Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Bill 2011

Education Services for Overseas Students (TPS Levies) Bill 2011

Education Services for Overseas Students (Registration Charges) Amendment (Tuition Protection Service) Bill 2011

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Social Policy Section

This Bills Digest replaces an earlier version dated 15 February 2012, to include further clarification of the operation of proposed subsection 27 of the Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Bill 2011.

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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

Date introduced: 22 September 2011

House: House of Representatives

Portfolio: Education, Employment and Workplace Relations

Commencement: The commencement provisions are complex and varied and are outlined in detail on pages seven to nine of the Explanatory Memorandum. However, with some conditions, the commencement of the proposed Tuition Protection Service is 1 July 2012 after Royal Assent.

Links: The links to the Bills, the Explanatory Memorandum and second reading speeches can be found on the Bills’ home pages for 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 or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The purpose of 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 Bills) is to amend the Education Services for Overseas Students Act 2000 (the ESOS Act); the Education Services for Overseas Students (Assurance Fund Contributions) Act 2000; the Education Services for Overseas Students (Registration Charges) Amendment Act 2011 [and] the Education Services for Overseas Students Amendment (Registration Charges Consequentials) Act 2011 to:

- establish a new Tuition Protection Service (TPS)
- limit refunds of pre-paid course fees to the portion of the course not delivered or assessed in the event of provider closure
- limit the amount of pre-paid course fees that may be collected by providers in order to reduce the potential refund

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• require non-exempt providers to keep initial pre-paid fees in a separate account until a student commences study
• strengthen record keeping obligations related to student contact details and academic progress
• establish a national registration system of multi-jurisdictional providers, and
• make a number of technical amendments.

Background

The ESOS Act and associated legislation is the legal framework governing the responsibility of education providers towards students who come to Australia on a student visa. The ESOS legislative framework consists of the ESOS Act, ESOS Regulations, the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students (the National Code) and the ESOS Registration Charges Act. The legislation provides a nationally consistent approach to registering education providers and sets out clear roles and responsibilities for providers wanting to teach overseas students.

The principal objects of the ESOS framework are:

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

The current ESOS Act has its origins in the substantial strengthening and reforms that occurred in 2000 amidst allegations of immigration ‘rorts’, poor quality education services, college closures and exploited students. The framework was later generally endorsed as sound by an independent evaluation in 2004–05 and 41 Recommendations to improve its effectiveness were implemented in amendments to the ESOS Act in 2006 and 2007.

Despite these reforms, problems in the international education sector came to a head in 2009 with media exposés of unethical behaviour within the sector, college closures and protests by Indian students following some assaults on individuals in their community.

In response the Rudd Government introduced amendments to the ESOS Act pending a review of the Act. The 2009 amendments required the re-registration of all institutions registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) by 31 December

1. For details on the background to these changes see: C Kempner and N Hancock, Education Services for Overseas Students Bill 2000 [and other related Bills], Bills Digests, nos. 62–66, 2000–01, Parliamentary Library, Canberra, 2000, viewed 1 February 2012, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillsdgs%2FLBR26%2F2

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2010, introduced two new registration requirements to strengthen the education credentials of education providers, and required providers to list the names of their agents and comply with any regulations relating to them.²

The Review which had been scheduled for 2010–2011 was brought forward and former Member of Parliament, Bruce Baird, was appointed to chair it.

**Basis of policy commitment**

The Baird Review of the *Education Services for Overseas Students Act 2000* reported in February 2010 and stressed new and strengthened regulatory approaches to protect Australia’s reputation for quality education.³ In releasing the report the Government announced a staged approach to the implementation of the Baird report’s 19 Recommendations.

The first stage response was implemented with the enactment of the *Education Services for Overseas Students Legislation Act 2011* and the second through the *Education Services for Overseas Students (Registration Charges) Amendment Act 2011*.⁴

These Bills implement Recommendations 5a, 5b, 6a, 16 and 17 of the Baird Review aimed at strengthening tuition protection provisions and introducing national registration for providers in multiple jurisdictions.

**Committee consideration**

The Bills have been referred to the House Standing Committee on Education and Employment for inquiry and report. Details of the inquiry and the report are at the [inquiry’s webpage].⁵

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2. For an outline of these amendments see: C Kempner, *Education Services for Overseas Students Amendment (Re-registration of Providers and Other Measures) Bill 2009*, Bills Digest, no. 28, 2009–10, Parliamentary Library, Canberra, 2009, viewed 10 January 2012, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p?query=Id%3A%22legislation%2Fbillsdgs%2FROMU6%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p?query=Id%3A%22legislation%2Fbillsdgs%2FROMU6%22)


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The Bills have been referred to the Senate Standing Committee on Education, Employment and Workplace Relations for inquiry and report. On 8 November 2011, the Senate granted an extension of time for reporting until 27 February 2012. Details of the inquiry are at the inquiry’s webpage.

**Position of major interest groups**

A reading of submissions to both the House Standing Committee on Education and Employment and the Senate Standing Committee on Education, Employment and Workplace Relations suggest there is general support for the risk management approach adopted by the Government in previous legislation and the proposed measures in the Bills. However there is some stakeholder concern, mainly centred on the compliance aspects and regulatory burdens, which are discussed in the main issues and key provisions below.

**Financial implications**

The Explanatory Memorandum states ‘it is expected the establishment of the TPS will be budget neutral’. Funding will be sourced from the existing ESOS Assurance Fund, including the 2012 Assurance Fund collection, which will be replaced by the TPS levy to the Overseas Students Tuition Fund from 2013.

**Main issues**

**Commencement date**

Stakeholders are concerned that the commencement date of 1 July 2012 for the Tuition Protection Service (TPS) will require tight implementation deadlines. Their concerns were taken up by the Coalition which, in the Second Reading debates in the House of Representatives, moved an

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7. Explanatory Memorandum, 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, p. 5.

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amendment for the commencement date to be 1 January 2013. The amendment did not pass. The Department of Education, Employment and Workplace Relations expects that:

The major impact for providers in relation to the commencement of the TPS will be in relation to the TPS levy. The levy will not commence until 2013. It is anticipated that the TPS Director would likely make a decision on the TPS levy in October 2012 and subsequently a legislative instrument would be brought before the Parliament shortly thereafter. These timeframes are not dissimilar from those that currently apply in relation to the decision making process the Contributions Review Panel currently undertakes in setting the annual contributions amounts paid by providers to the ESOS Assurance Fund.

Ministerial Powers

Universities Australia expresses concern at the ‘many powers for the Minister to create legislative instruments to govern certain aspects of provider compliance and for additional requirements to be included in the regulations’. It hopes the higher education sector will be consulted and have a chance to comment on proposals. The Bills provide no requirement for consultation, although the Legislative Instruments Act 2003 provides for ‘consultation before making legislative instruments’ (Part 3 of the Act). In particular section 17 ‘Rule-makers should consult before making legislative instruments’ specifies that the need for consultation is greater when the legislation is likely to have a direct effect on business (or a substantial indirect effect). Furthermore, as legislative instruments, they will be subject to Parliamentary scrutiny.

The TPS Levy

The Education Services for Overseas Students (TPS Levies) Bill 2011 contains provisions to require providers to pay fees and levies to fund the TPS established under the proposed new Part 5 of the Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Bill 2011. The first annual TPS Levy will be applied in 2013.

Part 2 of the Education Services for Overseas Students (TPS Levies) Bill 2011 defines the rates at which providers must pay. Proposed section 9 strengthens the risk managed approach by applying a risk rated premium to the levy which will be specified by the TPS Director, by legislative instrument,


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at the beginning of each year. This measure will combine with the restructured Annual Registration Charge introduced in the ESOS Registration Charges Act to strengthen the risk assessment framework.

The Department of Education, Employment and Workplace Relations points out that:

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 [Annual Registration Charge], 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.11

This risk rated premium is particularly welcomed by Universities Australia however proposed section 10 which allows for a special tuition protection levy has caused concern. The special levy would be applied to all providers and calculated as a percentage of overseas tuition fees as determined by the TPS Director and specified by legislative instrument at the beginning of each year. Universities Australia expects that ‘the inclusion of the special levy provision will mean that, given university students are much less likely to draw on the fund, universities will be in effect underwriting the private sector, notwithstanding the CRICOS fee reduction’.12 The Group of Eight universities are more forceful in their concerns stating:

Without knowing in advance how the ‘risk-related component’ of the TPS levy will work, we are concerned that TPS levies will be determined by volume of enrolments as much as by risk. This would have obvious disadvantages for low risk but high volume providers such as large universities. The risk-related component of the TPS levy will have to be carefully designed and monitored to ensure that it meets the professed objects of the scheme.

Considering their low risk status, universities carry a heavy financial burden due to administrative charges linked to volume of enrolments. We note the Government’s intention that the TPS levy should not impose a net additional cost on universities, once reductions in CRICOS annual registration charges are taken into account. The principle of no net additional


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cost should be applied so that universities are not disproportionately penalised if and when a special levy is introduced during times of stronger international student demand.13

Private providers are also concerned at the special levy, as argued by the Australian Council for Private Education and Training:

Providers need certainty regarding their potential future liabilities. Considerable distress has ensued in the sector around this aspect of the Bills, particularly the ‘special levy’ category which appears to have no rigour around how it is calculated and no apparent limit to the amount to be collected as a percentage of a provider’s overseas student tuition fees.14

### Powers of the TPS Director and the TPS Advisory Board

Under proposed section 54A of the Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Bill 2011 the Minister, by written instrument, will appoint a TPS Director. Proposed section 54B sets out the functions of the TPS Director one of which is to set the special levy on all providers under measures in the Education Services for Overseas Students (TPS Levies) Bill 2011.

Division 4 of the Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Bill 2011 provides for a TPS Advisory Board to advise the TPS Director in the making of the special levy. Proposed section 55D allows the Minister, by written instrument, to appoint the Board Members. The Board will thus perform an important role in mitigating the powers of the TPS Director. However stakeholders are concerned that the membership of the Board under proposed section 55C is not representative of all the sectors that provide international education.15

The House of Representatives Standing Committee on Education and Employment have recommended that ‘the Australian Government ensures broad representation of industry stakeholders on the TPS Advisory Board reflecting high and low risk providers as well as the various sectors of the industry’.16


15. See for example submissions from TAFE Directors Australia and English Australia to the House of Representatives Standing Committee on Education and Employment.


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Default notification requirements

Submissions to the parliamentary inquiries demonstrate that stakeholders regard the reporting timeframe for defaults to be too short. This is discussed in the key provisions below.

Key provisions

Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Bill 2011

Schedule 1—Tuition protection service

One of the principal objects of the ESOS Act is to provide financial and tuition assurance for courses for which international students have paid.

Item 1 repeals Part 5 of the ESOS Act in its entirety and inserts a new Part 5 proposing a new Tuition Protection Service (TPS). This meets the Baird Review Recommendation 17 to replace the current three tiers of protection—provider obligations, Tuition Assurance Scheme and the ESOS Assurance Fund—with a single TPS that will place or refund students when a defaulting provider does not meet its refund obligations.

Division 2, Subdivision A – obligations on providers

Proposed section 46A clarifies a provider defaults if it fails to provide the course at an agreed location or the course does not start on the agreed start date.

Proposed section 46B requires that a provider which defaults must notify the Secretary and the TPS director within 24 hours.

Providers from all sectors have noted that a 24 hour timeframe is not achievable. Universities in particular claim the timeframe is unrealistic.

Proposed section 46D requires providers that default to discharge their obligations by offering an alternative course at their own expense or by providing a refund to students within 14 days. Penalties are applied for failure to discharge obligations (proposed section 46E) and providers must notify the Secretary and the TPS Director of the outcome of their discharge of obligations within seven days (proposed section 46F).


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Division 2, Subdivision B– student defaults

Proposed section 47A defines student defaults. A student defaults if not commencing on the day of commencement of the course; withdrawing from the course or if their provider cancels their enrolment due to non-payment of fees, visa breach or misbehaviour.

Proposed section 47C requires providers to notify the Secretary and the TPS Director of student default within 24 hours.

As with proposed section 46B stakeholders regard the 24 hour timeframe as unrealistic. Universities Australia notes that the rationale for a short reporting timeframe for student defaults is not clear and states:

Universities enrol thousands of international students. Many international students may decide not to commence their course or withdraw from their course. This happens all the time and is reported to DEEWR and DIAC via PRISMS for which providers have 14 days. The same applies in relation to enrolment cancellations based on non-payment of fees, visa breaches or misbehaviour. The number of potential notifications from all universities under the student default categories could number in the hundreds on any one day. A notification period of 24 hours simply cannot be met. Given that providers already have to report these student course variations via PRISMS within 14 days, it seems unnecessary to move to such a short timeframe. 17

Schedule 3–pre-paid fees

Proposed section 22 provides for written agreements for study periods. Study periods must be no more than 24 weeks long.

Schools argue that the 24 week period is based on a typical university semester which is inconsistent with school study periods and rather should be defined as 12 months.

Proposed subsection 27 (1) limits the amount of pre-paid fees that may be received to no more than 50 per cent of the student’s total tuition fees for a course before the student has begun the course. The proposed limit will reduce any potential refund.

The current ESOS provisions have no restrictions on pre-paid fees with students possibly paying 100 per cent of tuition fees sometimes before a student visa is approved. DEEWR argue that the proposed changes implement Baird Review Recommendation 17 and:

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


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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.  

**Proposed subsection 27 (3)** restricts a provider from collecting student tuition fees more than two weeks before the beginning of a study period for the course.

Stakeholders regard this restriction as impracticable. The Council of Private Higher Education suggests this period should be extended to four weeks while the public university sector wants no timeframe on when a university can accept pre-paid fees.

However **proposed subsection 27(3)** appears to be limited by the other subsections of this provision. For example **proposed subsection 27(3)** does not appear to apply if fees are received before the student has begun the course (**proposed subsection 27(4)(a)**).

**Proposed section 28** requires providers to maintain a designated pre-paid fees account to receive tuition fees from overseas students.

**Proposed section 29** sets out obligations relating to the designated account.

The requirements in **proposed sections 28** and 29 do not apply to low risk providers such as universities who receive Commonwealth funding and providers administered by a state education authority as defined in **proposed section 31**. These provisions further implement a risk managed approach. As DEEWR points out:

> 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.

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Education Services for Overseas Students (Registration Charges) Amendment (Tuition Protection Service) Bill 2011

Proposed measures in this Bill will allow for national registration for providers operating in more than one state or territory, or across a number of locations within one state. This will reduce the current multiple registrations on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) where courses are provided across jurisdictions. It should simplify processes and reduce regulatory burden. This Bill would replace the words ‘a state’ with the words ‘at a location’, thereby covering institutions operating with either form of multiple locations.

Concluding comments

The Bills are the last tranche of legislation, other than subordinate legislation, responding to the Recommendations of the Baird Review of the Education Services for Overseas Students Act 2000. Measures in the Bills aim to further strengthen the consumer protection aspects of the ESOS framework and protect Australia’s reputation in the international student market through the introduction of a single layer Tuition Protection Service.

The consumer protection objectives and stronger risk management measures may impose a higher regulatory burden on providers. This balance between providing the best service and rights to international students and the appropriate regulatory requirements on providers has been a feature of the ESOS framework since the reforms in 2000.

An indication of the difficulties in finding an appropriate balance can be seen in the discussion on the measures concerning notification periods for provider and student defaults. The House of Representatives Standing Committee on Education and Employment has recommended that the notification period for provider and student defaults be amended from the proposed 24 hours to within 72 hours. Universities Australia agrees ‘that this change better reflects the intention of the Bills and welcome the adoption of a common-sense and practical interpretation of this requirement.

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21. The Minister states in the second reading speech that a number of remaining Recommendations ‘will be progressed in subordinate legislation such as the National Code and the ESOS regulations’, P Garrett, ‘Second reading speech: 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,’ House of Representatives, Debates, 22 September 2011, p. 43.


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However we maintain that even a 72 hour obligation places an unnecessary burden on universities ... we propose universities be given five days to notify the regulator of a provider or student default.\textsuperscript{23}


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