Australian Outlook

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Coronavirus Outbreak and Teaching Chinese Students Online: Legal Issues That Australian Universities Should Know

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With Chinese students being prevented from returning to Australia to continue their studies amidst the coronavirus, universities are pushing initiatives such as online teaching. However, there are some legal implications in doing so.

The coronavirus outbreak and the federal government's travel ban have so far prevented more than 100,000 Chinese students from travelling to and studying in Australia. Online teaching has been considered as one of the positive measures that Australian universities may provide to minimise the negative impacts of the coronavirus outbreak on Australian tertiary education sector. However, requesting that China relax the great firewall is not the only legal issue that Australian universities should be aware of.

More importantly, online teaching is a type of trade in services and is thus subject to international trade agreements. Under the Australia-China Free Trade Agreement ("ChAFTA"), China is not committed to provide market access for Australian universities to teach Chinese students online. This means China can shut down the online teaching platforms at any time without violating the ChAFTA. Moreover, when providing online instruction, Australian universities must also comply with Chinese laws for internet audio-visual service. Furthermore, online teaching may require the use of materials protected by intellectual property (IP) rights registered in Australia. The IP right-holders should be cautious if their rights are not registered in China.

A solution would be for the Australian government to consider requiring an urgent meeting of the Committee on Trade in Services under the ChAFTA to ask the Chinese government to grant

permission for Australian universities to enter its online teaching market.

Australia-China Free Trade Agreement

ChAFTA entered into force on 20 December 2015. Education, as a type of “trade in services,” is regulated by Chapter 8 of ChAFTA. Item 24 of Article 8.2 of ChAFTA provides that “trade in services” can be provided in four modes:

from the territory of a Party into the territory of the other Party (“cross-border supply mode”);
in the territory of a Party to the service consumer of the other Party (“consumption abroad mode”);
by a service supplier of a Party, through commercial presence in the territory of the other Party (“commercial presence mode”); and
by a service supplier of a Party, through presence of natural persons of that Party in the territory of the other Party (“presence of natural persons mode” or “movement of natural persons mode”)

These four modes of service are also adopted by the General Agreement on Trade in Services of the World Trade Organization (“GATS”). Without the travel ban, Chinese students are able to travel and attend courses in Australia. In international trade, this belongs to the mode of consumption abroad under item 24 (ii) of article 8.2. Teaching courses in Australia, streaming or saving the video or audio recordings online, and then providing these recordings to students in China would go beyond the “consumption abroad mode,” instead falling into the mode of “cross-border supply” (item 24 (i) of article 8.2).

Importantly, ChAFTA does not provide market access for Australian universities to provide education services in the mode of “cross-border supply.” This is because China has not made such a commitment in ChAFTA. China’s commitments can be found in the Schedule of Specific Commitments on Services Schedule of the People’s Republic of China (“schedule”). China has adopted a positive-list approach for ChAFTA, as it has for all free trade agreements that it has concluded so far. This means that a foreign service provider is allowed in the listed sectors only and market access and national treatment to foreign service providers are not offered to the sectors unbound in the Schedule.

China does not allow any Australian service provider to provide higher education services by online teaching or any other mode of “cross-border supply.” This is because China considers the provision of education as a sovereign power: allowing foreign education service providers to provide online education services may affect the normal exercise of the state’s power to administer and supervise education.

China generally made more commitments in the ChAFTA than in the WTO GATS (acceded to by China in 2001). However, in terms of cross-border supply of higher education, China’s commitment in the ChAFTA is the same as that in the GATS, so Australia cannot rely on the latter either. Although Chinese domestic law can provide better market access than it is obliged to under ChAFTA and GATS, thus far, China has not done so for foreign higher education service provided in the mode of cross-border supply.

Since some Australian universities have decided to offer online teaching to Chinese students who remain in China, the Australian Department of Foreign Affairs and Trade should request an urgent meeting of the Committee on Trade in Services with Chinese counterpart to prevent online teaching websites being shut down by China. In this meeting, the Australian government should request that China waive the limitation on the mode of cross-border supply of higher education because the World Health Organization has declared the coronavirus a public health emergency

of international concern and the current international travel ban has made the mode of consumption abroad not possible.

On 24 March 2017, Australia and China made the Declaration of Intent regarding Review of Elements of the China-Australia Free Trade Agreement. During the Review, Australia should require that China reconsider the absence of a commitment on online education because the ChAFTA is a long-term agreement that should address travel bans or reduced travel due to global epidemics or climate change. In addition, in accordance with the Chinese Service Center for Scholarly Exchange's (CSCSE) Notice on the Verification of Overseas Academic Degrees and Diplomas, degrees or diplomas obtained through distance education, network education, and other non-face-to-face education will not be verified by China's Ministry of Education. Therefore, when providing online instruction to Chinese students in China, Australian universities should ensure their degree programs include some face-to-face instruction.

Internet audio-visual service regulation

Online teaching also involves audio-visual data transmission and Australian universities must comply with Chinese laws for internet regulation. The Internet Audio and Video Information Service Management Regulation came into effect on 1 January 2020. This regulation applies to all audio-visual services provided through the Internet in China. Australian universities should work with companies that provide online teaching platforms, such as Canvas and Blackboard, to comply with this regulation. For example, internet logs should be kept for the supervision and law enforcement of the Cyberspace Administration of China and other relevant Chinese government agencies.

In terms of the content taught online, all audio and video service providers must comply with the Chinese Constitution and other laws, adhere to the correct political direction and value orientation, and promote the core values of socialism (Article 4 of the Regulation). This may jeopardise the freedom of speech that Australian universities espouse.

Providing internet audio-visual services in China must also follow Chinese Cybersecurity Law, Internet Information Service Management Rules, and the Provisional Internet Cultural Management Regulations, to name a few.

Furthermore, online teaching may also require providing teaching materials to Chinese students in China. Intellectual property rights are limited by geography. Some publishing houses may have copyrighted versions of textbooks for different markets. Course convenors will need to check all issues related to intellectual property rights before uploading materials online.

In conclusion, although online teaching is one of available solutions to alleviate the negative impact of the coronavirus outbreak on Australian universities and their Chinese students, it should be done legally. If China does not waive its restriction on cross-border supply of higher education service in ChAFTA, China could potentially shut down Australian online teaching platforms at any time. Therefore, universities should seek legal advice before providing online instruction.

Update: On 3 April 2020, the Chinese Service Centre for Scholarly Exchange's (CSCSE) revised their policy on the verification of overseas academic degrees and diplomas obtained through distance education and network education. According to the CSCSE Notification, verification will not be denied because the overseas academic degrees and diplomas are obtained through distance education and network education due to COVID-19.

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