

2004-2005-2006-2007

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**EDUCATION SERVICES FOR OVERSEAS STUDENTS LEGISLATION  
AMENDMENT BILL 2007**

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 BILL 2007**

## **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 objects clause proposed by this Bill clearly articulates the intent of the ESOS Act.

The legislative amendments contained in this Bill are the third group of amendments to implement recommendations of the evaluation of the ESOS Act which have been agreed by the Australian Government. The Bill also contains amendments, not raised in the evaluation, which address issues met by the Department in administering the ESOS Act.

The Bill provides for flexibility in the allocation of roles and responsibilities between the Australian Government and state and territory governments under the ESOS Act.

The Bill extends the scope of the ESOS Act to include education delivered on Christmas Island and Cocos (Keeling) Islands. This amendment is a response to a recommendation of the ESOS Evaluation to provide Christmas Island District High School (CIDHS) with the opportunity to apply for registration on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS).

The ESOS Act permits delivery of a course by arrangement between providers only where the second provider is operating in the same state as the registered provider. The amendment proposes to facilitate arrangements across state boundaries by allowing designated authorities to approve arrangements where the second provider is located in another state. The state in which the provider is registered would remain responsible for registering the course, approving the arrangement and monitoring compliance in relation to the course.

It was noted in the ESOS Evaluation that the provision of the ESOS Act which imposes a penalty for late payment of the ESOS Assurance Fund (the Fund) contribution impacts adversely on the effective operation of the Fund. It does not act as a significant deterrent and is not viable on a cost-benefit basis. The effective operation of the Fund is pivotal to the consumer protection provisions of the ESOS Act, and this Bill introduces an amendment to remove the penalty and ensure that the administrative resources of the Fund Manager are used effectively.

A technical consequential amendment arising from the revised National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students (the National Code 2007) is the move from optional to mandatory written agreements with overseas students. This measure is consistent with the ESOS Act's objectives of providing consumer protection for overseas students and protecting Australia's reputation for quality education and training services.

The Bill contains an amendment to accurately reflect the Department of Immigration and Citizenship (DIAC) role when providers identify a student as breaching a visa condition relating to course progress or attendance. The amendment recognises the primary role of the providers in determining these matters.

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:

- include an objects clause to clarify the main purposes of the ESOS Act;
- provide for delivery of education to overseas students on Christmas Island and Cocos (Keeling) Islands within the scope of the ESOS Act;
- facilitate course delivery by arrangement across state boundaries by allowing designated authorities to approve arrangements where the provider (other than the registered provider) is located in a different state to the registered provider;
- allow for a reflection of the actual allocation of the roles and responsibilities of the Australian Government and the state and territory governments in relation to investigating breaches of the National Code 2007;
- recognise that the role of DIAC is to resolve the visa status of an overseas student subsequent to an education provider advising a breach of a student visa condition;
- recognise that written agreements with each overseas student are mandatory, rather than optional, under the National Code 2007; and
- remove the imposition of a late payment penalty for late payment of the annual Fund contribution, deemed to be administratively burdensome on the Fund Manager and not cost-effective.

## **FINANCIAL IMPACT**

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

# EDUCATION SERVICES FOR OVERSEAS STUDENTS LEGISLATION AMENDMENT BILL 2007

## NOTES ON CLAUSES

### **Clause 1 - Short title**

Provides for the Act to be cited as the *Education Services for Overseas Students Legislation Amendment Act 2007*.

### **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, and for Schedule 1 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—Amendments

### *Education Services for Overseas Students Act 2000*

#### **Item 1 – After section 4**

**Item 1** inserts proposed new sections 4A (Objects) and 4B (Extension of the ESOS Act to Christmas Island and Cocos (Keeling) Islands).

#### **Proposed new section 4A**

**Proposed new section 4A** sets out the principal objects of the ESOS Act which are:

- to provide financial and tuition assurance to 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.

#### **Proposed new section 4B**

The purpose of the **proposed new section 4B** is to allow an education provider on Christmas Island or Cocos (Keeling) Islands to apply for registration on the Commonwealth Register of Institutions and Courses for Overseas Students. This has been done by extending the operation of the Act to Christmas Island and Cocos (Keeling) Islands.

**Proposed new subsection 4B(1)** provides that subject to subsection 4B(2), a reference to a State in a provision of the Act includes Christmas Island and Cocos (Keeling) Islands and a reference to a designated authority in relation to a State includes a reference to the Territories Minister.

**Proposed new subsection 4B(2)** limits the application of subsection 4B(1). The purpose of proposed new subsection 4B(2) is to provide that a reference to a State or designated authority in the sections and paragraphs below do not include a reference to Christmas Island and Cocos (Keeling) Islands. This is to deal with those references to State that are not applicable to Christmas Island and Cocos (Keeling) Islands. The following provisions do not apply to proposed new paragraph 4B(1)(a):

- the definitions of *designated authority* and *State* in section 5 (the definition section);
- paragraph 9(5)(a) (which provides that a provider that is administered by a State education authority does not need to satisfy the fit and proper test in order to be registered);
- paragraph 24(2)(a) (which exempts a provider that is administered by a State education authority from having to pay annual Fund contributions);
- section 36 (which requires the Minister to consult with States and industry representatives about the National Code);

- section 79 (which provides that the Fund Manager may invest money standing to the credit of the Fund that is not immediately required for the purpose of the Fund);
- paragraph 127(3)(b) (which exempts an authorised employee who is authorised to retain, destroy or dispose of a document from returning the document to the person who gave the employee the document or to the owner of the document);
- paragraph 152(3)(b) (which exempts an authorised employee who is authorised to retain, destroy or dispose of a document from returning the document to the person from who it was seized or to the owner of the document);
- paragraph 175(1)(e) (which requires the Secretary to give information that was obtained or received for the purposes of the Act to certain people).

**Proposed new subsection 4B(3)** allows the Territories Minister in writing to delegate all or any of his or her functions or powers as a designated authority under the Act to an APS employee who is an SES employee or acting SES employee or an officer or employee of a State.

**Items 2, 3, 5, 6, 7, 8, 10, 19, 20 and 21 – section 5, paragraph 8(1)(f), subsection 8(1) (note 1), subparagraph 8(3)(b)(iv), paragraph 10(4)(a), section 88, paragraphs 107(1)(a), 107(1)(b) and 107(1)(c) and 107(1)(d)**

**Items 2 and 3** amend the definitions of *approved provider* and *designated authority* by deleting the words “in a State” and replacing those words with the words “for the State”.

**Item 5** amends paragraph 8(1)(f) by deleting the words “for the particular State” and replacing those words with the words “for a State”.

**Item 6** amends note 1 to subsection 8(1) by deleting the words “in a State”.

**Items 7 and 8** amend subparagraph 8(3)(b)(iv) and subsection 9(1) by deleting the words “for that State” and “in that State” and replacing those words with the words “for a State” and “for that State” respectively.

**Item 10** amends paragraph 10(4)(a) by deleting the words “in a specified State” and replacing those words with the words “for a specified State”.

**Items 19 and 20** amend section 88 and paragraphs 107(1)(a), 107(1)(b) and 107(1)(c) by deleting the words “in the State” and replacing those words with the words “for the State” and “in a State” respectively.

**Items 21** amends paragraph 107(1)(d) by deleting the words “for the State”.

The purpose of the proposed amendments is to allow designated authorities to approve arrangements for course delivery between two or more providers where the second, and any additional, provider is located in a state other than that of the registered provider.

#### **Item 4 – Section 5**

**Item 4** inserts a new definition of *Territories Minister* which is a consequential amendment arising from item 1.

#### **Item 9 – Paragraph 9(2)(c)**

Section 9 deals with registering approved providers.

**Item 9** amends paragraph 9(2)(c) by deleting the words “that the provider complies with the national code” and replacing those words with the words “in the form approved by the Secretary for the purposes of this paragraph for the State, relating to the provider’s compliance with the national code”.

The purpose of this amendment is to provide flexibility in the allocation of the roles and responsibilities between the Australian Government and the states and territories governments under the Act.

#### **Item 11 – Paragraph 20(4)(b)**

Section 20 deals with the obligation on registered providers to send students notice of visa breaches.

**Item 11** amends paragraph 20(4)(b) by deleting the words “explaining the breach” and replacing those words with the words “making any submissions about the breach and the circumstances that led to the breach”.

The purpose of this amendment (and items 26 and 27 below) is to ensure that the ESOS Act and the *Migration Act 1958* relating to breach notices for overseas students reflect the requirement that such notices must specify that the student is to attend before an officer for the purposes of making any submissions about the breach and circumstances that led to the breach.

Under the National Code 2007, where an overseas student has breached an education provider’s policy on course progress or attendance and the breach is reported, the student will already have been given access to an appeals process. Student appeals of alleged student visa condition breaches will be managed by the education provider and the student’s attendance at the Department of Immigration and Citizenship will be to resolve their visa status.

#### **Items 12, 13, 14 and 15 – Subsections 28(1), 28(2), 28(4) and paragraph 28(4)(b)**

Part 3 of the Act deals with the obligations on registered providers and Division 2 deals with refunds of course money. Section 28 deals with refunds of course money if there is a written agreement about student default.

The purpose of items 12, 13, 14 and 15 is to ensure that, in accordance with the National Code 2007, providers are to enter a contract with international students that sets out the refund requirements that apply when there has been student default (except where that default occurred because the student was refused a student visa).

**Item 12** amends subsection 28(1) by repealing the subsection and replacing it with a proposed new subsection 28(1) which now provides that a registered provider must enter into a written agreement with each overseas student or intending overseas student, that sets out the refund requirements that apply in a situation covered by subsection 27(2) and meets the requirements (if any) set out in the National Code.

The effect of this amendment is to change the wording of the provision from an optional to a mandatory requirement and is a consequential amendment arising from the National Code 2007. Education providers are now required to have a written agreement formalising the enrolment of each of their overseas students.

A note at the end of item 12 clarifies that the heading to section 28 is amended by deleting the words “if there is” and replacing those words with the words “under”.

**Item 13** amends subsection 28(2) by deleting the words “The provider” and replacing those words with the words “In a situation covered by subsection 27(2), the provider”.

The purpose of this amendment is to ensure that the provisions of the ESOS Act are consistent with the revisions to the National Code.

**Item 14** amends subsection 28(4) by deleting the words “Despite subsection (1), this section does not apply if” and replacing those words with the words “Subsections (2) and (3), and the agreement mentioned in subsection (1), do not apply in relation to a student if”.

**Item 15** amends paragraph 28(4)(b) by deleting the words “subsection 27(2) to apply” and replacing those words with the words “the situation covered by subsection 27(2)”. This amendment is a wording change and does not make any change to the operation of the provision.

#### **Item 16 – Before subsection 29(1)**

Section 29 deals with refunds of course money if there is no written agreement about student default.

**Item 16** inserts proposed new subsection 29(1A) which provides that section 29(1A) applies:

- in a situation covered by subsection 27(1) (where the provider has defaulted); or
- in a situation covered by subsection 27(2) (where the student has defaulted) if an agreement has not been entered into with the student that meets the requirements of subsection 28(1); or
- paragraphs 28(4)(a) and 28(4)(b) apply in relation to the student (where the student was refused a visa or the refusal was a reason for one or more of the following acts or omissions by the student: the student’s failure to start the course on the agreed statutory date; the student’s withdrawal from the course or 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.

This is a consequential amendment arising from items 12, 13, 14 and 15.



### **Item 17 – Subsection 29(1)**

**Item 17** amends subsection 29(1) by deleting the words “Unless section 28 applies, the” and replacing those words with the words “The”. This is a consequential amendment arising from item 16.

### **Item 18 – Subsection 43(2)**

Section 43 requires States to investigate breaches of the National code. **Item 18** amends subsection 43(2) by inserting the word “may” before the word “request”.

The purpose of this amendment is to retain the Secretary’s obligation to notify the designated authority for a registered provider where there has been a possible breach of the national code but the Secretary will now have a discretionary power to request the designated authority to investigate the matter or take any other suitable action. The amendment allows for a reflection of the actual allocation of roles and responsibilities for investigating breaches of the National Code 2007 between the Australian Government and the state and territory governments.

### **Item 22 – Paragraph 172(1)(c)**

Subsection 172(1) deals with when a registered provider must pay a late payment penalty. **Item 22** amends paragraph 172(1)(c) by deleting the words “annual Fund contribution or”.

The purpose of this amendment is to remove the requirement for providers to pay a late payment penalty for late payment of the annual fund contribution, which is not considered a significant deterrent to late payment of the Fund contribution and is administratively burdensome on the ESOS Assurance Fund Manager.

### **Item 23 – Application of item 22**

**Item 23** is an application provision which provides that the amendment of paragraph 172(1)(c) of the *Education Services for Overseas Students Act 2000* made by item 22, applies in relation to the annual Fund contribution payable in respect of the calendar year commencing on 1 January 2008.

## ***Migration Act 1958***

The purpose of items 11, 24 and 25 is to ensure that the ESOS Act and the *Migration Act 1958* relating to breach notices for overseas students reflect the requirement that such notices must specify that the student is to attend before an officer for the purposes of making any submissions about the breach and circumstances that led to the breach.

Under the National Code 2007, where an overseas student has breached an education provider's policy on course progress or attendance and the breach is reported, the student will already have been given access to an appeals process. Student appeals of alleged student visa condition breaches will be managed by the education provider and the student's attendance at the Department of Immigration and Citizenship will be to resolve their visa status.

### **Items 24 and 25 – Subsection 137J(1) (note) and subsection 137J(2)**

**Items 24 and 25** amend the notes to subsections 137J(1) and 137J(2) by deleting the words “explaining the breach” and “explaining the breach alleged in the notice” and replacing those words with words “making any submissions about the breach and the circumstances that led to the breach”.

### **Item 26 – Application of items 24 and 25**

**Item 26** is an application provision which provides that the amendments made by items 24 and 25 apply in relation to a notice sent under section 20 of the *Education Services for Overseas Students Act 2000* after the commencement of this item which is 1 July 2007.