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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**EDUCATION SERVICES FOR OVERSEAS STUDENTS LEGISLATION
AMENDMENT (2006 MEASURES NO. 2) BILL 2006**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Education, Science and Training the
Hon Julie Bishop MP)

EDUCATION SERVICES FOR OVERSEAS STUDENTS LEGISLATION AMENDMENT (2006 MEASURES NO. 2) BILL 2006

OUTLINE

The provision of education and training to overseas students in Australia is regulated by the *Education Services for Overseas Students Act 2000* (the ESOS Act). The ESOS Act aims to protect the reputation and integrity of Australia's education and training export industry by ensuring that overseas students coming to study in Australia on student visas receive the education and training for which they have paid. It also contains provisions to ensure that students comply with their student visa conditions.

The legislative amendments contained in this Bill are the second group of amendments to implement recommendations of the recent evaluation of the ESOS Act which have been agreed by the Australian Government.

The evaluation identified provisions of the ESOS Act which impact adversely on the effective operation of the ESOS Assurance Fund (the Fund). The effective operation of the Fund is pivotal to the consumer protection provisions of the ESOS Act, and this Bill introduces amendments to ensure that, when the Fund Manager determines that a refund is payable, the refund amount is appropriate to the student's circumstances. The introduction of a sunset clause for the Fund Manager to determine a call on the Fund will provide the Fund Manager with more certainty regarding the Fund's liabilities at a point in time.

The Bill also reflects the outcome of consultation with industry and the Department of Immigration and Multicultural Affairs to introduce changes to providers' monitoring and reporting obligations that are in line with current educational practice while continuing to support the integrity of the migration system.

There are a small number of outstanding issues raised by the evaluation, and supported by the Australian Government, which are still the subject of consultation. It is anticipated that amendments to address these issues will be submitted for the autumn 2007 sittings.

The Bill also contains amendments, not raised in the evaluation, which address issues met by the Department in administering the ESOS Act. These amendments clarify certain provisions of the legislation, particularly those relating to consumer protection for overseas students. The Bill also contains technical amendments to update provisions relating to the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students (the National Code), which is in the process of revision.

All measures proposed are consistent with the ESOS Act's underpinning principles of consumer protection for overseas students and the maintenance of the integrity of the student visa system.

The Bill will amend the ESOS Act to:

- require that prior to registration, a provider must have Tuition Assurance Scheme (TAS) coverage for the course for which they are seeking registration, or be exempt, under the regulations made under the ESOS Act, from TAS coverage for the course;
- clarify that a provider is required to advise the Secretary when a student terminates study prior to the completion of the course, whether the termination was the result of action by the student or the provider, or otherwise;
- remove from the ESOS Act and specify in the regulations that the student visa conditions to which providers' reporting obligations relate and the student visa conditions for which a provider must send a student a written notice of a breach. This requires a technical amendment to a note in the *Migration Act 1958* to ensure the language in this Act and the ESOS Act is consistent;
- reduce the maximum penalty for a provider's failure to give the required information about students, report visa breaches, or send notices of visa breaches to students from 60 to 50 penalty points to bring these provisions in line with Commonwealth criminal law policy guidelines;
- extend the concept of 'student default' for refund purposes due to a student's failure to pay course money, breach of student visa condition, or the student's misbehaviour;
- prevent a written agreement from limiting a refund by a provider for a student default involving a student being refused a student visa so that the student does not start on the agreed starting day, withdraws from the course, or fails to pay the provider an amount owing in order to undertake the course;
- prohibit a call from being made on the ESOS Assurance Fund if the Fund Manager is not made aware within 12 months that it is likely that a provider will be unable to make the required refund to a student or arrange for a student to be offered a place in a suitable alternate course;
- allow for the Fund Manager to reduce the amount of a refund payable where the student has enrolled in a new course, the student has obtained academic credit or recognition of prior learning in the new course and to allow the Fund Manager to request this information; and
- update provisions in the ESOS Act relating to the National Code in order to reflect the operation of the *Legislative Instruments Act 2003* and to ensure that the National Code can be replaced at any time.

FINANCIAL IMPACT

The Bill will be Budget neutral and will not increase costs to the Commonwealth or the education export industry.

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NOTES ON CLAUSES

Clause 1 - Short title

Provides for the Act to be cited as the *Education Services for Overseas Students Legislation Amendment (2006 Measures No. 2) Act 2006*.

Clause 2 - Commencement

Subclause 2(1) inserts a three column table setting out commencement information for various provisions in the Act. Each provision of the Act specified in column 1 of the table commences (or is taken to have commenced) in accordance with column 2 of the table, and any other statement in column 2 has effect according to its terms.

The table provides for sections 1 to 3 to commence on Royal Assent, for Schedules 1, 3 and 4 and Part 1 of Schedule 2 to commence on 1 January 2007 and for Part 2 of Schedule 2 to commence on 1 July 2007.

Subclause 2(2) provides that column 3 of the table contains additional information which may be added to or edited in any published version of the Act, but that information in this column is not part of the Act.

Clause 3 - Schedule(s)

Provides that each Act that is specified in a Schedule is amended or repealed as set out in the applicable items in the Schedule and that any other item in a Schedule has effect according to its terms.

Schedule 1—Membership of tuition assurance scheme as prerequisite for registration

Education Services for Overseas Students Act 2000

Item 1 – After paragraph 9(2)(b)

Item 1 inserts proposed new paragraph 9(2)(ba) which requires, before the Secretary can register the provider in accordance with subsection 9(2), the provider to:

- be a member of a tuition assurance scheme that is established in accordance with the regulations made for the purposes of paragraph 22(1)(a) and that covers the course; or
- be exempt from the requirements of section 22 under regulations made for the purposes of subsection 22(3).

The purpose of the proposed paragraph is to ensure that prior to registration a provider must have or be exempt from tuition assurance scheme coverage for the course for which the provider is seeking registration.

Item 2 - Application

Item 2 is an application provision which provides that proposed new paragraph 9(2)(ba) of the *Education Services for Overseas Students Act 2000* applies in relation to the registration of providers on and after the commencement of this Schedule.

Schedule 2—Reporting by registered provider

Part 1—Early termination of studies

Education Services for Overseas Students Act 2000

Item 1 - Paragraph 19(1)(d)

Item 1 amends paragraph 19(1)(d) by deleting the words “studies by an accepted student” and substituting with the words “an accepted student’s studies (whether as a result of action by the student or the provider or otherwise)”.

The purpose of this amendment is to clarify that there is an obligation on the provider to give the Secretary information about an accepted student where the course is terminated prior to completion *either* as a result of the provider or student action.

Part 2—Breach of prescribed conditions of student visa

Education Services for Overseas Students Act 2000

Item 2 – Subsections 19(2) and 20(1)

Item 2 amends subsections 19(2) and 20(1) by deleting the words “student visa condition relating to attendance or satisfactory academic performance” and substituting with the words “prescribed condition of a student visa”.

Currently sections 19 and 20 require the provider to report a student when the student has breached a student visa condition relating to attendance or satisfactory academic performance. The amendment will now provide for the regulations made under the Act to identify student visa conditions to which the reporting requirements relate.

The purpose of this amendment is to ensure that the Department of Education, Science and Training has the necessary flexibility to amend the regulations made under the Act to ensure consistency between these regulations and the regulations made under the *Migration Act 1958*. It is also necessary to ensure that the ESOS legislative framework accurately captures the visa condition(s) determined by the Department of Immigration and Multicultural Affairs, which is set out in the regulations made under the *Migration Act 1958*.

To remove any doubt, the amendments will not incorporate a range of new conditions in the regulations made under the Act that registered providers must report on nor will the amendments to the Act change what constitutes an offence by the registered provider if they fail to report on the prescribed conditions. The intention is to ensure that the ESOS legislative framework is

consistent with the Migration legislative framework as it applies to student visa conditions relating to educational requirements.

Item 3 – Application

Item 3 is an application provision which provides that the amendment of subsections 19(2) and 20(1) of the *Education Services for Overseas Students Act 2000* made by Part 2 applies to breaches of conditions of visas that occur on or after the commencement of this Part.

Items 4, 5 and 6 – Subsections 104(1), 104(3) and 104(4) (penalty)

Items 4, 5 and 6 amend subsections 104(1), 104(3) and 104(4) by deleting “60” and substituting with “50”.

Currently subsections 104(1), 104(3) and 104(4) provide for a maximum penalty of 60 penalty units for offences under section 104. The amendments made by items 4, 5 and 6 of this Schedule will reduce the maximum penalty to 50 penalty units for an individual.

The purpose of the amendments are to ensure consistency with the Commonwealth’s general approach in recent years of reducing the maximum penalty to 50 penalty units for an individual if the terms of an offence are delegated to regulations made under an Act. Furthermore, these amendments will bring the Act into line with the following guideline produced by the Attorney-General’s Department in February 2004: *A Guide To Framing Commonwealth Offences, Civil Penalties And Enforcement Powers*.

Migration Act 1958

Item 7 – Subsection 137J(1) (note)

Item 7 amends the note to subsection 137J(1) by deleting the words “relating to attendance or satisfactory academic performance” and the substituting with the words “that is prescribed by regulations made for the purposes of that Act”, to reflect the amendment made by item 2 of Part 2 of Schedule 2.

Schedule 3—Refunds to students etc.

Education Services for Overseas Students Act 2000

Item 1 – At the end of subsection 27(2)

Item 1 inserts proposed new paragraph 27(2)(c) which extends the concept of ‘student default’ for refunds of course money.

Proposed paragraph 27(2)(c) provides that Division 2 of Part 3 of the Act applies if the registered provider of the course refuses to provide or continue providing the course because of one or more of the following events:

- the student failed to pay an amount he or she was liable to pay the provider, directly or indirectly, in order to undertake the course;
- the student breached a condition of his or her student visa;
- misbehaviour by the student.

Item 2 – Subsection 27(3) (at the end of the definition of *default day*)

Item 2 inserts proposed new paragraph 27(3)(d) to reflect the amendment made by item 1 of Schedule 4.

Proposed paragraph 27(3)(d) extends the definition of *default day*, in relation to *student default*, to include the day on which the registered provider of the course refuses to provide, or continue providing, the course to the student, if paragraph 27(2)(c) applies.

Item 3 – Application

Item 3 is an application provision which provides that the amendments of section 27 of the *Education Services for Overseas Students Act 2000* made by items 1 and 2, apply to refusals because of acts and omissions by overseas students and intending overseas students occurring on or after the commencement of this Schedule.

Item 4 – At the end of section 28

Item 4 adds proposed new subsection 28(4) which provides that despite subsection 28(1), section 28 does not apply if the student was refused a student visa and the refusal was a reason for one or more of the following acts or omissions by the student that directly or indirectly caused subsection 27(2) to apply:

- the student’s failure to start the course on the agreed starting day;
- the student’s withdrawal from the course;

- the student’s failure to pay an amount he or she was liable to pay the provider, directly or indirectly, in order to undertake the course.

The purpose of this amendment is to prevent a written agreement from limiting a refund by a provider for a student default which involves a student being refused a student visa because the student does not start on the agreed starting day, withdraws from the course, or fails to pay the provider an amount owing in order to undertake the course.

Item 5 – Application

Item 5 is an application provision which provides that section 28 of the *Education Services for Overseas Students Act 2000* as amended by item 4 applies in relation to agreements made on or after the commencement of this Schedule.

Item 6 – After subsection 76(1)

Section 76 deals with when a call is made on the ESOS Assurance Fund.

Item 6 inserts proposed new subsection 76(1A), which provides that the Fund Manager must not make a determination under subsection 76(1) if the time when the Fund Manager becomes aware that the circumstances described in paragraphs 76(1)(a), 76(1)(b) and 76(1)(c) may exist is more than 12 months after the default day relevant to the requirement mentioned in paragraph 76(1)(a).

The purpose of this amendment is to prohibit a call from being made on the ESOS Assurance Fund if the Fund Manager is not made aware within 12 months that it is likely that a provider is required to refund an amount under Division 2 of Part 3, will be unable to make this required refund to a student or arrange for a student to be promptly offered a place in a suitable alternate course.

Item 7 – Application

Item 7 is an application provision which provides that proposed new subsection 76(1A) of the *Education Services for Overseas Students Act 2000* applies in relation to default days that are on or after the commencement of this Schedule.

Item 8 – Subsection 76(2)

Item 8 deletes the word “However” and substitutes with the words “Despite subsection (1)”. This is a technical amendment to reflect the amendment made by item 6 of Schedule 4.

Items 9 and 10 – After subsection 77(1) and after section 77

Section 77 deals with what the Fund Manager must do when a call is made on the Fund.

Item 9 inserts proposed new subsection 77(1A) which allows the Fund Manager to reduce the amount of a refund payable in certain circumstances.

Proposed subsection 77(1A) provides that the amount the Fund Manger must pay out under paragraph 77(1)(b) is reduced by the amount worked out under the regulations if the student undertook (but did not complete) the course to which the call is made on the Fund (*the old course*), has since enrolled in another course (*the new course*) and the work required of the student in undertaking the new course is reduced on account of the student's work in undertaking the old course.

Item 10 inserts proposed new section 77A which is a consequential amendment to reflect the amendment made by item 9.

Proposed subsection 77A(1) provides for the Fund Manager to work out whether subsection 77(1A) applies to reduce the amount payable out of the Fund because, since undertaking the old course to which a call on the Fund relates, the student has been enrolled in the new course and the work required of the student in undertaking the new course is reduced on account of the student's work in undertaking the old course. Proposed paragraph 77A(1)(b) then provides for the Fund Manager to work out the amount of any reduction of a payment out of the Fund.

Proposed subsection 77A(2) provides that the Fund Manager may request a registered provider who the Fund Manager believes has enrolled the student in the new course to inform the Fund Manager within a specified reasonable period:

- whether the provider has enrolled the student; and
- whether the work required of the student in undertaking the new course is reduced on account of the student's work in undertaking the old course; and
- if the work is reduced, the extent and monetary value of the reduction.

Proposed subsection 77A(3) requires the registered provider to comply with the request.

A note at the end of proposed section 77A clarifies that the Minister may take action under Division 1 of Part 6 against a registered provider that has breached section 77A.

Item 11 – Application

Item 11 is an application provision which provides that proposed new subsection 77(1A) and proposed new section 77A of the *Education Services for Overseas Students Act 2000* apply in relation to calls made on the Fund on or after the commencement of this Schedule.

Schedule 4—National code

Education Services for Overseas Students Act 2000

Item 1 – Section 5 (definition of national code)

Item 1 amends the definition of *national code* in section 5 to redefine the term to mean “the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students in force under Part 4”.

Item 2 – Subsection 9(8)

Section 9 deals with registering approved providers.

Item 2 repeals subsection 9(8) and substitutes proposed new subsection 9(8) which provides that paragraph 9(2)(ca) does not apply when there is not a national code in force.

Item 3 – Subsection 33(1)

Item 3 repeals the subsection and substitutes proposed new subsection 33(1) which provides that the Minister may make a national code by legislative instrument expressed to commence on a day at least 28 days after it is registered in the Federal Register of Legislative Instruments.

A note at the end of proposed subsection 33(1) clarifies that the Minister may amend the National Code by legislative instrument with that kind of commencement provision, after consultations like those the Minister must undertake under section 36 before making the code.

The note also assists the reader by referring to subsection 33(3) of the *Acts Interpretation Act 1901* which provides that where an Act confers a power to make, grant or issue any instrument the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to like conditions to repeal, rescind, revoke, amend or vary any such instrument.

Item 4 – At the end of section 33

Item 4 inserts proposed new subsection 33(3) which provides that the Minister must ensure as far as practicable that there is a national code in force at all times.

Items 5, 7 and 10 – Sections 35, 37, 39 and 42

Items 5, 7 and 10 repeal sections 35, 37, 39 and 42. These provisions are no longer required because of the notification procedures under the *Legislative Instruments Act 2003* and the amendment made by item 3.

Item 6 – Subsection 36(2)

Item 6 deletes the words “establishing the” and substitutes with the words “making a”. This is a technical amendment as a result of the amendment made by item 3 of Schedule 5. The purpose of the amendment is to ensure that the language used in Part 4 of the Act is consistent with the operation of the *Legislative Instruments Act 2003*.

Item 8 – Subsections 41(1) and (2)

Item 8 repeals subsections 41(1) and 41(2) and substitutes with proposed new subsection 41(1) which provides that the Secretary must give each registered provider written notice of:

- the making or amendment of the National Code; and
- the day on which the code or amendment takes effect for the provider; and
- the way in which the provider can get access to the text of the code in force on that day.

Proposed subsection 41(2) provides that a notice given under subsection 41(1) is not a legislative instrument. This proposed provision is included to assist readers, as a notice given under subsection 41(1) is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Item 9 – At the end of subsection 41(3)

Section 41 deals with notification of the National Code.

Item 9 amends subsection 41(3) by inserting the words “or an amendment of the code” at the end of subsection 41(3). This is technical amendment as a result of the amendments made by item 3 of Schedule 5.

Item 11 – Transitional provision

Item 11 is a transitional provision which confirms that the National Code that was in force immediately before the commencement of this Schedule continues in force after that commencement as if it had been made under Part 4 of the *Education Services for Overseas Students Act 2000* as amended by this Schedule.