Education Legislation Amendment (Overseas Debt Recovery) Bill 2015 [and] Student Loans (Overseas Debtors Repayment Levy) Bill 2015

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Date introduced: 17 September 2015
House: House of Representatives
Portfolio: Education
Commencement: The commencement date for each Schedule is provided for in clause 2 of the Education Legislation Amendment (Overseas Debt Recovery) Bill 2015. Details of the proposed commencement dates can be found on page 7 of the Explanatory Memorandum to that Bill. The Student Loans (Overseas Debtors Repayment Levy) Bill 2015 commences at the same time as Schedule 1 to the Education Legislation Amendment (Overseas Debt Recovery) Bill 2015.

Links: The links to the Bills, their Explanatory Memoranda and second reading speeches can be found on the Bills’ home pages for the Education Legislation Amendment (Overseas Debt Recovery) Bill 2015 and the Student Loans (Overseas Debtors Repayment Levy) Bill 2015, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.
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The Bills Digest at a glance

What the Bills do

• The Bills extend the existing post-secondary income-contingent loan schemes, the Higher Education Loan Programme (HELP) and the Trade Support Loans (TSL) program, to include debtors not resident in Australia.

• Since the introduction of both loan schemes, debtors were able to leave Australia and so avoid compulsory repayment of their outstanding loan debts whilst they remained overseas.

• From 1 July 2017 these foreign resident debtors would be expected to make the same repayments as if they were living and working in Australia whilst working overseas, subject to the level of cooperation provided by the relevant tax authority in their country of residence.

• The Bills also support better international collaboration in targeting outstanding debtors under income-contingent loan schemes into the future.

How the Bills work

• The Education Legislation Amendment (Overseas Debt Recovery) Bill 2015 (the primary Bill) requires overseas debtors to notify the Taxation Commissioner of their absence from Australia after a certain period of time.

• The Bill imposes a liability on overseas debtors to repay amounts once their ‘assessed worldwide income’ reaches a certain point. The liability will be imposed as a levy.

• The way in which the foreign currency components of an overseas debtors’ ‘assessed worldwide income’ is to be converted to Australian currency will be set out in guidelines and rules issued under the Bill.

• The Bill also addresses the use and disclosure of personal protected information to improve the administration of the loans schemes.

• The Student Loans (Overseas Debtors Repayment Levy) Bill 2015 is a separate but related Bill which imposes the levy.

Why the Bills have been introduced

• The Bills give effect to a 2015–16 Budget measure.
Purpose of the Bill
The purpose of the Education Legislation Amendment (Overseas Debt Recovery) Bill 2015 (the primary Bill) is to amend the administrative legislation for HELP loans (the Higher Education Support Act 2003) and TSL loans (the Trade Support Loans Act 2014) with near identical provisions requiring overseas debtors to repay amounts through a new levy.¹

These amendments also create a new concept of ‘assessed worldwide income’.² This concept takes into account a given debtor’s income from all sources, whether earned in Australia or overseas. It is to be converted into Australian currency under guidelines or rules issued under the legislation.³ If the given debtor’s assessed worldwide income exceeds the minimum repayment income for a given income year, they will be forced to make a compulsory repayment through a levy.

The Bill also contains measures that will assist both Australia and other countries with income-contingent loan arrangements in identifying overseas debtors, and possible non-compliance, by allowing greater information sharing between the Australian Tax Office (ATO), the Department of Education and Training (Department) and foreign governments.

The Student Loans (Overseas Debtors Repayment Levy) Bill 2015 (Levy Bill) is a separate (but related) Bill which imposes the levy.

Structure of the Bill
The Bills are both relatively simple in structure. The primary Bill contains five schedules.

- **Schedule 1** of the Bill includes two parts relating to the repayment of accumulated HELP debts by overseas debtors:
  - Part 1 details amendments to the Higher Education Support Act and
  - Part 2 clarifies the application of these provisions.

- **Schedule 2** of the Bill largely replicates Schedule 1, to ensure consistency between the application of the new repayment requirements across both loan schemes. Schedule 2 includes two parts relating to the repayment of accumulated TSL debts by overseas debtors:
  - Part 1 details amendments to the Trade Support Loans Act and
  - Part 2 clarifies the application of these provisions.

- **Schedule 3** of the Bill amends the Higher Education Support Act to allow the Secretary of the Department to access tax file numbers for HELP debtors.

- **Schedule 4** of the Bill amends provisions of the Taxation Administration Act 1953 to allow a taxation officer to disclose taxpayer’s information in order to assist foreign governments to identify people who have an outstanding student debt.

- **Schedule 5** of the Bill makes other amendments to the Income Tax Assessment Act 1936 and the Income Tax Assessment Act 1997 to ensure that overseas debtors cannot claim their HELP or TSL repayments as allowable self-education expenses for Australian income tax purposes.

The Levy Bill is provided separately in order to abide by section 55 of the Constitution, which requires laws imposing taxation to only deal with the imposition of taxation.⁴ This Bill has no other effect.

Background
HELP and TSL loans are designed to support greater access to education and training. HELP loans work by raising a debt when a student attends higher education, with the government loaning the student their contribution to the cost of the higher education course. This contribution is set by government under the Higher Education Support Act 2003 and Trade Support Loans Act 2014, both accessed 3 November 2015.

Reading: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.

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¹ See: Higher Education Support Act 2003, section 106.
² See: proposed subsection 154-17(1) of the Higher Education Support Act 2003, at item 2 of Schedule 1 to the Bill; and proposed subsection 178(1) of the Trade Support Loans Act 2014, at item 2 of Schedule 2.
³ See: proposed subsection 154-17(2) of the Higher Education Support Act 2003, at item 2 of Schedule 1 to the Bill and proposed subsection 238-10(1), as amended by item 6 of Schedule 1 to the Bill; and Trade Support Loans Act 2014, section 106.
⁴ Constitution, accessed 3 November 2015.
Support Act. Conversely, TSL loans operate by paying apprentices instalments up to a total of $20,000 over the course of their apprenticeship, to assist with everyday costs. This raises a debt to the government. When the apprentice or higher education student reaches an income of a set threshold ($54,126 in 2015–16), compulsory repayments are made from their income to pay off the debt. Both loan schemes are based on the assumption that the private benefit to the student of their education and training will increase their earning capacity over their working life.

The intent to recover overseas HELP debt was first flagged by the then Minister for Education and Training on 10 June 2014, as part of discussions with the United Kingdom on higher education policy. It was then raised again in media reports in August 2014, endorsed both by the peak body Universities Australia and Professor Bruce Chapman, the creator of the original Higher Education Contribution Scheme (HECS), and the precursor to the HELP. The then Minister confirmed that work to produce a reciprocal agreement with the United Kingdom on outstanding student loan debt was continuing.

Such an arrangement would presumably clarify the roles, responsibilities and access to data sharing that would assist the United Kingdom to recover outstanding student loan debt from its citizens resident in Australia, and allow the Australian government to recover outstanding HELP and TSL debt from its citizens resident in the United Kingdom.

The policy measure was announced on 2 May 2015, prior to the 2015–16 Budget. The initial press release indicated a focus on HECS (the program names HECS and HELP are often used interchangeably) debt, with a commencement date for the policy change of 1 July 2017. TSL debt recovery was not yet included in the proposal, nor was there a clear mechanism for the debt recovery.

In the 2015–16 Budget on 13 May 2015, the policy was included as a revenue measure: ‘Higher Education Loan Programme – recovery of payments from overseas debtors’. It was forecast in Budget Paper No. 2 to recover over $26.0 million over four years from 2015–16, and more than $140 million over ten years. The inclusion of outstanding TSL debt was not explicitly provided for in the Budget measure.

Since the policy announcement, there has been no consultation process or Exposure Draft of the legislation provided – these Bills are the first opportunity to explore the legislative mechanisms intended to ensure overseas student debtors fall under the same requirements as those resident in Australia.

Committee consideration

The Bills have not yet been referred to any Committee for consideration.

Senate Standing Committee for the Scrutiny of Bills

In its recent Alert Digest, the Senate Standing Committee for the Scrutiny of Bills drew Senators attention to the potential infringement on the right to privacy in relation to Schedule 4 of the Bill. The Committee ‘leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.’

The Committee had no comment on the Levy Bill.

Policy position of non-government parties/independents

Following the policy announcement of 2 May 2015, the relevant Shadow Minister, Senator Kim Carr, stated that the Opposition would support measures ‘to protect fairness and integrity in universities, including the HECS

7. Ibid.
11. Ibid., p. 7.
12. Ibid., p. 35.
system. In this press release Senator Carr was critical of the delay in its implementation. Following the introduction of the legislation to the House of Representatives, the shadow Assistant Minister stated that:

Labor supports this legislation because it takes a responsible approach to budget savings and, importantly, the integrity of our income-contingent loan system.

Liberal Democrat Senator David Leyonhjelm has previously labelled the HECS scheme as ‘generous’ and so could support measures to ensure repayment of outstanding debt.

The Australian Greens then spokesperson for higher education, Senator Lee Rhiannon, stated on 13 May 2015 that the policy ‘is likely to be a logistical nightmare that will only raise a small amount of money’.

Position of major interest groups

Generally major interest groups have been supportive of the measure. The peak representational body for Australian higher education institutions, Universities Australia, stated ‘this is a welcome move by the Government in improving the fairness and sustainability of the student loans scheme’ and referred to it as ‘long overdue’.

The Group of Eight (a coalition of established, research-intensive universities) has not made a formal comment in relation to the debt recovery proposal. In its Budget coverage, the Innovative Research Universities organisation stated the policy change was a ‘useful tightening of responsibility’, and the Regional Universities Network stated it was ‘fair and equitable’.

Of the relevant student representatives, neither the National Union of Students (NUS) nor the Council of Australian Postgraduate Associations (CAPA) acknowledged the overseas debt measure in their analysis of the 2015–16 Budget, instead focusing on the Government’s continuing higher education reform package and associated funding reductions. The National Tertiary Education Union (NTEU) followed a similar approach in its statement on the Budget.

Financial implications

Since the initial 2015–16 Budget announcement, the financial implications of this policy change have altered slightly. The measure is now estimated to bring in more than $25 million from 2015–16 to 2018–19 and more than $150 million over 10 years in fiscal balance terms. The initial costing was for more than $26 million in savings over the forward estimates and only $140 million over 10 years. This may be due to the extension of the policy change to TSL debt, as well as more updated forecasts in current HELP and TSL debt patterns.

As income-contingent loans are dependent on student debtors gaining employment and a certain level of income before they are required to repay those loans, the overall health of the economy in which debtors are working is crucial when assessing the fiscal impact. This makes longer term costings such as these problematic.

14. Ibid.
17. L Rhiannon, Pyne’s copy and paste budget fails students, staff and the community, media release, 13 May 2015, accessed 20 October 2015.
19. Group of Eight, Hidden behind all the hyperbole – cutting research funds is a step too far, media release, 13 May 2015, accessed 30 September 2015.
21. See NUS, Pyne no fixer this budget, media release, 12 May 2015; and NUS, Budget has no vision for students, media release, 12 May 2015; and CAPA, No more fair go, universities just for the wealthy and privileged, media release, 13 May 2015; CAPA, Postgraduate students voice their concerns about the Federal Budget, media release, 13 May 2015; and CAPA, Cuts to research training threaten future of research workforce, media release, 13 May 2015, all accessed 30 September 2015.
22. NTEU, More of the same from an arrogant government that refuses to listen, media release, 12 May 2015, accessed 30 September 2015.
Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bills’ compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bills are compatible.\(^\text{25}\)

Parliamentary Joint Committee on Human Rights

The Parliamentary Joint Committee on Human Rights considers that the Bills do not raise human rights concerns.\(^\text{26}\)

Key issues and provisions

The ‘problem’ of student loan debt

Concern about the debt profile of income-contingent loans is not a new phenomenon. Since the 2005 reforms which changed the initial Higher Education Contribution Scheme (HECS) into the Higher Education Loan Programme (HELP) there has been a steady stream of media interest related to new statistics on HELP debt.\(^\text{27}\)

Yet it is interesting to recognise that this interest comes relatively late in the history of the scheme. HECS was introduced in 1989, reformed in 1996, and replaced with HELP in 2005. While the Department of Education and Training publishes an annual Higher Education Report on spending, performance and policy changes in the sector, it didn’t contain an estimation of the proportion of new student loans which was predicted to remain outstanding until 2005, more than 15 years after the introduction of HECS.\(^\text{28}\) The Department also introduced this assessment of outstanding debt, now known as the Debt Not Expected to be Repaid (DNER) measure, into its suite of program key performance indicators.\(^\text{29}\) As can be seen in the press clippings cited above in footnote 27, coverage of the HELP program now regularly includes observations about the level of accumulated student debt and the outstanding proportion expected to not be repaid.

Why does student loan debt arise?

Despite media and other attention, a certain level of unpaid student debt is an unavoidable aspect of a program like HECS, HELP or the TSL scheme. Income-contingent loans are based on the understanding that some debtors may never reach the income level required for compulsory repayment (see N Wran, below). This may be because the debtor spends significant time outside of the workforce, due to unemployment, parenting or other caring responsibilities, or leaving the Australian taxation system by going overseas. A student debt arises as soon as a student takes out a loan in order to access higher education: outstanding student debts are written off at death.\(^\text{30}\)

The initial development of the HECS scheme saw the inability of some students to repay as a benefit of the scheme. As the Committee on Higher Education Funding, which first recommended a form of student contribution to expand higher education funding, put it:

People whose personal incomes are below the threshold would not be required to pay the tax debit. This has a number of important advantages:

- Anyone who has little or no capacity to pay would not be required to do so;

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25. The Statements of Compatibility with Human Rights can be found at page 4 of the Explanatory Memorandum to the Bill and page 3 of the Explanatory Memorandum to the Levy Bill.


• People who leave the workforce, for example for child rearing, would not be required to pay until such time as they re-enter the workforce and their personal income reached the level of average weekly earnings;

• People who were not employed, who were welfare beneficiaries, or were in low paid employment would not be required to pay; and

• People from disadvantaged backgrounds would only be required to pay if they joined the top 22 per cent of all income earners.  

The Minister’s second reading speech, Explanatory Memoranda and associated materials for the Higher Education Funding Act 1988 were likewise silent on the issue of outstanding student debt. The chief focus, as with the committee report above, was to make the case for the introduction of a student contribution to the cost of higher education, based on an assessment of its private benefit. As higher education had been largely free since 1974, this was a radical change.

Similarly, initial assessment of the 1989 higher education reforms focussed on the principles involved: the introduction of a student contribution, consolidation of institutions through mergers, and greater ministerial involvement in policy making were all questioned. The long-term prospect of student debt was not considered.

What is the historical trend in student loan debt?
The proportion of unpaid or outstanding student debt has increased by 40% over the course of the HECS/HELP/TSL programs. As shown in Graph 1 below, for the first year it was measured, Debt Not Expected to be Repaid (DNER) was assessed as 16.63% of the total of new HECS loans; in 2012–13, the latest figure on record, it was 23.27% of new HELP loans.

Graph 1: Debt Not Expected to be Repaid (DNER), Higher Education Contribution Scheme and Higher Education Loan Programme, 1992–1993 onwards.

![Graph 1: Debt Not Expected to be Repaid (DNER)](image)

Source: Adapted from Department of Education and Training (DET), Higher Education Report 2011–2013, Table 54: Accumulated HELP debts and debt not expected to be repaid 1989–90 to 2012–13, DET, [Canberra], 2014, p. 120.

The concern may be better understood through an examination of the numbers: the amount of DNER has gone from an assessed $386 million in 1992–93 to $7,051 million in 2012–13: an increase of roughly 1800%. That’s within the context of a higher education system with an increase of more than 1300% in the amount of HELP loans overall over the same time span, and an increase of 165% in the number of domestic undergraduate
students in the same period. In short, the growth of DNER has outpaced both growth in HECS/HELP and government funding for the higher education system overall.

In April 2014, the Grattan Institute released an analysis of HELP debt, broken down into the characteristics of the students who were unlikely to repay their loans in full. This analysis revealed that the increase in DNER is largely not due to overseas debtors, the problem that these Bills are attempting to address, instead the increase in DNER is largely due to patterns of workforce participation (certain professions, as well as women generally, are likely to have interruptions to employment), disparities in pay and the use of indexation factors which means the compulsory income threshold rises more quickly than the indexation on HELP debts. This can also be seen by a consideration of the fiscal impact – if DNER is most recently estimated at $7,051 million in 2012–13 terms, and growing, recouping $140 million through this measure over the next 10 years is not likely to make a significant impact.

The trouble with world-first solutions

Australia was the first country to design an income-contingent loan scheme for higher education. At the time of its introduction, it was viewed as an essential part of broader reform of the sector – the then Minister, John Dawkins, stated that if HECS was rejected by the Parliament, the Australian Government would be forced to reduce its expenditure on higher education and curtail expanding the system. The implicit message in the introduction of HECS was that it allowed for costs to be contained in the longer term, as students took on more of the cost of their higher education. The Hawke Government could therefore afford to be more generous in a funding scenario with HECS.

To some extent, this has led to policy confusion: as HECS was changed by various governments, then replaced by HELP, questions remain about what the key aim of income-contingent loans schemes are. Should the emphasis for a program like HECS/HELP/TSL be expanding student opportunity or recouping student debt? If the former, then DNER isn’t a key concern as long as any student gets access to higher education they otherwise might not. If the latter, then some students should be excluded from the system, as they are likely to add to the accumulated student loan debt.

Neither the original Higher Education Funding Act 1988 nor the Higher Education Support Act 2003 provide clear legislative objectives in relation to their respective student loan schemes, which makes it difficult to know whether governments should prioritise access over fiscal sustainability. While DNER did reach 23.27% in 2012–13, this still meant that the Australian Government was forecast to receive more than 75 cents of every dollar it loaned out to students back. The problem is that without legislative objectives or a thorough review of the program, governments don’t know whether that constitutes success.

International examples

Since the introduction of HECS in 1989, both England and New Zealand have introduced similar income-contingent student loan schemes. As both of these schemes are based on taxable income, like Australia, they both have an issue when student debtors leave their respective countries for work and pay tax overseas.

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37. Ibid.


39. Ibid; the Higher Education Funding Bill 1988 as presented to Parliament included an alternative funding scenario in which the HECS scheme was rejected by the Parliament. This would have seen less funding provided to higher education institutions and fewer places.

40. In the United Kingdom, they are known as ‘student loans’ and administered through the Student Loans Company, a corporation initially set up through the Education (Student Loans) Act 1990 (UK). Student loans initially operated from 1989 on a basis similar to mortgage loans; income contingency was introduced in the 1998/1999 academic year. Due to the devolved nature of education policy in the United Kingdom, student loan settings are different in England, Wales, Scotland and Northern Ireland. In New Zealand, the ‘student loans scheme’ was phased in from 1992 and has always worked on an income-contingent basis. It is jointly administered by their Inland Revenue service (equivalent to the ATO), the Ministry of Education, and the Ministry of Social Development. Annual reports are available on the outcomes of the scheme.
The English method for dealing with overseas debtors is similar to that proposed for Australia, although there is more substantive clarity over the notification requirements. Students living overseas for more than three months need to send the Student Loan Company (the relevant statutory authority in England which administers the loan program) documentary evidence of how much they earn, or other evidence confirming they are able to support themselves without working.\(^{41}\) Penalties can apply if the debtor does not provide this evidence, including a requirement to repay the loan plus interest in a single lump sum, as well as legal action.\(^{42}\) The Student Loan Company then calculates the debtor’s income in terms of pounds sterling and calculates the required monthly repayment.\(^{43}\)

The New Zealand system ditches income contingency for administrative simplicity, by charging overseas graduates a flat fee based on the level of the outstanding debt.\(^{44}\) This leads to some graduates paying more than they might in an income contingent system (as applies to graduates who remain in New Zealand), with some paying less.

The issue of overseas student debt is still current in both countries. In New Zealand, the number of overseas student debtors increased by 25.2% between 2012 and 2014.\(^{45}\) The New Zealand government has subsequently introduced a new penalty: debtors with outstanding repayments can be prevented from leaving New Zealand again after they return to visit family.\(^{46}\) In England, a quarter of overseas debtors were in default as of April 2013.\(^{47}\)

**Administrative arrangements**

The Bills as drafted rely heavily on administrative aspects for their function. This can be seen in the new notification requirements, the new concept of ‘assessed worldwide income’ and the method of currency conversion and in the acknowledgement of reciprocal tax arrangements.

**Obligation to notify the Commissioner of Taxation when leaving Australia**

Proposed section 154-18 of the *Higher Education Support Act 2003* (HES Act) (at item 2 of Schedule 1 to the Bill) and proposed section 47C of the *Trade Support Loans Act 2014* (TSL Act) (at item 6 of Schedule 2) both require that HELP and TSL debtors (respectively) who:

- have an intention to remain outside of Australia for at least 183 days or
- have been outside Australia for at least 183 days in any 12 month period

must notify the Commissioner of Taxation (Commissioner):

- of their departure no later than seven days after leaving Australia or
- no later than seven days after the end of those 183 days (as the case may be)

- using the approved form.\(^{48}\)

In addition, proposed subsection 154-18(3) of the *HES Act* (at item 2 of Schedule 1) and 47C(3) of the *TSL Act* (at item 6 of Schedule 2) provide that foreign residents with a HELP or TSL debt (respectively) must use an approved form to notify the Commissioner of their annual income, including foreign-sourced income, for the income year within the timeframe specified in the form.

Collectively, these proposed amendments seek to bring to the attention of the ATO individuals who intend to, or currently reside overseas with HELP or TSL debts. Identification of such individuals will obviously assist the ATO

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41. See Student Loans Company (SLC), ‘*How repayment works*’, SLC website, accessed 6 October 2015.
42. Unlike HECS, HELP and TSL loans, English student loans now charge real interest rates of up to 3% above inflation. See Student Finance England, *Student loans – a guide to terms and conditions 2015/16*, p. 12, accessed 6 October 2015.
43. Ibid.
44. Taken from Norton and Cherastidtham, op. cit., p. 32.
46. See New Zealand Inland Revenue, ‘*Repayment obligations for overseas-based borrowers*’, Inland Revenue website, 16 March 2015, accessed 6 October 2015.
47. Ibid.
in terms of targeting information exchanges with foreign tax authorities, as well as resources for enforcement more generally.

Liability of overseas debtors to make payments

Proposed section 154-16 of the HES Act and proposed section 47A of the TSL Act provide a person:

• with a HELP or TSL debt (respectively)
• who is a foreign resident for the income year and
• whose assessed worldwide income exceeds the minimum repayment income for the income year must make repayments to the Commonwealth, via a levy.

As such, the above provisions impose the liability to make repayments on overseas debtors.

Assessed worldwide income

Proposed subsections 154-17(1) of the HES Act (at item 2 of Schedule 1) and 47B(1) of the TSL Act (at item 6 of Schedule 2) both define a debtor’s ‘assessed worldwide income’ as the sum of:

• the person’s repayment income for the income year and
• the person’s foreign-sourced income for the income year, converted into Australian currency.

As a result, overseas debtors will be assessed on their global income, and will be required to make repayments in Australian dollars, raising the issue of currency conversion and fairness, discussed below.

Guidelines and currency conversion and fairness

Proposed section 148–3 of the HES Act (at item 1 of Schedule 1 to the Bill) and existing section 238-10 of the HES Act will empower the Minister to make Overseas Debtors Repayment Guidelines in relation to certain matters as set out in the Bill. Proposed subsection 154–17(2) states that these Guidelines ‘may provide for how to work out a person’s foreign-sourced income ... including how to convert it into Australian currency.’ The Bill is otherwise silent on how this may be achieved, which gives the proposed Guidelines a particular importance from a practical perspective. For the separate TSL scheme, proposed section 47B of the TSL Act (at item 6 of Schedule 2) delegates similar capacity for the rules under the current TSL Act.

Whether rules or Guidelines are used, converting income earned overseas into Australian currency is the most fundamental aspect of ensuring overseas debtors are treated equitably. Without examining the as-yet-unwritten process, it is unclear as to how fairness will be preserved. Australian student debtors have a level of certainty, knowing that changes in their income will be taken into account over a given financial year. In contrast, however, Australian foreign resident student debtors may find that, due to the date on which the Guidelines or rules stipulate a currency conversion, they may be liable for compulsory repayment because of the variations in exchange rates. Will the processes attempt to take that into account by stipulating an average exchange rate for a given period? It’s not known at this point.

In the longer term, student debtors resident overseas may be required to make repayments one year but not the next, even though their overseas income has increased in real terms, because of currency exchange fluctuations. Two student debtors could have entirely different experiences dependent on whether they reside in Australia or overseas, despite similar employment characteristics, qualifications and overall student debt. The fairness of such distinct treatment is left unacknowledged by the policy measure in these Bills.

However, a possible model is provided in subdivision 960C of the Income Tax Assessment Act 1997 (ITAA 1997). Generally the ITAA 1997 provides that income paid in foreign currency is to be converted into Australian currency at the exchange rate that was applicable when it was derived. However, subsection 960-50(7) provides that Regulations may provide alternative rules for income paid in foreign currency. In turn, those

49. This is defined in section 154-5 of the Higher Education Support Act 2003 as the sum of a person’s taxable income, total net investment loss (within the meaning of the Income Tax Assessment Act 1997), the total of any reportable fringe benefits, exempt foreign income for the income year and reportable superannuation contributions (within the meaning of the Income Tax Assessment Act 1997) for the income year.

Regulations allow certain tax payers to choose a period of no more than 12 months to which the income relates, and use an average exchange rate over that period to convert the currency into Australian dollars.  

If a similar approach was adopted in the Guidelines, it would go some way towards ameliorating the fairness issue discussed above. This would be especially true if the Guidelines allowed the HELP or TSL debtor to elect to either use an average exchange rate over the relevant income year, or to use the exchange rate in effect at the time a repayment is made (thus allowing them to choose the most beneficial rate).

Reciprocal tax arrangements

As noted earlier in this Bills Digest, some of the initial impetus for this policy change may have come from dialogue between the Australian and United Kingdom governments, around better exchanging information on each country’s outstanding student loan debtors.

Division 355 of Schedule 1 of the Taxation Administration Act 1953 (TAA 1953) protects the confidentiality of taxpayer information (protected information). It creates strict rules regarding the disclosure of protected information by the Commissioner and taxation officials. In simple terms, disclosure of protected information is only permitted where any privacy concerns are outweighed by the public benefit of disclosures.

Subsection 355-25(1) of Schedule 1 of the TAA 1953 provides that it is an offence if a taxation officer discloses protected information to another entity, including foreign governments. To be able to disclose protected information, a taxation officer must rely on an exception contained in Division 355 of Schedule 1 of the TAA 1953.

The amendments proposed by Schedule 4 of the Bill would allow Australian tax officials to release information to foreign governments, such as the United Kingdom or New Zealand, in order for them to better identify their outstanding student debtors who now live and work in Australia. Item 2 of Schedule 4 then provides that the changes would apply to protected information regardless of when it came into existence.

The proposed reciprocal arrangement is a work in progress, as there has been no record of any formal memorandum of understanding or similar agreement between the two countries. This revised legislative framework would support such arrangements, but their operation and extent is as yet unclear. The Statement of Compatibility with Human Rights in the Explanatory Memorandum argues that any impact on the right to privacy is proportionate, given the offences and protections at Division 355 of Schedule 1 of the TAA 1953.

Summary of the proposed compliance regime

Provisions in Part 1 of Schedules 1 and 2 of the Bill provide a new compliance regime which can be summarised as follows:

- mandatory notification requirements applicable to HELP or TSL debtors who will, or currently do, reside overseas
- providing that a HELP or TSL debtor’s ‘assessed worldwide income’ includes their foreign income, converted into Australia dollars
- a requirement to make payment towards their HELP or TSL debt and
- the application of existing taxation law penalties and shortfall interest where the HELP or TSL debtor fails to make compulsory repayments.

Importantly, proposed section 154-90 of the HES Act (at item 5 of Schedule 1) and proposed section 56A of the TSL Act (at item 8 of Schedule 2) treat a failure to provide the Taxation Commissioner with a notice relating to absence from Australia and foreign income, as required under proposed section 154-18 of the HES Act and proposed section 47C of the TSL Act, as a breach of a taxation law. This means that Part III of the Taxation Administration Act 1953 may be applied in such cases, thus allowing fines to be imposed where a HELP or TSL debtor fails to provide notification requirements applicable to HELP or TSL debtors who will, or currently do, reside overseas.

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52. Taxation Administration Act 1953, subsection 355-30(1) provides that protected information is information that relates to the affairs of an entity, was obtained under or for the purposes of a taxation law, and which identifies or is reasonably capable of identifying the entity. It therefore includes the types of information dealt with by the Bill, accessed 3 November 2015.
53. See: proposed subsection 355-65(8) of Schedule 1 of the TAA 1953, at item 1 of Schedule 4 to the Bill.
debtor fails to notify the Commissioner about their absence from Australia or their foreign income. Where a HELP or TSL debtor notifies the Commissioner they are absent from Australia, and then refuses to make any assessed compulsory repayment, they will be subject to the usual civil penalties associated with a failure to meet HELP or TSL repayment obligations.55

This is similar to the English compliance regime which allows for the imposition of higher interest rates in cases of students resident overseas defaulting, rather the New Zealand regime which gives government agencies the power to prevent New Zealanders from leaving the country again if they have a long-standing unpaid student debt.56 While the effectiveness of these penalties is questionable, by increasing the debt burden as the English system does, it has the potential to act as a clear incentive to make repayments while outside the Australian tax system.

Both the Grattan Institute and Professor Bruce Chapman recommended a New Zealand style compliance mechanism for the recovery of outstanding student debt, with a minimum flat repayment paid by Australians resident overseas, and some form of penalty interest applied to those who default.57

Self-education expenses

Schedule 5 of the Bill contains amendments to various tax laws that will ensure that overseas HELP or TSL debt repayments are not allowable self-education expenses for Australian income tax purposes. Pages 28 to 29 of the Bill’s Explanatory Memorandum explain those amendments adequately.

Alternative approaches to student loan debt

The then Minister indicated that the matter of Australian student debtors resident overseas is an issue both of fiscal sustainability and equity.58 But, as previously noted, the student loan debt held by Australian residents overseas is a tiny proportion of the outstanding student debt burden. In analysing the current student debt load, the Grattan Institute highlighted a number of reforms in its Doubtful Debt report which would make more of an impact to the debt levels of programs like HELP and TSL.59 This included lowering the income threshold for compulsory repayment, changing the indexing of the income threshold, and ending the write-off of student debt upon death.

If there is a ‘serious’ problem with outstanding student debt, these reforms would be far more likely to make a significant impact. In a policy context without clarity over whether programs such as HELP should prioritise access or sustainability, an important signal may be found in how those more substantive reforms have not yet been implemented.

Concluding comments

Is outstanding student loan debt inherently bad? Reforms to student loans programs such as HELP often fail to address that fundamental question. The choice for the policy makers in 1989 was not between a scheme which ensured outstanding debt was fully repaid and one that did not, but between a fully subsidised higher education system that was increasingly costly, and a system where most students contributed in some way to the overall expenditure by government on higher education. Any proportion of student repayment could be seen to be an improvement on a fully subsidised system, even if HECS (later HELP and TSL) doesn’t recoup all outstanding student debt.

Without clarity in the system such as legislated objectives or existing benchmarks, it’s difficult to know what governments should be aiming for. We don’t know if these reforms constitute the closing of an unfortunate loophole that has existed since 1989, or a futile attempt to reduce an overflowing level of student debt—to bail out a flood with a teacup, as it were. Both interpretations are valid. If access is the point of HELP and TSL loans, then concerns regarding sustainability can stop as this inequitable provision has been addressed; if the cost to

55. See: Higher Education Support Act 2003, sections 154-60 and 154-65; Trade Support Loans Act 2014, sections 53 and 54; and Parts 4-15 and 4–25 of Schedule 1 of the Taxation Administration Act 1953 generally (imposes fines, penalties and shortfall interest for failure to pay income tax).
56. See Student Finance England, op. cit., p. 12. ‘You’ll be charged RPI+3% [an interest rate of inflation plus 3% on your debt] until you get in touch with us’, and Inland Revenue (New Zealand), op. cit.
government of providing these loans is the main focus, then further reforms will be needed. Governments being clear on what they expect student loans to provide and how they expect them to work would benefit students, education institutions and policy administrators in the long run.

Further, it isn’t clear that existing systems to recoup outstanding overseas student debt have worked internationally, and these are in countries where the obligation to repay if you go overseas is a long standing matter of policy. These Bills create a whole new obligation, so part of the task will be in creating a cultural shift in Australian students’ attitudes. Delegating the administrative details of how outstanding debt will be recouped to guidelines and rules also makes it difficult to assess their effectiveness, and to allow scrutiny of how students will be able to appeal or contest any administrative decisions involved, as well as safeguard their privacy.

Governments have an incentive to reduce outstanding debt and ensure that student loans are repaid, but the policy trade-off in these Bills could make it less likely for students to go overseas for work and other experiences that may enrich them personally and extend their broader skills and networks.