



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

**Act No. 164 of 2000 as amended**

This compilation was prepared on 9 March 2010  
taking into account amendments up to Act No. 10 of 2010

The text of any of those amendments not in force  
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be  
affected by application provisions that are set out in the Notes section

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# **An Act to regulate education services for overseas students, and for related purposes**

## **Part 1—Introduction**

### **1 Short title** [see Note 1]

This Act may be cited as the *Education Services for Overseas Students Act 2000*.

### **2 Commencement** [see Note 1]

- (1) This section and section 1 commence on the day on which this Act receives the Royal Assent.
- (2) The remaining provisions of this Act commence on a day or days to be fixed by Proclamation.
- (3) However, if a provision of this Act does not commence under subsection (2) within the period of 6 months beginning on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

### **3 Crown to be bound**

- (1) This Act binds the Crown in each of its capacities.
- (2) However, nothing in this Act makes the Crown in any capacity liable to be prosecuted for an offence.

### **4 Criminal Code applies**

The *Criminal Code* applies to all offences against this Act.

### **4A Objects**

The principal objects of this Act are:

- (a) to provide financial and tuition assurance to overseas students for courses for which they have paid; and
- (b) to protect and enhance Australia's reputation for quality education and training services; and

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- (c) to complement Australia's migration laws by ensuring providers collect and report information relevant to the administration of the law relating to student visas.

**4B Extension of this Act to Christmas Island and Cocos (Keeling) Islands**

- (1) Subject to subsection (2), this Act applies in relation to the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands as if:
  - (a) a reference in a provision of this Act to a State included a reference to the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands; and
  - (b) a reference in a provision of this Act to a designated authority in relation to a State included a reference to the Territories Minister.
- (2) Paragraph (1)(a) does not apply in relation to the following provisions:
  - (a) the definitions of *designated authority* and *State* in section 5;
  - (b) paragraph 9B(1)(a);
  - (c) paragraph 24(2)(a);
  - (d) section 36;
  - (e) section 79;
  - (f) paragraph 127(3)(b);
  - (g) paragraph 152(3)(b);
  - (h) paragraph 175(1)(e).
- (3) The Territories Minister may, by signed writing, delegate all or any of his or her functions or powers as a designated authority under this Act to:
  - (a) an APS employee who is an SES employee or acting SES employee; or
  - (b) an officer or employee of a State.

**5 Definitions**

In this Act, unless the contrary intention appears:

*accepted student* of a registered provider means a student (whether within or outside Australia):

- (a) who is accepted for enrolment, or enrolled, in a course provided by the provider; and
- (b) who is, or will be, required to hold a student visa to undertake or continue the course.

**agent** of a provider means a person (whether within or outside Australia) who represents or acts on behalf of the provider, or purports to do so, in dealing with overseas students or intending overseas students.

**annual Fund contribution** means an annual contribution that a provider is required to pay to the Fund Manager under subparagraph 9(2)(b)(i) or subsection 24(1).

**annual registration charge** means the annual registration charge imposed under the *Education Services for Overseas Students (Registration Charges) Act 1997*.

**approved provider** for a course for a State means a provider approved by the designated authority for the State to provide that course for the State to overseas students, other than an approval that has been withdrawn by that authority.

**associate** of a person has the meaning given by section 6.

**attendance notice** means a notice given under section 116.

**authorised employee** means a person who:

- (a) is authorised in writing by the Secretary to exercise powers under Part 7; and
- (b) is an employee of the Department; and
- (c) holds the classification of APS 5 or higher, or an equivalent classification.

**condition**, in relation to the registration of a provider, means a condition imposed on the registration under section 14A or subsection 83(3).

**contributions criteria** means the criteria determined under section 59 for working out how much annual Fund contribution each provider must pay.

**course** means a course of education or training.

**course money** has the meaning given by section 7.

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**designated authority** for a State means the person responsible under the law of the State for approving providers to provide courses to overseas students for the State.

**document** includes a copy of a document.

**evidential material** means either of the following:

- (a) a thing that there are reasonable grounds for suspecting will afford evidence as to the commission or suspected commission of an offence against this Act;
- (b) a thing that there are reasonable grounds for suspecting is intended to be used for the purpose of committing any such offence.

**Fund** means the ESOS Assurance Fund established under section 45.

**Fund Manager** means the Fund Manager appointed under section 49.

**higher education provider** has the same meaning as in the *Higher Education Support Act 2003*.

**high managerial agent** of a provider means an employee, agent or officer of the provider with duties of such responsibility that his or her conduct may fairly be assumed to represent the provider in relation to the business of providing courses.

**Immigration Minister** means any of the Ministers who administer the *Migration Act 1958* from time to time.

**Immigration Minister's suspension certificate** means a certificate given under Division 2 of Part 6.

**initial registration charge** means the initial registration charge imposed under the *Education Services for Overseas Students (Registration Charges) Act 1997*.

**intending overseas student** means a person (whether within or outside Australia) who intends to become, or who has taken any steps towards becoming, an overseas student.

**late payment penalty** means the penalty imposed by section 172.

**modification**, in relation to a condition on the registration of a provider, includes addition, omission and substitution.

**monitoring purpose** means a purpose of determining:

- (a) whether a registered provider is complying or has complied with the requirements of this Act or the national code; or
- (b) whether, because of financial difficulty or any other reason, the provider might not be able to:
  - (i) provide courses to its accepted students; or
  - (ii) refund course money to its accepted students.

**monitoring warrant** means a warrant issued under section 138 or subsection 165(2).

**national code** means the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students in force under Part 4.

**occupier**:

- (a) in relation to premises comprising a vehicle or vessel—means the person apparently in charge of the vehicle or vessel; and
- (b) in any case—includes a person who apparently represents the occupier.

**old ESOS Act** means the *Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991*.

**overseas student** means a person (whether within or outside Australia) who holds a student visa, but does not include students of a kind prescribed in the regulations.

**Panel** means the Contributions Review Panel established under section 54.

**premises** means:

- (a) an area of land or any other place, whether or not it is enclosed or built on; or
  - (b) a building or other structure; or
  - (c) a vehicle or vessel;
- and includes a part of any such premises.

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***principal executive officer*** of a provider that is not an individual means the person who has executive responsibility for the operation of the provider.

***production notice*** means a notice given under section 113.

***provide*** a course includes participate in providing the course.

***provider*** means an institution or other body or person that provides or seeks to provide courses to overseas students.

***Register*** means the Register kept under section 10.

***registered*** means registered under Part 2, and (except in sections 9 to 9B) includes re-registered under section 9A.

***registered provider*** for a course for a State means an approved provider that is entered on the Register as a provider for the course for the State.

***reinstatement fee*** means the fee referred to in section 171.

***resident*** means:

- (a) in the case of a company, a company incorporated in Australia that carries on business in Australia and that has its central management and control in Australia; or
- (b) in the case of an unincorporated body, a body that carries on business in Australia and that has its central management and control in Australia.

***search warrant*** means a warrant issued under section 144 or subsection 165(3).

***Secretary*** means the Secretary of the Department.

***special levy*** means a levy that is required to be paid to the Fund Manager under section 72.

***State*** includes the Australian Capital Territory and the Northern Territory.

***student visa*** has the meaning given by the regulations.

***Territories Minister*** means the Minister responsible for administering the *Christmas Island Act 1958*.



*this Act* includes the regulations.

*tribunal member* means a member of the Administrative Appeals Tribunal.

*tuition assurance scheme* means a scheme whose main objects include ensuring that overseas students receive the course they have paid for.

## **6 Meaning of *associate***

(1) In this Act:

*associate* of a person means:

- (a) the spouse or de facto partner of the person; or
- (b) a child of the person, or of the person's spouse or de facto partner; or
- (c) a parent of the person, or of the person's spouse or de facto partner; or
- (d) a sibling of the person; or
- (e) if the person is a company:
  - (i) an officer of the company; or
  - (ii) an officer of a company that is related to the first-mentioned company; or
  - (iii) a person who holds a substantial ownership interest in the company; or
- (f) if the person is an association or a co-operative—the principal executive officer or a member of the body (however described) that governs, manages, or conducts the affairs of the association or co-operative; or
- (g) if the person is a body corporate established for a public purpose by or under an Australian law and another body is responsible for the management or the conduct of the affairs of the body corporate—the principal executive officer or a member of that other body; or
- (h) if the person is any other kind of body corporate established for a public purpose by or under an Australian law—the principal executive officer or a member of the body corporate; or
- (i) if the person is a partnership:

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- (i) the principal executive officer or an individual, or a body corporate, that is a member of the partnership; or
- (ii) an individual who is an officer of a company, or a member of any other body corporate, that is a member of the partnership.

*Related companies*

- (2) For the purposes of subsection (1), the question of whether companies are **related** to each other is to be determined in the same manner as the question of whether bodies corporate (within the meaning of the *Corporations Act 2001*) are related to each other is determined under section 50 of the *Corporations Act 2001*.

*Substantial ownership interest*

- (3) For the purposes of subsection (1), a person holds a **substantial ownership interest** in a company if the total of all amounts paid on the shares in the company in which the person holds interests equals or exceeds 15% of the total of all amounts paid on all shares in the company.

*Interests in shares*

- (4) For the purposes of subsection (3):
  - (a) a person **holds an interest in a share** if the person has any legal or equitable interest in the share; and
  - (b) without limiting the generality of paragraph (a), a person **holds an interest in a share** if the person, although not the registered holder of the share, is entitled to exercise, or control the exercise of, a right attached to the share, otherwise than because the person has been appointed as a proxy or representative to vote at a meeting of members of a company or of a class of its members.

*Mutual associates*

- (5) If, under this section, one person is an associate of a second person, then the second person is an **associate** of the first person.

*Chains of associates*

- (6) If, under this section:
- (a) one person is an associate of a second person (including because of a previous application of this subsection); and
  - (b) the second person is an associate of a third person;
- then the first person is an **associate** of the third person.

*Other definitions*

- (7) In this section:

**child**: without limiting who is a child of a person for the purposes of this section, someone is the **child** of a person if he or she is a child of the person within the meaning of the *Family Law Act 1975*.

**de facto partner** of a person has the meaning given by the *Acts Interpretation Act 1901*.

**parent**: without limiting who is a parent of a person for the purposes of this section, someone is the **parent** of a person if the person is his or her child because of the definition of **child** in this section.

**person** includes a provider.

*Certain family relationships*

- (8) For the purposes of paragraph (d) of the definition of **associate** in subsection (1), if one person is the child of another person because of the definition of **child** in this section, relationships traced to or through the person are to be determined on the basis that the person is the child of the other person.

**7 Meaning of course money**

- (1) In this Act:

**course money** means money a provider receives, directly or indirectly, from:

- (a) an overseas student or intending overseas student; or

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- (b) another person who pays the money on behalf of an overseas student or intending overseas student;  
for a course that the provider is providing, or offering to provide, to the student.
- (2) For the purposes of subsection (1), *money received for a course* includes:
  - (a) tuition fees; and
  - (b) any amount received by the provider that the provider is to pay, on behalf of the student, to a private health insurer (within the meaning of the *Private Health Insurance Act 2007*); and
  - (c) any other amount that the student had to pay the provider, directly or indirectly, in order to undertake the course.

## Part 2—Registration of approved providers

### 8 Offence: providing or promoting a course without a registered provider

- (1) A person is guilty of an offence if the person:
- (a) provides a course in a State to an overseas student; or
  - (b) makes an offer to an overseas student or an intending overseas student to provide a course in a State to that student; or
  - (c) invites an overseas student or intending overseas student to undertake, or to apply to undertake, a course in a State; or
  - (d) holds himself, herself or itself out as able or willing to provide a course in a State to overseas students;
- unless:
- (e) the person is registered to provide that particular course for that particular State; or
  - (f) the person does so in accordance with an arrangement that the person has with a registered provider for that particular course for a State.

Maximum penalty: Imprisonment for 2 years.

Note 1: This means that, if 2 or more providers jointly provide a course, then only one of the providers needs to be registered.

Note 2: However, a provider of a course who is not registered must identify the registered provider in any written material promoting the course (see section 107) and must not engage in misleading or deceptive conduct in relation to the course (see subsection 83(2)).

Note 3: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

- (2) The prosecution bears a legal burden in relation to the matter in paragraph (1)(e) (despite subsection 13.3(3) of the *Criminal Code*).

Note: A defendant bears an evidential burden in relation to the matter in paragraph (1)(f): see subsection 13.3(3) of the *Criminal Code*.

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*Defence: surveys etc. to assess demand for a course*

- (3) A person does not commit an offence under paragraph (1)(d) if:
- (a) the relevant conduct was only for either or both of the following purposes:
    - (i) carrying out surveys or other investigations to assess the demand for the course; or
    - (ii) negotiating with another institution or other body or person in connection with designing or developing the course; and
  - (b) the person took reasonable steps to ensure that:
    - (i) overseas students and intending overseas students who were, or might become, interested in undertaking the course; and
    - (ii) any institution or other body or person who might also provide the course; andwere aware that:
    - (iii) the person was not a registered provider for the course for the State; and
    - (iv) the relevant conduct was not carried out in accordance with an arrangement that the person had with a registered provider for the course for a State; and
  - (c) the person neither invited nor accepted any amount for the course from overseas students or intending overseas students, or from the students' agents.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3): see subsection 13.3(3) of the *Criminal Code*.

## 9 Registering approved providers

*Recommendation by designated authority*

- (1) A designated authority for a State may recommend that an approved provider for that State be registered under this Act to provide a specified course for that State to overseas students.

*Registration by Secretary*

- (2) The Secretary must register the provider if:
- (a) the provider is:
    - (i) a resident of Australia; or

- (ii) a Table C provider (within the meaning of the *Higher Education Support Act 2003*); and
- (aa) the provider has paid the associated initial registration charge; and
- (b) either:
  - (i) the provider has paid its first annual Fund contribution (see Part 5); or
  - (ii) the provider would be exempt under subsection 24(2) from paying annual Fund contributions if the provider were a registered provider; and
- (ba) either:
  - (i) the provider is a member of a tuition assurance scheme that is established in accordance with the regulations made for the purposes of paragraph 22(1)(a) and that covers the course; or
  - (ii) the provider is exempt from the requirements of section 22 under regulations made for the purposes of subsection 22(3); and
- (c) the designated authority has given the Secretary a certificate, in the form approved by the Secretary for the purposes of this paragraph for the State, that:
  - (i) relates to the provider's compliance with the national code; and
  - (ii) states that the provider has the principal purpose of providing education; and
  - (iii) states that the provider has the clearly demonstrated capacity to provide education of a satisfactory standard; and
- (ca) except in the case of a provider mentioned in subsection 9B(1)—the designated authority has told the Secretary in writing that the provider has satisfied the designated authority that the provider is fit and proper to be registered; and
- (d) the Secretary has no reason to believe that the provider:
  - (i) is not complying, or will not comply, with this Act or the national code; or
  - (ii) does not have the principal purpose of providing education; or

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(iii) does not have the clearly demonstrated capacity to provide education of a satisfactory standard; and

Note: The Secretary must notify the relevant designated authority if the Secretary has reason to believe that any of the matters set out in this paragraph apply: see section 14.

- (e) the provider is not liable for an annual registration charge or late payment penalty that remains unpaid after it became due for payment.
- (3) The Secretary must not register the provider in any other circumstances.
- (4) Nothing in subsection (2) creates a duty for the Secretary to seek any information about the matters mentioned.
- (8) Subparagraph (2)(c)(i) does not apply when there is not a national code in force.

*Higher education providers*

- (9) For the purposes of subparagraphs (2)(c)(ii) and (2)(d)(ii), a higher education provider is taken to have the principal purpose of providing education if its principal purpose is either or both of the following:
- (a) providing education;
  - (b) conducting research.

**9A Re-registering existing registered providers**

*Recommendation by designated authority*

- (1) A designated authority for a State may recommend that an approved provider for that State that, as at the commencement of this section, is registered to provide a specified course for that State to overseas students be re-registered under this Act to provide that course to overseas students.
- (1A) A designated authority for a State must use a risk-management approach when considering whether to recommend that an approved provider should be re-registered.



*Re-registration by Secretary*

- (2) The Secretary must re-register the provider if:
- (a) the provider is:
    - (i) a resident of Australia; or
    - (ii) a Table C provider (within the meaning of the *Higher Education Support Act 2003*); and
  - (b) either:
    - (i) the provider has paid its annual Fund contribution (see Part 5), and any special levy it is required to pay, for the calendar year in which the recommendation under subsection (1) is made; or
    - (ii) the provider is exempt under subsection 24(2) from paying annual Fund contributions; and
  - (c) either:
    - (i) the provider is a member of a tuition assurance scheme that is established in accordance with the regulations made for the purposes of paragraph 22(1)(a) and that covers the course; or
    - (ii) the provider is exempt from the requirements of section 22 under regulations made for the purposes of subsection 22(3); and
  - (d) the designated authority has given the Secretary a certificate, in the form approved by the Secretary for the purposes of this paragraph for the State, that:
    - (i) relates to the provider's compliance with the national code; and
    - (ii) states that the provider has the principal purpose of providing education; and
    - (iii) states that the provider has the clearly demonstrated capacity to provide education of a satisfactory standard; and
  - (e) except in the case of a provider mentioned in subsection 9B(1)—the designated authority has told the Secretary in writing that the provider has satisfied the designated authority that the provider is fit and proper to be re-registered; and

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- (f) the Secretary has no reason to believe that the provider:
  - (i) is not complying, or will not comply, with this Act or the national code; or
  - (ii) does not have the principal purpose of providing education; or
  - (iii) does not have the clearly demonstrated capacity to provide education of a satisfactory standard; and

Note: The Secretary must notify the relevant designated authority if the Secretary has reason to believe that any of the matters set out in this paragraph apply: see section 14.

- (g) the provider is not liable for an annual registration charge or late payment penalty that remains unpaid after it became due for payment.
- (3) The Secretary must not re-register the provider in any other circumstances.
  - (4) Nothing in subsection (2) creates a duty for the Secretary to seek any information about the matters mentioned.
  - (5) Subparagraph (2)(d)(i) does not apply when there is not a national code in force.

*Higher education providers*

- (6) For the purposes of subparagraphs (2)(d)(ii) and (2)(f)(ii), a higher education provider is taken to have the principal purpose of providing education if its principal purpose is either or both of the following:
  - (a) providing education;
  - (b) conducting research.

**9B Deciding whether a provider is a fit and proper person**

- (1) Paragraphs 9(2)(ca) and 9A(2)(e) do not apply in relation to the following kinds of provider:
  - (a) a provider that is administered by a State education authority;
  - (b) 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;

(c) any other provider specified in the regulations.

To avoid doubt, any private corporate body established in connection with a provider covered by paragraph (a) or (b) is not itself, by virtue of that connection alone, a provider covered by that paragraph.

- (2) In deciding whether it is satisfied as mentioned in paragraph 9(2)(ca) or 9A(2)(e), the designated authority must have regard to whether a person to whom subsection (3) applies:
- (a) has been convicted of an offence; or
  - (b) has ever had his, her or its registration cancelled or suspended for any one or more courses for any one or more States under this Act or the old ESOS Act; or
  - (c) has ever had an Immigration Minister's suspension certificate issued in respect of him, her or it under this Act; or
  - (d) has ever had a condition imposed on his, her or its registration under this Act; or
  - (e) has ever become bankrupt, applied to take the benefit of a law for the benefit of bankrupt or insolvent debtors, compounded with his or her creditors or assigned his or her remuneration for the benefit of creditors; or
  - (f) has ever been disqualified from managing corporations under Part 2D.6 of the *Corporations Act 2001*; or
  - (g) was involved in the business of the provision of courses by another provider who is covered by any of the above paragraphs at the time of any of the events that gave rise to the relevant prosecution or other action;
- and any other relevant matter.
- (3) For the purposes of subsection (2), this subsection applies to the following persons:
- (a) the provider;
  - (b) an associate of the provider who has been, is or will be involved in the business of the provision of courses by the provider;
  - (c) a high managerial agent of the provider.
- (4) Nothing in subsection (2) affects the operation of Part VIIC of the *Crimes Act 1914* (which deals with spent convictions).
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**10 The Register**

- (1) The Secretary must cause a Register to be kept for the purposes of this Act.
- (2) The Register is called the Commonwealth Register of Institutions and Courses for Overseas Students.
- (3) The Secretary may cause the contents of the Register to be made available to the public by electronic or other means.
- (4) The Secretary must cause the following information, and only that information, to be entered on the Register:
  - (a) the name of each approved provider registered to provide a specified course for a specified State;
  - (b) if the provider is not an individual—the name of the principal executive officer of the provider;
  - (c) a number allocated to the provider for the purposes of the Register;
  - (ca) whether the provider has been re-registered under section 9A;
  - (d) any other matters prescribed by the regulations.
- (5) An approved provider is registered when the Secretary has entered the name of the provider, the course and the State on the Register.

**11 Approved providers must notify the Secretary and designated authority of previous breaches etc.**

- (1) Before a designated authority recommends an approved provider for registration, the provider must tell the Secretary and the authority if the provider or an associate or high managerial agent of the provider:
  - (a) has been convicted of an offence under this Act or the old ESOS Act at any time during the last 5 years; or
  - (b) has ever had his, her or its registration cancelled or suspended for any one or more courses for any one or more States under this Act or the old ESOS Act; or
  - (c) has ever had an Immigration Minister's suspension certificate issued in respect of him, her or it under this Act; or
  - (d) has ever had a condition imposed on his, her or its registration under this Act; or

- (e) was involved in the provision of a course by another provider who is covered by paragraph (a), (b), (c) or (d) at the time of any of the events that gave rise to the relevant prosecution or other action.

Note: If an approved provider breaches this section and later becomes registered, the Minister may take action under Division 1 of Part 6 against the provider: see section 85.

*No effect on Part VIIC of the Crimes Act*

- (2) Nothing in subsection (1) affects the operation of Part VIIC of the *Crimes Act 1914* (which, in certain cases, relieves persons from any requirement to disclose spent convictions).

## **12 Initial registration charge**

The Secretary must give a written notice to each provider who is liable to pay the initial registration charge stating the amount of the charge.

Note 1: A provider cannot get registered under section 9 until it has paid the initial registration charge: see paragraph 9(2)(aa).

Note 2: For the amount of the initial registration charge, see sections 6 and 7 of the *Education Services for Overseas Students (Registration Charges) Act 1997*.

## **13 Fund Manager may require information**

- (1) At any time before an intending registered provider becomes registered, the Fund Manager may request the provider to give the Fund Manager information that is relevant to determining the provider's amount of annual Fund contribution.

Note: The Minister may take action under Division 1 of Part 6 against a registered provider that has breached this section. A person could also be guilty of an offence if the person provides false or misleading information in complying or purporting to comply with this section: see section 108.

- (2) The Fund Manager does not have to determine the amount of the provider's annual Fund contribution under section 58 until the provider complies with the request.

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**14 Notifying States if the Secretary suspects non-compliance with this Act or the national code etc.**

- (1) This section applies if:
  - (a) the Secretary has reason to believe that an approved provider who is not yet registered:
    - (i) is not complying, or will not comply, with this Act or the national code; or
    - (ii) does not have the principal purpose of providing education; or
    - (iii) does not have the clearly demonstrated capacity to provide education of a satisfactory standard; and
  - (b) the source of the information is not the designated authority that recommended the approved provider for registration.
- (1A) For the purposes of subparagraph (1)(a)(ii), a higher education provider is taken to have the principal purpose of providing education if its principal purpose is either or both of the following:
  - (a) providing education;
  - (b) conducting research.
- (2) The Secretary must give the information to the designated authority that recommended the provider for registration.
- (3) Before deciding whether the provider should be registered, the Secretary must allow the designated authority at least 7 days to respond in writing to the information.

**14A Imposing conditions on registration of providers**

- (1) If:
  - (a) the designated authority for a State has imposed a condition on a provider relating to its provision of courses for the State to overseas students; and
  - (b) the provider was not registered under section 9 at the time the condition was imposed; and
  - (c) the provider subsequently becomes registered under that section;the Secretary may, at the time of registering the provider, impose that condition, or that condition as modified under subsection (3) of this section, on the provider's registration.

- (2) If:
- (a) the designated authority for a State has imposed a condition on a provider relating to its provision of courses for the State to overseas students; and
  - (b) the provider was registered under section 9 at the time the condition was imposed;
- the Minister may, by notifying the provider in writing, impose that condition, or that condition as modified under subsection (3) of this section, on the provider's registration.
- (3) The modifications that may be made to the condition imposed by the designated authority on the provider are the following:
- (a) if the condition imposed by the designated authority is not limited to a specified period—a modification to limit the condition imposed under this section to a specified period;
  - (b) if the condition imposed by the designated authority is limited to a specified period—a modification to limit the condition imposed under this section to a shorter specified period;
  - (c) a modification to limit the circumstances in which the condition imposed by the designated authority applies as a condition imposed under this section.
- (4) In deciding whether to impose a condition under this section, the Secretary or Minister must have regard to any advice of the designated authority.

## Part 3—Obligations on registered providers

### Division 1—General obligations

#### 15 Registered providers must not engage in misleading or deceptive conduct

A registered provider must not engage in misleading or deceptive conduct in connection with:

- (a) the recruitment of overseas students or intending overseas students; or
- (b) the provision of courses to overseas students.

Note: The Minister may take action under Division 1 of Part 6 against a registered provider that has breached this section.

#### 16 Only Australian residents and Table C providers may be registered

A registered provider must be:

- (a) a resident of Australia; or
- (b) a Table C provider (within the meaning of the *Higher Education Support Act 2003*).

Note: The Minister may take action under Division 1 of Part 6 against a registered provider that has breached this section.

#### 17 Registered providers must notify the Secretary of breaches etc. by associates and high managerial agents

- (1) A registered provider must tell the Secretary as soon as practicable if the provider becomes aware that an associate or high managerial agent of the provider:
  - (a) has been convicted of an offence under this Act or the old ESOS Act at any time during the last 5 years; or
  - (b) has ever had the associate's or agent's registration cancelled or suspended for any one or more courses for any one or more States under this Act or the old ESOS Act; or
  - (c) has ever had an Immigration Minister's suspension certificate issued in respect of the associate or agent; or



- (d) has ever had a condition imposed on the associate's or agent's registration under this Act; or
- (e) was involved in the provision of a course by another provider who is covered by paragraph (a), (b), (c) or (d) at the time of any of the events that gave rise to the relevant prosecution or other action.

Note: The Minister may take action under Division 1 of Part 6 against a registered provider that has breached this section.

*No effect on Part VIIC of the Crimes Act*

- (2) Nothing in subsection (1) affects the operation of Part VIIC of the *Crimes Act 1914* (which, in certain cases, relieves persons from any requirement to disclose spent convictions).

## **18 Payments to providers**

- (1) If a registered provider for a course enters into an arrangement with one or more other providers to provide the course jointly, the arrangement must:
  - (a) be such that the students pay their course money to the registered provider and not directly to the other providers; or
  - (b) both:
    - (i) be in writing; and
    - (ii) provide for the receipt and disbursement of any course money paid by students directly to any of the other providers.
- (1A) However, for the purpose of determining the registered provider's obligations under this Act, any course money paid by students directly to any of the other providers is taken to have been paid directly to the registered provider.
- (2) A registered provider does not breach its obligations under this Act or any other Act relating to education by charging overseas students, or intending overseas students, an amount as part of the student's tuition fee, if the amount is for any action the provider is required to undertake because of this Act or the national code.

Note: The Minister may take action under Division 1 of Part 6 against a registered provider that has breached this section.

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**19 Giving information about accepted students**

- (1) A registered provider must give the Secretary the following information within 14 days after the event specified below occurs:
  - (a) the name and any other prescribed details of each person who becomes an accepted student of that provider;
  - (b) for each person who becomes an accepted student—the name, starting day and expected duration of the course for which the student is accepted;
  - (c) the prescribed information about an accepted student who does not begin his or her course when expected;
  - (d) any termination of an accepted student’s studies (whether as a result of action by the student or the provider or otherwise) before the student’s course is completed;
  - (e) any change in the identity or duration of an accepted student’s course;
  - (f) any other prescribed matter relating to accepted students.
- (2) A registered provider must give the Secretary particulars of any breach by an accepted student of a prescribed condition of a student visa as soon as practicable after the breach occurs.
- (3) Information required under this section must be given in a form approved by the Secretary. The approved form may be electronic.

Note 1: The Minister may take action under Division 1 of Part 6 against a registered provider that has breached this section. A breach of this section is also an offence: see section 104.

Note 2: It is an offence to provide false or misleading information in complying or purporting to comply with this section: see section 108.

*Unincorporated registered providers*

- (4) If the registered provider is an unincorporated body, then it is instead the principal executive officer of the provider who must give the Secretary the information as required under this section.

**20 Sending students notice of visa breaches**

- (1) A registered provider must send an accepted student of the provider a written notice if the student has breached a prescribed condition of a student visa.

Note 1: The Minister may take action under Division 1 of Part 6 against a registered provider that has breached this section. A breach of this section is also an offence: see section 104.

Note 2: It is an offence to provide false or misleading information in complying or purporting to comply with this section: see section 108.

- (2) The registered provider must send the notice as soon as practicable after the breach.
- (3) The notice must be in a form approved by the Secretary of the Immigration Minister's Department.
- (4) The notice must:
  - (a) contain particulars of the breach; and
  - (b) state that the student is required to attend in person before an officer (within the meaning of the *Migration Act 1958*) at a specified place within 28 days after the day specified in the notice as the date of the notice, for the purpose of making any submissions about the breach and the circumstances that led to the breach; and
  - (c) state that the student must present photographic identification when so attending; and
  - (d) set out the effect of sections 137J and 137K of that Act.

*Unincorporated registered providers*

- (5) If the registered provider is an unincorporated body, then it is instead the principal executive officer of the provider who must send the notice as required under this section.

## **21 Record keeping**

- (1) A registered provider must keep records of each accepted student who is enrolled with the provider or who has paid any course money for a course provided by the provider.
- (2) The records must consist of each accepted student's current residential address, as supplied by the student, and any other details prescribed by the regulations.
- (3) The provider must retain the records for at least 2 years after the person ceases to be an accepted student. However, the records do not need to be kept up to date after the cessation.

**Part 3** Obligations on registered providers

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Note: The Minister may take action under Division 1 of Part 6 against a registered provider that has breached this section. A breach of this section is also an offence: see section 105.

*Unincorporated registered providers*

- (4) If the registered provider is an unincorporated body, then it is instead the principal executive officer who must keep and retain the records as required under this section.

**21A Obligations relating to the agents of registered providers**

- (1) A registered provider must:
- (a) maintain a list of all the provider's agents; and
  - (b) publish that list:
    - (i) on its website; and
    - (ii) in any other manner prescribed by the regulations; and
  - (c) comply with any requirements of regulations made for the purposes of subsection (2).

Note: The Minister may take action under Division 1 of Part 6 against a registered provider that has breached this section.

- (2) The regulations may prescribe requirements that registered providers must comply with in relation to their agents.

**22 Registered providers must belong to a tuition assurance scheme**

- (1) A registered provider for a course must at all times:
- (a) be a member of a tuition assurance scheme that:
    - (i) is established in accordance with the regulations; and
    - (ii) covers the course; and
  - (b) comply with the rules of the scheme.

Note: The Minister may take action under Division 1 of Part 6 against a registered provider that has breached this section.

- (2) A registered provider for a course who is not a member of such a tuition assurance scheme breaches subsection (1) even if the reason for not being a member is that:
- (a) the provider's application for membership was rejected; or
  - (b) the provider's membership of a scheme has been cancelled.

- (3) The regulations may exempt providers for courses from the requirements of this section.

### **23 Annual registration charge**

A registered provider who is liable to pay an annual registration charge for a year must pay the charge by the last business day of February of the year.

Note 1: A registered provider is liable for an annual registration charge: see section 5 of the *Education Services for Overseas Students (Registration Charges) Act 1997*.

Note 2: The registration of a provider who breaches this section is automatically suspended: see section 90.

### **24 Annual Fund contributions**

- (1) A registered provider must pay an annual Fund contribution for each calendar year.

Note: Part 5 has the details about how amounts of contribution are determined and about the Fund generally.

- (2) However, the following kinds of provider are exempt from the requirement to pay annual Fund contributions:
- (a) a provider that is administered by a State education authority;
  - (b) 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;
  - (c) any other provider specified in the regulations.

To avoid doubt, any private corporate body established in connection with a provider covered by paragraph (a) or (b) is not itself, by virtue of that connection alone, a provider covered by that paragraph.

- (3) A registered provider who is required to pay an amount of annual Fund contribution for a calendar year must pay it to the Fund Manager by the day stated in the notice that the Fund Manager gives the provider under Part 5.

Note: The Minister may take action under Division 1 of Part 6 against a registered provider that has breached this section.

## **25 Special levies for the Fund**

A registered provider who is required to pay an amount of special levy under section 72 must pay it to the Fund Manager by the day stated in the notice that the Fund Manager gives the provider under that section.

Note: The Minister may take action under Division 1 of Part 6 against a registered provider that has breached this section.

## **26 Disclosure obligations of registered providers**

- (1) A registered provider who is required to pay an annual Fund contribution for a year must tell the Fund Manager as soon as practicable of any matter that might cause the Fund Manager to increase the amount of contribution the provider would be required to pay for that or a later year.
- (2) The obligation in subsection (1) continues to apply even after the registered provider has paid its annual Fund contribution for the year.

### *Fund Manager may request information*

- (3) At any time, the Fund Manager may request a registered provider to give the Fund Manager information that is relevant to determining the provider's amount of contribution. The provider must comply with the request.

Note 1: The Minister may take action under Division 1 of Part 6 against a registered provider that has breached this section.

Note 2: It is an offence to provide false or misleading information in complying or purporting to comply with this section: see section 108.

## **Division 2—Refunds of course money**

### **27 When this Division applies**

#### *Provider default*

- (1) This Division applies to an overseas student or an intending overseas student in relation to a course if:
  - (a) the course does not start on the agreed starting day; or
  - (b) the course ceases to be provided at any time after it starts but before it is completed; or
  - (c) the course is not provided in full to the student because a sanction has been imposed on the registered provider under Part 6;and the student has not withdrawn before the default day.
- (1A) If a registered provider for a course has changed to become an entity of a different kind, the Minister may notify the provider in writing that the course is not taken, for the purposes of paragraph (1)(b), to have ceased to be provided merely because of the change. The notice has effect accordingly.
- (1B) In deciding whether to give the notice, the Minister must have regard to:
  - (a) the effect of the change on the delivery of courses and outcomes for students; and
  - (b) any advice of the designated authority for a State that approved the provider as an approved provider for that State.

#### *Student default*

- (2) This Division also applies to an overseas student or an intending overseas student in relation to a course if:
  - (a) the course starts on the agreed starting day, but the student does not start the course on that day (and has not previously withdrawn); or
  - (b) the student withdraws from the course (either before or after the agreed starting day); or

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- (c) the registered provider of the course refuses to provide, or continue providing, the course to the student 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.
- (3) In this Division:

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

*default day* means:

- (a) the agreed starting day, if paragraph (1)(a) or (2)(a) applies; or
- (b) the day on which the course ceased to be provided, if paragraph (1)(b) or (c) applies; or
- (c) the day on which the student withdraws from the course, if paragraph (2)(b) applies; or
- (d) the day on which the registered provider of the course refuses to provide, or continue providing, the course to the student, if paragraph (2)(c) applies.

**28 Refund under a written agreement about student default**

- (1) A registered provider must enter into a written agreement with each overseas student or intending overseas student that:
  - (a) sets out the refund requirements that apply in a situation covered by subsection 27(2); and
  - (b) meets the requirements (if any) set out in the national code.
- (2) In a situation covered by subsection 27(2), the provider must pay the amount (if any) required by the agreement to the following person:
  - (a) if a person (other than the student) is specified in the agreement to receive any refund under this section—the specified person;



- (b) otherwise—the student.
- (3) The provider must pay that amount within 4 weeks after receiving a written claim from the student.
- Note: The Minister may take action under Division 1 of Part 6 against a registered provider that has breached this section.
- (4) Subsections (2) and (3), and the agreement mentioned in subsection (1), do not apply in relation to the student if:
- (a) the student was refused a student visa; and
  - (b) the refusal was a reason for one or more of the following acts or omissions by the student that directly or indirectly caused the situation covered by subsection 27(2):
    - (i) the student's failure to start the course on the agreed starting day;
    - (ii) the student's withdrawal from the course;
    - (iii) the student's failure to pay an amount he or she was liable to pay the provider, directly or indirectly, in order to undertake the course.

## **29 Refund in other cases**

- (1A) This section applies:
- (a) in a situation covered by subsection 27(1); or
  - (b) in a situation covered by subsection 27(2) if:
    - (i) an agreement has not been entered into with the student that meets the requirements of subsection 28(1); or
    - (ii) paragraphs 28(4)(a) and (b) apply in relation to the student.
- (1) The registered provider (or former registered provider) for the course must pay the student:
- (a) the total of the course money the provider received in respect of the student before the default day; less
  - (b) the total of the prescribed amounts relating to expenses the provider incurred for the student for the course before the default day.
- (A negative result is treated as nil).

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**Division 2** Refunds of course money

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- (2) For the purposes of paragraph (1)(b), the regulations may prescribe different amounts (including nil amounts) for students in different circumstances.
- (3) In a subsection 27(1) case, the provider must pay the amount within 2 weeks after the default day.
- (4) In a subsection 27(2) case, the provider must pay the amount within 4 weeks after the default day.

Note: The Minister may take action under Division 1 of Part 6 against a registered provider that has breached this section.

**30 Recovering the amount**

- (1) The following person is entitled to recover the amount owing under this Division as a debt by action in a court of competent jurisdiction:
  - (a) if the situation is covered by subsection 27(2) and a person (other than the student) is specified in an agreement under section 28—the specified person;
  - (b) otherwise—the student.
- (2) This Division does not affect any liability that a provider has apart from this Division to pay an additional amount to the student.

**31 Providers' liabilities may be satisfied by alternative arrangements**

*Section applies if provider defaults*

- (1) This section applies in a situation covered by subsection 27(1).

*Provider may arrange alternative course*

- (2) As an alternative to making a payment required by this Division, the registered provider (or former registered provider) may arrange for the student to be offered a place in an alternative course at the provider's expense.
- (3) The provider is relieved of its liability to make the payment if the student accepts, in writing, the offer under subsection (2).

Note: A call is not made on the Fund in respect of the original course if:

- (a) the student accepts the offer (see paragraph 76(1)(a)); or

- (b) the alternative course is a suitable alternative course (whether or not the student accepts the offer) (see paragraph 76(1)(c)).

*Tuition assurance scheme may arrange suitable alternative course*

- (4) As an alternative to the registered provider (or former registered provider) making a payment required by this Division, a tuition assurance scheme that covers the course may arrange for the student to be promptly offered a place in a suitable alternative course.

Note: Not all courses are required to be covered by a tuition assurance scheme: see subsection 22(3).

- (4A) The regulations may prescribe criteria to be applied in considering whether a particular course is a suitable alternative course for the purposes of this Act.

- (5) The provider is relieved of its liability to make the payment if the student accepts, in writing, the offer under subsection (4).

Note: A call is not made on the Fund in respect of the original course: see paragraph 76(1)(c).

### **32 Registered provider must tell the Secretary and the Fund Manager of non-compliance**

A registered provider that fails to comply, or becomes aware that it will not be able to comply, with its obligations under this Division must tell the Secretary and the Fund Manager of this as soon as practicable.

Note: The Minister may take action under Division 1 of Part 6 against a registered provider that has breached this section.

## Part 4—The national code

### 33 The national code

- (1) The Minister may make a national code by legislative instrument expressed to commence on a day at least 28 days after it is registered in the Federal Register of Legislative Instruments.

Note: The Minister may amend the national code by legislative instrument with that kind of commencement provision, after consultations like those the Minister must undertake under section 36 before making the code. See subsection 33(3) of the *Acts Interpretation Act 1901*.

- (2) The code is to be called the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students.
- (3) The Minister must ensure as far as practicable that there is a national code in force at all times.

### 34 Purpose of the national code

The purpose of the national code is to provide nationally consistent standards for the registration and conduct of registered providers and the conduct of persons who deliver educational services on behalf of registered providers.

### 36 Minister must consult States and industry representatives

- (1) Each State Minister who is responsible for education may nominate a person for the purpose of consultations with that State about the national code.
- (2) Before making a national code, the Commonwealth Minister must consult each such nominee and persons who, in the Minister's opinion, represent the interests of providers.
- (3) At any time, a State Minister may withdraw a nomination and substitute a different person.

**38 Contents of the national code**

The national code must contain some or all of the following:

- (a) standards and procedures to be applied by a designated authority in determining whether to recommend that an approved provider be registered;
- (b) standards and procedures required of registered providers in providing courses to overseas students;
- (c) standards and procedures required of a designated authority in monitoring registered providers' compliance with, and investigating possible breaches of, the national code;
- (d) standards required of registered providers in connection with their dealings with their agents;
- (e) standards required of a registered provider of a course in connection with the provider's dealings with other providers of the course;
- (f) rules about the kind of connection required of a provider with a course in order for the provider to be registered;
- (g) standards and procedures required of registered providers in making agreements relating to refunds of course money;
- (h) standards required of the content of such agreements;
- (i) any other matters that are necessary or convenient to give effect to the purpose of the national code.

**40 Legal effects of the national code**

The only legal effects of the national code are the effects that this Act expressly provides for.

Note: This Act provides that compliance with the national code is a prerequisite for registration (see section 9) or re-registration (see section 9A) and that sanctions under Division 1 of Part 6 may be imposed on a registered provider who breaches the national code.

**41 Notification of the national code**

- (1) The Secretary must give each registered provider written notice of:
  - (a) the making or amendment of the national code; and
  - (b) the day on which the code or amendment takes effect for the provider; and
  - (c) the way in which the provider can get access to the text of the code in force on that day.

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- (2) A notice given under subsection (1) is not a legislative instrument.
- (3) However, a breach of this section does not affect the validity of the national code or an amendment of the code.

**43 States to investigate breaches of the national code**

- (1) This section applies if:
  - (a) the Secretary has information suggesting a possible breach of the national code by a registered provider for a State; and
  - (b) the source of the information is not the designated authority of that State.
- (2) Before the Secretary investigates the matter further or takes any other action under this Act, the Secretary must notify the designated authority of the possible breach and may request the authority to investigate the matter or take any other suitable action.
- (3) However, the Secretary may investigate the matter or take any other action:
  - (a) without notifying the designated authority; or
  - (b) without waiting for the designated authority to investigate or take any other action;if, in the Secretary's opinion, the circumstances of the possible breach require urgent action.

**44 Regulations may prescribe penalties**

- (1) The regulations may make it an offence to breach prescribed provisions of the national code.
- (2) The offence must be punishable by a fine of no more than 10 penalty units.

## **Part 5—The ESOS Assurance Fund**

### **Division 1—Basics of the Fund**

#### **45 Establishment of the Fund**

The ESOS Assurance Fund is established by this section.

#### **46 Purpose of the Fund**

The purpose of the Fund is to protect the interests of overseas students and intending overseas students of registered providers by ensuring that the students are provided with suitable alternative courses, or have their course money refunded, if the provider cannot provide the courses that the students have paid for.

#### **47 What money goes into the Fund**

- (1) The following amounts must be credited to the Fund:
  - (a) all amounts of annual Fund contributions received from providers (see Subdivision A of Division 4);
  - (b) all amounts of special levy received from registered providers (see Subdivision C of Division 4);
  - (c) all amounts recovered from providers under section 78;
  - (d) the proceeds from any investments made using Fund money under section 79;
  - (e) any money the Fund Manager borrows for the Fund;
  - (f) any other money appropriated by the Parliament for the purpose of the Fund;
  - (g) any late payment penalty or review fees received by the Fund Manager;
  - (h) any other amount given to the Fund.

#### *CRF appropriation*

- (2) Whenever an amount of annual Fund contribution or special levy is received, then to the extent that section 81 of the Constitution applies to the receipt, the Consolidated Revenue Fund is appropriated by that amount for the purpose of the Fund.

## **48 What money comes out of the Fund**

### *Amounts held on trust*

- (1) Amounts standing to the credit of the Fund must be held by the Fund Manager on trust for the benefit of overseas students and intending overseas students of registered providers, for the purpose of the Fund.

### *Expenditure of amounts*

- (2) Those amounts must only be expended for the following purposes:
  - (a) in making payments as a result of calls being made on the Fund under Division 5;
  - (b) in paying premiums for insurance of the Fund;
  - (c) in making investments under section 79;
  - (d) in repaying loans, and interest on loans, of the Fund;
  - (e) in meeting expenses incurred in managing and administering the Fund, including the Fund Manager's fees and expenses;
  - (f) in refunding amounts of overpaid annual Fund contribution or special levy.



## **Division 2—The Fund Manager**

### **49 Appointment of the Fund Manager**

- (1) The Secretary must, by writing, appoint a Fund Manager.
- (2) The Fund Manager may be an individual or a company.

### **50 Functions and powers of the Fund Manager**

- (1) The functions of the Fund Manager are as follows:
  - (a) to hold the money standing to the credit of the Fund on trust for the benefit of overseas students and intending overseas students of registered providers, for the purpose of the Fund;
  - (b) to manage the Fund in a way that ensures it is able to meet all its liabilities from time to time;
  - (c) to propose to the Panel the criteria for determining the amounts of annual Fund contributions for providers;
  - (d) to determine the amounts of annual Fund contributions for providers, in accordance with those criteria;
  - (e) to collect annual Fund contributions and special levies from providers;
  - (f) to arrange alternative courses for students, and to make payments from the Fund, when required to do so under this Part;
  - (g) any other functions that this Act confers on the Fund Manager.
- (2) The Fund Manager has power to do all things necessary and convenient for or in connection with performing its functions.

### **51 Terms and conditions of the appointment of the Fund Manager**

The terms and conditions of the Fund Manager's appointment (including the duration of the appointment) are to be as agreed in writing by the Secretary and the Fund Manager.

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**52 Acting Fund Manager**

- (1) The Secretary may appoint a person to act as the Fund Manager:
  - (a) if there is a vacancy in the office of the Fund Manager, whether or not an appointment has previously been made to the office; or
  - (b) during any period, or during all periods, when the Fund Manager is absent from duty or from Australia or is, for any reason, unable to perform the duties of the office.
- (2) Anything done by or in relation to a person purporting to act under this section is not invalid merely because:
  - (a) the occasion for the appointment had not arisen; or
  - (b) there was a defect or irregularity in connection with the appointment; or
  - (c) the appointment had ceased to have effect; or
  - (d) the occasion to act had not arisen or had ceased.

**53 Indemnity**

- (1) The Fund Manager is not personally subject to any liability 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 this Act.
- (2) However, this section does not affect the operation of the *Privacy Act 1988*.

## **Division 3—The Contributions Review Panel**

### **54 Establishment of the Panel**

- (1) The Contributions Review Panel is established.

#### *Membership of the Panel*

- (2) The Panel consists of 10 people appointed by the Minister.
- (3) One of the people appointed must be appointed as the Chair of the Panel.
- (4) All of the members must have qualifications and experience that the Minister considers to be relevant to the performance of the Panel's functions.
- (5) At least 5 of the members must be people who, in the Minister's opinion, represent the interests of providers who are liable to pay annual Fund contributions.
- (5A) Also, at least 4 of those members mentioned in subsection (5) must be people who, in the Minister's opinion, represent the interests of providers who are members of tuition assurance schemes.

#### *Regulations about membership*

- (6) The regulations may prescribe different numbers of members for the purposes of subsections (2) and (5) but only:
- (a) after the initial appointment of the Panel is complete; and
  - (b) after the Minister has consulted representatives of providers about the proposed regulations.
- (7) Such regulations apply only in relation to appointments made after the regulations take effect. They do not affect:
- (a) the validity of the composition of the Panel as at the time when the regulations take effect; or
  - (b) the tenure of a person who is a member of the Panel when the regulations take effect.

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**55 Functions and powers of the Panel**

- (1) The functions of the Panel are:
  - (a) to determine the contributions criteria; and
  - (b) to hear and determine appeals by providers against determinations of their contributions.
- (2) The Panel has power to do all things necessary and convenient for or in connection with performing its functions.
- (3) The performance of the functions or the exercise of the powers of the Panel is not affected merely because there is a vacancy or vacancies in the membership of the Panel.

**56 Terms and conditions of Panel members**

- (1) Each member of the Panel is to be appointed on a part-time basis.
- (2) The remuneration and allowances and the other terms and conditions of each member's appointment (including the duration of appointment) are to be as agreed in writing by the Minister and the member.

**57 Procedures of the Panel**

- (1) In any vote of the Panel, the Chair has a deliberative vote and, if the votes are equal, has a casting vote.
- (2) Otherwise, the regulations may provide for the procedures of the Panel.
- (3) Subject to those regulations and subsection (1), the Panel may determine its own procedures.

*Procedures relating to Panel review of contributions*

- (4) The procedures determined under this section may allow for applications for review made under section 68 to be heard and determined by one or more members of the Panel instead of by the Panel as a whole.

## **Division 4—Annual Fund contributions and special levies**

### **Subdivision A—Annual Fund contributions**

#### **58 Fund Manager to set contributions**

- (1) For each calendar year, the Fund Manager must determine the amount of annual Fund contribution required from each provider who is required to pay a contribution.

Note: The regulations may exempt some providers from the requirement to pay an annual Fund contribution: see section 24.

- (2) In doing so, the Fund Manager must apply the contributions criteria determined under this Division.

#### **59 How the contributions criteria are determined**

##### *Fund Manager to give draft contributions criteria*

- (1) The Fund Manager must give the Panel a set of draft contributions criteria.
- (2) The Panel must either accept the draft without alteration or ask the Fund Manager to revise it.

##### *Accepting the draft without alteration*

- (3) If the Panel accepts the draft without alteration, then the contributions criteria are as set out in the draft.

##### *Revision of draft*

- (4) If the Panel asks the Fund Manager to revise the draft, the Fund Manager must do so and give the revised draft to the Panel. The Panel must deal with the revised draft in the same way as an original draft.

##### *Panel may ultimately determine the contributions criteria*

- (5) If, after considering any revised draft or drafts, the Panel concludes that the Fund Manager will not be able to propose a draft that is

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acceptable to the Panel, the Panel may determine the contributions criteria itself.

**60 Content of the contributions criteria**

- (1) The contributions criteria:
  - (a) must be determined having regard solely to the purpose of the Fund; and
  - (b) must enable the amount of contribution for each provider to reflect, at least to some extent, the risk of calls being made on the Fund in respect of that provider.

*Tuition assurance schemes*

- (2) One of the contributions criteria must be whether the provider in question is a member of a tuition assurance scheme or schemes that cover each of the provider's courses.

*Security over assets*

- (3) The contributions criteria may allow for a reduction of a provider's contribution if the provider agrees to the Fund Manager taking a charge or other security over an asset or assets of the provider.

**61 Changing the contributions criteria**

- (1) The Panel may ask the Fund Manager to draft, and give to the Panel, changes to the contributions criteria. The Fund Manager must comply with the request.
- (2) Alternatively, the Fund Manager may give the Panel draft changes on its own initiative.
- (3) Either way, the contributions criteria must not be changed more than once each year.
- (4) The procedure for dealing with the draft changes is the same as that for dealing with draft contributions criteria under section 59.
- (5) The changed contributions criteria must still meet the requirements in section 60.

- (6) In this section:

*change* includes add to, revoke or substitute.

## **62 Dissemination of contributions criteria**

When contributions criteria, or changed contributions criteria, have been determined, the Fund Manager must make them publicly available.

## **63 Notice of amount of annual Fund contribution**

- (1) The Fund Manager must give a written notice to each provider who is liable to pay an annual Fund contribution stating:
- (a) the provider's amount of contribution; and
  - (b) if the provider is registered—the day by which the provider must pay the contribution.

Note 1: There is no particular due day for unregistered providers, but they cannot get registered under section 9 until they have paid their contribution: see paragraph 9(2)(b).

Note 2: The provider may seek a review of the amount of annual Fund contribution from the Fund Manager and then the Panel: see sections 66 and 68.

- (2) The day mentioned in paragraph (1)(b) must be at least 14 days after the notice is given to the registered provider.

## **64 Notifying the Secretary of the payment of annual Fund contributions**

### *First annual Fund contribution*

- (1) The Fund manager must notify the Secretary if a provider who is not yet registered under section 9 has paid its first annual Fund contribution.

Note: The Secretary needs to know when this has happened so that the provider can be registered under section 9: see paragraph 9(2)(b).

- (2) A notification under subsection (1) must be given as soon as practicable after the provider has paid its first annual Fund contribution.

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*Annual Fund contributions for 2009 and 2010*

- (3) The Fund manager must notify the Secretary:
- (a) if a registered provider paid its annual Fund contribution for the calendar year beginning on 1 January 2009 before the commencement of this subsection—that the registered provider has paid its annual Fund contribution for that calendar year; and
  - (b) if a registered provider has paid its annual Fund contribution for:
    - (i) if paragraph (a) does not apply—the calendar year beginning on 1 January 2009; and
    - (ii) the calendar year beginning on 1 January 2010.

Note: The Secretary needs to know when this has happened so that the provider can be re-registered under section 9A: see paragraph 9A(2)(b).

- (4) A notification under paragraph (3)(a) must be given as soon as practicable after the commencement of subsection (3).
- (5) A notification under paragraph (3)(b) must be given as soon as practicable after the registered provider has paid its annual Fund contribution.
- (6) Subparagraph (3)(b)(ii) does not apply in relation to a registered provider if the provider is re-registered under section 9A before 1 January 2010.

**65 Increasing annual Fund contributions**

- (1) This section applies if, at any time after having given a notice to a provider under section 63, the Fund Manager decides, on the basis of new information, that the provider's required contribution for the year should be increased.
- (2) The Fund Manager must give another written notice to the provider stating:
- (a) its new amount of annual Fund contribution; and
  - (b) if the provider is registered—the day by which the provider must pay the outstanding amount of the contribution.

Note: There is no particular due day for unregistered providers, but they cannot get registered under section 9 until they have paid their contribution: see paragraph 9(2)(b).



- (3) The day mentioned in paragraph (2)(b) must be at least 14 days after the notice is given to the registered provider.

### **Subdivision B—Rights of review**

#### **66 Applying to the Fund Manager for a review of the contribution amount**

- (1) A provider may apply in writing to the Fund Manager for a review of the determination of its amount of annual Fund contribution.

*Provider may only challenge application of criteria*

- (2) The provider may only challenge the application of the contributions criteria to the particular provider; not the contributions criteria themselves.

*Time limit for application*

- (3) The application must be made within 14 days after the provider is given the notice under section 63 or 65, or such longer time as the Fund Manager allows.

*Provider must pay contribution on time*

- (4) A registered provider must still pay its annual Fund contribution on time even if the provider has applied for a review under this section.

Note: There is no particular due day for unregistered providers, but they cannot get registered under section 9 until they have paid their contribution: see paragraph 9(2)(b).

#### **67 Review by the Fund Manager**

- (1) On a review, the Fund Manager must either:
  - (a) dismiss the application; or
  - (b) substitute a different amount of annual Fund contribution for the provider.
- (2) The Fund Manager must give the provider written notice setting out:
  - (a) the Fund Manager's decision, including a statement of reasons; and

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- (b) the provider's new amount of annual Fund contribution, if it has changed; and
- (c) if the provider is registered—the day by which the provider must pay any outstanding amount of the contribution.

Note: There is no particular due day for unregistered providers, but they cannot get registered under section 9 until they have paid their contribution: see paragraph 9(2)(b).

- (3) The day mentioned in paragraph (2)(c) must be at least 14 days after the notice is given to the registered provider.

**68 Applying for review by the Panel**

- (1) If the provider is dissatisfied with the outcome of the review by the Fund Manager, the provider may apply in writing to the Panel for a further review of the determination of its amount of annual Fund contribution.

*Grounds for challenging application*

- (2) The provider may only challenge the application of the contributions criteria to the particular provider; not the contributions criteria themselves.

*Time limit on application*

- (3) The application must be made within 14 days after the notice is given to the provider under section 67, or such longer time as the Panel allows.

*Provider must pay contribution on time*

- (4) A registered provider must still pay its annual Fund contribution on time even if the provider has applied for a review under this section.

**69 Review by the Panel**

- (1) On a review, the Panel must either:
  - (a) dismiss the application; or
  - (b) send the decision back to the Fund Manager with binding written directions as to how the contributions criteria should be applied in the particular circumstances.

Note: The application may be determined by one or more members of the Panel, instead of by the Panel as a whole, if the Panel's procedures allow this: see subsection 57(3).

- (2) The Panel must give the provider written notice of its decision, including a statement of reasons.
- (3) In a paragraph (1)(b) case, the Fund Manager must reconsider the original decision in light of the directions and then give the provider a written notice stating:
  - (a) its amount of annual Fund contribution; and
  - (b) if the provider is registered—the day by which the provider must pay any outstanding amount of the contribution.

Note: There is no particular due day for unregistered providers, but they cannot get registered under section 9 until they have paid their contribution: see paragraph 9(2)(b).

- (4) The day mentioned in paragraph (3)(b) must be at least 14 days after the notice is given to the registered provider.

## **70 Fees for review**

- (1) The regulations may prescribe fees payable for an application for review by the Fund Manager or the Panel.
- (2) The fee is payable to:
  - (a) the Fund Manager, for a review by the Fund Manager; or
  - (b) the Secretary, for a review by the Panel.
- (3) The fees must not amount to taxation.

## **71 Refund of overpaid contributions**

If a review under this Subdivision results in a lower amount of annual Fund contribution, then the Fund Manager must refund or remit the difference.

## **Subdivision C—Special levies**

### **72 Special levies**

- (1) If at any time the Fund Manager considers that the Fund does not have enough money to meet its current or future liabilities, the Fund Manager may require all registered providers who are liable

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to pay an annual Fund contribution for that year to pay a special levy to the Fund Manager.

- (2) However, the Fund Manager must obtain the approval of the Panel before imposing the requirement.
- (3) In deciding whether to give its approval, the Panel must consider the Fund's ability to meet its current and future liabilities, and any other relevant matter.

**73 Amount of the levy**

The amount of each registered provider's special levy must correspond, so far as practicable, to the provider's proportion of the total of the annual Fund contributions required of registered providers for the year.

Example: Assume that, as a registered provider, Anne was required to pay an annual Fund contribution of \$1,000, which represented 1% of the total annual Fund contributions required from all registered providers for the year. If the Fund Manager decided that special levies totalling \$50,000 were needed, Anne's special levy would be \$500 (1% of \$50,000).

**74 Fund Manager must give written notice**

- (1) The Fund Manager must give a written notice to each registered provider who is liable to pay an amount of special levy stating:
  - (a) the amount of the special levy; and
  - (b) the day by which the provider must pay the amount.
- (2) The day mentioned in paragraph (1)(b) must be at least 14 days after the notice is given to the registered provider.

**74A Notifying the Secretary of the payment of special levies**

- (1) The Fund manager must notify the Secretary:
  - (a) if a registered provider paid an amount of special levy that the provider is required to pay during the period beginning on 1 January 2009 and ending on the day before the day on which this section commences—that the registered provider paid the amount of special levy during that period; and
  - (b) if a registered provider has paid an amount of special levy that the provider is required to pay during:

- (i) the period beginning on the day on which this section commences and ending at the end of 31 December 2009; and
- (ii) the calendar year beginning on 1 January 2010.

Note: The Secretary needs to know when this has happened so that the provider can be re-registered under section 9A: see paragraph 9A(2)(b).

- (2) A notification under paragraph (1)(a) must be given as soon as practicable after the commencement of this section.
- (3) A notification under paragraph (1)(b) must be given as soon as practicable after the registered provider has paid the amount of special levy.
- (4) Subparagraph (1)(b)(ii) does not apply in relation to a registered provider if the provider is re-registered under section 9A before 1 January 2010.

### **Subdivision D—Reminder notices for late payers**

#### **75 Reminder notices**

- (1) The Fund Manager must give a reminder notice to a registered provider who has not paid an amount of annual Fund contribution or special levy by the end of the due day.
- (2) The reminder notice must:
  - (a) specify the amount that is still owing; and
  - (b) state that the registered provider must pay the amount, along with the associated late payment penalty, by the end of the seventh day after the reminder notice is given to the provider; and
  - (c) set out the effect of section 90.

Note: Section 90 provides that the provider's registration is automatically suspended if the provider does not comply with the reminder notice.

- (3) The Fund Manager must tell the Secretary if the registered provider fails to comply with the reminder notice.

## **Division 5—Calls on the Fund**

### **76 When a call is made on the Fund**

- (1) A call is made on the Fund if the Fund Manager determines that, for an overseas student or an intending overseas student in relation to a course for which there is or was a registered provider:
- (a) the provider is required to refund an amount under Division 2 of Part 3; and
  - (b) it appears that the provider will be unable to satisfy its obligations under that Division; and
  - (c) the student has not been promptly offered a place in a suitable alternative course in accordance with subsection 31(4).

Note 1: Section 31 sets out circumstances in which a provider is not required to refund an amount under Division 2 of Part 3.

Note 2: Subsection 31(4A) provides for regulations to prescribe criteria to be applied in considering whether a particular course is a suitable alternative course.

- (1A) The Fund Manager must not make a determination under subsection (1) if the time when the Fund Manager becomes aware that the circumstances described in paragraphs (1)(a), (b) and (c) may exist is more than 12 months after the default day relevant to the requirement mentioned in paragraph (1)(a).
- (2) Despite subsection (1), a call is not made on the Fund if the provider was exempt under the regulations from making an annual Fund contribution to the Fund for the year.

### **77 What the Fund Manager must do when a call is made**

- (1) If a call is made on the Fund, the Fund Manager must, as soon as practicable:
- (a) in consultation with the overseas student or intending overseas student, place him or her in a course in Australia that the Fund Manager regards as a suitable alternative course; or
  - (b) failing that—pay:

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- (i) if the situation is covered by subsection 27(2) and a person (other than the student) is specified in an agreement under section 28—the specified person; or
  - (ii) otherwise—the student;
- out of the Fund, an amount equal to the amount that the provider must still pay in order to satisfy the refund requirements under Division 2 of Part 3.

Note: Subsection 31(4A) provides for regulations to prescribe criteria to be applied in considering whether a particular course is a suitable alternative course.

- (1A) However, the amount that the Fund Manager must pay out of the Fund under paragraph (1)(b) is reduced by the amount worked out under the regulations if:
- (a) the student undertook (but did not complete) the course (the *old course*) to which the call made on the Fund relates; and
  - (b) since undertaking the old course, the student has been enrolled in another course (the *new course*); and
  - (c) the work required of the student in undertaking the new course is reduced on account of the student's work in undertaking the old course.
- (2) In placing a student in an alternative course, the Fund Manager may spend more than the amount of that refund entitlement if the Fund Manager considers that to do so would best promote the purpose of the Fund.

**77A Fund Manager may ask provider of new course about academic credit or recognition of prior learning**

- (1) This section applies for the purposes of enabling the Fund Manager to work out:
- (a) whether subsection 77(1A) applies to reduce the amount payable out of the Fund because:
    - (i) since undertaking a course (the *old course*) to which a call made on the Fund relates, the student concerned has been enrolled in another course (the *new course*); and
    - (ii) the work required of the student in undertaking the new course is reduced on account of the student's work in undertaking the old course; and

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- (b) the amount of any reduction of a payment out of the Fund under subsection 77(1A).
- (2) The Fund Manager may request a registered provider whom the Fund Manager believes has enrolled the student in the new course to inform the Fund Manager within a specified reasonable period:
  - (a) whether the provider has enrolled the student; and
  - (b) whether the work required of the student in undertaking the new course is reduced on account of the student's work in undertaking the old course; and
  - (c) if the work is reduced, the extent and monetary value of the reduction.
- (3) The registered provider must comply with the request.

Note: The Minister may take action under Division 1 of Part 6 against a registered provider that has breached this section.

## **78 Consequences of a payment under section 77**

### *Cessation of claim*

- (1) After the Fund Manager pays an amount under section 77, the student, or person specified in an agreement under section 28, ceases to have any claim against the provider in respect of the student's course money.

### *Provider must pay back Fund Manager*

- (2) Instead, the provider must pay the Fund Manager an amount equal to the amount that the Fund Manager paid under section 77.
- (3) The Fund Manager may recover that amount from the provider as a debt due to the Commonwealth by action in a court of competent jurisdiction.

### *Fund Manager may enforce security*

- (4) If the provider had granted the Fund Manager a charge or other security over any of its assets, the Fund Manager may enforce the charge or security in satisfaction, or partial satisfaction, of the debt.



## **Division 6—Miscellaneous**

### **79 Investments**

The Fund Manager may invest money standing to the credit of the Fund that is not immediately required for the purpose of the Fund:

- (a) on deposit with an authorised deposit-taking institution (within the meaning of the *Banking Act 1959*); or
- (b) in securities of the Commonwealth or of a State; or
- (c) in securities guaranteed by the Commonwealth or a State; or
- (d) in any other manner that is consistent with sound commercial practice.

### **80 Financial accountability**

*Auditor to prepare written report*

- (1) As soon as practicable after the end of each calendar year, the Fund Manager must arrange for an independent auditor to prepare a written report on the financial state of the Fund.
- (2) The auditor must be a person who:
  - (a) is registered, or is taken to be registered, as a company auditor under Part 9.2 of the *Corporations Act 2001*; or
  - (b) is a member of the Institute of Chartered Accountants in Australia, the Australian Society of Certified Practising Accountants or any other body prescribed for the purposes of subparagraph 1280(2)(a)(i) of the *Corporations Act 2001*; or
  - (c) is approved by the Secretary as an auditor for the purposes of this section.
- (3) The report must be given to the Minister and the Panel.

*Minister may require other reports*

- (4) The Minister may at any time give the Fund Manager a written notice requiring the Fund Manager to arrange for other reports about the Fund.
- (5) The Minister must publish a copy of the notice in the *Gazette*.

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**80A Reports on provider defaults**

- (1) If one or more calls are made on the Fund as a result of a set of circumstances (a *provider default*) that result in a registered provider becoming required to refund one or more amounts under Division 2 of Part 3 because of subsection 27(1), the Fund Manager must give to the Minister a report that sets out the following:
  - (a) the day on which the provider default occurred;
  - (b) the nature of the provider default;
  - (c) the number of students affected by the provider default;
  - (d) the total amount of the payments that, at the time of giving the report to the Minister, have been made out of the Fund relating to the provider default;
  - (e) an estimate of the total amount of claims against the Fund, by students affected by the provider default, that are outstanding at the time of giving the report to the Minister;
  - (f) whether one or more suitable alternative course were available to students affected by the provider default;
  - (g) information relating to the steps that the Fund Manager took to arrange suitable alternative courses for students affected by the provider default;
  - (h) the total number of students affected by the provider default who, at the time of giving the report to the Minister, have been placed in suitable alternative courses; and
  - (i) such other matters relating to the provider default that the Fund Manager considers it appropriate to include.
- (2) The report must be given to the Minister within 60 days after the day on which the provider default occurred.
- (3) The Minister must cause a copy of a report given to the Minister under this section to be tabled in each House of the Parliament as soon as practicable after receiving the report.

**81 No income tax**

To avoid doubt, the Fund Manager does not have to pay income tax on amounts of annual Fund contribution or special levy collected.

## **82 Future cessation of the Fund**

- (1) If the Parliament passes an Act providing for the cessation of the Fund, then any surplus money of the Fund at the time of the cessation must be repaid to providers who were liable to pay an annual Fund contribution for the year in which the cessation occurs.
- (2) The regulations may provide for details of how those repayments are to be worked out, and for other matters relating to such repayments.

## **Part 6—Enforcement**

### **Division 1—Conditions, suspension and cancellation**

#### **Subdivision A—Sanctions for non-compliance etc.**

#### **83 Minister may impose sanctions for non-compliance etc.**

*Circumstances in which Minister may take action*

- (1) The Minister may take one or more of the actions listed in subsection (3) against a registered provider if the Minister believes on reasonable grounds that the registered provider or an associate or high managerial agent of the registered provider is breaching, or has breached, this Act, the national code or a condition of the provider's registration.

Note: Section 93 sets out the procedure for taking the action.

- (1A) The Minister may take one or more of those actions 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:
- (a) provide courses to its accepted students; or
  - (b) refund course money to its accepted students.

Note: Section 93 sets out the procedure for taking this action.

- (1B) The Minister may also take one or more of those actions against a registered provider (other than a provider covered by subsection 9B(1)) if the Minister (having regard to the matters referred to in subsection 9B(2)) believes on reasonable grounds that the provider is not fit and proper to be registered.

Note: Section 93 sets out the procedure for taking the action.

- (1C) The Minister may also take one or more of those actions against a registered provider if the Minister believes on reasonable grounds that the registered provider:
- (a) does not have the principal purpose of providing education;
  - or

- (b) does not have the clearly demonstrated capacity to provide education of a satisfactory standard.

Note: Section 93 sets out the procedure for taking the action.

- (1D) For the purposes of paragraph (1C)(a), a higher education provider is taken to have the principal purpose of providing education if its principal purpose is either or both of the following:

- (a) providing education;
- (b) conducting research.

- (2) The Minister may also take one or more of those actions against a registered provider for a course if the Minister believes on reasonable grounds that a provider that is providing the course with the registered provider is engaging, or has engaged, in misleading or deceptive conduct in connection with:

- (a) the recruitment of overseas students or intending overseas students to the course; or
- (b) the provision of the course to overseas students.

Note: Section 93 sets out the procedure for taking the action.

*Actions the Minister may take*

- (3) The actions are:
  - (a) to impose one or more conditions on the registered provider's registration either generally or in respect of any one or more specified courses for any one or more specified States (see section 86);
  - (b) to suspend the registered provider's registration for any one or more specified courses for any one or more specified States (see section 95);
  - (c) to cancel the registered provider's registration for any one or more specified courses for any one or more specified States.

*Actions not limited to particular courses*

- (4) The Minister may take action under this section against a registered provider's registration for a particular course for a State even if the conduct, or the situation, that results in the Minister taking the action does not relate to that particular course.

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**84 Minister may take further action**

The Minister may take action under section 83 even if he or she has already taken other action under that section in relation to the same matter.

**85 Minister may take action for breaches occurring before provider was registered**

The Minister may take action against a registered provider under section 83 even if the provider was not yet registered at the time of the relevant breach.

**86 Examples of conditions**

- (1) Examples of the conditions that the Minister may impose under section 83 are conditions that:
  - (a) there be no net increase, or only a limited net increase, in the number of overseas students enrolled with the provider;
  - (b) the provider enrol only a limited number of new overseas students;
  - (c) the provider not accept any new students from a specified country;
  - (d) the provider not deal with a specified agent in relation to overseas students or intending overseas students;
  - (e) the provider not provide a specified course.
- (2) The examples do not limit the kinds of condition that the Minister may impose.

**88 Cancellation if suspended providers cease to provide courses**

The Minister may cancel the registration of a provider for a State if the provider ceases to provide courses for the State to overseas students while the provider's registration for the State is suspended.

Note: Section 93 sets out the procedure for taking this action.

## **Subdivision C—Automatic suspension and cancellation**

### **89 Automatic suspension for loss of approval**

- (1) The registration of a provider for a course for a State is suspended by force of this subsection if the designated authority for the State suspends the approval of that course for the provider.

Note: Section 95 sets out the effect of suspension.

#### *Removal of suspension*

- (2) After the State's suspension is removed, the Minister may give the provider a notice that sets out the effect of subsection (3).
- (3) If the Minister gives the provider a notice under subsection (2), the suspension is removed by force of this subsection when the provider has paid the associated reinstatement fee.

Note: For the amount of the associated reinstatement fee, see section 171.

### **89A Automatic suspension if not fit and proper**

- (1) The registration of a provider (other than a provider covered by subsection 9B(1)) is suspended for all courses for a State by force of this subsection if the designated authority for the State tells the Secretary that the authority (having regard to the matters referred to in subsection 9B(2)) is no longer satisfied that the provider is fit and proper to be registered.

Note: Section 95 sets out the effect of suspension.

#### *Removal of suspension*

- (2) If the designated authority tells the Secretary that the authority is again satisfied that the provider is fit and proper to be registered, the Minister may give the provider a notice that sets out the effect of subsection (3).
- (3) If the Minister gives the provider a notice under subsection (2), the suspension is removed by force of this subsection when the provider has paid the associated reinstatement fee.

Note: For the amount of the associated reinstatement fee, see section 171.

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**90 Automatic suspension for non-payment of annual Fund contribution, special levy or annual registration charge**

- (1) The registration of a provider who:
- (a) fails to comply with a reminder notice given under section 75; or
  - (b) fails to pay the annual registration charge in accordance with section 23;

is suspended by force of this subsection for all courses for all States.

Note: Section 95 sets out the effect of suspension.

*Removal of suspension*

- (2) The suspension is removed by force of this subsection when the provider has paid:
- (a) the amount owing; and
  - (b) the associated late payment penalty; and
  - (c) the associated reinstatement fee.

Note: For the amount of the associated reinstatement fee, see section 171.

**91 Automatic cancellation of registration for provider who ceases to be approved for a course for a State**

A provider's registration for a course for a State is cancelled by force of this section if the provider ceases to be an approved provider for that course for that State.

**92 Automatic cancellation for bankruptcy**

The registration of a provider is cancelled for all courses for all States by force of this section if:

- (a) a provider who is an individual becomes bankrupt; or
- (b) a winding-up order is made in respect of a provider that is a body corporate.

**92A Automatic cancellation for failure to re-register**

The registration of a provider is cancelled for a course for a State by force of this section if:



- (a) that registration was in force immediately before the commencement of this section; and
- (b) the provider is not, on or before 31 December 2010, re-registered under section 9A to provide the course for the State.

**92B Automatic cancellation if designated authority does not recommend re-registration**

- (1) The registration of a provider is cancelled for a course for a State by force of this subsection if the designated authority for the State gives the Secretary a notice stating that the designated authority does not recommend that the provider be re-registered under section 9A to provide the course for the State.
- (2) The notice must be in the form approved by the Secretary.
- (3) The cancellation takes effect on the day of cancellation specified in the notice.

**Subdivision D—Common rules for conditions, suspension and cancellation**

**93 Procedure for taking action etc.**

- (1) Before making a decision:
  - (aa) to impose a condition under subsection 14A(2); or
  - (a) to take action under Subdivision A of this Division; or
  - (b) not to give a notice under subsection 89(2) or 89A(2);the Minister must give the registered provider a written notice:
  - (c) stating that the Minister intends to make that decision and why; and
  - (d) giving the provider:
    - (ia) if subsection 14A(2) applies—at least 72 hours; or
    - (i) if Subdivision A applies and, in the Secretary's opinion, the circumstances require urgent action—at least 24 hours; or
    - (ii) if Subdivision A otherwise applies—at least 72 hours; or
    - (iii) if subsection 89(2) or 89A(2) applies—at least 7 days; to give the Minister written submissions about the matter.

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- (2) After considering any submission received within that period, if the Minister still considers that he or she should make the decision, the Minister may do so and must give the provider written notice of the decision.

**94 Minister may authorise removal of condition or suspension**

*Removal of condition*

- (1) If a condition is imposed on a provider's registration, the Minister may, at any time, give the provider a written notice that:
- (a) specifies the condition; and
  - (b) sets out the effect of subsection (2).
- (2) If the Minister has given a provider a notice under subsection (1), the condition specified in the notice is removed by force of this subsection when the provider has paid the associated reinstatement fee.

Note: For the amount of the associated reinstatement fee, see section 171.

*Removal of suspension*

- (3) If a provider's registration is suspended, the Minister may at any time give the provider a written notice that sets out the effect of subsection (4).
- (4) If the Minister has given a provider a notice under subsection (3), the suspension is removed by force of this subsection when the provider has paid the associated reinstatement fee.

Note: For the amount of the associated reinstatement fee, see section 171.

**95 Effect of suspension**

- (1) A provider whose registration is suspended for a course for a State under this Division must not:
- (a) do any thing for the purpose of recruiting or enrolling overseas students or intending overseas students for the course for the State; or
  - (b) subject to subsection (3), solicit or accept any money from an overseas student or an intending overseas student for the course for the State; or

- (c) if an accepted student of the provider has not begun the course—permit the student to begin the course for the State.
- (2) The provider is still registered for the course for the State for all other purposes.
- (3) The Minister may give to a provider whose registration is suspended a notice in writing that:
  - (a) states that, for the whole period of the suspension, paragraph (1)(b) does not apply to the provider in relation to overseas students who have started the course; or
  - (b) states that, for a specified part of the period of the suspension, paragraph (1)(b) does not apply to the provider in relation to overseas students who have started the course.The notice has effect accordingly.
- (4) A notice under subsection (3) is not a legislative instrument.

### **96 Updating the Register**

- (1) The Secretary must cause the Register to be altered appropriately if:
  - (a) a provider's registration is suspended or cancelled for any one or more courses for any one or more States; or
  - (b) a provider's registration has a condition imposed on it; or
  - (c) a provider's registration has a suspension or condition removed.
- (2) However, a failure to do so does not affect the validity of the relevant action.

## Division 2—Immigration Minister's suspension certificate

### 97 Immigration Minister may give a registered provider a suspension certificate

- (1) The Immigration Minister may give an Immigration Minister's suspension certificate to a registered provider if, in the Immigration Minister's opinion, a significant number of overseas students or intending overseas students in respect of:
  - (a) the registered provider; or
  - (b) another provider that is an associate of the registered provider;are entering or remaining in Australia for purposes not contemplated by their visas.

#### *Matters that the Minister may consider*

- (2) In considering whether to give such a certificate, the Immigration Minister may have regard to any of the following:
  - (a) the number of applications for student visas made by overseas students and intending overseas students, in respect of the registered provider or associate, that have been refused, where there were fraudulent statements made or fraudulent documents given in connection with the application;
  - (b) the number of the registered provider's or associate's accepted students who have breached conditions of their visas;
  - (c) the number of accepted students and former accepted students of the registered provider or associate who remain in Australia unlawfully after finishing their courses;
  - (d) any other matter set out in regulations made for the purposes of this paragraph under the *Migration Act 1958*.
- (3) Subsection (2) does not limit the matters to which the Immigration Minister may have regard in considering whether to give a certificate.

- (4) For the purposes of paragraph (2)(a), it is immaterial whether or not the fraudulent statements or documents were a reason for refusing the application.

*Power to be exercised personally*

- (5) The power to give an Immigration Minister's suspension certificate must be exercised by the Immigration Minister personally.

## **98 Procedure for issuing certificate**

*Written notice of intention to give certificate*

- (1) Before issuing the certificate, the Immigration Minister must give the registered provider a written notice:
- (a) stating that the Immigration Minister intends to give the provider an Immigration Minister's suspension certificate, and why; and
  - (b) giving the provider at least 7 days to give the Immigration Minister written submissions about the matter.
- (2) After considering any submission received within that period, the Immigration Minister may give the registered provider the certificate if the Immigration Minister still considers that he or she should do so.

*Tabling certificate in Parliament*

- (3) The Immigration Minister must table a copy of the certificate in both Houses of Parliament within 15 sitting days of giving it to the provider.

*Delegating function of giving written notice*

- (4) The Immigration Minister may, by signed writing, delegate to the Secretary of his or her Department, or to an SES employee or acting SES employee in that Department, the function of giving notices under subsection (1).

## **99 Content of certificate**

An Immigration Minister's suspension certificate must:

- (a) state the day on which it takes effect; and

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- (b) set out why it has been given; and
- (c) set out the effect of sections 100, 101 and 102.

**100 Duration of certificate**

- (1) An Immigration Minister's suspension certificate remains in effect for the period of 6 months beginning on the day that it says it takes effect.
- (2) The Immigration Minister may revoke an Immigration Minister's suspension certificate at any time by giving the registered provider written notice.

**101 Effect of certificate: offence**

- (1) A person is guilty of an offence if the person:
  - (a) makes an offer to an overseas student, an intending overseas student or any other prescribed non-citizen for him or her to be provided with a course in any State by a registered provider; or
  - (b) invites an overseas student, an intending overseas student or a prescribed non-citizen to undertake, or apply to undertake, a course in any State offered by a registered provider; or
  - (c) holds a registered provider out as able or willing to provide a course in any State to overseas students or prescribed non-citizens;

while an Immigration Minister's suspension certificate is in effect for that registered provider.

Maximum penalty: Imprisonment for 2 years.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

- (2) The provider is still registered for all other purposes.
- (3) In this section:

***prescribed non-citizen*** means a non-citizen (within the meaning of the *Migration Act 1958*) who is of a kind prescribed for the purposes of this section in regulations made under that Act.

### **102 Further certificates**

- (1) Unless, by the end of the period for which an Immigration Minister's suspension certificate is in effect, the registered provider has satisfied the Immigration Minister that he or she should not be given a further certificate, the Immigration Minister may give the provider a further Immigration Minister's suspension certificate.
- (2) The Immigration Minister does not have to follow the procedure in subsections 98(1) and (2) in order to give a further Immigration Minister's suspension certificate.

#### *Tabling further certificate in Parliament*

- (3) However, the Immigration Minister must table a copy of the further certificate in both Houses of Parliament within 15 sitting days of giving it to the provider.

#### *Application of this section to further certificates*

- (4) This section applies to a further Immigration Minister's suspension certificate or certificates in the same way as it applies to an original Immigration Minister's suspension certificate.

### **103 Updating the Register**

- (1) The Secretary must cause the Register to be altered appropriately if the Immigration Minister has given or revoked an Immigration Minister's suspension certificate (or a further such certificate).
- (2) However, a failure to do so does not affect the validity of the certificate or revocation.

## Division 3—Offences

### 104 Notification requirements

- (1) A registered provider that breaches subsection 19(1) is guilty of a separate offence for each event for which the required information is not given.

Maximum penalty: 50 penalty units.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

- (2) Strict liability applies to subsection (1).

- (3) A registered provider that breaches subsection 19(2) is guilty of a separate offence for each event for which the required information is not given.

Maximum penalty: 50 penalty units.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

- (4) A registered provider that breaches section 20 is guilty of a separate offence for each breach for which the required notice is not sent.

Maximum penalty: 50 penalty units.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

### 105 Record-keeping

- (1) A registered provider that breaches section 21 is guilty of a separate offence for each student for whom the required records are not kept or retained.



Maximum penalty: 60 penalty units.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

- (2) Strict liability applies to subsection (1).

### **106 Infringement notices**

- (1) The regulations may provide for the Minister to give a registered provider an infringement notice requiring payment of a penalty for an offence against subsection 104(1) or section 105 as an alternative to prosecution for the offence.
- (2) The amount of the penalty must be:
- (a) for an individual—4 penalty units; or
  - (b) for a body corporate—20 penalty units.

Note: See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

- (3) The regulations may provide for matters concerning the infringement notices.

### **107 Failing to identify registered provider in written material**

- (1) A person is guilty of an offence if the person in written material, including in electronic form:
- (a) makes an offer to an overseas student or an intending overseas student to provide a course in a State to that student; or
  - (b) invites an overseas student or intending overseas student to undertake, or to apply to undertake, a course in a State; or
  - (c) holds himself, herself or itself out as able or willing to provide the course in a State to overseas students;
- and the material fails to identify:
- (d) the registered provider for the course; and
  - (e) the number allocated to the registered provider under section 10; and
  - (f) any other information prescribed by the regulations.

Maximum penalty: Imprisonment for 6 months.

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Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

**108 Providing false or misleading information**

A person is guilty of an offence if the person provides false or misleading information in complying or purporting to comply with any of the following provisions:

- (a) section 13 (fund manager may require information);
- (b) section 19 (giving information about accepted students);
- (c) section 20 (sending students notice of visa breaches);
- (d) subsection 26(1) or (3) (disclosure obligations of registered providers).

Maximum penalty: Imprisonment for 12 months.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

**109 Access to electronic notification system**

- (1) This section applies if a computer system is established for the purpose of receiving and storing information about accepted students that is given to the Secretary under section 19.
- (2) The Secretary may give any person access to the system for the purposes of this Act.

*Access may be given subject to conditions*

- (3) The access may be given subject to conditions that the Secretary determines in writing relating to the use of the system and of the means of obtaining access to the system.
- (4) The Secretary must give the person a copy of the conditions.

*Offence: breaching conditions*

- (5) The person is guilty of an offence if the person:
  - (a) intentionally breaches a condition; and
  - (b) knows that, or is reckless as to whether, that conduct is a breach of the condition.

Maximum penalty: Imprisonment for 6 months.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: A person who obtains unauthorised access to information on the system that is protected by an access control system could be guilty of an offence against Part 10-7 of the *Criminal Code*.

### 110 Bogus providers

- (1) A person is guilty of an offence if:
- (a) the person intentionally provides, purports to provide or offers to provide a course to overseas students; and
  - (b) the course is not genuine; and
  - (c) in engaging in the conduct mentioned in paragraph (a), the person intends to facilitate, or is reckless as to facilitating, a breach of one or more conditions of any of the students' visas (whether or not a breach in fact occurs).

Maximum penalty: Imprisonment for 2 years, 100 penalty units or both.

- (2) The fault element for paragraph (1)(b) is knowledge.
- (3) For the purposes of subsection (1), a course is not ***genuine*** if it is provided without serious regard to reasonable standards of education or training (including standards relating to attendance and participation by students) or if the course is a sham.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

## **Part 7—Monitoring and searching providers**

### **Division 1—Introduction**

#### **111 Powers conferred on magistrates in their personal capacity**

- (1) A power conferred on a magistrate by section 129, 138, 144, 150, 154 or 165 is conferred on the magistrate in a personal capacity and not as a court or a member of a court.
- (2) The magistrate need not accept the power conferred.

#### **112 Immunity of magistrates**

A magistrate exercising a power mentioned in subsection 111(1) has the same protection and immunity as if he or she were exercising that power as, or as a member of, the court of which the magistrate is a member.

## **Division 2—Notices requiring information and documents**

### **Subdivision A—Production notices**

#### **113 Production notices**

- (1) This section applies if the Secretary reasonably believes that an individual specified in subsection (4) has, or has access to, information or documents that are relevant to a monitoring purpose.
- (2) The Secretary may give the individual a written notice requiring him or her to:
  - (a) give any information or documents relevant to the monitoring purpose to an authorised employee; or
  - (b) show any such documents to an authorised employee; or
  - (c) make copies of any such documents and give the copies to an authorised employee.

Note: The Secretary may also give the individual an attendance notice: see section 116.

*Information and documents may be required in a particular form*

- (3) If the information or documents are in a particular form then the production notice may require the information or documents to be given in that form.

*Individuals who may be given production notices*

- (4) The individuals who may be given a production notice are:
  - (a) an officer or employee of a registered provider; or
  - (b) a consultant to a registered provider; or
  - (c) a partner in a registered provider; or
  - (d) an individual trading as a registered provider.

#### **114 Contents of the production notice**

- (1) A production notice must:
  - (a) state that it is given under section 113; and
  - (b) set out the effects of sections 120, 121 and 122; and

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- (c) state how and by when the information or documents must be given or shown.

*Time for production of information or documents*

- (2) In so far as the notice covers information or documents:
  - (a) that relate to any extent to the calendar year in which the notice is given; and
  - (b) that are required to be given or shown on the premises where they are currently located;the time mentioned in paragraph (1)(c) must be at least 24 hours after the notice is given.
- (3) In so far as the notice covers any other information or documents, the time mentioned in paragraph (1)(c) must be at least 72 hours after the notice is given.

**115 Serving production notices**

- (1) The Secretary must give a production notice to an individual:
  - (a) by delivering it to the individual personally; or
  - (b) by:
    - (i) leaving it at the address of the individual's place of residence or business last known to the Secretary; and
    - (ii) taking reasonably practicable action to draw the individual's attention to the notice; or
  - (c) by sending it by ordinary or any other class of pre-paid post to the individual's place of residence or business last known to the Secretary.
- (2) However, if the Secretary uses the method in paragraph (1)(c), the time mentioned in paragraph 114(1)(c) must be at least 14 days after the notice is given (instead of at least 24 hours or 72 hours).

Note: Section 29 of the *Acts Interpretation Act 1901* sets out when the notice is taken to have been given if the notice is posted to the individual.

**Subdivision B—Attendance notices**

**116 Attendance notices**

- (1) This section applies if the Secretary reasonably believes that an individual specified in subsection (3) has, or has access to,
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information or documents that are relevant to a monitoring purpose.

- (2) The Secretary may give the individual written notice requiring the individual to attend before an authorised employee and answer questions about the matter.

Note: The Secretary may also give the individual a production notice: see section 113.

*Individuals who may be given attendance notices*

- (3) The individuals who may be given an attendance notice are:
- (a) an officer or employee of a registered provider; or
  - (b) a consultant to a registered provider; or
  - (c) a partner in a registered provider; or
  - (d) an individual trading as a registered provider.

### **117 Contents of the attendance notice**

- (1) An attendance notice must:
- (a) state that it is given under section 116; and
  - (b) set out the effects of sections 120, 121 and 122; and
  - (c) state where and when the individual is to attend.

The time mentioned in paragraph (c) must be at least 14 days after the notice is given.

- (2) An attendance notice may be included in the same document as a production notice, if the notices are being given to the same individual.

### **Subdivision C—Common rules for production and attendance notices**

#### **118 Scales of expenses**

The regulations may prescribe scales of expenses to be allowed to persons required to give information or documents under this Division.

### **119 Reasonable compensation for giving copies**

A person is entitled to be paid by the Commonwealth reasonable compensation for complying with a requirement covered by paragraph 113(2)(c) (copies of documents given under production notices).

### **120 Offence: failing to comply with a notice**

- (1) A person who refuses or fails to comply with a production or attendance notice is guilty of an offence.

Maximum penalty: Imprisonment for 6 months.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

- (2) However, a person is not guilty of an offence in relation to a production notice if the person complied with the notice to the extent that it was practicable to do so within the period allowed by the notice.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2): see subsection 13.3(3) of the *Criminal Code*.

### **121 Offence: giving false or misleading information**

A person who gives false or misleading information in the course of complying or purporting to comply with a production or attendance notice is guilty of an offence.

Maximum penalty: Imprisonment for 12 months.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

### **122 Offence: giving false or misleading document**

- (1) A person who gives or shows an authorised employee a document that is false or misleading in a material particular, in the course of complying or purporting to comply with a production or attendance notice, is guilty of an offence.

Maximum penalty: Imprisonment for 12 months.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.



- (2) However, the person is not guilty of the offence if the document is accompanied by a written statement signed by the person:
- (a) stating that the document is, to the person's knowledge, false or misleading in the material particular concerned; and
  - (b) setting out or referring to the material particular.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2): see subsection 13.3(3) of the *Criminal Code*.

### **123 Information and documents that incriminate a person**

- (1) A person is not excused from the requirement to comply with a production or attendance notice on the ground that doing so might tend to incriminate the person or expose the person to a penalty.
- (2) However, if the person is an individual:
- (a) the information, document or answer to the question; or
  - (b) any other information, document or thing obtained as a direct or indirect result of complying with a notice;
- is not admissible in evidence against the individual in any criminal proceedings other than proceedings under, or arising out of, section 121 or 122.

### **124 Copies of documents**

An authorised employee, or another employee of the Department with an authorised employee's permission, may:

- (a) inspect a document given or shown to the authorised employee under this Division; and
- (b) make and retain copies of, or take and retain extracts from, such a document; and
- (c) retain a copy of a document given to the authorised employee in accordance with a requirement covered by paragraph 113(2)(c) (copies of documents given under production notices).

### **125 Employee may retain documents**

- (1) An authorised employee, or another employee of the Department with an authorised employee's permission, may retain a document given to the authorised employee under this Division:
- (a) for the purposes of this Act; or

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- (b) for the purposes of an investigation as to whether an offence has been committed; or
  - (c) to enable evidence of an offence to be secured for the purposes of a prosecution.
- (2) However, the document must not be retained for longer than 60 days after the authorised employee was given the document.
- Note: The authorised employee may apply to retain the document for a further period: see section 128.

**126 Owner of document must be given copy**

- (1) An employee retaining a document under section 125 must as soon as practicable:
- (a) certify a copy of the document to be a true copy; and
  - (b) give the copy to the person (the *owner*) otherwise entitled to possession of the document.
- (2) The certified copy must be received in all courts and tribunals as evidence as if it had been the original.

*Owner may inspect etc. original document*

- (3) Until the certified copy is given, the owner, or a person authorised by the owner, may inspect and make copies of, or take and retain extracts from, the original document at the times and places that the employee thinks appropriate.

**127 Retaining documents**

- (1) This section applies 60 days after a document is given to an authorised employee under this Division.
- (2) The authorised employee must take reasonable steps to return the document to the person who gave the employee the document or to the owner if that person is not entitled to possess it.
- (3) However, the authorised employee does not have to take those steps if:
- (a) the authorised employee may retain the document because of an order under section 129; or

- (b) the authorised employee is otherwise authorised (by a law, or an order of a court, of the Commonwealth or a State) to retain, destroy or dispose of the document.

**128 Employee may apply to magistrate or tribunal member for a further period**

- (1) An authorised employee given a document under this Division, or another employee who is currently retaining such a document, may apply to a magistrate or tribunal member for an order that the employee may retain the document for a further period.

*Time limit for application*

- (2) The application must be made before the end of:
  - (a) 60 days after the document was given to the authorised employee; or
  - (b) a period previously specified in an order of a magistrate or tribunal member under section 129.

*Employee must try to notify those affected*

- (3) Before making the application, the employee must:
  - (a) take reasonable steps to discover which persons' interests would be affected by the retention of the document; and
  - (b) if it is practicable to do so, notify each person who the employee believes to be such a person of the proposed application.

**129 Magistrate or tribunal member may order retention for further period**

- (1) The magistrate or tribunal member may order that the employee who made the application under section 128 may retain the document if the magistrate or tribunal member is satisfied that it is necessary for the employee to retain it:
  - (a) for the purposes of this Act; or
  - (b) for the purposes of an investigation as to whether an offence has been committed; or
  - (c) to enable evidence of an offence to be secured for the purposes of a prosecution.

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- (2) The order must specify the period for which the employee may retain the document.

## **Division 3—Monitoring warrants**

### **Subdivision A—Monitoring powers**

#### **130 Authorised employee may enter premises for a monitoring purpose**

- (1) An authorised employee may for a monitoring purpose:
  - (a) enter any premises:
    - (i) occupied by a registered provider for the purposes of providing courses; or
    - (ii) at which it is reasonable to believe there might be a thing belonging to or possessed by the provider, or an activity conducted by or with the consent of the provider, that is relevant to a monitoring purpose; and
  - (b) exercise the monitoring powers set out in section 131.
- (2) An authorised employee is not authorised to enter premises under subsection (1) unless:
  - (a) the occupier of the premises has consented to the entry and the employee has shown his or her identity card if requested by the occupier; or  

Note: Section 157 sets out the requirements for obtaining the occupier's consent.
  - (b) the entry is made under a monitoring warrant.  

Note: Monitoring warrants are issued under section 138 or subsection 165(2).

#### **131 Monitoring powers of authorised employees**

- (1) For the purposes of this Division, the following are the **monitoring powers** that an authorised employee may exercise in relation to premises under section 130:
  - (a) to search the premises, and any receptacle on the premises, for any thing on the premises belonging to or possessed by the provider that might be relevant to a monitoring purpose;
  - (b) to examine any such thing;

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- (c) to examine any activity that is conducted on the premises by, or with the consent of, the provider that might be relevant to a monitoring purpose;
- (d) to take photographs or make video or audio recordings or sketches on the premises of any such activity or thing;
- (e) to inspect any document on the premises belonging to or possessed by the provider that might be relevant to a monitoring purpose;
- (f) to take extracts from or make copies of any such document;
- (g) to take onto the premises any equipment and materials that the authorised employee requires for the purpose of exercising powers in relation to the premises;
- (h) to secure a thing, until a search warrant is obtained to seize it, being a thing:
  - (i) that the employee finds during the exercise of monitoring powers on the premises; and
  - (ii) that the employee believes on reasonable grounds is evidential material; and
  - (iii) that the employee believes on reasonable grounds would be lost, destroyed or tampered with before the warrant can be obtained;
- (i) the powers in subsections (2), (3) and (5).

*Operating equipment*

- (2) For the purposes of this Division, the **monitoring powers** include the power to operate equipment that is on the premises to see whether:
  - (a) the equipment; or
  - (b) a disk, tape or other storage device that:
    - (i) is on the premises; and
    - (ii) can be used with the equipment or is associated with it;contains information belonging to the provider that is relevant to a monitoring purpose.

*Removing disks etc. and documents*

- (3) For the purposes of this Division, the **monitoring powers** include the following powers in relation to information described in

subsection (2) that is found in the exercise of the power under that subsection:

- (a) to operate facilities that are on the premises to put the information in documentary form and remove the documents so produced;
  - (b) to operate such facilities to transfer the information to a disk, tape or other storage device that:
    - (i) is brought to the premises for the exercise of the power; or
    - (ii) is on the premises and the use of which for that purpose has been agreed to in writing by the provider or occupier (as appropriate);
  - (c) to remove from the premises a disk, tape or other storage device to which the information has been transferred in exercise of the power under paragraph (b).
- (4) The powers mentioned in subsections (2) and (3) must be exercised in accordance with section 148.

*Securing evidence of other offences*

- (5) If an authorised employee, during a search of premises, reasonably believes that there is on the premises a thing that might afford evidence of the commission of an offence against this Act, the *Crimes Act 1914* or the *Criminal Code*, the **monitoring powers** include securing the thing pending the obtaining of a warrant to seize it.

### **132 Authorised employee on premises with consent may ask questions**

An authorised employee who is only authorised to enter premises because the occupier of the premises consented to the entry may:

- (a) ask the occupier to:
  - (i) answer any questions that are relevant to a monitoring purpose; and
  - (ii) give or show the authorised employee any document requested by the employee that is relevant to the matter; or

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- (b) ask any person on the premises to answer any questions that may facilitate the exercise of monitoring powers in relation to the premises.

Note: A person could be guilty of an offence if, in complying or purporting to comply with this section, the person gives false or misleading information or shows a document that is false or misleading in a material particular: see sections 135 and 136.

**133 Authorised employee on premises under warrant may ask questions**

An authorised employee who is authorised to enter premises by a monitoring warrant may:

- (a) require the occupier of the premises to:
  - (i) answer any questions that are relevant to a monitoring purpose; and
  - (ii) give or show the employee any document requested by the employee that is relevant to a monitoring purpose; or
- (b) require any person on the premises to answer any questions that may facilitate the exercise of monitoring powers in relation to the premises.

Note 1: A person could be guilty of an offence if the person fails to comply with a requirement under this section: see section 134.

Note 2: A person could be guilty of an offence if, in complying or purporting to comply with this section, the person gives false or misleading information or shows a document that is false or misleading in a material particular: see sections 135 and 136.

**134 Offence: failure to answer question**

- (1) A person is guilty of an offence if the person refuses or fails to comply with a requirement under section 133 (employee on premises under warrant may ask questions).

Maximum penalty: Imprisonment for 6 months.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

- (2) However, a person is not guilty of an offence if answering the question or giving or showing the document might tend to incriminate the person or expose the person to a penalty.



Note: A defendant bears an evidential burden in relation to the matter in subsection (2): see subsection 13.3(3) of the *Criminal Code*.

### **135 Offence: giving false or misleading information**

A person who gives false or misleading information in the course of complying or purporting to comply with section 132 or 133 (employee may ask questions) is guilty of an offence.

Maximum penalty: Imprisonment for 12 months.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

### **136 Offence: giving or showing documents that are false or misleading in material particulars**

- (1) A person who gives or shows an authorised employee a document that is false or misleading in a material particular, in the course of complying or purporting to comply with section 132 or 133 (employee may ask questions), is guilty of an offence.

Maximum penalty: Imprisonment for 12 months.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

- (2) However, the person is not guilty of an offence if the document is accompanied by a written statement signed by the person:
- (a) stating that the document is, to the person's knowledge, false or misleading in the material particular concerned; and
  - (b) setting out or referring to the material particular.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2): see subsection 13.3(3) of the *Criminal Code*.

## **Subdivision B—Applying for monitoring warrants**

### **137 Authorised employee may apply for a monitoring warrant**

- (1) An authorised employee may apply to a magistrate or tribunal member for a monitoring warrant in relation to premises mentioned in subsection 130(1) (including premises in a State other than the magistrate's or tribunal member's State).

Note: Monitoring warrants may also be obtained by telephone, fax or other electronic means in urgent circumstances: see section 165.

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- (2) The employee must give the magistrate or tribunal member an information on oath or affirmation that sets out the grounds for seeking the warrant.

**138 Magistrate or tribunal member may issue a monitoring warrant**

The magistrate or tribunal member may issue a monitoring warrant if he or she is satisfied that it is reasonably necessary that one or more authorised employees have access to the premises mentioned in subsection 130(1) for a monitoring purpose.

**139 Magistrate or tribunal member may require more information**

- (1) The magistrate or tribunal member may require an authorised employee or other person to give the magistrate or tribunal member further information on oath or affirmation concerning the grounds on which the monitoring warrant is being sought before issuing it.
- (2) The information may be given orally or by affidavit.
- (3) The magistrate or tribunal member must not issue the warrant until the employee or other person has given the required information.

**140 Contents of monitoring warrant**

- (1) A monitoring warrant must:
  - (a) authorise one or more authorised employees:
    - (i) to enter the premises; and
    - (ii) to exercise the powers under section 131 in relation to the premises; and
  - (b) state whether the entry is authorised at any time of the day or night or during specified hours of the day or night; and
  - (c) state the day and time at which it ceases to have effect (which must be no later than 7 days after it is issued); and
  - (d) state the purpose for which the warrant is issued; and
  - (e) state that the warrant is issued under section 138.
- (2) The authorised employees do not have to be named in the warrant.

## **Division 4—Search warrants**

### **Subdivision A—Search powers**

#### **141 Authorised employee may enter premises to look for evidential material**

- (1) This section applies if an authorised employee has reasonable grounds for suspecting that there may be evidential material on any premises.
- (2) The authorised employee may:
  - (a) enter the premises; and
  - (b) exercise the search powers set out in section 142; and
  - (c) if the entry is under warrant—seize the evidential material, if the authorised employee finds it on the premises.
- (3) However, an authorised employee is not authorised to enter premises under subsection (2) unless:
  - (a) the occupier of the premises has consented to the entry and the employee has shown his or her identity card if requested by the occupier; or  

Note: Section 157 sets out the requirements for obtaining the occupier's consent.
  - (b) the entry is made under a search warrant.  

Note: Search warrants are issued under section 144 or subsection 165(3).

#### **142 Search powers of authorised employees**

- (1) For the purposes of this Division, the following are the *search powers* that an authorised employee may exercise in relation to premises under section 141:
  - (a) to search the premises, and any receptacle on the premises, for the evidential material;
  - (b) to examine the evidential material;
  - (c) to take photographs or make video or audio recordings or sketches on the premises of the evidential material;
  - (d) to inspect any documentary evidential material;

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- (e) to take extracts from or make copies of the evidential material;
- (f) to take onto the premises any equipment and materials that the authorised employee requires for the purpose of exercising powers in relation to the premises;
- (g) the powers in subsections (2), (3) and (5).

*Operating equipment*

- (2) For the purposes of this Division, the **search powers** include the power to operate equipment that is on the premises to see whether:
  - (a) the equipment; or
  - (b) a disk, tape or other storage device that:
    - (i) is on the premises; and
    - (ii) can be used with the equipment or is associated with it;contains evidential material.

*Removing disks etc. and documents*

- (3) For the purposes of this Division, the **search powers** include the following powers in relation to the evidential material that is found in the exercise of the power under subsection (2):
  - (a) to seize the equipment or any disk, tape or other associated storage device;
  - (b) to operate facilities that are on the premises to put the material in documentary form and remove the documents so produced;
  - (c) to operate such facilities to transfer the material to a disk, tape or other storage device that:
    - (i) is brought to the premises for the exercise of the power; or
    - (ii) is on the premises and the use of which for that purpose has been agreed to in writing by the provider or occupier (as appropriate);
  - (d) to remove from the premises a disk, tape or other storage device to which the evidential material has been transferred in exercise of the power under paragraph (c).
- (4) The powers mentioned in subsections (2) and (3) must be exercised in accordance with section 148.

- (5) An authorised employee may seize equipment under paragraph (3)(a) only if:
- (a) it is not practicable to put the material in documentary form as mentioned in paragraph (3)(b) or to copy the material as mentioned in paragraph (3)(c); or
  - (b) possession by the occupier of the equipment could constitute an offence.
- (6) An authorised employee may seize equipment under paragraph (3)(a) or remove the documents under paragraph (3)(b) only if the employee entered the premises under a warrant.

*Securing evidence of other offences*

- (7) If an authorised employee, during a search of premises, reasonably believes that there is on the premises a thing that might afford evidence of the commission of an offence against this Act, the *Crimes Act 1914* or the *Criminal Code*, then the **search powers** include securing the thing pending the obtaining of a warrant to seize it.

Note: Section 151 allows for things to be seized without a warrant in emergencies.

## **Subdivision B—Applying for search warrants**

### **143 Authorised employee may apply for a search warrant**

- (1) An authorised employee may apply to a magistrate or tribunal member for a search warrant in relation to the premises mentioned in subsection 141(1) (including premises in a State other than the magistrate's or tribunal member's State).

Note: Search warrants may also be obtained by telephone, fax or other electronic means in urgent circumstances: see section 165.

- (2) The employee must give the magistrate or tribunal member an information on oath or affirmation that sets out the grounds for seeking the warrant.

### **144 Magistrate or tribunal member may issue a search warrant**

The magistrate or tribunal member may issue a search warrant if he or she is satisfied that there are reasonable grounds for suspecting that there may be evidential material on the premises.

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**145 Magistrate or tribunal member may require more information**

- (1) The magistrate or tribunal member may require an authorised employee or other person to give the magistrate or tribunal member further information on oath or affirmation concerning the grounds on which the search warrant is being sought before issuing it.
- (2) The information may be given orally or by affidavit.
- (3) The magistrate or tribunal member must not issue the warrant until the employee or other person has given the required information.

**146 Contents of a search warrant**

- (1) A search warrant must:
  - (a) authorise one or more authorised employees:
    - (i) to enter the premises; and
    - (ii) to exercise the powers under section 142 in relation to the premises; and
  - (b) state whether the entry is authorised at any time of the day or night or during specified hours of the day or night; and
  - (c) state the day and time at which it ceases to have effect (which must be no later than 7 days after it is issued); and
  - (d) state the purpose for which the warrant is issued; and
  - (e) state that the warrant is issued under section 144.
- (2) The authorised employees must be named in the warrant.

## **Division 5—Common rules for monitoring warrants and search warrants**

### **Subdivision A—Common powers etc. under monitoring warrants and search warrants**

#### **147 Use of reasonable force and assistance**

An authorised employee may use such assistance and force as is necessary and reasonable in entering the premises under a monitoring warrant or a search warrant and exercising the powers under section 131 or 142.

#### **148 Use of electronic equipment in exercising search or monitoring powers**

In order to exercise search powers or monitoring powers, an authorised employee or a person assisting may operate electronic equipment on the premises if he or she reasonably believes that this can be done without damaging the equipment or data recorded on the equipment.

Note: Compensation may be payable in certain circumstances if the equipment or data is damaged: see section 160.

#### **149 Securing electronic equipment for use by experts**

- (1) This section applies if the authorised employee or a person assisting reasonably believes that:
  - (a) there is on the premises:
    - (i) if the authorised employee is on the premises under section 130—information belonging to the provider concerned that is relevant to a monitoring purpose; or
    - (ii) if the authorised employee is on the premises under section 141—evidential material;  
that might be accessible by operating electronic equipment that is on the premises; and
  - (b) expert assistance is required to operate the equipment; and

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- (c) if he or she does not take action under subsection (2), the information might be destroyed, altered or otherwise interfered with.
- (2) The authorised employee or person assisting may do whatever is necessary to secure the equipment.

*Authorised employee must give notice*

- (3) Before doing so, the authorised employee or person assisting must give notice to the occupier of the premises of:
  - (a) his or her intention to secure equipment; and
  - (b) the fact that the equipment may be secured for up to 24 hours.

*Time limit on securing equipment*

- (4) The equipment may only be secured until the earlier of:
  - (a) 24 hours later; or
  - (b) the equipment being operated by the expert.

**150 Extension of period**

- (1) If an authorised employee or a person assisting reasonably believes that the expert assistance will not be available within 24 hours, he or she may apply to a magistrate or tribunal member for an extension of the period.
- (2) The authorised employee or a person assisting must give notice to the occupier of the premises of his or her intention to apply for an extension. The occupier is entitled to be heard in relation to that application.
- (3) Subdivision B of Divisions 3 and 4 relating to the issue of monitoring warrants and search warrants apply, with such modifications as are necessary, to the issue of an extension.

**151 Powers without warrant in emergency situations**

- (1) This section applies when an authorised employee is on premises under section 130 or 141 if the employee reasonably suspects that:
    - (a) a thing relevant to an offence against this Act, the *Crimes Act 1914* or the *Criminal Code* is on the premises; and
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- (b) it is necessary to exercise a power under subsection (2) in order to prevent the thing from being concealed, lost or destroyed; and
  - (c) it is necessary to exercise the power without the authority of a monitoring warrant or a search warrant because the circumstances are so serious and urgent.
- (2) The authorised employee may:
- (a) search the premises, and any receptacle on the premises, for the thing; and
  - (b) seize the thing if he or she finds it there; and
  - (c) either:
    - (i) if the employee is on the premises under section 130—exercise the powers mentioned in subsections 131(2) and (3); or
    - (ii) if the employee is on the premises under section 141—exercise the powers mentioned in subsections 142(2) and (3);in relation to the thing.

### **152 Retaining seized things**

- (1) This section applies to an authorised employee when one of the following happens in respect of a thing seized under section 151:
  - (a) the reason for the thing's seizure no longer exists or it is decided that the thing is not to be used in evidence; or
  - (b) the period of 60 days after the thing's seizure ends.
- (2) The authorised employee must take reasonable steps to return the thing to the person from whom it was seized or to the owner if that person is not entitled to possess it.
- (3) However, the authorised employee does not have to take those steps if:
  - (a) in a paragraph (1)(b) case:
    - (i) proceedings in respect of which the thing might afford evidence have been instituted before the end of the 60 days and have not been completed (including an appeal to a court in relation to those proceedings); or
    - (ii) the authorised employee may retain the thing because of an order under section 153; or

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- (b) in any case—the authorised employee is otherwise authorised (by a law, or an order of a court or a tribunal, of the Commonwealth or a State) to retain, destroy or dispose of the thing; or
- (c) the thing is forfeited or forfeitable to the Commonwealth or is the subject of a dispute as to ownership.

**153 Authorised employee may apply for a thing to be retained for a further period**

- (1) This section applies if an authorised employee has seized a thing under section 151 and proceedings in respect of which the thing might afford evidence have not commenced before the end of:
  - (a) 60 days after the seizure; or
  - (b) a period previously specified in an order of a magistrate or tribunal member under section 154.
- (2) The authorised employee may apply to a magistrate or tribunal member for an order that the employee may retain the thing for a further period.

*Authorised employee must try to notify those affected*

- (3) Before making the application, the authorised employee must:
  - (a) take reasonable steps to discover which persons' interests would be affected by the retention of the thing; and
  - (b) if it is practicable to do so, notify each person who the employee believes to be such a person of the proposed application.

**154 Magistrate or tribunal member may order that the thing be retained**

- (1) The magistrate or tribunal member may order that the authorised employee who made an application under section 153 may retain the thing if the magistrate or tribunal member is satisfied that it is necessary for the employee to do so:
  - (a) for the purposes of an investigation as to whether an offence has been committed; or
  - (b) to enable evidence of an offence to be secured for the purposes of a prosecution.

- (2) The order must specify the period for which the employee may retain the thing.

### **155 Occupier to provide authorised employee with all facilities and assistance**

- (1) The occupier of the premises to which a monitoring warrant or a search warrant relates must provide the authorised employee executing the warrant and any person assisting that employee with all reasonable facilities and assistance for the effective exercise of their powers.
- (2) A person is guilty of an offence if the person breaches subsection (1).

Maximum penalty: 10 penalty units.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

### **Subdivision B—Obligations on authorised employees etc.**

#### **156 Being on premises with consent**

- (1) An authorised employee may enter premises under section 130 or 141 with the consent of the occupier of the premises at any reasonable time of the day or night.
- (2) However, the authorised employee must leave the premises if the occupier asks the employee to do so.

#### **157 Consent**

- (1) Before obtaining the consent of a person for the purposes of paragraph 130(2)(a) or 141(3)(a), the authorised employee must inform the person that he or she may refuse consent.
- (2) An entry of an authorised employee with the consent of a person is not lawful unless the person voluntarily consents to the entry.

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**158 Announcement before entry**

An authorised employee executing a monitoring warrant or a search warrant must, before entering premises under the warrant:

- (a) announce that he or she is authorised to enter the premises; and
- (b) give a person on the premises (if there is one) an opportunity to allow entry to the premises.

**159 Copy of warrant to be given to the occupier before entry**

- (1) If a monitoring warrant or a search warrant is being executed on premises and the occupier of the premises is present, the authorised employee must make a copy of the warrant available to the occupier.
- (2) The authorised employee must identify himself or herself to that person.

**160 Compensation for damage to electronic equipment or data**

- (1) This section applies if:
  - (a) damage is caused to equipment as a result of it being operated as mentioned in section 148; or
  - (b) the data recorded on the equipment is damaged or programs associated with its use are damaged or corrupted;because:
  - (c) insufficient care was exercised in selecting the person who was to operate the equipment; or
  - (d) insufficient care was exercised by the person operating the equipment.

*Amount of compensation*

- (2) The Commonwealth must pay the owner of the equipment, or the user of the data or programs, such reasonable compensation for the damage or corruption as they agree on.
- (3) However, if the owner or user and the Commonwealth fail to agree, the owner or user may institute proceedings in the Federal Court for such reasonable amount of compensation as the Court determines.

- (4) In determining the amount of compensation payable, regard is to be had to whether the occupier of the premises and his or her employees and agents, if they were available at the time, provided any appropriate warning or guidance on the operation of the equipment.
- (5) Compensation is payable out of money appropriated by the Parliament.

*Damage to data*

- (6) For the purposes of subsection (1), *damage to data* includes damage by erasure of data or addition of other data.

**161 Occupier entitled to be present during execution of the monitoring warrant**

- (1) If a monitoring warrant or a search warrant is being executed at premises and the occupier of the premises is present, the occupier is entitled to observe the execution of the warrant.
- (2) The right to observe the execution of the warrant ceases if the occupier impedes that execution.
- (3) This section does not prevent the execution of the warrant in 2 or more areas of the premises at the same time.

**162 Identity cards**

- (1) The Secretary must give each authorised employee an identity card.
- (2) An identity card must:
  - (a) be in a form approved in writing by the Secretary; and
  - (b) include a recent photograph of the employee.

*Offence: failing to return identity card*

- (3) A person is guilty of an offence if:
  - (a) the person holds or held an identity card; and
  - (b) the person ceases to be an authorised employee; and
  - (c) the person does not, as soon as is practicable after so ceasing, return the identity card to the Secretary.

**Part 7** Monitoring and searching providers

**Division 5** Common rules for monitoring warrants and search warrants

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Maximum penalty: 1 penalty unit.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

- (4) This offence is one of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

*Defence: lost or destroyed card*

- (5) However, the person is not guilty of the offence if the identity card was lost or destroyed.

Note: A defendant bears an evidential burden in relation to the matter in subsection (5): see subsection 13.3(3) of the *Criminal Code*.

*Authorised employee must always carry identity card*

- (6) An authorised employee must carry an identity card at all times when exercising powers under Division 3, 4 or 5.

**163 Authorised employee must produce identity card on request**

An authorised employee is not entitled to exercise any powers under Division 3, 4 or 5 in relation to premises if:

- (a) the occupier of the premises requests the authorised employee to show his or her identity card to the occupier; and
- (b) the authorised employee fails to comply with the request.

**Subdivision C—Issue of warrants by telephone etc.**

**164 Employee may apply for warrants by telephone etc.**

- (1) An authorised employee may apply to a magistrate or tribunal member for a monitoring warrant or a search warrant by telephone, fax or other electronic means if the employee thinks it necessary to do so because of urgent circumstances.
- (2) The magistrate or tribunal member may require communication by voice to the extent that it is practicable in the circumstances.

- (3) Before making the application, the authorised employee must prepare an information on oath or affirmation that sets out the grounds for seeking the warrant.
- (4) However, the employee may make the application before the information has been sworn or affirmed, if necessary.

**165 Magistrate or tribunal member may grant warrant by telephone etc.**

*Procedure before issuing the warrant*

- (1) Before issuing the warrant the magistrate or tribunal member must:
  - (a) consider the information prepared under subsection 164(3); and
  - (b) receive any further information that the magistrate or tribunal member may require about the grounds on which the warrant is being sought.

*Issuing monitoring warrant by telephone etc.*

- (2) The magistrate or tribunal member may issue a monitoring warrant if the magistrate or tribunal member is satisfied:
  - (a) that it is reasonably necessary that one or more authorised employees have access to the premises for a monitoring purpose; and
  - (b) that there are reasonable grounds for issuing the warrant by telephone, fax or other electronic means.

*Issuing search warrant by telephone etc.*

- (3) The magistrate or tribunal member may issue a search warrant if the magistrate or tribunal member is satisfied:
  - (a) that there are reasonable grounds for suspecting that there might be evidential material on the premises; and
  - (b) that there are reasonable grounds for issuing the warrant by telephone, fax or other electronic means.

Section 166

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**166 Procedure for issuing warrant by telephone etc.**

*Obligations on magistrate or tribunal member*

- (1) If the magistrate or tribunal member issues a warrant under section 165, the magistrate or tribunal member must complete and sign a warrant that is the same as the monitoring warrant or search warrant that the magistrate or tribunal member would have issued if the application had been made under section 137 or 143.
- (2) The magistrate or tribunal member must also:
  - (a) inform the authorised employee of:
    - (i) the terms of the warrant; and
    - (ii) the day and time when it was signed; and
    - (iii) the time at which it ceases to have effect (which must be no later than 48 hours after it is signed); and
  - (b) record on the warrant the reasons for issuing it.

*Obligations on authorised employees*

- (3) The authorised employee must:
  - (a) complete a form of warrant in the terms given to the authorised employee by the magistrate or tribunal member; and
  - (b) write on it the magistrate's or tribunal member's name and the day and time when the warrant was signed.

**167 Procedure after telephone warrant ceases or is executed**

*Obligations on authorised employee*

- (1) An authorised employee who completes a form of warrant under section 166 must send the magistrate or tribunal member who signed the monitoring warrant or search warrant:
  - (a) the form of warrant completed by the authorised employee; and
  - (b) the information duly sworn or affirmed in connection with the warrant.
- (2) The form of warrant and information must be sent by the end of the day after the earlier of:
  - (a) the day on which the warrant ceases to have effect; or



- (b) the day on which the warrant is executed.

*Obligations on magistrate or tribunal member*

- (3) The magistrate or tribunal member must:
- (a) attach the monitoring warrant or search warrant signed by the magistrate or tribunal member under section 166 to the form of warrant and information; and
  - (b) deal with the documents in the same way that the magistrate or tribunal member would have dealt with them if the application for the warrant had been made under section 137 or 143.

**168 Form of warrant authorises exercise of power**

The form of warrant completed under section 166 is authority for any exercise of a power that the monitoring warrant or search warrant issued under section 165 is authority for, if the form of warrant is in accordance with the terms of the monitoring warrant or search warrant.

**169 Court to assume that exercise of power not authorised by telephone etc. warrant**

A court must assume (unless the contrary is proved) that an exercise of power was not authorised by a monitoring warrant or search warrant if the warrant signed by the magistrate or tribunal member under section 166 is not produced in evidence.

## Part 8—Miscellaneous

### 170 Delegation

*Minister's delegation*

- (1) The Minister may, by signed writing, delegate to the Secretary, or to an SES employee or acting SES employee in the Department, all or any of the Minister's powers under this Act.

*Secretary's delegation*

- (2) The Secretary may, by signed writing, delegate to an SES employee or acting SES employee in the Department, all or any of the Secretary's powers under this Act.

### 171 Reinstatement fee

- (1) A registered provider must pay a reinstatement fee before the suspension of, or a condition on, the registration of the provider is removed under subsection 89(3), 89A(3), 90(2) or 94(2) or (4).

*Amount of reinstatement fee*

- (4) The amount of the reinstatement fee is:
  - (a) \$100 for 2000; and
  - (b) for a later year (the *current year*), the amount worked out by multiplying the reinstatement fee for the year before the current year by the indexation factor that applies to the current year.

*Annual indexation*

- (5) The *indexation factor* that applies to the current year is worked out using the following formula:

$$\frac{\text{Index number for the recent September quarter}}{\text{Index number for the previous September quarter}}$$

where:

*index number* for a quarter means 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.

*previous September quarter* means the September quarter before the recent September quarter.

*recent September quarter* means the September quarter in the year before the current year.

- (6) The indexation factor worked out under subsection (5) must be rounded up or down to 3 places (rounding up in the case of exactly halfway between).
- (7) The amount worked out under paragraph (4)(b) must be rounded to the nearest whole dollar (rounding up in the case of 50 cents).
- (8) 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.

### **172 Late payment penalty**

- (1) A registered provider must pay a late payment penalty for any:
  - (a) annual registration charge; or
  - (c) special levy;payable by the provider that remains unpaid after the time when it became due for payment.

Note: The Minister may take action under Division 1 of Part 6 against a registered provider that has breached this section.

#### *Amount of penalty*

- (2) The amount of the penalty is 20% per year on the unpaid amount calculated from the day when the original amount became due for payment.

Section 173

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**173 Debts due to the Commonwealth**

- (1) The following are recoverable as debts due to the Commonwealth by action in a court of competent jurisdiction:
  - (a) annual registration charge;
  - (b) late payment penalty;
  - (c) annual Fund contribution (other than a provider's first annual Fund contribution) or special levy.
- (2) In the case of an amount that relates to the Fund, the Fund Manager may recover the debt on behalf of the Commonwealth.

**174 Amounts payable by unincorporated bodies**

The following persons are jointly and severally liable to pay an amount for which a registered provider that is an unincorporated body is liable under this Act, the *Education Services for Overseas Students (Registration Charges) Act 1997* or the *Education Services for Overseas Students (Assurance Fund Contributions) Act 2000*:

- (a) the principal executive officer of the provider at the time the liability arose;
- (b) if there was a body (however described) that governed, managed or conducted the affairs of the provider at that time—each of the persons who were members of that body at that time.

**175 Giving information to relevant bodies**

*Giving information to government agencies, the Fund Manager etc.*

- (1) For the purposes of:
  - (a) promoting compliance with this Act and the national code; or
  - (b) assisting with the regulation of providers; or
  - (c) promoting compliance with the conditions of a particular student visa or visas, or of student visas generally; or
  - (d) facilitating the monitoring and control of immigration;the Secretary may give information obtained or received for the purposes of this Act to:

- (e) an agency of the Commonwealth, or of a State, that is responsible for or otherwise concerned with immigration or the regulation of providers; or
- (f) the Fund Manager; or
- (g) a tuition assurance scheme; or
- (h) a person specified in the regulations for the purposes of this paragraph.

Note: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

*Giving information to registered providers*

- (2) For the purposes of:
  - (a) promoting compliance with this Act and the national code; or
  - (b) promoting compliance with the conditions of a particular student visa or visas, or of student visas generally;
 the Secretary may give information relating to an accepted student's student visa to the registered provider for the accepted student.

## **176 Review of decisions**

- (1) An application may be made to the Administrative Appeals Tribunal for the review of:
  - (a) a decision that an approved provider should not be registered under section 9 or re-registered under section 9A; or
  - (aa) a decision to impose a condition on a provider's registration under section 14A; or
  - (ab) a decision not to notify a registered provider under subsection 27(1A); or
  - (b) a decision to take any action under section 83 or 88; or
  - (c) a decision not to give a notice under subsection 89(2) or 89A(2); or
  - (d) a decision not to give a notice under subsection 95(3).
- (2) If such a decision is made and a written notice of the decision is given to a person whose interests are affected by the decision, the notice must include:
  - (a) a statement to the effect that application may be made to the Administrative Appeals Tribunal under the *Administrative Appeals Tribunal Act 1975* for review of the decision; and

**Section 176A**

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- (b) if the person is entitled to reasons for the decision under section 28 of that Act—a statement to the effect that the person may request, under that section, a statement that includes reasons for the decision.
- (3) A breach of subsection (2) does not affect the validity of the decision concerned.

**176A Review of this Act**

The Minister must cause an independent evaluation of the operation of this Act to be commenced within 3 years after the day on which this Act receives the Royal Assent.

**177 Regulations**

The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

**Table of Acts****Notes to the *Education Services for Overseas Students Act 2000*****Note 1**

The *Education Services for Overseas Students Act 2000* as shown in this compilation comprises Act No. 164, 2000 amended as indicated in the Tables below.

For all relevant information pertaining to application, saving or transitional provisions *see* Table A.

**Table of Acts**

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Education Services for Overseas Students Act 2000</i>	164, 2000	21 Dec 2000	Ss. 1 and 2: Royal Assent Remainder: 4 June 2001 ( <i>see Gazette</i> 2001, No. S175)	
<i>Education Services for Overseas Students (Consequential and Transitional) Act 2000</i>	166, 2000	21 Dec 2000	Schedule 4: (a)	—
<i>Corporations (Repeals, Consequential and Transitionals) Act 2001</i>	55, 2001	28 June 2001	Schedule 3 (items 168–171): 15 July 2001 ( <i>see Gazette</i> 2001, No. S285) (b)	—
<i>Cybercrime Act 2001</i>	161, 2001	1 Oct 2001	21 Dec 2001 ( <i>see Gazette</i> 2001, No. S529)	—
<i>Education Services for Overseas Students Amendment Act 2002</i>	101, 2002	10 Nov 2002	11 Nov 2002	Sch. 1 (items 20, 23, 27)
<i>Education Services for Overseas Students Amendment Act 2005</i>	157, 2005	19 Dec 2005	Schedule 1: 20 Dec 2005 ( <i>see s. 2(1)</i> ) Schedule 2: 20 Dec 2005 Remainder: Royal Assent	Sch. 1 (item 4)
<i>Education Services for Overseas Students Legislation Amendment (2006 Measures No. 1) Act 2006</i>	143, 2006	6 Dec 2006	1 Jan 2007	Sch. 1 (items 37, 38)

**Table of Acts**

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Education Services for Overseas Students Legislation Amendment (2006 Measures No. 2) Act 2006</i>	144, 2006	6 Dec 2006	Schedule 1, Schedule 2 (item 1), Schedule 3 and Schedule 4: 1 Jan 2007 Schedule 2 (items 2–7): 1 July 2007 Remainder: Royal Assent	Sch. 1 (item 2), Sch. 2 (item 3), Sch. 3 (items 3, 5, 7, 11) and Sch. 4 (item 11)
<i>Private Health Insurance (Transitional Provisions and Consequential Amendments) Act 2007</i>	32, 2007	30 Mar 2007	Schedule 2 (item 9): 1 Apr 2007 (see s. 2(1))	—
<i>Education Services for Overseas Students Legislation Amendment Act 2007</i>	70, 2007	28 May 2007	Schedule 1: 1 July 2007 Remainder: Royal Assent	Sch. 1 (item 23)
<i>Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008</i>	144, 2008	9 Dec 2008	Schedule 5 (items 1–5): 10 Dec 2008	—
<i>Education Services for Overseas Students Amendment (Re-registration of Providers and Other Measures) Act 2010</i>	10, 2010	3 Mar 2010	Schedule 1 (items 1–26, 31) and Schedule 2: Royal Assent	Sch. 1 (item 31)



**Act Notes**

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(a) The *Education Services for Overseas Students Act 2000* was amended by Schedule 4 only of the *Education Services for Overseas Students (Consequential and Transitional) Act 2000*, subsections 2(2) and (3) of which provide as follows:

(2) Item 1 of Schedule 4 commences at the later of:

- (a) the time when Parts 4 to 10 of the Act that establishes the Administrative Review Tribunal commence; and
- (b) immediately after the commencement of section 5 of the *Education Services for Overseas Students Act 2000*.

Note: The Act that establishes the Administrative Review Tribunal is either the *Administrative Review Tribunal Act 2000* or the *Administrative Review Tribunal Act 2001*.

(3) The rest of Schedule 4 commences at the later of:

- (a) the time when Parts 4 to 10 of the Act that establishes the Administrative Review Tribunal commence; and
- (b) immediately after the commencement of section 176 of the *Education Services for Overseas Students Act 2000*.

The *Administrative Review Tribunal Bill* was not enacted. Therefore these amendments did not commence.

(b) The *Education Services for Overseas Students Act 2000* was amended by Schedule 3 (items 168–171) only of the *Corporations (Repeals, Consequential and Transitional) Act 2001*, subsection 2(3) of which provides as follows:

(3) Subject to subsections (4) to (10), Schedule 3 commences, or is taken to have commenced, at the same time as the *Corporations Act 2001*.



**Table of Amendments****Table of Amendments**

ad. = added or inserted   am. = amended   rep. = repealed   rs. = repealed and substituted

Provision affected	How affected
<b>Part 1</b>	
S. 4A .....	ad. No. 70, 2007
S. 4B .....	ad. No. 70, 2007 am. No. 10, 2010
S. 5 .....	am. No. 101, 2002; No. 157, 2005; Nos. 143 and 144, 2006; No. 70, 2007; No. 10, 2010
Subhead. to s. 6(7).....	rs. No. 144, 2008
S. 6 .....	am. No. 55, 2001; No. 144, 2008
S. 7 .....	am. No. 32, 2007
<b>Part 2</b>	
S. 8 .....	am. No. 101, 2002; No. 70, 2007
Note 1 to s. 8(1) .....	am. No. 70, 2007
Subhead. to s. 9(1).....	ad. No. 143, 2006
Subhead. to s. 9(2).....	ad. No. 143, 2006
Subhead. to s. 9(5).....	ad. No. 143, 2006 rep. No. 10, 2010
S. 9 .....	am. No. 55, 2001; No. 101, 2002; No. 157, 2005; Nos. 143 and 144, 2006; No. 70, 2007; No. 10, 2010
Note to s. 9(2)(d) .....	am. No. 101, 2002 rs. No. 10, 2010
Ss. 9A, 9B .....	ad. No. 10, 2010
S. 10 .....	am. No. 70, 2007; No. 10, 2010
S. 11 .....	am. No. 101, 2002; No. 143, 2006
S. 12 .....	rs. No. 143, 2006
Note 1 to s. 12 .....	am. No. 10, 2010
Heading to s. 14 .....	am. No. 101, 2002; No. 10, 2010
S. 14 .....	am. No. 101, 2002; No. 10, 2010
S. 14A .....	ad. No. 10, 2010
<b>Part 3</b>	
<b>Division 1</b>	
S. 16 .....	rs. No. 157, 2005
Heading to s. 17 .....	am. No. 143, 2006
S. 17 .....	am. No. 101, 2002; No. 143, 2006
Heading to s. 18 .....	rs. No. 157, 2005 am. No. 143, 2006
S. 18 .....	am. No. 157, 2005; No. 143, 2006
S. 19 .....	am. No. 144, 2006
S. 20 .....	am. No. 144, 2006; No. 70, 2007
S. 21A .....	ad. No. 10, 2010
S. 22 .....	am. No. 143, 2006

**Table of Amendments**

ad. = added or inserted   am. = amended   rep. = repealed   rs. = repealed and substituted

Provision affected	How affected
Note 2 to s. 23.....	rs. No. 143, 2006
Note 1 to s. 26(3) .....	am. No. 101, 2002
<b>Division 2</b>	
S. 27 .....	am. No. 144, 2006; No. 10, 2010
Heading to s. 28.....	am. No. 70, 2007
S. 28.....	am. No. 101, 2002; No. 144, 2006; No. 70, 2007
S. 29.....	am. No. 70, 2007
S. 30.....	am. No. 101, 2002
S. 31 .....	rs. No. 143, 2006 am. No. 10, 2010
Heading to s. 32.....	am. No. 143, 2006
S. 32.....	am. No. 143, 2006
<b>Part 4</b>	
S. 33.....	am. No. 157, 2005; No. 144, 2006
S. 35.....	rep. No. 144, 2006
S. 36.....	am. No. 144, 2006
S. 37.....	rep. No. 144, 2006
S. 39.....	rep. No. 144, 2006
Note to s. 40.....	am. No. 10, 2010
S. 41.....	am. No. 144, 2006
S. 42.....	rep. No. 144, 2006
S. 43.....	am. No. 70, 2007
<b>Part 5</b>	
<b>Division 4</b>	
<b>Subdivision A</b>	
S. 60.....	am. No. 143, 2006
Note 1 to s. 63(1) .....	am. No. 10, 2010
S. 64.....	rs. No. 10, 2010
Note to s. 65(2) .....	am. No. 10, 2010
<b>Subdivision B</b>	
Note to s. 66(4) .....	am. No. 10, 2010
Note to s. 67(2) .....	am. No. 10, 2010
Note to s. 69(3) .....	am. No. 10, 2010
<b>Subdivision C</b>	
S. 74A .....	ad. No. 10, 2010
<b>Division 5</b>	
S. 76.....	am. No. 101, 2002; Nos. 143 and 144, 2006; No. 10, 2010
Note to s. 76(1) .....	ad. No. 143, 2006 rep. No. 10, 2010
Notes 1, 2 to s. 76(1).....	ad. No. 10, 2010
S. 77 .....	am. No. 101, 2002; No. 144, 2006
Note to s. 77(1) .....	ad. No. 10, 2010

**Table of Amendments**

ad. = added or inserted   am. = amended   rep. = repealed   rs. = repealed and substituted

Provision affected	How affected
S. 77A .....	ad. No. 144, 2006
Heading to s. 78 .....	rs. No. 101, 2002
S. 78 .....	am. No. 101, 2002
<b>Division 6</b>	
S. 80 .....	am. No. 55, 2001
S. 80A .....	ad. No. 10, 2010
<b>Part 6</b>	
<b>Division 1</b>	
<b>Subdivision A</b>	
Subhead. to s. 83(1) .....	ad. No. 143, 2006
Subhead. to s. 83(3) .....	ad. No. 143, 2006
Subhead. to s. 83(4) .....	ad. No. 143, 2006
S. 83 .....	am. No. 101, 2002; No. 143, 2006; No. 10, 2010
Heading to Subdiv. B .....	rep. No. 101, 2002
of Div. 1 of Part 6	
S. 87 .....	rep. No. 101, 2002
S. 88 .....	am. No. 70, 2007
<b>Subdivision C</b>	
S. 89 .....	am. No. 143, 2006
S. 89A .....	ad. No. 143, 2006 am. No. 10, 2010
S. 90 .....	rs. No. 143, 2006
Ss. 92A, 92B .....	ad. No. 10, 2010
<b>Subdivision D</b>	
S. 93 .....	am. No. 101, 2002; No. 143, 2006; No. 10, 2010
S. 94 .....	rs. No. 143, 2006 am. No. 10, 2010
S. 95 .....	rs. No. 101, 2002 am. No. 10, 2010
S. 96 .....	am. No. 101, 2002
<b>Division 3</b>	
S. 104 .....	am. No. 144, 2006
S. 107 .....	am. No. 70, 2007
Note 2 to s. 109(5) .....	rs. No. 161, 2001
<b>Part 8</b>	
Subhead. to s. 171(5) .....	ad. No. 143, 2006
S. 171 .....	am. No. 143, 2006
S. 172 .....	am. No. 143, 2006; No. 70, 2007
Note to s. 172(1) .....	ad. No. 143, 2006
S. 173 .....	am. No. 143, 2006
Subhead. to s. 175(1) .....	am. No. 143, 2006
S. 175 .....	am. No. 143, 2006
S. 176 .....	am. No. 101, 2002; No. 143, 2006; No. 10, 2010

**Table A**

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**Table A**

**Application, saving or transitional provisions**

*Education Services for Overseas Students Amendment Act 2002*  
(No. 101, 2002)

**Schedule 1**

**20 Application of items 17, 18 and 19**

The amendments made by items 17, 18 and 19 apply to any action taken after the items commence (irrespective of when the conduct, or the situation, that results in the action occurred).

**23 Saving suspensions under section 87**

The repeal of section 87 of the *Education Services for Overseas Students Act 2000* by item 22 does not affect the suspension of a registered provider's registration:

- (a) that was done under that section; and
- (b) that is in force when the item commences.

**27 Application of items 24, 25 and 26**

The amendments made by items 24, 25 and 26 apply to any decision to take action that is made after the items commence (irrespective of when the conduct, or the situation, that results in the decision to take the action occurred).

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*Education Services for Overseas Students Amendment Act 2005* (No. 157, 2005)

**Schedule 1**

**4 Application of items 1 to 3**

A Table C provider (within the meaning of the *Higher Education Support Act 2003*) does not breach its obligations under the national code established under Part 4 of the *Education Services for Overseas Students Act 2000* merely because the provider is not a resident of Australia.

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*Education Services for Overseas Students Legislation Amendment (2006 Measures No. 1) Act 2006* (No. 143, 2006)

**Schedule 1**

**37 Application**

- (1) The amendments:
- (a) of the *Education Services for Overseas Students Act 2000* made by items 2, 3, 4, 8, 30, 31 and 33 of this Schedule; and
  - (b) of the *Education Services for Overseas Students (Registration Charges) Act 1997* made by item 36 of this Schedule;
- do not apply to a liability to pay the initial registration charge or a reinstatement fee if the liability existed immediately before the commencement of this item.
- (2) The amendments of the *Education Services for Overseas Students Act 2000* made by items 9, 10, 11 and 12 of this Schedule apply to a provider becoming aware as mentioned in subsection 17(1) of that Act (as amended by this Schedule) before, on or after the commencement of this item.
- (3) The amendments of the *Education Services for Overseas Students Act 2000* made by items 25, 27 and 35 of this Schedule, so far as they relate to section 89 of that Act, do not apply to suspensions under that section that happened before the commencement of this item. To avoid doubt, subsection 176(1) of that Act, as in force immediately before that commencement, continues to apply to suspensions under section 89 of that Act that happened before that commencement.
- (4) The amendment of the *Education Services for Overseas Students Act 2000* made by item 26 of this Schedule, so far as it relates to paragraph 90(1)(b) of that Act, applies to a failure to pay an annual registration charge that:
- (a) becomes due for payment on or after the commencement of this item; or
  - (b) became due for payment before the commencement of this item and remained unpaid immediately before that commencement.

## Table A

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- (5) The amendment of the *Education Services for Overseas Students Act 2000* made by item 26 of this Schedule, so far as it relates to subsection 90(2) of that Act, applies to suspensions under subsection 90(1) of that Act that happen on or after the commencement of this item.

### 38 Saving

- (1) Regulations:
- (a) made for the purposes of paragraph 22(1)(a) of the *Education Services for Overseas Students Act 2000*; and
  - (b) that are in force immediately before the commencement of this item;
- have effect from that commencement as if they had been made for the purposes of subparagraph 22(1)(a)(i) of that Act after that commencement.
- (2) The amendments made by items 14 and 16 of this Schedule do not affect the continuity of:
- (a) rules referred to in paragraph 22(1)(b) of the *Education Services for Overseas Students Act 2000*; or
  - (b) regulations made for the purposes of subsection 22(3) of that Act;
- that are in force immediately before the commencement of this item.
- (3) The amendment made by item 21 of this Schedule does not affect the continuity of determinations made under subsection 76(1) of the *Education Services for Overseas Students Act 2000* that are in force immediately before the commencement of this item.

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*Education Services for Overseas Students Legislation Amendment (2006 Measures No. 2) Act 2006* (No. 144, 2006)

## Schedule 1

### 2 Application

Paragraph 9(2)(ba) of the *Education Services for Overseas Students Act 2000* applies in relation to the registration of providers on and after the commencement of this Schedule.



## **Schedule 2**

### **3 Application**

The amendment of subsections 19(2) and 20(1) of the *Education Services for Overseas Students Act 2000* made by this Part applies to breaches of conditions of visas that occur on or after the commencement of this Part.

## **Schedule 3**

### **3 Application**

The amendments of section 27 of the *Education Services for Overseas Students Act 2000* by this Schedule apply to refusals because of acts and omissions by overseas students and intending overseas students occurring on or after the commencement of this Schedule.

### **5 Application**

Section 28 of the *Education Services for Overseas Students Act 2000* as amended by this Schedule applies in relation to agreements made on or after the commencement of this Schedule.

### **7 Application**

Subsection 76(1A) of the *Education Services for Overseas Students Act 2000* applies in relation to default days that are on or after the commencement of this Schedule.

### **11 Application**

Subsection 77(1A) and section 77A of the *Education Services for Overseas Students Act 2000* apply in relation to calls made on the Fund on or after the commencement of this Schedule.

## **Schedule 4**

### **11 Transitional provision**

The national code that was in force immediately before the commencement of this Schedule continues in force after that commencement as if it had been made under Part 4 of the *Education Services for Overseas Students Act 2000* as amended by this Schedule.

**Table A**

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*Education Services for Overseas Students Legislation Amendment Act 2007*  
(No. 70, 2007)

**Schedule 1**

**23 Application of item 22**

The amendment made by item 22 applies in relation to annual Fund contribution payable in respect of the calendar year commencing on 1 January 2008.

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*Education Services for Overseas Students Amendment (Re-registration of Providers and Other Measures) Act 2010* (No. 10, 2010)

**Schedule 1**

**31 Application of amendments of section 9 to pending matters**

If:

- (a) a designated authority for a State made a recommendation relating to an approved provider under subsection 9(1) of the *Education Services for Overseas Students Act 2000* before the commencement of this item; and
- (b) the Secretary did not make a decision, before that commencement, whether the provider should be registered under section 9 of that Act;

that section as amended by this Act applies to the making of the decision whether to register the provider under that section.