EXPLANATORY STATEMENT

Issued by the Authority of the Delegate for the Minister for Education and Training

Higher Education Support Act 2003

Higher Education Support (Australian College of Nursing Ltd) Higher Education Provider Approval Amendment 2017

Authority

Section 16-25 of the Higher Education Support Act 2003 (the Act) provides for the approval of bodies as higher education providers by the Minister.

Under paragraphs 16-50(1)(a) and (b) of the Act, the Minister must, respectively, decide an application for approval as a higher education provider and cause the applicant to be notified in writing whether or not the applicant is approved as a higher education provider.

Subsection 16-55(1) provides that a notice of approval under paragraph 16-50(1)(b) is a legislative instrument.

Subsection 16-60(1) of the Act provides the Minister may impose conditions on a body corporate’s approval as a higher education provider. Subsection 16-60(2) provides that the Minister may vary a condition imposed under subsection 16-60(1).

Under paragraph 238-5(1)(b) of the Act, the Minister may, by writing, delegate, to an APS employee all or any of the Minister’s powers under the Act (other than under sections 38-45, 41-45 or 46-40). The Minister has delegated his powers under section 16-60 of the Act to an APS employee with a classification of SES Employee Band 1 or higher with responsibility for the administration of the FEE-HELP scheme.

Purpose

The purpose of the legislative instrument (the Instrument) is to amend Higher Education Support Act 2003 – Higher Education Provider Approval No. 4 of 2016 (F2016L02005) (the Notice of Approval) notified to the Australian College of Nursing Ltd (the body).

The amendment varies one of the conditions of the body’s approval as a higher education provider, recorded in the Notice of Approval. The reason for this change is to correct a typographical error (namely, a misdescription of name of the relevant body). As the error was present when the rule maker made the original approval, this is a deficiency which cannot be rectified by recourse to subsection 15D(1) of the Legislation Act 2003.

Background

The Act provides the Commonwealth with powers to give financial support for higher education and certain vocational education and training through grants and other payments to providers, and through financial assistance to students (usually in the form of loans).

The Act provides for loans, called FEE-HELP assistance, to be made available to students enrolled in certain higher education courses. A body has to be approved by the Minister as a higher education provider before its students can receive FEE-HELP.
On 20 December 2016, the body was approved by the Minister’s delegate as a higher education provider by the Notice of Approval. The Notice of Approval was then registered on the Federal Register of Legislation on 21 December 2016 (F2016L02005).

After the Notice of Approval had been registered a typographical error was identified in the instrument as made by the rule maker. That error is contained in the text of condition number nine which incorrectly refers to another higher education provider, when it should have referred to the body, being the requisite approved body. The conditions for approval imposed under section 16-60 of the Act as agreed to by the body did not contain this typographical error.

Consultation

Section 16-65 of the Act provides that the Minister must, within 30 days of his or her decision to impose or vary a condition on a higher education provider, cause the provider to be notified, in writing, of the decision, the reasons for the decision, and the period for which the condition is imposed. Consistent with this requirement, on 5 September 2017, the department wrote to the body, informing the body that a typographical error in the conditions set out in the Notice of Approval had been identified and that the Notice of Approval was being amended to correct this error.

Details of the Higher Education Support (Australian College of Nursing Ltd) Higher Education Provider Approval Amendment 2017

Section 1 - Name

This section provides that the name of the Instrument is the Higher Education Support (Australian College of Nursing Ltd) Higher Education Provider Approval Amendment 2017.

Section 2 - Commencement

This section provides that the Instrument commences on 20 December 2016. The Instrument commences retrospectively, but this retrospective commencement does not adversely affect the rights of, or impose any liabilities on the approved body or any other person. This is because the amendment is to correct a previous error, omission or ambiguity and is beneficial—in that it simply corrects a typographical error and does not affect an entitlement to approval from the date it was originally intended to be implemented or available.

On 5 September 2017 the department wrote to the body to provide notice of, and explanation for, the amendments and advise that the amendment would take effect from 20 December 2016.

The retrospective commencement is appropriate in that it does not breach subsection 12(2) of the Legislative Instruments Act 2003.

Section 3 – Authority

This section provides that the authority for the Instrument is subsection 16-60(2) of the Act.

Section 4 - Amendment

Section 4 provides that the Higher Education Support Act 2003 – Higher Education Provider Approval No. 4 of 2016 (F2016L02005) is amended by omitting ‘Proteus Technologies Pty
Ltd’ from paragraph 9 of the Conditions and substituting ‘Australian College of Nursing Ltd’. This amendment is intended to correct a typographical error.

Statement of Compatibility with Human Rights

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

Higher Education Support (Australian College of Nursing Ltd) Higher Education Provider Approval Amendment 2017

This legislative instrument (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 Instrument

The Instrument is made by a delegate of the Minister under subsection 16-60(2) of the Higher Education Support Act 2003 (the Act). The purpose of the Instrument is to amend the Higher Education Support Act 2003 – Higher Education Provider Approval No. 4 of 2016 (F2016L02005) (the Notice of Approval) notified to the Australian College of Nursing Ltd (the body). The amendment varies the conditions of the body’s approval as a higher education provider, which are recorded in the Notice of Approval. The reason for this amendment is to correct a typographical error.

Human rights implications

The Instrument might be seen as engaging the right to education, contained in Article 13 of the International Covenant on Economic, Social, and Cultural Rights, as it varies the conditions of the body’s approval as a FEE-HELP provider. However, the Instrument will not affect the provision of higher education by the body as the change to the body’s conditions of approval as a higher education provider for the purposes of FEE-HELP under the Act, is not substantive. The change corrects a typographical error contained in one of the conditions of the approval. This amendment is machinery only and does not affect the body’s rights or obligations or engage any rights-based interests.

The retrospective commencement will not cause detriment to individuals. Neither the approved provider nor any students currently or prospectively associated with this approved provider will be disadvantaged as a result of this amendment. Ensuring that the Notice of Approval is correct by redressing a typographical error is a beneficial measure with no detrimental impact on any person.

Conclusion

The Instrument is compatible with human rights as it does not raise any human rights issues.

Katerina Lawler
Delegate of the Minister