry stakeholders be consulted before the Minister changes the code.

**Item 10** repeals section 42 which contains the existing procedure to amend the National Code.

**Item 8** proposes a **new subsection 41(1)** which provides that each registered provider be given written notice of amendment of the National Code, the day on which the amendment takes effect and means of access to the new code. Proposed **new subsection 41(2)** provides that such a notice to providers is not a legislative instrument. Despite the provisions for consultation in section 36, stakeholders have expressed concern that ‘there has been no communication regarding any future evaluation or review of either the ESOS Act or the National Code. This is of concern as it implies a future of ad hoc amendments’.<sup>13</sup>

Other items in Schedule 4 are technical amendments making the Act consistent with the operation of the *Legislative Instruments Act 2003*.

## Concluding comments

The Government is concerned that the ESOS legislation framework continues to ensure the quality of education provision to overseas students whilst providing consumer protection and maintaining the integrity of the student visa system. The Bill clarifies the consumer protection provisions and the student visa aspects and introduces technical amendments aimed at streamlining the administration of the Act. Stakeholder response has expressed concern at ‘an ever increasing compliance and reporting load on providers, with impacts on customer service and administration costs. These costs will have to be passed onto students, which in turn will impact on Australia’s international competitiveness.’<sup>14</sup> Furthermore, providers are concerned that the legislation imposes more regulation on all

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providers in an attempt to deal with the small minority of unscrupulous providers that could be dealt with under the existing legislation.<sup>15</sup> Peak bodies claim that the \$6 million collected in the Annual Registration Charge (ARC) provides the Government with ‘the resources to be more proactive in identifying and dealing with those providers operating on the fringes of the industry who continue to take advantage of international students, and facilitate visa fraud and illegal immigration without imposing additional administrative, regulatory and compliance burdens on all providers’.<sup>16</sup>

## Endnotes

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1. The economic benefits of international education to Australia are now estimated to be around \$7.5 billion of which \$6.9 billion is from spending by onshore students. See: Department of Education, Science and Training, *Annual Report 2004-05*, p.113.
2. See [Easy guide to ESOS](#) on the Department of Education, Science and Training website.
3. For details on the background to these changes, see *Bills Digest, Nos. 62-66, 2000-01*.
4. PhillipsKPA and LifeLong Learning Associates, [Evaluation of the Education Services for Overseas Students Act 2000](#) (Australian Education International, Department of Education, Science and Training, Canberra 2005), p. xxxiii.
5. The first stage is implemented in Education Services for Overseas Students Legislation Amendment (2006 Measures No.1) Bill 2006. See Bills Digest, No. 13, 2006-07.
6. In May 2006 The Australian Vice Chancellor’s Committee (AVCC) estimated compliance costs to universities of \$33 - \$41 million ([AVCC Response to the Industry Consultation Draft National Code](#) AVCC, May 2006). Negotiations with the University sector have resulted in that sector being exempt from student attendance reporting and police checks relating to provision of services to under 18 year olds. This will reduce but not eliminate compliance costs for the sector. See: [Cost Compliance Report](#) (May 2006).
7. If the entity committing the offence is a corporation, the maximum penalty will be five times this figure - 250 penalty units (\$27 500) for each offence.
8. PhillipsKPA and LifeLong Learning Associates, [Evaluation of the Education Services for Overseas Students Act 2000](#) (Australian Education International, Department of Education, Science and Training, Canberra 2005), p. 153.
9. *ibid*, p. 152.
10. The ESOS Assurance Fund is established under Section 45 of the Act. The purpose of the Fund is to protect the interests of overseas students and intending 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 consists of contributions and levies from providers, amounts recovered from providers, parliamentary appropriations and penalties and fees.

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11. The Fund Manager is appointed by the Secretary and may be an individual or a company. Functions of the Fund Manager include determining the amounts of annual Fund contributions for providers, collecting contributions and levies from providers, arranging alternative courses for students and making payments from the Fund.
12. There may need to be clarification of the provisions of subsection 44(1) of the *Legislative Instruments Act 2003* as they apply to the National Code. Subsection 44(1) provides that under certain conditions, legislative instruments dealing with 'intergovernmental bodies or schemes' are not disallowable.
13. [Joint Peak Body Response to the Industry Consultation Draft National Code](#) (May 2006), p. 9.
14. *ibid*, p. 8.
15. ['New legislation for international students will satisfy no one'](#) *Campus Review*, 31 May 2006, p. 7.
16. [Joint Peak Body Response to the Industry Consultation Draft National Code](#) (May 2006), p. 8.

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