

REPLACEMENT EXPLANATORY STATEMENT

Issued by the authority of Minister for Education and Youth

Education Services for Overseas Students Act 2000

Education Services for Overseas Students (Exempt Courses) Instrument 2021

AUTHORITY

The *Education Services for Overseas Students (Exempt Courses) Instrument 2021* (the Instrument) is made by the Minister under section 5AA of the *Education Services for Overseas Students Act 2000* (ESOS Act).

PURPOSE AND OPERATION

The purpose of this instrument is to specify courses that are exempt from registration under the ESOS Act.

The ESOS Act requires all providers to be registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) to deliver a course to overseas students. The ESOS Act was amended, with effect from 3 March 2021, by the *Education Services for Overseas Students Amendment (Refunds of Charges and Other Measures) Act 2021* to insert a clear definition of the term 'course' for this purpose, in new section 5AA of the ESOS Act. Subsection 5AA(3) of the ESOS Act provides that the Minister may, by legislative instrument, determine that a course of education or training is not a course for the purposes of this new definition (with the result that the provider of any such course will not require registration where the course is provided to overseas students). As such, this instrument effectively exempts some courses from requiring CRICOS registration.

The regulatory requirements placed on registered providers under the ESOS Act promote the fundamental objects of the ESOS Act, including to provide tuition assurance, ensure quality education and protect visa integrity, where an overseas student has made a substantial investment in a course of education or training in Australia. However, these regulatory requirements do not suit some short duration courses that are low cost and supplementary to a student's main course of study. Specifically, the additional administrative and financial investment needed to maintain CRICOS registration has meant that few providers seek to offer such courses to overseas students, causing students' access to training for employment in industries such as hospitality, health and construction to be limited.

Allowing providers to deliver courses exempted from registration by this instrument may also help facilitate overseas students to pursue personal interests and participate in recreational activities while studying in Australia.

Exempted VET Courses

The following types of vocational education and training (VET) courses are exempted:

- Courses which may be required ahead of attending a workplace component approved as part of a substantive qualification; and
- Courses which are required by industry for employment in a limited number of industries international students work in while studying in Australia consistent with their student visa requirements of up to 40 hours a fortnight, such as:
 - hospitality;
 - health;
 - construction;
 - infection control;
 - retail; or
 - horticulture.

These courses have been assessed as attracting broad support from industry, regulators or providers as requiring exemption. They are the type of courses which students can attend in addition to their full-time main course of study, without jeopardising the attendance or progress of the main course (which would breach visa requirements).

Exempted Higher Education Provider Courses

The instrument also exempts some courses delivered by higher education providers which do not lead to a qualification recognised under the Australian Qualifications Framework (AQF), including hobby or recreational courses. It enables higher education providers to deliver short recreational courses in subjects such as creative arts, languages, or music that are not part of or do not lead to an AQF qualification (non-AQF courses). Providers will not be able to offer these courses on a supplementary basis if they are intended to be used for credit towards an AQF qualification. If a provider intends to grant credit or otherwise formally recognise completion of a non-AQF course offered by that provider towards an AQF qualification, both the non-AQF and AQF courses must continue to be registered on CRICOS. Registration is also required where there is an agreement between higher education providers to grant credit or otherwise formally recognise completion of a non-AQF course towards an AQF qualification.

Registered higher education providers must still register some other non-AQF courses, such as:

- English Language Intensive Courses for Overseas Students (ELICOS);
- Foundation Programs;
- study abroad or student exchange;
- tertiary coursework and research preparatory courses; and
- professional outcomes and placement courses.

Other Requirements and Obligations

Students will not be able to apply for a student visa based on any exempted course and providers must not advertise them as registered CRICOS courses or make any claim of

endorsement under the ESOS Act. Providers will continue to be required to monitor course progress and meet reporting requirements for the student's main, CRICOS registered course. Providers must support students to make satisfactory progress in their primary course of study and can take action where required, including implementing intervention strategies, if there is any impact on the student's progress in this course.

Providers continue to be required to follow domestic laws and regulations for exempted courses. This includes, for example, accreditation under the Australian Skills Quality Authority (ASQA) or other accrediting body and the Standards for Registered Training Organisations, where applicable. Consumer protection laws would also apply to these courses in cases of refund disputes or non-delivery.

As students' needs change, the Minister may consider amending the instrument to either add or remove courses from the definition of 'course' under the ESOS Act. The Department of Education Skills and Employment (the department) may consult providers, industry and regulators when updating the instrument.

Legislation Act 2003

Part 1 and Part 2 of Schedule 1 of this Instrument prescribe 21 named units of competency and two named VET courses, respectively. In addition to those named units and courses, the Instrument also specifies in Parts 1 and 2 any unit or course (respectively) 'identified in the National Register referred to in section 216 of the *National Vocational and Training Regulator Act 2011* as a later version of, or a superseding [unit or course]' of the units or courses named.

This additional specification is a specification by class in accordance with subsection 13(3) of the *Legislation Act 2003*. That provision relevantly provides that if enabling legislation confers on a person a power to prescribe a matter, the person may identify the matter by referring to a class or classes of matters. The note in subsection 5AA(3) of the Act contemplates that specification by class may be used to determine that various courses of education or training are not 'courses' for the purposes of the Act.

The purpose of prescribing these classes of courses and units is to preserve the effect of the Instrument in relation to units and courses that supersede the units and courses specified. Determining the scope of the class by reference to an objectively ascertainable criterion, such as the way units and courses are described in the National Register, avoids the ambiguity that may result if a more general specification of superseding units or courses is used.

For example, the reference is intended to ensure that, where a first aid course with a new unit code is devised to cover the same skills associated with the unit of competency described at item 5 in the table in Part 1 of Schedule 1, that first aid course will remain exempt, even though the 'unit code' may technically differ from the code initially specified. Without referring to a superseded unit in this way, the Instrument would need to be immediately updated in the event that a new unit code is applied to a first aid course, with

providers at risk of requiring registration under the Act in the event of any delay in updating the Instrument. In this light, the Instrument intends to operate by clarifying that first aid courses are exempt, and the reference to the National Register is made to indicate the current unit code, providing additional certainty around which units or courses fall within this class.

The reference to the National Register serves only as a manner of describing a class that is prescribed by the Instrument, in the same way that other units and courses specified by the Instrument are described by their name and unit or course code. No part of the National Register is applied, adopted or incorporated by the Instrument.

The National Register may be accessed at <https://training.gov.au/Home/Tga>.

REGULATORY IMPACT

The Office of Best Practice Regulation advises that a Regulatory Impact Statement is not required, as the proposal is unlikely to have a more than minor regulatory impact on business, community organisations or individuals (OBPR reference number 24152).

COMMENCEMENT

The Instrument commences on the day after it is registered on the Federal Register of Legislation.

CONSULTATION

On 22 March 2021, the department released a paper for public consultation on the proposed model for exempting supplementary courses and received 26 responses, including responses from peak and student bodies.

The Tertiary Education Quality and Standards Agency (TEQSA) and ASQA have been closely consulted in their capacity as ESOS agencies during the development of the instrument. The Victorian Registration and Qualifications Authority and the Training Accreditation Council Western Australia have also advised the department on State specific non-ASQA accredited units for exemption.

The majority of feedback was supportive of the instrument's purpose to enable delivery of supplementary courses to overseas students without registration on CRICOS. Stakeholders were invited to provide feedback on the suitability of the proposed list of exempt courses and identify other courses for exemption. In response to feedback, the department added a number of courses for exemption which meet the policy intent and are required by industry for employment.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Education Services for Overseas Student (Exempt Courses) Instrument 2021

The *Education Services for Overseas Student (Exempt Courses) Instrument 2021* (the Instrument) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

The purpose of this instrument is to specify courses that are exempt from registration under the *Education Services for Overseas Students Act 2000* (ESOS Act).

The ESOS Act requires all providers to be registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) to deliver a course to overseas students. The ESOS Act was amended, with effect from 3 March 2021, by the *Education Services for Overseas Students Amendment (Refunds of Charges and Other Measures) Act 2021* to insert a clear definition of the term ‘course’ for this purpose, in new section 5AA of the ESOS Act. Subsection 5AA(3) of the ESOS Act provides that the Minister may, by legislative instrument, determine that a course of education or training is not a course for the purposes of this new definition (with the result that the provider of any such course will not require registration where the course is provided to overseas students). As such, this instrument effectively exempts some courses from requiring CRICOS registration.

The regulatory requirements placed on registered providers under the ESOS Act promote the fundamental objects of the ESOS Act, including to provide tuition assurance, ensure quality education and protect visa integrity, where an overseas student has made a substantial investment in a course of education or training in Australia. However, these regulatory requirements do not suit some short duration courses that are low cost and supplementary to a student’s main course of study. Specifically, the additional administrative and financial investment needed to maintain CRICOS registration has meant that few providers seek to offer such courses to overseas students, causing students’ access to training for employment in industries such as hospitality, health and construction to be limited.

Human rights implications

The Instrument engages the following rights:

- *the right to education – Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and*
- *the right to work – Article 6 of the ICESCR.*

Right to education

The Instrument engages the right to education contained in Article 13 of the ICESCR. The right to education recognises the important personal, societal, economic and intellectual benefits of education.

Australia's strong domestic regulations and education system underpins the quality of all courses delivered to domestic and overseas students, creating a strong international education system and allowing Australia to promote and support the right to education. The ESOS Act provides additional protections for overseas students and upholds Australia's reputation for quality education and training services.

The Instrument is compatible with the right to education as it enables overseas students to access courses supplementary to their main course, where protections existing outside of the ESOS Act are sufficient for those courses.

Exempting certain courses from the requirements of the ESOS Act may also result in students pursuing other kinds of supplementary courses to facilitate personal interests and enhance the quality of students' Australian experience. Importantly, overseas students will continue to be afforded the tuition assurance and protections under the ESOS Act for their substantive course of study which is registered under the ESOS Act.

Providers will continue to be required to monitor course progress and meet reporting requirements for the student's main, CRICOS registered course. Providers must support students to make satisfactory progress in their primary course of study and can take action where required, including implementing intervention strategies, if there is any impact on the student's progress in this course.

Providers will also continue to be required to follow domestic laws and regulations for exempted courses. This includes, for example, accreditation under the Australian Skills Quality Authority (ASQA) or other accrediting body and the Standards for Registered Training Organisations, where applicable. Consumer protection laws would also apply to these courses in cases of refund disputes or non-delivery.

On this basis, allowing providers to deliver exempted courses without registration under the ESOS Act will remove barriers which have led to few providers offering these courses to overseas students. It will enable overseas students to pursue personal interests and participate in recreational activities while studying in Australia, without removing important protections which exist under other legislative frameworks.

Right to work

The Instrument also engages the right to work contained in Article 6 of the ICESCR. Article 6(1) recognises the right to work, which includes the right of everyone to the opportunity to gain one's living by work which he or she freely chooses or accepts.

The Instrument furthers the Commonwealth's commitment to the delivery of quality education and training services to overseas students, providing a solid foundation for

people to pursue quality work objectives after completing their studies. A high-quality international education system provides a pathway for overseas students to pursue broader employment opportunities.

This Instrument is compatible with the right to work as it will enable overseas students to undertake courses which are pre-requisites for work in specific industries. This will improve overseas students' employability while they pursue their substantive course of study. It will also make them less vulnerable to exploitation in the workplace because, as holders of the relevant occupational certificates, they will be better able to choose the employers for whom they will work. Students will be more competitive in the job market and can be assured they have the appropriate qualifications to seek employment with law-abiding employers.

Conclusion

The Instrument is compatible with human rights because it promotes the protection of human rights.

Minister for Education and Youth, Alan Tudge

Education Services for Overseas Student (Exempt Courses) Instrument 2021

EXPLANATION OF PROVISIONS

Section 1: Name

Section 1 provides that the title of the Instrument is the *Education Services for Overseas Student (Exempt Courses) Instrument 2021*.

Section 2: Commencement

Section 2 specifies that the Instrument commences on the day after it is registered on the Federal Register of Legislation.

Section 3: Authority

Section 3 provides that the Instrument is made under subsection 5AA(3) of the *Education Services for Overseas Students Act 2000*.

Section 4: Definitions

Section 4 defines terms used in the Instrument and specifies which terms are defined in the ESOS Act.

Australian Qualifications Framework

Section 14 of the *Legislation Act 2003* states that, unless the contrary intention appears, a legislative instrument may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

Accordingly, the Instrument has confined the definition of the *Australian Qualifications Framework* to the framework as it existed at the time the Instrument is made. The AQF, as it existed at the time this Instrument was made, can be found at:

<https://www.aqf.edu.au/aqf-second-edition-january-2013>. This version also includes the following three addenda which are available on the same webpage:

1. Addendum to the AQF Second Edition January 2013: Amended Qualification Type: Masters Degree,
2. Addendum No.2 to the AQF Second Edition January 2013: Amended Qualification Type: AQF Issuance Policy, Masters Degree (Extended), and
3. Addendum No.3 to the AQF Second Edition January 2013: Additional AQF Qualification: Undergraduate Certificate.

If this link is disabled and the relevant version of the AQF and associated addenda are required, the department may be contacted at aqfc@aqf.edu.au.

Study abroad or student exchange

Study abroad or student exchange courses are provided to overseas students who are enrolled in a tertiary program at an overseas institution. Study abroad courses are provided

where there is no official exchange agreement in place between the Australian provider and overseas provider. Conversely, a student exchange occurs where the student remains enrolled at the overseas institution but undertakes study with the Australian provider under a formal agreement.

Tertiary coursework and research preparatory course

The Diploma Preparation Program (DPP) offered by Bond University and the Post-Graduate Qualifying Program (PQP) offered by Edith Cowan University are examples of *tertiary coursework and research preparatory courses*. The DPP provides a pathway for students to pursue undergraduate studies, by teaching students the core subjects and skills which are required for entry to a Bond University Higher Education Diploma Program. Similarly, the PQP is a one semester non-AQF program designed for students who already have tertiary qualifications but have not qualified for direct entry into master's degrees at Edith Cowan University. This program is designed to equip students with the knowledge, skills and English Language Proficiency for entry into master's degrees in the School of Arts & Humanities at the university.

Professional outcomes and placement course

Professional outcomes and placement courses include, for example, placements undertaken by overseas registered nurses at Australian health care facilities, which enable them to adapt to the Australian health care system and be assessed against the Registered Nurse Standards of Practice. Such a course enables the student to attain work as a Registered Nurse at an Australian health care facility.

Section 5: Exempt Courses

Section 5 sets out various categories of courses that are exempt from the definition of 'course' in the ESOS Act.

The exempted categories of courses are as follows:

- Any 'VET course' within the meaning of the *National Vocational Education and Training Regulator Act 2011*, the requirements for which are solely made up of units of competency listed in Part 1 of Schedule 1 of the Instrument and where completion of the course does not result in a qualification recognised under the AQF;
- Any VET course listed under Part 2 of Schedule 1 of the Instrument; and
- Any course offered by a registered higher education provider which is listed under Schedule 2 of the Instrument.

The practical effect of this section is that providers will now be able to offer courses that fall into the above categories to overseas students without registering them on the CRICOS register.

The Note under this section clarifies that, if the exemption is to apply, the units of competency listed under Part 1 of Schedule 1 cannot be combined to form course

requirements with units that are not listed. That is, where all the requirements for a course are units of competency that are listed in the table in Part 1 of Schedule 1, the course is exempt from the definition of ‘course’ in section 5AA of the ESOS Act. However, if one or more of the units of competency required for completion of a certain course is not listed in the table in Part 1 of Schedule 1, then that course is not exempt from the definition of ‘course’ in section 5AA of the ESOS Act.

Schedule 1 – VET Courses

Schedule 1 operates to exempt courses that are employment-related or required ahead of attending a workplace component approved as part of a substantive qualification, such as first aid training, construction white cards and the responsible service of alcohol. This Instrument allows providers to offer these courses to overseas students without CRICOS registration.

Part 1 – Units of competency

This Part lists the units of competency required, either individually or collectively, for the completion of a course that is exempt under paragraph 5(a). For example, a course which only requires successful completion of a unit specified in this Part, such as ‘Licence to operate a Forklift truck’, is exempt from the definition of ‘course’ under the ESOS Act. Similarly, a course which requires successful completion of several units specified in this Part, such as ‘Provide First Aid’, ‘Provide First Aid in an education and care setting’ and ‘Provide First Aid in remote or isolated site’, is also exempt from the definition of ‘course’.

However, where a course requires successful completion of one or more specified units as described above, but also requires completion of a unit which is not specified, then the entire course is not exempt from the definition of ‘course’. In this case, the provider must register this course on CRICOS.

Any later or superseding versions of these units, as identified on the National Register, are also included in the operation of this Part. The National Register can be viewed at <https://training.gov.au/Home/Tga>.

Part 2 - VET courses

Part 2 of Schedule 1 lists specific VET courses that are exempt from the definition of ‘courses’ under section 5AA(1) and are therefore excluded from the operation of the ESOS Act. The table under this Part excludes specific VET courses accredited by the Victorian Registration and Qualification Authority.

Schedule 2 – Higher Education

Under paragraph 5AA(1)(e) of the ESOS Act, a course is a course of education or training if it is offered by a registered higher education provider. Subsection 5AA(3) of the ESOS Act allows the Minister, by legislative instrument, to determine that a course of education or

training is not a course for the purposes of the ESOS Act. The note under subsection 5AA(3) clarifies that the Minister has the power to exempt a class of courses in an instrument.

Subsection (1) of Schedule 2 of this Instrument exempts a class of courses offered by registered higher education providers from the definition of 'course' under section 5AA(1) of the ESOS Act. Certain types of courses which may fall within this class, but should not be exempted from the definition, are specified in subsection (2). Therefore, courses which fall within the exempted class, but do not fall within the categories set out in subsection (2), do not require CRICOS registration.

Subsection 1

Courses specified in subsection (1) are courses which do not enable a student to gain a substantive qualification (i.e. non-AQF courses). Subparagraphs (1)(i) to (iii) outline different ways in which a course may enable a student to gain an AQF qualification. For a course to be exempt, it must not enable a student to gain a qualification in any of the ways listed.

The purpose of subparagraph (1)(ii) is to make it clear that registered higher education providers cannot avoid ESOS registration by providing courses that, in and of themselves, do not lead to a qualification recognised under the AQF, but then grant credit for those courses towards a course which does lead to an AQF qualification. If a provider intentionally engages in this practice, then the non-AQF courses which are eligible for credit towards an AQF qualification would not satisfy subparagraph (1)(ii) and would therefore require CRICOS registration.

Subparagraph (1)(iii) has the purpose of preventing providers from avoiding CRICOS registration through an agreement with another provider. In particular, two providers cannot work together so that one provider offers an exempt non-AQF course, and then the second provider recognises completion of that non-AQF course towards a course which does lead to an AQF qualification.

For example, a subsidiary entity provides short courses in business which do not lead to AQF qualifications, and then the parent entity recognises those courses as prior learning or credit toward a Bachelor of Commerce awarded by the parent entity. In this scenario, the non-AQF courses provided by the subsidiary would not satisfy subparagraph (1)(iii) and would therefore not be exempt from the definition of 'course'. The subsidiary would need to register the non-AQF courses on CRICOS. For clarity, this arrangement could also occur between unrelated entities.

In summary, the exemption should not be used by providers as a loophole for avoiding CRICOS registration of short courses, and then combining these exempt courses to award an overseas student an AQF qualification.

Subsection 2

Subsection 2 of Schedule 2 specifies certain non-award courses that are exempt from Section 1 of Schedule 2, and therefore still require registration on CRICOS. Where a course

falls within the type of course specified in subsection (1), but also falls within the types of courses specified in subsection (2), it is not an exempt course.

English Language Intensive Courses for Overseas Students (ELICOS) include courses where a student attends an English language course which would lead to or prepare a student to complete a substantive qualification, while a Foundation Program includes courses for overseas students that equip these students with the skills and capabilities to seek entry into higher education programs in Australia.

Subsection 2 will preserve the status quo and ensure that higher education providers will still be required to register the listed courses under the ESOS Act. These courses are appropriate for registration under the ESOS Act, to ensure that consumer protections under the Tuition Protection Service and eligibility for student visas are maintained. These courses have an identified study outcome, are not recreational in nature and are taken as full-time course of study rather than supplementary to a student's main course.