Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015 [and] Education Services for Overseas Students (Registration Charges) Amendment (Streamlining Regulation) Bill 2015

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Date introduced: 17 September 2015
House: House of Representatives
Portfolio: Education and Training
Commencement: The commencement date for each Schedule is provided for in section 2 of each Bill.

Links: The links to the Bills, their Explanatory Memorandum and second reading speeches can be found on the Bills’ home pages for the Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015 and the Education Services for Overseas Students (Registration Charges) Amendment (Streamlining Regulation) 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.
The Bills Digest at a glance

What the Bills are

This Bills Digest relates to two Bills being:

• Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015 (the Streamlining Regulation Bill)
• Education Services for Overseas Students (Registration Charges) Amendment (Streamlining Regulation) Bill 2015 (the Registration Charges Bill)

What the Bills do

• The Streamlining Regulation Bill amends the existing Educational Services for Overseas Students regulatory framework, including the Education Services for Overseas Students Act 2000 (ESOS Act).
• With the establishment of the Tertiary Education Quality Standards Agency for higher education providers, and the Australian Skills Quality Agency for vocational education and training providers, the Streamlining Regulation Bill allows for greater clarity over ‘who does what’ in providing assurance for Australia’s overseas education market.
• The Streamlining Regulation Bill simplifies administrative arrangements. It allows for the use of Ministerial directions in limited circumstances, provides an internal review process, and enhances the role of the Tuition Protection Service (TPS) Director to seek out, keep and share information with ESOS agencies as needed, with resultant offences arising in the event of the provision of false or misleading documents.
• The Streamlining Regulation Bill also reduces existing regulatory requirements on overseas education providers. These regulatory requirements were introduced by the previous Labor government as part of reforms in 2010–11.
• The Registration Charges Bill contains minor consequential changes to the entry to market charge regime in the Education Services for Overseas Students (Regulatory Charges) Act 1997.

How the Streamlining Regulation Bill works

• The Bill creates a new concept, that of the ESOS agency. This ensures each type of education provider can be properly approved by the appropriate regulator. The ESOS agency is allowed to approve an education provider for a period of up to seven years.
• The Bill clarifies that the subordinate regulatory standards created under the ESOS Act apply in the registration of providers and the monitoring of registration compliance.
• A new process of internal review is created so that providers may apply for an administrative review of a regulator’s decision before the provider applies to the Administrative Appeals Tribunal.
• The Minister is granted new powers to give directions to the ESOS agency in regards to their performance under the ESOS Act. This power is limited to ensure the Minister does not interfere with the approval of a particular education provider.
• Likewise, the TPS Director is granted new powers to seek information from a provider through a production notice, is allowed to retain documents for purposes under the ESOS Act. These powers are supported by the creation of a new offence involving the production of a false or misleading document.
• The amendments remove existing aspects of the ESOS framework in relation to the concept of a study period, the requirement for non-exempt providers to hold student fees in a designated account, and the requirement for providers to only receive 50 per cent of student fees at a time.

Why the Bill has been introduced

• The Bills result from a 2014 policy commitment to reform the ESOS framework.
Purpose of the Bills
The purpose of the Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015 (the Streamlining Regulation Bill) is to amend the Education Services for Overseas Students Act 2000,1 (ESOS Act) and a number of other statutes to:

• clarify the roles of regulatory authorities (ESOS agencies), as well as the Minister and the Secretary, in the approval and monitoring of providers under the ESOS Act
• ensure the subordinate legislative instruments of the ESOS framework are taken into account by decision makers and providers
• allow for an internal review of decisions made by ESOS agencies, as well as a recourse to appeal before the Administrative Appeals Tribunal
• provide for Ministerial directions to ESOS agencies
• enable the TPS Director to require the production of documents or information as may assist with the performance of the TPS Director’s functions, and to retain those documents for a set period
• create a new offence should the document provided be false or misleading, with a penalty of imprisonment for 12 months
• repeal the concept of study period from the legislation, and the associated requirement for providers to have written agreements with providers stating the cost and duration of their study
• allow students to choose to pay more than 50 per cent of their student fees up front2 and
• remove the requirement for providers to place student fee revenue in a separate, designated account.

The purpose of the Education Services for Overseas Students (Registration Charges) Amendment (Streamlining Regulation) Bill 2015 (Registration Charges Bill) is to make minor consequential changes to the entry to market charge regime in the Education Services for Overseas Students (Registration Charges) Act 19973 (ESOS Registration Charges Act).

Structure of the Bills
The Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015 contains six Schedules:

• Schedule 1 streamlines existing provisions of the ESOS Act, the Education Services for Overseas Students (TPS Levies) Act 2012,4 the National Vocational Education and Training Regulator Act 20115 and the Tertiary Education Quality and Standards Agency Act 20116 to allow for a more consolidated regulatory approach by ESOS agencies
• Schedule 2 creates a new process for internal review of decisions within the ESOS Act
• Schedule 3 amends the ESOS Act, the National Vocational Education and Training Regulator Act and the Tertiary Education Quality and Standards Agency Act to allow for Ministerial directions to be given to ESOS agencies in certain circumstances
• Schedule 4 clarifies the role and powers of the TPS Director within the ESOS Act
• Schedule 5 specifies the deregulatory aspects of the proposed policy change within the ESOS Act and
• Schedule 6 lists amendments in relation to transition and application of the changes above.

The Registration Charges Bill has one Schedule the amendments in which clarify the operation of the entry to market charge.

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2. Payment of more than 50 per cent of student fees up front is currently prohibited.
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 comprises the *ESOS Act, Education Services for Overseas Students Regulations 2001*¹ (ESOS Regulations), the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students² (the National Code) and the *ESOS Registration Charges Act*. The legislative framework provides a nationally consistent approach to registering education providers and sets out clear roles and responsibilities for providers wanting to teach overseas students.

All approved providers are listed on the Commonwealth Register of Institutions and Courses for Overseas Students³ (CRICOS). This is the official Australian Government website that lists all Australian education providers to offer courses to people studying in Australia on student visas and the courses offered—whether the course be in the nature of schooling, vocational education and training (VET), English language assistance, higher education, or other learning.

The principal objects of the ESOS framework are:

- to provide tuition assurance, and refunds, for overseas students for courses for which they have paid and
- 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.

Regulatory history

The single framework to safeguard overseas students was first introduced by the Hawke government in the form of the *Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991.*⁴ That Act was subsequently repealed and replaced by the *ESOS Act.*⁵

The history of the ESOS Act is one of ongoing iterative reform. Following an independent evaluation in 2004–05, it was amended in 2006 and 2007 by the Howard government, which also created a legislative instrument in the form of a National Code for providers.⁶ This was an attempt to set standards for the industry.

Following media exposés of unethical behaviour in the sector, the Rudd government made further amendments in 2009.⁷ The 2009 amendments required the re-registration of all institutions registered on CRICOS by 31 December 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.⁸

In 2010, the government undertook to review the operation of the ESOS Act. The review was chaired by the former Member of Parliament, Bruce Baird, and resulted in 19 recommendations.⁹ The recommendations were

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11. 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, 62–66, 2000–01, Department of the Parliamentary Library, Canberra, 2000, all accessed 13 October 2015.
13. For instance, N O’Malley, *‘Tenth school for overseas students collapses’*, Sydney Morning Herald, 7 November 2009, p. 5; H Gilmore and N O’Malley, *‘Review to bring overseas students’ industry to account’*, The Age, 14 August 2009, p. 9, accessed 29 November 2015.
implemented in stages, with three key tranches of legislative amendments in 2010 and 2011.\textsuperscript{10} The changes included:

- a single national register of all providers approved to offer education services to overseas students
- a risk-management approach to registration
- a new Tuition Protection Service (TPS), paid through a levy on providers
- requirements to place student fees in a separate account and to limit the amount of pre-paid fees that may be collected, in order to make refunds to students more convenient and reduce the financial exposure to the TPS and
- strengthening record keeping obligations on providers.

These changes commenced in 2012.

**Broad policy framework**

The changes to ESOS should be seen as part of a series of measures to strengthen Australia's international education market and make it more attractive to overseas students. These reforms take into account both its export value for the Australian economy, and its cultural and diplomatic heft.

In the lead-up to the 2013 Federal election, the Liberal Party announced its intention to establish ‘a new $100 million Colombo Plan that will give Australian university students an opportunity to study in our region to deepen our engagement with our neighbours’.\textsuperscript{17} Following the Coalition’s Federal election success, the incoming Minister for Education, Christopher Pyne, referred to the New Colombo Plan in his first speech to international education stakeholders, given in October 2013.\textsuperscript{18}

Future policy commitments to streamline student visa processing and develop a national strategy for international education were also flagged at the time. The streamlined student visa processing was announced in June 2015, with implementation by June 2016.\textsuperscript{19} A draft national strategy for international education has also been released with a final strategy intended to be released in the second half of 2015.\textsuperscript{20}

**Basis of the policy commitment**

In April 2014, Mr Pyne confirmed that the Department of Education had been consulting stakeholders on changes to the Education Services for Overseas Students framework.\textsuperscript{21} This was grouped with further reforms, such as streamlined student visa processing, and reforming the governance of the Tertiary Education Quality and Standards Agency (TEQSA), to reduce the regulatory burden on Australia’s tertiary education sector and ensure it was not ‘at risk of being left behind’ in international rankings.\textsuperscript{22}

\textsuperscript{16} For further information on the Gillard government reforms to ESOS, see C Kempner, [*Education Services for Overseas Students Legislation Amendment Bill 2010*, Bills digest, 40, 2010–11, Parliamentary Library, Canberra, 2010; C Dow, [*Education Services for Overseas Students (Registration Charges) Amendment Bill 2011* (and) *Education Services for Overseas Students Amendment (Registration Charges Consequentials) Bill 2011*, Bills digest, 32–33, 2011–12, Parliamentary Library, Canberra, 2011; C Dow, [*Education Services for Overseas Students (Registration Charges) Amendment (Tuition Protection Service) Bill 2011* (and) *Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Bill 2011* (and) *Education Services for Overseas Students (TPS Levies) Bill 2011*, Bills digest, 95, 2011–12, Parliamentary Library, Canberra, 2012, all accessed 13 October 2015.\textsuperscript{17} See Liberal Party of Australia and The Nationals, [*The Coalition’s policy for foreign affairs*, Coalition policy document, Election 2013, accessed 13 October 2015.\textsuperscript{18} C Pyne (Minister for Education), [*New architecture for international education: opening speech to the Australian International Education Conference: Canberra*, speech, 9 October 2013, accessed 14 October 2015.\textsuperscript{19} C Pyne (Minister for Education and Training) and M Cash (Assistant Minister for Immigration and Border Protection), [*Simplified student visa process to boost Australia’s international education sector*, media release, 16 June 2015, accessed 11 August 2015.\textsuperscript{20} C Pyne (Minister for Education and Training), [*Harnessing the knowledge boom: putting international education at the heart of Australia’s future prosperity*, media release, 1 April 2015, accessed 2 November 2015.\textsuperscript{21} C Pyne (Minister for Education), [*Address to the Association for Tertiary Education Management, South Australia*, speech, 9 April 2014, accessed 14 October 2015.\textsuperscript{22} Ibid.
Discussion paper
These consultations formed the basis of a discussion paper, released on 1 October 2014. Submissions were open for a month. The discussion paper included the following terms of reference for the review of ESOS:

- reducing burdens on education institutions offering courses to international students by ensuring government and statutory agencies request only the information they genuinely need and use to ensure Australia’s education system is of the highest quality and integrity
- ensuring a more efficient registration process for education institutions by streamlining domestic and international education standards and quality assurance frameworks
- increasing opportunities and flexibility for organisations to provide education in a contemporary manner that meets the needs of international students and
- supporting the student visa system.

The discussion paper proposed 31 potential changes to the ESOS framework, including the ESOS Act, National Code and various Regulations which would achieve these aims. These included:

- streamlining of decision making powers and removal of duplication or inconsistency across regulatory agencies
- removal of requirements to have a designated account and to not take more than 50 per cent of tuition fees for a course before a student commences and
- reconsideration of current statutory reporting timelines.

Further consultation
Further submissions were sought in response to these proposed changes, and further consultation was flagged in relation to a revised National Code in late 2014 or early 2015.

A post-implementation review of the creation of the TPS in December 2014 found it had ‘broad support’ from the industry while concerns about ‘significant additional compliance workload’ as a result of its introduction remained. The post-implementation review flagged the discussion paper and associated processes to reform ESOS as a way of addressing these concerns.

Release of exposure draft legislation
On 7 July 2015, the Department of Education and Training published exposure draft legislation along with an explanatory overview on its website, and laid out a month-long process for consultation. The Assistant Minister for Education and Training, Simon Birmingham, also formally announced the release of the exposure draft legislation for consultation.

The submissions in response to the exposure draft and the preceding discussion paper have not been made publicly available on the Department of Education and Training website.

Difference
The Bills which were introduced into the House of Representatives on 17 September 2015 are not in exactly the same terms as the exposure drafts. The substantive difference can be found in Schedule 5 to the Streamlining Regulation Bill. The ESOS Act in its current form has a prohibition on a student paying more than 50 per cent of

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25. Ibid.
26. Ibid.
27. Department of Education, Tuition Protection Service post-implementation review, report prepared for the Office of Best Practice Regulation within the Department of Prime Minister and Cabinet, Department of Education, Canberra, December 2014, pp. 27–8, accessed 1 November 2015.
their fees for a course before the student has begun the course, save if the course is no more than 24 weeks long.\textsuperscript{30}

The exposure draft legislation contained a proposal which would allow the student to request to pay more than 50 per cent, placing the onus on the student or their representative.\textsuperscript{31} This was in line with options flagged in the relevant discussion paper. However, the Streamlining Regulation Bill changes the duration of the exemption from 24 weeks to 25 weeks. According to the accompanying Regulatory Impact Statement, this change reflects stakeholder feedback to the exposure draft legislation.\textsuperscript{32}

**Committee consideration**

*Senate Standing Committees on Education and Employment*

The provisions of the Bills have been referred to the Senate Education and Employment Legislation Committee (Education and Employment Committee) for inquiry and report by 30 November 2015. Details of the inquiry are available on the Committee’s website.\textsuperscript{33}

*Senate Standing Committee for the Scrutiny of Bills*

The Committee chose to make no comment on these Bills.\textsuperscript{34}

**Policy position of non-government parties/independents**

No formal media release from the relevant non-government party spokespersons or shadow ministry has been identified in relation to this legislation upon its introduction to the House of Representatives.

In the second reading debate, the Shadow Assistant Minister for Education and for Higher Education, Amanda Rishworth stated:

> I will state from the outset that Labor offers reserved support for this legislative package but does remain concerned with several of the specifics of the bills … We are absolutely willing to support reducing unnecessary red tape, but what we do not want to see is the watering down of protections for our international students and, indeed, of those protections that would threaten international education, which is our big export industry…. [The ALP] does reserve its right to make amendments in the Senate if needed.\textsuperscript{35}

Representatives of the Australian Greens, the Palmer United Party and independent members did not make a formal contribution to the debate in the House of Representatives according to Hansard.

**Position of major interest groups**

Industry stakeholders are generally supportive of the changes on the basis that they remove burdensome regulation from their work. Rod Camm, Chief Executive Officer of the Australian Council for Private Education and Training, said:

> The proposed changes to Australia’s Education Services for Overseas Students (ESOS) legislation will give Australia’s Education sector a real chance. By reducing unnecessary regulation, providers will be able to get on with the task of growing the sector and providing quality education to students from around the world.\textsuperscript{36}

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\textsuperscript{30} For the current prohibition, see Section 27, *Education Services for Overseas Students Act 2000*, accessed 1 November 2015.

\textsuperscript{31} Department of Education and Training, *Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015*: [exposure draft], schedule 5, item 13, accessed 1 November 2015.

\textsuperscript{32} Department of Education and Training, *Regulation impact statement: Proposed changes to the Education Services for Overseas Students framework*, Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015, p. 25, accessed 1 November 2015.

\textsuperscript{33} Senate Education and Employment Legislation Committee, ‘[Inquiry into the Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015 and the Education Services for Overseas Students (Registration Charges) Amendment (Streamlining Regulation) Bill 2015 homepage]’, Parliament of Australia website, accessed 24 November 2015.

\textsuperscript{34} Senate Standing Committee for the Scrutiny of Bills, *Alert digest*, 11, 2015, The Senate, 14 October 2015, pp. 8–9, accessed 24 November 2015.


Similarly, Anne-Marie Lansdown, Deputy Chief Executive of Universities Australia stated that:

Compliance is now at a point where certain provisions are actually limiting student choice and the capacity of education providers to provide the best options for their students ...These bills address the concerns head-on and will allow universities to focus on what they do best, delivering an international education experience of uncompromising quality.  

Organisations representing students and their interests have not been supportive of the proposed reforms in Schedule 5 to the Streamlining Regulation Bill.

The National Tertiary Education Union argued the Bills should not be proceeded with ‘in their current form’ as the existing legislation provides ‘very important safety net provisions introduced in 2012’ which should not be removed.

In their response to the initial discussion paper, dated October 2014, the Council of International Students Australia (CISA) endorsed the administrative and technical changes, but did not support the removal of the 2012 requirements on providers. CISA further expressed a view that the reform process at that stage focussed on the education providers and not on the students who were protected under the ESOS framework:

ESOS is meant to be consumer protection legislation and international students are the consumers defined within the Act. As with the consultation process itself, the perspective of students seem to have not been considered in detail.

Financial implications

The cost of the system changes required to implement the administrative reforms has been estimated at $0.4m. There is no financial impact associated with the clarification of the entry to market charge.

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 Bill is compatible.

Parliamentary Joint Committee on Human Rights

The Parliamentary Joint Committee on Human Rights examined the Bill and stated that ‘[the Bills]... do not require additional comment as they either do not engage human rights or engage rights (but do not promote or limit rights)’.

Key issues and provisions—Streamlining Regulation Bill

Overview

Broadly two key issues have emerged in the commentary and policy basis which have still not been explicitly addressed by the Government in these Bills or the accompanying Explanatory Memoranda:

• the fragmented regulatory environment and

37. Universities Australia, Legislation will cut red tape and strengthen international education, media release, 17 September 2015, accessed 1 November 2015.
40. Ibid., p. 2.
41. Explanatory Memorandum, Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015, p. 7, accessed 3 November 2015.
42. Explanatory Memorandum, Education Services for Overseas Students (Registration Charges) Amendment (Streamlining Regulation) Bill 2015, p. 2, accessed 3 November 2015.
43. The Statement of Compatibility with Human Rights can be found at pp. 9–15 of the Explanatory Memorandum to the Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015.
44. Parliamentary Joint Committee on Human Rights, Twenty-ninth report of the 44th Parliament, October 2015, p. 1 [para 1.7].
• the proposed ‘audience’ for the reforms.

The fragmented regulatory environment

Education services for overseas students can cover a variety of educational providers in different sectors—that is, schools, vocational education and training institutions, or higher education institutions such as universities. Those overseas students may be attending on a full- or part-time basis, seeking a formal qualification or undergoing English language training. The institutions they attend may be private or public institutions in nature. Currently, each sector has a different regulatory authority.

The amendments in Schedule 1 to the Streamlining Regulation Bill attempt to clarify this by creating the administrative concept of the ESOS agency for an educational provider. 45 Rather than being a singular agency, proposed section 6C of the ESOS Act prescribes the ESOS agency for each type of provider as follows:

• for a registered higher education provider the ESOS agency will be TEQSA
• for a registered VET provider the ESOS agency will be the National VET Regulator (currently ASQA)
• for an approved school provider the ESOS agency will be the Secretary and
• for a person or entity that provides an ELICOS or a Foundation Program, or for any other provider or registered provider, the ASOS agency will be determined by the Minister by legislative instrument. 46

Where a provider falls into more than one class of providers (that is, provides both higher education and school courses) the Minister may determine what the ESOS agency or agencies will be for that provider. 47

Providers must apply directly to their ESOS agency for registration, for renewal of registration and to add courses at one or more locations to an existing registration. 48

Item 11 of Schedule 1 to the Streamlining Regulation Bill repeals the current definition of designated authority. 49 Currently, in order to be registered to deliver education services to overseas students an organisation must first be approved by the designated authority. The designated authority ‘is determined by the sector and jurisdiction a provider operates in’. 50 For registered higher education providers the designated authority is TEQSA, for registered VET providers the designated authority is ASQA and for approved school providers the designated authority will be the Department of Education. The creation of the ESOS agency concept, and the streamlining of the current registration and monitoring of providers by vesting of powers directly in ASQA and TEQSA as the relevant ESOS agency, means that these agencies will no longer need to be classed as designated authorities. However, the important role of the states and territories is retained in relation to school providers, which will be classed in the revised ESOS Act as designated state authorities. 51

Key issue: possible inconsistency of application

The ESOS agency concept simplifies the existing fragmented regulatory environment rather than unifying it.

Under proposed section 7A of the ESOS Act it will be for the relevant ESOS agency to decide whether a provider or registered provider is fit and proper to be registered. 52 Proposed subsection 7A(2) sets out those matters to which the ESOS agency must have regard in making that decision, including, for instance, whether the provider or a related person 53 of the provider has ever been convicted of an offence, whether a condition has ever been imposed on the registration of the provider (or related person of the provider) and whether the provider (or related person of the provider) has entered into bankruptcy or insolvency.

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45. Item 12 of Schedule 1 to the Streamlining Regulation Bill inserts the definition of ESOS agency into section 5 of the ESOS Act.
46. Item 29 of Schedule 1 to the Streamlining Regulation Bill inserts proposed section 6E which contains the definition of provider.
47. ESOS Act, proposed subsection 6C(3).
48. ESOS Act, proposed Part 2—Registration of Providers, inserted by item 32 of Schedule 1 to the Streamlining Regulation Bill.
49. Existing section 7A of the ESOS Act which sets out the meaning of designated authority is repealed by Item 30 of Schedule 1 to the Streamlining Regulation Bill.
51. Explanatory Memorandum, Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015, p. 11; Item 12 of Schedule 1 to the Streamlining Regulation Bill inserts a new definition of designated state authority.
52. Item 30 of Schedule 1 to the Streamlining Regulation Bill inserts proposed section 7A into the ESOS Act.
53. Proposed subsection 7A(3) of the ESOS Act defines a related person of a provider or registered provider as an associate of the provider who has been, is or will be, involved in the business of the provision of courses by the provider, or a high managerial agent of the provider.
However, it assumes the adequacy of existing regulatory arrangements, which may be an issue. For instance, following numerous media reports into the private VET sector, the Senate Standing Committee on Education and Employment (Senate Committee) undertook an inquiry into the operation, regulation and funding of private vocational education and training (VET) providers in Australia. Private VET providers are a subset of those offering educational services to overseas students. In its report, the Senate Committee found:

... there is every reason to doubt that ASQA [the national regulator for VET] is fit for purpose, and that the regulatory architecture of VET may need a revamp.54

ASQA provides a risk-management approach to its VET providers and does not automatically audit them or assess the quality of their educational offerings or performance of their staff. While this ensures a focus on those providers with characteristics of high-risk, it also means regulators have to constantly evolve their understanding of what these characteristics are, and at times, may expose both the regulator and the student to an inadequate understanding of the risk.

The Victorian Minister had previously raised concerns about ASQA’s capacity to inform the Victorian government regarding its concerns as to the fitness of certain private VET operators.55 The diverse nature of the education services sector would require the separate regulators to work together and communicate adequately.

The effect of the Streamlining Regulation Bill is that those providers offering VET courses will continue to be approved by ASQA, higher education providers will continue to be approved by the Tertiary Education Quality Standards Agency, and the Minister may determine, by legislative instrument, the ESOS agency for an ELICOS, Foundation Program or other provider of education services.56 If there are any issues with the regulatory capacity of these ESOS agencies, this can be raised in the Parliament.

The ESOS agency for schools is the Secretary of the Commonwealth Department of Education and Training.57 However, it is for the designated State authority to decide whether an approved school provider is fit and proper to be registered. The Streamlining Regulation Bill does not impose a duty on a designated State authority.58

The Streamlining Regulation Bill maintains a risk-management approach in the regulation of providers and registered providers. As each ESOS agency may interpret this risk-management approach differently, as well as independently assess the relevant elements of the ESOS framework in approving a given provider, there is scope for significant inconsistency and quality issues in comparing providers. If a provider is approved and listed on CRICOS, overseas students will simply know that it complies with the ESOS framework—it may be possible for a provider to do so and not provide a high quality of education, as completion rates or objective auditing and assessment are not involved in ESOS approvals.

**Key issue: compliance burden**

The Innovative Research Universities (IRU) group has also raised concerns with the fragmented regulatory approach. Each of its constituent universities is also registered with the higher education regulator, TEQSA. IRU argues that those institutions which have been regulated by a given provider under their existing legislation should automatically have approval to be registered as a CRICOS institution, rather than require separate approval processes under the ESOS framework.59

This assumes that a given approved institution—say a school, or a VET provider, or a university—does not require any further assurance just because it is teaching overseas students. However, overseas students may have different expectations regarding course information, quality and refunds in case of institutional collapse. There may also be policy reasons to consider the education services for overseas students sector separately, because of the reputational damage to Australia’s economy more broadly. IRU’s concerns go in part to the still fragmented nature of Australia’s education sector.

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56. *ESOS Act*, proposed subsections 6C(1) (table item 4) and 6C(2).
57. *ESOS Act*, proposed subsections 6C(1) (table item 3).
58. *ESOS Act*, proposed section 7AA, inserted by item 30 of the Streamlining Regulation Bill.
Ministerial directions
This could be addressed by the new power of Ministerial direction contained in Schedule 3 to the Streamlining Regulation Bill. Schedule 3 inserts proposed section 170C into the ESOS Act to empower the Minister, by way of legislative instrument, to give a direction to an ESOS agency in relation to its functions under the Act. In that case, the ESOS agency must comply with the direction. However, the Minister is restricted from giving a direction about, or in relation to, a particular provider. Section 159 of the NVETR Act is amended so that the National VET Regulator is subject to a Ministerial direction under section 170C of the ESOS Act. Section 135 of the TEQSA Act is similarly amended so that TEQSA is subject to such a Ministerial direction. A direction made by the Minister is subject to disallowance and the Minister may consult with the Immigration Minister about the giving of the direction.

Key issue: school providers
These amendments allow a Minister to direct an ESOS agency as to how it should perform its functions and help maintain consistency across the different ESOS agencies. However, that does not overcome the inability of the Streamlining Bill (for Constitutional reasons) to regulate school providers in the same way as non-school ESOS providers. The requirement for the Department to engage with the appropriate designated State authority for a school provider would likely complicate monitoring and assurance.

The proposed ‘audience’ for the reforms
The deregulatory provisions in Schedule 5 to the Streamlining Regulation Bill remove key aspects of the previous Labor government’s reforms. Specifically, the proposed amendments in Schedule 5 aim to:

• remove the existing requirement on all providers to report all instances of student default within five days
• amend the current restriction on education providers receiving more than 50 per cent of tuition fees for a course (if course longer than 24 weeks) before the student commences the course
• remove the requirement for non-exempt providers to maintain an account in which all tuition fees paid prior to commencement are held (designated account) and
• remove the definition of study period and removal of requirement to enter into an agreement with every overseas student setting out study periods and tuition fees.

Reporting defaults
Currently registered providers are required to notify the Secretary and the TPS Director in the event that an overseas student or intending overseas student defaults in relation to a course provided by the provider. Where a provider fails to provide this information within five business days, the Minister may impose sanctions for non-compliance (such as imposing conditions, or suspending or cancelling a registration). Registered providers are also required to notify the Secretary and the TPS Director as to whether a refund was provided to the student who defaulted within seven days after the end of the provider obligation period. The Explanatory Memorandum argues that these notification requirements ‘are burdensome and duplicative’.

Items 14, 16 and 17 of Schedule 5 to the Streamlining Regulation Bill have the effect of removing the requirement for providers to report on a student defaulting in every case and instead provide that reports are only required to be given where an overseas student, or intending overseas student, defaults and there is a requirement under section 47E of the ESOS Act for the provider to issue a refund. Section 47E of the ESOS Act relates to cases where a student’s visa has been refused or where the provider has not entered into a written agreement as required by the ESOS Act.

60. ESOS Act, proposed subsection 170C(4).
61. ESOS Act, proposed subsection 170C(2).
62. Item 2 of Schedule 3 to the Streamlining Regulation Bill.
63. Item 3 of Schedule 3 to the Streamlining Regulation Bill.
64. ESOS Act, proposed subsection 170C(5).
65. ESOS Act, section 47C.
66. See Part 6, Division 1 of the ESOS Act, Division 1 of Part 6.
67. ESOS Act, section 47H. Sections 47D and 47E set out the circumstances where a refunded needs to be provided. Under subsection 47E(3) of the ESOS Act, the refund must be paid within the provider obligation period which is four weeks from the default day.
68. Explanatory Memorandum, p. 84.
Tuition fees

Division 2 of Part 3 of the ESOS Act sets out the requirements for providers in relation to tuition fees paid by overseas students. Currently the legislation imposes some limits of the amount of tuition fees a provider can receive from a student before the student commences their course and requires providers to deposit all received tuition fees in a designated account. Items 3, 7 and 8 of the Schedule 5 to the Streamlining Regulation Bill will remove the restriction on a provider receiving more than 50 per cent of tuition fees for a course where the course is longer than 24 weeks. The amendments also allow providers to request students to pay instalments on tuition fees at any point (previously providers had to wait until two weeks before the course commenced).

Concern has been raised about how this amendment interacts in practical terms with another policy area. It has been pointed out that ‘the ability for students to deposit substantial sums into their university accounts may attract unscrupulous transactions and avoid the scrutiny of other Australian agencies tracking fraud’. In view of this risk, it has been suggested that ‘scope should be given to education providers to limit payment amounts’.

Item 9 of the Streamlining Regulation Bill removes the requirement for providers to hold all tuition fees received before a student commences in a designated account. The Government has outlined how the proposed amendments will benefit providers:

- Remove the requirement for a designated account will ensure fairer competition between public and private providers of international education, and enable them to invest the fees collected in improvements that will enhance the quality and delivery of the course. It will also allow those providers greater flexibility in managing their administration of the course.

The Explanatory Memorandum notes that ‘while the designated account requirement was introduced to reduce risk to the TPS, its removal is countered by only minimal changes to the 50 per cent limit on the collection of tuition fees before a student commences a course’. As the Streamlining Regulation Bill proposes to remove the 50 per cent limit on collection fees (as discussed above) this statement is puzzling. In the event a provider is unable to deliver a course, the TPS ensures students are either able to complete their studies in a different course or with a different education provider, or receive a refund of their tuition fees. While the ESOS agency can choose to impose additional safeguards in relation to providers considered to be a high risk, the ultimate effect of the removal of these provisions may be that the TPS is required to step in more often where providers fail to deal with tuition fees payments appropriately and are unable to refund those fees when required.

Written agreements

Under section 22 of the ESOS Act, providers are required to enter into a written agreement with each student which sets out the length of the study period of the course and the tuition fees for each study period. A study period cannot be longer than 24 weeks. Item 6 of Schedule 5 to the Bill repeals section 22 to remove both of these requirements. The Explanatory Memorandum notes that the provisions requiring the setting up of a written agreement are already contained within the National Code and that there is, therefore, no need for them to also be contained in the ESOS Act. While the Explanatory Memorandum specifically states that the requirement for providers to disclose tuition fees and study periods will not be removed, the National Code is a

69. ESOS Act, subsection 27(3).
70. University of Sydney, Submission to DET, Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015 and Education Services for Overseas Students (Registration Charges) Amendment (Streamlining Regulation) Bill 2015: exposure drafts, University of Sydney, p. 10.
71. Ibid.
72. Items 13, 15 and 18 repeal notes in sections 46D, 47D and 50C of the ESOS Act as a consequence of the repeal of sections 28–32 of the ESOS Act.
73. Explanatory Memorandum, p. 83.
74. Ibid.
75. Tuition Protection Service (TPS), 'Student TPS overview', TPS website, accessed 12 November 2015.
76. Subsection 22(3), ESOS Act.
77. Item 2 of Schedule 5 to the Bill repeals the definition of study period from section 5 of the ESOS Act as a consequence of the repeal of section 22.
78. Explanatory Memorandum, pp. 81–82.
The National Code also contains a definition of study period, though it differs from the period prescribed under the ESOS Act. The National Code defines a study period as a discrete period of study within a course, namely term, semester, trimester, short course of similar or lesser duration, or as otherwise defined by the registered provider as long as that period does not exceed six months.\textsuperscript{80} The Explanatory Memorandum provides the rationale for preferring the definition in the National Code being that the definition set out in the ESOS Act (less than 24 weeks) does not always align with the periods of study offered by overseas education providers.\textsuperscript{81}

As CISA has pointed out in the discussion paper process, these measures are based on a broad assumption that what is good for providers under the ESOS framework will be inherently good for the students.

As there have not been significant industry failings since the amendments made to the ESOS framework under the Rudd and Gillard governments, it is possible to assume these regulatory measures were successful in preventing further disruption to international students. However, without clear evidence as to what they actually achieved and whether they changed provider behaviour, it is difficult to ascertain what case should be made for their retention or removal.

**Other provisions**

*Internal review process*

Schedule 2 to the Streamlining Regulation Bill introduces a new internal review process in regards to certain decisions made by delegates of ESOS agencies.\textsuperscript{82}

Currently, section 176 of the ESOS Act lists those decisions made by the Secretary,\textsuperscript{83} the TPS Director\textsuperscript{84} and the Minister\textsuperscript{85} that are subject to merits review by the Administrative Appeals Tribunal (AAT). Item 7 of Schedule 2 to the Streamlining Regulation Bill repeals that section.

Instead, item 5 inserts proposed Part 7A—Review of Decisions into the ESOS Act. The new Part 7A sets out those decisions which are reviewable decisions in table form.\textsuperscript{86} A provider may choose to have a reviewable decision which has been made by a delegate of an ESOS agency reviewed internally.\textsuperscript{87} Where a provider has chosen to have a decision internally reviewed and is not satisfied with the findings of the internal review, the provider can then seek to have the internal review decision reviewed by the AAT.\textsuperscript{88} The Explanatory Memorandum states the amendment is intended to reduce the cost and time associated with an immediate and direct appeal to the AAT.\textsuperscript{89} However cost and time are not the sole considerations in having a quality assurance scheme. In its submission to the Education and Employment Committee inquiry into the Streamlining Regulation Bill, the University of Sydney suggested that the ‘internal review within the ESOS Agency be undertaken by a separate by a dedicated unit to ensure transparency of process. Without this, any legislative reference might serve as a token gesture.’\textsuperscript{90}

Proposed subsection 169AE(1) of the ESOS Act allows for the ESOS agency to either review the decision itself or to allow for a delegate of the agency to review the decision.\textsuperscript{91} The review must be conducted within 90 days and the person conducting the internal review may confirm, vary or set aside the original decision (in the latter case, the person can make such other decision as he or she thinks appropriate). The Explanatory Memorandum notes

79.  Ibid., p. 82.
82.  Appealable decisions include: refusal of initial registration, refusal of renewal of registration, refusal to add a new course at a location.
83.  ESOS Act, sections 9AB, 9AC, 9AD, 9AE, 9AF and 9AG.
84.  ESOS Act, section 53A.
85.  ESOS Act, sections 9AD and 9AF, subsection 46A(4), section 83 and subsections 89(2), 89A(2) and 95(3).
86.  ESOS Act, proposed section 169AB.
87.  ESOS Act, proposed sections 169AD and 169AE.
88.  ESOS Act, proposed section 169AG.
89.  Explanatory Memorandum, p. 4.
91.  Proposed paragraph 169AE(1)(b) provides that the delegate cannot be the same delegate who was originally involved in making the decision and must be employed in at least the same level of position as the delegate who made the decision.
that these amendments have ‘been requested by ASQA and TEQSA, in order to provide similar appear processes for providers under the ESOS Act to those available in the TEQSA Act and the NVETR Act’.  

**Expansion of TPS Director’s powers**

Schedule 4 to the Streamlining Regulation Bill amends the ESOS Act to allow for the TPS Director to:

- make a recommendation to an ESOS agency that enforcement action be taken against a provider
- issue a production notice to an education provider and
- have a TPS officer assist them in their duties.

**Item 3** inserts **proposed paragraph 54B(fa)** into the ESOS Act so that the TPS Director is empowered to recommend that an ESOS agency take one or more actions against a registered provider where he, or she, believes that the provider might not be able to provide courses or refund amounts to its students.  

**Item 5** of Schedule 4 to the Streamlining Regulation Bill inserts **proposed subsection 83(1AA)** to place an obligation on the ESOS agency to consider any recommendation made by the TPS Director under **proposed paragraph 54B(fa)**.

Currently if the TPS Director requires information about a provider’s performance he, or she, is unable to issue a production notice and must instead request a delegate of the Secretary to issue one on his, or her, behalf. **Item 8** of Schedule 4 to the Streamlining Regulation Bill inserts **proposed section 113A** into the ESOS Act which provides that where the TPS Director reasonably believes that an individual of a registered provider has information or documents relevant to the TPS Director’s functions under the ESOS Act, the TPS Director can issue a written notice requiring the individual to give, show or make copies of the information or documents.

**Key issues and provisions—Registration Charges Bill**

**Entry to market charges**

Under the **ESOS Registration Charges Act** a provider who is a registered provider on 1 January of a year is liable to pay an annual registration charge for the year.  

The Registration Charges Bill makes minor changes to the **ESOS Registration Charges Act** by repealing and replacing section 6 which sets out the amounts that a provider is required to pay by way of entry to market charges. The effect of the amendment is to ensure that an education provider registered under the **ESOS Act** pays all entry to market charges but is not charged more than once if its registration period is less than two years and it seeks renewal.

**Concluding comments**

The administrative changes in Schedules 1–4 to the Streamlining Regulation Bill appear to be a useful update, although they do highlight the often difficult nature of Australia’s regulatory system for educational services. Quality concerns may be ameliorated by the increased capacity of the Minister to ensure a consistent approach to regulation across ESOS agencies.

Overall, measures in the Bills reduce the current regulatory burden on providers, assuming quality will continue regardless. With the capacity of regulatory agencies such as ASQA under current scrutiny, the Bills represent a missed opportunity to establish a unified education services sector.

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93. Subsection 83(3) provides that the following actions can be recommended: to impose conditions on the registered provider’s registration either generally or in respect of any one or more specified courses, or to suspend or cancel the registered provider’s registration for any one or more specified courses.

94. The information or documents must be provided/shown to a **TPS Officer**. **Item 2** of the Bill defines a **TPS Officer** as APS employee in the Department who assists the TPS Director in the performance of the TPS Director’s functions or a consultant engaged by the TPS Director under section 54L of the ESOS Act.

95. **Education Services for Overseas Students (Registration Charges) Act**, subsection 5(1).
**Glossary**

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<th>Description</th>
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<tr>
<td>AAT</td>
<td>Administrative Appeals Tribunal</td>
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<td>ASQA</td>
<td>Australian Skills Quality Authority</td>
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<td>CISA</td>
<td>Council of International Students Australia</td>
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<td>CRICOS</td>
<td>Commonwealth Register of Institutions and Courses for Overseas Students</td>
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<td>NVETR Act</td>
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<td>TEQSA</td>
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<td>VET</td>
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