



**Department of Education, Employment and
Workplace Relations and
Department of Industry, Innovation, Science,
Research and Tertiary Education**

**ADMINISTRATION OF STUDENT REFUNDS UNDER THE
*EDUCATION SERVICES FOR OVERSEAS STUDENTS ACT 2000***

December 2012

Report by the Commonwealth Ombudsman under the *Ombudsman Act 1976*

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Reports by the Ombudsman

Under the *Ombudsman Act 1976* (Cth), the Commonwealth Ombudsman investigates the administrative actions of Australian Government agencies and officers. An investigation can be conducted as a result of a complaint or on the initiative (or own motion) of the Ombudsman.

The *Ombudsman Act 1976* considers six other roles of the Commonwealth Ombudsman – the role of the Overseas Student Ombudsman, to investigate complaints about education services for overseas students; Defence Force Ombudsman, to investigate action arising from the service of a member of the Australian Defence Force; the role of Immigration Ombudsman, to investigate action taken in relation to immigration (including immigration detention); the role of Postal Industry Ombudsman, to investigate complaints against private postal operators; the role of Taxation Ombudsman, to investigate action taken by the Australian Taxation Office; and the role of Law Enforcement Ombudsman, to investigate conduct and practices of the Australian Federal Police (AFP) and its members. Complaints about the conduct of AFP officers prior to 2007 are dealt with under the *Complaints (Australian Federal Police) Act 1981* (Cth).

Most complaints to the Ombudsman are resolved without the need for a formal report. The Ombudsman can, however, culminate an investigation by preparing a report that contains the opinions and recommendations of the Ombudsman. A report can be prepared if the Ombudsman is of the opinion that the administrative action under investigation was unlawful, unreasonable, unjust, oppressive or improperly discriminatory. A report can also be prepared to describe an investigation, including any conclusions drawn from it, even if the Ombudsman has made no adverse findings.

A report by the Ombudsman is forwarded to the agency concerned and the responsible minister. If the recommendations in the report are not accepted, the Ombudsman can choose to furnish the report to the Prime Minister of Parliament.

These reports are not always made publicly available. The Ombudsman is subject to statutory secrecy provisions, and for reasons of privacy, confidentiality or privilege it may be inappropriate to publish all or part of a report. Nevertheless, to the extent possible, reports by the Ombudsman are published in full or in an abridged version.

Copies or summaries of the reports are usually made available on the Ombudsman website at www.ombudsman.gov.au. Commencing in 2004, the reports prepared by the Ombudsman (in each of the roles mentioned above) are sequenced into a single annual series of reports.

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EXECUTIVE SUMMARY

In 2011 the Commonwealth Ombudsman office investigated a complaint from an overseas student about a decision of the Education Services for Overseas Students (ESOS) Assurance Fund Manager. We found the decision flawed and contrary to the requirements of the *Education Services for Overseas Students Act 2000* (the ESOS Act). As a result of this investigation, the fund manager conducted a review of 480 payments and subsequently paid out \$2.1 million in refunds to some 308 overseas students. On its own motion, the Commonwealth Ombudsman investigated the department's¹ administration of the ESOS Act.

The original complaint and this investigation shows that the pre-July 2012 tuition protection scheme for overseas students was not always administered in accordance with the requirements of the ESOS Act, and that significant problems with the payment of refunds could have been avoided or at least identified earlier by more active oversight by the responsible department. Importantly, there was inadequate guidance for decision makers on the implementation of the ESOS Act, and this allowed systemic errors to occur for over a two and a half year period from 2008 to 2010.

Under the pre-July 2012 scheme, overseas students were entitled to a full refund of course money paid to a defaulting provider if they were not placed in a suitable alternative course. However, this is not how the scheme was implemented in all cases. The fund manager routinely deducted amounts from refunds, even though the affected student had not enrolled in a suitable alternative course at the time. Under the new tuition protection scheme (post-July 2012), overseas students will no longer be entitled to a full refund of course money if they are not placed in a suitable alternative course.

As part of the fund manager's review of 480 payments, we found that it had reduced refund amounts when overseas students were enrolled in new courses which were not on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS). What exactly constitutes a 'suitable alternative course' was not defined in the ESOS Act under the old scheme, but it is defined in the new scheme post-July 2012, and the new definition means that the provider and the course must be on CRICOS.

Our investigation of the department's administration of the ESOS Act highlights deficiencies in the way it monitored the fund manager's compliance with the ESOS Act. The department observed hundreds of decisions being made by the Fund Manager which did not comply with the ESOS Act and which were to the detriment of overseas students. The decisions were however corrected when this office brought the matter to the attention of the department and fund manager. We acknowledge that the department acted promptly in working with the fund manager to correct the issues we raised in relation to an individual complaint and in addressing the systemic issues arising. This office and the fund manager have different interpretations of the ESOS Act in regards to calculating the amount to be refunded and whether it included material costs and health insurance. Recent amendments to the ESOS Act have clarified this matter, but perhaps more could be done to avoid doubt.

¹ Until December 2011, the ESOS Act was administered by the Department of Education, Employment and Workplace Relations. It is now administered by the Department of Industry, Innovation, Science, Research and Tertiary Education.

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Following our investigation, the department made changes in January 2011 to the way it monitored the fund manager. Notably, it ceased its involvement in determining whether or not overseas students could access a review of the fund manager's decision. The department says that this decision was consistent with legal advice it received about how it should conduct its relationship with the fund manager. However, we believe that the department had a role as lead policy agency in monitoring legislative and contractual compliance. We believe that a more active approach to oversight of the fund manager by the department and a more active approach to handling legal errors was both legally and administratively possible. Taking such an approach would have helped prevent systemic problems identified by our investigation, and will help prevent similar problems in the future.

PART 1—INTRODUCTION

1.1 Today, there are approximately 307,000² overseas students studying in Australia. Thousands of these students, past and present, have been affected by education providers defaulting on their obligations. Provider default affects the ability of students to gain the qualifications they seek and impacts upon Australia's international reputation. This in turn can affect the number of students entering Australia and the health of one of the country's largest industries.

1.2 As the Commonwealth Ombudsman, our office has jurisdiction over Australian Government agencies and its contracted service providers and other prescribed authorities, including the Department of Education, Employment and Workplace Relations (DEEWR), the Department of Industry, Innovation, Science, Research and Tertiary Education (DIISRTE) and the fund manager. Since April 2011 the Commonwealth Ombudsman has also been the Overseas Students Ombudsman. The Overseas Students Ombudsman investigates complaints about the actions of registered private education providers in relation to intending, accepted and former overseas students. We seek to ensure that overseas students are treated fairly by private education providers.

1.3 In 2011 the Commonwealth Ombudsman's Office investigated a complaint from an overseas student involving DEEWR and a decision of the fund manager, PricewaterhouseCoopers (PwC). As a result of this investigation, the fund manager conducted a review of payments made in similar circumstances and subsequently paid out \$2.1 million in refunds that had previously been withheld to some 308 overseas students.. We acknowledge the prompt action taken by the department and fund manager to address this systemic problem.

1.4 On its own motion, the Commonwealth Ombudsman began, on 17 June 2011, an investigation into the department's administration of the ESOS Act. The investigation focused on the department's responsibilities in relation to the fund manager; the fund manager's decision making under the ESOS Act; and the fund manager's review of 480 cases during 2011. We sought to ensure that corrective action was consistent with the ESOS Act.

1.5 This report discusses the findings of that investigation, highlights weaknesses in the administration of the scheme and helps to identify areas within the new Tuition Protection Service (TPS) (following changes to the *Education Services for Overseas Students Act 2000* on 1 July 2012) where the framework can be strengthened. We aim to share the lessons learnt to assist those agencies and authorities responsible for administering the ESOS Act and providing tuition protection for overseas students to improve their services and decision making.

1.6 In doing so, we acknowledge that the department's role in administering the ESOS Act is far broader than its role in relation to the ESOS Assurance Fund (the fund) and the activities of the fund manager, which are the focus of this investigation. We also acknowledge the considerable changes to the legislation over the last year aimed at addressing weaknesses in the tuition protection framework.

² On 30 June 2012 there were 307,050 international student visa holders in Australia: Department of Immigration and Citizenship, *Student visa program quarterly report, Quarter ending at 30 June 2012*

PART 2 –BACKGROUND

The tuition protection framework before July 2012

2.1 In 2000 the ESOS Act was amended to create the ESOS Assurance Fund which was intended to:

...provide assurance through a collective responsibility that did not depend on the honesty and good financial management of the provider. In the case of provider collapse, the assurance fund will arrange and (if necessary) pay for the tuition of students or refund students from the fund where alternative tuition was not possible.³

And to:

...ensure that Australia's reputation remains one of integrity and quality. This is important because the failure of just a few providers to assure student fees and tuition has the ability to damage the image of Australia as a desired education destination, knock back student numbers, spark international relations issues with source countries of students affected, involve Commonwealth bailouts using taxpayers money and place further community pressure on government to more tightly control inflows and the movements of overseas students to Australia.⁴

2.2 While the fund was established as an industry fund based on provider contributions, the Australian Government has also made financial contributions to the fund. The fees of the fund manager were paid out of the fund in accordance with the ESOS Act.

2.3 The ESOS Act provided that when an education provider (private or public) closes, or ceases to offer a course to overseas students, the provider has obligations to current or intending overseas students to either pay the students the total of the course money they received in respect of the students, or arrange for the students to be offered places in suitable alternative courses. The refund scheme was designed to ensure that students displaced from a course conducted by a provider that is a member of a Tuition Assurance Scheme (TAS), could be quickly relocated to studies in an alternative course with another provider belonging to the same TAS, at no extra cost to the student.

2.4 If the defaulting provider did not arrange for the student to be placed in a suitable alternative course (or the student did not accept the provider's offer of a place in an alternative course) and the provider failed to pay the student a refund of their course money, the TAS arranged for the student to be offered a place in a suitable alternative course. The student could also choose to enrol themselves in a new course.

2.5 If the TAS was unable to, or did not, offer the student a place in a suitable alternative course, a call was made on the fund and the fund manager was required to consult with the current or intending overseas student and place him or her in a course that the fund manager regarded as a suitable alternative course. If the student was not placed in a suitable alternative course or did not otherwise enrol themselves, the fund manager was obliged to pay from the fund a full refund of course monies to the student.

³ ESOS Bill 2000 Explanatory Memorandum.

⁴ Ibid.

2.6 If the overseas student or intending overseas student was placed in a suitable alternative course by the fund manager, with the student's assistance, in accordance with s 77(1)(a) of the ESOS Act, the fund manager could reduce the refund amount at the time of its decision. This would be based on information from the new provider about academic credit or recognition for prior learning, under s 77(1A) of the ESOS Act and in accordance with the formula prescribed in the Education Services for Overseas Students Regulations 2001 (the ESOS Regulations).

2.7 The department⁵ is responsible for the administration of the ESOS Act. The *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007* (the National Code) is a legislative instrument under the ESOS Act. It defines the department's role, which includes supporting national consistency and policy development to assist the consistent interpretation and application of the ESOS framework. The National Code says that the department also monitors compliance with the ESOS Act and the standards in the code itself, particularly focusing on student visa integrity and consumer protection.

The tuition protection framework after July 2012

2.8 Amendments to the ESOS Act on 1 July 2012 significantly changed the tuition protection framework. The amendments abolished the ESOS Assurance Fund and the fund manager and created a new scheme referred to as the Tuition Protection Service (TPS).

2.9 The responsibilities of the new TPS Director are similar to those of the former fund manager. The functions of the TPS Director include reporting to the Minister for Tertiary Education, Skills, Science and Research on the operation of the TPS and the financial status of the new Overseas Students Tuition Fund (OSTF), which replaced the ESOS Assurance Fund. The TPS Director, with the assistance of the TPS Administrator, also administers a placement facility for overseas students affected by provider default and assesses calls on the OSTF. The TPS Director has a contract with PwC to deliver the TPS Administrator role and responsibilities. However, the TPS Director cannot delegate his or her decision-making power, and must make all refund decisions personally.

2.10 The TPS Director is remunerated by the Australian Government, but the operating costs of the TPS Administrator are paid by the OSTF. The TPS Director is supported by a departmental secretariat, which is funded by the Australian Government. The OSTF is an industry fund, and while it is financially supported in the first instance by the Australian Government, the intention is for the OSTF to rely on an industry sourced TPS levy to fund its operations.

⁵ Now the Department of Industry, Innovation, Science, Research and Tertiary Education (DIISRTE), given that as of December 2011 DEEWR is no longer responsible for administering the ESOS Act.

2.11 The TPS Administrator is responsible for:

- case management of any outstanding caseload of students affected by a registered provider default up to and including 30 June 2012
- case management of students affected by a registered provider default from 1 July 2012 onwards
- operational support as primary user of the TPS Online Placement System
- provision of automated reports using the TPS Online Placement System
- development and maintenance of an integrated service delivery plan.

2.12 The TPS Advisory Board advises the TPS Director on the setting of TPS levies. The Advisory Board comprises representatives of three Australian Government departments (the Department of Industry, Innovation, Science, Research and Tertiary Education, the Department of Finance and Deregulation, and the Department of Immigration and Citizenship), the Australian Government Actuary, the Australian Prudential Regulation Authority, and seven other members appointed by the minister.

2.13 Defaulting providers continue to be obliged to offer their students placement in a suitable alternative course or pay a refund. However, students are no longer entitled to a full refund of pre-paid course money if they are not placed in a suitable alternative course after a provider defaults. Students are only entitled to the unspent portion of their course fees.

2.14 A range of new timeframes for reporting and penalties for non-compliance are also applied to defaulting providers. This includes the requirement that providers place students in an alternative course at their expense, and must make those arrangements or pay the refund within 14 days. There are also new limits on the amount of pre-paid tuition fees a provider can collect up-front. The new scheme removes the involvement of a TAS in the placement of overseas students in suitable alternative courses after provider default.

2.15 Where the defaulting provider fails to place a student in a suitable alternative course, those students have 30 days (after the 14 day provider obligation period) to enrol in a new course using a student placement facility. This facility is offered online and allows students to research available courses and determine for themselves which course best meets their needs.

2.16 If a student accepts placement in an alternative course through the student placement facility, the TPS Director pays the registered provider of that course the student's refund entitlement. If a student does not accept or otherwise identify an alternative provider following provider default, and the provider does not refund the unspent pre-paid tuition fees, the TPS Director will refund that money from the OSTF.

PART 3 – INVESTIGATION

3.1 In 2011 the Ombudsman's office investigated a complaint from an overseas student, Mr A (see case details at paragraph 3.6) about the actions of DEEWR and a decision of the fund manager. We found that the fund manager's decision had not been made in accordance with the provisions of the ESOS Act. The student received a partial refund of course money he had paid to a defaulting provider instead of the full refund he was entitled to receive as a consequence of not being placed in a suitable alternative course.

3.2 As a result of this investigation, the fund manager conducted a review of payments made to other overseas students in similar circumstances to the complainant (that is, where the provider had defaulted, the students had not been placed in a suitable alternative course and their refund was reduced) to determine whether the refunds had been correctly assessed. Four hundred and eighty cases were identified and reviewed. As a consequence of the review the following four categories of cases were identified:

- 107 students who had not enrolled in another course received a top-up amount to equal a full refund (Category One).
- 84 students were not given a further refund, because their refunds had been reduced for reasons other than the application of s 77(1A) of the ESOS Act. This section of the Act allows deductions to be made to the refund where the student is enrolled in a suitable alternative course and given academic credit by a new provider for studies undertaken with the defaulting provider (Category Two).
- 88 students with new providers did not get an additional refund because the new provider assessed the outstanding work to complete their course as equal to or less than the original assessment made by the fund manager (Category Three).
- 201 students with new providers received an additional refund because the amount of work required to complete their course was greater than originally assessed by the fund manager (but the refund they received did not amount to a total refund) (Category Four).

3.3 We asked the department and the fund manager for information on the fund manager's review of 480 cases and subsequent new decisions. We also requested, under s 9 of the *Ombudsman Act 1976*, information about the fund manager's use of discretion in determining suitable alternative courses for overseas students and for the reasons for certain decisions. We asked the department whether compensation had been considered for those students whose full refund was delayed, for up to two and a half years in some cases.

3.4 The fund manager provided copies of decisions where a partial refund was paid as we requested, plus comments and advice relevant to those decisions. The Ombudsman's office reviewed this material and the issues raised in these cases are discussed below.

Refunds

Partial refunds

3.5 Under the pre-July 2012 tuition protection scheme, overseas students were entitled to a full refund of course money paid to a defaulting provider if they were not placed in a suitable alternative course. However, this is not how the fund manager implemented the scheme in all cases.

3.6 In 2011 the Ombudsman investigated the complaint of an overseas student, Mr A, whose education provider defaulted.

Mr A was studying with a flight school which closed part way through his studies. Mr A had paid the flight school \$49,000 for the course. Mr A was not placed in a suitable alternative course at the time the fund manager decided to pay him a partial refund of

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approximately \$32,500. The fund manager reduced the refund amount based on its estimation of the academic credit or recognition for prior learning which Mr A may be able to obtain in the future.

Mr A complained to the department about the decision of the fund manager and asked for a review of the fund manager's decision. He argued that, according to the ESOS Act, it was wrong for the fund manager to deduct money from his refund and that the flying hours documented in his log book were not relevant to the decision.

Mr A complained to the Ombudsman. We investigated the complaint against the department and suggested that the fund manager's decision had not been made in accordance with the refund provisions in the ESOS Act. The department liaised with the fund manager and asked the fund manager to reconsider its decision. The fund manager reconsidered the matter and made a new decision to pay the student a further \$16,500 so that his total refund was equal to the total amount of course money he had paid to the defaulting flight school.

3.7 In Mr A's case, the fund manager made its original determination based on refund rules that applied when it placed an overseas student in a suitable alternative course. If an overseas student was placed in a suitable alternative course, the fund manager was permitted to deduct from the refund the amount it had cost the student to undertake that part of a course for which the new provider was willing to give credit or recognition. In Mr A's case, the fund manager had not placed him in, and he had not himself enrolled in, a suitable alternative course, and Mr A was entitled to a full refund of the course money he had paid to the defaulting provider.

3.8 We note that until January 2011, the department received copies of all refund decisions made by the fund manager and assessed requests from overseas students for review of the Fund Manager's decisions. Around this time, the department obtained legal advice that it did not have a legislated responsibility for reviewing those decisions, and that it was necessary for the department to respect the statutory independence of the fund manager. We are concerned that there did not appear to be a mechanism for determining whether the fund was operating lawfully and as intended, apart from a services contract which the department monitored. We note that the department took prompt and proactive action to address the issues we raised in the initial complaint investigation and demonstrated its capacity to oversight the fund manager's administration.

3.9 During our discussions and meetings with the department, it was apparent that there was concern that students would gain a 'windfall' payment from the fund if full refunds were made. For example, if Mr A received a full refund of \$49,000 he could enrol in a new flying course at a future date, use his log book to gain academic credit and only have to pay for part of the new course. He would not have to pay the new provider for that portion of the course he had already completed or repay the fund, and would consequently be financially advantaged by the provider default.

3.10 It is not clear from the investigation why incorrect decisions to pay partial refunds were regularly made by the fund manager. The fund manager believes it was acting in compliance with the ESOS Act. The fund manager advised that there were competing tensions inherent in the ESOS Act in that there was a requirement for the fund manager to make refunds in certain circumstances and at the same time manage the fund in a way that ensured it was able to meet its liabilities. The department has advised that it did not at any stage of its administration of the ESOS Act direct, encourage, promote or recommend a breach of a legislative requirement under the ESOS Act. It appears, however, that the combination of competing

tensions and a lack of oversight contributed to decision-making that was inconsistent with the requirements of the ESOS Act over a period of two and a half years.

3.11 The department's preferred policy position for the granting of refunds is now in effect with the 1 July 2012 changes to the ESOS Act. Overseas students will no longer receive a full refund of course money if they are not enrolled in a suitable alternative course after a provider defaults. A catalyst for this change was the March 2010 report *Stronger, simpler, smarter ESOS: supporting international students* by the Hon Bruce Baird AM. The report recommended that the ESOS Act be amended to only refund the portion of the course not delivered or assessed when the provider fails to meet their obligation.⁶ This recommendation was based on the need to make the fund more financially viable, reduce the financial burden on defaulting providers to pay refunds, and reduce the burden of financial contributions providers have to pay to the fund.

3.12 In order for the new scheme to operate effectively and lawfully, the TPS Director will need to provide guidance to the TPS Administrator to support the processing of claims and the TPS Administrator's advice to the TPS Director in relation to refund decisions. However, in providing that guidance, the TPS Director must be careful to ensure that all guidance and advice is consistent with the legislation and does not limit the scope of the legislation or the discretion that the TPS Director may apply. If the department notices that the TPS Director's decisions are contrary to the requirements of the ESOS Act, the department should take necessary action to address any practices that are inconsistent with the legislation.

Costs to be refunded

3.13 In addition to the issue of partial refunds described in Mr A's case, this investigation also considered what costs can be included and excluded when calculating the refund entitlement. Under the pre-July 2012 scheme, if a call was made on the fund following default by a provider, under s 77(1) the fund manager was required to place the student in a suitable alternative course or, failing that, pay the student an amount equal to the amount that the provider would need to pay to meet its refund obligations. The amount the provider was required to pay was set out at s 29(1) of the ESOS Act and required the student be refunded:

- (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.

3.14 Section 7 of the ESOS Act defines 'course money' as money the provider receives for the course, including tuition fees, money the provider received to pay on the student's behalf to a private health insurer, and any other amount that the student had to pay the provider directly or indirectly in order to undertake the course.

3.15 The ESOS Regulations state at r 3.19, the amount to be subtracted from course money (in respect to cases where the provider defaults):

For paragraph 29(1)(b) of the Act, the amount for a student in the circumstances mentioned in subsection 27(1) of the Act is nil.

⁶ Baird, B 2010, *Stronger, simpler, smarter ESOS: supporting international students*, Commonwealth of Australia, recommendation 17a, p. 56.

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3.16 There is no provision for deducting monies paid for private health insurance or other expenses. Indeed, it is clear that these costs are part of the course money, which must be refunded.

3.17 Section 77(1A) stated that, where a student enrolls in a new course at their expense (rather than being placed in a course by the fund manager), the amount of refund to be paid may be reduced to recognise the reduced work required to complete the new course because of the study undertaken in the old course with the defaulting provider. The amount of the reduction is calculated using a formula contained within ESOS r 5.04, which states:

For subsection 77(1A) of the Act, the amount by which the refund is reduced is:

$$R = A \times B$$

where:

R is the amount by which the refund is reduced.

A is the amount paid by the student for the old course.

B is the reduction, expressed as a percentage, in the work required of the student in undertaking the new course, as a result of the student's work already undertaken in the old course.

3.18 Section 29(1) of the Act provides a base from which the calculation under ESOS r 5.04 is made. That base includes all course monies, including tuition fees; money the provider received to pay on the student's behalf to a private health insurer; and any other amount that the student had to pay the provider directly or indirectly in order to undertake the course, which would include course materials.

3.19 When analysing the fund manager's decisions we noted that where partial refunds were paid to students, the calculation did not include health insurance and course material costs as part of the base amount to be refunded under s 29(1) of the Act. The fund manager excluded the costs of health insurance and other costs from the calculation at r 5.04, explaining that:

Whilst section 7 of the ESOS Act includes material fees and private health insurance as a component of total course fees, the Fund Manager has determined that such amounts will not be refundable as the student has received the benefit of the fees as a result of studying and remaining in Australia.

3.20 The fund manager suggests that as s 77A(2)(c) of the ESOS Act sets out that the fund manager may request the provider of a new course to provide information in respect of the 'extent and monetary value of the reduction', this particular wording needs to be taken into account when assessing what costs to include or exclude. According to the fund manager this wording would indicate that the intent of the legislation was to take into account both course effort and monetary aspects in determining any reduction in refund payable. However, the fund manager has argued that neither the ESOS Act nor the ESOS Regulations provided specific direction on how the formula in r 5.04 was to be applied. We acknowledge that the provisions in question lacked specificity.

3.21 This office and the fund manager have different views on how refunds should have been calculated when the student had enrolled in a suitable alternative course. To illustrate the differences the following example calculations are provided.

Ombudsman understanding of provisions

Tuition fees	\$5000
Health insurance	\$200
Course material costs	\$300

Value of work recognised 20%

$$R = A \times B$$

$$R = \$5,500 \times 20\%$$

Refund \$4400

Fund manager understanding of provisions

Tuition fees	\$5000
Health insurance	\$200
Course material costs	\$300

Value of work recognised 20%

$$R = A \times B$$

$$R = \$5,000 \times 20\%$$

Refund \$4000

3.22 In our opinion the fund manager's approach to calculating the refund amount appears contrary to law, but determining the correct legal interpretation would be a matter for a court.

3.23 This lack of specificity about what amounts are included and what amounts are excluded has, in part, been addressed with the recent amendments to the ESOS Act and accompanying legislative instruments. The definition of tuition fees has changed and there is now a formula for calculating the amount of unspent pre-paid fees when a provider defaults. However, the new s 7 of the ESOS Act refers to tuition fees as fees that are directly related to the provision of a course. While this will exclude health insurance costs – health insurance costs are listed separately to tuition fees – it is not clear whether tuition fees include course material costs or not. We note that regulations can be made to include or exclude any class of fees, and these should be put in place as soon as possible to provide clear guidance on this issue for future cases where a refund decision is required. It would provide consistency in the industry and ensure fairness and transparency for students in relation to anticipated refunds. The department has advised that it is currently exploring the need for clarification of 'tuition fees' beyond the new definition at s 7 of the Act. The TPS Director has also advised that written agreements between students and registered providers will provide some guidance on what constitutes tuition fees.

Recommendation 1

3.24 To ensure consistency and clarity in future refund decisions, the Ombudsman recommends that:

- the department initiate changes to ESOS Regulations to clarify the definition of ‘tuition fees’ under s 7 of the ESOS Act, in particular to clarify whether material costs are included or excluded.

Suitable alternative course

Defining ‘suitable alternative course’

3.25 Under the pre-July 2012 tuition protection scheme, when a call was made on the fund, the fund Manager was required, as soon as practicable, to consult with the overseas student or intending overseas student and place him or her in a course that the fund manager regarded as a suitable alternative course.⁷

3.26 The fund manager’s view of this function is that:

- it was obliged to consult with the student about placement in a suitable alternative course
- when making an assessment, it took into account the type of course, the level of qualification, and the duration, location and cost of the alternative course, as compared with the pre-July 2012 course
- the relative importance of each of these factors was dependent on the specific circumstances of each student
- if an alternative course was considered suitable by the fund manager, the course was offered to the student
- in other cases, students (in consultation with the fund manager) located a course that best met their specific circumstances and the manager paid to place the student with the new provider if it agreed that the course was a suitable alternative
- if a suitable alternative course was not available, the student would be assessed for a refund.

3.27 The fund manager developed these principles to guide its decisions in relation to consultations with overseas students and intending overseas students. As the term ‘suitable alternative course’ was not defined in the ESOS Act, the ESOS Regulations or any legislative instrument, the fund manager had discretion to decide what constituted a suitable alternative course.

3.28 Recent amendments to the ESOS Act continue to use the term ‘suitable alternative course’. We note that s 49(6) of the ESOS Act states:

The Minister may, by legislative instrument, specify criteria to be applied in considering whether a particular course is a suitable alternative course for the purposes of this Act.

3.29 We note that on 18 June 2012, the minister made a legislative instrument specifying the criteria to be applied in considering whether a particular course is a ‘suitable alternative course’, which the TPS Director will follow.

⁷ See s 77 of the ESOS Act (pre-June 2012 version).

3.30 The Ombudsman's view is that the decision-making processes of the fund manager would have been enhanced by guidance on what constitutes a suitable alternative course. It would have added transparency to the process and assisted students to understand their entitlements and obligations if their provider defaulted. We note that transparency for what constitutes a suitable alternative course has now been provided for the new scheme.

Student consultation

3.31 When a call was made on the fund, under s 77(1)(a) of the ESOS Act the fund manager was required, as a first step, to consult with the overseas student or intending overseas student and attempt to place him or her in a course that the fund manager regards as a suitable alternative course.

3.32 However, the limitation of the fund manager's capacity to consult was recognised. The department's fact sheet 'TPS and Other Measures Amendment Bill 2011 – Questions and Answers' originally stated, in respect to the benefits of the new scheme:

Under the new TPS framework the primary responsibility for placement activity will move to the student themselves. This will mean that unlike in the existing system where a student has very little if any input into their placement with a new provider through either a Tuition Assurance Scheme administrator or through the Assurance Fund Manager, students will instead be able to make their own choices about which study options best suit them following a provider default⁸.

This suggests a gap existed between the requirement for consultation at s 77(1)(a) of the ESOS Act, and what occurred in practice.

3.33 The new TPS Director will not be obliged to consult with students on placement options. The intention of the new TPS is for overseas students to have access to a secure online placement facility. The department says that there will be someone available to assist the student if they need help using this facility. Students will have 30 days to enrol in a new course using the student placement facility (after the provider obligation period) unless the TPS Director specifies a different period of time. The department considers that students will be in a stronger and more favourable position under the new TPS scheme.

3.34 While recognising the benefits of the placement facility, we note that students using the online placement facility will have already experienced provider default and will place considerable value on understanding the risk profile of a new provider. It may be difficult for students to assess the quality of any alternative courses and providers, and whether they might also close, but they will most likely be keen to know. We know that the TPS will use a risk profile tool to assist with setting the TPS levy for each provider, but this information will not be available to students. We suggest that the TPS Director consider what assistance can be provided to students using the placement facility to help them to make informed choices.

3.35 On a final note, the cases of Mr A and the 480 cases reviewed by the fund manager, demonstrate the difficulties that arise when there is provider default and students look for, or are placed in, alternative courses. It is essential that the TPS

⁸ Department of Industry, Innovation, Science, Research and Tertiary Education 'TPS and Other Measures Amendment Bill 2011 – Questions and Answers', p. 4.

Director implement policies and procedures to ensure that the new TPS scheme operates smoothly and transparently from an administrative and user perspective, and that the online placement facility promotes consumer confidence in the provision of education services within Australia.

New course and CRICOS registration

3.36 As discussed earlier, under the pre-July 2012 tuition protection scheme, overseas students were entitled to a full refund of the course money they had paid to a defaulting provider if they were not placed in a suitable alternative course. The fund manager had assessed refunds for students whose providers had defaulted and who had not been placed in a suitable alternative course. In doing so the fund manager incorrectly reduced refunds based on a predicted future benefit the student might gain from prior learning with the defaulting provider.

3.37 In reassessing those decisions in early 2011, the fund manager investigated whether the students had, since the original decisions were made, enrolled in new courses (s 77(1A)(b) of the ESOS Act) and had received academic credit for the earlier studies (s 77A of the ESOS Act). Under s 77:

...the amount that the Fund Manager must pay out of the Fund... is reduced by the amount worked out [under Regulation 5.04] 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.

3.38 Of the 129 reassessed decisions by the fund manager that our office reviewed, 25 students were not placed in a suitable alternative course at the time of the original decisions following provider default. These students were not granted a full refund at that time as they were entitled, but on review they were reassessed as having since found a new course during the intervening period and their entitlement to a refund removed or reduced even though the new course was not on the CRICOS.

3.39 Section 5 of the ESOS Act does not define 'a course' as being a CRICOS registered course, whether it is the new course, the old course or a suitable alternative course. However, we note that:

- registered providers must be registered on CRICOS if they want to provide education and training to overseas students
- registered providers can only enrol overseas students in courses registered on CRICOS
- an overseas student must hold a student visa
- it is a mandatory condition of student visas that a person who holds a student visa must remain enrolled in a registered course, and a registered course is a CRICOS course
- the fund is to benefit overseas students and intending overseas students.

3.40 According to the fund manager, it did not consider courses that were not on CRICOS as 'suitable alternative courses' and did not place students under s 77(1)(a)

in such courses. However, the review of 480 cases was a different assessment. In the review process, if the student had subsequently enrolled themselves in a new course, whether or not it was on CRICOS, the fund manager made deductions for academic credit or recognition for prior learning under r 5.04 of the ESOS Regulations 2001.

3.41 On review, the fund manager did not make a decision about whether the course was suitable because it was not placing the student in the course. This approach and interpretation of the legislation is possible. However, on review it would have been open to the fund manager to find that the new courses that the 25 students had enrolled themselves in were not new courses for the purposes of the ESOS Act, because the courses were not on CRICOS, and this would have meant they received a full refund. In any case, the fund manager agrees that there is a need for clarity around what is meant by ‘new course’ and ‘suitable alternative course’.

3.42 We note that for the operation of the new scheme, the minister’s new legislative instrument specifying the criteria to be applied in considering whether a particular course is a ‘suitable alternative course’ includes:

- that the course is offered by a person who is registered (on CRICOS to deliver that particular course), or a person who provides that course under arrangement with a registered provider for that particular course
- similarity with level and field of study as the original course
- geographical location
- and acceptability to the student.

This instrument clarifies the legislation.

Recommendation 2

3.43 To ensure overseas students are placed in suitable alternative courses and that this process operates effectively, the Ombudsman recommends that:

- the TPS Director implement policies and procedures to ensure that the administration of the online placement facility – from use of the system by students through to decision making based on student choices identified through this new system – operates smoothly and that policies and procedures are made publicly available
- the TPS Director consider what assistance can be provided to students using the placement facility to help them to make informed choices.

Fund manager oversight

3.44 The relationship between the department and the fund manager was unusual in that the fund manager was both a statutory decision-maker and a contracted service provider. The ESOS Act set out the role, responsibilities and authority of the fund manager, with the contract between the department and the fund manager giving life to those provisions by establishing the terms and conditions of appointment and providing a mechanism for remuneration.

3.45 As an independent statutory decision maker, the fund manager was accountable for its decisions. Accordingly, it was not the department’s responsibility to review each of the fund manager’s decisions. However, it was the department’s responsibility to have in place sufficient governance and accountability arrangements to ensure that systemic problems with the operation of the tuition scheme were identified, and to take appropriate action to ensure those systemic problems were rectified.

3.46 As we noted earlier in the report, the department took prompt action to address the issues we raised in the initial complaint investigation that led to this own-motion investigation, and demonstrated its capacity to oversight the fund manager's administration. As manager of the fund manager's contract, a level of oversight by the department would also be required to ensure the fund manager met their responsibilities.

3.47 As discussed earlier, in 2011 the Ombudsman investigated the complaint of an overseas student, Mr A, whose education provider defaulted.

Mr A was studying with a flight school which closed part way through his studies. Mr A had paid the flight school \$49,000 for the course. Mr A was not placed in a suitable alternative course at the time that the fund manager decided to pay him a partial refund of approximately \$32,500. Mr A complained to the department about the decision of the fund manager and asked for a review of its decision.

At that time, the department handled all requests for review of the fund manager's decisions, and decided whether the case warranted review. The department regarded new written evidence as a threshold requirement, and said that they would not refer Mr A's case to the fund manager for review because Mr A had not provided any new written evidence for the fund manager to consider.

Mr A complained to the Ombudsman. We investigated the complaint against the department, and suggested that the fund manager's decision had not been made in accordance with the refund provisions in the ESOS Act. The department liaised with the fund manager and asked the fund manager to reconsider its decision. The fund manager reconsidered the matter and made a new decision to pay the student an additional amount of approximately \$16,500.

3.48 Prior to our investigation of Mr A's case, the department assessed all requests for review of the fund manager's decisions – a student could not seek a review directly from the fund manager. The department required new written evidence before a student would be granted access to review by the fund manager. In addition to requests for review of the fund manager's decisions, the department was receiving copies of all decisions made by the fund manager.

3.49 As a result of our investigations, we know that the fund manager made at least 396 decisions over a period of two and a half years that were contrary to the requirements of the ESOS Act. That such a large number of errors occurred over a long period of time, when the department had copies of all decisions and received requests for review, suggests that there was a problem in that the department did not have the mechanisms in place to ensure that the fund manager was performing its responsibilities in accordance with the ESOS Act.

3.50 Following our investigation of Mr A's case, the department reviewed its practices and decided to cease its involvement in assessing requests for review of the fund manager's decisions. From January 2011 to June 2012, students were able to request an internal review of the fund manager's decision by directly asking the fund manager. The fund manager continued to give copies of all review decisions to the department. When we have approached the department in relation to complaints about the fund manager's decisions, the department has referred us to the fund manager. The fund manager has worked with us to resolve those complaints.

3.51 We understand that as part of the review of its practices, the department sought and received legal advice that suggested the department had limited authority

to involve itself with the activities and decision making of the fund manager. However, that should not preclude the department from exercising an appropriate level of oversight.

3.52 The issue of review of the TPS director's decisions will continue to be important under the new scheme, and we suggest that the TPS director formalise appropriate internal review arrangements. We note and agree with the TPS director's view that the establishment of any internal review mechanism would require detailed consideration of the relevant provisions of the ESOS Act and the ESOS Amendment Act. We also agree that it would be necessary to determine whether the provisions that confer decision-making powers on the TPS director may be interpreted as enabling decisions to be varied and revoked through internal review processes.

3.53 In early 2011, and following our investigation of Mr A's case, the department identified 51 cases (similar to Mr A's case) where it had not passed to the fund manager a request by a student for a review of the fund manager's decision. These 51 cases date back to January 2009 and included requests for review related to provider closures dating back to late 2008. These cases were subsequently included in the 480 cases reviewed by the fund manager.

3.54 Under the pre-July 2012 scheme, the department had a responsibility to assess complaints, seek appropriate remedies for individuals and make systemic improvements. The department was involved in coordinating responses to provider closures; providing information to overseas students through the ESOS enquiry line; attending joint meetings with the fund manager and overseas students after a provider closure; developing ESOS policy; monitoring compliance with the ESOS Act; and briefing the Australian Government about the fund in relation to the government's financial contributions. The 51 requests for review of the fund manager's decisions could have been assessed as complaints and would have provided useful intelligence on problems that the department was in a position to rectify.

3.55 We have noted the potential for a similar problem to arise with the new scheme. The legislation to implement the post July 2012 scheme, amongst other things, gives effect to the department's policy intent that benefits/skills gained (or capable of being gained) by a student from a partially completed course should be reflected in the amount of refund to which that student is entitled. The department is responsible for implementing this new legislation.

3.56 In relation to information introducing the new legislation, we noted a discrepancy between the information published on the department's website about the new TPS and the ESOS Act. The department stated that, under the new TPS, if the new course costs more than the student is eligible to receive from the TPS director from unspent pre-paid tuition fees, the student will be required to pay the difference to the new provider.⁹ However, the new s 50B of the ESOS Act states that where a student accepts a place in an alternative course, the TPS Director may spend more than the amount of the refund entitlement if the TPS Director considers that to do so would best protect the interests of the student, and would not jeopardise the sustainability of the OSTF.

3.57 Given the department's lead role in administering the ESOS Act and ensuring compliance, if the department notices decisions being taken that are not in accordance with the ESOS Act, or that the discretions under the ESOS Act are in some way fettered, it must act to ensure legislative compliance or propose legislative

⁹ op.cit. 'TPS and Other Measures Amendment Bill 2011 – Questions and Answers', p.3.

change. The department also needs to make sure that its guidance to overseas students is consistent with the legislation, and that it provides full and accurate information about their entitlements.

3.58 The department has advised that the new TPS scheme will be subject to several arrangements for external scrutiny, for example:

- the TPS Director is required to report annually to the minister on the operation of the TPS
- the TPS Director will be required to attend senate estimates hearings to answer questions on the operation of the TPS
- the Auditor-General has indicated that the administration of the ESOS Act will be the subject of a future audit
- a post implementation review encompassing the operation of the TPS will also be undertaken in the next 18 months.

Additionally, the OSTF is subject to the oversight arrangements of the Financial Management and Accountability regime.

3.59 We acknowledge the improved governance arrangements with the creation of the TPS Director and that the TPS Director is a statutory decision maker. However it is still important that appropriate engagement exists between the director and the department which has broad responsibilities for administering the ESOS Act. This engagement should enable the department to provide feedback on any systemic issues or concerns in legislative interpretation and administration. It would also enable the TPS Director to provide feedback and insight gained from administration of TPS including refinements and clarification in policy or legislation.

Recommendation 3

3.60 To ensure robust oversight of refund related decisions, the Ombudsman recommends that:

- the TPS Director formalise arrangements for the review of refund related decisions, including the establishment of internal review mechanisms
- the TPS Director to put in place regular monitoring and feedback arrangements to ensure that the TPS Administrator's advice and assessments, which are used to aid the TPS Director's refund decisions, are compliant with the ESOS Act
- the department and the TPS Director have appropriate engagement arrangements to enable broad oversight and feedback in relation to the administration of the TPS.

Other matters

3.61 As part of the investigation we considered two important issues which warrant noting in this report:

- how the fund manager remade its decisions
- the potential for compensation in some cases.

Remaking decisions

3.62 As has already been discussed, after reviewing the 480 cases, the fund manager took action to correct its original decisions by making new assessments. The circumstances of many of the students had changed during the period between the original and the new assessment. Some students who had not been placed in a

suitable alternative course at the time of the original decision had since enrolled in new courses. The fund manager took the students' new circumstances into account when reassessing their claim.

3.63 This led to some concern and a number of complaints to this office by affected students. Their concern was that if the ESOS Act had been correctly applied at the time of the original call on the fund, they would have received full reimbursement of course fees, to which they were no longer entitled. They took the view that this was a detriment to them arising from the fund manager's error.

3.64 As part of our investigation we requested advice from the fund manager on its power to remake decisions under the ESOS Act and, in particular, in relation to s 77. We were advised that:

- while there was no express power to reassess refund decisions, there was an implied power to do so under s 50(2) of the ESOS Act
- the fund manager could reassess its refund decisions made under s77(1)(b) of the ESOS Act, if it decided to do so, and upon request by a student
- reassessment of the refund decision did not require a new decision about whether or not a call had been made on the fund under s 76 of the ESOS Act and the fund manager was not legally obliged to review refund assessments
- the fund manager chose to make new decisions, rather than correct the original decision, when reviewing and reassessing the 480 cases
- the fund manager could take into account any new information in making a reassessment of its original refund decision
- the new course did not have to be registered on CRICOS to be a new course for the purposes of s 77(1A) of the ESOS Act.

3.65 We agree with the observations of the fund manager and its powers to remake decisions under the ESOS Act. In our view, and notwithstanding the accuracy of the complainants' observations, the potential for a windfall payment would be made real if these students had not had their current circumstances taken into consideration. For the purposes of the reassessment, which is the remaking of the decisions, the circumstances of the students at the time of the remade decisions are relevant.

Compensation

3.66 As part of our investigation we considered the issue of compensation for those overseas students who were affected by the errors in original decisions, many of whom had to wait over two years before receiving the refund they were entitled to under the ESOS Act.

3.67 The department advised us that it had not received a claim for compensation from any of the students and that it found the issue difficult to discuss in the abstract. It also made the point that the original refund decisions and subsequent reassessments were decisions of the fund manager, not the department.

3.68 The department's view is that the fund manager is not an agent of the department, but an independent statutory decision maker established to operate at arm's length. In addition, the contract with the fund manager expressly states that the fund manager will not be the department's agent by virtue of the contract. The Scheme for Compensation for Detriment caused by Defective Administration (CDDA

Scheme)¹⁰ may apply if there were defective administration on the part of the department, but would not be available where the defective actions are those of the fund manager's.

3.69 In the Ombudsman's view, the department cannot contract out its responsibilities. Although the fund manager was not the agent of the department, the department retained responsibility for ensuring that the fund manager acted in accordance with the ESOS Act in exercising its authority. It is arguable that the department's failure to identify a problem and to refer some 51 complaints to the fund manager for review constituted poor administration on its part, and may have had a detrimental effect on these individuals. In our view, the department should consider whether there is a potential case for compensation and invite claims for further consideration.

Recommendation 4

3.70 The Ombudsman recommends that the department consider whether there are potential cases for compensation under the CDDA Scheme for the 51 affected overseas students and, if so, invite claims for further consideration.

PART 4 –CONCLUSION

4.1 The cases we examined indicate that the pre-July 2012 tuition protection scheme was not always administered in accordance with the ESOS Act, and that the problems could have been avoided or at least identified earlier by more active oversight by the department. The department's approach to administration of the ESOS Act allowed the fund manager to make systemic errors over two and a half years of decision making. In particular, the case studies reveal the following systemic issues:

- partial refunds were paid to hundreds of overseas students over a period of two and a half years when they were entitled to full refunds, and the department did not act to remedy these errors made by the fund manager until this office brought these errors to their attention
- a lack of definition in the ESOS Act about what constitutes a 'course' meant that during the review of 480 cases the fund manager could interpret the legislation narrowly and reduce refunds to overseas students if the new course the student enrolled in after provider default was not on CRICOS.

4.2 When implementing the post-July 2012 scheme, the department will need to work closely with the TPS Director and the TPS Director will need to closely monitor, and provide feedback to the TPS Administrator to ensure that the problems similar to those that occurred under the old scheme are properly mitigated. A key lesson learnt from this investigation is that if legislation is not giving effect to the policy intent or there is a change in policy intent, the policy department must take action to remedy

¹⁰ The CDDA Scheme allows Government agencies to compensate persons who have experienced detriment as a result of an agency's defective actions or inaction. Payments made under the CDDA Scheme are discretionary and there is no automatic entitlement to a payment. This information, and more, is available at: www.finance.gov.au/financial-framework/discretionary-compensation/cdda-scheme.html.

the gap through legislative change. In the interim, the legislation must be implemented as it is written.

PART 5 –RECOMMENDATIONS

5.1 The following recommendations were made by the Ombudsman.

Recommendation 1

To ensure consistency and clarity with future refund decisions, the Ombudsman recommends that:

- the department initiate changes to ESOS Regulations to clarify the definition of ‘tuition fees’ under s 7 of the ESOS Act, in particular to clarify whether material costs are included or excluded.

Recommendation 2

To ensure overseas students are placed in suitable alternative courses and that this process operates effectively, the Ombudsman recommends that:

- the TPS Director implement policies and procedures to ensure that the administration of the online placement facility, from use of the system by students through to decision making based on student’s choices identified through this new system, operates smoothly and that policies and procedures are made publicly available.
- the TPS Director consider what assistance can be provided to students using the placement facility to help them to make informed choices.

Recommendation 3

To ensure robust oversight of refund related decisions, the Ombudsman recommends that:

- the TPS Director formalise arrangements for the review of refund related decisions, including the establishment of internal review mechanisms
- the TPS Director to put in place regular monitoring and feedback arrangements to ensure that the TPS Administrator’s advice and assessments, which are used to aid the TPS Director’s refund decisions, are compliant with the ESOS Act
- the department and the TPS Director have appropriate engagement arrangements to enable broad oversight and feedback in relation to the administration of the TPS.

Recommendation 4

The Ombudsman recommends that the department consider whether there are potential cases for compensation under the CDDA Scheme for the 51 affected overseas students and, if so, invite claims for further consideration.