

# UNIVERSITY AND OTHER EDUCATION

## REGULATION OF INTERNATIONAL EDUCATION: AUSTRALIA AND NEW ZEALAND

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*Australia and New Zealand have many thousands of international students studying across all sectors. In both countries these students represent a significant source of overseas funds and contribute enormously to the cultural life of each country. This article examines the requirements under Australian and New Zealand law governing international students to determine whether these provide adequate safeguards for international students at all education levels.*

### I INTRODUCTION

Following concerns relating to the provision of quality courses to international students the Australian Parliament passed the *Education Services for Overseas Students Act 2000* (Cth). This Act, which replaced earlier legislation, has operated since June 2001 and requires providers to register. This in turn requires the provider to have been assessed by the relevant state or Territory registering body and to be certified as having complied with a National Code governing quality assurance, financial and tuition assurance requirements. The New Zealand Qualifications Authority (NZQA) is responsible for quality assurance including quality assurance in relation to international students. New Zealand also adopts a registration and compliance with code process.

There were 303,324 enrolments by full-fee overseas students in Australia in 2003.<sup>1</sup> Sixty-six per cent were in New South Wales and Victoria. Nearly half of these were in higher education. ELICOS (English Language Courses for Overseas Students) and vocational education were approximately the same size with over 50,000 in both sectors and schools make up about 25,000 students. New Zealand also has many thousands of international students studying across all sectors. In 2003 there were 101,900 international students.<sup>2</sup> Approximately three quarters of these were in English language schools or on study tours, over eighteen thousand were in universities or polytechnics and over eight thousand were in schools. In both countries these students represent a significant source of overseas funds and add enormously to the cultural life of each country. These invaluable contributions are at risk if either country does not properly safeguard against courses that are poorly provided or not provided at all.

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## II THE LEGISLATION AND QUALITY ASSURANCE

### A Australia

The *Explanatory Memorandum for the Education Services for Overseas Students Bill 2000* stated that the objective of the Act was to ‘address the legitimate concerns that had been raised about some educational institutions that were dealing with overseas students’. Accordingly the Act is intended to protect provider and course quality and to implement measures to protect student funds. The *Education Services for Overseas Students Act 2000* (Cth) (ESOS) establishes a registration system for those providers who wish to offer programs to overseas students (s 8). This Register is known as the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) (s 10). Additional rules are contained in the *Education Services for Overseas Students Regulations 2001* (Cth) (ESOS Regs) and the *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students* (the ESOS Code) established under s 33 of ESOS.

The power to recommend an approved provider rests initially with the State or Territory where the provider proposes to operate, and registration for operation in a particular state does not allow operation in Australia as a whole, or in another state as principal or via an agent (*International Management Centres Association Ltd v Department of Education Science and Training*)<sup>3</sup>. As a prerequisite to registration a State or Territory has to consider, and if all is in order, certify compliance by the provider with the ESOS Code (s 9(2)(c)). Failure to comply with the ESOS Code attracts penalties including deregistration under s 83(1), though a provider is given time to make written submissions prior to a determination under s 83. State registration occurs under legislation such as the *Vocational Education and Training Accreditation Act 1990* (NSW).<sup>4</sup>

One important right given to providers is to seek a review in the Administrative Appeals Tribunal of Ministerial decisions under s 83 of ESOS. An example is *International Management Centres Association Ltd v Department of Education Science and Training*.<sup>5</sup> This was a review of the Minister’s decision to cancel the registration of International Management Centres Association (IMCA) for failing to refund course fees under s 29 of the ESOS Act. IMCA was registered to provide courses in Queensland, however it allowed an agent, Australian College of Technology, to conduct its programs in Sydney for which there was no registration. Subsequently it refused to refund student fees, claiming that in fact these fees had never been paid to it by the Australian College of Technology which in the meantime had gone into administration. In reaching his decision that this was irrelevant and affirming the Minister’s decision to cancel registration, Deputy President Handley explained the rationale of the Act:

It is a matter of public knowledge that income earned from the sale of educational services to overseas students makes a significant contribution to the Australian economy. Clearly, to safeguard ongoing income from this source and those involved in educational services whether as providers or recipients, it is necessary to have a regulatory framework in place to ensure the quality of the educational services provided and to protect student funds. (80)

There are salient lessons from this decision:

First, the failure to seek or obtain registration in NSW combined with a related failure to reimburse fees paid to the agent offering the course in NSW led to cancellation of registration in Queensland. The matter not only demonstrates the danger of uncontrolled 'licensing' arrangements but also the state based nature of the registration system. The Commonwealth law operates in conjunction with a State registration system, accordingly it is a joint federal-state system. Separate registration and its attendant quality controls on matters such as facility inspection have to be met in each State or Territory where the provider intends to operate whether as agent or principal.

Second, providers refusing to refund fees in the face of Departmental advice that they should be in serious danger of having their registrations cancelled throughout Australia even though the breach of the legislation occurred in only one state or territory. With such a heavy stick in the hands of the regulators, providers should move more quickly to grant refunds or to protect their decision not to refund by appropriate legal action to confirm the legitimacy, such as a declaration by a court that the amount does not have to be refunded.

The Act, ESOS Code and Regulations provide a number of quality assurance mechanisms ultimately controlled via the registration system described above. Registered providers can offer full time courses to overseas students. Part time and distance programs are not allowed under ESOS Code 13.1, though a recent ESOS evaluation and review has recommended some liberalisation and clarification of these rules.<sup>6</sup> The duration of the course must be specified. The provider must be an Australian resident and if it is a company, it must be a company incorporated in Australia carrying on business in Australia with its central management and control in Australia. If it is an unincorporated body, it must carry on its business and have its central management and control in Australia (ESOS Code 13.6).

A provider must be fit and proper to be registered on CRICOS (ESOS Code 13.7<sup>5</sup>, ESOS Act s 9(6), s 11). This may include an inspection of premises (ESOS Code 13.8), though universities are exempted from this inspection provided they are the sole provider and deliver the program in their home state. Inspections will include interviews with management and staff, and may include students (ESOS Code 13.11).

The maximum period of registration is five years (ESOS Code 13.12) though this can be renewed. There is a requirement that the CRICOS registration specifies the number of overseas students that can be taught by the provider, 'having regard to its capacity and the number of other students enrolled. This capacity relates to the premises, facilities, resources, equipment, materials and staff appropriate to the number of students'. (ESOS Code 13.13).

The ESOS Code provides specific conditions re teaching and physical resources:

- There must be teaching staff with qualifications, experience, induction and professional development appropriate for the delivery and assessment of CRICOS registered courses, for the number of students under instruction (ESOS Code 15);
- Teaching resources need to be appropriate for the delivery of CRICOS-registered courses and adequate for the number of students under instruction (ESOS Code 16); and
- Ownership or tenancy arrangements over its premises must be such that students can complete their courses in an appropriate learning environment in the time required (ESOS Code 17). There must be adequate space and facilities for the courses to be provided and the Code specifies minimum floor areas per student (ESOS Code 18).

The ESOS Code sets a number of standards and duties in relation to recruitment of overseas students. It makes the registered provider responsible whether any conduct was the provider's, its

agents, or someone involved in the provision of a course under an arrangement with the registered provider (ESOS Code 26-30). This parallels s 84 of the *Trade Practices Act 1974* (Cth) (and s 45 of the *Fair Trading Act 1986* (NZ)) where conduct engaged in by a director servant or agent of a body corporate within the scope of the actual or ostensible authority is conduct also engaged in by the provider. This is especially relevant in relation to remedies under misleading and deceptive legislation covered below. Under ESOS Code 49 a provider cannot accept overseas students recruited by an agent they know or suspect is engaged in dishonest practices, this specifically includes an agent suggesting to overseas students that they come to Australia on a student visa with a purpose other than full time study. Recruitment must be conducted in an ethical and responsible manner (ESOS Code 26). Offers of places must be on the basis of an assessment by a suitably qualified person of the extent to which the student's qualifications and proficiencies are appropriate to the course (ESOS Code 26). In addition, there are specific matters that must be completed, given, or told to the prospective student prior to acceptance of enrolment:

- An accurate representation of the local environment including campus location, and living costs (ESOS Code 23), and that accompanying children will have to pay full fees to attend school (ESOS Code 24);
- Requirements for English language skills (unless this is clearly not relevant), or bridging courses where these are considered necessary (ESOS Code 27);
- An assessment by a suitably qualified person of an intending overseas student's proficiency in English (unless this is clearly not relevant). Evidence of assessment must meet the requirements of the *Migration Regulations* (ESOS Code 28); and
- The registered provider must inform intending overseas students accurately of the requirements of the course, and there must not be any suggestion that they do not have to study or attend classes (ESOS Code 29).

## B *New Zealand*

In New Zealand relevant legislation is contained in the *Education Act 1989* (NZ). Part 20 of that Act establishes the New Zealand Qualifications Authority (NZQA) with broad ranging purposes of standard setting relating to qualifications in secondary schools and post-school education and training. Unlike ESOS, the *Education Act* is not exclusively directed at overseas students though some sections are, such as s 35B considered below.

### 1 *Schools*

In relation to schools s 35B provides:

The Board (or, in the case of a school that is not a state school, the governing body) of a registered school shall not establish, or permit any student to enrol or continue to be enrolled in, any class, course, or programme, intended exclusively or mainly for foreign students, unless the class, course, or programme, is for the time being approved by the New Zealand Qualifications Authority, which shall not approve it unless satisfied on reasonable grounds that—

- (a) The school has or will have adequate staff, equipment, and premises to provide it; and
- (b) The standard of instruction provided in it will be no lower than the standard that would be expected in any similar class, course, or programme for domestic students.

Accordingly, schools offering courses mainly for international students will have to seek approval for the course from NZQA.

## 2 *Private Training Establishments*

Importantly, NZQA is given power to establish policies and criteria for the registration and accreditation of private training establishments, and to accredit providers to deliver programmes and courses of study (s 253). Section 232 of the *Education Act* provides quality assurance mechanisms for private training establishments. Overseas students cannot undertake a course unless it is approved and the establishment offering it is accredited (s 232(1)). Under s 236 there are a number of matters that must be ascertained by NZQA before granting an application for registration, including:

- It must be satisfied that the establishment is a suitable body to be registered and must have adequate staff, equipment and acceptable financial management practices and performance;
- It must provide every prospective student with a written statement of the total course costs and other financial commitments associated with each course of study or training before accepting that student's enrolment;
- There must be a withdrawal and refund policy as specified in s 236(1)(d); and
- The standard of instruction must not be lower than the standard at a polytechnic or college of education.

Private training establishments are also subject to a student fee protection policy issued by NZQA.<sup>7</sup> If a course closes, students are to be given a choice between a refund and an alternate provider. The policy is applicable to all students, not just those from overseas (cl 2). Fee protection exists in the form of student fees being paid into an independent trust account, or their repayment is guaranteed, or supported by bank or other bonds, or insurance, or protected through collaborative arrangements with other providers. Alternatively, students may pay their fees in arrears.

## 3 *Tertiary Institutions*

Under s 162 tertiary institutions consist of colleges of education, polytechnics, specialist colleges, universities, and wanangas. These are not registered by NZQA though that body does have an advice giving role prior to their establishment (s 162), and, except in relation to universities, must give its consent before tertiary institutions offer bachelor, master or doctoral degrees (s 192(8)).

New Zealand also has a code of practice for international students, the New Zealand Code of Practice for the Pastoral Care of International Students (PCIS Code). This is given effect by s 238F of the *Education Act* which provides:

- (1) A provider may enrol a person as an international student or continue to have an international student enrolled, so long as the provider is a signatory to the code.
- (2) A provider must not enrol a person as an international student or continue to have an international student enrolled, or provide educational instruction for such a person, if—
  - (a) the provider is not a signatory to the code; or
  - (b) the provider is removed as a signatory to the code under section 238G; or

- (c) for any other reason provided in the code, the provider ceases to be a signatory to the code.
- (3) A provider that is suspended under section 238G may continue to have international students enrolled and may provide educational instruction to only those students to the extent permitted by the review panel under that section.

The PCIS Code requires that the following information must be given under cl 4.2 (and included in prospectuses) before students enter into commitments:

Cost of tuition and all other course-related costs, so that there are no substantial hidden costs;  
Application requirements and procedures;  
Conditions of acceptance;  
Refund conditions;  
English language proficiency requirements (if applicable);  
Information on facilities, equipment and staffing;  
Information on the course/s or qualification/s the signatory offers;  
Information on medical and travel insurance requirements; and  
Information and advice on the types of accommodation applicable to students.

Other matters required by the Code include:

- Prospectuses or promotional material must give a fair and accurate representation of the activities and services (PCIS Code 5);
- Where a level of oral or written competency is required, the provider must assess the prospective international student and be satisfied on reasonable grounds that these competencies are met before making an offer of place to the student or accepting the student for enrolment (PCIS Code 6);
- The provider must determine the extent to which the proficiencies and career intentions of the prospective international student are matched by the educational opportunities offered by the signatory (PCIS Code 7);
- Staff members representing a provider overseas must have knowledge about the provider's programmes, be sensitive to culture and customs, and advise prospective international students of any significant barriers relating to courses and qualifications offered by a provider being recognised for employment or further study in the student's home country when the career intentions of the student have been made known to the staff member (PCIS Code 8);
- The Code contains detailed provisions relating to recruitment and accommodation agents (PCIS Code 11 and 12);
- Contractual arrangements have to be conducted in a fair and reasonable manner (PCIS Code 13);
- The Code also contains much more detail than the ESOS code on accommodation (PCIS Code Part 6, Welfare PCIS Code 15). In this sense it is, as its name indicates, more pastoral than its Australian counterpart, though it should be noted that the recent ESOS evaluation has recommended steps to improve this in Australia<sup>8</sup>; and
- Detailed provisions exist for monitoring compliance with the Code, including site checks by the administrator appointed under the Code (PCIS Code 30).

### III STUDENT REMEDIES

#### A *Australia*

The ESOS Code provides in paragraph 3:

Consumer protection must cater for the fact that students who travel to Australia cannot usually see before they purchase, and, if there is reason for discontent with the services they have obtained, they may not be able to remain in Australia to pursue the consumer protection remedies provided through the courts.

Despite this recognition, ESOS does surprisingly little to assist overseas students to gain access to the courts. The Tuition Assurance Scheme has been noted above but this process does not provide anything in the way of damages over and above tuition fees refunds.

ESOS contains a misleading and deceptive provision modeled on s 52 of the *Trade Practices Act 1974* (Cth) (TPA). Thus ESOS s 15 provides:

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.

Breach of s 15 allows the Minister to take action under the enforcement provisions. This can include various sanctions such as suspension of registration or the imposition of conditions on registration. Section 88(1) provides:

- (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; and
  - (e) the provider not provide a specified course.

These conditions would be onerous for the provider but do not assist a student who is unhappy with the quality of a course, or has suffered significant damages because of this.

Each calendar year a non exempt registered provider<sup>9</sup> has to pay a contribution (s 24(1)) into an assurance fund which has been established under s 45. Section 46 states its purpose:

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.

Thus if the course does not start on the agreed starting day, or the course ceases to be provided, or the course is not provided in full because a sanction has been imposed on the registered

provider, the student will be entitled to a refund (s 27). Section 30 entitles the student to seek this refund as a debt in a court.

ESOS does not contain an equivalent of s 82 of the *Trade Practices Act*, the damages remedy. Nevertheless the various standards and duties contained in ESOS, the regulations and the ESOS Code will be of considerable assistance in mounting a damages claim under s 52 or Australian State legislation. The recent ESOS evaluation<sup>10</sup> has noted the deficiencies in the Act relating to remedies and made a number of recommendations, including the insertion of s 82 style remedies into the ESOS Act.<sup>11</sup> It also recommends a written contract containing a series of clauses covering matters such as course details, entry requirements, fees, refunds, support services, accommodation, visa conditions, details on the local environment, dispute resolution procedures, and the drawing up of model contracts for each sector.<sup>12</sup> It is submitted that this model contract for various sectors is a good recommendation, because left to their own devices providers may find some of these matters a little difficult to reduce to a contract. Another consumer protection recommendation includes the inclusion of quite detailed course refund standards in the Code.<sup>13</sup>

## B *New Zealand*

Breach of the PCIS Code attracts sanctions under s 238G, which, if a 'serious breach' may result in removal or suspension as a signatory. An International Education Appeal Authority is established under Code cl 25 to receive and adjudicate on complaints received from international students. It may refer complaints about misleading or deceptive conduct to the Commerce Commission (cl 25.9). It may impose sanctions such as corrective action, publication of breaches and restitution orders on signatories, though it is not made clear what is meant by a restitution order. It is unlikely to include common law damages. If the conduct represents a serious breach, the International Education Appeal Authority may recommend to an International Education Review Panel that the signatory be suspended or removed from the Code. The International Education Appeal Authority has no power of suspension or removal, this power resides in the Review Panel.

From 1 October 2003 to 1 October 2004 the International Education Appeal Authority dealt with 101 complaints. Private Training Establishments generated the majority of complaints. The Authority notes that these complaints dealt with 'poor quality homestay accommodation, course quality and inappropriate course placement, misleading information about course costs, inadequate information about the nature of courses, expulsion, inadequate information about refund provisions and the interpretation of refund provisions'.<sup>14</sup>

## C *Remedies Outside Specific Legislation Protecting International Students: Australia and New Zealand*

A number of commentators have discussed the nature of the relationship between student and university, and more particularly whether it is contractual and also whether s 52 applies to students.<sup>15</sup> These propositions will now be revisited, noting that the respective legislation of both countries extends well beyond universities to schools, technical colleges and a raft of private providers.

### 1 *Educational Services as a Contract*

It has been argued successfully that university students are in a contractual relationship with their universities,<sup>16</sup> though not all aspects of such a relationship, for example, what mark a



student should be awarded, may be justiciable, this would turn on the wording of the contract.<sup>17</sup> Nevertheless, the termination of a student's enrolment could be contractual because it took place under enrolment rules which were found to be contractual. This was the case in *Bayley-Jones v University of Newcastle*. It would be unsafe to regard the contractual principles described in that case as limited to universities. There is little doubt that the enrolment of an overseas student in a state school is contractual, though there is an interesting debate to be had as to whether the enrolment of a local child in the very same school is contractual. As discussed below there has been a ready acceptance in the Consumer, Trader and Tenancy Tribunal of New South Wales that the relationship of student and private provider is contractual.<sup>18</sup> Similar statements have been made in the Australian Migration Review Tribunal.<sup>19</sup> These conclusions are hardly revolutionary. In Australia the ESOS evaluation recommends that providers be required to enter into a detailed plain English contract with international students.<sup>20</sup>

The PCIS Code clearly contemplates that New Zealand providers are in a contractual relationship with their students, for example, PCIS Code 13.2 and 13.3 state:

13.2 All contractual and financial dealings between signatories or their agents and international students must be conducted in a fair and reasonable manner.

13.3 All contractual and financial arrangements between signatories and/or recruitment agents on the one hand and international students on the other hand must be recorded in writing, and international students or their parent/s must be given a copy of any agreement they are a party to.

Once contract law is established, additional remedies flow, including damages (if there are any) and/or rescission if possible. Common law implied terms may apply, such as the requirement to deliver the educational services with due care and skill. Furthermore, it may also be possible in Australia to argue the non excludable care and skill terms in s 74 of the *Trade Practices Act*,<sup>21</sup> adding to contractual remedies. This also partly addresses the lack of ESOS and PCIS legal remedies relating to the quality of educational services delivery.

## 2 *The Application of s 52 of the Trade Practices Act and s 9 of the Fair Trading Act*

Section 52 (1) of the Trade Practices Act 1974 (Cth) states:

A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 9 of the *Fair Trading Act 1986* (NZ) similarly provides:

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

States in Australia have also reproduced s 52 in their *Fair Trading Acts*.

There are a number of elements that have to be satisfied before a student could take advantage of the misleading and deceptive provisions. Most importantly the conduct must occur *in trade and commerce* and not merely *with respect to trade and commerce*: *Concrete Constructions Pty Ltd v Nelson*.<sup>22</sup> Are universities, colleges, or schools engaged in *trade and commerce*? In *Quickenden v Commissioner O'Connor of the Australian Industrial Relations Commission*<sup>23</sup> the full Federal Court examined whether the University of Western Australia was a trading corporation for the purposes of s 51(xx) of the Australian Constitution. The University successfully argued it was a trading corporation though the Court did not accept that *all* of the university's activities

were trading, regarding as ‘questionable’ whether ‘provision of educational services within the statutory framework’ was trading. The Court found in *Matthews v University of Queensland*<sup>24</sup> that representations made by a university registrar that an appeal committee would fairly and expeditiously deal with a complaint was not one made in trade and commerce, and further expressed the view that representations that the lecturer would be available, provide a written statement of the goals of a subject and the nature of its assessment were ‘likely’ not made in trade and commerce.<sup>25</sup> In *Fennell v Australian National University*<sup>26</sup> Fennell sought damages from ANU in regard to an advertisement for an MBA degree which he argued had implied that the university would find him an overseas placement as part of the degree. Sackville J did not discuss whether the matter had occurred in trade and commerce or was a breach of s 52, he was content to dismiss the claim because the student could not show damages. He did make a pointed reference to ‘competition among universities for full fee-paying graduate students’<sup>27</sup> thereby placing the university’s marketing campaign for the degree in a trade context.

The Federal Court of Appeal held in *Plimer v Roberts*<sup>28</sup> that misrepresentations made in a public lecture were not made in trade or commerce and was undecided as to whether the organisation which ran the lecture series was engaged in trade or commerce in charging for admission to and selling recordings of the lecture series, though two of the judges appeared to regard this as trade.

State owned high schools and technical colleges should have more success in arguing that they are non-profit state instrumentalities and do not operate in trade or commerce, though this would not prevent an argument that they can enter into contracts with overseas students as argued above. A further issue is the extent to which any Crown immunity may be available.<sup>29</sup>

Accordingly, issues such as whether a university, a school or a private provider is engaging in trade or commerce will have to be considered in their respective contexts. Suffice it to say that they should all assume they *are* when they advertise a course and charge a fee for the delivery of educational services and add significantly to the respective income of Australia or New Zealand. Private providers should take no solace in the fact that many of them are companies which do not return profits to their members and do not purport to trade. This would be an unsafe test at best because many of those companies employ their members and take their profits out in the form of salaries. Similarly the fact the provider is a professional body offers no protection. In *Monroe Topple & Associates Pty Ltd v The Institute of Chartered Accountants in Australia*<sup>30</sup> Lindgren J held:

In my view, for the above reasons, ICAA’s carrying out of its educational and training function in connection with its CA Program pursuant to its Charter constitutes the provision of services ‘in trade or commerce’.<sup>31</sup>

The other elements for a breach of s 52 have been addressed elsewhere,<sup>32</sup> though it must not be forgotten that many overseas students are children either at the time they are recruited, or in the case of school students, when they study. Marketing activities will be evaluated in light of their target audience<sup>33</sup> and children have a special place in this evaluation.<sup>34</sup>

With this in mind what types of conduct could come within s 52 / s 9 in the context of international students? These matters are worthy of consideration:

- A representation that a course had a particular accreditation or approval or affiliation which it did not have or which had been applied for but not yet received, or not obtained after advertising that it would be. In *ACCC v The Australasian Institute Pty Ltd*<sup>35</sup> the ACCC obtained a s 87B undertaking from the Australasian Institute Pty Ltd (TAI) regarding

alleged misrepresentations that its internet MBA degrees had approval of some Australian universities and that ‘TAI was a body of high academic standing’. Commenting on this matter, Professor Fels, Chairperson of the ACCC said:

The Trade Practices Act 1974 applies to educational providers and businesses operating over the Internet just as it applies to businesses involved in traditional forms of trade and commerce.;<sup>36</sup>

A further example is the Christchurch District Court decision in *Commerce Commission v Design and Arts College of New Zealand Ltd.*<sup>37</sup> Here the defendant college pleaded guilty to charges of misleading representations under s 13 of the *Fair Trading Act* in relation to the status of a multimedia course which had been represented as being at a national diploma level when this was not the case, and a further representation had been made that approval from ANZA had been lodged where this was not so.

- Misleading representations with respect to the price of courses, for example by not including all compulsory fees (also see ESOS Code 21.3, PCIS Code 13).
- Marketing material indicating that a particular course was required to carry on a trade or profession where this was not the case (also see PCIS Code 8).
- Glowing but untrue predictions of graduate employability or success in gaining admission to further study.
- Inflated statements of course entry requirements which are not applied.
- Inflated statements regarding equipment and premises (also see ESOS Code 13.8, PCIS Code 4.2, and 5).
- Misrepresentations regarding class size (also see ESOS Code 13.13, PCIS Code 5).
- Misrepresentations as to course duration (also see the ESOS Code 13.3, PCIS Code 5).
- Misrepresentations as to educational quality including qualifications of teachers, examiners, library and computer resources (also see the ESOS Code 13.7, 15, 16).
- Misrepresentations regarding competing providers (also see the ESOS Code 19).
- Misrepresentations re work placements/experience (unsuccessfully argued in *Fennell v Australian National University*<sup>38</sup>).
- Misrepresentations concerning the student’s likely success in a program or a misrepresentation as to their English language proficiency (also see the ESOS Code 26–30, PCIS 6).
- Misrepresentations as to the level of prior learning that that will be recognised (also see the ESOS Code 31, PCIS Code 7.3.3).
- Misrepresentations as to the amount of refunds that will be granted (also see the ESOS Code 42 - 44).
- Misrepresentations as to available support services (also see the ESOS Code 45).
- Misrepresentations as to visa requirements (also see ESOS 49.1, PCIS Code 10).

Even if a misrepresentation is proven a student will not necessarily be entitled to damages. In the two cases that follow the student plaintiffs were neither able to show that damages had been suffered nor that a misrepresentation had been made.

*Fennell v Australian National University* demonstrates how damages will be assessed in a student context. Sackville J of the Federal Court made it very clear that in assessing s 52 /s 82 damages one has to compare the actual position of the plaintiff to the position that party would have been in but for the conduct contravening s 52. He noted the following comments of McHugh

and Hayne JJ in *Marks v GIO Australia Holdings Ltd* in regard to what is central to economic loss:<sup>39</sup>

when it is said that the loss was, or will probably be, caused by misleading or deceptive conduct, is that the plaintiff has sustained (or is likely to sustain) a prejudice or disadvantage as a result of altering his or her position under the inducement of the misleading conduct.

A party that is misled suffers no prejudice or disadvantage unless it is shown that that party could have acted in some other way (or refrained from acting in some way) which would have been of greater benefit or less detriment to it than the course in fact adopted.<sup>40</sup>

The difficulty faced by the plaintiff Fennell was that within three months of the earliest date he could have completed the course he had secured a \$90,000 per annum job, some \$40,000 more than he had been earning before doing the course (an MBA). This proved fatal to his claim because he failed the *Marks v GIO* test. Realising this was likely to happen, his counsel tried an alternate argument in contract, arguing that a statement about securing an overseas placement made in an advertisement was promissory and constituted a collateral contract. This ran into similar problems in damages assessment.

One inexpensive avenue that may be available to overseas students is use of the small claims tribunals in various jurisdictions.<sup>41</sup> Such access is demonstrated in *Kwan v The University of Sydney Foundation Program Pty Ltd*<sup>42</sup> where Kwan, a Hong Kong student completing a pre-university study program, sued the Foundation, the agent offering the course, and Sydney University claiming he had not received what he bargained for and that services had been misrepresented. Specifically, he complained about the state of the building where the program was offered which was undergoing renovations and he said was dusty, noisy and dirty. His action was brought in contract law, and under the *Consumer Claims Act 1998* (NSW) and the misleading and deceptive provisions of the *Fair Trading Act* (NSW) 1987. The Consumer, Trader and Tenancy Tribunal's jurisdiction to hear a claim under the *Fair Trading Act* has to be ancillary to a claim brought in relation to the supply of goods and services.<sup>43</sup> After hearing the matter, the Tribunal found against the student and found no breach of contract or misleading and deceptive conduct. Importantly there was no evidence of loss, and the student was found to have got what he paid for.<sup>44</sup>

There has been at least one instance where the Commonwealth has come to the rescue of overseas students, though this predated ESOS, and indeed demonstrated the need for the current regulatory regime. In the 1993 decision *Commonwealth of Australia v Noel Ling and Australian TEFL College*<sup>45</sup> fees and expenses had been paid by over 1000 Chinese students in relation to English courses to be offered in Australia, but because (and for legitimate reasons) visas could not be obtained, these students could not travel to Australia to complete their courses. It was held that this contract contained a business efficacy implied term that those amounts would be repaid in the event of failure to obtain a visa.<sup>46</sup>

The Australian government assisted these students by reimbursing their fees and at the same time taking an assignment of their rights under the contract to pursue Mr Ling. In this litigation this was held to be a valid assignment. Furthermore the Federal Court allowed the Commonwealth to trace these funds from an associated company which took the funds knowing of the potential claims. Of interest is that the Australian government also argued s 52 based on a s 51A future representation that fees would be refunded if a visa was not obtained. In the event Beaumont J had no need to make a finding on this matter. Nevertheless, the reverse onus contained in representations relating to future matters contained in s 51A will be of significant value to student plaintiffs seeking to prove an actionable s 52 misrepresentation in Australia.

## IV CONCLUSIONS

Why have the legislation at all? We should not assume when our countries pass legislation as described in this paper that we are doing it out of a sense of philanthropy: the legislation exists to protect a vital source of foreign income, indeed if the numbers of foreign students were small would we expect to see such legislation? Did it exist when the numbers were small? Despite such cynicism we should not be too critical of what our respective governments have provided. International students studying in both countries have far more protection than they did in the past. Now they are obliged to be given information in advance about the course they wish to undertake, and important measures exist to protect their fees against the action of unscrupulous or ultimately insolvent providers. New Zealand should be congratulated for its additional steps in relation to pastoral care. To its credit Australia has recently reviewed its legislation, and, as noted within, this review has made a number of recommendations for improvement.

The emphasis in the Codes is on registration processes and quality audits of the provider, the assumption being that this will deliver a quality product. Many of us who have been through a quality audit process at the university level might be more cynically inclined to describe them as window dressing and marketing exercises which often do not get to the heart of serious institutional issues.

We do not readily grant remedies beyond fee recovery. Neither country sets up a mechanism to allow class actions within the international student legislation, and access to effective remedies such as damages recovery relating to the poor quality of courses are neither provided for in the codes nor highlighted as existing elsewhere. We have seen above that in fact these do exist under common law and in sections such as s 52 / s 9, but they are not described in the international student codes and no encouragement is given to students to access small claims remedies. Despite this, we have seen that some international students have found their way to such courts, though one is left to wonder with what sense of awe. Students are left to their own devices to pursue these not always obvious remedies. Many will have already returned to their countries because visas have expired making any attempt at legal redress very costly, or impractical.

Furthermore, the international student codes do not apply to overseas students studying outside Australia and New Zealand. Again we could ask why this is so, are the national income and far reduced multiplier effects (such as accommodation and living costs) not so significant? Is there a feeling that any failure can be blamed on a local twinning partner, or are we simply content to allow international students studying in their own counties access to domestic remedies?

Finally, one very significant matter that raises difficulties for overseas students and providers is continued compliance with visa rules. In New Zealand PCIS Code 10.5 requires immediate advice to the immigration authorities if a student's enrolment has been terminated. In Australia s 20 of ESOS requires registered providers to notify students if the student has breached a visa condition relating to attendance or satisfactory performance. This then will often cause the cancellation of the visa. Section 20 has given rise to a significant number of appeals by students against cancellation of their student visas before the Migration Review Tribunal. On occasion that Tribunal has been critical of the way in which the s 20 process has operated both at the course provider level and the Department of Immigration and Multicultural and Indigenous Affairs especially in regard to its effects on student rights and ultimately Australia's reputation. Thus in *Wu, Mr Ying Ching*<sup>47</sup> presiding member, Mr Hurley stated:

Another impression that has formed in the Tribunal is that prior to review before the Tribunal the 'rights' of students appear to have taken second place to assertions made

by education providers. Such an impression is borne out when one considers the brief particulars specified in section 20 notices, delegates' apparent unquestioning acceptance of them, and cases when a delegate has issued a cancellation notice, conducted an interview and made a decision, all in one day, or all in a matter of a few minutes, and, in some cases, the whole process has occurred within one minute.

Some education providers seem to have operated on the basis that they can unilaterally 'lay down the law' and delegates seem to have favoured such practice. Perhaps because it makes education providers' and the Department's administration of student visa cancellations easier. Perhaps such practice has arisen because it keeps out of focus particulars of the contract that exist (or at least should exist) between the student and the education provider. But when one thinks about it, that 'laying down the law' attitude arises out of what some may see as the systemic neglect (even the relevant legislation is rather silent) to consider the terms of contract that exist between the student and the education provider. Those terms are the foundation of a student's 'rights' and are determinative of whether or not it can be legitimately found that a student has breached condition 8202. Strangely, the Tribunal is yet to see a sound written contract (leaving aside enrolment forms and what can be inferred out of them) between a student and an education provider.<sup>48</sup>

The presiding member completed his criticisms with a chilling prediction:

In the long term, it could be that a neglect of student rights will undermine Australia's reputation as an education provider for overseas students and the whole 'industry' may suffer. It appears that the industry is very competitive and private companies and individuals are contesting for income within and without Australia. Indeed, in one sense Australia is competing against other countries such as the USA, Canada and the United Kingdom. In such an environment it is important (even leaving aside national pride) that mechanisms are in place to ensure high standards are maintained or else the overall industry may suffer.<sup>49</sup>

He has highlighted a number of very significant students' rights issues which if ignored certainly could well put the international golden calf to rest. It is up to us to be vigilant in our educational institutions to protect international students from arbitrary actions.

## V ENDNOTES

1. *AEI – The Australian Government International Education Network*. <http://aei.dest.gov.au/AEI/MIP/Statistics/StudentEnrolmentAndVisaStatistics/Recent.htm>.
2. [http://www.stats.govt.nz/analytical-reports/tsa-\(revised-treatment-intl-students\)/introduction.htm](http://www.stats.govt.nz/analytical-reports/tsa-(revised-treatment-intl-students)/introduction.htm).
3. *International Management Centres Association Ltd v Department of Education Science and Training* [2004] AATA 463 (12 May 2004).
4. see for example *Education (Overseas Students) Act 1996* (Qld); *Training and Skills Development Act 2003* (SA) (South Australia also has a *Code of Practice and Standards for Registration to Deliver Education Services to Overseas Students*); *Education Providers Registration (Overseas Students) Act 1991* (Tas); *Victorian Qualifications Authority Act 2000* (Vic); *Education Service Providers (Full Fee Overseas Students) Registration Act 1991* (WA).
5. Note 3.
6. The Evaluation recommends that 'international students may enroll part-time or temporarily suspend/intermit their studies during the course or in the final term/semester through formal agreement with the provider and on specific grounds'. Those grounds include exceptional personal circumstances. PhillipsKPA and Lifelong Learning Associates *Evaluation of the Education Services for Overseas Students Act 2000* DEST, 2005 at p xxv. As a result of this evaluation the ESOS Act and Code is presently being revised. For further information see: [http://www.dest.gov.au/sectors/international\\_](http://www.dest.gov.au/sectors/international_)

education/policy\_issues\_reviews/reviews/evaluation\_of\_the\_esos\_act\_2000/default.htm

7. NZQA *Student Fee Protection Policy* 10 May, 2004.
8. The Evaluation recommends a set of standards in relation to accommodation and student support services: Note 6 at xliii, and xlii respectively.
9. Government schools and TAFEs and public universities constitute the main exemptions, along with those private providers that collect their fees in arrears (s 24(2)).
10. Note 6.
11. Note 6 at xliii.
12. Note 6 at xliv.
13. Note 6 at xliv–xlv.
14. International Education Appeal Authority *Report of The International Education Appeal Authority in Respect of Period 1 October 2003 To 30 September 2004*, Ministry of Education, New Zealand <http://www.minedu.govt.nz/index.cfm?layout=document&documentid=6786&indexid=6666&indexparentid=6663>.
15. P Clarke ‘University Marketing and the Law: Applying the Trade Practices Act to Universities’ Marketing and Promotional Activities’ (2003) 8(2) *Deakin Law Review* 304–317; D Considine ‘The Loose Cannon Syndrome: Universities as Businesses and Students as Consumers’ 37(1) (1994), *Australian Universities Review* 36–40; J Jackson ‘The Marketing of University Courses under Sections 52 and 53 of the Trade Practices Act 1974 (Cth)’ (2002) 6 *Southern Cross University Law Review* 106–132; F Rorke ‘The Application of the Consumer Protection Provisions of the *Trade Practices Act 1974* (Cth) to Universities’ (1996) 12 *Queensland University of Technology Law Journal* 176–200.
16. *Bayley-Jones v University of Newcastle* (1990) 22 NSWLR 424.
17. *Norrie v University of Auckland Senate* [1984] 1 NZLR 129; *Clark v University of Lincolnshire and Humberside* (2000) 1 WLR 198; *Matthews v University of Queensland* [2002] FCA 414; *Griffith University v Tang* [2005] HCA 7 (3 March 2005) per Kirby J at para 165, and see Farrington DJ, *The Law of Higher Education*, Butterworths, London, 1998 at 307. Surprisingly neither party chose to argue such a contract before the Australian High Court in *Tang v Griffith University* [2003] QCA 571 prompting Kirby J to ask counsel for the university arguing the case for special leave to the High Court why that was so (*Griffith University v Tang* [2004] HCATrans 227 (21 June 2004)). The decision has now been handed down and commented on by Chief Justice Gleeson: ‘There was no evidence of a contract between the parties. There may well have been such a contract, but, if there was one, we were not told about it, and it was not relied upon by either party. The silence in the evidence about this matter, which bears upon the legal nature and incidents of the relationship between the parties, is curious’. *Griffith University v Tang* [2005] HCA 7 (3 March 2005) at para 12, see also para 58; and Kirby J at para 130.
18. See for example *Li v ABC Tong International Group* [2002] NSWCTTT 491 (13 September 2002); *Song v The Meridian International School* [2003] NSWCTTT 343 (1 April 2003); *Navarro v Academies Australasia P/L* [2003] NSWCTTT 678 (22 December 2003); *Cui v Australian Tesol Training Centre* [2003] NSWCTTT 329 (2 April 2003). <http://www.austlii.edu.au/au/cases/nsw/NSWCTTT/>.
19. See for example *WU, Mr Ying Ching* [2003] MRTA 8095 (28 November 2003), discussed post.
20. PhillipsKPA and Lifelong Learning Associates *Evaluation of the Education Services for Overseas Students Act 2000* DEST, 2005 at xliv.
21. Though it should be noted that s 74 requires that the service be delivered in the ‘course of a business’ which is problematic in relation to a state school enrolling an overseas student.
22. *Concrete Constructions Pty Ltd v Nelson* (1990) 92 ALR 193.
23. *Quickenden v Commissioner O’Connor of the Australian Industrial Relations Commission* [2001] FCA 303 (23 March 2001).
24. *Matthews v University of Queensland* [2002] FCA 414 ( 8 April 2002).
25. *Matthews v University of Queensland* [2002] FCA 414 at paras 10 and 23.
26. *Fennell v Australian National University* [1999] FCA 989 (22 July 1999).
27. Note 26 at para 1.
28. *Plimer v Roberts* (1997) 150 ALR 23.

29. Section 2B of the *Trade Practices Act* has removed state crown immunity for Part IV, but not Part V which includes s 52. Section 4 of the *Fair Trading Act* (NZ) states that that Act binds the Crown in so far as it engages in trade. The Australian state *Fair Trading Acts* generally remove state immunity, making state instrumentalities subject to action, though usually not prosecution. The provisions removing immunity vary from state to state. In NSW s 3 of the *Fair Trading Act* states: 'This Act binds the Crown in right of the State in so far as the Crown in right of the State carries on a business, whether directly or by right of the State. (2) Nothing in this Act renders the State liable to prosecution for an offence'.
30. *Monroe Topple & Associates Pty Ltd v The Institute of Chartered Accountants in Australia* [2001] FCA 1056 (6 August 2001).
31. Note 30 at para 153.
32. See the articles referred to in note 15.
33. *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, see especially Gibbs CJ at 199.
34. We should recognise that many such children have parents, who in fact may have made all the relevant decisions. Nevertheless those parents may not have been present when promotions were made, such as where a presentation was made at an overseas school or where the material was on an attractive provider website.
35. An Australian Competition and Consumer Commission media release *Court Finds The Australasian Institute Misled Students* describing the mediated outcome can be found at <<http://www.accc.gov.au/media/mr1999/mr-251-99.htm>>.
36. The settlement *Undertaking to the Australian Competition and Consumer Commission given for the Purposes of Section 87B of the Trade Practices Act 1974 (Cth)* is at: [http://www.accc.gov.au/pubreg/87b\\_1999/18481\\_d99.pdf](http://www.accc.gov.au/pubreg/87b_1999/18481_d99.pdf)
37. *Commerce Commission v Design and Arts College of New Zealand Ltd* [2002] DCR 662.
38. *Fennell v Australian National University* [1999] FCA 989 (22 July 1999).
39. *Marks v GIO Australia Holdings Ltd* (1998) 158 CLR 333.
40. Note 39 at 347 quoted in *Fennell v Australian National University* [1999] FCA 989 (22 July 1999) at para 10. On damages assessment in New Zealand see the Court of Appeal decision *Cox and Coxon v Leipst*. <http://www.brookers.co.nz/legal/judgments/Default.asp?doc=ca\2000\case~nz~nat~ca~2000~969.html#Number1>.
41. See for example these decisions of the Consumer, Trader and Tenancy Tribunal of New South Wales *Li v ABC Tong International Group* [2002] NSWCTTT 491 (13 September 2002); *Song v The Meridian International School* [2003] NSWCTTT 343 (1 April 2003); *Navarro v Academies Australasia P/L* [2003] NSWCTTT 678 (22 December 2003); *Cui v Australian Tesol Training Centre* [2003] NSWCTTT 329 (2 April 2003) <http://www.austlii.edu.au/au/cases/nsw/NSWCTTT/>.
42. *Kwan v The University of Sydney Foundation Program Pty Ltd* [2002] NSWCTTT 83 (8 May 2002).
43. *Consumer Claims Act 1998* (NSW) s 3.
44. Note 43 at para 69.
45. *Commonwealth of Australia v Noel Ling and Australian TEFL College* (1993) 118 ALR 309.
46. Note 45 at paras 71–81.
47. *WU, Mr Ying Ching* [2003] MRTA 8095 (28 November 2003).
48. Note 47 paras 77–78.
49. Note 47 para 79.