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The Parliament of the Commonwealth of Australia

HOUSE OF REPRESENTATIVES

**Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Bill 2011**

**Education Services for Overseas Students (TPS Levies) Bill 2011**

**Education Services for Overseas Students (Registration Charges) Amendment (Tuition Protection Service) Bill 2011**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Tertiary Education, Skills, Jobs and Workplace Relations, Senator the Honourable Chris Evans)

## **Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Bill 2011**

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## **OUTLINE**

The purpose of the Bills is to make amendments to the *Education Services for Overseas Students Act 2000* (the ESOS Act) to implement the Government's second phase response to recommendations from the recent review of the Education Services for Overseas Students legislative framework. The review was conducted by the Hon Bruce Baird AM and the report, *Stronger, simpler, smarter ESOS: supporting international students* (the Baird Review) was released on 9 March 2010. The first phase of legislative amendments to the ESOS Act, in response to the review, was enacted on 8 April 2011.

The centrepiece of the Bills is reform to strengthen tuition protection to ensure students receive the tuition they have paid for or, as a last resort, a refund. The other main reform being introduced is national registration for providers operating in multiple jurisdictions. Finally, technical amendments will assist in making ESOS stronger, simpler and smarter.

These Bills will establish a universal single layer Tuition Protection Service (TPS) as recommended in the Baird Review (recommendation 16) to provide a more flexible and streamlined approach to student placement and refund arrangements in the event a defaulting provider does not meet its refund obligations under the ESOS Act. This will reduce double-handling and delay associated with the current combination of Tuition Assurance Schemes (TAS) and the ESOS Assurance Fund.

Additionally, to implement Baird recommendation 17a, students will only be eligible for a refund of the unused portion of prepaid tuition fees (i.e. tuition for which the student has paid but which has not yet been delivered by the provider) rather than a full refund, as previously, in recognition that they may obtain credit for part study already completed. This should first encourage more providers to meet their default obligations to students and avoid recourse to the TPS at all. Failing this, however, the partial refund equivalent is to be used in the TPS model as an incentive payment for other providers to place affected students.

Students will be given a more active role in selecting from suitable placement options through an online information service. Where a student does not access a placement through the placement facility provided by the TPS Director, the student may be eligible for a refund of their unexpended tuition fees from the TPS Director.

In addition to more timely and effective placement and refund arrangements, a key objective of the new TPS is to address capacity issues within the current arrangements. The TPS is anticipated to provide a more sustainable framework, fully funded by the sector without the

need for further government financial assistance in future periods of high demand. In this, a critical difference is that the TPS will apply to all international education providers registered on the Commonwealth Register of Institutions and Courses for International Students (CRICOS) and all current tuition assurance exemptions will be removed.

The governance arrangements to support a sustainable TPS framework include an independent TPS Director as a statutory appointment made by the Minister. The TPS Director will be responsible for determining the amount of the annual TPS Levy and will be accountable for the monies collected which are to be held in an Overseas Student Tuition Fund (OSTF). Amounts held in the OSTF are held for the purpose of funding the placement and refund activity of the TPS framework.

The TPS Director will be advised by a TPS Advisory Board, also appointed by the Minister and comprising representatives from across the sector and relevant Commonwealth agencies. The combination of sector and government representatives is aimed at ensuring a diverse range of views are factored into the decision-making process regarding the annual TPS Levy.

A secretariat staffed by officers from the Department will support the Director. The TPS Director will be able to engage an external service provider to manage and sustain the placement facility through which students will access new course placement options. The service provider will carry out the day-to-day management of the TPS, with the cost of this service to be recovered through an element of the annual TPS Levy paid by all providers.

The existing provisions that require some form of primary assurance mechanism to be held by non-exempt providers (such as TAS membership) are being removed. At the same time, exemptions from the TAS and the Assurance Fund arrangements will be removed and all CRICOS registered providers will be required to pay the annual TPS Levy. This means providers will no longer be required under the ESOS Act to pay separate fees for membership of a TAS or to maintain another type of assurance mechanism in addition to paying the annual TPS Levy.

The annual TPS Levy will comprise four tiers:

1. An **administrative fee** component payable by all providers except registered schools that have no international students.
2. A **base fee** component paid by all providers, except registered schools that have no international students, which recognises the reputational benefits to the sector of a robust and sustainable tuition protection arrangement.
3. A **risk rated fee** component to recognise the risk of default associated with each provider. As public institutions are effectively publicly underwritten they would not pay this component. Any provider taking payment in arrears will have this taken into account when being assessed for this component.
4. A **special levy**, initially set at zero, will be charged during times of more buoyant sector circumstances in order to insure against future systemic shocks experienced by the sector.

In summary, the implementation of a new universal single layer TPS framework will serve to place students more effectively. It will limit refunds, remove unnecessary administrative layers and fees, draw from a greater pool of available places in the sector with incentives for providers to place students and enable greater student choice and responsibility as well as direct contact with potential new providers. It will also provide for transparent decision

making and fee setting that better targets provider risk and ensures sufficient funds are collected from the sector to meet fluctuating requirements related to the risk of future provider default.

Complementing the new TPS framework is a proposed amendment to limit the collection of pre-paid course fees to no more than one study period in advance. Currently there is no limitation on the portion of pre-paid fees a provider can collect and the provider has the capacity to utilise these funds prior to a student commencing or even having their visa approved. While many providers already take no more than one study period fees at a time, this amendment will help reduce the liability to businesses by limiting the size of refunds owed to students.

To further protect students, the pre-paid fees amendment is proposed to require all providers who do not receive recurrent government funding to place pre-paid course fees for the first study period into a designated account. This account can only be drawn down when the student's first study period begins. By keeping pre-paid fees separate to day-to-day operating expense accounts, refunds will be more accessible before the student commences. For example, when a visa is refused, the refund can be made in full and in a timely way without impact on the financial operations of the business or recourse to the TPS. Strong penalties will be imposed for non-compliance with this requirement.

The Baird Review recommended strengthened student record keeping as essential to ensuring provider compliance with a range of obligations, in particular, standards related to student welfare, especially young students and tuition protection. The proposed amendments will require all providers to demonstrate that efforts have been made to encourage students to update their contact details, with penalties for failure to do so. It is also proposed that the ESOS Act include specific new requirements and penalties related to ensuring academic records are kept up to date and the regulator may access these records at any time on request, including when a provider is under administration. This will be critical for calculating accurate refunds and credit transfer in placing students affected by a closure.

A key objective of this reform is to simplify regulation and strengthen risk management to ensure compliance monitoring is targeted to highest risk. In response to Recommendation 6(a) of the Baird Review the proposed amendments will simplify the ESOS Act by providing a single, national registration for providers operating across different jurisdictions, either in more than one state or territory, or across a number of locations within one state. The proposed amendment will allow for additional locations to be added to an initial registration, or to the scope of an existing registration, allowing these providers to consolidate their ESOS operations under one CRICOS code.

This will enable more flexibility by the regulators to reduce unnecessary regulatory burden. However, it will not limit the existing ability of the regulator to impose conditions or take compliance action against any aspect or all the provider's operations in response to assessed risk or non-compliance. The proposed amendment of national registration has been recommended to better position ESOS regulation for the anticipated transfer of ESOS functions in 2012 to the national regulators currently being established for the Vocational Education and Training (VET) and higher education sectors. Transition arrangements related to existing multiple registrations have been provided for in this measure.

Various minor technical amendments have been included to complement the new measures to build a stronger, simpler and smarter ESOS. This includes clarifying the definitions of tuition fees, to only include the costs directly associated with the course, as these costs are eligible for refunds, and accepted students, to now include former accepted students in the definition to make reporting requirements and complaints handling processes applicable even if a student has ceased with a provider. These changes will improve the operation of the ESOS Act. The Act will also be amended to repeal the re-registration provision as this process has now been completed.

### **FINANCIAL IMPACT STATEMENT**

The implementation of the TPS comprises \$5 million seed money for the Overseas Student Transition Fund in 2012-13 and \$0.8 million to remunerate the TPS Director across the forward estimates. These costs will be offset by funding sourced from Government financial assistance provided to the Assurance Fund in 2010, and as a consequence it is expected the establishment of the TPS will be budget neutral.

To facilitate the transition to the TPS, the 2012 ESOS Assurance Fund contribution collection processes provided for under the current ESOS Act arrangements will proceed as scheduled in March 2012. The first TPS levy would then be applied for the 2013 year, allowing time for the TPS Director to consider the advice of the TPS Advisory Board and to make the decision in relation to the TPS levy.

Based on a range of assumptions the Australian Government Actuary has modelled possible revenue for 2012-13 at \$6.1 million.

## NOTES ON CLAUSES

For ease of description, this explanatory memorandum uses the following abbreviations:

‘CRICOS’ means the Commonwealth Register of Institutions and Courses for Overseas Students as provided under section 10 of the *Education Services for Overseas Students Act 2000*

‘ESOS’ means *Education Services for Overseas Students*

‘the ESOS Act’ means the *Education Services for Overseas Students Act 2000*

‘the ESOS Charges Act’ means the *Education Services for Overseas Students (Registration Charges) Act 1997*

## **Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Bill 2011**

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

Provides for the Act to be cited as the *Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Act 2011*.

### **Clause 2 - Commencement**

This clause inserts a three column table setting out commencement information for various provisions of 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.

Table item 1 provides that sections 1 to 4 and any other provisions in this Act not covered by the table shall commence on Royal Assent.

Table item 2 provides that Parts 1 and 2 of Schedule 1 shall commence on the first 1 July that occurs on or after the day this Act receives the Royal Assent.

Table item 3 provides that Division 1 of Part 3 of Schedule 1 shall commence on the first 1 July that occurs on or after the day this Act receives the Royal Assent. However, if item 12 of Schedule 1 to the *Education Services for Overseas Students Amendment (Registration Charges Consequential) Act 2011* commences at or before that time, the provision referred to in table item 3 shall not commence at all.

Table item 4 provides that Division 2 of Part 3 of Schedule 1 shall commence the later of the following times:

- (a) immediately after the commencement of the provision(s) covered by table item 3; and
- (b) immediately after the commencement of Schedule 1 to the *Education Services for Overseas Students (Registration Charges) Amendment Act 2011*.

However, the provision referred to in table item 4 shall not commence at all if the event mentioned in paragraph (b) does not occur.

Table item 5 provides that Parts 4 and 5 of Schedule 1 shall commence on the first 1 July that occurs on or after the day this Act receives the Royal Assent.

Table item 6 provides that Parts 1 and 2 of Schedule 2 shall commence on the first 1 July that occurs on or after the day this Act receives the Royal Assent.

Table item 7 provides that Division 1 of Part 3 of Schedule 2 shall commence on the first 1 July that occurs on or after the day this Act receives the Royal Assent. However, if item 10 of Schedule 1 to the *Education Services for Overseas Students Amendment (Registration*

*Charges Consequential*) Act 2011 commences at or before that time, the provision referred to in table item 7 shall not commence at all.

Table item 8 provides that Division 2 of Part 3 of Schedule 2 shall commence the later of the following times:

- (a) immediately after the commencement of the provision(s) covered by table item 6; and
- (b) immediately after the commencement of Schedule 1 to the *Education Services for Overseas Students (Registration Charges) Amendment Act 2011*.

However, the provisions referred to in table item 8 shall not commence at all if the event mentioned in paragraph (b) does not occur.

Table item 9 provides that Division 3 of Part 3 of Schedule 2 shall commence immediately before the commencement of item 7 of Schedule 1 to the *Education Services for Overseas Students Amendment (Registration Charges Consequential) Act 2011*. However, if that item commences at the same time as, or before, Part 2 of Schedule 2 to this Act, the provision referred to in table item 9 shall not commence at all.

Table item 10 provides that Division 4 of Part 3 of Schedule 2 shall commence immediately before the commencement of items 5, 6, 8 and 9 of Schedule 1 to the *Education Services for Overseas Students Amendment (Registration Charges Consequential) Act 2011*. However, if those items commence at the same time as, or before, Part 2 of Schedule 2 to this Act, the provision referred to in table item 10 shall not commence at all.

Table item 11 provides that Part 4 of Schedule 2 shall commence on the first 1 July that occurs on or after the day this Act receives the Royal Assent.

Table item 12 provides that Division 1 of Part 1 of Schedule 3 shall commence on the first 1 July that occurs on or after the day this Act receives the Royal Assent.

Table item 13 provides that Division 2 of Part 1 of Schedule 3 shall commence immediately after the commencement of the provisions covered by table item 6.

Table item 14 provides that Part 2 of Schedule 3 shall commence on the first 1 July that occurs on or after the day this Act receives the Royal Assent.

Table item 15 provides that Schedules 4 to 7 shall commence on the first 1 July that occurs on or after the day this Act receives the Royal Assent.

Table item 16 provides that Part 1 of Schedule 8 shall commence on the day this Act receives the Royal Assent. However, if item 3 of Schedule 1 to the *Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Act 2011* commences before that time, the provision referred to in table item 16 shall not commence at all.

Table item 17 provides that Part 2 of Schedule 8 shall commence the later of the following times:

- (a) the start of the day this Act receives the Royal Assent; and



(b) immediately after the commencement of item 3 of Schedule 1 to the *Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Act 2011*.

Table item 18 provides that Part 3 of Schedule 8 shall commence immediately after the commencement of the provision covered by table item 17.

Table item 19 provides that Part 1 of Schedule 9 shall commence on the first 1 July that occurs on or after the day this Act receives the Royal Assent.

Table item 20 provides that Part 2 of Schedule 9 shall commence immediately after the commencement of the provisions covered by table item 6.

A note makes it clear that these commencement times will not be amended by any later amendments of this Act.

### **Clause 3 - Schedule(s)**

Clause 3 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.

### **Clause 4 - Regulations**

This clause enables the Governor-General to make regulations prescribing matters required, necessary or convenient for the operation of or giving effect to this Act. This includes regulations to prescribe transitional matters, such as saving or application provisions, relating to the amendments or repeals made by this Act.

## **Schedule 1—Tuition protection service**

### **Part 1—Main amendments**

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

##### **Item 1 - Part 5**

This Item repeals Part 5 in its entirety and inserts new Part 5 proposed to deal with the Tuition Protection Services.

### **Part 5—Tuition protection service**

#### **Division 1—Guide to this Part**

##### **Proposed section 45 - Guide to this Part**

Proposed section 45 contains a simplified outline to proposed Part 5 of the ESOS Act to assist readers.

#### **Division 2—Obligations on registered providers when a provider or student defaults**

Division 2 sets out the obligations on registered providers when a provider or student defaults, and includes penalties and sanctions that may apply. The Baird Review recommended that ESOS be made stronger by introducing financial penalties for a broader range of non-compliant behaviour, and that the tuition protection framework be strengthened. Division 2 contains a number of strict liability offence provisions intended to discourage non-compliant behaviour.

The policy intent in introducing strict liability offences is to better enforce compliance with provider refund obligations under the ESOS Act which is the first line of tuition protection and goes to the heart of a key object of the ESOS Act. They pertain to actions that can be readily verified by the facts, for example, in relation to the offence in proposed section 47F, either the provider has entered into a written agreement which complies with proposed section 47B or it has not. Strict liability offences give ESOS regulators options and flexibility around enforcement activity, such as issuing infringement notices, to effectively take corrective action for non-compliance without having to restrict a provider's ability to operate in the first instance.

## **Subdivision A—Provider defaults**

### **Proposed section 46A - When a registered provider defaults**

Proposed section 46A deals with when a registered provider has defaulted in relation to its obligations to provide a course to an overseas student (or an intending overseas student).

Proposed subsection (1) sets out the elements of a provider's default. A registered provider defaults on its obligations either, by failing to provide the course to a student at a location on the agreed starting day, or where the course ceases to be provided to the student at the location at any time after it starts but before it is completed, and the student has not withdrawn from the course before the relevant day of default.

Proposed subsection (2) clarifies that a registered provider also defaults if, as a result of a sanction having been imposed on the provider under Part 6, the provider is unable to continue to provide a course at a specified location.

Proposed subsection (3) makes clear that a registered provider does not default in relation to an overseas student (or intending overseas student) and a course at a location, if the provider fails to commence providing the course, or the course has ceased to be provided to a student because the student has defaulted in relation to the course under proposed paragraph 47A(1)(c).

A provider fails to start to provide a course to at a location to a student if the student is ready and able to commence the course at the location on the agreed starting day and is unable to start the course because the provider does not start providing the course at the location to the student on the agreed starting day. However, a provider does not fail to start to provide a course at a location to a student where a provider is ready and able to provide a course at a location to the student on the agreed starting day, but the provider cannot start providing the course at the location to the student because the student does not start the course.

Under proposed subsection (4), where a course continues to be provided at a location, but the entity providing the course has changed, the Minister may deem that the course is not taken to have ceased to be provided at the location merely because of the change by notifying the relevant provider in writing to this effect. This is intended to cover the situations both where the provider might change its legal entity and also where a provider sells or otherwise transfers its business to another registered provider which continues to deliver the course at the location.

Before giving a notice under subsection (4), proposed subsection (5) requires the Minister to have regard to any effect the change will have on the delivery of courses and outcomes for students and any advice provided by the relevant designated authority.

### **Proposed section 46B - Registered providers to notify of provider default**

Proposed section 46B requires a registered provider to notify the Secretary, the TPS Director and the relevant students in the event of its (the provider's) default. Proposed subsection (1) obliges a registered provider to give notices in accordance with section 46B if the provider defaults in relation to one or more overseas students or intending overseas students and a course at a location. In accordance with proposed subsection (2), the provider must notify, in writing, the Secretary and the TPS Director of the default within 24 hours of the default occurring.

Proposed subsection (3) requires the following information to be included in the notice:

- the circumstances of the default;
- the details of the students in relation to whom the provider has defaulted;
- advice as to whether the provider intends to discharge its obligations to those students (under proposed section 46D) and how the provider intends to discharge those obligations.

In addition to notifying the secretary and the TPS Director, proposed subsection (4) requires the provider to also notify, in writing, the students in relation to whom the provider has defaulted.

Proposed subsection (5) provides that a notice given under proposed subsections (2) or (4) must comply with any requirements of a legislative instrument made under subsection (6).

Proposed subsection (6) provides the Minister with a legislative instrument making power to specify the notice requirements for a notice given under section 46B.

Proposed subsection (7) clarifies that the provisions of section 46B shall continue to apply to a provider even if the provider has ceased to be a registered provider.

### **Proposed section 46C - Designated authorities to notify of provider default**

Proposed section 46C obliges all designated authorities to inform the Secretary and the TPS Director as soon as practicable, in writing, if the authority has become aware that a registered provider has defaulted, or is likely to default.

### **Proposed section 46D - Obligations on registered providers in case of provider default**

Proposed section 46D sets out the obligations imposed on registered providers which default.

Proposed subsection (1) sets out that the provisions of section 46D shall apply where a registered provider defaults in relation to an overseas student or intending overseas student and a course at a location.

Proposed subsection (2) provides that the provider must discharge its obligations to each of its students in accordance with proposed subsection (3). Under this amendment, the provider must have discharged these obligations within the *provider obligation period* which is specified for the purposes of proposed section 46D as the period of 14 days after the default

day. Note that there are different provider obligation periods for the purpose of proposed sections 46D, 47D and 47E. Item 18 in Part 2 of Schedule 1 of the Bill proposed to insert a definition of *provider obligation period* which states, ‘Provider obligation period, in relation to a default has the meaning given by 46D, 47D or 47E (as the case requires)’.

Proposed subsection (3) provides that a provider will have discharged its obligations if either of the following completed:

- a student has accepted, in writing, an offer of a place in an alternative course which the provider arrange for the student to be offered a place in a course (in accordance with proposed subsection (4)); or
- the provider has provided a refund in accordance with proposed subsection (6).

For the purposes of discharging its obligations under subsection (3), a provider may arrange for the student to be offered a place in an alternative course at the provider’s expense, or the provider may pay the student a refund of the amount, worked out in accordance with any legislative instrument made under proposed subsection (7), of any unspent pre-paid fees received by the provider in respect of the student. Pre-paid fees are dealt with under Schedule 3.

Proposed subsection (7) provides the Minister with a legislative instrument making power to specify a method for working out the amount of unspent pre-paid fees for the purposes of providing a refund under subsection (6).

Proposed subsection (8) clarifies that the provisions of section 46D shall continue to apply to a provider even if the provider has ceased to be a registered provider.

### **Proposed section 46E - Offence for failure to discharge obligations**

Proposed section 46E is an offence provision whereby a person commits an offence if the person defaults in relation to an overseas student or intending overseas student and a course at a location and the person fails to discharge obligations owed to the student in accordance with section 46D (whether or not the provider is still a registered provider at that time).

Proposed subsection (1) directs the offence against either the registered provider, or against the principal executive officer of the provider where the registered provider is an unincorporated body.

Proposed subsection (2) makes clear that the offence under section 46E is one of strict liability. Strict liability is appropriate for a number of reasons. This conduct concerns obligations on providers to place a student or refund fees in accordance with the legislation within 14 days of default. The first principal object of the Act is to provide tuition assurance to overseas students for courses for which they have paid. These obligations are therefore central to the protection of international students’ interests. Strict liability is also appropriate as the regulator is able to readily assess that a breach has taken place.

This is one of a number of strict liability offences introduced by this Bill which are related to the refund obligations of providers under the Act. A key concern raised during ESOS review consultations was about the effectiveness of ESOS enforcement provisions and the review recommended that ESOS be made stronger by introducing financial penalties for a broader

range of non-compliant behaviour as well as recommendations for simplifying and strengthening the tuition protection framework, including refunds. The policy intent of the amendments introducing a number of strict liability offences therefore is to better enforce compliance with the provider refund obligations under the ESOS Act.

The imposition of sanctions may have significant implications for a provider's operations, and may also have an adverse impact on students particularly if the provider were to cease operations. Instead of such sanctions, financial penalties are a tangible and immediate action that can be taken against providers for compliance breaches. It is anticipated that this would reduce the need for lengthy enforcement processes and would also be less likely to compromise a provider's ability to continue operating (with the consequent effect this may have on students). The penalty to be introduced does not involve imprisonment and is quite low – 60 penalty units. The application of strict liability with respect to the penalty is considered likely to significantly enhance the effectiveness of the enforcement regime for the conduct in question. The ability to impose penalties on a strict liability basis without needing to establish fault is very important for the effectiveness of enforcement related to refund obligations. It will also place providers on notice that they need to take these matters seriously and give them the incentive to do so.

The commission of this offence attracts a fine of 60 penalty units. Proposed subsection (3) provides that for each successive day during which the provider continues to remain in breach of section 46E, the provider is liable for 10 percent of the maximum penalty.

#### **Proposed section 46F - Registered providers to notify of outcome of discharge of obligations**

Any registered provider that has defaulted in relation to one or more overseas students (or intending overseas students) and a course at a location must comply with the notification requirements imposed by proposed section 46F.

Proposed subsection (2) provides that within 7 days of attempting to discharge its obligations to its students, the provider must notify the Secretary and the TPS Director within 7 days after the end of the provider obligation period imposed by proposed subsection 46D(2).

For the purposes of proposed subsection (2), the notice must include the following information:

- whether the provider discharged its obligations to the students in accordance with proposed section 46D;
- where the provider has arranged alternative courses:
  - (i) details of the students the provider arranged alternative courses for; and
  - (ii) details of the courses arranged; and
  - (iii) evidence of each student's acceptance of an offer of a place in an alternative course;
- if the provider provided refunds:
  - (i) details of the students the provider provided refunds to; and
  - (ii) details of the amounts of the refunds provided.

Proposed subsection (4) provides that a notice given under proposed subsection (1) must comply with any requirements of a legislative instrument made under subsection (5).

Proposed subsection (5) provides the Minister with a legislative instrument making power to specify the notice requirements for a notice given under section 46F.

Proposed subsection (6) clarifies that the provisions of section 46F shall continue to apply to a provider even if the provider has ceased to be a registered.

## **Subdivision B—Student defaults**

### **Proposed section 47A - When a student defaults**

Proposed section 47A sets out when a student defaults in relation to a course at a location.

Proposed subsection (1) sets out the elements of a student default. A student will have defaulted if any of following occurs:

- the course starts at the location on the agreed starting day, but the student does not start the course on that day (and has not previously withdrawn); or
- the student withdraws from the course at the location (either before or after the agreed starting day); or
- the registered provider of the course refuses to provide, or continue providing, the course to the student at the location because of one or more of the following events:
  - (i) 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;
  - (ii) the student breached a condition of his or her student visa;
  - (iii) misbehaviour by the student.

Proposed subsection (2) provides that an overseas student (or intending overseas student) does not default for failing to start the course on the agreed starting day (under proposed paragraph 47A(1)(a)) if the student is unable to start that course because the registered provider has defaulted in relation to the course at the location under proposed subparagraph 46A(1)(a)(i), ie, where the provider fails to start to provide the course to the student at the location on the agreed starting day.

### **Proposed section 47B - Requirement to make written agreement about student default**

Proposed section 47B imposes upon registered providers the obligation to enter into a written agreement with each overseas student (or intending overseas student). The written agreement must set out the refund requirements that shall apply if the student defaults in relation to a course at a location and must meet the requirements set out in the national code.

### **Proposed section 47C - Registered provider to notify of student default**

In the event of a student default, proposed subsection (1) requires a registered provider to give notice in accordance with section 47C if an overseas student or intending overseas student defaults in relation to a course provided by the provider at a location.

Proposed subsection (2) obliges the provider to notify, in writing, the Secretary and the TPS Director of the default within 24 hours of the default occurring. The Minister has discretion whether to take action against a provider who breaches this provision. This obligation under proposed subsection 47(2) is in addition to the broader obligation the provider has under section 19 of the Act to provide the Secretary with information about accepted students which could include, where relevant, information about student default. Proposed subsection (2) recognises that it is important for the TPS director and the Secretary to be notified as soon as possible about a student default. Note also that the registered provider must also give information about the outcome of the discharge of its obligations under proposed section 47H.

Proposed subsection (3) provides that a notice given under proposed subsection (1) must comply with any requirements of a legislative instrument made under subsection (4).

Proposed subsection (4) provides the Minister with a legislative instrument making power to specify the notice requirements for a notice given under this section.

Proposed subsection (5) clarifies that the provisions of this section shall continue to apply to a provider even if the provider has ceased to be a registered.

#### **47D Refund under a written agreement about student default**

Proposed section 47D deals with refunds to be made by registered providers in relation to student default.

Proposed subsection (1) makes clear that if an overseas student (or intending overseas student) defaults in relation to a course provided by the provider at a location, a registered provider must provide a refund under section 47D.

Subsection (2) clarifies that the quantum of the refund which the provider must pay is the amount required by the written agreement entered into with the overseas student under proposed section 47B.

Proposed subsection (3) directs the provider to pay any refund amount to the either the relevant student. Alternately, if the written agreement specifies a person other than the student, the provider must pay the refund to the specified person.

Proposed subsection (4) provides that the provider must pay the refund within the period the period of 4 weeks after receiving a written claim from the student. This period is specified as the *provider obligation period* for the purposes of this section.

Proposed subsection (5) creates an exception to the refund obligation under section 47D where a student does any of the following:

- fails to start the course at the location on the agreed starting day;
- withdraws from the course at that location;
- fails to pay an amount he or she was liable to pay the provider, directly or indirectly, in order to undertake the course at that location; and

such act or omission directly or indirectly causes the student to default; and one of the reasons for the student's act or omission was that the student was refused a student visa. In these circumstances the registered provider is not required to provide a refund under this



proposed section 47D, instead the provider is required to provide a refund in accordance with the legislative instrument made under proposed subsection 47E(4).

Proposed subsection 47D(5) has the same effect as section 28(4) of the Act which is repealed by this Bill. In circumstances where 47D(5) applies the registered provider must provide a refund under proposed section 47(E).

Proposed subsection (6) clarifies that the provisions of section 47D shall continue to apply to a provider even if the provider has ceased to be a registered.

#### **47E Refund in other cases**

Proposed section 47E sets out the refund obligations of registered providers in all other cases.

Under proposed subsection (1) a registered provider must provide a refund under this section if an overseas student (or an intending overseas student) defaults in relation to a course at a location and either of the following applies:

- the provider has not entered into an agreement with the student that is compliant with the requirements of section 47B; or
- the provider is not required to pay a refund to the student because of a refusal of a student's visa under subsection 47D(5).

Proposed subsection (2) provides that the quantum of the refund which the provider must pay to the student is the amount worked out in accordance with a legislative instrument made under proposed subsection (4), of any unspent pre-paid fees received by the provider in respect of the student. Pre-paid fees are dealt with under Schedule 3.

Proposed subsection (3) provides that the provider must pay the refund within the period the period of 4 weeks after the default day. This period is specified as the *provider obligation period* for the purposes of this section.

Proposed subsection (4) provides the Minister with a legislative instrument making power to specify a method for working out the amount of unspent pre-paid fees for the purposes of providing a refund under subsection (2). This gives the Minister flexibility in specifying the amount of refund available to students under this section where either no agreement has been entered into with the student under section 47B or where the student was refused a visa and the circumstances in paragraph 47D(5)(b) apply.

Proposed subsection (5) clarifies that the provisions of section 47E shall continue to apply to a provider even if the provider has ceased to be a registered.

#### **Proposed section 47F - Offence for failure to enter agreement that complies with requirements**

Proposed section 47F is an offence provision whereby a person commits an offence if the person fails to enter into an agreement that complies with the requirements of proposed section 47B.

Proposed subsection (1) directs the offence against either the registered provider or against the principal executive officer of the provider where the registered provider is an unincorporated body.

Proposed subsection (2) makes clear that the offence under section 47F is one of strict liability. This offence concerns the obligation on providers to enter into a written agreement entered into with the student in accordance with proposed section 47B which includes the refund requirements that apply if the student defaults. Regardless of the existence of intent, this obligation is central to the protection of international students' interests. It will significantly enhance the effectiveness of the enforcement regime for the conduct in question and reduce the need for lengthy enforcement processes or the imposition of conditions that compromise a provider's ability to continue operating. Strict liability is appropriate in this situation as the regulator is able to readily assess that a breach has taken place.

The commission of this offence attracts a fine of 60 penalty units. Proposed subsection (3) makes clear that section 4K of the *Crimes Act 1914* (continuing offences) does not apply in relation to an offence under subsection (1).

### **Proposed section 47G - Offence for failure to provide refund**

Proposed section 47G is an offence provision whereby a person commits an offence if the person fails to provide a refund to the student in accordance with section 47D or 47E (as the case requires) (whether or not the provider is still a registered provider at that time) where an overseas student or intending overseas student has defaulted in relation to a course at a location that is or was provided, or is to be provided, by the person.

Proposed subsection (1) directs the offence against either the registered provider or against the principal executive officer of the provider where the registered provider is an unincorporated body.

Proposed subsection (2) makes clear that the offence under section 47F is one of strict liability.

The commission of this offence attracts a fine of 60 penalty units. Proposed subsection (3) provides that for each successive day during which the provider continues to commit an offence under proposed subsection 47G(1), the provider is liable for 10 percent of the maximum penalty.

### **Proposed section 47H - Registered providers to notify of outcome of discharge of obligations**

If an overseas student (or intending overseas student) defaults in relation to a course provided by a provider at a location, that provider must comply with the notification requirements imposed by proposed section 47H about the discharge of the providers obligations.

Proposed subsection (2) provides that, within 7 days after the end of the relevant provider obligation period, a provider must give a notice to the Secretary and the TPS Director. Note that a definition of provider obligation period is proposed to be inserted into section 5 of the Act that says:

*Provider obligation period, in relation to a default has the meaning given by 46D, 47D or 47E (as the case requires).*

For the purposes of subsection (2), the notice must include the following information:

- whether the provider provided a refund under section 47D or 47E;
- details of the student the provider provided the refund to;
- details of the amount of the refund provided.

Proposed subsection (4) provides that a notice given under proposed subsection (1) must comply with any requirements of a legislative instrument made under subsection (5).

Proposed subsection (5) provides the Minister with a legislative instrument making power to specify the notice requirements for a notice given under proposed section 47H.

Proposed subsection (6) clarifies that the provisions of proposed section 47H shall continue to apply to a provider even if the provider has ceased to be a registered.

### **Subdivision C—Recovering an amount**

#### **Proposed section 48 - Recovering an amount**

Proposed section 48 sets out provisions relating to the recovery of an amount owing to a student under this Division 1.

Proposed subsection (1) provides that an overseas student or intending overseas student may recover an amount owing to the student under Division 1 of the ESOS Act as a debt by action in a court of competent jurisdiction, unless a person other than the student is specified in the agreement entered into between the provider and the student as the person to whom the refund must be paid. In this case, the specified person, rather than the student, may recover the amount as a debt by action in a court of competent jurisdiction.

Proposed subsection (3) clarifies that Division 1 shall not affect any liability that a provider has apart from this Division to pay an additional amount to the student.

### **Division 3—Student placement service**

#### **Proposed section 49 - Student placement service**

Proposed section 49 sets out the student placement service to be used by the TPS Director where registered provider (or former registered provider) has defaulted in relation to an overseas student (or intending overseas student) and a course at a location.

For the student placement service to be invoked, the provider must have either, failed to discharge its obligations under section 46D to the student by the end of the provider obligation period, or the provider is unlikely to be able to discharge its obligations under section 46D to the student by the end of the provider obligation period. Note that provider obligation period for the purposes of section 46D is 14 days after the default. See proposed

subsection 46(D)(2) and the proposed definition of *provider obligation period* to be inserted into section 5 of the Act by item 18 of Part 2 of Schedule 1 of this Bill.

As the first step, if any suitable alternative courses are available, the TPS Director must provide, in writing (which may be in electronic form), the student with one or more options for such alternative courses. If a registered provider offers the student a place in an alternative course (referred to in subsection (2)), the student may accept the offer. If a student chooses to accept such an offer, the student's acceptance must be made in writing and within the period of 30 days after the end of the relevant provider obligation period. In exceptional circumstances, the TPS Director may determine, in writing, a shorter period for the acceptance of course placement, or alternatively may determine in writing a longer period if agreed to by the student.

Subsection (6) provides the Minister with a legislative instrument making power to specify criteria to determine whether a particular course is a suitable alternative course for the purposes of this Act.

## **Division 4—Calls on the OSTF**

### **Proposed section 50A - When a call is made on the OSTF**

Proposed section 50A sets out circumstances in which a call can be made on the OSTF (the Overseas Students Tuition Fund). In all instances the TPS Director must determine that the necessary circumstances exist.

Proposed subsection (2) deals with the situation where the TPS Director determines that a registered provider has defaulted in relation to an overseas student or intending overseas student and at the end of a provider obligation period a provider has not discharged its obligations under s 46D and , no place in an alternative course has been accepted by the student in accordance with the student placement services provisions under proposed section 49. In this case, a call is made on the OSTF

Proposed subsection (3) deals with the situation where the TPS Director determines that at the end of the provider obligation period following a provider default , the provider has failed to discharge its obligations under proposed section 46D and a place in an alternative course has been accepted by the student under proposed section 49. In this case, a call is made on the OSTF.

Finally, proposed subsection (4) deals with the situation where the TPS Director determines that a student has defaulted in relation to a course provided by a registered provider , and a refund has not been provided by the relevant registered provider by the end of the provider obligation period.

Proposed subsection (5) makes clear that no call can be made on the OSTF if the TPS Director becomes aware of any of the circumstances set out in subsections (2), (3) or (4) more than 12 months from the relevant default day.

## **Proposed section 50B - What the TPS Director must do when a call is made**

If a call is required to be made on the OSTF, proposed subsection (1) requires the TPS Director to pay that amount out of the OSTF, as soon as practicable, equal to the amount that the provider must still pay in satisfaction of the provider's refund obligations under Division 2.

Proposed subsection (2) authorises the TPS Director to pay an amount larger than a student's refund entitlement where a student has accepted a place in an alternative course (in accordance with section 49) and the TPS Director considers that to pay the larger amount would best protect the interests of the student and would not jeopardise the sustainability of the OSTF. The purpose of this provision is to allow discretion to the TPS Director to pay the larger amount of the refund providing the circumstances in subsection 50B(2) exist.

The party to whom the TPS Director must pay the amount will be:

- if the student has accepted a place in an alternative course in accordance with section 49—the registered provider of that course; and
- if a refund was required to be paid under section 47D, and a person (other than the student) is specified in the agreement made with the student under section 47B to receive any refund under this section—the specified person; and
- otherwise—the student.

Proposed subsection (4) provides that where the TPS Director must pay a registered provider for providing an alternative course (for placement of a student) and the amount required to be paid is more than the cost of the course, the TPS Director must pay the difference to either the student or the person specified in the agreement made with the student, as the case may be.

The purpose of this provision is to ensure that the focus of the TPS framework remains on placing students who have been affected by a default and that this placement is at the choice or election of the student. Where a student chooses an alternative course option that costs less than the amount of the unexpended tuition fee money for which the student would be eligible to be refunded if the student did not accept a place in an alternative course, that student will receive the difference between the amount payable for the alternative course and the amount the student would have received if the student did not accept the offer of an alternative course and instead received a refund.

Proposed subsection (5) provides the Minister with a legislative instrument making power to specify requirements for payments made under section 50B.

## **Proposed section 50C - Consequences of a payment under section 50B**

Proposed section (1) that a student, or other person specified in the agreement with the student under proposed section 47B to receive any refund under proposed section 50B, cease to have a claim against a provider in relation to the student's pre-paid fees in certain circumstances. Those circumstances are where there has been either a student or provider default and the TPS Director has paid an amount in satisfaction of a call that has been made on the OSTF.

Where the TPS Director has paid an amount from the OSTF, the relevant provider must repay the TPS Director the amount equal to the payment amount that the TPS Director paid under section 50B. Proposed subsection (3) authorises the TPS Director to recover that amount from the provider as a debt due to the Commonwealth by action in a court of competent jurisdiction. If the provider has previously granted the TPS Director a charge or other security over any of its assets, proposed subsection (4) authorises the TPS Director to enforce the charge or security in full or partial satisfaction of the debt.

Proposed subsection (5) clarifies that the provisions of section 50C shall continue to apply to a provider even if the provider has ceased to be a registered.

#### **Proposed section 50D - TPS Director to notify Immigration Secretary**

As soon as practicable after the TPS Director has provided a refund to either the student or the person specified in the agreement made with the student, as the case may be, proposed section 50D requires the TPS Director to notify the Immigration Secretary.

The TPS Director must include in the notice to the Immigration Secretary the name of the overseas student (or intending overseas student) in relation to whom the refund was provided. The notice must also comply with any requirements specified in the legislative instrument made under proposed subsection (3).

Subsection (3) provides the Minister with a legislative instrument making power to specify requirements for a notice given under section 50D.

#### **Proposed section 50E - Right to refund may be cancelled etc. without compensation**

Proposed section 50E stipulates that any right to be paid an amount as a refund under section 50B is granted on the basis that the right may be cancelled, revoked, terminated or varied by or under later legislation. Proposed section 50E also makes clear that no compensation is payable if the right has been cancelled, revoked, terminated or varied.

## **Part 5A—Overseas Students Tuition Fund, the TPS Director and the TPS Advisory Board**

### **Division 1—Guide to this Part**

#### **Proposed section 51 - Guide to this Part**

Proposed section 51 contains a simplified outline to proposed Part 5A of the ESOS Act to assist readers.

### **Division 2—Overseas Students Tuition Fund and TPS levies**

#### **Subdivision A—Overseas Students Tuition Fund**

##### **Proposed section 52A - Name of Fund**

Proposed section 52A establishes the Overseas Students Tuition Fund (known by the acronym OSTF), which will be a Special Account for the purposes of the *Financial Management and Accountability Act 1997*.

##### **Proposed section 52B - Credits to the OSTF**

Proposed section 52B mandates that amounts equal to the following must be credited to the OSTF:

- all amounts of TPS levy received from providers (see section 24 and Subdivision B of this Division);
- all amounts recovered from providers under section 50C;
- any money the TPS Director borrows for the OSTF;
- any other money appropriated by the Parliament for the purpose of the OSTF;
- any late payment penalty received by the TPS Director;
- amounts received by the Commonwealth for the purposes of the OSTF.

##### **Proposed section 52C - Purposes of the OSTF**

Proposed subsection (1) specifies that the purposes of the OSTF are:

- making of payments as a result of calls being made on the OSTF under Division 4 of Part 5;
- paying or discharging costs, expenses and other obligations incurred by the Commonwealth in the performance of the TPS Director's functions, including in managing the OSTF.

Proposed subsection (2) provides that any payment or discharge of costs, expenses and other obligations incurred by the Commonwealth in the performance of the TPS Director's functions (including in managing the OSTF) will not include the following:

- paying any remuneration or allowances payable to the TPS Director under this Act; or

- paying or discharging any costs, expenses or other obligations associated with services provided to the TPS Director by any employee or officer of the Department.

## **Subdivision B—TPS levies**

### **Proposed section 53A - TPS Director to set TPS levies**

Proposed section 53A requires the TPS Director to determine the amount of TPS levy to be collected from each provider who is required to pay a levy for each calendar year. In determining the amount of the TPS levy, the TPS Director must comply with the legislative instrument made under subsections 9(3) and 10(2) of the *Education Services for Overseas Students (TPS Levies) Act 2011* for that year.

Subsections 9(3) of the *Education Services for Overseas Students (TPS Levies) Act 2011* requires the TPS Director to specify, by legislative instrument, various matters for the purposes of calculating registered provider's TPS levy.

Subsection 10(2) of the *Education Services for Overseas Students (TPS Levies) Act 2011* requires the TPS Director to specify, by legislative instrument, a percentage for a year for the purposes of calculating the formula used to determine a registered provider's special tuition protection component.

### **Proposed section 53B - Notice of amount of TPS levy**

Proposed section 53B provides that the TPS Director must give a written notice which specifies the amount of a provider's TPS levy and the day by which the provider must pay the levy to each provider who is liable to pay a TPS levy. Proposed subsection (2) requires that the day by which the provider must pay the levy (as specified in the written notice) must be at least 14 days after the notice is given to the provider.

### **Proposed section 53C - Notifying the Secretary in relation to payment of TPS levy**

Proposed section 53C sets out the notification requirements for the TPS Director in relation to payment of TPS Levy. In relation to a provider's first payment of the TPS levy, proposed subsection (1) obliges the TPS Director to notify the Secretary if the provider (who is not yet registered under section 9AB) has paid its first TPS levy. It is necessary for the Secretary to know when the provider has paid its first TPS levy so that the Secretary may register the provider. The TPS Director must give the Secretary the notice as soon as practicable after the provider has paid the levy.

In the event that a registered provider fails to make later payment of a TPS levy, the TPS Director must notify the Secretary that the provider has not paid a TPS levy for a year by the end of the period referred to in paragraph 53D(2)(b).

### **Proposed section 53D - Reminder notices**

Proposed section 53D sets out the requirements of reminder notices in relation to outstanding payments of TPS levies. Proposed subsection (1) requires the TPS Director to give a reminder notice to each registered provider who has not paid the TPS levy by the end of the



relevant due day. Proposed subsection (2) specifies the matters to be included in a reminder notice which include:

- the amount of the TPS levy that is still outstanding ; and
- a statement to the effect that the registered provider must pay, by the end of the seventh day after the reminder notice is given to the provider, the amount of the TPS levy, together with the amount of the associated late payment penalty; and
- a statement setting out the effect of section 90—that the provider’s registration will be automatically suspended if the provider does not comply with the reminder notice.

Proposed subsection (3) obliges the TPS Director to notify the Secretary if a provider has failed to comply with the reminder notice.

### **Division 3—TPS Director**

#### **Proposed section 54A - Appointment of TPS Director**

Proposed subsection (1) provides that the TPS Director is appointed by the Minister by written instrument. Before making the appointment, proposed subsection (2) provides that the Minister may take any recommendation of the Secretary into account in relation to the appointment.

Proposed subsection (3) provides that the TPS Director’s term of office is to be specified in the instrument of appointment and cannot exceed 5 years. While an appointment cannot exceed 5 years, an individual may serve more than one term as the TPS Director, that is, they may be reappointed by the Minister. Proposed subsection (4) provides that the TPS Director is to be appointed on a full-time basis.

#### **Proposed section 54B - Functions of the TPS Director**

Proposed section 54B provides that the TPS Director has the following functions:

- to facilitate and monitor the placement of overseas students and intending overseas students in alternative courses under section 49;
- to determine whether a call is made on the OSTF under section 50A;
- to pay amounts out of the OSTF under section 50B;
- to report to the Minister on:
  - (i) the operation of Part 5 (tuition protection service); and
  - (ii) the financial status of the OSTF;
- to manage the OSTF in a way that ensures that it is able to meet all its liabilities from time to time;
- to make the legislative instrument each year for the purposes of subsections 9(3) and 10(2) of the Education Services for Overseas Students (TPS Levies) Act 2011;
- any other function conferred by this Act.

#### **Proposed section 54C - Remuneration and allowances**

Proposed subsection (1) provides that the TPS Director is to be paid such remuneration as is determined by the Remuneration Tribunal, or if no determination is in operation, the TPS Director is to be paid such remuneration that is prescribed by the regulations.

Proposed subsection (2) provides that the TPS Director is to be paid the allowances that are prescribed by the regulations.

Proposed subsection (3) clarifies that section 54C has effect subject to the *Remuneration Tribunal Act 1973*. The *Remuneration Tribunal Act 1973* provides for the Remuneration Tribunal to conduct inquiries and make determination on the remuneration of certain office holders.

#### **Proposed section 54D - Leave of absence**

Proposed subsection (1) provides that the TPS Director's recreational leave entitlements will be determined by the Remuneration Tribunal.

Proposed subsection (2) authorises the Minister to grant the TPS Director leave of absence (other than recreation leave) on such terms and conditions as the Minister determines.

#### **Proposed section 54E - Restrictions on outside employment**

Proposed section 54E prohibits the TPS Director from engaging in paid employment outside the duties of his or her office without first obtaining the Minister's approval.

#### **Proposed section 54F - Disclosure of interests**

Proposed section 54F requires the TPS Director to give written notice to the Minister of all interests, pecuniary or otherwise, that the TPS Director has or acquires that could conflict with the proper performance of the TPS Director's functions.

#### **Proposed section 54G - Resignation**

Proposed subsection (1) provides that the TPS Director may resign his or her appointment by giving a written resignation to the Minister. Such a resignation takes effect on the day it is received by the Minister or, if a later day is specified in the resignation, on that later day (proposed subsection (2)).

#### **Proposed section 54H - Termination of appointment**

Proposed subsection (1) sets out the ground upon which the TPS Director's appointment may be terminated by the Minister. The grounds on which the Minister may terminate the appointment are:

- for misbehaviour or physical or mental incapacity; or
- if the TPS Director becomes bankrupt, applies for relief from bankruptcy or insolvency debtors, compounds with his or her creditors, or makes an assignment of his or her remuneration for the benefit of his or her creditors; or
- if the TPS Director is absent (except on leave of absence) for 14 consecutive days or for 28 days in any 12 months; or
- if the TPS Director engages, except with the Minister's approval, in paid employment outside the duties of his or her office contrary to section 54E; or
- if the TPS Director fails, without reasonable excuse, to comply with section 54F (disclosure of interests).

### **Proposed section 54J - Other terms and conditions**

Proposed section 54J makes allowance for the Minister to determine in writing such other terms and conditions of the TPS Director's appointment in relation to matters not covered by this Division 3.

### **Proposed section 54K - Acting TPS Director**

Subsection (1) permits the Minister to appoint a person to act as the TPS Director:

- when there is a vacancy in the office of the TPS Director (whether or not an appointment has previously been made to the office); or
- whenever the TPS Director is absent from duty or overseas, or is unable to perform the duties of the office for any reason.

### **Proposed section 54L - Consultants**

Proposed section 54L authorises the TPS Director to engage consultants to assist in the performance of the TPS Director's functions.

### **Proposed section 54M - Indemnity**

Proposed subsection (1) clarifies that the TPS Director will not personally be liable to any person (other than the Commonwealth) in respect of anything done, or omitted to be done, in good faith in the exercise or performance of powers or functions under the ESOS Act or the *Education Services for Overseas Students (TPS Levies) Act 2011*. However, proposed subsection (2) provides that the TPS Director's indemnity does not affect the operation of the *Privacy Act 1988*.

## **Division 4—TPS Advisory Board**

### **Subdivision A—Appointment of Board members**

#### **Proposed section 55A - Establishment**

Proposed section 55A establishes the TPS Advisory Board.

#### **Proposed section 55B - Function of the Board**

Proposed section 55B provides that the Board's function is to provide advice and make recommendations to the TPS Director in relation to the making of a legislative instrument each year under subsections 9(3) and 10(2) of the *Education Services for Overseas Students (TPS Levies) Act 2011*. Provision of such advice and making of such recommendations may be on the TPS Board's own initiative or at the request of the TPS Director.

Subsections 9(3) of the *Education Services for Overseas Students (TPS Levies) Act 2011* provides the TPS Director a legislative instrument making power to specify various matters

for the purposes of calculating the formula used to determine a registered provider's risk component for a risk factor.

Subsection 10(2) of the *Education Services for Overseas Students (TPS Levies) Act 2011* also provides the TPS Director a legislative instrument making power to specify a percentage for a year for the purposes of calculating the formula used to determine a registered provider's special tuition protection component.

### **Proposed section 55C - Membership**

Proposed subsection (1) provides that the Board shall consist of up to 12 members. Five members shall be a representative from each of the following Commonwealth agencies:

- (i) the Department;
- (ii) the Department whose Minister administers the *Financial Management and Accountability Act 1997*;
- (iii) the Department administered by the Immigration Minister;
- (iv) the Australian Government Actuary;
- (v) the Australian Prudential Regulation Authority; and

Up to a maximum of 7 other board members may be appointed by the Minister (see also proposed section 55D). A person shall be eligible for appointment as one of the up to 7 Board members referred to in proposed paragraph 55C(1)(b) unless the Minister is satisfied that proposed Board member has qualifications or experience that the Minister considers relevant to the performance of the Board's function (proposed subsection (2)).

Proposed subsection (1) requires the Minister to appoint, by written instrument, one of the Board members to be the Chair, and another Board member to be the Deputy Chair.

### **Proposed section 55D - Appointment of Board members**

The Minister shall appoint Board members on a part-time basis by written instrument (proposed subsections (1) and (3)).

Proposed subsection (2) provides that Board members shall hold office for the period specified in the instrument of appointment and that the period must not exceed 2 years. A board member could be reappointed for more than one 2 year period.

### **Proposed section 55E - Remuneration and allowances**

Proposed section 55E sets out the remuneration and allowances to be paid to Board members. Proposed subsection (1) provides that a Board member (other than a Board member appointed as a representative of one of the Commonwealth agencies) is to be paid the remuneration that is determined by the Remuneration Tribunal. Where no such determination of that remuneration by the Tribunal is in operation, such a Board member is to be paid the remuneration that is prescribed by the regulations.

Proposed subsection (2) provides that a Board member (other than as a representative of one of the Commonwealth agencies) shall be paid the allowances that are prescribed by the regulations.

Proposed subsection (3) clarifies that the operation of section 55E is subject to the *Remuneration Tribunal Act 1973*.

#### **Proposed section 55F - Leave of absence**

Proposed subsection (1) provides that the Minister may grant the Chair leave of absence on such terms and conditions as the Minister determines.

Proposed subsection (2) provides that the Chair may grant another Board member leave of absence on such terms and conditions as the Chair determines.

#### **Proposed section 55G - Restrictions on outside employment**

Proposed section 55 prohibits a Board member from engaging in any paid employment that, in the Minister's opinion, conflicts (or may conflict) with the relevant Board member's proper performance of his or her duties.

#### **Proposed section 55H - Disclosure of interests**

Proposed section 55H provides that the Board member must disclose by written notice to the Minister all interests (pecuniary or otherwise) that the member has or acquires which conflict or could conflict with the proper performance of the member's functions.

#### **Proposed section 55J - Disclosure of interests to the Board**

A Board member who has an interest (pecuniary or otherwise) in a matter being considered (or about to be considered by the Board) must disclose the nature of the interest to a meeting of the Board as soon as possible after the relevant facts have come to the Board member's knowledge (proposed subsections (1) and (2)).

Proposed subsection (3) requires the disclosure to be recorded in the minutes of the meeting of the Board.

The Board member must not be present during any deliberation by the Board on the relevant matter and must not take part in any decision of the Board with respect to the matter unless the Board has determined otherwise (proposed subsection (4)). Furthermore, the relevant Board member must not be present during any deliberation of the Board for the purpose of making a determination under subsection (4) and must not take part in making the determination (proposed subsection (5)).

Proposed subsection (6) requires the subsection (4) determination to be recorded in the minutes of the meeting of the Board.

#### **Proposed section 55K - Resignation**

Proposed subsection (1) provides that a Board member may resign by giving a written resignation to the Minister. Proposed subsection (2) clarifies that the Chair or Deputy Chair may resign as the Chair or Deputy Chair, as the case may be without resigning his or her appointment as a Board member. Such resignations take effect on the day it is received by the

Minister or, if a later day is specified in the resignation, on that later day (proposed subsection (3)).

### **Proposed section 55L - Termination**

Proposed section 55L sets out the grounds upon which a Board member's appointment may be terminated by the Minister. The grounds upon which the Minister may terminate an appointment are:

- for misbehaviour physical or mental incapacity; or
- if the Board member becomes bankrupt, applies for relief from bankruptcy or insolvency, enters, compounds with his or her creditors, or makes an assignment of his or her remuneration for the benefit of his or her creditors; or
- if the Board member is absent (except on leave of absence) from 2 consecutive meetings of the Board; or
- if the Board member engages in paid employment that, in the Minister's opinion, conflicts (or may conflict) with the proper performance of his or her duties (contrary to section 55G); or
- the Board member fails, without reasonable excuse, to comply with his or her disclosure of interests obligations (as required by section 55H or 55J).

### **Proposed section 55M - Other terms and conditions**

Proposed section 55M provides that a Board member holds office on the terms and conditions (if any) in relation to matters not covered by this Division that are determined by the Minister.

### **Proposed section 55N - Acting appointments**

Proposed subsection (1) allows the Minister to appoint person to act as Board members:

- to fill vacancies on the Board (whether or not an appointment has previously been made); or
- to replace Board members who are absent from duty or overseas, or who are unable to perform the duties of the office for any reason.

Proposed subsection (2) allows the Minister to appoint a Board member to act as the Chair if the Deputy Chair is unable to act as the Chair:

- to fill a vacancy in the office of the Chair (whether or not an appointment has previously been made); or
- to replace the Chair if during any period, (or periods) when the Chair is absent from duty or overseas or is unable to perform the duties of the office for any reason.

## **Subdivision B—Meetings of the TPS Advisory Board**

### **Proposed section 56A - Convening meetings**

Proposed subsection (1) requires the Board to hold the meetings that are necessary for the efficient performance of its function. Such meetings are to be held at the times and places that the Chair determines (proposed subsection (2)).

Proposed subsection (3) requires the Chair to convene at least 2 Board meetings each calendar year and to convene a meeting if requested in writing by the Minister or by at least 7 of the Board members.

#### **Proposed section 56B - Presiding at meetings**

It is a requirement that the Chair preside at all meetings at which he or she is present (proposed subsection (1)). If the Chair is not present at a meeting, the Deputy Chair must preside (proposed subsection (2)).

#### **Proposed section 56C - Quorum**

Proposed subsection (1) provides that a quorum at Board meetings is constituted by 6 Board members, one of whom must be either the Chair or the Deputy Chair.

However, if a Board member is prevented from participating in the deliberations or decisions of the Board due to a conflict of interest under section 55J and as a result of that member leaving the meeting there is no longer a quorum present and either of the Chair or the Deputy Chair still remains at the meeting, the remaining Board members at the meeting shall constitute a quorum for the purpose of any deliberation or decision at that meeting with respect to that matter (proposed subsection (2)).

#### **Proposed section 56D - Voting at meetings**

Proposed subsection (1) provides that all questions arising at a meeting are to be determined by a majority of the votes of the Board members present and voting. The person presiding at a meeting has a deliberative vote and, in the event of an equality of votes, a casting vote (proposed subsection (2)).

#### **Proposed section 56E - Conduct of meetings**

Proposed section 56E provides that the Board may regulate proceedings at its meetings as it considers appropriate.

#### **Proposed section 56F - Minutes**

Proposed section 56F requires the Board to keep minutes of its meetings.

#### **Proposed section 56G - Decisions without meetings**

Proposed subsection (2) permits the Board to determine that it may make decisions of a particular kind without meeting and to determine the method by which Board members are to indicate agreement with proposed decisions.

If, without meeting, a majority of the Board members entitled to vote on the proposed decision indicate agreement with the decision in accordance with the method determined by the Board under subsection (2), and all Board members were informed of the proposed decision (or reasonable efforts were made to inform all the members of the proposed decision) the Board is taken to have made a decision at a meeting (proposed subsection (1)).

Proposed subsection (3) clarifies that a Board member is not entitled to vote on a proposed decision if the particular Board member would not have been entitled to vote on that proposal if the matter had been considered at a meeting of the Board.

Proposed subsection (4) mandates that the Board must keep a record of decisions made without meetings under section 56G.



## Part 2—Consequential amendments

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

#### Item 2 – Paragraph 4A(a)

Section 4A of the ESOS Act describes the Act’s principle objects. This Item amends the paragraph concerning tuition assurance. The amended subparagraph states that a principle object of the Act is to provide tuition assurance, and refunds, for overseas students for courses for which they have paid.

#### Item 3 – Paragraphs 4B(2)(c) and (e)

Section 4B concerns the extension of the ESOS Act to Christmas Island and Cocos (Keeling) Islands. This Item repeals paragraphs 4B(2)(c) and (e), which refer to parts of the ESOS Act that are amended by the Bill.

#### Items 4 to 21, inclusive – Section 5

Section 5 contains defined terms used within the ESOS Act. Items 4-19 insert new definitions and repeal a number of these terms to improve the operation of the ESOS Act in line with the new Tuition Protection Service. The following new defined terms are inserted:

***agreed starting day*** for a course means the day on which the course was scheduled to start, or a later day agreed between the registered provider and for the course and the student. (Item 4)

***Board*** means the TPS Advisory Board established by section 55A. (Item 6)

***Board member*** means a member of the Board appointed under section 55D, including the Chair and the Deputy Chair. (Item 7)

***call***: a *call* is made on the OSTF in the circumstances set out in section 50A. (Item 8)

***default***:

- (a) in relation to a registered provider—has the meaning given by section 46A; and
- (b) in relation to an overseas student or intending overseas student—has the meaning given by section 47A. (Item 10)

***default day***, in relation to a default, means:

- (a) if subparagraph 46A(1)(a)(i) or paragraph 47A(1)(a) applies—the agreed starting day; or
- (b) if subparagraph 46A(1)(a)(ii) applies—the day on which the course ceases to be provided; or
- (c) if paragraph 47A(1)(b) applies—the day on which the student withdraws from the course; or

- (d) if paragraph 47A(1)(c) applies—the day on which the registered provider of the course refuses to provide, or continue providing, the course to the student. (Item 11)

***Immigration Secretary*** means the Secretary of the Department administered by the Immigration Minister. (Item 14)

***OSTF***: see Overseas Students Tuition Fund. (Item 15)

***Overseas Students Tuition Fund*** means the Overseas Students Tuition Fund established under section 52A. (Item 16)

***provider obligation period***, in relation to a default, has the meaning given by section 46D, 47D or 47E (as the case requires). (Item 18)

***TPS levy*** means a TPS levy that a provider is required to pay to the TPS Director under paragraph 9AB(1)(d) or subsection 24(1). (Item 20)

The following definitions are repealed:

***annual Fund contribution*** (Item 5)

***contributions criteria*** (Item 9)

***Fund*** (Item 12)

***Fund Manager*** (Item 13)

***Panel*** (Item 17)

***special levy*** (Item 19)

***tuition assurance scheme*** (Item 21)

### **Item 22- Section 13**

Section 13 of the ESOS Act allows the Fund Manager under the old Tuition Assurance arrangements to request relevant information from providers intending to become registered.

Item 20 repeals and replaces this section in line with the new TPS arrangements. Proposed subsection 13(1) permits the TPS director to request information that is relevant to determining a prospective provider's TPS levy at any time before that provider is registered. Proposed subsection 13(2) states that the TPS Director does not have to determine a provider's TPS levy until the provider complies with the request.

### **Item 23 – Section 22**

Item 23 repeals section 22 of the ESOS Act, which required registered providers to be members of a Tuition Assurance Scheme under the old Tuition Assurance arrangements.

### **Item 24 – Sections 24 and 25**

Sections 24 and 25 of the ESOS Act concern Annual Fund contributions under the old Tuition Assurance arrangements.

Item 22 repeals these sections and replaces them with a new section 24, which states that a registered provider must pay a TPS levy for each calendar year (subsection 24(1)), and that a provider required to pay a levy must pay it to the TPS Director by the day stated in the notice that the TPS Director gives to them (subsection 24(2)).

### **Item 25 – Section 26**

Proposed section 26 of the ESOS Act concerns the obligation of registered providers to disclose information that might result in an increase to the provider's annual tuition assurance contribution. Item 23 updates the terminology used in the section in line with the new TPS arrangements.

### **Item 26 –Division 2 of Part 3**

Item 24 repeals Division 2 of Part 3 of the ESOS Act, which deals with refunds of course money. This repeal is consequential to Item 1 of Part 1 of the Bill, which inserts a new Part 5 of the Act setting out TPS arrangements, including provisions relating to refunds.

### **Item 27 – Paragraph 90(1)(a)**

Paragraph 90(1)(a) of the ESOS Act concerns suspension of providers and contains a reference to a payment reminder notice under section 75. Item 25 updates this reference to the new section 53D.

### **Item 28 – Paragraphs 106(1A)(e) and (f)**

Paragraphs 106(1A)(e) and (f) of the ESOS Act are references to sections that contain offences which may result in an infringement notice. Item 26 updates these references to corresponding sections in proposed Part 5 of the amended Act.

### **Item 29 - Paragraph 108(a)**

This Item makes a consequential amendment for the purposes of Schedule 1 of this Act replacing the reference to 'fund manager' with 'TPS Director'.

### **Item 30 - After section 170A**

This Item inserts new section 170B. New section 170B requires the TPS Director to prepare and give a report to the Minister at the end of each financial year in relation to the operations of the tuition protection service.

The report must be included in the included in the Department's annual report for that financial year.

### **Item 31 - At the end of section 170**

This Item permits the Immigration Secretary to delegate, by signed writing, his or her power under section 50D (TPS Director to notify Immigration Secretary) to an SES employee (or acting SES employee) in the Department administered by the Immigration Minister.

**Items 32 and 33 - Paragraph 172(1)(c)**

These Items are consequential amendments made for the purposes of clause 4 of the Education Services for Overseas Students (TPS Levies) Bill 2011.

**Item 34 - Subsection 173(2)**

This Item makes a consequential amendment for the purposes of Schedule 1 of this Act.

**Item 35 - Section 174**

This Item makes a consequential amendment for the purposes of the Education Services for Overseas Students (TPS Levies) Bill 2011.

**Item 36 - Subsection 175(1) (heading)**

This Item inserts a new subheading in relation to subsection 175(1) to assist readers of the ESOS Act.

**Item 37 - Paragraphs 175(1)(f) and (g)**

This Item makes a consequential amendment for the purposes of Schedule 1 of this Act.

**Item 38 - Before paragraph 176(1)(b)**

This Item provides that the following decisions will be subject to review:

- a decision not to notify a registered provider under subsection 46A(4); and
- a decision under section 53A as to an amount of TPS levy to be paid by a provider.

***Tertiary Education Quality and Standards Agency Act 2011***

**Item 39 - Paragraph 189(1)(e)**

This Item makes a consequential amendment for the purposes of Schedule 1 of this Act to replace a reference, in paragraph 189(1)(e) of the Tertiary Education Quality and Standards Agency Act 2011, to ‘tuition assurance scheme’ with ‘TPS Director’.

**Part 3—Contingent amendments**

**Division 1—Amendment that will not commence if the Registration Charges Acts commence first**

*Education Services for Overseas Students Act 2000*

**Item 40 - Section 90 (heading)**

This Item makes a consequential amendment for the purposes of Schedule 1 of this Act

**Division 2—Amendment commencing immediately after the later of the commencement of Part 1 of this Schedule and the Registration Charges Acts**

*Education Services for Overseas Students Act 2000*

**Item 41 - Section 90 (heading)**

This Item makes a consequential amendment for the purposes of Schedule 1 of this Act

**Part 4—Repeal of the Education Services for Overseas Students  
(Assurance Fund Contributions) Act 2000**

***Education Services for Overseas Students (Assurance Fund Contributions)  
Act 2000***

**Item 42 - The whole of the Act**

This Item repeals the *Education Services for Overseas Students (Assurance Fund Contributions) Act 2000*. That act will be replaced by the *Education Services for Overseas Students (TPS Levies) Act 2011*.

## **Part 5—Application, saving and transitional provisions**

### **Division 1—Introduction**

#### **Item 43 - Definitions**

This Item inserts the following new definitions for the purposes of this Part 5:

*asset* means:

- (a) any legal or equitable estate or interest in real or personal property, whether actual, contingent or prospective; and
- (b) any right, power, privilege or immunity, whether actual, contingent or prospective;

but does not include a right, power, privilege or immunity conferred by an Act or by regulations or other subordinate legislation made under an Act.

*ESOS Act* means the *Education Services for Overseas Students Act 2000*.

*liability* means any liability, duty or obligation, whether actual, contingent or prospective, but does not include a liability, duty or obligation imposed by an Act or by regulations or other subordinate legislation made under an Act.

*old Fund* means the ESOS Assurance Fund established under section 45 of the ESOS Act (as in force immediately before this item commences).

### **Division 2—Defaults**

#### **Item 44 - Application—defaults after commencement**

This Item provides that the amendments made by this Schedule shall apply in relation to any default by a registered provider, or an overseas student or intending overseas student, that occurs after this item commences.

#### **Item 45 - Transitional—defaults before commencement**

Subitem (1) sets out what happens if the following circumstances arise:

If, before this item commences:

- a registered provider defaults in relation to an overseas student or intending overseas student and a course at a location; or
- an overseas student or intending overseas student defaults in relation to a course at a location; and

by the time this item commences:

- the student has not accepted an alternative course in accordance with Division 2 of Part 3, or Division 5 of Part 5, of the ESOS Act (as in force immediately before this item commences); and
- the student has not been provided with a refund under one of those Divisions.

Subitem (2) provides that, despite the repeal of Division 2 of Part 3, and Division 5 of Part 5, of the ESOS Act by this Schedule, those Divisions (except subsections 31(4) to (5)) (as in force immediately before this item commences) shall continue to apply after this item commences, in relation to the default, with the following changes:

- references in those Divisions to the Fund Manager are taken to be references to the TPS Director;
- references in those Divisions to the Fund are taken to be references to the Overseas Students Tuition Fund;
- section 77 of the ESOS Act applies as if it required the TPS Director to comply with that section within:
  - (i) the period of 30 days of a call being made on the Fund; or
  - (ii) if the TPS Director determines that exceptional circumstances apply—any longer period determined in writing by the TPS Director, and agreed to by the student;
- the TPS Director may pay an amount in relation to a student under section 77 of the ESOS Act without having attempted to place the student in a suitable alternative course.

Subitem (3) provides that, for the purposes of section 52C of the ESOS Act (as inserted by this Schedule), making a payment under section 77 of the ESOS Act (as continued by this item) is taken to be a purpose of the Overseas Students Tuition Fund.

### **Division 3—The old Fund and the OSTF**

#### **Item 46 - Vesting of assets of old Fund**

Subitem (1) provides that the provision of this Item 46 shall apply to the assets of the old Fund immediately before this item commences. Under this provision, at that time, the assets cease to be assets of the old Fund and become assets of the Commonwealth without any conveyance, transfer or assignment. The Commonwealth becomes the successor in law in relation to the assets (subitem (2)).

#### **Item 47 - Transferring amount standing to the credit of the old Fund**

This Item provides that any amount standing to the credit of the old Fund immediately before this item commences is, by force of this item, transferred to the Commonwealth immediately after this item commences.

#### **Item 48 - Vesting of liabilities of old Fund**

Subitem (1) provides that the provisions of this item 48 shall apply to the liabilities of the old Fund immediately before this item commences, other than any loan from the Commonwealth. Under this provision, at that time, the liabilities cease to be liabilities of the old Fund and become liabilities of the Commonwealth without any conveyance, transfer or assignment. The Commonwealth becomes the successor in law in relation to the liabilities (subitem (2)).

#### **Item 49 - Transitional—financial accountability**



This Item provides that, despite the repeal of section 80 of the ESOS Act by this Schedule, that section (as in force immediately before this item commences) shall continue to apply, after this item commences, with the following changes:

- the TPS Director (and not the Fund Manager) must arrange for the independent auditor to prepare the report;
- the report must be prepared as soon as possible after 30 June of the year in which this item commences (and not after the end of a calendar year);
- the report must be given to the Minister only (and not the Panel).

#### **Item 50 - Section 82 of the ESOS Act**

This Item seeks to clarify that section 82 of the ESOS Act (as in force immediately before this item commences) does not apply in relation to the repeal of Division 1 of Part 5 of that Act by this Schedule thus clarifying that any surplus money of the ESOS Assurance Fund at the time of its cessation will not be returned to providers.

#### **Item 51 - Seed funding for the OSTF**

Subitem (1) provides that, despite section 52B of the ESOS Act (as inserted by this Schedule), the amount (the *seed funding amount*) of \$5 million is, by force of this item, credited to the OSTF immediately after this item commences.

Subitem (2) deals with the return of any amount to the Commonwealth. Under this provision, the difference between the following is, by force of this item, debited from the OSTF at the beginning of the 1 July that occurs 1 year after this Item commences:

- the seed funding amount; and
- the total of amounts debited from the OSTF under section 52C of the ESOS Act (as inserted by this Schedule) before the 1 July that occurs one year after this item commences.

### **Division 4—The Fund Manager and the Contributions Review Panel**

#### **Item 52 - Termination of appointment of Fund Manager**

This Item provides that, a person who, immediately before this item commences, is appointed as Fund Manager, ceases, by force of this item, to be Fund Manager after that time.

#### **Item 53 - References in Acts and instruments—Fund Manager**

Subitem (1) provides that, if:

- an Act or instrument is in force immediately before this item commences; and
- the Act or instrument contains a reference to the Fund Manager;

the Act or instrument has effect after this item commences as if the reference to the Fund Manager were a reference to the TPS Director.

Subitem (2) provides that the Minister may, by writing, determine that the provisions of subitem (1):

- does not apply in relation to a specified reference; or

- applies, in relation to a specified reference, as if the reference in that subitem to the TPS Director were a reference to the Commonwealth.

Subitem (3) permits the regulations to provide that an instrument containing a reference specified in a determination under paragraph (2)(a) has effect, after this item commences, as if the reference were a reference to a person or body other than the TPS Director or the Commonwealth.

Subitem (4) clarifies that a determination made under subitem (2) is not a legislative instrument.

#### **Item 54 - Operation of laws—Fund Manager**

Subitem (1) provides that, if, before this item commences, a thing was done by, or in relation to, the Fund Manager, then, for the purposes of the operation of any law of the Commonwealth after this item commences, the thing is taken to have been done by, or in relation to, the TPS Director.

Subitem (2) provides that, for the purposes of subitem (1), a thing done before this item commences under a provision that is amended by this Act has effect from that time as if it were done under that provision as amended. However, this is not taken to change the time at which the thing was actually done.

Subitem (3) allows the Minister to, by writing, determine that subitem (1):

- does not apply in relation to a specified thing done by, or in relation to, the Fund Manager; or
- applies as if the reference in that subitem to the TPS Director were a reference to the Commonwealth.

Subitem (4) permits the regulations to provide for a thing specified in a determination under paragraph (3)(a) to be taken to have been done by, or in relation to, a person or body other than the TPS Director or the Commonwealth.

Subitem (5) clarifies that a determination made under subitem (3) is not a legislative instrument.

#### **Item 55 - Transitional—transfer of Fund Manager’s records**

Subitem (1) provides that the provisions of Item 55 shall apply to any records or documents that are in the possession of the Fund Manager immediately before this item commences.

Subitem (2) provides that the records and documents are, by force of this item, transferred to the Commonwealth after this item commences.

#### **Item 56 - Termination of appointment of members of Contributions Review Panel**

Item 56 provides that a person who, immediately before this item commences, is a member of the Contributions Review Panel, ceases, by force of this item, to hold office as such a member after that time.



### **Item 57 - References in Acts and instruments—Contributions Review Panel**

Subitem (1) provides that, if:

- an Act or instrument is in force immediately before this item commences; and
  - the Act or instrument contains a reference to the Contributions Review Panel;
- the Act or instrument has effect after this item commences as if the reference to the Contributions Review Panel were a reference to the TPS Advisory Board.

Subitem (2) provides that the Minister may, by writing, determine that the provisions of subitem (1):

- does not apply in relation to a specified reference; or
- applies, in relation to a specified reference, as if the reference in that subitem to the TPS Advisory Board were a reference to the Commonwealth.

Subitem (3) permits the regulations to provide that an instrument containing a reference specified in a determination under paragraph (2)(a) has effect after this item commences as if the reference were a reference to a person or body other than the TPS Advisory Board or the Commonwealth.

Subitem (4) clarifies that a determination made under subitem (2) is not a legislative instrument.

### **Item 58 - Operation of laws—Contributions Review Panel**

Subitem (1) provides that if, before this item commences, a thing was done by, or in relation to, the Contributions Review Panel, then, for the purposes of the operation of any law of the Commonwealth after this item commences, the thing is taken to have been done by, or in relation to, the TPS Advisory Board.

Subitem (2) provides that, for the purposes of subitem (1), a thing done before this item commences under a provision that is amended by this Act has effect after this item commences as if it were done under that provision as amended. However, this is not taken to change the time at which the thing was actually done.

Subitem (3) provides that the Minister may, by writing, determine that the provisions of subitem (1):

- does not apply in relation to a specified thing done by, or in relation to, the Contributions Review Panel; or
- applies as if the reference in that subitem to the TPS Advisory Board were a reference to the Commonwealth.

Subitem (4) allows the regulations to provide for a thing specified in a determination under paragraph (3)(a) to be taken to have been done by, or in relation to, a person or body other than the TPS Advisory Board or the Commonwealth.

Subitem (5) clarifies that a determination made under subitem (3) is not a legislative instrument.

### **Item 59 - Amending instruments may be retrospective**

Subitem (1) provides that, if:

- an instrument is made within the period of 12 months beginning on the day on which this item commences; and
- a provision of the instrument amends a reference to the Fund Manager or the Contributions Review Panel;

the provision may be expressed to take effect from the day that this item commences, or a later day in the period referred to in paragraph (a), that occurs before the instrument is made.

Subitem (2) provides that this Item 59 has effect despite the operation of subsection 12(2) of the *Legislative Instruments Act 2003*.

### **Item 60 - Transitional—reviews**

Subitem (1) provides that the provisions of this Item 60 shall apply if, before this item commences:

- a person applies for a review of the amount of its annual Fund contribution under section 66 or 68 of the ESOS Act (as in force immediately before this item commences); and
- a notice has not been given under section 67 or 69 (as the case requires) of that Act.

subitem (2) provides that, despite the repeal of Subdivision B of Division 4 of Part 5 (rights of review) of the ESOS Act by this Schedule, that Subdivision continues to apply, after this item commences, as if:

- a reference in that Subdivision to the Fund Manager were a reference to the TPS Director; and
- a reference in that Subdivision to the Panel were a reference to the Secretary.

### **Division 5—Payment of TPS levies**

#### **Item 61 - Application—payment of TPS levies**

This Item provides that the requirement to pay a TPS levy imposed by section 14 of the *Education Services for Overseas Students (TPS Levies) Act 2011* shall apply in relation to:

- the first calendar year that begins after the day this item commences; and
- later calendar years.

### **Division 6—Miscellaneous**

#### **Item 62 - Constitutional safety net**

Subitem (1) provides that, if the operation of this Schedule would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.

Subitem (2) provides that, if the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in a court of competent jurisdiction

for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

Subitem (3) provides that for the purpose of this Item 62 the following definitions shall apply:

- *acquisition of property* shall have the same meaning as in paragraph 51(xxxi) of the Constitution.
- *just terms* shall have the same meaning as in paragraph 51(xxxi) of the Constitution.

### **Item 63 - Delegation by Minister**

Subitem (1) allows the Minister to, by writing, delegate all or any of his or her powers and functions under this Part 5 to a person.

Subitem (2) provides that the delegate must be:

- the Secretary; or
- an SES employee, or acting SES employee, in the Department.

Subitem (3) provides that in the exercise of powers or functions under a delegation, the delegate must comply with any directions of the Minister.

## **Schedule 2—National registration**

### **Part 1—Main amendments**

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

##### **Item 1 - Section 9**

This Item repeals section 9 in its entirety and substitutes new Division 3 into the ESOS Act. Section 9 sets out the process for registering an approved provider. Currently, the ESOS Act requires that a designated authority for a state recommend that a provider for that state be registered to provide a specified course for that state to overseas students. On this basis, each provider registered is assigned a separate CRICOS registration number. Many providers now operate across sectors and across jurisdictions. Providers may have separate registrations and separate CRICOS numbers within a state or in several states for different operates. Importantly too, this practice is out of step with registration of providers under quality assurance frameworks which involve mutual recognition processes, noting that ESOS functions of designated authority for the majority of providers are being transferred to the new national regulators for the Vocational Education and Training and Higher Education sectors. Those national regulators may also be delegated powers of the Secretary or the Minister under the ESOS Act.

Multiple CRICOS registrations have contributed to a disjointed system and have created difficulties in tracking the activities of a provider nationally. This also has implications for managing risk at both the local and national level.

Following on from the recent amendments to the ESOS Act which introduced a risk management approach to all new registrations and ongoing monitoring of registrations, the amendments contained in proposed Division 3 are intended to overcome this disjointed system.

Proposed Division 3 reorganises and amends Part 2 of the ESOS Act to implement Recommendation 6(a) of the *Review of the Education Services for Overseas Students (ESOS) Act 2000, Stronger, simpler, smarter ESOS: supporting international students* undertaken by the Hon Bruce Baird, AM (the Baird Review). Recommendation 6(a) of the Baird Review suggests that a regime of national registration of providers be introduced whilst the assessment of the suitability and capacity of individual courses be conducted at each location.

By this reform, it is hoped to clarify what constitutes a provider and assigning a single registration number to the provider to provide will provide more certainty regarding the nature of the entity being regulated. This improvement to the registration process shall enable tracking of a provider's activities nationally and at the local level and will facilitate better risk assessment. It is also expected that the management of, and correspondence with, the providers by the regulator shall be simplified, helping to facilitate a smooth transition of ESOS functions to the new national regulators. In spite of the creation of the concept of a single provider to be accredited/regulated nationally, these amendments ensure that a suitable level of control over the operations of providers is retained at the local level.

## **Division 3—Registration of approved providers**

### **Subdivision A—Registration of approved providers**

#### **Proposed section 9AA - Recommendation by designated authority that approved provider be registered to provide a course at a location**

Proposed section 9AA changes the existing basis of the recommendation which a designated authority makes when recommending that an approved provider be registered under the ESOS Act. Currently, a designated authority recommends an approved provider for a State be registered to provide a course for that State to overseas students.

Under this amendment, when making a recommendation a designated authority must specify each location at which an approved provider shall provide that course to overseas students. This is intended to ensure that the designated authority has assessed the suitability and capacity of individual courses at each location at which the approved provider intends to provide courses. The term, location, must be specified in sufficient detail to enable the physical identification of the venue at which the course shall be provided. For example, location may be determined by a street address, a particular floor of a multi-storey building or a campus. The level of detail required to determine a particular location will depend on the physical characteristics of the premises at which the course will be provided.

Proposed subsection (3) permits a designated authority to recommend that the Secretary add one or more courses at one or more locations to a provider's existing registration.

#### **Proposed section 9AB - Registration of approved providers by Secretary**

Proposed section 9AB reorganises the existing criteria (currently under section 9 of the ESOS Act) required to be met by an approved provider before it can be registered and introduces a new requirement.

Paragraph 9(2)(c) of the ESOS Act currently sets out the requirement that a designated authority must give the Secretary a certificate verifying certain matters before the Secretary can register an approved provider. These matters have been relocated to proposed section 9AH. Proposed paragraph (1)(e) requires that a designated authority has given the Secretary a certificate in accordance with new section 9AH. Before the Secretary may register an approved provider, proposed paragraph (1)(f) introduces a further requirement that, before the Secretary may register the provider, s/he must not have any reason to believe that the provider is unlikely to be able to provide education of a satisfactory standard.

Proposed subsection (4) requires that, at the time the Secretary registers an approved provider, she or he must determine the location (or locations) of each course the provider is registered to provide. As stated previously, the location at which the provider intends to provide courses must be specified in sufficient detail to enable the physical identification of the venue, such as, a street address, a particular floor of a multi-storey building or a campus.

Proposed subsection (5) clarifies that new section 9AB also applies in respect of a renewal of a registered provider's existing registration.





## **Proposed section 9AC - Period of registration**

Proposed section 9AC specifically deals with the period during which a provider is registered. New subsection (1) limits the period of time which a provider may be registered by the Secretary. Under this amendment, the Secretary must determine a registration period of more than two years but no more than five years.

Proposed subsection (2) clarifies that despite the restriction imposed on the Secretary that provider must be registered for a minimum period of two years, which in turn relates to the way the annual registration charge is applied, the Minister's power to cancel a registered provider's registration within the initial two years of a provider's registration is unaffected by new subsection (1).

Proposed subsection (3) makes clear that in spite of a recommendation by a designated authority that a provider be registered for a particular period (made under new subsection 9AH(i)) the Secretary may determine a different registration period. Proposed subsection (4) provides that the Secretary may alter a registration period previously determined under new subsection (1), provided the period does not exceed 5 years from the day on which the provider was registered.

Proposed subsection (5) has been included to avoid the situation where a registered provider's registration may expire as a result of the delay between the time when a recommendation is made by a designated authority that a provider be re-registered, and the time when the Secretary decides whether to re-register the provider. Under this amendment, the provider's registration is taken to continue until the Secretary makes his or her decision.

Proposed subsection (6) is intended to cover the situation where a provider's registration expires before a provider has finished delivering a course to students. Under this amendment, such a provider registration is deemed to continue until the course has been fully provided to students enrolled before the registration expired but that the provider does not enrol any new students from the expiry date. This measure ensures that students' studies are not disrupted in cases where a provider's registration has expired mid-way through a provider's course delivery.

It is intended that new subsection (6) will only operate once the Secretary has made a decision referred to in subsection (5).

## **Proposed section 9AD - Imposing conditions on provider's registration when designated authority has imposed conditions**

Proposed section 9AD sets out the circumstances when conditions may be imposed on a provider's registration when a designated authority has imposed conditions. Proposed subsection (1) provides that if a designated authority has imposed a condition on a provider relating to its provision of courses, the Secretary may impose that condition on the provider's registration when the provider is first registered on CRICOS.

Proposed subsection (2) permits either the Secretary or the Minister to impose a condition on a provider's existing registration previously imposed by a designated authority, as long as the Secretary or Minister notifies the provider in writing. Proposed subsection (3) requires the

Secretary or Minister to have regard to any advice of the relevant designated authority and to use a risk-management approach in deciding whether to impose a condition.

### **Proposed section 9AE - Secretary's conditions on provider's registration**

Proposed section 9AE enables the Secretary to impose a condition on a provider's registration on the Secretary's own initiative. Under this amendment, the Secretary may impose a condition on a provider's registration at the time a provider is registered, or at any time prior to the expiration of a provider's registration. The Secretary may also impose a condition generally or in relation to one or more specified courses for one or more specified locations.

Proposed subsection (3) clarifies that the Secretary's power to impose a condition under this section is not in any way limited by the Secretary's power to impose a condition previously imposed by a designated authority under new section 9AD. In deciding whether to impose a condition under this section, proposed subsection (4) obliges the Secretary to use a risk-management approach.

### **Proposed section 9AF - Variation or removal of conditions**

Proposed section 9AF sets out the circumstances under which the Secretary and Minister may vary or remove conditions previously imposed. New subsection (1) makes clear that the Secretary may vary or remove any condition that the Secretary has imposed under either new sections 9AD or 9AE. Similarly, new subsection (2) provides that the Minister may vary or remove a condition that the Minister has imposed under new section 9AD. In deciding whether to vary or remove a condition, new subsection (3) obliges both the Secretary and the Minister to use a risk-management approach.

### **Proposed section 9AG - Changing the scope of a provider's registration**

Proposed section 9AG allows the scope of a provider's registration to be changed by the adding of a new course at a specified location to a provider's existing registration in certain circumstances. Where a designated authority has recommended that a provider be registered to provide a particular course at a specified location and the provider is already registered to provide a course at that location then the Secretary must add that course at the specified location to the provider's existing registration. There is an additional requirement if the registered provider is not already registered to provide any courses at the relevant location. In that case the designated authority must, in addition to making a recommendation under 9AA also give the Secretary a certificate in accordance with section 9AH before the Secretary must add one or more courses at the relevant location(s).

Proposed subsection (2) prohibits the Secretary from adding any courses at any locations to a provider's existing registration under any circumstances other than in accordance with proposed subsection (1). Proposed subsection (3) clarifies that subsection (1) in no way imposes a duty upon the Secretary to seek any other information in relation to changing the scope of a provider's registration.

Whilst new section 9AB and new section 9AG both relate to registration of a provider, there is an essential difference between the two provisions. Section 9AB applies in relation to either the initial registration of an approved provider or the renewal of a registered provider's

expired registration. Section 9AG applies only in circumstances where a provider wishes to add one or more new courses at one or more locations to that provider's existing registration.

## **Subdivision B—Provisions relating to registration**

### **Proposed section 9AH - Certificate from designated authority**

Proposed section 9AH sets out the matters which a designated authority must certify when recommending that a provider be registered (or that a provider's expired registration be renewed, as the case may be) under section 9AB(1)(e); or that the scope of a registered provider's registration be changed under 9AG(1)(b).

In all cases other than where a designated authority makes a recommendation that a provider be registered to provide a course at a location in circumstances where the provider is already registered to deliver another course at that location, before the Secretary may register a provider to provide a course at a location, the designated authority must give the Secretary a certificate stating the following matters for the purpose of recommending that an approved provider should be registered on CRICOS:

- (a) the provider's compliance with the national code; and
- (b) that the provider is fit and proper to be registered; and
- (c) that the provider has the principal purpose of providing education; and
- (d) that the provider has clearly demonstrated the capacity to provide education of a satisfactory standard (including by having an appropriate business model and access to adequate financial resources, for example); and
- (e) if applicable, that the provider meets the ELICOS Standards; and
- (f) if applicable, that the provider meets the Foundation Program Standards; and
- (g) the results of the designated authority's risk assessment of the provider; and
- (h) the conditions, if any, that should apply to the provider's registration for the course for the location, in view of the results of that risk assessment; and
- (i) if the certificate is for the purposes of paragraph 9AB(1)(f)—states the period (of no more than 5 years) for which the provider should be registered.

### **Item 2 - Sections 10 and 11**

This Item repeals sections 10 and 11. The repeal of section 10 is consequential to the amendment made by Item 3 (inserting new Division 4).

This Item also repeals section 11 which imposes an obligation on an approved provider to notify the Secretary and the relevant designated authority of certain previous convictions or sanctions imposed on the provider or an associate of the provider. This provision will be repealed as this obligation is now redundant in view of the fact that the provider is required to provide the same information to designated authorities as part of the fit and proper person test under subsection 9B of the ESOS Act. It is noted that the fit and proper person test is part of the initial registration process. It is also an ongoing requirement with automatic suspension under section 89A if the designated authority tells the Secretary that the provider no longer satisfies the fit and proper requirements outlined in section 9B(2).

### **Item 3 - Sections 14A and 14B**

This Item repeals sections 14A and 14B and substitutes new Division 4 relating to the Commonwealth Register of Institutions and Courses for Overseas Students.

Section 14A currently provides that where a designated authority has imposed a condition on a provider relating to its provision of courses to overseas students, the Secretary or Minister may impose that condition, or a modified version of that condition, upon the provider.

Section 14B currently permits the Secretary to impose conditions on the registration of a provider on the Secretary's own initiative on the basis of a risk assessment made by either the Secretary or the relevant designated authority.

Under this Schedule's amendments, the provisions of sections 14A and 14B have been relocated respectively, to proposed sections 9AD and 9AE.

## **Division 4—The Register**

### **Proposed section 14A - The Register**

Proposed section 14A contains the provisions currently in section 10 which sets out the provisions for the creation and maintenance of the register to be known as the Commonwealth Register of Institutions and Courses for Overseas Students. Under this amendment, the provisions relating to the Register are substantially identical to those in the current section 10. However, proposed section 14A imposes additional requirements on the Secretary to those in section 10 in so far as the Secretary is required to enter on the Register the following information in relation to each provider's registration:

- the name of each provider who is registered;
- the name of each course which the provider is registered to provide, and each location at which the provider is registered to provide that course;
- a unique identifier allocated to the provider;
- a unique identifier allocated to each course at each location for which the provider is registered;
- the day on which the provider is registered;
- the period of the provider's registration;
- any conditions that are imposed on the provider's registration (either generally or in relation to specific courses and locations);

Under this amendment the Secretary is authorised to cause any other information she/he considers appropriate to be entered on the Register in relation to a provider's registration and also to cause the contents of all or part of the Register to be made publicly available. For example, where a provider is appealing a decision to cancel its registration under the ESOS Act, the Secretary may consider it misleading to prospective students for the provider's registration to remain on public view pending the outcome of the appeal.

## **Proposed section 14B - Updating the Register**

Proposed subsection (1) will require the Secretary to ensure that the information entered on the Register is kept up-to-date. Subsection (2) specifically obliges the Secretary to update the Register when any of the following events occur:

- a provider's registration is suspended or cancelled for any one or more courses for any one or more locations; or
- a provider's registration has a condition imposed on it; or
- a provider's registration has a suspension or condition removed, or a condition varied; or
- a provider applies to the Administrative Appeals Tribunal for review of a decision to suspend or cancel, or to impose a condition on, the provider's registration.

Proposed subsection (3) clarifies that the validity of any of the events specified in subsection (2) is not affected if the information in the Register is not kept current.

## **Part 2—Consequential amendments**

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

#### **Item 4 - Before section 1**

This Item inserts the subheading, Division 1—Preliminary before section 1 of the ESOS Act. New Division 1 deals with Preliminary matters such as the objects and the defined terms of the ESOS Act.

#### **Item 5 - Paragraph 4B(1)(b)**

This Item repeals and substitutes paragraph (b) of subsection 4B(1) of the ESOS Act. Section 4B deals with the application of the ESOS Act to the territories of Christmas Island and Cocos (Keeling) Islands. Paragraph (b) provides that any reference in a provision of the ESOS Act in relation to a State is taken to include a reference to the Territories Minister.

Under this amendment, any such reference to a designated authority covered by table item 4 of the table in subsection 7A(1) of the ESOS Act is taken to include a reference to the Territories Minister. Table Item 4 of subsection 7A(1) of the ESOS Act will introduce new definitions for the term ***designated authority***. This amendment will be inserted by item 4 of Schedule 1 to the *Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Act 2011* and will commence on 29 January 2012.

#### **Item 6 - Paragraph 4B(2)(d)**

This Item is consequential to the amendment made by Item 41 of Schedule 2 of this Act. Item 41 will repeal section 36 which deals with consultation the Minister must undertake with the States and Industry representatives before the Minister makes the national code.

#### **Item 7 - Section 5 (definition of *approved provider*)**

This Item repeals and substitutes the definition of ***approved provider***. In accordance with proposed section 9AA, this amendment reflects the changed requirement that a provider's approval by a designated authority is directed at the specific location at which the provider shall provide a course to ensure that the provider's suitability and capacity of individual courses at each location has been assessed by the relevant designated authority.

#### **Item 8 - Section 5 (definition of *Commonwealth designated authority*)**

This Item repeals the current definition of ***Commonwealth designated authority*** pending the new definition of ***Commonwealth designated authority*** to be inserted by item 2 of Schedule 1 to the *Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Act 2011* which will commence on 29 January 2012.

#### **Item 9 - Section 5 (definition of *condition*)**

This Item is a consequential amendment made for the purposes of proposed sections 9AD and 9AE.

**Item 10 - Section 5 (definition of *modification*)**

This Item is a consequential amendment made for the purposes of proposed section 9AF.

**Item 11 - Section 5 (definition of *Register*)**

This Item is a consequential amendment made for the purposes of proposed section 14A.

**Item 12 - Section 5 (definition of *registered*)**

This Item is a consequential amendment made for the purposes of proposed Division 3 of Part 1 of Schedule 2.

**Item 13 - Section 5 (definition of *registered provider*)**

This Item is a consequential amendment made for the purposes of proposed section 9AA.

**Item 14 - After section 5**

This Item inserts new section 5A which sets out criteria for determining whether a higher education provider's principal purpose is education. Under this amendment, the principal purpose of a higher education provider is deemed to be provision of education if the provider's principal purpose is either providing education, or providing research, or both.

**Item 15 - Subsection 7A(1)**

This Item is a consequential amendment made for the purposes of proposed section 9AA. It reflects the change from registering providers 'for a course for a state' to registering providers 'for a course for a location'

**Item 16 - Subsection 7A(1) (cell at table item 4, column headed "the designated authority is:")**

New section 7A will be inserted by item 4 of Schedule 1 to the *Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Act 2011* which will commence on 29 January 2012. Section 7A will define the varying meanings of *designated authority* applicable to different types of providers seeking registration under the ESOS Act in the various jurisdictions.

Under this amendment, table item 4 under subsection (1) will be amended to reflect the change from registering providers 'for a course for a state' to registering providers 'for a course for a location'.

**Items 17 and 18**



These Items are consequential amendments made for the purposes of proposed section 9AA to reflect the change under the new national registration provisions that providers will not be registered for a state.

#### **Item 19 - At the end of Part 1**

This Item inserts new section 7B which contains a simplified outline to the ESOS Act to assist readers.

#### **Item 20 - Before section 8**

This Item inserts new section 8A which contains a simplified outline to Part 2 of the ESOS Act to assist readers.

This Item also inserts a new subheading for Division 2 which sets out offences for providing or promoting a course without a registered provider.

#### **Items 21, 22, 23, 24 and 25**

These Items are consequential amendments made for the purposes of proposed section 9AA to reflect the change under the new national registration provisions that providers will not be registered for a state.

#### **Item 26 - Before subsection 9B(1)**

Section 9B sets out the fit and proper person test which all providers must satisfy unless exempt under subsection (1). This Item makes amendments to specify the circumstances in which the fit and proper test is applicable. The purpose of this amendment is to make it clear that the fit and proper person test is an ongoing requirement throughout a provider's registration period, not only at initial registration ie it applies as follows:

- when a designated authority must certify certain matters when recommending that a provider be registered (or that a provider's expired registration be renewed, as the case may be) for the purposes of paragraph 9AH(b);
- when the Minister may impose sanctions against a registered provider if the Minister believes on reasonable grounds that because of financial difficulty (or any other reason) the provider might not be able to, either provide courses, or, refund course money, to its accepted students for the purposes of subsection 83(1B);
- for the purposes of proposed subparagraphs 89A(1A)(b)(i) and (ii) (as inserted by Item 58), when either a designated authority notifies the Secretary that the authority is no longer satisfied that the provider is fit and proper to be registered, or the Secretary is no longer satisfied that the provider is fit and proper to be registered.

#### **Items 27 and 28**

These Items are consequential amendments made for the purposes of the proposed subsection 9B(1A) inserted by Item 26.

### **Item 29**

This Item is consequential amendment made for the purposes of the proposed section 9AA to reflect the change under the new national registration provisions that providers will not be registered for a state.

### **Item 30**

This Item is a consequential amendment made to reflect that for many providers the National Vocational Educational and Training Regulator is now or soon will be their designated authority and from 30 January next year the Tertiary Education Quality and Standards Agency will be the designated authority for many providers.

### **Items 31 and 32 - Subparagraph 14(1)(a)(iii) and At the end of paragraph 14(1)(a)**

Where the Secretary has a reasonable belief that a yet to be registered provider will not comply with the ESOS Act or national code or does not have the principal purpose of providing information of does not have a clearly demonstrated capacity to provide education of a satisfactory standard and that source of information is not the relevant designated authority then the Secretary must give that information to the designated authority.

Items 31 and 32 adds the further requirement that where the Secretary has a reasonable belief that the yet to be registered provider is unlikely to be able to provide education of a satisfactory standard the Secretary must give that information to the relevant designated authority where the source of the information was not the designated authority.

### **Items 33 and 34**

These Items are consequential amendments made for the purposes of proposed section 5A inserted by Item 14 of Schedule 2 .

### **Item 35 - Before Division 1 of Part 3**

This Item inserts new section 15A which contains a simplified outline to Part 3 of the ESOS Act to assist readers.

### **Item 36 - Paragraph 17(1)(b)**

This Item is a consequential amendment made for the purposes of proposed section 9AA to reflect the change under the new national registration provisions that providers will not be registered for a state.

### **Item 37 - Before section 33**

This Item inserts new section 33A which contains a simplified outline to Part 4 of the ESOS Act to assist readers.

### **Item 38 - Subsection 33(1)**

Section 33 of the ESOS Act authorises the Minister to make a national code by legislative instrument. Subsection 33(1) stipulates that the legislative instrument must commence on a day at least 28 days after it is registered on the Federal Register of Legislative Instruments. This Item will remove the restriction preventing the legislative instrument from commencing before the expiration of 28 day after it is registered.

Since the enactment of this provision in 2005, the Minister made the *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007* (the National Code) on 7 March 2007 which was registered on the Federal Register of Legislative Instruments on 15 March 2007, the requirement to restrict commencement of the national code to at least 28 days after registration is now unnecessary.

### **Item 39 - Subsection 33(1) (note)**

Item inserts a note clarifying that the Minister may amend the national code by legislative instrument in accordance with see subsection 33(3) of the *Acts Interpretation Act 1901*.

### **Item 40 - Section 34**

With the introduction of the single national registration provisions in Part 1 of Schedule 2 it is no longer necessary to have standards for nationally consistent registration in the National Code.

### **Item 41 - Section 36**

Section 36 of the ESOS Act requires that, before making a national code (under section 33), the Minister must consult with representatives of each State and with persons who, in the Minister's opinion, represents the interests of providers. This provision was enacted to ensure comprehensive consultation with the sector was undertaken prior to the making of the national code. Given the settled nature of the National Code and the ongoing obligation imposed on all rule-makers by section 17 of the *Legislative Instruments Act 2003* to undertake appropriate consultation before making a legislative instrument, the requirement to consult is now redundant and section 36 is therefore repealed.

### **Item 42 - Paragraphs 38(a), (c) and (f)**

Section 38 specifies the matters which the national code must contain including matters pertaining to the roles and responsibilities of designated authorities. However, in view of the comprehensive articulation of requirements to be satisfied by designated authorities in the substantive provisions of the ESOS Act (in particularly under those provisions to be inserted by proposed section 9AH) this Item will remove the requirement for the National Code to contain requirements for certain standards and procedures for registered providers. Additionally, with the transfer of designated authority responsibility in large part from the states and territories to the Australian Skills Quality Authority in July 2011 and to the Tertiary Education Quality and Standards Agency in early 2012, the usefulness of the national code for promoting consistency in the designated authority role is diminished.

**Item 43 - Section 40 (note)**

This Item is a consequential amendment made for the purposes of proposed section 9AB.

**Item 44**

This Item is a consequential amendment made to reflect that for many providers the National Vocational Educational and Training Regulator is now or soon will be their designated authority and from 29 January next year the Tertiary Education Quality and Standards Agency will be the designated authority for many providers.

**Item 45**

This Item is a consequential amendment made for the purposes of proposed section 9AA to reflect the change under the new national registration provisions that providers will not be registered for a state.

**Item 46 - Before Division 1 of Part 6**

This inserts new section 83A which contains a simplified outline to Part 6 of the ESOS Act to assist readers.

**Item 47 - Subsection 83(1B)**

This Item is a consequential amendment made for the purposes of Items 26 and 28 of this Schedule.

**Item 48 and 49 - Subsection 83(1B) (note) and At the end of subsection 83(1B)**

These Items insert a new Note in subsection 83(1B) clarifying that before taking any action under subsection 83(1B), the Minister must have regard to the matters specified in section 9B in deciding whether a provider is fit and proper to be registered.

**Item 50 - Subsection 83(1C) (note)**

This Item is a consequential amendment made for the purposes of Item 51.

**Items 51 and 52- At the end of subsection 83(1C) and subsection 83(1D)**

This Item inserts a new Note referring reader to proposed section 5A which sets out when a higher education provider is taken to have the principal purpose of providing education.

**Item 52 - Subsection 83(1D)**

This Item is a consequential amendment made for the purposes of proposed section 5A. Proposed section 5A will replace subsection 83(1D) in setting out when a higher education provider is taken to have the principal purpose of providing education.

## **Items 53, 54, 56 and 57**

These Items are consequential amendments made for the purposes of proposed section 9AA to reflect the change under the new national registration provisions that providers will not be registered for a state.

## **Item 55 - Section 88**

This Item repeals section 88. Section 83 enables the Minister to impose a variety of sanctions against a provider for various acts of non-compliance. Section 88 specifically authorises the Minister to cancel the registration of a provider if the provider ceases to provide a course to overseas students while the provider's registration is suspended. Given the comprehensive nature of the Minister's powers to impose sanctions for non-compliance under section 83, the provisions of section 88 are redundant.

## **Item 58 - Subsections 89A(1) to (2)**

This Item repeals subsection 89A(1) to (2), inclusive. Under proposed subsection (1A), the provisions of section 89A shall apply if a provider has been approved to provide a course at a location and either a designated authority notifies the Secretary that the authority is no longer satisfied that the provider is fit and proper to be registered, or the Secretary is no longer satisfied that the provider is fit and proper to be registered.

Should proposed subsection (1A) be invoked, the consequence for such a provider as set out in proposed subsection (1B) is automatic suspension of all of its courses for all locations it is registered to provide, unless the circumstances in proposed subsection (1C) apply.

Proposed subsection (1C) provides that where the designated authority, which has told the Secretary the provider is no longer fit and proper to be registered, is a designated authority referred to in table item 4 of the table in subsection 7A(1) of the ESOS Act, the provider's registration will be suspended only for all courses and all locations in the relevant State. Note that section 7A of the ESOS Act will be inserted by the Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Act 2011 and will come into effect before proposed subsections 89A(1) to (2). Also the proposed amendments to subsection 7A(1) in Schedule 7 of this Bill will come into effect before subsections 89A(1) to (2). At the time when proposed subsections 89A(1) to (2) come into effect the designated authority in table item 4 of the table in subsection 7A(1) will be the person responsible under the law of the State for approving providers to provide courses to overseas students.

Where the circumstances in subsection (1C) apply and the provider is also approved by either or both of the National Vocational Education and Training Regulator or/and the Tertiary Education Quality and Standards Agency to provide courses at one or more locations then the provider is also suspended for all those courses at the relevant locations.

The policy intent of this provision is that:

- Where a designated authority is the person responsible under the law of a state for approving providers (ie the designated authority is not the National Vocational

Education and Training Regulator or the Tertiary Education Quality and Standards Agency); and

- that designated authority tells the Secretary that it (the designated authority) is not satisfied that the provider is fit and proper for registration; then
- it is not considered appropriate for the provider to be suspended for courses at locations in other states where the designated authority for the provider is a person responsible under the law of such other state(s) for the approval of providers.

### **Items 59, 60, 61 and 62**

These Items are consequential amendments made for the purposes of proposed section 9AA to reflect the change under the new national registration provisions that providers will not be registered or approved for a state.

#### **Item 63 - Before subsection 93(1)**

This Item inserts a new subheading to specify that subsection 93(1) sets out the notice requirements the Minister must satisfy before taking action under Subdivision D of the ESOS Act.

#### **Item 64 - Subsection 93(1)**

This Item is a consequential amendment made for the purposes of proposed section 9AD.

#### **Item 65 - Before subsection 93(1A)**

This Item inserts a new subheading to specify that subsection 93(1A) sets out the notice requirements the Secretary must satisfy before taking action under Subdivision D of the ESOS Act.

#### **Item 66 - Subsection 93(1A)**

This Item is a consequential amendment made for the purposes of proposed section 9AE.

#### **Item 67 - Before subsection 93(2)**

This Item inserts a new subheading to specify that subsection 93(2) requires the Minister and the Secretary to consider any submissions received from a provider before taking action under Subdivision D of the ESOS Act.

### **Item 68, 69 and 70**

These Items are consequential amendments made for the purposes of proposed section 9AA to reflect the change under the new national registration provisions that providers will not be registered for a state.

### **Item 71 - Section 96**

This Item repeals section 96. Section 96 sets out the Secretary's obligation to the contents of the Register up to date. As these provisions have been relocated to new section 14B, section 96 is now redundant.

### **Item 72 and 74**

These Items are consequential amendments made for the purposes of proposed section 9AA to reflect the change under the new national registration provisions that providers will not be registered for a state.

### **Items 75 - Paragraph 107(1)**

Section 107 is an offence provision which provides that if a person, in written material, offers to provide a course to an overseas student, invites an overseas student or intending overseas student to undertake, or to apply to undertake a course and that material fails to clearly identify the registered provider and other information that is set out in that section, the person is guilty of an offence. Under this amendment, it is clarified that an offence will have been committed if the material fails to identify any of three information requirements in subparagraphs (d) to (f). The information that must be identified in the written material is:

- the registered provider for the course,
- the CRICOS number allocated to the registered provider; and
- any other information prescribed in the regulations.

### **Item 76 and 77**

These Items are consequential amendments made for the purposes of proposed section 14A.

### **Item 78 - Before Division 1 of Part 7**

This Item inserts new section 111A which contains a simplified outline to Part 7 of the ESOS Act to assist readers.

### **Item 79 - Before Division 1 of Part 8**

This Item inserts new section 169A which contains a simplified outline to Part 8 of the ESOS Act to assist readers.

### **Item 80 - Paragraphs 176(1)(a) to (ab)**

This Item is a consequential amendment made for the purposes of proposed Subdivision A of Part 2 of the ESOS Act.

### **Item 81 - Paragraph 176(1)(b)**

This Item is a consequential amendment made for the purposes of Item 55 which repeals section 88.

### **Part 3—Contingent amendments**

#### **Division 1—Amendment that will not commence if the Registration Charges Acts commence first**

The provisions of this Division 1 shall only commence if the *Education Services for Overseas Students (Registration Charges) Amendment Act 2011* commences after this Act.

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

###### **Item 82 - Section 12 (note 1)**

This Item is a consequential amendment to be made for the purposes of proposed section 9AB. However this Item will only commence if the *Education Services for Overseas Students (Registration Charges) Amendment Act 2011* commences after this Act.

#### **Division 2—Amendments commencing immediately after the later of the commencement of Part 2 of this Schedule and the Registration Charges Acts**

The provisions of this Division 2 shall commence immediately after the later of the commencement of this Part 2 of Schedule 2 and the *Education Services for Overseas Students (Registration Charges) Amendment Act 2011*.

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

###### **Item 83 - Paragraph 9AB(1)(c)**

This Item repeals and substitutes paragraph 9AB(1)(c) to incorporate the new entry to market charge (as inserted by Schedule 1 of the *Education Services for Overseas Students Amendment (Registration Charges Consequential) Bill 2011*) which will be payable by all new providers seeking their first registration under the ESOS Act unless exempted by regulation.

###### **Items 84**

This Item makes consequential amendments to paragraph 9AB(1)(g) to take account of the new entry to market charges to be imposed by amendments proposed to section 6 of the *Education Services for Overseas Students (Registration Charges) Act 1997* by the *Education Services for Overseas Students (Registration Charges) Amendment Bill 2011* and the relevant consequential amendments to the ESOS Act to be made by the *Education Services for Overseas Students Amendment (Registration Charges Consequentials) Bill 2011*.

###### **Item 85**



This Item makes consequential amendments to the note to the proposed subsection 12(1) to be inserted into the ESOS Act by the Education Services for Overseas Students Amendment (Registration Charges Consequentials) Bill 2011 and is a consequential amendment for the purposes of proposed section 9AB.

**Item 86**

This Item is a consequential amendment for the purposes of proposed section 9AB.

***Education Services for Overseas Students Amendment (Registration Charges Consequentials) Act 2011***

**Item 87 - Subitem 17(4) of Schedule 1**

This Item is a consequential amendment made for the purposes of proposed section 9AB.

***Education Services for Overseas Students (Registration Charges) Amendment Act 2011***

**Item 88 - Subitem 14(2) of Schedule 1**

This Item is a consequential amendment made for the purposes of proposed section 9AA.

**Division 3—Repeal of provisions if this Act commences before item 7 of Schedule 1 to the Registration Charges Acts**

The following Items shall only take effect if this Act commences before item 7 of Schedule 1 to the *Education Services for Overseas Students (Registration Charges) Amendment Act 2011* which shall commence on a single day to be fixed by Proclamation.

***Education Services for Overseas Students Amendment (Registration Charges Consequentials) Act 2011***

**Items 89, 90 and 91 - Item 7 of Schedule 1, Subitems 17(1) and (2) of Schedule 1, Subitems 17(1) and (2) of Schedule 1**

These Items make consequential amendments for the purposes of Item 1 of Part 1 of Schedule 2 to the *Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Act 2011*. The Items 7, 17(1), 17 (2) and 17(4) of Schedule 1 to the *Education Services for Overseas Students Amendment (Registration Charges Consequentials) Act 2011* amend or refer to provisions of section 9 of the ESOS Act. Item 1 of Part 1 of Schedule 2 of *Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Act 2011* repeals section 9 and substitutes it with the provisions set out in that Item. If section 9 is repealed before the above mentioned Items of Schedule 1 of the *Education Services for Overseas Students Amendment (Registration Charges Consequentials) Act 2011* take effect then those Items are redundant.

#### **Division 4—Repeal of provisions if this Act commences before other items in the Registration Charges Acts**

The following Items shall only take effect if this Act commences before the other items in the *Education Services for Overseas Students (Registration Charges) Amendment Act 2011*.

#### ***Education Services for Overseas Students Amendment (Registration Charges Consequentials) Act 2011***

##### **Items 92 and 93**

Items 5, 6, 8 and 9 of Schedule 1 of *Education Services for Overseas Students Amendment (Registration Charges Consequentials) Act 2011* make consequential amendments to paragraphs 9(2)(aa), 9(2)(e), 9A(2)(g) and 10(4)(ca) of the ESOS Act. All of these provisions will be repealed when the *Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Act 2011* commences (see Schedule 2 Items 1, Schedule 2 Item 2, and Schedule 8 Item 1). If these latter provisions come into effect before the Items 5, 6, 8 and 9 of Schedule 1 of *Education Services for Overseas Students Amendment (Registration Charges Consequentials) Act 2011* then the those aforementioned Items in the Registration Charges Consequential Act will be redundant.

#### **Part 4—Application, saving and transitional provisions**

This Part 4 sets out the application, savings and transitional provisions relevant to Schedule 2.

##### **Division 1—Definition of ESOS Act**

###### **Item 94 - Definition of ESOS Act**

This Item inserts a definition of the term, *ESOS Act*, for the purposes of this Part 4.

##### **Division 2—Application and transitional provisions for national registration**

###### **Item 95 - Application—recommendations of designated authorities**

This Item is an application provision aimed at avoiding unintended consequences of the amendments made by this Act.

The application arrangements made by subitem 95(1) deal with amendments made by Parts 1 to 3 of this Schedule and provide that those amendments shall apply in relation to any recommendation, made by a designated authority that an approved provider be registered under the ESOS Act to provide a course at a location to overseas students after this item commences.

The application arrangements made by subitem 95(2) deal with amendments made by Parts 1 to 3 of this Schedule and provide that those amendments shall apply in relation to any recommendation, made by a designated authority that an approved provider be registered under the ESOS Act to provide a course for a State to overseas students if the recommendation is made before this item commences and immediately before that commencement, the Secretary has not yet decided whether to register the provider for the course for the State under section 9 of that Act.

The application arrangements made by subitem 95(3) shall apply if, after this item commences, the Secretary decides to either register a provider referred to in subitem (2) of this item; or to add a course to the registration of a provider referred to in subitem (2) of this item. In these cases, the Secretary must determine the location or locations at which the provider is to be registered to provide the course.

The application arrangements made by subitems 95(4) and (5) shall apply if, after this item commences, the Secretary decides to add a course at a location to a provider's registration under section 9AG of the ESOS Act (as inserted by this Schedule) and the provider already has 2 or more other separate registrations to provide courses to overseas students. In these cases, the Secretary may choose which registration to add the new course to, but must use a risk management approach.

The application arrangements made by subitem 95(6) deal with review of a decision under subitem (3) of this item to determine the location or locations at which the provider is to be registered to provide the course; and a decision under subitem (4) of this item to choose which registration to add a new course to. In these cases, the ESOS Act shall apply as if section 176 of that Act included references to these decisions therefore allowing for application for review of these decisions to the Administrative Appeals Tribunal.

#### **Item 96 - Transitional—requesting amalgamation of registrations**

This Item provides for transitional arrangements to allow for amalgamation of registrations. Subitem 96(1) provides that this item shall apply where at the time this item commences, a provider has more than one registration under the ESOS Act.

Subitem 96(2) provides that the provider may request that the Secretary amalgamate all of the provider's registrations into one registration. In doing so, the provider must use the approved form.

Subitem 96(3) authorises the Secretary to approve a form for the purposes of subitem (2).

Where a provider makes a request under subitem (2), subitem 96(4) authorises the Secretary to amalgamate all of the provider's registrations into one registration or to refuse to amalgamate all of the provider's registrations into one registration.

Subitem 96(5) provides that the Secretary may choose which of the provider's registrations shall become the provider's single registration under the ESOS Act.

Subitem 96(6) requires the Secretary to use a risk management approach when considering which registration to choose to become the provider's single registration.

In deciding to amalgamate a provider's registrations, subitem 96(7) authorises the Secretary to remove a provider's registration from the Register if the Secretary amalgamates that registration into another registration under this item.

Subitem 96(8) provides that the ESOS Act shall apply as if section 176 of that Act included a reference to a decision under subitem (4) of this item to refuse to amalgamate all of the provider's registrations into one registration and a decision under subitem (5) of this item to choose which registration is to become the provider's single registration to ensure these decisions are subject to review. Therefore in these circumstances an application could be made to the Administrative Appeals Tribunal for review of such decisions.

### **Division 3—Other application, saving and transitional provisions**

#### **Item 97 - Transitional—old registrations**

Under this item, a provider who is registered under section 9 of the ESOS Act immediately before this item commences is taken, after that time, to be registered under section 9AB of that Act.

#### **Item 98 - Saving—cancellation or suspension of registration of courses for States**

Despite the amendment of paragraphs 9B(2)(b) and 17(1)(b) of the ESOS Act by this Schedule, those paragraphs continue to operate, in relation to a cancellation or suspension that occurs before this item commences, as if those amendments had not been made.

#### **Item 99 - Transitional—locations already in Register**

Item 99 provides that this item shall only apply if immediately before this item commences, a provider is registered under the ESOS Act to provide a course for a State and the Register also includes a reference to one or more locations in that State at which the provider provides that course.

Under subitem 99(2), the provider is taken, after this item commences, to be registered to provide that course at that location or those locations.

Subitem 99(3) provides that if immediately before this item commences, a provider's registration for a course for a State is suspended and the provider is taken to be registered to provide the course at a location or at locations in that State, the provider's registration shall be taken, after this item commences, to be suspended for the course at all the locations in that State.

Subitem 99(4) provides that if, immediately before this item commences, a provider's registration for all courses for all States is suspended and, the provider is taken to be registered to provide a course at a location or locations the provider's registration shall be taken, after this item commences, to be suspended for all courses for all locations.

#### **Item 100 - Transitional—approved form and certificates**

This Item deals with issues concerning the certificate that a designated authority gives the Secretary when the designated authority is recommending a provider be registered under the ESOS Act.

Subitem 100(1) provides that a form that has been approved for a State for the purposes of paragraph 9(2)(c) of the ESOS Act immediately before this item commences shall be taken, after that time, to have been approved for the purposes of section 9AH of that Act (as inserted by this Schedule).

Subitem 100(2) provides that if a designated authority gives the Secretary a certificate under paragraph 9(2)(c) of the ESOS Act before this item commences and immediately before this item commences, the Secretary has not yet decided whether to register the provider to whom the certificate relates, the certificate shall be taken, after this item commences, to have been given under section 9AH of that Act (as inserted by this Schedule).

Subitem 100(3) provides that if a designated authority referred to in subitem (2) tells the Secretary in writing, for the purposes of paragraph 9(2)(ca) of the ESOS Act, that the provider has satisfied the designated authority that the provider is fit and proper to be registered, the designated authority shall be taken to have included such a statement in a certificate for the purposes of paragraph 9AH(b) of that Act (as inserted by this Schedule).

#### **Item 101 - Application—period of registration**

This Item is an application provision which relates to subsection 9AC(4) of the ESOS Act (as inserted by this Schedule) which authorises the Secretary to vary the period of a providers registration. The subsection 9AC(4) shall apply to any registration of a provider (whether the provider is registered before or after this item commences).

#### **Item 102 - Application—powers in relation to conditions**

This Item is an application provision which relates to sections 9AD, 9AE and 9AF of the ESOS Act (as inserted by this Schedule) which deal with imposing and varying conditions on a provider's registration. These provisions shall apply in relation to any condition imposed on a provider's registration (whether before or after this item commences).

#### **Item 103 - Saving—the Register**

This Item is a savings provision which provides that the repeal of section 10 of the ESOS Act (which contains requirements related to the Register) by this Schedule does not affect the continuity of the Register. Note the proposed sections 14A and 14B inserted into the ESOS Act by Item 3 of Schedule 2, contain requirements about the Register.

#### **Item 104 - Saving—allocated numbers**

This Item is also a savings provision which provides that if, before this item commences, a number has been allocated to a provider under paragraph 10(4)(c) of the ESOS Act (ie a number allocated for the purposes of the Register) and, immediately before this item commences, the provider is registered to provide a course for a State, then that number shall be taken, after this item commences, to be a unique identifier that is allocated under paragraph 14A(4)(d) of that Act (as inserted by this Schedule).



### **Item 105 - Transitional—regulations**

This Item is a transitional provision and provides that regulations that are in force under paragraph 10(4)(d) of the ESOS Act (ie about prescribed information which the Secretary must enter on the Register) immediately before this item commences shall be taken, after that time, to have been made for the purposes of paragraph 14A(4)(i) of that Act (as inserted by this Schedule).

### **Item 106 - Transitional—conditions**

This Item is a transitional provision which relates to certain conditions imposed on a provider's registration and provides as follows:

- a condition that is in force under section 14A of the ESOS Act immediately before this item commences shall be taken, after that time, to have been imposed under section 9AD of that Act (as inserted by this Schedule); and
- a condition that is in force under section 14B of the ESOS Act immediately before this item commences shall be taken, after that time, to have been imposed under section 9AE of that Act (as inserted by this Schedule).

### **Item 107 - Application—amendments to section 89**

Item 107 is an application provision and provides that the repeal of subsection 89(1) of the ESOS Act (which relates to suspension of a provider's registration for a course for a State when the designated authority for the State has suspended approval of that course for the provider) by this Schedule shall not affect the continuity of any suspension of the registration of a provider that is in force under that subsection immediately before this item commences.

### **Item 108 - Application—amendments to section 89A**

Item 108 is an application provision relating to section 89A of the ESOS Act which is about automatic suspension of a provider when the provider's designated authority tells the Secretary that the provider is no longer fit and proper to be registered. Subsections 89A(1) to (2) of are being repealed and replaced with provisions as set out in Item 58 of schedule 2 to this Act.

Subitem 108(1) provides that the amendments to section 89A of the ESOS Act made by this Schedule shall apply in relation to any registration of a provider (whether the provider is registered before or after this item commences).

Subitem 108(2) provides that the repeal of subsections 89A(1) to (1B) of the ESOS Act by this Schedule shall not affect the continuity of any suspension of the registration of a provider that is in force under any of those subsections immediately before this item commences.

Subitem (3) provides that the repeal of subsection 89A(2) of the ESOS Act by this Schedule shall not affect the continuity of any notice that is given under that subsection before this item commences; and in relation to which, immediately before this item commences, the provider has not yet paid the associated reinstatement fee.

## **Schedule 3—Pre-paid fees**

### **Part 1—Amendments**

#### **Division 1—Main amendments**

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

##### **Item 1 - After paragraph 4B(2)(b)**

This Item inserts new paragraph 4B(2)(c) of the ESOS Act. New paragraph 4B(2)(c) provides that proposed paragraph 31(a) (as inserted by Item 5 of Schedule 3) in relation to provider exemption from the requirements imposed by proposed sections 28 and 29) is excluded from the operation of paragraph 4B(1)(a). Under this amendment, the provisions of proposed paragraph 31(a) shall not be read to include the Territory of Christmas Island or the Territory of the Cocos (Keeling) Islands as if it is a reference to a State.

##### **Items 2 and 3**

These Items insert the following new definitions into section 5:

***pre-paid fees*** shall mean tuition fees received by a registered provider in respect of an overseas student or intending overseas student, in relation to a study period for a course to be provided by the provider, before the student begins the study period.

***study period*** for a course provided by a provider shall mean the study period for the course set out in a written agreement made by the provider under section 22.

##### **Item 4 - After section 21A**

This Item inserts new section 22 dealing with the requirement for written agreements to provide for study periods.

Proposed subsection (1) provides that a registered provider for a course for a location must enter into a written agreement with each overseas student or intending overseas student. Under this amendment, the written agreement must set out the length of each study period for the course for the location, and also the tuition fees payable for each study period for the course for the location.

Proposed subsection (2) permits the written agreement to be included in the same document as the written agreement specified under proposed section 47B (in relation to refund requirements to be specified in a written agreement).

The following requirements apply in relation to study periods:

- A study period must be no more than 24 weeks long (proposed subsection (3)).
- A course may have only one study period (subject to proposed subsection (3)) (subsection (4)).



- A study period for a course may (subject to proposed subsection (3)) be longer than the course (subsection (5)). For example, it may be possible that a student is enrolled in two consecutive English Language Intensive Courses for Overseas Student (which are only 10 weeks duration each).

### **Item 5 - After Division 1 of Part 3**

Item 5 inserts new Division 2 dealing with pre-paid fees. This amendment was made following the Baird Review's recommendations regarding the need to strengthen consumer protection arrangements, through developing a more sustainable and effective system. This is in light of a number of recent provider closures. These provider closures have put considerable pressure on the current system. In a number of cases, providers have not been able to fulfil their responsibilities of providing refunds to students. This has resulted in students being referred to the ESOS Assurance Fund or experiencing lengthy delays in receiving their refund from the provider.

There is currently no regulation around student course fees. Providers are able to collect course fees prior to study commencing and from students who have yet to have their visa approved. At present, providers have the capacity to utilise these funds prior to study commencing, however if a student's visa is not approved, these funds must be refunded in full. The Commonwealth is not involved in the setting of course fees.

There have been instances where providers have relied upon pre-paid course fees to meet their operating costs. Reliance on pre-paid fees to meet operating costs raises concerns in relation to a provider's financial viability, particularly in light of the recent decline in international student numbers.

When assessing a student for a visa, the Department of Immigration and Citizenship considers the amount of pre-paid course fees as an indicator of the student's commitment to studying in Australia.

### **Proposed section 27 - Pre-paid fees**

Proposed section 27 shall operate to limit the amount of initial pre-paid fees that may be collected by a registered provider. Initial pre-paid fees are pre-paid fees that are received by a registered provider before the student begins a course. Pre-paid fees that are received by a provider, after the student has started a course, in respect of a study period that has not yet commenced are not initial pre-paid fees.

Under this provision, a registered provider must not collect in excess of 50% of a student's total tuition fees for a course before the student has begun the course (subsection (1)). However, the 50% limit shall not apply if the relevant course has only one study period (subsection (2)).

A registered provider is prevented from receiving tuition fees for a course more than 2 weeks before the beginning of a study period for the course (subsection (3)). This means that other than initial prepaid fees, a registered provider may only collect fees for one study period at a time and the fees for each study period may not be collected more than 2 weeks before the beginning of the study period.

However, under subsection (4) the provisions of subsection (3) shall not apply in relation to initial pre-paid fees and payment in arrears. This means that initial pre-paid fees may be collected more than 2 weeks before the first study period as is current practice (as many students pay initial pre-paid fees at the visa application stage). When a provider only takes payment in arrears the student may pay fees at different times after a study period has commenced and part of the course has been delivered. In this situation there are no pre-paid fees and therefore no time restriction on when fees are collected.

### **Proposed section 28 - Obligation for registered provider to maintain designated account**

Proposed section 28 imposes upon all registered providers (other than providers covered by proposed section 31) to maintain a separate account to be designated as the initial pre-paid fees account (subsection (3)).

Subsection (1) requires that all (noting exemptions under section 31) registered providers who receive tuition fees (in respect of an overseas student or intending overseas student for a course) before the student commences the course must maintain a separate account in accordance with this section.

Subsection (2) provides that the account must be maintained with an Australian ADI (within the meaning of section 9 of the *Corporations Act 2001*).

This proposed section will not apply in relation to a provider that is exempted from the requirement in accordance with proposed section 31.

### **Proposed section 29 - Obligations in relation to designated account money**

Proposed section 29 requires all non-exempt registered providers (for providers which are exempted from the requirement see proposed section 31) to pay all initial pre-paid fees, received before the student has commenced the relevant course, to the credit of a designated account (subsection (1)). The provider must pay such fees into the account within 5 business days of receiving the fees (subsection (2)).

The provider must ensure that, at all times, there is a sufficient amount standing to the credit of the account to repay all tuition fees to every overseas student or intending overseas student for whom tuition fees have been paid to the provider and for whom the relevant course has not yet commenced (subsection (3)). Subsection (3) also defines the following two terms:

- the ***protected amount*** the relevant amount which must stand to the credit of the designated account to repay all tuition fees to every ***relevant student***;
- a ***relevant student*** means an overseas student or intending overseas student:
  - (a) in respect of whom tuition fees have been paid to the provider; and
  - (b) who has not yet begun the course that the provider is to provide to the student.

Proposed subsection (4) provides that the only time an amount may be withdrawn from the account, (so as to decrease the balance of the account below the protected amount) are as follows:

- if the amount withdrawn is to pay a refund to (or in relation to) a relevant student (under proposed section 46D, 47D or 47E); or
- both of the following apply:

- (i) the provider has arranged for a relevant student to be offered a place in an alternative course at the provider's (expense under proposed section 46D);
- (ii) the amount is withdrawn to pay the alternative provider in relation to the relevant student; or
- if the amount is withdrawn to pay the TPS Director in relation to the relevant student (under proposed section 50C).

Proposed subsection (5) provides that an amount withdrawn from the account in accordance with proposed subsection (4) must not be more than the amount of the tuition fees received by the provider in respect of the relevant student before the student begins the course.

Proposed subsection (6) clarifies that, the money held in the designated account is not available for payment of any debt of any creditor of the provider and is not liable to be attached or taken in execution of a court order at the instance of a creditor of the provider other than as referred to in proposed subsection (4).

### **Proposed section 30 – Regulations**

Proposed section 30 permits the regulations to provide for additional requirements in relation to:

- tuition fees for a course received by a provider, in respect of an overseas student or intending overseas student, before the student has begun the course; or
- designated accounts maintained under this Division 2.

### **Proposed section 31 - Exemption from requirement**

Proposed section 31 exempts all providers who satisfy the following criteria from complying with the requirement to maintain a designated account:

- a provider that is administered by a State education authority;
- any other provider that is entitled to receive funds under a law of the Commonwealth for recurrent expenditure for the provision of education or training, other than one excluded by the regulations from the scope of this paragraph;
- any other provider specified in the regulations.

### **Proposed section 32 - Offence**

Proposed section 32 is an offence provision. Under this provision, a person (other than one that is exempt under proposed section 31) shall commit an offence if the person engages in conduct that breaches the requirement to maintain a designated account in accordance with proposed sections 28 or 29.

This offence is directed against either the registered provider, or against the principal executive officer of the provider where the registered provider is an unincorporated body.

Subsection (3) provides that the offence under proposed section 32 is one of strict liability. The commission of this offence attracts a fine of 60 penalty units.

This obligation is central to the protection of international students' interest for a timely refund if a visa application is refused or in the case of a provider closure. In the case of a provider closure the money in the designated account is prevented from being used to pay

other debts and must instead be used to refund students who have not yet commenced. The fact that the offence may be directed at the principal executive officer where the provider is an unincorporated body will act as a strong deterrent against non-compliance with this obligation for providers who are unincorporated. Being a strict liability offence, a financial penalty may be imposed on a person who commits such offence if minor non-compliance is identified. This is considered likely to significantly enhance the effectiveness of the enforcement regime for the conduct in question and reduce the need for lengthy enforcement processes or the imposition of conditions that compromise a provider's ability to continue operating. Strict liability is appropriate in this situation as the regulator is able to readily assess that a breach has taken place.

## **Division 2—Consequential amendment**

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

#### **Item 6 - Section 15A (after the paragraph relating to Division 1)**

This Item inserts proposed section 15A which contains a simplified outline to proposed Division 2 of Part 1 the ESOS Act to assist readers.

## **Part 2—Application provision**

### **Item 7 - Application**

This Item provides that the amendments made by this Schedule shall apply in relation to any tuition fees for a course that are received, after Division 1 of Part 1 of this Schedule commences, by a registered provider, in respect of an overseas student or intending overseas student, before the student has begun the course.

## **Schedule 4—Tuition fees**

### **Part 1—Amendments**

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

##### **Items 1, 2 3, 5, 6, 7, 8, 9 and 10**

These Items are consequential to the amendments made by this Schedule 4 which introduces the concept of *tuition fees* and, in relation to amendments in Items 2, 9 and 10 the introduction of the concept of *pre-paid fees* in Schedule 3.

##### **Item 4 - Section 7**

This Item which inserts new section 7 into the ESOS Act, defines the term, *tuition fees* to mean fees a provider receives, directly or indirectly, from an overseas student or intending overseas student (or another person who pays the fees on behalf of an overseas student or intending overseas student) that are directly related to the provision of a course that the provider is providing, or offering to provide, to the student. Tuition fees do not generally include such things as transportation, accommodation or books or equipment even if pre-paid by the student directly to the provider and purchased by the provider on behalf of the student.

## **Part 2—Application provision**

### **Item 11 - Application**

This Item provides that the amendments made by this Schedule 4 shall apply in relation to any tuition fees for a course that are received by a registered provider after this item commences.

## **Schedule 5—Former accepted students**

### **Part 1—Amendments**

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

##### **Item 1 - After subsection 19(2)**

This Item inserts new subsection (2A) into section 19 of the ESOS Act. Section 19 sets out the type of information which a registered provider must give to the Secretary following a specified event. Under this amendment, a registered provider must give particulars of a breach by an accepted student of a prescribed condition of a student visa even if the student has ceased to be an accepted student of the provider.

##### **Item 2 - After subsection 20(1)**

This Item inserts new subsection (1A) into section 20 of the ESOS Act. Section 20 requires a registered provider to send an accepted student (of the provider) a written notice if the student has breached a prescribed condition of a student visa. Under this amendment, a registered provider must send such a notice to a student even if the student has ceased to be an accepted student of the provider.

##### **Items 3, 4 and 5**

These Items are consequential to the amendments made by this Schedule 5 which introduces the concept of *former accepted student* ie a student who has ceased to be an accepted student.

#### ***Ombudsman Act 1976***

##### **Items 6 and 7**

These Items are consequential to the amendments made by this Schedule 5 which introduces the concept of *former accepted student* ie a student who has ceased to be an accepted student.



## **Part 2—Application provision**

### **Item 8 – Application**

Subitem (1) provides that the amendments to the ESOS Act that are made by this Schedule 5 apply in relation to:

- any breach of a student visa that occurs after this item commences; and
- any information that relates to an accepted student or former accepted student (whether the information was obtained before or after this item commences).

Subitem (2) provides that the amendments to the *Ombudsman Act 1976* that are made by this Schedule apply in relation to any complaint made, or investigation commenced, after commencement.

## Schedule 6—Record keeping requirements

### Part 1—Amendments

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

##### **Items 1 and 5 - Sections 5 and 21**

Section 5 defines certain terms that appear in the ESOS Act. **Item 1** inserts a definition of *approved unit of study* as having the meaning given by section 21 of the Act.

**Item 5** inserts this definition at the end of section 21. An *approved unit of study* is defined as a unit of study (however described) that has been approved for the course by a designated authority.

##### **Item 2 - Before subsection 21(1)**

Section 21 concerns record keeping requirements of registered providers. **Item 2** inserts the subheading *Record of students' details*, before subsection 21(1) to clarify that subsection 21 concerns record keeping requirements and procedures in relation to students' contact details and records of study.

##### **Item 3 - Subsections 21(2) and (3)**

The Baird Review made a general recommendation that ESOS Act establish clear, objective and enforceable standards that education providers must meet. Good record keeping is essential to ensuring and enforcing provider compliance with a range of obligations such as reporting students for failing to meet visa conditions on course progress, standards related to student welfare and consumer protection.

Item 3 strengthens the record keeping requirements contained in section 21 of the ESOS Act by specifying what details must be held on student records with respect to personal information, currency of enrolment and records of assessment, and that these records must be kept by all registered providers for at least 2 years after a person ceases to be an accepted student.

Item 3 inserts new subsections (2), (2A), (2B), (2C) and (3) into section 21. New subsection (2) specifies that for each accepted student, a registered provider's records must consist of the following information:

- the student's current residential address;
- the student's mobile phone number (if any);
- the student's email address (if any);
- any other details prescribed by the regulations.

New subsection (2A) will require providers to ensure a procedure has been instituted to ensure that, at least every six months, all registered providers confirm the accuracy of, and

update, the information referred to in subsection (2) in respect of each student who remains an accepted student of the provider.

The provider could, for example, comply with this requirement at the time of confirmation of enrolment or changes to enrolment, or by sending each of its students a text message or email to ascertain the currency of the provider's records.

New subsection (2B) deals with a provider's records of assessment held for each of its students. Under this amendment, a registered provider must record the outcome of each accepted student's assessment for every approved unit of study for a course undertaken by the student where the student's progress has been assessed.

New subsection (2C) requires that the all records of assessment must be kept up-to-date and maintained in accordance with any requirements prescribed by the regulations.

New subsection (3) deals with the retention of records and replicates current subsection 21(3). Under this amendment, a registered provider must retain all records kept under section 21 for at least 2 years after the person is no longer an accepted student; however after the person ceases to be an accepted student the records no longer need to be kept up-to-date.

#### **Item 4 - Before subsection 21(5)**

This Item inserts the subheading *Offence* to indicate that subsection 21(5) is an offence provision.

## **Part 2—Application and transitional provisions**

### **Item 6 - Application**

Proposed subitem (1) inserts an application provision which provides that the amendments made by Schedule 6 shall apply to an approved unit of study that an accepted student begins after Item 6 has commenced. Item 6 commences on the first 1 July that occurs on or after the day this Act receives the Royal Assent.

Subitem (2) provides that the amendments made by this Schedule 6 (including the amendments made in relation to student details) also apply in relation to an approved unit of study that an accepted student begins before this item commences, but which has not been completed by the time this Item 6 commences.

### **Item 7 - Transitional—regulations**

This Item provides that any regulations that are in force under subsection 21(2) of the *Education Services for Overseas Students Act 2000* immediately before this item commences are taken, after that time, to have been made for the purposes of paragraph 21(2)(d) of that Act (as inserted by this Schedule 6).

## **Schedule 7—Definition of designated authority**

### **Part 1 – Amendments that will not commence if the TEQSA Consequential Act commences first**

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

##### **Item 1 –Section 5 (after paragraph (a) of the definition of *designated authority*)**

This Item will only apply if this Act commences before the commencement of Item 3 of Schedule 1 of the *Tertiary Education and Quality Standards Agency (Consequential Amendments and Transitional Provisions) Act 2011*.

This Item inserts the new limb to the definition of ***designated authority*** under section 5 of the ESOS Act which provides that the designated authority in relation to a provider, to the extent that the provider is a registered training organisation (within the meaning of the *National Vocational Education and Training Regulator Act 2011*), but not an NVR registered training organisation, and is seeking to provide courses to overseas students for a non-referring State (within the meaning of that Act), shall be the National VET Regulator. The words

(aa) *to the extent that the provider:*

(i) *is a registered training organisation*

indicate that this provision only relates to the provider to the extent it is seeking to provide courses to overseas students in its capacity as a registered training organisation and does not apply to the provider to the extent it is seeking to provide other courses to overseas students ie it applies in relation to the provider’s delivery of vocational education and training courses but not to the extent it is seeking to deliver other courses to overseas students such as school courses or higher education courses.

Where a provider in a non-referring state (within the meaning of the *National Vocational Education and Training Regulator Act 2011*) is seeking registration under the ESOS Act to deliver vocational education and training courses to overseas students but at the time of seeking such registration the provider is regulated for the delivery of its vocational education and training by the relevant State regulator (rather than by the National VET Regulator), it is appropriate for the National VET Regulator to be the designated authority for the provider. This is because once the provider becomes registered to provide the vocational education and training courses to overseas students, the National VET Regulator will take over as the regulator for the provider’s delivery of vocational education and training courses.

In these circumstances, it is appropriate that the designated authority for the provider be the same body that will regulate the provider’s delivery of vocational education and training once it becomes registered under the ESOS Act.

**Part 2 – Amendment commencing immediately after the later of Royal Assent and the commencement of the TEQSA Consequential Act**

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

**Item 2 – Subsection 7A(1) (after table item 2)**

This Item will amend the definition of designated authority as it will appear in subsection 7A(1) of the ESOS Act immediately after the commencement of Item 3 of Schedule 1 of the *Tertiary Education and Quality Standards Agency (Consequential Amendments and Transitional Provisions) Act 2011*. The amended definition will provide that the designated authority in relation to a provider, to the extent that the provider is a registered training organisation (within the meaning of the *National Vocational Education and Training Regulator Act 2011*), but is not an NVR registered training organisation (within the meaning of that same Act), and is seeking to provide courses to overseas students for a non-referring State (within the meaning of the same Act), shall be the National VET Regulator.

Where a provider in a non-referring state (within the meaning of the *National Vocational Education and Training Regulator Act 2011*) is seeking registration under the ESOS Act but at the time of seeking such registration is regulated for the delivery of its vocational education and training by the relevant State regulator (rather than by the National VET Regulator), it is appropriate for the National VET Regulator to be the designated authority for the provider. This is because, once the provider becomes registered to provide vocational education and training courses to overseas students, the National VET Regulator will take over as the regulator for the provider's delivery of vocational education and training.

In these circumstances, it is appropriate that the designated authority for the provider be the same body that will regulate the provider's delivery of vocational education and training once it becomes registered under the ESOS Act.

**Part 3 – Amendment commencing immediately after the commencement of  
Division 2 of this Part**

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

**Item 3 – Subsection 7A(1) (paragraph (b) of cell at table item 2A, column headed “For a provider, to the extent that it is:”)**

This Item is a consequential amendment made for the purposes of proposed section 9AA as inserted by Schedule 1.

## **Schedule 8—Miscellaneous**

### **Part 1—Main amendments**

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

##### **Items 1, 2 and 3**

Sections 9A, 92A and 92B of the ESOS Act dealt with the re-registration of all CRICOS registered providers under strengthened criteria by 31 December 2010. The purpose of requiring the re-registration of all existing registered providers was to restore stakeholder confidence in the quality of education services provided across the entire international education sector during the period of upheaval in 2009.

As the process of re-registration of all CRICOS registered providers is now complete, these provisions are now redundant and will be repealed by these Items.

##### **Item 4 - Section 110**

This Item repeals section 110 in its entirety. Section 110 is an offence provision prohibiting a person from providing, purporting to provide, or offering to provide a course to overseas students in a State in circumstances in which the course is not genuine.

New Subdivision A of Division 2 of Part 5 (as inserted by Item 1 of Schedule 1) now deal with all instances of provider default.. Section 110 is now redundant and shall be repealed by Item 1.

##### **Item 5 – At the end of Part 6**

This Item inserts new Division 4 into Part 6 of the ESOS Act. New Division 4 deals with enforceable undertakings which may be given by a person to provide assurance to the Secretary regarding a registered provider's compliance with a provision of the ESOS Act, the National Code or a condition of registration.

Division 4 contains two new sections. New section 110A sets out the types of undertakings which the Secretary may accept from a registered provider. Under new subsection (1) the Secretary is able to accept the following types of written undertakings from a person:

- That the registered provider will take specified action in order for a registered provider to comply with a provision of the ESOS Act, the National Code or a condition of registration;
- That the registered provider will refrain from taking specified action in order for a registered provider to comply with a provision of the ESOS Act, the National Code or a condition of registration; and
- That a registered provider will take specified action directed towards ensuring that, in the future, the registered provider does not, or is not likely to, contravene a provision of the ESOS Act, the National Code or a condition of registration.



New subsection (2) provides that an undertaking previously given by a registered provider may only be withdrawn or varied with the written consent of the Secretary.

New subsection (3) clarifies that the consent of the Secretary is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Under subsection (4) the Secretary may, by written notice, cancel an undertaking previously given by a registered provider.

New section 110B deals with the enforcement of undertakings given under section 110A.

Under new subsection (1), if a registered provider has given an undertaking which has not been withdrawn or cancelled and the Secretary considers that the registered provider has breached the undertaking, the Secretary may apply to either the Federal Court or the Federal Magistrates Court for an order.

New subsection (2) authorises the Court to make any of the following orders if the Court is satisfied that the person has breached the undertaking:

- An order directing the person to comply with the undertaking;
- An order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
- Any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;
- Any other order that the Court considers appropriate.

**Item 6 - At the end of subsection 113(4)**

This Item inserts new paragraph (e) into subsection 113(4). Subsection (4) sets out the persons who the Secretary is authorised to give a production notice requiring information or documents that are relevant to a monitoring purpose under section 113.

New paragraph (e) adds an officer or employee of an administrator or liquidator of a registered provider or former registered provider as an individual who may be given such a production notice under section 113.

**Item 7 - At the end of subsection 116(3)**

This Item inserts new paragraph (e) into subsection 116(3). Subsection (3) sets out the persons who the Secretary is authorised to give an attendance notice requiring the individual to attend before an authorised employee and answer questions about a matter that is relevant to a monitoring purpose under section 116.

New paragraph (e) adds an officer or employee of an administrator or liquidator of a registered provider or former registered provider as an individual who may be given such an attendance notice under section 116.

**Item 8 - After subsection 170(2)**

Item 8 inserts new subsection (2AA) into section 170. New subsection (2AA) authorises the Secretary to delegate, by signed writing, any or all of the Secretary's powers under Subdivision A of Division 2 of Part 7 dealing with production notices to a person in the Department who holds, or is acting in, an Executive Level 1 or 2, or equivalent, position.

**Item 9 - Section 176A**

This Item repeals section 176A. Section 176A is a provision which required the Minister to initiate an independent evaluation of the operation of the ESOS Act within the first 3 years after the day on which the ESOS Act received Royal Assent. As the ESOS Act received the Royal Assent on 21 Dec 2000 this provision is now redundant.

**Part 2—Consequential amendments**

*Education Services for Overseas Students Act 2000*

**Item 10 - At the end of section 83A**

This Item inserts a further bullet point into the new Guide to Part 6. This new bullet point explains that the Secretary may accept a written undertaking under Division 4 relating to compliance with a provision of the ESOS Act, the National Code or a provision of a provider's registration. The bullet point further explains that the Secretary may apply to a court to enforce the undertaking.

## **Education Services for Overseas Students (TPS Levies) Bill 2011**

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

Provides for the Act to be cited as the *Education Services for Overseas Students (TPS Levies) Act 2011*.

### **Clause 2 - Commencement**

This clause inserts a three column table setting out commencement information for various provisions of 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.

Table item 1 provides that sections 1 and 2, together with any other provisions in this Act not covered by the table shall commence on Royal Assent.

Table item 2 provides that section 3 to 16, inclusive, shall commence the same time as Part 1 of Schedule 1 to the *Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Act 2011* commences.

Part 1 of Schedule 1 to the *Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Act 2011* shall commence on the first 1 July that occurs on or after the day this Act receives the Royal Assent

A note makes it clear that these commencement times will not be amended by any later amendments of this Act.

### **Clause 3 - Crown to be bound**

Clause 3 provides that the Crown shall be bound in each of its capacities by this Act.

### **Clause 4 – Interpretation**

Subclause (1) defines certain terms that appear in the Act. These definitions include the following:

***administrative fee component*** for a registered provider for a year has the meaning given by section 6 of this Act.

***base fee component*** for a registered provider for a year has the meaning given by section 7 of this Act.

***overseas student tuition fees*** for a registered provider for a year means the amount of tuition fees received by the provider during the year in respect of an overseas student or intending overseas student.

***risk rated premium component*** for a registered provider for a year has the meaning given by section 9 of this Act.

***special tuition protection component*** for a registered provider for a year has the meaning given by section 10 of this Act.

***total enrolments*** for a registered provider for a year are worked out in accordance with section 5 of the *Education Services for Overseas Students (Registration Charges) Act 1997*.

Subclause (2) clarifies that any expression used in this Act and also used in the ESOS Act has the same meaning as the ESOS Act.

## Part 2—The amount of the TPS levy

### Clause 5 - TPS levy

Item 5 establishes the TPS levy to be imposed on providers in respect of their CRICOS registration.

Subclause (1) provides that a provider who is registered on 1 January of a year must pay a TPS levy for the year. A note to this subclause makes clear that the obligation to pay a TPS levy also extends to a registered provider whose registration has been suspended.

Subclause (2) sets out the basis for calculation of the TPS levy. Under this provision, the amount of the TPS levy for a registered provider for a year is the sum of the following components:

- the provider's administrative fee component for the year;
- the provider's base fee component for the year;
- the provider's risk rated premium component for the year ;
- the provider's special tuition protection component for the year .

A note to this subclause clarifies that certain classes of providers may be exempt from the requirement to pay either, the base fee component or the risk rated premium component, or both.

Subclause (3) provides that a provider, who is seeking to be registered for the first time under section 9AB of the ESOS Act in a year, will be liable to pay a TPS levy for the year.

Subclause (4) sets out the basis for calculation of the TPS levy. Under this provision, the amount of the TPS levy for an unregistered provider for that year is the sum of the following components:

- the amount specified in paragraph 6(a) (of this Act) for the year;
- the amount specified in paragraph 7(a) (of this Act) for the year.

A note to this subclause states that the amounts under subclause (4) will be indexed. A second note to this subclause clarifies that certain classes of providers may be exempt from the requirement to pay the amount in paragraph 7(a) of this Act.

### Clause 6 - Administrative fee component

Clause 6 sets out the basis for calculation of the *administrative fee component*. Under this provision, a registered provider's *administrative fee component* for a year is the sum of the following components:

- (a) \$100;
- (b) \$2 multiplied by the total enrolments for the provider for the previous year.

A note to this clause provides that section 4 of this Act deals with the term, *total enrolments*. A second note to this clause states that the dollar amounts under section 8 will be indexed.

### **Clause 7 - Base fee component**

Clause 7 sets out the basis for calculation of the *base fee component*. Under this provision, a registered provider's *base fee component* for a year is the sum of the following components:

- (a) \$200;
- (b) \$5 multiplied by the total enrolments for the provider for the previous year.

A note to this clause provides that section 4 of this Act deals with the term, *total enrolments*. A second note to this clause states that the dollar amounts under section 8 will be indexed.

### **Clause 8 - Indexation of administrative and base fee components**

Subclause (1) sets out the basis for calculation of indexation of the administrative fee component and the base fee component. Indexation shall be applied to work out the dollar amounts specified in paragraphs 6(a) or (b) or 7(a) or (b) for any year after the initial year. Any year in which indexation is applied is defined to be the *current year*.

A note to this subclause states that the TPS Director must publish the indexed dollar amount under section 13.

Subclause (2) sets out the indexation formula. Under this provision, indexation of the dollar amounts is to be calculated by multiplying the amounts that applied to the year before the *current year* by using the following formula:

$$\frac{\text{Index number for the recent September quarter}}{\text{Index number for the previous September quarter}}$$

The terms used in the above formula are defined as follows:

*index number*, for a quarter, is defined to mean the All Groups Consumer Price Index number that is the weighted average of the 8 capital cities and is published by the Australian Statistician for that quarter.

*initial year* is defined to mean the first calendar year in relation to which the TPS levy is imposed under section 14.

*previous September quarter* is defined to mean the September quarter before the recent September quarter.

*recent September quarter* is defined to mean the September quarter in the year before the current year.

The indexation amounts must be rounded up or down. Subclause (3) provides that the indexation factor worked out under subclause (2) must be rounded up or down to 3 places (rounding up in the case of exactly halfway between).(4) Amounts worked out under subclause (2) for the purposes of paragraph 6(a) or 7(a) must be rounded to the nearest whole dollar (rounding up in the case of 50 cents).

Subclause (5) provides that the amounts worked out under subclause (2) for the purposes of paragraph 6(b) or 7(b) must be rounded to the nearest whole cent (rounding up in the case of 0.5 cent).

Subclause (6) provides that if at any time (whether before or after the commencement of this section) the Australian Statistician has changed or changes the reference base for the Consumer Price Index, then, for the purposes of applying this section after the change, only index numbers published in terms of the new reference base are to be used.

### **Clause 9 - Risk rated premium component**

Subclause (1) sets out the basis for calculation of a registered provider's *risk rated premium component*. Under this provision, a registered provider's *risk rated premium component* for a year is the sum of the provider's risk components for each risk factor for the year.

Subclause (2) provides that a registered provider's *risk component* for a risk factor for a year is calculated in accordance with the following formula:

$$\left( \begin{array}{cc} \text{Specified} & \text{Increase factor} \\ \text{percentage} & \text{for the risk factor} \\ \text{for the year} & \text{for the year} \end{array} \right) \times \begin{array}{c} \text{Provider's overseas student} \\ \text{tuition fees} \\ \text{for the previous year} \end{array}$$

Subclause (3) provides that, before the beginning of each year, the TPS Director must, by legislative instrument, specify the following for the purposes of subsection (2):

- (a) a percentage for that year;
- (b) one or more risk factors that reflect the risk of calls being made on the OSTF in respect of registered providers with that factor or those factors;
- (c) for each risk factor, the factor by which the specified percentage for that year is multiplied.

At the beginning of each year for the purposes of the risk component in proposed subsection 9(2), the Director will specify a percentage for that year. The Director will also specify one or more risk factors that reflect the risk of calls being made on the OSTF in respect of registered providers. For each risk factor the Director will specify a factor by which the specified percentage for that year is multiplied. The registered provider's risk rated premium component for the year is the sum of the provider's risk components each of which is calculated in accordance with proposed subsection 9(2).

### **Clause 10 - Special tuition protection component**

Subclause (1) provides that a registered provider's special tuition protection component for a year is worked out in accordance with the following formula:

$$\text{Specified percentage for the year} \times \frac{\text{Provider's overseas student tuition fees for the previous year}}{\text{tuition fees}}$$

Subclause (2) provides that, before the beginning of each year, the TPS Director must, by legislative instrument, specify a percentage for that year for the purposes of subsection (1). < The special tuition protection component is designed to build additional insurance in the OSTF during more buoyant sector circumstances. This component would be imposed on all providers and would be expressed as a percentage of overseas student tuition fee income as determined by the TPS Director following advice of the TPS Advisory Board. This would be determined in a similar way, but for a different purpose, to the base amount for the risk rated premium component of the TPS Levy.

Subclause (3) makes clear that the percentage to be specified may be zero.



## **Part 3—Miscellaneous**

### **Clause 11 - Rules relating to making a legislative instrument**

Subclause (1) provides that the matters related to the Risk rated premium (under subclause 9(3) and the percentage for the year in relation to the special tuition protection components (under subclause 10(2)) must be specified in the same legislative instrument.

Subclause (2) sets out the matters which the TPS Director must have regard to before making the legislative instrument referred to under subclauses 9(3) and 10(2). Before making the instrument, the TPS Director must have regard to:

- (a) any advice of the Board in relation to the matters referred to in those subsections; and
- (b) the sustainability of the OSTF.

Subclause (3) provides that the TPS Director may also have regard to any other matter s/he considers appropriate.

Subclause (4) provides that, before the TPS Director makes a legislative instrument under subclauses 9(3) and 10(2), the Treasurer must approve the legislative instrument in writing. Subclause (5) clarifies that an approval given by the Treasurer under subsection (4) is not a legislative instrument.

### **Clause 12 - Exemptions**

Clause 12 provides the Minister with a legislative instrument making power to prescribe that certain classes of registered providers are exempt from the requirement to pay either or both of the following:

- (a) the base fee component (or paragraph 7(a) of the base fee component);
- (b) the risk rated premium component.

### **Clause 13 - Publication of administrative and base fee components**

The TPS Director must annually publish the dollar amounts for each of the administrative fee component and the base fee component. The Director may publish such information in any manner s/he considers appropriate.

### **Clause 14 - Imposition of requirement to pay the TPS levy**

Clause 14 imposes the obligation to pay TPS levies under the ESOS Act.

### **Clause 15 - Section 114 of the Constitution**

Section 114 of the Constitution, among other things, prohibits the Commonwealth, from imposing any tax on any property of the State. Subclause (1) operates to avoid any

unintended operation of this Act that would otherwise be invalid for contravention of section 114 of the Constitution.

Subclause (2) provides that, for the purposes of this clause 14, the term ‘State’ includes the Australian Capital Territory and the Northern Territory.

### **Clause 16 – Regulations**

This clause enables the Governor-General to make regulations prescribing matters required, necessary or convenient for the operation of, or giving effect to, this Act.

Any such regulation would be a legislative instrument under section 6(a) of the *Legislative Instruments Act 2003*.

## **Education Services for Overseas Students (Registration Charges) Amendment (Tuition Protection Service) Bill 2011**

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

This clause provides for the Act to be cited as the *Education Services for Overseas Students (Registration Charges) Amendment (Tuition Protection Service) Act 2011*.

### **Clause 2 - Commencement**

This clause inserts a three column table setting out commencement information for various provisions of 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.

Table item 1 provides that sections 1 to 3, together with any other provisions in this Act not covered by the table shall commence on Royal Assent.

Table item 2 provides that Schedule 1, inclusive, shall commence the later of:

- (a) immediately after the commencement of Part 1 of Schedule 2 to the *Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Act 2011* (table item 6 of that Act provides that Part 1 of Schedule 2 shall commence on the first 1 July that occurs on or after the day this Act receives the Royal Assent); and
- (b) immediately after the commencement of Schedule 1 to the *Education Services for Overseas Students (Registration Charges) Amendment Act 2011* (Table item 2 of that Act provides that that Schedule 1 shall commence on a single day to be proclaimed, or if any of the provisions do not commence within 6 months from Royal Assent, they shall commence on the day after that 6 month period expires).

A note makes it clear that these commencement times will not be amended by any later amendments of this Act.

### **Clause 3 - Schedule(s)**

Clause 3 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***

#### **Items 1 and 4**

Items 1 and 4 are consequential amendments made for the purposes of proposed section 9AA (as inserted by Item 1 of Schedule 2 of the Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Bill 2011.

#### **Item 2 - Subsection 6(1)**

Item 1 repeals and substitutes subsection 6(1) in its entirety. New subsection 6(1) sets out the circumstances in which the provisions of section 6 shall apply. Under this amendment, section 6 shall apply if a designated authority recommends that a provider be registered to provide a course at a location to overseas students (in accordance with proposed section 9AA) and the provider is not currently registered to provide any course at any locations.

#### **Item 3 - Subsection 6(2) (table)**

This Item is a consequential amendment made for the purposes of proposed section 9AB (as inserted by Item 1 of Schedule 2 of the Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Bill 2011.