

**1994**

**AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY**

**EDUCATION SERVICES FOR OVERSEAS STUDENTS  
(REGISTRATION AND REGULATION OF PROVIDERS) BILL 1994**

**EXPLANATORY MEMORANDUM**

**Circulated by Authority of the Minister for Education and Training**

**Bill Wood MLA**

## EDUCATION SERVICES FOR OVERSEAS STUDENTS (REGISTRATION AND REGULATION OF PROVIDERS) BILL 1994

This Bill is for an Act to regulate providers of education services for overseas students. The Bill is complementary to the *Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991* of the Commonwealth (the Commonwealth Act) and provides a number of controls on the provision of education services. The main purposes of the Bill are to:

- protect the financial interests of overseas students through providing for the keeping of trust accounts for students' fees;
- ensure that providers of education services for overseas students meet a certain standard in the courses provided;
- ensure that providers of education services are financially viable and are otherwise suitable to provide courses to overseas students;
- ensure that information provided to prospective students is fair and accurate, and that proper contractual arrangements are observed; and
- ensure that reasonable standards are complied with in the provision of facilities and other matters directly affecting the welfare of students.

### *Relationship with the Commonwealth Act*

Section 4 of the Commonwealth Act provides that it is an offence for an institution or other body or person to provide to, or offer to provide to an overseas student, or invite an intending overseas student to undertake, a course unless the person is a registered provider. A registered provider is a person or institution who is entered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS). A person or institution becomes a registered provider when a State (which includes the Australian Capital Territory and Northern Territory) approves that person or institution to provide a course to overseas students.

The Bill provides the mechanism for approving providers in the ACT. This mechanism includes the setting up of an ACT Register of Institutions Providing Education and Training for Overseas Students (the register). When a person or institution is approved as a provider in respect of a particular course the particulars of the approval are entered onto the register and provided to the Commonwealth for entry onto CRICOS. The register does overlap with CRICOS, however, this duplication is necessary as the Commonwealth Act has a sunset clause providing for the repeal of the Commonwealth Act on 1 January 1997. While this Bill is complementary to the Commonwealth Act, it is also capable of operating independently of the Commonwealth Act to regulate the provision of education services to overseas students. The Commonwealth Act contemplates this independent operation. Section 9 of the Commonwealth Act provides that the Governor-General may suspend the operation of certain sections of that Act in a State if she or he is satisfied that arrangements in effect in the State are sufficient to achieve the purposes of the suspended section or sections.

*Financial arrangements for overseas students*

The Bill provides that providers must make arrangements to safeguard student fees through the use of trust accounts. Providers are also required to produce regular financial statements regarding those trust accounts so that the Territory may monitor the compliance with these requirements.

*Arrangements for the general welfare of overseas students*

The Bill also has several provisions that are designed to safeguard the interests of overseas students generally. These provisions are concerned with ensuring that adequate teaching facilities are maintained, that students receive an adequate level of pastoral care to assist in making adjustments to the Australian way of life, and that there are adequate procedures in place to allow students who have a grievance with the provider to have that grievance heard and dealt with in an appropriate manner.

*Financial implications*

The Bill has no financial implications.

Details of the Bill are as follows.

**EDUCATION SERVICES FOR OVERSEAS STUDENTS (REGISTRATION AND  
REGULATION OF PROVIDERS) BILL 1994**

**PART I - PRELIMINARY**

This Part deals with the formal clauses of the Bill.

*Clause 1* provides for the short title of the Act.

*Clause 2* provides for the commencement of the Act. The delayed commencement is to allow sufficient time for the necessary administrative processes to be established and for the regulations that need to be in place at commencement of the legislation to be made. The commencement of clause 5 is not tied to the general six month default commencement in subclause 2(3). Clause 5 establishes the offences relating to providing education services to overseas students without being approved. It is intended that a period of up to three months be provided, after the commencement of the remaining clauses, to allow time for providers to become approved. This may, depending on when the remaining clauses of the Act commence, take the commencement of clause 5 outside of the six month period.

*Clause 3* provides for the interpretation of the Bill. In particular, "course money" has a particular meaning under the Act. Only course moneys are covered by the trust account and refund requirements of the Act. The exclusion of an enrolment fee of not more than \$250 from the definition of course money, unless the provider and student agree otherwise, effectively means that the enrolment fee is non-refundable.

*Clause 4* provides for the keeping of the ACT Register of Institutions Providing Education and Training for Overseas Students. The register is a record of approved providers of courses for overseas students in the Territory. It is a public document that may be inspected by any member of the public.

**PART II - APPROVALS**

This Part establishes offences relating to providing courses to overseas students without being registered and also provides the mechanism by which private

providers may become registered. A person or institution is firstly approved with respect to a particular course (or courses) and on obtaining that approval they are entered onto the register and the Commonwealth is advised accordingly for the purposes of entering the institution onto CRICOS. Non-government schools, government schools and public tertiary institutions are treated differently from private providers. The former category of institutions are approved automatically whereas private providers must go through an application and assessment process before obtaining approval. This recognises that non-government schools are already obliged to meet certain requirements in order to obtain registration under the *Education Act 1937*. Similarly, government schools and public tertiary institutions are subject to numerous controls through being accountable for public moneys.

*Clause 5* establishes the offences of providing a course, offering to provide a course, or inviting an overseas student to undertake a course, or holding out as being able or willing to provide a course to an overseas student without being approved in respect of the course. This clause mirrors similar offence provisions in the Commonwealth Act.

*Clause 6* provides that non-government schools, government schools and public tertiary institutions may apply to the Chief Executive for approval as a provider of specified courses to overseas students. The application is approved automatically by the Chief Executive and the relevant registrable particulars are entered into the register. The "registrable particulars" are those particulars that are specified in clause 37 of the Bill. Subclauses 6(5) and 6(6) provide the mechanisms by which the register may be altered if there is an alteration in these registrable particulars. In the event that a non-government school ceases to be registered under the *Education Act 1937* then the approval as a provider of specified courses to overseas students is automatically withdrawn. "Public tertiary institution" has the specific meaning provided for in subclause 6(7).

*Clause 7* is the mechanism by which a person or institution, other than an institution of the type referred to in clause 6 of the Bill, may apply for approval as a provider of specified courses to overseas students. The information that is required to accompany an application is to enable the Chief Executive to make an informed decision having regard to the criteria set out in clause 8.

*Clause 8* establishes the process for approval of an application made under clause 7. The Chief Executive may not approve a person or institution as a provider

unless the applicant (in the case of a natural person) or the principal executive officer (in the case of a body corporate) is an Australian citizen or a permanent resident of Australia. This criterion is relevant from the point of view of ensuring accountability of providers. The Chief Executive must also be satisfied that the financial position of the applicant is such that the applicant has sufficient resources to enable it to comply with the Act. The Chief Executive must be satisfied that the applicant has made arrangements to comply with the duties imposed under Divisions 1 and 2 of Part III. Subclause 8(5) requires the Chief Executive to consider whether the courses in respect of which the applicant is seeking approval are suitable courses. This would include consideration of matters such as the course syllabus and the qualification awarded on completion of the course. Where the Chief Executive approves an application then the relevant particulars are entered onto the register. Clause 32 requires the Chief Executive to provide the Commonwealth with these particulars for entry onto CRICOS. The Chief Executive may impose conditions on an approval. In particular, subclause 8(4) specifically provides that the Chief Executive may impose conditions requiring the private provider to participate in an indemnity scheme or to hold indemnity insurance or a guarantee of a type approved by the Minister. These particular types of conditions are intended to operate as a safeguard for student moneys in the event that a private provider fails. An indemnity scheme could include, for example, a tuition assurance scheme such as is provided for in section 7A of the Commonwealth Act. If the Chief Executive makes a decision refusing to approve an application, or approves an application subject to conditions, then the applicant has the right, under clause 40, to apply to the Administrative Appeals Tribunal for a review of that decision. The term "private provider" is used to refer to a provider that is approved through this process.

*Clause 9* provides the mechanism by which an approval may be varied on application by the private provider. This mechanism could be used to either vary the particulars entered onto the register (for example a change in the provider's name) or to vary the conditions of the approval. The Chief Executive must have regard to the prescribed matters in subclause 9(5) before making a decision as to whether or not to approve a variation. The nature of the proposed variation will determine which of the prescribed matters are relevant to the variation. The Chief Executive would only be required to consider whether the applicant could comply with Division 1 and 2 of Part III if, for example, the variation proposal would require new facilities.

### PART III - PRIVATE PROVIDERS

This Part deals with the specific obligations of private providers. These obligations are primarily intended to protect the interest of overseas students. Division 1 is concerned with the general standard of care owed to the overseas students by the private provider. Division 2 specifies certain requirements in respect of information and other material which is provided to prospective students. Failure to comply with the requirements of Divisions 1 and 2 would be grounds for suspension or withdrawal of approval as a private provider under Division 5. Divisions 3 and 4 are concerned with protecting the financial interests of overseas students. Division 3 ensures that fees paid by a student to a private provider are placed into a trust account and only used for the defined purposes. Division 4 provides for the circumstances and manner in which refunds will be paid by the provider to an overseas students. Division 5 provides for regular reviews of the approval of private providers and contains mechanisms for suspension and withdrawal of approval where this is necessary.

#### Division 1 - Duties

*Clause 10* places a requirement on private providers to maintain appropriate public liability and fire insurance policies. This requirement is similar to requirements placed on non-government schools under the *Education Act 1937*.

*Clause 11* places an obligation on private providers to ensure that teaching facilities are adequate and that physical safety, health and welfare of students is protected. This would include, for example, maintaining classrooms in a reasonable state of repair and providing adequate heating and cooling. It could also include, for example, the provision for particular facilities that were appropriate to the cultural needs of the students for whom the courses are intended.

*Clause 12* places an obligation on providers to provide adequate counselling and support services. This clause is intended to ensure that students have adequate information to allow them to live in the Territory (which might include, for example, information on how to catch a bus) and adequate assistance with problems that may arise from cultural differences between a student's home country and Australia.

*Clause 13* is intended to ensure that where a student has a grievance with a provider then there are procedures in place to allow the student to have that grievance heard and dealt with in an appropriate manner.

#### **Division 2 - Prohibitions**

*Clause 14* provides that the information that a private provider supplies to prospective students in its prospectus and in its enrolment forms must meet a certain standard. Because of the nature of the enrolment forms and prospectus in forming the basis of the contract between the prospective student and the provider, these documents must clearly itemise, amongst other things, fees and charges (this would require for example, clearly identifying accommodation and tuition fees where these are provided as a package), the qualification that will be awarded, and the relevance of the qualification to further study (for example, whether it is recognised as a pre-requisite for another course). The standard required is to ensure that students have sufficient information to make an informed decision about the course provided by the provider.

*Clause 15* is complementary to clause 14 in that it provides that any other advertising material of the private provider must be consistent with the information in the prospectus.

#### **Division 3 - Financial arrangements**

*Clause 16* provides that private providers must open and maintain a trust account into which moneys received from students are to be paid. This clause stipulates the time within which moneys are to be paid into the account and also defines the purposes to which the moneys in the trust account may be applied. The regulations will set out the manner in which the private provider may draw upon the moneys in a trust account as payment for the tuition and other services provided. The regulations will be similar to the Education Services for Overseas Students (Registration of Providers and Financial Regulation) Regulations of the Commonwealth in this respect.

*Clause 17* provides that the trust moneys standing to the credit of a trust account are not available for the purpose of payment of creditors and may not be used to satisfy a judgement against the provider. The only exception is where the debt is a debt due to a student under the refund provisions in Division 4.

*Clause 18* clarifies the obligations of a bank at which a trust account is kept by a private provider pursuant to the Act. The bank is not under any obligation to ensure that the transactions in relation to the trust account are in accordance with the Act. The bank also does not have any recourse to a trust account for the purposes of satisfying a liability of the private provider to the bank.

*Clause 19* provides that a private provider must give receipts for trust moneys received.

*Clause 20* is a complementary clause to clause 19. It provides that a private provider must keep proper accounting records for trust accounts maintained under the Act. This requirement will assist the Chief Executive and inspectors in ensuring compliance with the Act. This requirement will also assist the private provider in preparing returns as required under clause 22 of the Bill.

*Clause 21* requires a private provider to make arrangements such that at all times the provider is able to meet the obligations to make refunds to students under Division 4. This may be in the form of insurance or some other arrangement that will guarantee the availability of funds.

*Clause 22* requires a private provider to give the Chief Executive returns in respect of each trust account maintained by the provider. This provision is based on section 8 of the Commonwealth Act and the prescribed form of the returns will be similar to the prescribed form in the Education Services for Overseas Students (Registration of Providers and Financial Regulation) Regulations of the Commonwealth. The information is needed to monitor compliance with the requirements of the Act.

*Clause 23* provides that the regulations may exempt a private provider or a class of providers from all or any of the financial requirements in Division 3.

#### **Division 4 - Refunds**

*Clause 24* creates an obligation for a private provider to refund moneys held in the trust account to a student where the provider defaults in providing a course to an overseas student.

*Clause 25* provides that where an intending overseas student is refused a student visa then they are entitled to a full refund of any course moneys paid to a private

provider. This refund will not include an enrolment fee (if any) of not more than \$250 as this is excluded from the definition of "course money" in clause 3 of the Bill.

*Clause 26* describes the refund arrangements that are to be followed where the overseas student does not start, or withdraws from, the course provided by the private provider. *Subclause 26(1)* specifically provides that the provisions do not apply where the intending overseas student is refused a student visa (covered by clause 25) so that, in effect, the provision only applies where there is some default on the part of the student. This provision also only applies where the provider and the student do not have a written agreement covering refund arrangements in this situation.

#### **Division 5 - Reviews**

*Clause 27* provides for the regular review of the approval of private providers. These reviews must be conducted at least once every 5 years. If however, the Chief Executive believes on reasonable grounds that a private provider has contravened the Act, then the review may be undertaken at any time. The extent of compliance with the Act and the likelihood of continued compliance are considered by the Chief Executive when conducting the review. At the conclusion of the review the Chief Executive may confirm the approval, confirm the approval subject to conditions or give the provider notice that the Chief Executive believes that the approval should be suspended and withdrawn or simply withdrawn. Before the Chief Executive suspends or withdraws an approval the provider is invited to show cause why the approval should not be so suspended or withdrawn. At the conclusion of the show cause period the Chief Executive may, after consideration of any representations of the provider, proceed with suspending or withdrawing the provider's approval or confirm the approval. The option in sub-subparagraph 27(4)(a)(i) to suspend the approval and at the end of the period to withdraw the approval is designed to allow the provider to continue with existing students until completion of the course or to rectify the problem that has led to the suspension. *Subclause 27(5)* provides that a private provider whose approval is suspended may apply to the Chief Executive for a review of that suspension. To make such an application the provider would need to demonstrate a change in circumstances such as would warrant the revocation of the suspension. The effect of the suspension of approval is provided for in clause 32. Decisions of the Chief Executive to impose conditions on, or suspend or withdraw the approval or refuse to revoke the

suspension of a private provider are able to be reviewed by the Administrative Appeals Tribunal.

*Clause 28* also provides that where the approval of a provider has been suspended then the provider must notify any overseas student or intending overseas student of the suspension.

*Clause 29* provides that, for the purposes of conducting the review of the approval of a private provider, the Chief Executive may require the provider to furnish certain information. The provision specifies the manner in which any information so obtained is to be treated and also provides penalties for non-compliance with a notice of the Chief Executive.

*Clause 30* is similar to clause 29 and provides that the Chief Executive may request information from an agency for the purposes of conducting a review under clause 27. This provision is intended to facilitate the transfer of information between agencies in compliance with the *Privacy Act 1988* of the Commonwealth.

*Clause 31* sets out the powers of inspectors to enter buildings and conduct an inspection for the purposes of conducting a review under clause 27. These are standard powers of entry and inspection. Inspectors are provided for in clause 34 of the Bill.

*Clause 32* specifies the effect of a suspension of approval under clause 27. This clause basically prevents the provider from entering into any new arrangements with potential students and prevents the provider from permitting any enrolled student from commencing a course while the suspension is in force. Should the suspension be revoked the provider would be able to resume these activities. Should the approval of the provider be withdrawn after the period of suspension then this clause limits the number of students that will be affected by the withdrawal of the approval.

#### **PART IV - RELATIONSHIP TO COMMONWEALTH ACT**

This Part sets out the interrelationship between this Bill and the Commonwealth Act.

*Clause 33* provides that the Chief Executive must provide the Secretary of the relevant Commonwealth Department administering the Commonwealth Act with the relevant particulars of any approved provider for entry into CRICOS. Where there is any change in the status of the provider or in any of the particulars provided, the Chief Executive will similarly provide relevant details to the Secretary.

*Clause 34* provides that where the Commonwealth cancels or suspends the approval of a provider under the Commonwealth Act then the approval of the provider under the Territory Act is similarly affected.

#### PART V - MISCELLANEOUS

*Clause 35* provides that there shall be inspectors for the purposes of the Act.

*Clause 36* is a standard provision for the issue of identity cards to inspectors and provides a penalty for failure to return an identity card when a person ceases to be an inspector.

*Clause 37* specifies the registrable particulars that are required to be entered on to the register and provided to the Commonwealth for entry onto CRICOS.

*Clause 38* provides for notification of decisions of the Chief Executive to the person or institution affected by the decision. This clause should be read in conjunction with clauses 38 and 39.

*Clause 39* provides for the manner in which a notice of decision will be given under clause 38. This first part of the clause provides that the notice of decision will be in a particular form that is now standard. However, when the *Administrative Appeals Tribunal (Amendment) Act (No. 2) 1994* commences, the notice of decision will be required to comply with the Code of Practice that will then be in force.

*Clause 40* provides that the Administrative Appeals Tribunal may review a decision of the type referred to clause 38.

*Clause 41* sets out the power of the Minister to determine fees for the purposes of the Act. Fees are determined in relation to applications for approval and applications for variation of approval.

*Clause 42* specifies that the maximum penalty that a court may impose on a body corporate that is convicted of an offence is five times the maximum pecuniary penalty provided throughout the Act.

*Clause 43 and 44* are provisions establishing evidentiary matters. These provisions are necessary to establish the fact of whether or not a provider was or was not approved with respect to a specified course on a particular date. *Clause 44* is necessary to establish the state of mind of a body corporate for the purposes of the Act.

*Clause 45* provides that regulations may be made prescribing matters that are required or permitted to be prescribed or necessary or convenient to be prescribed for the purposes of the Act.