Higher Education Legislation Amendment (Miscellaneous Measures) Bill 2015

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This Bills Digest should be read in conjunction with the Bills Digest for the Higher Education and Research Reform Amendment Bill 2014 and the Bills Digest for the Higher Education and Research Reform Bill 2014.

Contents

History of the Bill ................................................................. 2
Structure of the Bills Digest .................................................. 2
Purpose of the Bill ............................................................... 2
Structure of the Bill ............................................................. 2
Committee consideration ....................................................... 3
  Senate Standing Committee for the Scrutiny of Bills ............... 3
Policy position of non-government parties/independents .......... 3
Position of major interest groups ......................................... 3
Financial implications .......................................................... 3
  Special appropriations ..................................................... 4
Statement of Compatibility with Human Rights ................. 4
  Parliamentary Joint Committee on Human Rights .............. 4
Key issues and provisions ................................................... 4
  Schedule 1—New Zealand Citizens .................................. 4
  Schedule 2—Torrens University Australia .......................... 4
  Schedule 3—University name change ................................ 4
  Schedule 4—Constitutional bases for other grants ............. 5
  Schedule 5—TEQSA operational plans ............................. 6
  Schedule 6—Research funding ......................................... 7
Concluding comments ........................................................ 7

Date introduced: 22 October 2015
House: House of Representatives
Portfolio: Education and Training
Commencement: Sections 1 to 3 commence on Royal Assent. Schedule 1 commences on 1 July 2016. Schedules 2 to 6 commence on the day after Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, 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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History of the Bill

The Government announced a series of higher education reforms in the 2014–15 Budget. These reforms were presented to Parliament twice, in the form of the Higher Education and Research Reform Amendment Bill 2014 and the Higher Education and Research Reform Bill 2014 (‘the previous Bills’). Both of these Bills were not proceeded with after being negatived in the Senate.

Within the broader reform legislation, there were also a variety of technical or relatively non-contentious changes. This Bill reintroduces these measures in addition to other relatively technical measures to amend higher education and research legislation.

Structure of the Bills Digest

Provisions in Schedules 1, 3 and 6 reflect similar provisions in the previous Bills. Background and analysis of these measures were set out in the relevant Bills Digest. As analysis and background on these provisions has already been provided, this Bills Digest will focus on any commentary on these provisions since the Bills were not proceeded with, as well as provisions in Schedules 2, 4 and 5.

Purpose of the Bill

The purpose of the Higher Education Legislation Amendment (Miscellaneous Measures) Bill 2015 is to amend the Higher Education Support Act 2003 (HESA), the Tertiary Education Quality and Standards Agency Act 2011 (the TEQSA Act), and the Australian Research Council Act 2001 (the ARC Act) to give authority to a number of measures emerging out of the 2014–15 Budget and subsequent technical amendments. These measures include:

- allowing certain New Zealand citizens access to Higher Education Loan Programme (HELP) loans
- recognising the establishment of Torrens University Australia as a private university operating in Australia
- reflecting the creation of Federation University Australia through the merger of the University of Ballarat and the Gippsland campus of Monash University
- confirming the Constitutional basis for other grants to higher education institutions under HESA
- reducing the administrative requirements placed on the Tertiary Education Quality and Standards Agency (TEQSA) and the Australian Research Council (ARC) and
- increasing the funding caps for the ARC.

Structure of the Bill

The Bill contains six schedules. Where these are similar to provisions in the previous Bills, this has been indicated below.

<table>
<thead>
<tr>
<th>Schedule</th>
<th>Status</th>
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<tr>
<td><strong>Schedule 1</strong> amends HESA to allow certain New Zealand students access to HELP Loans</td>
<td>Revised from previous Bills, provisions almost identical with some minor drafting changes for clarity</td>
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<tr>
<td><strong>Schedule 2</strong> amends HESA to recognise the establishment of Torrens University Australia</td>
<td>New</td>
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Schedule 3 amends HESA to take into account the creation of Federation University Australia

Schedule 4 provides further Constitutional basis for the Other Grants in HESA

Schedule 5 removes the requirement for TEQSA to produce an annual operational plan

Schedule 6 reduces reporting requirements on the ARC and increases the legislated funding caps

Committee consideration

The Bill has not been referred to any Committee for consideration.

**Senate Standing Committee for the Scrutiny of Bills**

This Committee had no comment on the Bill.

Policy position of non-government parties/independents

The Australian Labor Party, Australian Greens and other non-government parties and independents do not appear to have formally released any comment on this specific legislation.

However, on 2 September 2014 the Labor Opposition Shadow Minister for Higher Education, Research, Innovation and Industry, Senator Kim Carr encouraged the government to separate out non-controversial measures from its 2014–15 Budget higher education packages in further legislation that the ALP could support. These ‘non-controversial’ measures included extending HELP assistance to certain New Zealand citizens resident in Australia, updating the ARC funding caps, and recognising the establishment of Federation University Australia. This may imply bipartisan support for at least those aspects of the current Bill.

As part of their current policy platform, the Australian Greens prioritise the ‘public good’ of education and focus on the place of public institutions in providing it. Principle 15 of their Education platform document states that:

> Universities are places of learning and research where the needs of the whole community and the values of service to the public, scholarship and academic freedom should take priority over sectional and commercial interests.

This suggests the Australian Greens may not support the expansion of grant funding under HESA to particular private institutions.

Position of major interest groups

The major interest groups in higher education have not yet released any statements in relation to this legislation that could be found.

Financial implications

The Explanatory Memorandum states that the measure to extend access to HELP loans to certain New Zealand students is estimated to lead to additional costs of $12.3 million from 2015–16 to 2018–19, in fiscal balance terms, and that the amendments to ARC funding legislation will allow for additional spending of up to $1,538.9 million from 2015–16 to 2018–19.

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**Special appropriations**

The ARC Act contains a special appropriation which grants the Council the ability to spend up to the legislated amount (known as a ‘funding cap’) for a given financial year on its grant programs.

**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 Bill’s 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 Bill is compatible.\(^\text{12}\)

**Parliamentary Joint Committee on Human Rights**

The Parliamentary Joint Committee on Human Rights considers that the Bill does not give rise to human rights concerns.\(^\text{13}\)

**Key issues and provisions**

As mentioned above, the Bill has three Schedules which are largely similar to provisions previously placed before the Parliament (Schedules 1, 3 and 6), and three Schedules which are entirely new (Schedules 2, 4 and 5). Due to the largely technical nature of these provisions, substantive issues only arise in relation to the funding changes proposed in Schedule 6.

**Schedule 1—New Zealand Citizens**

Since the Government’s decision to not proceed with the previous Bills, the Opposition Shadow Minister for Higher Education, Research, Innovation and Industry, Senator Kim Carr introduced the Higher Education Support Amendment (New Zealand Citizens) Bill 2015 to the Senate on 24 June 2015.\(^\text{14}\)

This would have extended HELP loans to certain categories of New Zealanders resident in Australia. The provisions were almost identical to those in Schedule 10 of both previous Bills. Second reading of this private member’s Bill was moved on 24 June 2015 and it was debated further on 17 September 2015.

The provisions in the current Government Bill reflect some minor changes from the previous Bill, presumably for clarity, and allow the Government to implement its 2014–15 Budget measure.

It should be noted this policy change was first proposed by the then Labor Government in June 2013, but was not legislated prior to the 2013 election.\(^\text{15}\)

**Schedule 2—Torrens University Australia**

This Schedule adds a new higher education provider to HESA. This would include Torrens University Australia under Table B of the Act, which lists private Australian universities. The mechanisms of funding under HESA allow for higher education institutions to be listed under a Table of the Act, which identifies them as eligible for certain grants.\(^\text{16}\)

Torrens University Australia is currently registered with the appropriate regulator, TEQSA.\(^\text{17}\) Should this amending Bill be passed, Torrens University Australia will be able to receive research funding under Part 2-3 and Part 2-4 of HESA.

**Schedule 3—University name change**

As with proposed Schedule 2, this Schedule contains a technical amendment reflecting the change of name of the University of Ballarat to Federation University Australia (FedUni). FedUni was created through the amalgamation of the University of Ballarat and the Monash University Gippsland Campus in 2014.\(^\text{18}\)

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12. The Statement of Compatibility with Human Rights can be found at pp. 4–6 of the Explanatory Memorandum to the Bill.
16. Torrens University would not be eligible for funding under the Commonwealth Grants Scheme, which subsidises places for students at public higher education providers in Australia.
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HESA includes public universities as listed providers under Table A of the Act and thereby identifies them as eligible for certain grants. The name change would reflect the updated nature of FedUni and ensure there is no legal question over its current funding eligibility.

Schedule 4—Constitutional bases for other grants

According to the Bill’s Explanatory Memorandum, this Schedule ‘confirms the relevant heads of constitutional power that Part 2-3 of HESA relies upon’ to ensure there is sound basis for the Other Grants made under HESA.19 These Other Grants include:

- grants to support equality of opportunity in higher education
- grants to support the capital development projects of higher education providers
- grants to support research by, and the research capability of higher education providers and
- grants to support the development of systemic infrastructure used by higher education providers.

The Other Grants under HESA are governed by a series of Guidelines and have been operating in various forms since the introduction of HESA in 2003.20 Neither the Explanatory Memorandum to this Bill, nor the Second Reading Speech, clarify why these Other Grants need additional Constitutional authority. As such, the inclusion of proposed section 41-95 appears to be a reaction to the High Court decisions in Pape, Williams (No. 1) and Williams (No. 2) (the Williams decisions).21

In simple terms, the High Court has held that even if the Commonwealth has a valid constitutional basis for spending money, specific legislative authorisation beyond an appropriation Act is usually required before it can do so.

Until the High Court’s 2009 decision in Pape, the prevailing view was that the Commonwealth had the power to appropriate monies to a purpose or matter irrespective of whether or not the Commonwealth had any legislative power in relation to that purpose or matter. This purported ‘spending power’ was inferred from sections 81 and 83 of the Constitution, which deal with appropriations.

However, in Pape the High Court ruled that sections 81 and 83 of the Constitution do not of themselves provide the Executive Branch of the Commonwealth Government with a substantive spending power.22 Instead, the Commonwealth has to show some legal basis, beyond the mere passing of an Appropriation Act, for expenditure to be lawful. Put simply, spending can only usually be authorised by legislation that falls within a subject matter head of power under section 51 of the Constitution or by the ‘nationhood power’.23

In Williams (No. 1) the High Court again held that the Executive Branch of the Commonwealth Government cannot (generally) spend money unless it is supported by constitutionally valid, legislatively provided power. Hayne J noted pointedly that the proposition that just ‘because certain expenditure could be authorised by

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23. The Commonwealth has a subject matter head of power that supports some forms of funding for higher education. Section 51(xxixA) of the Constitution provides that the Commonwealth can legislate amongst other things for ‘the provision of … benefits to students’. The High Court has held that such laws must do more than provide some advantage to a student. At minimum there must be some form of material aid such as money or the provision of a service to an identified or identifiable student to provide for human wants which are as a consequence of being a student: Williams v Commonwealth of Australia (2014) 252 CLR 416, [2014] HCA 23, paragraphs [38]–[48] (French CJ, Hayne, Kiefel, Bell and Keane JJ) (in particular [46]), accessed 2 November 2015. Whilst this power would support funding related to the Higher Education Loan Programme (HELP), it would not necessarily support funding for ‘other grants’ under HESA.

In relation to the ‘nationhood power’, the High Court has held that the power (which arises from the incidental (section 51(xxxix) and Executive/prerogative powers (section 61) of the Constitution along with the existence and character of the Commonwealth as a national government) confers upon the Commonwealth the power to ‘engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation’; Victoria v The Commonwealth and Hayden (1975) 134 CLR 338, [1975] HCA 52, p. 397.
statute, it can be undertaken by the Executive’ was false.\textsuperscript{24} Put simply, even if the Constitution provides a head of power that could support legislation that could then authorise certain expenditure, this does not mean the Government can spend money prior to such legislation being passed. The Commonwealth Parliament passed what it perceived as remedial legislation to counteract the Williams (No. 1) decision.\textsuperscript{25} The validity of that legislation was the focus of Williams (No. 2).

In Williams (No. 2) the High Court held that the remedial legislation was also not authorised under the incidental power (section 51(xxxix) of the Constitution) because it would allow any appropriations made under sections 81 and 83 of the Constitution to be spent as the Executive branch of the Commonwealth Government saw fit, against the authority of Pape. Put simply, once again the High Court held that all expenditures must be authorised by legislation supported by a relevant constitutional power—it is not simply enough to pass an Appropriation Act.

The inclusion of proposed section 41-95 appears to be a reaction to the Pape and Williams decisions, as it outlines the following additional constitutional heads of power that authorise the making of Other Grants under the HESA:

- the corporations power (section 51(xx) of the Constitution)
- the trade and commerce power (section 51(i) of the Constitution)
- the postal and telegraphic power (section 51(v) of the Constitution)
- the astronomical and meteorological observation power (section 51(viii) of the Constitution)
- the census and statistics power (section 51(xi) of the Constitution)
- the aliens power (section 51(xix) of the Constitution)
- the pension power (section 51(xxiii) of the Constitution)
- the student and sickness benefits power (section 51(xxiiiA) of the Constitution)
- the race power (section 51(xxvi) of the Constitution)
- the external affairs power (section 51(xxix) of the Constitution) and
- the ‘incidental’ power (section 51(xxxix) of the Constitution).\textsuperscript{26}

Whilst the inclusion of proposed section 41-95 does not guarantee that aspects of the Bill will not be susceptible to some form of constitutional challenge in the future, it would appear it is aimed at ensuring that other provisions in the Bill remain valid in the event of such a challenge being successful, and hence any grants made under the alternative heads of power.

Schedule 5—TEQSA operational plans

This Schedule removes the current requirement for TEQSA to produce an annual operational plan.\textsuperscript{27} This requirement has been superseded since the establishment of TEQSA in 2011 by a requirement to prepare a corporate plan under the Public Governance, Performance and Accountability Act 2013, which applies to all accountable authorities such as the ARC.\textsuperscript{28} This is intended to simplify and standardise governance requirements across the public sector.

Item 3 of the Schedule changes the date on which the corporate plan must be provided to the Minister for approval from 31 January to 30 April each year. This is intended to allow the Commissioners time to prepare the plan in conjunction with government policy as set out in the relevant Portfolio Budget Statements.

\textsuperscript{24} Williams \textit{v} Commonwealth of Australia (2012) 248 CLR 156, \cite{Williams v Commonwealth of Australia (2012)} [2012] HCA 23, as per Hayne J at [194].

\textsuperscript{25} Financial Framework Legislation Amendment Act (No. 3) 2012, accessed 1 November 2015.


Schedule 6—Research funding

This Schedule contains revised administrative arrangements and updated funding caps for the ARC. Similar to Schedule 5, items 2 and 3 remove the current requirement for the ARC to produce a corporate plan.29

The ARC operates on a rolling legislative authorisation for its funding; the Australian Research Council Act 2001 has to be amended regularly to allow for additional funding across the forward estimates and to take into account indexation.

The updated funding caps in items 4 and 5 of the Schedule allow the ARC to fund its programs through the 2018–19 financial year. It is unclear whether these updated funding caps continue with the efficiency dividend that was proposed by the then Labor Government in 2013.30 The efficiency dividend was also included in the 2014–15 Budget and was due to take effect from 2015–16.31 As of the 2015–16 Budget, this remained government policy.32 Graph 1 below details ARC funding trends from 2010 and suggests that neither government has consistently increased ARC funding.

Graph 1: ARC funding caps, as legislated and proposed, 2010 onwards.


Concluding comments

The amendments proposed are largely technical and non-controversial in nature. They will ensure newly established higher education providers can receive equitable funding support and New Zealand citizens who have been in Australia for most of their lives can access higher education loans. The updated funding caps in Schedule 6 reflect the ways in which government research funding is often beset by broader budget priorities.

32. No changes to budget settings in relation to the ARC efficiency dividend were announced as part of the 2014–15 MYEFO or the 2015–16 Budget. The Department of Education and Training confirmed the ARC efficiency dividend remained government policy in a recent Estimates hearing. See Senate Education and Employment Legislation Committee, Proof Committee Hansard, 21 October 2015, p. 58, accessed 19 November 2015.