2008-2009

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

EDUCATION SERVICES FOR OVERSEAS STUDENTS AMENDMENT (RE-REGISTRATION OF PROVIDERS AND OTHER MEASURES) BILL 2009

REVISED EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Education the Honourable Julia Gillard MP)

THIS EXPLANATORY MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE HOUSE OF REPRESENTATIVES TO THE BILL AS INTRODUCED
OUTLINE

The purpose of the Bill is to make adjustments to the operation of the Education Services for Overseas Students Act 2000 to clarify the application of various provisions and to introduce processes that will increase the accountability of international education and training services providers under the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007.

The Bill will introduce provisions to enable re-registration of all institutions that are currently registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) to deliver courses of education and training to international students by the end of 2010. Registration of providers not re-registered by that date will be cancelled. The purpose of this measure is to restore consumer confidence in the quality of education services provided across the entire international education sector. As part of this re-registration measure, the Bill introduces provisions for two new registration criteria which aim to raise quality by ensuring only those institutions that have both genuine purpose and demonstrated capacity to provide quality education are able to be registered.

Additionally, the Bill will introduce provisions requiring the publication by providers of the names of education agents who represent them and promote their education services. The Bill will also enhance provisions relating to the management of a provider’s registration, ability to provide educational services and determination of default situations. The Bill will also provide the Commonwealth with more clarity in relation to what constitutes a “suitable alternative course” and lessen the financial and regulatory burdens on providers that may wish to change their business structures for legitimate business purposes whilst still providing sound protection for overseas students.

In addition, the Bill will introduce a provision requiring the Fund Manager to provide the Minister with reports on provider defaults that result in calls being made on the Assurance Fund. This measure will increase accountability for actions taken by the Fund Manager and provide an early alert to the Australian Government of any pressures on the ESOS consumer protection mechanisms.

FINANCIAL IMPACT

There is a financial impact associated with the amendments related to the re-registration of CRICOS institutions. This includes a financial impact related to the re-registration process itself which will be reduced by states and territories taking a risk-
management approach and through re-directing existing resources from current auditing activities no longer required. The main impact will be in Victoria and New South Wales who have both already announced fast tracked audit procedures for high-risk providers. Any additional resources will be met jointly by the state and territory governments and the Australian Government under existing funding arrangements including national agreements.

There is also a potential financial impact on the ESOS Assurance Fund related to closures resulting from decisions not to re-register certain providers however this should be understood in the context of existing pressures on the Fund. This context includes a general restructuring of the international education sector, intensified auditing by the states and territories, changes to skilled migration policy, rapid growth and significant changes in the composition of the international student body and emerging issues related to quality and student wellbeing.
NOTES ON CLAUSES

Clause 1 - Short title

Provides for the Act to be cited as the *Education Services for Overseas Students Amendment (Re-registration of Providers and Other Measures) Bill 2009*.

Clause 2 - Commencement

Clause 2 provides that the Act commences on the day it receives Royal Assent.

Clause 3 - Schedule(s)

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

For ease of description, this explanatory memorandum uses the following abbreviations:

‘CRICOS’ means the Commonwealth Register of Institutions and Courses for Overseas Students.

‘ESOS Act’ means the *Education Services for Overseas Students Act 2000*.

Schedule 1— Re-registration etc. of providers

Part 1 – Amendments

*Education Services for Overseas Students Act 2000*

**Item 1 – Paragraph 4B(2)(b)**

Repeals and substitutes paragraph 4B(2)(b) of the ESOS Act, but does not alter its effect. The amendment provides that subsection 4B(1) does not apply in relation to new paragraph 9B(1)(a).

Section 4B extends the application of the ESOS Act to Christmas Island and the Territory of Cocos (Keeling) Islands. Subsection 4B(1) provides that a reference in the ESOS Act to a State includes a reference to the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands. This amendment will ensure that paragraph 4B(1)(a) will not apply to remove the requirement for the Territories Minister to inform the Secretary that a provider in Territory of Christmas Island or the Territory of Cocos (Keeling) Islands is fit and proper to be registered on CRICOS.

This is a consequential amendment to Items 8 and 11. Item 8 repeals subsections 9(5) to 9(7) and Item 11 inserts a new section 9B.

**Item 2 – Section 5**

Inserts a new definition of *higher education provider* into section 5. A *higher education provider* is defined as having the same meaning as in the *Higher Education Support Act 2003* (HESA).

Higher education provider is defined in section 16-1 of HESA as being a body corporate that is approved under Division 16 of HESA.

This is a consequential amendment to Items 10 and 11.

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

Amends the definition of *registered* in section 5 by adding the words “and (except in sections 9 to 9B) includes re-registered under section 9A”. The amended definition is as follows:

“*registered* means registered under Part 2 “, and (except in sections 9 to 9B) includes re-registered under section 9.”
Item 4 – Subparagraph 9(2)(b)(ii)

Repeals and substitutes subparagraph 9(2)(b)(ii).

Section 9 provides for the registration of providers on CRICOS and subsection 9(2) provides that the Secretary must register a provider if the requirements of paragraphs 9(2)(a) to (e) are satisfied. The effect of the amendment is to provide that one of these criteria is that the provider has either paid its first annual Fund contribution (subparagraph 9(2)(b)(i)), or the provider would be exempt under subsection 24(2) from paying annual Fund contributions if the provider were registered (new subparagraph 9(2)(b)(ii)).

For the purposes of subparagraph 9(2)(b)(ii), the amendment broadens the categories of providers potentially exempt from paying annual Fund contributions so that these categories correctly align with the categories of exemptions listed in subsection 24(2) – one of which is providers specified in the regulations (regulation 3.18).

The amendment also aligns with new subparagraph 9A(2)(b)(ii) pertaining to the criteria for re-registering existing providers (Item 11).

Item 5 – Paragraph 9(2)(c)

Repeals and substitutes paragraph 9(2)(c).

Subsection 9(2) provides that the Secretary must register a provider if the requirements of paragraphs 9(2)(a) to (e) are satisfied.

The effect of Item 5 is to broaden the scope of paragraph 9(2)(c). The amended paragraph 9(2)(c) requires the designated authority for a State to give the Secretary a certificate in the form that the Secretary has approved that:

- relates to the provider’s compliance with the national code; and
- states that the provider has the principal purpose of providing education; and
- states that the provider has the clearly demonstrated capacity to provide education of a satisfactory standard.

The second and third of these criteria are new.

Item 6 – Paragraph 9(2)(ca)

Omits the reference to subsection 9(5) in paragraph 9(2)(ca) and substitutes a reference to new subsection 9B(1). This is a technical amendment related to Item 11.
Item 7 – Paragraph 9(2)(d)

Repeals and substitutes paragraph 9(2)(d), including its note. Subsection 9(2) provides that the Secretary must register a provider if the requirements of paragraphs 9(2)(a) to (e) are satisfied.

The amended paragraph 9(2)(d) criteria are where the Secretary has no reason to believe that the provider:

- is not complying, or will not comply with the ESOS Act or the national code; or
- does not have the principal purpose of providing education; or
- does not have a clearly demonstrated capacity to provide education of a satisfactory standard.

The second and third of these criteria are new and they align with the new criteria in paragraph 9(2)(c) (Item 5).

The amended note states that the Secretary must notify the relevant designated authority if the Secretary has reason to believe that any of the matters in paragraph 9(2)(d) apply. The note also draws reference to section 14 relating to the requirement for the Secretary to notify designated authorities if the Secretary has reason to believe an approved provider who is not yet registered is not complying, or will not comply, with the ESOS Act or the national code.

Item 8 – Subsections 9(5) to (7)

Repeals subsections 9(5) to 9(7) relating to whether a provider is fit and proper to be registered.

This is a consequential amendment to Item 11. Item 11 inserts new section 9B which re-inserts the fit and proper provisions previously contained in repealed subsections 9(5) to 9(7) and applies them to both new registrations and re-registrations.

Item 9 – Subsection 9(8)

Omits the reference to paragraph 9(2)(ca) and substitutes it with a reference to paragraph 9(2)(c).

Subsection 9(8) should refer to paragraph 9(2)(c) instead of paragraph 9(2)(ca). Item 9 makes this technical correction.

Section 9 concerns the registration of providers. Subsection 9(2) specifies that the Secretary must register a provider if the requirements of paragraphs 9(2)(a) to (e) are satisfied. Paragraph 9(2)(c) specifies that one of these criteria is that the designated authority for a State (the body responsible under State law for approving providers to
provide courses in the State to overseas students) has given the Secretary a certificate relating to the provider’s compliance with the national code.

Subsection 9(8) should refer to paragraph 9(2)(c) with the effect that the paragraph does not apply if the national code is not in force.

Item 10 – At the end of section 9

Inserts a new subsection 9(9). New subsection 9(9) provides that, for the purposes of new subparagraphs 9(2)(c)(ii) and 9(2)(d)(ii) (as inserted by Items 5 and 7), a higher education provider is taken to have the principal purpose of providing education if its principal purpose is either or both of providing education or conducting research (these criteria are drawn from paragraph 16-25(aa) of the Higher Education Support Act 2003).

Item 11 – After section 9

Inserts new sections 9A and 9B.

New section 9A makes provision for the re-registration of existing registered providers.

New subsection 9A(1) provides that a designated authority for a State may recommend that a provider which is approved to provide a course for that State to overseas students at the time new section 9A commences, should be re-registered to provide that course to overseas students.

New subsection 9A(2) provides that the Secretary must re-register a provider if the criteria listed in subsection 9A(2) are satisfied. These are as follows:

- The criteria in paragraph 9A(2)(a) are that the provider be either a resident of Australia, or a Table C provider within the meaning of HESA. These criteria are the same as in paragraph 9(2)(a).

- The criteria in paragraph 9A(2)(b) are that either the provider has paid its annual Fund contribution under Part 5 and any special levy it is required to pay for the relevant calendar year in which a subsection 9A(1) recommendation is made, or the provider is exempt under subsection 24(2) from the requirement to pay annual Fund contributions.

- The criteria in paragraph 9A(2)(c) are that the provider is either a member of a tuition assurance scheme that covers the course, or is exempt from the requirement to be a member of a tuition assurance scheme under regulations made for the purpose of subsection 22(3). These are the same criteria as in paragraph 9(2)(ba).
The criteria in paragraph 9A(2)(d) are that the designated authority for the State has given the Secretary a certificate in the approved form that:
  o relates to the provider’s compliance with the national code; and
  o states the provider has the principal purpose of providing education; and
  o states the provider has the clearly demonstrated capacity to provide education of a satisfactory standard.

These criteria are the same as those inserted into paragraph 9(2)(c) by Item 5.

The criterion in paragraph 9A(2)(e) is that, except for a provider mentioned in subsection 9B(1), the designated authority, in writing, has informed the Secretary that the provider has satisfied the designated authority that it is fit and proper to be registered. This criterion is the same as the criterion in paragraph 9(2)(ca) (as amended by Item 6);

The criteria in paragraph 9A(2)(f) are that the Secretary has no reason to believe that the provider:
  o is not complying, or will not comply with the ESOS Act or the national code; or
  o does not have the principal purpose of providing education; or
  o does not have a clearly demonstrated capacity to provide education of a satisfactory standard.

These criteria are the same as the criteria in paragraph 9(2)(d) (as amended by Item 7). A note to paragraph 9A(2)(f) states that the Secretary must notify the relevant designated authority if the Secretary has reason to believe that any of the matters set out in paragraph 9A(2)(f) apply. The note also draws reference to section 14 relating to the requirement for the Secretary to notify designated authorities if the Secretary has reason to believe an approved provider who is not yet registered is not complying, or will not comply, with the ESOS Act or the national code. This note is the same as the note inserted into paragraph 9(2)(d) by Item 7.

The criterion in paragraph 9A(2)(g) is that the provider is not liable for an annual registration charge or a late payment penalty imposed but not yet paid. This criterion is the same as the criterion in paragraph 9(2)(e).

New subsection 9A(3) provides that the Secretary must not re-register a provider in any other circumstances. This stipulation is the same as that in subsection 9(3).

New subsection 9A(4) provides that nothing in subsection 9A(2) creates a duty for the Secretary to seek information about the matters mentioned in the subsection. This stipulation is the same as that in subsection 9(4).

New subsection 9A(5) provides that subparagraph 9A(2)(d)(i) does not apply when the national code is not in force. This provision is the same as that in subsection 9(8) (as amended by Item 9).
New subsection 9A(6) provides that, for the purposes of new subparagraphs 9A(2)(d)(ii) and 9A(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 providing education or conducting research (these criteria are drawn from paragraph 16-25(aa) of the *Higher Education Support Act 2003*).

New section 9B makes provision for deciding whether a provider is a fit and proper person and contains the same criteria as in subsections 9(5) to 9(7) as repealed by Item 8.

New subsection 9B(1) provides that the fit and proper requirements specified in paragraphs 9(2)(ca) and 9A(2)(e) do not apply to the following kinds of provider:

- those administered by a State education authority;
- providers entitled under a law of the Commonwealth to receive recurrent expenditure funding to provide education or training (other than providers excluded by regulations made for the purposes of new paragraph 9B(1)(b);
- any other provider specified in the regulations.

New subsection 9B(1) also makes it clear, for the avoidance of doubt, that private bodies corporate established in connection with a provider covered by paragraphs 9B(1)(a) or (b) are not, simply because of that connection alone, providers covered by either paragraph.

New subsection 9B(2) provides that the designated authority, when deciding whether it is satisfied that a provider is fit and proper for the purposes of paragraphs 9(2)(ca) or 9A(2)(e), must have regard to a number of criteria with respect to a person to whom new subsection 9B(3) applies (ie the provider, an associate of the provider who has been, is or will be involved in the business of the provision of courses by the provider, or a high managerial agent of the provider). The criteria are whether a person:

- has been convicted of an offence;
- has ever had his or her registration cancelled or suspended for any courses for any States under the ESOS Act or its predecessor (the *Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991*);
- has ever had an Immigration Minister’s suspension certificate issued to him or her under the ESOS Act;
- has ever had a condition imposed on him, her or its registration under the ESOS Act;
- has ever become bankrupt, applied to take the benefit of laws 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;
- has even been disqualified from managing corporations under Part 2D.6 of the *Corporations Act 2001*;
- was involved in the business of the provision of courses by another provider covered by any of the above at the time of any of the events that gave rise to a relevant prosecution or other action;

and any other relevant matter.
New subsection 9B(4) provides that nothing in subsection 9B(2) affects the operation of Part VIIC of the *Crimes Act 1914* relating to spent convictions.

**Item 12 – After paragraph 10(4)(c)**

Inserts new paragraph 10(4)(ca). The effect of the amendment is that the Secretary must also cause information about whether a provider has been re-registered under section 9A to be entered on the Register.

**Item 13 – Section 12 (note 1)**

Amends note 1 to section 12 (which relates to the initial registration charge) by adding the words “under section 9” after the word “registered”. The amended note 1 now reads “A provider cannot get registered under section 9 until it has paid the initial registration charge: see paragraph 9(2)(aa).”

The amendment to note 1 clarifies that the initial registration charge only applies to registration under section 9 (and not to re-registration under section 9A).

**Item 14 – Paragraph 14(1)(a)**

Repeals and substitutes paragraph 14(1)(a). The effect of new paragraph 14(1)(a) is that, where an approved provider is not yet registered and the Secretary, on the basis of information received from other than the designated authority (that recommended the provider for registration), has reason to believe that the provider:

- is not complying, or will not comply with the ESOS Act or national code; or
- does not have the principal purpose of providing education; or
- does not have a clearly demonstrated capacity to provide education of a satisfactory standard.

The Secretary must give that information to the designated authority:

Item 14 also alters the heading to section 14 by adding “etc” at the end of the heading. The amended heading reads as follows: “Notifying States if the Secretary suspects non-compliance with this Act or the national code etc”.

**Item 15 – After subsection 14(1)**

Inserts new subsection 14(1A) into section 14. The effect of new subsection 14(1A) is to clarify that, for the purposes of amended paragraph 14(1)(a), a higher education provider is taken to have the principal purpose of providing education if its principal purpose is either or both of providing education or conducting research (these criteria are drawn from paragraph 16-25(aa) of the *Higher Education Support Act 2003*).
Item 16 – Section 40 (note)

Amends the note to section 40 (which relates to the legal effect of the national code) by adding the words “or re-registration (see section 9A)” after “section 9”). The amended note now reads “This Act provides that compliance with the national code is a prerequisite for registration (see section 9) or re-registration (see section 9A) and that sanctions under Division 1 of Part 6 may be imposed on a registered provider who breaches the national code.”

The amendment to the note clarifies that compliance with the national code is a prerequisite for both registration and re-registration.

Item 17 – Subsection 63(1) (note 1)

Amends note 1 to subsection 63(1) (which relates to the Fund Manager giving written notice to providers liable to pay an annual Fund contribution) by adding the words “under section 9” after the word “registered”. The amended note now reads “There is no particular due day for unregistered providers, but they cannot get registered under section 9 until they have paid their contribution: see paragraph 9(2)(b).”

The amendment to the note clarifies that registration relates to section 9.

Item 18 – Section 64

Repeals and substitutes section 64.

The effect of new subsection 64(1) is that the Fund manager must notify the Secretary if a provider that is not yet registered under section 9 has paid its first annual Fund contribution. A note to new subsection 64(1) draws reference to paragraph 9(2)(b) and explains that the Secretary needs to know this information as soon as it happens so that the provider can be registered under section 9. New subsection 64(2) provides that the notification must be given as soon as practicable after the provider has paid its annual Fund contribution.

New subsections 64(3) to 64(6) apply to annual Fund contributions for the 2009 and 2010 calendar years and relate to the re-registration of providers.

The effect of new subsection 64(3) is that the Fund manager must notify the Secretary if registered providers have paid their annual Fund contributions.

New paragraph 64(3)(a) applies to situations where a registered provider has paid its annual Fund contribution for the calendar year beginning 1 January 2009 prior to the commencement of subsection 64(3). New subsection 64(4) provides that the notification must be given as soon as practicable after the commencement of subsection 64(3).
New paragraph 64(3)(b) applies to situations where a registered provider has paid its annual Fund contribution for:

- if paragraph 64(3)(a) does not apply - the calendar year beginning 1 January 2009 (subparagraph 64(3)(b)(i)); and
- the calendar year beginning 1 January 2010 (subparagraph 64(3)(b)(ii)).

In these circumstances, new subsection 64(5) provides that the notification must be given as soon as practicable after the registered provider has paid its annual Fund contribution. However, new subsection 64(6) provides that subparagraph 64(3)(b)(ii) does not apply where a provider has already been re-registered under section 9A before 1 January 2010.

A note to subsection 64(3) explains that the Secretary needs to know about the payment of annual Fund contributions for the purposes of re-registration of providers under new section 9A (paragraph 9A(2)(b)).

New subsection 74A(4) provides that subparagraph 74A(1)(b)(ii) does not apply in relation to registered providers that are re-registered under section 9A prior to 1 January 2010.

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

Amends the notes to subsections 65(2), 66(4), 67(2) and 69(3) by adding the words “under section 9” after the word “registered”. The amendment to the notes clarifies that the reference to registered in the notes refers to registered under section 9.

**Item 20 – At the end of Subdivision C of Division 4 of Part 5**

Inserts new section 74A concerning notifying the Secretary about the payment of special levies. A note to subsection 74A(1) explains that the Secretary needs to know this information for the purposes of provider re-registration under new section 9A (paragraph 9A(2)(b)).

If a registered provider is required to pay and has paid a special levy during the period commencing 1 January 2009 and ending on the day before section 74A commences, new paragraph 74A(1)(a) requires the Fund manager to notify the Secretary that the registered provider has paid the special levy. Subsection 74A(2) requires the notification to be given as soon as practicable after the commencement of section 74A.

New paragraph 74A(b) requires the Fund manager to notify the Secretary if a registered provider has paid a special levy it is required to pay during the period beginning on the day section 74A commences and ending on 31 December 2009 and during the 2010 calendar year. Subsection 74A(3) requires the notification to be given as soon as practicable after the registered provider has paid the special levy.
**Item 21 – Subsection 83(1B)**

The effect of **Item 21** is to replace references to repealed subsections 9(5) and 9(6) in subsection 83(1B) (which relates to the actions the Minister can take against a registered provider where the Minister believes on reasonable grounds that the provider is not fit and proper to be registered) with references to new subsections 9B(1) and 9B(2).

This is a consequential amendment to **Items 8 and 11**.

**Item 22 – After subsection 83(1B)**

Inserts new subsections 83(1C) and (1D) into section 83.

The effect of new subsection 83(1C) is that the Minister may take action against a registered provider under subsection 83(3) where the Minister has reasonable grounds to believe the provider does not have the principal purpose of providing education or does not have the demonstrated capacity to provide education of a satisfactory standard.

A note to new subsection 83(1C) explains that section 93 sets out the procedure for taking such action.

New subsection 83(1D) explains that, for the purposes of new paragraph 83(1C)(a), a higher education provider is taken to have the principal purpose of providing education if its principal purpose is either providing education or conducting research (these criteria are drawn from paragraph 16-25(aa) of the *Higher Education Support Act 2003*).

**Items 23 and 24 – Subsection 89A(1)**

The effect of **Items 23 and 24** is to replace the references to repealed subsections 9(5) and 9(6) in subsection 89A(1) (which relates to the automatic suspension of providers if the designated authority for a State tells the Secretary that the authority no longer considers the provider is fit and proper to be registered) with references to new subsections 9B(1) and 9B(2).

These are consequential amendments to **Items 8 and 11**.

**Item 25 – At the end of Subdivision C of Division 1 of Part 6**

Inserts new sections 92A and 92B.

The effect of new section 92A is that, if a provider was registered for a course for a State immediately before section 92A commences, and the provider is not re-registered under new section 9A on or before 31 December 2010 - then the provider’s registration for the course for the State is automatically cancelled as of this date.
There is no right of appeal to the Administrative Appeals Tribunal under section 176 for such automatic cancellations under new section 92A.

The effect of new subsection 92B(1) is that a provider’s registration for a course for a State is cancelled if the relevant designated authority gives the Secretary a notice which states that the designated authority does not recommend that the provider should be re-registered under new section 9A to provide the course for the State. New subsection 92B(2) provides that the notice must be in the form approved by the Secretary and new subsection 92B(3) provides that cancellations (under subsection 92B(1)) take effect on the day of cancellation specified in the notice.

**Item 26 – Paragraph 176(1)(a)**

The effect of **Item 26** is to amend paragraph 176(1)(a) so that decisions under new section 9A not to re-register a provider are decisions with respect to which an application for review can be made to the Administrative Appeals Tribunal.

*Education Services for Overseas Students (Registration Charges) Act 1997*

**Items 27 to 30 – Section 6**

The effect of **Items 27 to 30** is to insert references to section 9 of the ESOS Act into section 6 of the *Education Services for Overseas Students (Registration Charges) Act 1997* (Registration Charges Act) so that it is clear that the initial registration charge under section 6 of the Registration Charges Act only applies in respect of registrations under section 9 and not to re-registrations under new section 9A.

**Part 2 – Application provision**

**Item 31 – Application of amendments of section 9 to pending matters**

**Item 31** inserts an application provision which provides that if, prior to the commencement of Item 31, a designated authority for a State has made a recommendation under subsection 9(1) of the ESOS Act and the Secretary had not, before that commencement, made a decision about whether to register a provider under section 9 – then section 9 as amended by this Act applies to the decision about whether to register the provider.
Schedule 2—Other matters

Items 1 and 2—Section 5

Item 1 inserts a definition of condition into section 5. In relation to the CRICOS registration of a provider, condition is defined as meaning a condition imposed on a provider’s registration under section 14A or subsection 83(3).

Under subsection 83(3), the Minister may impose conditions on a provider’s CRICOS registration. The grounds for making decisions to impose such conditions are specified in subsections 83(1), 83(1A), 83(1B) and 83(2).

Item 2 inserts a definition of modification into section 5, which is defined as meaning, in relation to a condition on the CRICOS registration of a provider, an addition, omission and substitution.

Items 1 and 2 are consequential to Item 3.

Item 3—At the end of Part 2

Inserts new section 14A.

Subsection 14A(1) has the effect of providing that the Secretary may, at the time of registering a provider on CRICOS under section 9, impose:

- a condition that was imposed on the provider by the designated authority for a State, relating to its provision of courses to overseas students in that State; or
- that condition as modified under subsection 14A(3)

in situations where the provider was not registered under section 9 at the time the designated authority for the State imposed the condition, but the provider subsequently becomes registered under section 9.

Subsection 14A(2) applies to situations where the designated authority for a State has imposed a condition on the provider relating to its provision of courses to overseas students in that State and the provider was registered on CRICOS under section 9 at the time. In these circumstances, subsection 14A(2) has the effect of providing that the Minister may, by notifying the provider in writing, impose that condition on the provider’s CRICOS registration, or that condition as modified under subsection 14A(3).

Subsection 14A(3) has the effect of providing that the modifications that can be made under subsections 14A(1) and 14A(2) are as follows:

- if the condition imposed by the designated authority is not limited to a specified period, to limit the condition to a specified period;
- if the condition imposed by the designated authority is limited to a specified period, to limit the condition to a shorter specified period;
- to modify the circumstances in which the condition imposed by the designated authority applies as a condition imposed by section 14A.

Subsection 14A(4) has the effect of providing that the Minister must have regard to any advice of the designated authority before deciding whether to impose a condition under section 14A.

**Item 4 – After section 21**

Inserts new section 21A.

Subsection 21A(1) has the effect of requiring registered providers to keep lists of all their agents (as defined in section 5 of the ESOS Act), to publish those lists on their websites and in any other manner prescribed by the regulations, and to comply with the requirements of any regulations made under subsection 21A(2).

A note to subsection 21A(1) states that the Minister may take action under Division 1 of Part 6 against registered providers that fail to comply with section 21A.

Subsection 21A(2) has the effect of providing that the regulations may prescribe requirements that registered providers must comply with in relation to their agents.

**Item 5 – After subsection 27(1)**

Inserts new subsections 27(1A) and 27(1B).

Division 2 of Part 3 of the ESOS Act provides for the refund of course money to a provider’s students and subsection 27(1) makes provision for refunds in the event of provider default. Paragraph 27(1)(b) provides that Division 2 of Part 3 applies to an overseas student or an intending overseas student of a provider with respect to a course if the course ceases to be provided after it starts, but before it is completed.

New subsection 27(1A) provides that, for the purposes of paragraph 27(1)(b), if the provider has changed to become a different entity, the Minister may issue a notice to the provider to the effect that the course is not taken to have ceased merely because of the change in entity. The notice has effect accordingly.

New subsection 27(1B) provides that, in deciding whether to give the notice, the Minister must have regard to the effect of the change on the delivery of courses and the outcomes for students and any advice from the designated authority for a State that approved the provider as an approved provider for that State.
Item 6 – After subsection 31(4)

Inserts new subsection 31(4A). Subsection 31(4A) has the effect of providing that the regulations may prescribe criteria to be applied in considering whether a particular course is a suitable alternative course for the purposes of the ESOS Act.

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

Adds a reference to subsection 31(4) at the end of paragraph 76(1)(c).

Subsection 76(1) as amended by Item 7 provides that a call is made on the Assurance Fund if the Fund Manager determines that, for an overseas student or an intending overseas student, in relation to a course for which there is or was a registered provider:

- the provider is required to refund an amount to the student under Division 2 of Part 3; and
- it appears the provider will be unable to satisfy its obligations under that Division; and
- the student has not been promptly offered a place in a suitable alternative course under subsection 31(4).

Subsection 31(4) provides that, as an alternative to the registered provider (or former registered provider) making a payment to a student as required by Division 2 of Part 3, a tuition assurance scheme that covers the course may arrange for the student to be promptly offered a place in a suitable alternative course.

Item 8 – Subsection 76(1) (note)

Repeals and substitutes the note to subsection 76(1) with two notes. Subsection 76(1) provides that a call is made on the ESOS Assurance Fund if the Fund Manager determines that, for an overseas student or intending overseas student in relation to a course for which there is or was a registered provider:

- the provider is required to make a refund under Division 2 of Part 3 (relating to refunds of course money to students); and
- it appears the provider will be unable to satisfy its obligations under Division 2 of Part 3; and
- the student has not been promptly offered a place in a suitable alternative course.

The new notes are for clarification and state that:

- section 31 sets out the circumstances in which a provider is not required to refund an amount under Division 2 of Part 3; and
- subsection 31(4A) provides for regulations to prescribe criteria to be applied in considering whether a particular course is a suitable alternative course.
**Item 9 – At the end of subsection 77(1)**

Adds a note at the end of subsection 77(1). The note clarifies that subsection 31(4A) provides for regulations to prescribe criteria to be applied in considering whether a particular course is a suitable alternative course.

Subsection 77(1) provides that, if a call is made on the Assurance Fund, the Fund Manager must, as soon as practicable and in consultation with the overseas student or intending overseas student, place him or her in a course in Australia that the Fund Manager regards as a suitable alternative course.

**Item 9A – After section 80**

Inserts new section 80A.

New section 80A makes provision for the Fund Manager to provide the Minister with reports on provider defaults.

The effect of new subsection 80A(1) is to provide that the Fund Manager must provide the Minister with reports. This obligation is triggered when one or more calls are made on the Fund due to provider default (as provided for in subsection 27(1)) that result in a registered provider being required to refund one or amounts under Division 2 of Part 3. The reports must set out the following:

- the day on which the provider default occurred;
- the nature of the provider default;
- the number of students affected by the provider default;
- at the time the report is given to the Minister, the total amount of the payments that have been made out of the Fund relating to the provider default;
- at the time the report is given to the Minister, an estimate of the total amount of outstanding claims against the Fund, by students affected by the provider default;
- whether one or more suitable alternative courses were available to the students affected by the provider default;
- information about the steps the Fund Manager took to arrange suitable alternative courses for the students affected by the provider default;
- at the time the report is given to the Minister, the total number of students affected by the provider default who have been placed in suitable alternative courses; and
- any other matters relating to the provider default that the Fund Manager considers would be appropriate to include.

New subsection 80A(2) provides that the reports must be given to the Minister within 60 days after the day on which a provider default occurs.

New subsection 80A(3) provides that the Minister must cause the reports received from the Fund Manager to be tabled in each House of Parliament as soon as possible after receipt.
**Items 10 and 11 – Subsection 93(1)**

**Items 10 and 11** amend subsection 93(1). **Item 10** inserts paragraph 93(1)(aa) which has the effect of providing that, before making a decision to impose a condition under subsection 14A(2), the Minister must give the provider a written notice. **Item 11** inserts paragraph 93(1)(d)(ia) which has the effect of providing that this written notice must allow the provider at least 72 hours to give the Minister written submissions about the matter.

**Item 12 – Subsection 94(1)**

Amends subsection 94(1) by replacing the words “the Minister imposes a condition” with the words “a condition is imposed”. This is a consequential amendment to **Item 10**.

**Item 13 – Paragraph 95(1)(b)**

 Inserts a reference to new subsection 95(3) into paragraph 95(1)(b). This amendment is consequential to **Item 14**.

**Item 14 – At the end of section 95**

Inserts new subsections 95(3) and 95(4).

Paragraph 95(1)(b) provides that a provider whose registration has been suspended for a course for a State under Division 1 of Part 6, must not solicit or accept any money from an overseas student or an intending overseas student for the course for the State.

New subsection 95(3) provides that the Minister may give a provider whose registration has been suspended a notice in writing, which has effect accordingly, and which states that:

- for the whole period of the suspension, paragraph 95(1)(b) does not apply to the provider in relation to those overseas students of the provider who have started their courses; or
- for a specified part of the period of the suspension, paragraph 95(1)(b) does not apply to the provider in relation to those overseas students of the provider who have started their courses.

The effect of this amendment is that, whilst a provider’s registration on CRICOS is suspended under Division 1 of Part 6 of the ESOS Act, the Minister will have a discretion to allow the provider to continue to accept money from its overseas students who have already started their courses.
New subsection 95(4) provides that a notice under subsection 95(3) is not a legislative instrument. This provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

**Item 15 – After paragraph 176(1)(a)**

Inserts new paragraphs 176(1)(aa) and (ab).

New paragraph 176(1)(aa) has the effect of providing that the Minister’s decision to impose a condition on a provider’s CRICOS registration under new section 14A is a decision with respect to which an application for review may be made to the Administrative Appeals Tribunal. This is a consequential amendment to **Item 3**.

New paragraph 176(1)(ab) has the effect of providing that the Minister’s decision not to notify a provider under new subsection 27(1A) is a decision with respect to which an application for review may be made to the Administrative Appeals Tribunal. This is a consequential amendment to **Item 5**.

**Item 16 – Subsection 176(1)**

Inserts new paragraph 176(1)(d).

**Item 16** has the effect of providing that a decision not to give a notice under subsection 95(3) is a reviewable decision under subsection 176(1) of the ESOS Act. Subsection 176(1) specifies those decisions under the ESOS Act for which an application for review can be made to the Administrative Appeals Tribunal.