



Higher Education Support Amendment (No. 1) Bill 2011

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Higher Education Support Amendment (No. 1) Bill 2011

Date introduced: 10 February 2011

House: Senate

Portfolio: Education, Employment and Workplace Relations

Commencement: Sections 1 to 3 and anything else in the Act not covered in the table provided, on the day of Royal Assent; Schedule 1 on the day after the Act receives Royal Assent.

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bill's home page, or through <http://www.aph.gov.au/bills/>. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

Purpose

The main purpose of this Bill is to amend the *Higher Education Support Act 2003* (HESA) in order to:

- provide flexibility in the 'principal purpose' requirement for the recognition of bodies corporate as higher education or VET providers, and
- reduce the risk of undesirable providers through the introduction of a 'fit and proper person' test for the management personnel of these bodies, and the introduction of conditions for their recognition.

Background

In the second reading speech, the Parliamentary Secretary representing the Minister for Education, Employment and Workplace Relations, articulated the main rationale for these changes. It is to facilitate access to the FEE-HELP and VET FEE-HELP income contingent loans, which are available to full-fee paying higher education and eligible VET students in full-fee paying and some government subsidised higher level courses. This initiative would also assist the Government in meeting its 2010 Budget commitment to providing a National Entitlement to a Quality Training Place with the support of a VET FEE-HELP income contingent loan. The second reading speech notes that the current arrangements need to be refined to 'reflect current higher education and VET sector arrangements', and to ensure consistency with the new regulatory framework that will commence with the establishment of the new National VET Regulator (NVR).

The proposed changes are expected to:

- ... simplify administrative requirements delivering efficiencies to both providers and the Commonwealth, improve the Commonwealth's ability to manage provider risk, increase the rate

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of provider approval, and therefore increase the number of students able to access income contingent loans through quality providers in both the higher education and VET sectors.¹

Main issues

As noted in the Bills Digest on the NVR Bill that is currently before the Parliament, the increasing number and diversity of providers that have entered the VET market with the expansion of competitive funding from the mid 1990s, combined with the growth of the international education sector, has been associated with an increased risk of unethical education providers entering the market.² The higher education sector has also become more diverse in scope and size, presumably also adding to these regulatory risks.³ These are the risks that the Government will have to manage in seeking to increase the rate of provider approval under HESA and the number of students who will gain access to income contingent loans that will flow from that.

The ‘fit and proper person’ test that will be applied to decision-makers within the bodies applying for recognition as providers, and the capacity for putting conditions on the recognition of these providers are mechanisms that will help to manage this risk. It is not clear what the risk associated with the more flexible ‘principal purpose’ measure introduced in this Bill might be. This flexibility will enable the principal purpose to be ‘taken to be’ to provide either or both the education or research function in the case of a higher education provider, or the education function in the case of a VET provider. The Minister can determine that the body’s principal purpose is ‘taken to be’ to provide either or both the education or research function in the case of a higher education provider, or the education function in the case of a VET provider, if the Minister is satisfied that any of the body’s purposes do not conflict with the education and/or research purpose.

The Bill provides that the ‘fit and proper’ matters that are to be considered by the Minister in making a decision are to be specified in a legislative instrument. However, this Bill does not provide a similar mechanism for, or specify how the Minister will assess the ‘principal purpose’ requirements—that is, how she will satisfy herself that any of the body’s purposes are not in conflict with the education or research function.

How the ‘principal purpose’ requirement is to be implemented within the VET sector has been raised as an issue in the context of the NVR Bill. The Australian Education Union (AEU) had wanted to see

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1. J McLucas, ‘Second reading speech: Higher Education Support Amendment (No. 1) Bill 2011’, Senate, *Debates*, 10 February 2011, p. 460.
 2. C Kempner, *National Vocational Education and Training Regulator Bill 2010*, Bills Digest, no. 61–62, 2010–11, Parliamentary Library, Canberra, 2011, viewed 1 March 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillsdgs%2F542615%22>
 3. See for example T Karmel, *Reflections on the tertiary education sector in Australia*, NCVET, 2008, <http://www.ncver.edu.au/publications/2115.html>

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the ‘principal purpose’ requirement specified in the NVR Bill.⁴ In their joint submission to the Senate inquiry into the NVR Bills, the AEU and TAFE Directors Australia asked that the regulatory standards for VET providers oblige training providers to have education as a primary or significant purpose.⁵ In its submission to the Senate inquiry, the Department of Education, Employment and Workplace Relations (DEEWR) noted that the national standards would be the responsibility of the new National Standards Council. DEEWR noted that these national standards would be developed in consultation with stakeholders and that the NVR Bill would upgrade the standards to legislative instruments.⁶

Given the Government’s stated intention of ensuring consistency in its regulatory frameworks⁷, the ‘principal purpose criteria’—recently introduced under the *Education Services for Overseas Students Act 2000* (ESOS Act) in response to the turmoil in the international education sector in 2009—is perhaps a good indication of how it might be adopted:

The focus of the principal purpose criteria is on determining that the principal purpose of the provider **in setting up operations as an education provider is to deliver a quality education outcome for students** rather than a focus on the principal purpose of the legal entity of the organisation as a whole.⁸

The Australian Education International (AEI) website notes that the assessment of principal purpose for ESOS is based on a range of documentation and other evidence, rather than purely on the legal structure of the organisation. This evidence includes: a proven track record of delivering education outcomes to students; robust strategic planning, governance, workforce and systems which support the education purpose, and income streams and resources of the organisations are clearly received from and directed back into the delivery of quality education services.⁹

The issue of ensuring that the application of the ‘principal purpose’ requirement is effective in dealing with the financial risk to Government associated with providing income contingent loans for courses run by broader based institutions, is worthy of consideration.

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4. J Ross, ‘Serious loopholes in VET Regulator plan: AEU’, *Campus review*, 7 February 2011, viewed 21 March 2011, <http://www.campusreview.com.au/pages/section/article.php?s=News&idArticle=19800>
 5. Australian Education Union (AEU) and TAFE Directors Australia, *Submission to the Senate Education, Employment and Workplace Relations Committee Inquiry into the National VET Regulator Bill 2010 (‘the Bill’) & National VET Regulator (Transitional Provisions) Bill 2010 (‘the Transitional Bill’) and the National VET Regulator (Consequential Amendments) Bill 2011 (‘the Consequential Bill’) [collectively ‘the NVR Bills’]*, AEU and TAFE Directors Australia, 2011, viewed 2 March 2011, http://www.aph.gov.au/Senate/committee/eet_ctte/nvetr_bills_2011/submissions.htm
 6. Department of Education, Employment and Workplace Relations (DEEWR), *Submission to the Inquiry into the National Vocational Education and Training Regulator Bill 2010 [2011], National Vocational Education and Training Regulator (Transitional Provisions) Bill 2010 [2011] and National Vocational Education and Training Regulator (Consequential Amendments) Bill 2011*, DEEWR, Canberra, 2011, p. 4, http://www.aph.gov.au/Senate/committee/eet_ctte/nvetr_bills_2011/submissions.htm
 7. J McLucas, op. cit.
 8. Australian Education International (AEI), ‘Information on the principal purpose criteria’, AEI web page, viewed 8 February 2011, http://www.aei.gov.au/AEI/ESOS/Principal_Purpose_Criteria.htm
 9. Ibid.

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Key provisions

The key provisions outlined here are those dealing with the 'fit and proper person' and the 'principal purpose' requirements, and the capacity to impose and vary conditions of a provider's recognition.

Schedule 1, items 1 to 18 make amendments to the sections of the Act as they relate to how bodies are approved as higher education providers. **Items 19 to 31** make amendments to Schedule 1A of the Act which covers VET FEE-HELP and these therefore deal with the provisions for the recognition of VET providers.

Schedule 1, items 1 and 2 amend section 16–25 by creating new **subsection 16–25(1)** and substituting paragraph 16–25(aa) with new **paragraph 16–25(1)(aa)** to introduce the flexibility in the 'principal purpose' requirement. This would be achieved by extending the current provisions that require the body's principal purpose to be to provide education and/or to conduct research, by enabling the body's principal purpose to be 'taken to be', one or both of these functions. **Item 3** adds the new **subsection 16–25(2)** which enables the Minister to determine that the body's principal purpose is to provide either or both of these functions if the Minister is satisfied that any of the body's purposes do not conflict with the education and/or research purpose.

Item 3 then adds a new **paragraph 16–25(1)(g)** which requires that the Minister be satisfied that each decision maker within the body applying for recognition as a provider under the Act, be a 'fit and proper person'. New **subsection 16–25(3)** requires that in making her decision about whether a person is 'fit and proper', the Minister must take into account matters specified in the legislative instrument required by new **subsection 16–25(4)**.

Item 5 introduces new **sections 16–60 and 16–65** that enable conditions to be placed on a body corporate's approval as a higher education provider, and also details the procedure for varying these conditions.

Items 7 and 8 make consequential amendments to section 22–7 which deals with revocation of a body's recognition as a higher education provider on the grounds of changes to its principal purpose.

Revocation procedures for higher education providers on the grounds of a decision maker not being a fit and proper person are provided for under **items 15 and 16**.

Items 20 and 21 effectively mirror the provisions for VET providers that are provided for higher education providers in **items 2 and 3**. However, for VET providers, the only specified principal purpose is to provide education, and therefore the Minister may determine that providing education is taken to be the body's principal purpose if satisfied that any of the body's purposes do not conflict with that purpose. **Item 23** mirrors **item 5** which enables conditions to be imposed on providers and to be varied. **Item 25** provides for the revocation of a body's recognition as a VET provider on the grounds of changes to its principal purpose. **Item 28** provides the revocation procedures for VET providers on the grounds of a decision-maker not being a 'fit and proper person'.

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