THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

HIGHER EDUCATION SUPPORT AMENDMENT (NO. 1) BILL 2011

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Tertiary Education, Skills, Jobs and Workplace Relations, Senator the Honourable Chris Evans)
The Bill will introduce a number of streamlining measures to the Higher Education Support Act 2003 to improve the efficiency and effectiveness, and ensure the ongoing integrity of the Government’s income contingent loan programs for the higher education and vocational education and training (VET) sectors i.e. FEE-HELP and VET FEE-HELP respectively, and to ensure consistency with other Commonwealth frameworks.

FINANCIAL IMPACT

There are no financial implications to this Bill.
NOTES ON CLAUSES

Clause 1 - Short title

Provides for the Act to be cited as the Higher Education Support Amendment (No. 1) Act 2011.

Clause 2 - Commencement

Subclause 2(1) inserts a three column table setting out commencement information for various provisions in the Act. Each provision of the Act specified in column 1 of the table commences (or is taken to have commenced) in accordance with column 2 of the table.

The table has the effect of providing for sections 1 to 3 and anything in this Act not elsewhere covered by this table to commence on Royal Assent; and Schedule 1 to commence on the day after this Act receives the Royal Assent.

Subclause 2(2) provides that column 3 of the table is for additional information which may be added to or edited in any published version of the Act but that information is not part of the Act.

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Provides that each Act that is specified in a Schedule is amended or repealed as set out in the applicable items in the Schedule and that any other item in a Schedule has effect according to its terms.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

Schedule 1—Amendments

*Higher Education Support Act 2003*

**Body corporate is ‘fit and proper’ for purpose**

Summary

To ensure that Chief Executive Officers, senior members of staff or other persons who are in a position to influence the management of an applicant body corporate are fit and proper for the purpose of approval as either a higher education provider or VET provider, a new requirement has been introduced that the Minister be satisfied that a body corporate seeking approval is ‘fit and proper’ for that purpose.

The following amendments are made to subsection 16-25 (in relation to higher education providers) and to clause 6 (in relation to VET providers) are mirror amendments to ensure consistency between the respective provisions.

Explanation of the changes

**Items 3 and 21** make amendments to introduce a new requirement that bodies corporate seeking approval as either a higher education provider or a VET provider are ‘fit and proper’ for that purpose.

**Items 3 and 21** respectively introduce a new requirement that the Minister be satisfied that a body corporate seeking approval as a provider under the Act is ‘fit and proper’ for that purpose. **Item 3** inserts new paragraph (g) into subsection 16-25(1) (as amended by **Item 1**) and also inserts new subsections 16-25(2), (3) and (4). **Item 21** inserts new paragraph (h) into subclause 6(1) (as amended by **Item 19**) and also inserts new subclauses 6(2), (3) and (4).

Under these new amendments, the Minister must be satisfied for the purposes of approval, that the body, through its senior members of staff and/or persons who are influential in making decisions which will affect the affairs of the body, is a fit and proper person. Under the proposed new requirements, the Minister must specify, by legislative instrument, the criteria which she or he must take into account in deciding whether a person is a fit and proper person before the body may be approved as either a higher education provider or a VET provider.

**Item 15** and **Item 28** inserts new section 22-17 into the Act and new clause 33A into Schedule 1A. These new provisions, respectively, allow the Minister to revoke the approval of a body as either a higher education provider or a VET provider if the body is no longer a fit and proper person. Under these respective amendments, the Minister may revoke a provider’s approval if she or he is satisfied that either the body corporate, or at least one person who makes (or participates in making) decisions that substantially affect the body’s affairs is not a fit and proper person.
In deciding whether to revoke a body’s approval, these new provisions respectively oblige the Minister to take into account the criteria which she or he must have specified in a legislative instrument under subsection 16-25(4) and subclause 6(4) of Schedule 1A. New subsection 22-17(2) and subclause 33A(2) of Schedule 1A also permit the Minister to take any other matters into account which she or he considers relevant.

**Items 1, 4, 6, 9 and 10** make technical amendments to section 16-25 for the purposes of **Item 3**, whilst, **Items 19, 22 and 24** make technical amendments to clause 6 of Schedule 1A for the purposes of **Item 21**.

**More flexible ‘principal purpose’ requirements**

**Summary**

This amendment adds to the current principal purpose provisions to allow the Minister the discretion to approve a body corporate as a higher education or VET provider where the principal purpose of that body may not be education (and/or research in the case of higher education providers), as long as its other purpose(s) do not conflict with its principal purpose. The Minister may suspend or revoke a body’s approval as a higher education or VET provider if any of the body’s other purposes conflict with its principal purpose, or if the body no longer has education (and/or research, in the case of higher education providers) as its principal purpose.

The following amendments are made to subsection 16-25 (in relation to higher education providers) and to clause 6 (in relation to VET providers) and are similar amendments to ensure consistency between the respective provisions.

**Explanation of the changes**

**Items 2 and 3**, and **Items 20 and 21** make amendments to introduce more flexible ‘principal purpose’ requirements in relation to both higher education providers and VET providers.

**Item 2** deals with the purpose of higher education providers. **Item 2** repeals and substitutes paragraph 16-25(aa) of the Act in relation to higher education providers. This amendment, together with new subsection 16-25(2) as inserted by **Item 3**, changes the requirement that the principal purpose of a body corporate must be either education or research or both by allowing the Minister to determine that the principal purpose of a body corporate is either education, research or both when the Minister is satisfied that any of the body’s other purposes do not conflict with the body’s purpose of providing education and/or conducting research.

**Items 7 and 8** make amendments to section 22-7. Section 22-7 deals with the revocation of a body’s approval as a higher education provider where the provision of education, or the conducting of research, or both are no longer a body’s principal purpose. Under this amendment, the grounds upon which the Minister may revoke a body’s approval is broadened to include circumstances where providing education and/or conducting research is not, or is no longer taken to be, the body’s principal
purpose; or if the body no longer has education and/or research as its principal purpose.

**Items 20** deals with the purpose of VET providers. **Item 20**, together with **Item 21**, makes similar amendments in relation to the purpose of VET providers. **Item 20** repeals and substitutes paragraph 6(2) of Schedule 1A. The amendment made by **Item 20**, together with new subclause 6(2) inserted by **Item 21** allows the Minister to determine that the principal purpose of a body corporate is education if the Minister is satisfied that any of the body’s other purposes do not conflict with the body’s purpose of providing education.

**Item 25** repeals and substitutes paragraph 31(a) of Schedule 1A. **Item 25** deals with revocation of a VET provider’s approval in circumstances where the principal purpose of the body is no longer education. Under this amendment, the Minister may revoke a body’s approval as a VET provider under two new circumstances (as provided for by **Item 21** where providing education is no longer, (or is no longer taken to be) the body’s principal purpose, or the Minister is satisfied that the body’s principal purpose conflicts with its purpose of providing education.

**Imposition of conditions on the approval of providers**

**Summary**

To better manage individual provider risk and ensure provider quality, this change allows the Minister to give qualified approvals of bodies corporate as higher education or VET providers by imposing specific conditions on the approval. This amendment also allows the Minister to revoke an approval if a provider fails to meet those specific conditions.

The following amendments make similar amendments to the provisions relating to higher education and VET providers to provide the Minister with the authority to impose conditions on the approval of a body corporate as a provider under (in relation to higher education providers) Subdivision 16-C of the Act and Subdivision 3-B of Schedule 1A (in relation to VET providers).

**Explanation of the changes**

**Item 5** inserts new sections 16-60 and 16-65 into the Act whilst **Item 23** inserts new clauses 12A and 12B into Schedule 1A. Respectively, new section 16-60 and new clause 12A allow the Minister to impose conditions on the approval of a body as a higher education provider or a VET provider. Under this amendment, the Minister may give qualified approval to a body corporate by imposing specific conditions on its approval and is not limited to imposing conditions only at the time the body corporate is notified of its approval as either a higher education provider or a VET provider. The Minister may also impose or vary a condition any time after a body has been approved.

In circumstances where the Minister decides to impose a new condition or to vary an existing condition upon the approval of a body corporate, new section 16-65 and new
clause 12B, respectively, require the Minister to observe procedural fairness requirements. Under these requirements, the Minister must notify the body corporate, in writing, within 30 days of:

(a) the decision; and
(b) the reasons for the decision; and
(c) the period for which the condition is imposed.

**Item 13** and **Item 26**, respectively, make amendments to allow the Minister to revoke a body’s approval as a higher education provider (under new subparagraph 22-15(1)(a)(ii) or as a VET provider under new subparagraph 33(1)(a)(ii) of Schedule 1A if the Minister is satisfied that the body has breached a condition imposed on its approval.

**Items 11 and 12** make technical amendments to section 22-15 for the purposes of **Item 13**.

**Item 14** and **Item 27** insert identical notes (at the end paragraph 22-15(1)(a) in relation to higher education providers and at the end of subclause 33(1) of Schedule 1A in relation to VET providers) providing, respectively, that section 16-60 and Clause 12A allows conditions to be imposed on body’s approval.

**Suspension of provider approval: procedural fairness**

**Summary**

Changes to the provisions enabling the Minister to suspend a provider’s approval have been made to ensure procedural fairness requirements are observed before a body’s approval as a higher education or VET provider is suspended. Under this amendment, the Minister must afford a body the opportunity to make submissions and must take any submissions received into account before the Minister decides whether to suspend the provider’s approval as a higher education or VET provider. Subsequent to the Minister’s decision to suspend a provider’s approval, a further amendment is proposed to change the time period within which the Minister must give the body notice of his or her intention to revoke its approval from 48 hours to a ‘reasonable period of time’.

The following amendments are made to subsection 16-25 (in relation to higher education providers) and to clause 6 (in relation to VET providers) are mirror amendments to ensure consistency between the respective provisions.

**Explanation of the changes**

**Item 16** and **Item 29** make amendments which will apply procedural fairness requirements similar to those which appear at section 22-20 of the Act and clause 34 of Schedule 1A - regarding the process for revocation of a body’s approval as a provider for loss of status or breach.
**Item 16** inserts new subsection 22-30(2A) and (2B) into the Act. **Item 29** inserts new subclauses 36(2A) and (2B) into Schedule 1A.

Section 22-30 and clause 36 respectively deal with suspension of a body’s approval as a higher education provider and a VET provider. Under these provisions the Minister may, by legislative instrument, determine that a body’s approval as a provider is suspended from a specified date, pending the Minister’s decision whether to revoke the body’s approval as a provider.

Under these new amendments, before the Minister may determine that a body’s approval is suspended (either as a higher education provider under subsection 22-30(1) or as a VET provider under subclause 36(1)), the Minister must give written notice to the body that the Minister is considering suspending the body’s approval, together with the reasons why the Minister is considering such suspension, and must also invite the body to respond in writing to the Minister within 14 days of the date of the notice.

New subsection 22-30(2B) and new subclause 36(2B) of Schedule 1A, respectively, provide that before the Minister may make a determination under subsections 22-30(1) and 36(1), the Minister must take into consideration any response received from the body within the 14 day period.

**Item 17** and **Item 30** make changes respectively to the provisions which deal with the period of time within which the Minister must respond to a body corporate after having issued a notice of a determination to suspend a body’s approval under section 22-30 and clause 36.

Currently, under subsection 22-30(1) of the Act and subclause 36(1) of Schedule 1A, if the Minister makes a determination to suspend a body’s approval (a Suspension Determination), the Minister must also give the body a notice (respectively, under section 22-20 and clause 34) notifying the body that the Minister is also considering revoking the body’s approval (a Revocation Notice). A Revocation Notice must include the reasons why the Minister is considering such a revocation, and must also invite the body to make written submissions to the Minister why its approval should not be revoked. Presently, if the Minister intends to issue a Revocation Notice following the issuing of a Suspension Determination, the Minister has only 48 hours to issue the Revocation Notice following the issuing of the Suspension Determination. **Item 17** and **Item 30** would amend, respectively, subsection 22-30(3) of the Act and subclause 36(3) of Schedule 1A to change the time period within which the Minister must give a body a Revocation Notice from 48 hours to a ‘reasonable period of time’.

It is necessary to amend subclause 36 of Schedule 1A of the Act to increase the period of time within which the Minister is required to give to a body, a notice under clause 34 to a ‘reasonable period of time.’ The application of the current period of 48 hours is impractical as it does not allow the Minister, sufficient time to form an opinion regarding an intention to revoke the approval of a body.
**Reviewable decisions**

**Summary**

**Item 18** and **Item 31** make amendment which sets out new decisions, as provided for under this Act, which are subject to review.

Section 206-1 and clause 91 set out, respectively, the decisions under the Act and Schedule 1A which are subject to review. **Item 18** inserts references to new decisions (as inserted by **Item 5**) to ensure that these new decisions (to impose a condition under new subsection 16-60(1) or to vary a condition imposed on the approval of a higher education provider under subsection 16-60(2)) are reviewable. **Item 31** inserts references to decisions able to be made subclauses 12A(1) and (2) (as inserted by **Item 23**) to ensure that any decision made by the Minister to impose a condition (subclause 12A(1)) or to vary a condition imposed on the approval of a VET provider (subclause 12A(2)) are reviewable.

**Application provisions**

**Item 32** is an application provision aimed at avoiding any unintended consequences of the amendments made by this Act. The following changes shall only apply as provided below:

Subitem 32(1) provides that new paragraphs 16-25(1)(aa) and (g) and new subsections 16-25(2), (3) and (4) of the Act (as inserted by this Act) shall only apply in relation to an application for approval made on or after this item commences.

Subitem 32(2) provides that the amendments made by items 5, 11, 12, 13 and 14 shall apply in relation to a body approved as a higher education provider before, on or after this item commences.

Subitem 32(3) provides that the amendments made by items 7, 8, 15, 25 and 28 shall apply in relation to an approval given before, on or after this item commences.

Subitem 32(4) provides that the amendments made by items 16 and 17 shall only apply in relation to a notice given under new subsection 22-30(2A) of the Act (as inserted by this Act) after this item commences.

Subitem 32(5) provides that new paragraph 6(1)(b) and new subclause 6(2) of Schedule 1A to the Act (as inserted by this Act) shall apply in relation to an application for approval made before, on or after this item commences.

Subitem 32(6) provides that new paragraph 6(1)(h) and new subclauses 6(3) and (4) of Schedule 1A to the Act (as inserted by this Act) shall only apply in relation to an application for approval made on or after this item commences.

Subitem 32(7) provides that the amendments made by items 23, 26 and 27 shall apply in relation to a body approved as a VET provider before, on or after this item commences.
Subitem 32(8) provides that the amendments made by items 29 and 30 shall only apply in relation to a notice given under new subclause 36(2A) of Schedule 1A to the Act (as inserted by this Act) after this item commences.