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Higher Education Legislation Amendment Bill (No. 3) 2002

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 64 2002–03

Higher Education Legislation Amendment Bill (No. 3) 2002

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Higher Education Legislation Amendment Bill (No. 3) 2002

Date Introduced: 16 October 2002

House: House of Representatives

Portfolio: Education, Science and Training

Commencement: Royal Assent

Purpose

To amend the *Higher Education Funding Act 1988* so that universities and other higher education providers may not deliver higher education in the external territories without receiving accreditation in accordance with the *National Protocols for Higher Education Approval Processes*.

Background

Greenwich University¹

While the stated purpose of this Bill is to extend the *National Protocols for Higher Education Approval Processes* to the external territories, the impetus for the Bill has come from events surrounding the establishment of Greenwich University on Norfolk Island.

Greenwich University is a distance education provider, established in Australia in 1998 under Norfolk Island legislation. It first took the name 'Greenwich University' in 1989 when its headquarters were in Hawaii. The University was set up on Norfolk Island, firstly by regulation in June 1998² and subsequently by statute³. In February 2000, according to its self-assessment report, Greenwich had 411 enrolled students of whom 61% were in doctoral programs, 31% in masters programs, and 8% in bachelor programs. Greenwich at that time had an active faculty complement of 110, most of whom occupied positions with traditional universities, large corporations or the professions. In 1999 courses were offered in arts and humanities, business and political studies, science and technology and social science and health.⁴

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Norfolk Island

Norfolk Island is administered in accordance with the provisions of the *Norfolk Island Act 1979* (Cth), by which the Australian Parliament confers a measure of internal self-government as a territory under the authority of the Commonwealth. Norfolk Island has achieved a degree of internal self-government so has some similarity with the Northern Territory and the ACT. However, unlike these Territories, it is not a member of the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA)⁵. Furthermore, Commonwealth legislation does not automatically extend to Norfolk Island, unless expressed to do so. Examples of Commonwealth legislation which do not apply to Norfolk Island include Commonwealth Corporations Act, tax law and the Education Services for Overseas Students Legislation.

The Territory is administered by the Administrator, appointed by the Governor-General. In forming certain opinions required under the Act, the Administrator must rely on his or her own judgement. In all other respects, the Administrator acts on advice. That advice comes from a variety of sources depending on the category of matter involved. In some instances, the Administrator is the senior representative of the Commonwealth on the Island, acting on the advice of the Minister for Territories. In the case of the *Greenwich University Act 1998*, that Act was passed by the Assembly and then in accordance with the Norfolk Island Act was assented to by the Administrator acting on the advice of the Minister for Territories, who at that time was Senator the Honourable Ian MacDonald.

Gallagher Review of Greenwich University

In January 1999 Greenwich University, through the Acting Chief Minister of Norfolk Island, wrote to the Chair of MCEETYA requesting that Greenwich University be listed on the register of the Australian Qualifications Framework (AQF). The AQF maintains a register of bodies with authority to issue qualifications and a register of authorities empowered by State and Territory Governments to accredit post-compulsory education and training courses. Listing occurs once the relevant State or Territory accreditation authority has accredited the new institution and the necessary policy and legislative processes have been finalised. Register on the AQF essentially means that the respective governments testify to the academic claims of the institutions, but it does not go to financial viability.

The Commonwealth Department of Education, Training and Youth Affairs (DETYA) responded to the Norfolk Island request in June 1999, by establishing a Review Committee chaired by Michael Gallagher to provide advice on whether Greenwich University is suitable for inclusion on the AQF'. According to the chair of this Committee, throughout the entire process of the review, Greenwich University was given an opportunity to comment on the terms of reference, on the membership of the Committee and on the whole review process. It was given drafts of all the reports and had an opportunity to comment and did so. Further, the final report was provided to both Greenwich University and to the Norfolk Island Government.⁶

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The Gallagher Review was completed in December 2000. Amongst other things it found:

- Greenwich University had not been able to demonstrate that quality assurance processes that would be expected of Australian universities are in place.
- The qualifications of many of the faculties that were reviewed were considered either inadequate or inappropriate.
- The lack of publications in peer refereed journals in all disciplines was further evidence of a standard of research that would be unacceptable for staff in Australian universities who were supervising doctoral students.
- The quality of student work from the three faculties that were assessed indicated that the standards sought are not comparable with requirements set by other Australian universities.
- On the criterion of scholarship and research, Greenwich University had not been able to demonstrate that its standing is demonstrably equivalent to that of other Australian universities.

The Review Committee concluded that Greenwich University failed to meet the review criteria and therefore recommended that:

Greenwich University not be listed on the registers of the Australian Qualifications Framework because the standard of its course, quality assurance mechanisms and its academic leadership fail to meet the standards expected of Australian universities.⁷

However the Committee, qualified this recommendation adding:

while Greenwich University does not currently satisfy the criteria for listing on the AQF registers, it is open to the University to re-apply once it has addressed the deficiencies identified in this report.⁸

Following completion of the review, the then Minister for Education, the Honourable Dr Kemp, made a statement to the Parliament reporting the findings of the Committee and gave notice to prospective students and employers to beware, that neither the Commonwealth or the States would vouch for the credentials of Greenwich University.⁹

Six months later the issue was still unresolved. The Chair of the Review Committee, Michael Gallagher, gave evidence in Estimates Hearings stating that although Greenwich University had submitted further documents these had not addressed the deficiencies identified in the review.¹⁰ Of greater concern was evidence that Greenwich was ignoring the recommendations of the Review Committee and was continuing to operate and market its courses overseas describing itself as a fully accredited Australian institution.¹¹

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ALP's position

The saga of Greenwich University has been relentlessly pursued by the ALP in Parliament particularly through Senate Estimates Committee hearings. The Greenwich University Act received assent in December 1998 and on 11 February 1999 the ALP, mainly under the initiative of Senator Kim Carr, began a long series of questioning on this matter. Questions went to issues such as: the establishment and accreditation of the university; the advice of the Territories Minister to the Norfolk Island Administrator; the marketing of Greenwich as an accredited Australian university; the Government's apparent tardiness in responding to the Review Committee's recommendations; and at a more personal level, the integrity and professional calibre of senior staff of Greenwich University. According to Senator Carr, the findings of Review Committee fully vindicated the Opposition's concerns about the university.

Main Provisions

Schedule 1—Amendment of the *Higher Education Funding Act 1988*

Schedule 1 of the Bill makes amendments to the *Higher Education Funding Act 1988* (HEF Act).

Application of the Bill

Item 1 inserts **proposed section 2B**, an applications section, into the HEF Act. It clarifies that proposed Chapter 5C extends to 'every external territory'. It is of note that section 18 of the *Norfolk Island Act 1979* states that an Act or a provision of an Act does not apply to the Territory unless expressed to do so. It would seem that the term 'every external territory' is sufficient to be considered a reference to Norfolk Island.¹²

Item 2 inserts **proposed Chapter 5C** into the HEF Act. It has the effect of extending the *National Protocols for Higher Education Approval Processes* to all of Australia's external Territories. According to the Explanatory Memorandum this is on the same basis as has been agreed and applied by the States and mainland Territories.

Definitions

Proposed subsection 106ZL(1) contains definitions of 'Australian Qualifications Framework', 'Australian Qualifications Framework Register', 'higher education award', 'listed self-accrediting entity' and 'National Protocols' for the purposes of new Chapter 5.

Proposed subsections 106ZL(2) and (3) clarify that the provisions in the Bill have application to universities operating in an online or virtual environment.

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Offences

Proposed sections 106ZM, 106ZN and 106ZO create offences relating to non-accredited universities or higher education providers operating in external Territories.

Under **proposed subsection 106ZM(1)** it is an offence for a person to operate or purport to operate in an external territory as a university or as a provider of courses leading to higher education awards unless the person is:

- a listed self-accrediting entity¹³ or
- approved by the Minister as a self-accrediting entity and any course offered by the person is accredited by the Minister.¹⁴

Proposed subsection 106ZM(2) specifies that this offence attracts strict liability¹⁵ in respect of the physical elements of circumstance — that the power of approval and accreditation is under proposed section 106ZQ. In very simple terms this means the prosecution would not need to prove that the defendant knew the letter of the law in regard to Ministerial accreditation and approval. However a defence of mistake of fact would be open to the defendant under section 9.2 of the *Criminal Code*.¹⁶

The maximum penalty for this offence is 40 penalty units (ie \$4410) for a natural person or five times that amount for a body corporate. By way of comparison similar offences in New South Wales legislation bring a penalty of 200 penalty units.¹⁷

Proposed section 106ZN deals with the offence of offering higher education awards or courses in external Territories without accreditation. It is written in similar terms to proposed section 106ZM.

Under **proposed subsection 106ZO(1)** it is an offence for a person to use the word ‘university’, ‘university college’ or any like words to identify the person or their operation in an external territory unless:

- the person is a listed self-accrediting entity, or
- the person is a self-accrediting entity as approved by the Minister and the Minister has approved the use of that word or those words for those purposes.

Proposed subsection 106ZO(2) specifies that this offence attracts strict liability¹⁸ in respect of the physical elements of circumstance — that the power of approval is under proposed section 106ZQ. This means the prosecution would not need to prove that the defendant knew the letter of the law in regard to Ministerial approval. However a defence of mistake of fact would be open to the defendant under section 9.2 of the *Criminal Code*.¹⁹

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The maximum penalty for this offence is 40 penalty units (ie \$4,410) for a natural person or five times that amount for a body corporate. Again, by way of comparison, a similar offence in the *Higher Education Act 2001* (NSW) brings a penalty of 200 penalty units²⁰.

Use of the word 'university'

Proposed section 106ZP provides that, notwithstanding any law in an external Territory, the registration or authorisation of the use of any company or business name that uses the word "university", "university college" or any like words is of no effect unless the Minister has given written approval for the use of that name.

As the Minister's Second Reading Speech indicates, the immediate effect of this measure will be to require International University of America Pty Ltd on Norfolk Island and any other bodies registered in the external territories with the name 'university' to cease using the word 'university' in their company or business name.

Accreditation according to the National Protocols

Proposed section 106ZQ sets out the accreditation and approval procedures for the provision of higher education in external Territories. As the Explanatory Memorandum indicates, these accreditation procedures were agreed upon by MCEETYA in 2000 and have already been set in place in the States and internal Territories.

A person, other than a natural person²¹, not already listed as a self-accrediting entity, that wishes to operate in an external territory as a university, must apply in writing to the Minister either for approval as a self-accrediting entity or for accreditation of each course it proposes to offer (**proposed subsection 106ZQ(1)**). Regulations may prescribe fees to be paid in respect of such applications and may also set out the manner and times of payment of fees (**proposed subsections 106ZQ(2) and (3)**).

The Minister may determine the entity to be a self-accrediting entity if satisfied, following an assessment made having regard to the National Protocols²², that it is appropriate that the body be empowered to issue its own qualifications (**proposed subsection 106ZQ(4)**). The period and conditions of approval are to be set by the Minister (**proposed subsection 106ZQ(6)**).

Proposed subsections 106ZQ(5) and (7) set out a similar arrangement for applying for accreditation of a particular course leading to a higher education award.

Under **proposed subsection 106ZQ(8)** the Minister may amend or revoke approval of a self accrediting entity if the Minister is satisfied:

- the entity has breached a condition of approval, or
- following a reassessment in accordance with the National Protocols, the circumstances are so different that if the body were to apply for approval the Minister would refuse the application.

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The Minister has similar powers in respect of amending or revoking approval of courses in external Territories (**proposed subsection 106ZQ(9)**).

Decisions made by the Minister regarding accreditation and approval are reviewable in the Administrative Appeals Tribunal (**proposed section 106ZR**).

Concluding Comments

It is of interest that the Bill and its Explanatory Memorandum do not refer to either Norfolk Island or Greenwich University, whereas the Minister's Second Reading Speech is quite candid in indicating the Bill is targeting Greenwich University. The Minister states that the effect of the Bill is that Greenwich will no longer be able to trade as a university or offer higher education awards, until and if it makes an application demonstrating that it meets the requirements set out in the National Protocols.

The Bill has received bipartisan support and both the Government and Opposition are on the public record as stating that the continued operation of Greenwich University on Norfolk Island represents a threat to Australia's international reputation in the field of education. The difference on party lines is based in the Opposition's criticism of the Government in first allowing Greenwich University to operate on Norfolk Island and then in waiting almost two years before acting on the recommendations of the Gallagher Review Committee.

The Government has responded to this criticism by arguing that the alleged procrastination was to allow Greenwich University time to make the relevant changes in order to re-apply for accreditation. On the other hand the frank opinion of the Chair of the Review Committee in Estimates Committee suggests that the Department expects that it would take some time for Greenwich University to rectify the deficiencies identified in the review.

It [Greenwich University] clearly has a long way to go before it reaches anywhere near university standards. Frankly, from what we saw in the review process, much of what it is accepting at doctoral standard would not pass muster at high school.²³

The Government has indicated that initial correspondence with the Norfolk Island Administration suggested that the Assembly might rescind the Greenwich University Act given the outcome of the Gallagher Review²⁴. However should that not happen, the Bill will have the effect of overriding the Greenwich University Act²⁵.

The question of compensation for either the Norfolk Island Government or for Greenwich University has been raised both in the media²⁶ and the Parliament.

On 23 October Dr Nelson stated that:

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'The Commonwealth has sought legal advice in this matter and there is no basis upon which, from the government's point of view, Greenwich University, or the Norfolk Island Government in that regard, would have any claim on the Commonwealth'²⁷

The Commonwealth does have the power to override Territory legislation under section 122 of the *Constitution*. The Commonwealth could also argue that Greenwich has had almost two years to address the deficiencies identified in the Review and further, the effect of the Bill does not prevent Greenwich University from applying for registration as a self-accrediting entity at a later date.

Endnotes

- 1 Much of the material in this section is extracted from the Gallagher Review Committee's *Report on the Application by the Norfolk Island Government for the Listing of Greenwich University on the Australian Qualifications Framework Register*, December 2000.
- 2 The Education (Greenwich University) Regulations (Norfolk Island) were made on 30 June 1998.
- 3 The *Greenwich University Act 1998* (Norfolk Island) was passed by the Norfolk Island Legislature and then in accordance with the *Norfolk Island Act 1979*, was endorsed by the then Territories Minister, Senator the Hon. Ian MacDonald, and granted assent by the Norfolk Island Administrator on 9 December 1998.
- 4 Gallagher Review Committee's *Report on the Application by the Norfolk Island Government for the Listing of Greenwich University on the Australian Qualifications Framework Register*, December 2000, p. 1.
- 5 MCEETYA is a body which defines and coordinates policy within the relevant portfolio areas. Its membership comprises the relevant ministers at Federal, State and Territory level and has provision for observers such as Norfolk Island at its meetings.
- 6 Senate, Estimates Committee, Education, Training and Youth Affairs Portfolio: Department of Education, Training and Youth Affairs *Hansard*, 22 February 2001, p. 223.
- 7 Gallagher Review Committee's *Report on the Application by the Norfolk Island Government for the Listing of Greenwich University on the Australian Qualifications Framework Register*, December 2000, p. 33.
- 8 *ibid.*
- 9 The Honourable R Kemp, MP, *Hansard*, 'Ministerial Statements: Education: Greenwich University', 7 December 2000, p. 23740.
- 10 Senate, Estimates Committee, Education, Training and Youth Affairs Portfolio: Department of Education, Training and Youth Affairs, *Hansard*, 7 June 2001, p.421.
- 11 Senate, Estimates Committee, Education, Training and Youth Affairs Portfolio: Department of Education, Training and Youth Affairs *Hansard*, 21 June 2002, p. 727.

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- 12 Paragraph 17(pd) of the *Acts Interpretation Act 1901* defines 'External Territory' to mean a Territory, not being an internal Territory, for the government of which as a Territory provision is made by any Act.
- 13 A 'listed self-accrediting entity' is an entity whose name is included in the Australian Qualifications Framework Register as a university or higher education institution empowered to issue its own qualification (**proposed subsection 106ZL(1)**).
- 14 Ministerial approval and accreditation procedures are set out in proposed section 106ZQ.
- 15 A strict liability offence is one where the prosecution does not have to prove fault, only that the defendant carried out the requisite physical elements of the offence. For a discussion of the physical and fault elements of offences the reader is referred to the Background section of Bills Digest, No.92 2000-01 for the Environment and Heritage Protection Legislation Amendment (Application of Criminal Code) Bill 2000.
- 16 This defence is available if a person is under a mistaken but reasonable belief about a fact and, had that fact existed, the conduct would not constitute an offence. Under the Criminal Code, any legislative provision that attracts strict liability must expressly state that it is an offence of strict liability (see section 6.1 of the Code).
- 17 See 'Division 4 Offences' of the *Higher Education Act 2001* (NSW).
- 18 See above at no. 15.
- 19 See above at no. 17.
- 20 Section 13.
- 21 **Proposed subsection 106ZQ(10)** provides that for the purposes of section 106ZQ, the term 'person' does not include a 'natural person'.
- 22 The National Protocols are defined in Chapter 4A of the HEF Act to mean the National Protocols for Higher Education Approval Processes (first endorsed by the Ministerial Council on Education, Employment, Training and Youth Affairs on 31 March 2000), as in force from time to time.
- 23 Senate, Estimates Committee, Education, Training and Youth Affairs Portfolio: Department of Education, Training and Youth Affairs *Hansard*, 7 June 2001, p. 421.
- 24 *ibid*.
- 25 Honourable B Nelson, MP, *Hansard*, Second Reading Speech, 16 October 2002, p. 7678.
- 26 'Greenwich weighs up legal route', *Australian*, 30 October 2002.
- 27 Honourable B Nelson, MP, *Hansard*, Second Reading Debate for the Bill, 23 October 2002, p. 8446.

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