



Education Services for Overseas Students Amendment (Re-registration of Providers and Other Measures) Act 2010

No. 10, 2010

**An Act to amend the *Education Services for
Overseas Students Act 2000*, and for related
purposes**

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No. 10, 2010

An Act to amend the *Education Services for Overseas Students Act 2000*, and for related purposes

[Assented to 3 March 2010]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Education Services for Overseas Students Amendment (Re-registration of Providers and Other Measures) Act 2010*.

Education Services for Overseas Students Amendment (Re-registration of Providers and Other Measures) Act 2010 No. 10, 2010 1

2 Commencement

This Act commences on the day this Act receives the Royal Assent.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Re-registration etc. of providers

Part 1—Amendments

Education Services for Overseas Students Act 2000

1 Paragraph 4B(2)(b)

Repeal the paragraph, substitute:

- (b) paragraph 9B(1)(a);

2 Section 5

Insert:

higher education provider has the same meaning as in the *Higher Education Support Act 2003*.

3 Section 5 (at the end of the definition of *registered*)

Add “, and (except in sections 9 to 9B) includes re-registered under section 9A”.

4 Subparagraph 9(2)(b)(ii)

Repeal the subparagraph, substitute:

- (ii) the provider would be exempt under subsection 24(2) from paying annual Fund contributions if the provider were a registered provider; and

5 Paragraph 9(2)(c)

Repeal the paragraph, substitute:

- (c) the designated authority has given the Secretary a certificate, in the form approved by the Secretary for the purposes of this paragraph for the State, that:
 - (i) relates to the provider’s compliance with the national code; and
 - (ii) states that the provider has the principal purpose of providing education; and
 - (iii) states that the provider has the clearly demonstrated capacity to provide education of a satisfactory standard; and

6 Paragraph 9(2)(ca)

Omit “subsection (5)”, substitute “subsection 9B(1)”.

7 Paragraph 9(2)(d)

Repeal the paragraph, substitute:

- (d) the Secretary has no reason to believe that the provider:
 - (i) is not complying, or will not comply, with this Act or the national code; or
 - (ii) does not have the principal purpose of providing education; or
 - (iii) does not have the clearly demonstrated capacity to provide education of a satisfactory standard; and

Note: The Secretary must notify the relevant designated authority if the Secretary has reason to believe that any of the matters set out in this paragraph apply: see section 14.

8 Subsections 9(5) to (7)

Repeal the subsections.

9 Subsection 9(8)

Omit “Paragraph (2)(ca)”, substitute “Subparagraph (2)(c)(i)”.

10 At the end of section 9

Add:

Higher education providers

- (9) For the purposes of subparagraphs (2)(c)(ii) and (2)(d)(ii), a higher education provider is taken to have the principal purpose of providing education if its principal purpose is either or both of the following:
 - (a) providing education;
 - (b) conducting research.

11 After section 9

Insert:

9A Re-registering existing registered providers

Recommendation by designated authority

- (1) A designated authority for a State may recommend that an approved provider for that State that, as at the commencement of this section, is registered to provide a specified course for that State to overseas students be re-registered under this Act to provide that course to overseas students.
- (1A) A designated authority for a State must use a risk-management approach when considering whether to recommend that an approved provider should be re-registered.

Re-registration by Secretary

- (2) The Secretary must re-register the provider if:
 - (a) the provider is:
 - (i) a resident of Australia; or
 - (ii) a Table C provider (within the meaning of the *Higher Education Support Act 2003*); and
 - (b) either:
 - (i) the provider has paid its annual Fund contribution (see Part 5), and any special levy it is required to pay, for the calendar year in which the recommendation under subsection (1) is made; or
 - (ii) the provider is exempt under subsection 24(2) from paying annual Fund contributions; and
 - (c) either:
 - (i) the provider is a member of a tuition assurance scheme that is established in accordance with the regulations made for the purposes of paragraph 22(1)(a) and that covers the course; or
 - (ii) the provider is exempt from the requirements of section 22 under regulations made for the purposes of subsection 22(3); and
 - (d) the designated authority has given the Secretary a certificate, in the form approved by the Secretary for the purposes of this paragraph for the State, that:
 - (i) relates to the provider's compliance with the national code; and

- (ii) states that the provider has the principal purpose of providing education; and
- (iii) states that the provider has the clearly demonstrated capacity to provide education of a satisfactory standard; and
- (e) except in the case of a provider mentioned in subsection 9B(1)—the designated authority has told the Secretary in writing that the provider has satisfied the designated authority that the provider is fit and proper to be re-registered; and
- (f) the Secretary has no reason to believe that the provider:
 - (i) is not complying, or will not comply, with this Act or the national code; or
 - (ii) does not have the principal purpose of providing education; or
 - (iii) does not have the clearly demonstrated capacity to provide education of a satisfactory standard; and

Note: The Secretary must notify the relevant designated authority if the Secretary has reason to believe that any of the matters set out in this paragraph apply: see section 14.

- (g) the provider is not liable for an annual registration charge or late payment penalty that remains unpaid after it became due for payment.
- (3) The Secretary must not re-register the provider in any other circumstances.
 - (4) Nothing in subsection (2) creates a duty for the Secretary to seek any information about the matters mentioned.
 - (5) Subparagraph (2)(d)(i) does not apply when there is not a national code in force.

Higher education providers

- (6) For the purposes of subparagraphs (2)(d)(ii) and (2)(f)(ii), a higher education provider is taken to have the principal purpose of providing education if its principal purpose is either or both of the following:
 - (a) providing education;
 - (b) conducting research.

9B Deciding whether a provider is a fit and proper person

- (1) Paragraphs 9(2)(ca) and 9A(2)(e) do not apply in relation to the following kinds of provider:
- (a) a provider that is administered by a State education authority;
 - (b) any other provider that is entitled to receive funds under a law of the Commonwealth for recurrent expenditure for the provision of education or training, other than one excluded by the regulations from the scope of this paragraph;
 - (c) any other provider specified in the regulations.

To avoid doubt, any private corporate body established in connection with a provider covered by paragraph (a) or (b) is not itself, by virtue of that connection alone, a provider covered by that paragraph.

- (2) In deciding whether it is satisfied as mentioned in paragraph 9(2)(ca) or 9A(2)(e), the designated authority must have regard to whether a person to whom subsection (3) applies:
- (a) has been convicted of an offence; or
 - (b) has ever had his, her or its registration cancelled or suspended for any one or more courses for any one or more States under this Act or the old ESOS Act; or
 - (c) has ever had an Immigration Minister's suspension certificate issued in respect of him, her or it under this Act; or
 - (d) has ever had a condition imposed on his, her or its registration under this Act; or
 - (e) has ever become bankrupt, applied to take the benefit of a law for the benefit of bankrupt or insolvent debtors, compounded with his or her creditors or assigned his or her remuneration for the benefit of creditors; or
 - (f) has ever been disqualified from managing corporations under Part 2D.6 of the *Corporations Act 2001*; or
 - (g) was involved in the business of the provision of courses by another provider who is covered by any of the above paragraphs at the time of any of the events that gave rise to the relevant prosecution or other action;

and any other relevant matter.

- (3) For the purposes of subsection (2), this subsection applies to the following persons:
- (a) the provider;

- (b) an associate of the provider who has been, is or will be involved in the business of the provision of courses by the provider;
 - (c) a high managerial agent of the provider.
- (4) Nothing in subsection (2) affects the operation of Part VIIC of the *Crimes Act 1914* (which deals with spent convictions).

12 After paragraph 10(4)(c)

Insert:

- (ca) whether the provider has been re-registered under section 9A;

13 Section 12 (note 1)

After “registered”, insert “under section 9”.

14 Paragraph 14(1)(a)

Repeal the paragraph, substitute:

- (a) the Secretary has reason to believe that an approved provider who is not yet registered:
 - (i) is not complying, or will not comply, with this Act or the national code; or
 - (ii) does not have the principal purpose of providing education; or
 - (iii) does not have the clearly demonstrated capacity to provide education of a satisfactory standard; and

Note: The heading to section 14 is altered by adding at the end “etc.”.

15 After subsection 14(1)

Insert:

- (1A) For the purposes of subparagraph (1)(a)(ii), a higher education provider is taken to have the principal purpose of providing education if its principal purpose is either or both of the following:
 - (a) providing education;
 - (b) conducting research.

16 Section 40 (note)

After “section 9)”, insert “or re-registration (see section 9A)”.

17 Subsection 63(1) (note 1)

After “registered”, insert “under section 9”.

18 Section 64

Repeal the section, substitute:

64 Notifying the Secretary of the payment of annual Fund contributions

First annual Fund contribution

- (1) The Fund manager must notify the Secretary if a provider who is not yet registered under section 9 has paid its first annual Fund contribution.

Note: The Secretary needs to know when this has happened so that the provider can be registered under section 9: see paragraph 9(2)(b).

- (2) A notification under subsection (1) must be given as soon as practicable after the provider has paid its first annual Fund contribution.

Annual Fund contributions for 2009 and 2010

- (3) The Fund manager must notify the Secretary:
- (a) if a registered provider paid its annual Fund contribution for the calendar year beginning on 1 January 2009 before the commencement of this subsection—that the registered provider has paid its annual Fund contribution for that calendar year; and
 - (b) if a registered provider has paid its annual Fund contribution for:
 - (i) if paragraph (a) does not apply—the calendar year beginning on 1 January 2009; and
 - (ii) the calendar year beginning on 1 January 2010.

Note: The Secretary needs to know when this has happened so that the provider can be re-registered under section 9A: see paragraph 9A(2)(b).

- (4) A notification under paragraph (3)(a) must be given as soon as practicable after the commencement of subsection (3).

(5) A notification under paragraph (3)(b) must be given as soon as practicable after the registered provider has paid its annual Fund contribution.

(6) Subparagraph (3)(b)(ii) does not apply in relation to a registered provider if the provider is re-registered under section 9A before 1 January 2010.

19 Subsections 65(2), 66(4), 67(2) and 69(3) (notes)

After “registered”, insert “under section 9”.

20 At the end of Subdivision C of Division 4 of Part 5

Add:

74A Notifying the Secretary of the payment of special levies

(1) The Fund manager must notify the Secretary:

- (a) if a registered provider paid an amount of special levy that the provider is required to pay during the period beginning on 1 January 2009 and ending on the day before the day on which this section commences—that the registered provider paid the amount of special levy during that period; and
- (b) if a registered provider has paid an amount of special levy that the provider is required to pay during:
 - (i) the period beginning on the day on which this section commences and ending at the end of 31 December 2009; and
 - (ii) the calendar year beginning on 1 January 2010.

Note: The Secretary needs to know when this has happened so that the provider can be re-registered under section 9A: see paragraph 9A(2)(b).

(2) A notification under paragraph (1)(a) must be given as soon as practicable after the commencement of this section.

(3) A notification under paragraph (1)(b) must be given as soon as practicable after the registered provider has paid the amount of special levy.

(4) Subparagraph (1)(b)(ii) does not apply in relation to a registered provider if the provider is re-registered under section 9A before 1 January 2010.

21 Subsection 83(1B)

Omit “subsection 9(5) if the Minister (having regard to the matters referred to in subsection 9(6))”, substitute “subsection 9B(1) if the Minister (having regard to the matters referred to in subsection 9B(2))”.

22 After subsection 83(1B)

Insert:

(1C) The Minister may also take one or more of those actions against a registered provider if the Minister believes on reasonable grounds that the registered provider:

- (a) does not have the principal purpose of providing education;
or
- (b) does not have the clearly demonstrated capacity to provide education of a satisfactory standard.

Note: Section 93 sets out the procedure for taking the action.

(1D) For the purposes of paragraph (1C)(a), a higher education provider is taken to have the principal purpose of providing education if its principal purpose is either or both of the following:

- (a) providing education;
- (b) conducting research.

23 Subsection 89A(1)

Omit “subsection 9(5)”, substitute “subsection 9B(1)”.

24 Subsection 89A(1)

Omit “subsection 9(6)”, substitute “subsection 9B(2)”.

25 At the end of Subdivision C of Division 1 of Part 6

Add:

92A Automatic cancellation for failure to re-register

The registration of a provider is cancelled for a course for a State by force of this section if:

- (a) that registration was in force immediately before the commencement of this section; and

- (b) the provider is not, on or before 31 December 2010, re-registered under section 9A to provide the course for the State.

92B Automatic cancellation if designated authority does not recommend re-registration

- (1) The registration of a provider is cancelled for a course for a State by force of this subsection if the designated authority for the State gives the Secretary a notice stating that the designated authority does not recommend that the provider be re-registered under section 9A to provide the course for the State.
- (2) The notice must be in the form approved by the Secretary.
- (3) The cancellation takes effect on the day of cancellation specified in the notice.

26 Paragraph 176(1)(a)

After “section 9”, insert “or re-registered under section 9A”.

Education Services for Overseas Students (Registration Charges) Act 1997

27 Subsection 6(1)

After “becoming registered”, insert “under section 9 of the *Education Services for Overseas Students Act 2000*”.

28 Subsection 6(1) (at the end of the note)

Add “under that section”.

29 Subsection 6(2)

After “registration”, insert “under that section”.

30 Subsection 6(2) (definition of *remaining months*)

After “registered”, insert “under that section”.

Part 2—Application provision

31 Application of amendments of section 9 to pending matters

If:

- (a) a designated authority for a State made a recommendation relating to an approved provider under subsection 9(1) of the *Education Services for Overseas Students Act 2000* before the commencement of this item; and
- (b) the Secretary did not make a decision, before that commencement, whether the provider should be registered under section 9 of that Act;

that section as amended by this Act applies to the making of the decision whether to register the provider under that section.

Schedule 2—Other matters

Education Services for Overseas Students Act 2000

1 Section 5

Insert:

condition, in relation to the registration of a provider, means a condition imposed on the registration under section 14A or subsection 83(3).

2 Section 5

Insert:

modification, in relation to a condition on the registration of a provider, includes addition, omission and substitution.

3 At the end of Part 2

Add:

14A Imposing conditions on registration of providers

(1) If:

- (a) the designated authority for a State has imposed a condition on a provider relating to its provision of courses for the State to overseas students; and
- (b) the provider was not registered under section 9 at the time the condition was imposed; and
- (c) the provider subsequently becomes registered under that section;

the Secretary may, at the time of registering the provider, impose that condition, or that condition as modified under subsection (3) of this section, on the provider's registration.

(2) If:

- (a) the designated authority for a State has imposed a condition on a provider relating to its provision of courses for the State to overseas students; and

-
- (b) the provider was registered under section 9 at the time the condition was imposed;
- the Minister may, by notifying the provider in writing, impose that condition, or that condition as modified under subsection (3) of this section, on the provider's registration.
- (3) The modifications that may be made to the condition imposed by the designated authority on the provider are the following:
- (a) if the condition imposed by the designated authority is not limited to a specified period—a modification to limit the condition imposed under this section to a specified period;
 - (b) if the condition imposed by the designated authority is limited to a specified period—a modification to limit the condition imposed under this section to a shorter specified period;
 - (c) a modification to limit the circumstances in which the condition imposed by the designated authority applies as a condition imposed under this section.
- (4) In deciding whether to impose a condition under this section, the Secretary or Minister must have regard to any advice of the designated authority.

4 After section 21

Insert:

21A Obligations relating to the agents of registered providers

- (1) A registered provider must:
- (a) maintain a list of all the provider's agents; and
 - (b) publish that list:
 - (i) on its website; and
 - (ii) in any other manner prescribed by the regulations; and
 - (c) comply with any requirements of regulations made for the purposes of subsection (2).

Note: The Minister may take action under Division 1 of Part 6 against a registered provider that has breached this section.

- (2) The regulations may prescribe requirements that registered providers must comply with in relation to their agents.

5 After subsection 27(1)

Insert:

- (1A) If a registered provider for a course has changed to become an entity of a different kind, the Minister may notify the provider in writing that the course is not taken, for the purposes of paragraph (1)(b), to have ceased to be provided merely because of the change. The notice has effect accordingly.
- (1B) In deciding whether to give the notice, the Minister must have regard to:
- (a) the effect of the change on the delivery of courses and outcomes for students; and
 - (b) any advice of the designated authority for a State that approved the provider as an approved provider for that State.

6 After subsection 31(4)

Insert:

- (4A) The regulations may prescribe criteria to be applied in considering whether a particular course is a suitable alternative course for the purposes of this Act.

7 At the end of paragraph 76(1)(c)

Add “in accordance with subsection 31(4)”.

8 Subsection 76(1) (note)

Repeal the note, substitute:

- Note 1: Section 31 sets out circumstances in which a provider is not required to refund an amount under Division 2 of Part 3.
- Note 2: Subsection 31(4A) provides for regulations to prescribe criteria to be applied in considering whether a particular course is a suitable alternative course.

9 At the end of subsection 77(1)

Add:

- Note: Subsection 31(4A) provides for regulations to prescribe criteria to be applied in considering whether a particular course is a suitable alternative course.

9A After section 80

Insert:

80A Reports on provider defaults

- (1) If one or more calls are made on the Fund as a result of a set of circumstances (a *provider default*) that result in a registered provider becoming required to refund one or more amounts under Division 2 of Part 3 because of subsection 27(1), the Fund Manager must give to the Minister a report that sets out the following:
 - (a) the day on which the provider default occurred;
 - (b) the nature of the provider default;
 - (c) the number of students affected by the provider default;
 - (d) the total amount of the payments that, at the time of giving the report to the Minister, have been made out of the Fund relating to the provider default;
 - (e) an estimate of the total amount of claims against the Fund, by students affected by the provider default, that are outstanding at the time of giving the report to the Minister;
 - (f) whether one or more suitable alternative course were available to students affected by the provider default;
 - (g) information relating to the steps that the Fund Manager took to arrange suitable alternative courses for students affected by the provider default;
 - (h) the total number of students affected by the provider default who, at the time of giving the report to the Minister, have been placed in suitable alternative courses; and
 - (i) such other matters relating to the provider default that the Fund Manager considers it appropriate to include.
- (2) The report must be given to the Minister within 60 days after the day on which the provider default occurred.
- (3) The Minister must cause a copy of a report given to the Minister under this section to be tabled in each House of the Parliament as soon as practicable after receiving the report.

10 Before paragraph 93(1)(a)

Insert:

- (aa) to impose a condition under subsection 14A(2); or
-

11 Before subparagraph 93(1)(d)(i)

Insert:

- (ia) if subsection 14A(2) applies—at least 72 hours; or

12 Subsection 94(1)

Omit “the Minister imposes a condition”, substitute “a condition is imposed”.

13 Paragraph 95(1)(b)

Before “solicit”, insert “subject to subsection (3),”.

14 At the end of section 95

Add:

- (3) The Minister may give to a provider whose registration is suspended a notice in writing that:
 - (a) states that, for the whole period of the suspension, paragraph (1)(b) does not apply to the provider in relation to overseas students who have started the course; or
 - (b) states that, for a specified part of the period of the suspension, paragraph (1)(b) does not apply to the provider in relation to overseas students who have started the course.

The notice has effect accordingly.

- (4) A notice under subsection (3) is not a legislative instrument.

15 After paragraph 176(1)(a)

Insert:

- (aa) a decision to impose a condition on a provider’s registration under section 14A; or
- (ab) a decision not to notify a registered provider under subsection 27(1A); or

16 At the end of subsection 176(1)

Add:

- ; or (d) a decision not to give a notice under subsection 95(3).

*[Minister's second reading speech made in—
House of Representatives on 19 August 2009
Senate on 26 October 2009]*

(154/09)

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Measures) Act 2010 No. 10, 2010 19*