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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TRAINING GUARANTEE (ADMINISTRATION) AMENDMENT BILL 1991

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment, Education and Training, the Hon John Dawkins MP)

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TRAINING GUARANTEE (ADMINISTRATION) AMENDMENT BILL 1991

GENERAL OUTLINE

This Bill amends the Training Guarantee (Administration) Act 1990 to give effect to undertakings made by the Government in relation to outstanding trainers and to fees charged by Industry Training Agents (RITAs). It clarifies the intentions of the original legislation in several regards and makes some minor technical amendments to its provisions. It also makes provision for the recognition of alternative training levy schemes.

The Bill provides for companies which demonstrate an outstanding commitment to training to apply for and to receive, on the basis of criteria to be set by regulation, an exemption for three years from the provisions of the Training Guarantee (Administration) Act.

The Bill rectifies an earlier anomaly and gives effect to the Government's undertaking that Registered Industry Training Agents (RITAs) will be empowered to charge a fee on application for rather than on issue of a certificate. The Bill makes clear the status of RITAs and the training advisory body which, when charging fees for services, are not acting as agents of the Commonwealth and are entitled to retain those fees. Additional flexibility in fee setting is provided.

The Bill rectifies an unintentional limitation of the original legislation, in respect of grouping provisions. This amendment allows related companies - not just those which fall within the definition of corporations in the Companies Act - to group for Training Guarantee purposes and to take advantage of the resultant record keeping and reporting savings

Partnerships and unincorporated associations are not legal persons, but are treated as persons and employers for Training Guarantee purposes. This Bill inserts into the Principal Act provisions, similar to sections 165 and 166 of the Fringe Benefits Tax Assessment Act, which outline specific requirements relating to the obligations of partners, and of members and controlling officers of unincorporated associations.

The provisions relating to the definition of eligible training are altered slightly to ensure that eligible training programs contain no significant object which is not itself a training object. At the same time it is made clear that structured on the job training with an unavoidable production element is allowable.

The Bill makes provision for alternative training levy schemes to be recognised and for their participants to qualify, on the basis of criteria to be set by regulation, for exemption from the Training Guarantee. This is in recognition of the preference of some industries or industry groups to institute and administer their own training levy scheme to raise the training standards in their industry or sector.

FINANCIAL IMPACT STATEMENT

It is not expected that any additional funds will be required as a result of these amendments to the Training Guarantee (Administration) Act, nor that any additional demands will be made on the Training Guarantee Fund. This Bill provides for fees to be charged for consideration of applications for outstanding trainer or recognised alternative training levy scheme status, with a view to recovering the cost to the Commonwealth

NOTES ON CLAUSES

Clause 1 - Short Title etc

This clause provides that the Act may be cited as the Training Guarantee (Administration) Amendment Act 1991. The clause also identifies the Principal Act as the Training Guarantee (Administration) Act 1990.

Clause 2 -Commencement

This provides that the Act commences on the day on which it receives Royal Assent, with the exception of sections 12, 13, 14, 16 and 17 and subsections 19(5) and (6). These provisions do not come into effect until 1 July 1991 or the date of Royal Assent whichever is the later. This is to ensure that these new arrangements do not commence before the beginning of the new financial year, in the interests of administrative efficiency and ease of implementation.

Clause 3- Interpretation

This clause amends and inserts a number of definitions used in the Act, required as a result of amendments outlined in other paragraphs, notably

- the insertion of "a particular" in paragraph (e) of the definition of person re-expresses the way in which the Act deals with trusts, for the guidance and information of employers

- the omission of paragraphs (c) and (d) of the definition of employer is consequential upon the amendments in proposed sections 11A and 11B, and

- 'statutory fee upper limit' is defined as being $500 in relation to the year commencing 1 July 1991, and is automatically indexed for later years on the basis of an indexation factor based on AWE (average weekly earnings).

Clause 4 - Interpretation - meaning of "employee" - exclusion of persons covered by recognised alternative training levy schemes

This clause establishes the basis for alternative training levy schemes to be recognised, and for their participants to receive exemption from Training Guarantee obligations.

Proposed subsection 4A(1) provides that if, under the regulations, a person is taken to be covered by a recognised alternative training levy scheme, that person is not an employee for Training Guarantee purposes. In other words, employers of persons so identified have no Training Guarantee obligations based on the salaries or wages of those persons.

Proposed subsection 4A(2) enables regulations to be made empowering the Minister for Employment, Education and Training to recognise alternative training levy schemes and their coverage.

Under these regulations the Minister may decide on conditions which have to be satisfied in order to make an "approval in principle" decision about a particular scheme and its coverage. The Minister may then confirm that recognition, after the approved period (ie a "scheme decision"), on the basis of those conditions having been met or on the basis that special circumstances make it reasonable to do so, even though the conditions have not been satisfied.

The regulations may enable the Minister to revoke scheme decisions or to delegate his decision making power to a Departmental officer holding a Senior Executive Service position and to authorise the charging of a fee for applications for decisions (to cover the administrative costs).

Proposed paragraph 4A(2)(f) stipulates that applicants for scheme decisions may be required to obtain certificates to show that the conditions have been met. These certificates must be obtained from specified persons and provided to the Minister. This is to ensure that the Minister has access to authenticated information about conditions, such as the amount of money contributed by participants in an alternative scheme, before a scheme decision is made.

Paragraph 4A(2)(g) provides that managers of alternative schemes may be required to notify changed circumstances. This is to ensure that changing economic or other circumstances within an industry or sector covered by a scheme can be taken early account of and, if necessary, amendments made to arrangements or conditions, before the end of an agreed period of operation.

Paragraph 4A(2)(h) allows employers of persons taken to be covered by a recognised alternative training levy scheme and of persons who are not so covered, to lodge a Training Guarantee statement in respect of non-excluded employees on the assumption that the approval in principle of the alternative scheme will be confirmed by a scheme decision.

Proposed sub-section 4A(3) stipulates that sub-section (2) detailing the regulatory powers does not limit the generality of sub-section (1). Proposed sub-section 4A(4) points out that none of the powers conferred by this section limits the powers conferred by virtue of the definition of "employee" in section 4, which contains a provision enabling the Minister to exclude persons from that definition by prescription.

Section 25 of the Administrative Appeals Tribunal Act 1975 authorises AAT review of regulations. It is intended, in any event, that the Regulations will provide specifically for review by the AAT.

Clause ~~5 - Treatment~~ of ~~Partnerships~~
Treatment of Unincorporated Associations

Partnerships and unincorporated associations are not persons at law, but are deemed to be both persons and employers for the purposes of the Training Guarantee. The purpose of this clause is to insert into the Act provisions, similar to sections 165 and 166 of the Fringe Benefits Tax Assessment Act, which outline specific requirements relating to the obligations of partners in partnerships, and members and controlling officers of unincorporated associations. An obligation incurred by the partnership or association is imposed on each partner or, in the case of unincorporated associations, the controlling officer or officers. The partners and the members of the association are jointly and severally liable for amounts payable. The existing and new provisions deal with employers on a partnership by partnership (or association by association) basis.

Proposed sub-sections 11A(4) and 11B(5) make clear that where, because the Act applies to partnerships and associations as if they were persons, an offence is taken to have been committed by a partnership or an association, that the offence is taken to have been committed by each of the partners or the controlling officer or officers. This provision is similar to the provisions of the Fringe Benefits Tax Assessment Act, and enables action to be taken against individual partners or officers rather than requiring that the Commonwealth proceed against the partnership or the association. Subsection 11A(5) and 11B(6) provide that certain circumstances are a defence against such a prosecution. Proposed subsections 11A(6) and 11B(8) include in the operation of these sections Part III of the Taxation Administration Act 1953 to the extent that it relates to the Training Guarantee. Part III of the Taxation Administration Act provides general offences and prosecution provisions for most Commonwealth taxing legislation. These proposed subsections make it clear that partners and members of unincorporated associations have the same defence under the Taxation Administration Act provisions for Training Guarantee matters as under more specific Training Guarantee Act provisions.

Clause 6 - Election by Members of a Business Group

This clause amends in several regards section 12 of the Principal Act, which allows for corporations which are members of the same business group to elect to be treated as a single employer for the purposes of the Act.

First, it inserts provisions identical to those in the previous clause concerning on whom the obligations fall, by whom they are payable, by whom offences may be taken to have been committed and defences to a prosecution. This is desirable for consistency.

Second, it replaces the definition in the Principal Act of "related corporations" (which was based on the Companies Act 1981) with a broader definition. This is necessary because the definition in the Companies Act excludes certain categories of organisations which should not be denied the advantages of grouping. The question of whether corporations are related to each other is still to be determined, however, in the same way as it is determined under the Companies Act.

Proposed subsection 12(6) stipulates that corporations may not make an election to group if any of them has either singly or as a member of a group achieved outstanding trainer status under s18A. This is to prevent a company with a significant commitment to training which has had that commitment recognised under s18A, from then grouping with some or all of its related companies (who may or may not in their own right achieve the minimum training requirements). The non-grouping of an outstanding trainer with other companies is consistent with the exclusion of outstanding trainers from the requirements of the Act and avoids the double advantage of obtaining both outstanding trainer status and minimising a group's overall shortfall

Proposed subsection 12(7) includes within this section those provisions of Part III of the Taxation Administration Act 1953 dealing with prosecution and offences which relate. This is consistent with previous clauses.

Proposed subsection 12(8) provides that section 12 does not apply in relation to s18A or regulations made for the purposes of s18A. This is necessary because section 18A provides for regulations to create a type of election which operates independently from the section 12 election. Without this clause section 12 would apply to all elections. For example, one of the differences is that section 12 elections to group apply only for one financial year, whereas section 18A groupings are for a three year period.

Clause 7 - Charge not payable unless employer has Training Guarantee shortfall etc

This clause amends subsection 13(2) of the Principal Act by adding, as an additional category of provision under which an employer is not liable to pay a Training Guarantee charge, the provision relating to exemptions for outstanding trainers.

Clause 8 - Exemption for outstanding trainers

This clause provides the basis for a system of recognition of and exemption from the provisions of the Act for employers who are outstanding trainers. This amendment was foreshadowed in the Second Reading Speech in respect of the Principal Act and was announced in the Prime Minister's Economic Statement on 12 March 1991.

The clause provides for regulations to be made empowering a decision maker (either the Minister, his delegate who is performing the duties of a Senior Executive Service Officer in the Department or a person specified in the regulations), to make or revoke decisions about outstanding trainer status, on the basis of relevant criteria. An employer may be taken to be an eligible outstanding trainer for a 3 year period.

The provisions of this clause are similar to those in clause 4 regarding recognised alternative training levy schemes, for the same reasons. Fees may be charged to cover processing costs, certificates may be required to provide a reliable basis for decision-making and employers may be required to notify changed circumstances because the changed circumstances may involve those criteria upon the basis of which the outstanding trainer status was granted, for a three year period.

Subsection (2) is not intended to provide an exhaustive list nor to limit the generality of subsection 1.

Section 25 of the Administrative Appeals Tribunal Act 1975 authorises AAT review of regulations. In is intended, in any event, that these regulations will provide specifically for review by the AAT.

Subsection 18A(4) provides for related corporations (as defined in the amended section 12) to elect to be treated as a single employer for the purposes of this section.

Clause 9 - Meaning of eligible training expenditure

This clause amends section 25 of the Principal Act and is necessary as a consequence of the earlier provisions relating to recognised alternative training levy schemes.

The clause stipulates that contributions to recognised alternative training levy schemes made by employers of persons taken to be covered by those schemes are not eligible training expenditure. This means that an employer cannot make his required contribution to an alternative scheme and then claim that amount to fulfil Training Guarantee obligations he may have in respect of other employees (not covered by the alternative scheme).

Clause 10 - Meaning of eligible training program

This clause amends section 27 of the Principal Act with the dual purposes of eliminating an unintentional loophole and of clarifying the intentions of the original legislation.

Proposed new paragraphs 27(1)(b), (c) and (d) provide that an eligible training program may not have a significant object which is not directed towards the development, maintenance or improvement of employment related skills. This is a change from the original provisions which allowed significant other objects as long as they were "employment related".

This original provision was inserted to protect structured on the job training which may, by its nature, have an unavoidable production component. It was not intended, however, to allow significant elements of, say, an eligible off the job training program to deal with non-training matters.

The new provisions ensure that all significant elements of eligible training programs are training related and specifically stipulate that productive activity resulting from an on the job program is taken to be "directed towards the development maintenance or improvement of employment related skills...".

Paragraph 27(2)(a) of the Principal Act is amended to ensure that the approval process of a structured training program is conducted in advance of the program delivery. This is consistent with the remaining provisions of the subsection and reflects the original intention.

Clause 11 - Secrecy

This clause provides that, for the purposes only of section 39 of the Principal Act, registered industry training agents (RITAs) who provide services to employers in relation to training advisory certificates, are providing those services for the Commonwealth and in relation to the Act. This ensures that RITAs are bound by the secrecy provisions of s39 and may not, for example, divulge or communicate protected information which they have obtained in the course of their duties as a RITA.

Clause 12 - Training advisory certificates given by registered industry training agents

The original provisions of the Principal Act allow the Governor General (under s102) to make regulations prescribing fees not exceeding $500 for the issue of training advisory certificates. This provision resulted in the undesirable situation where RITAs could not charge for their services if they did not issue a certificate.

This clause is inserted into section 43 of the Principal Act and provides legislative authority for industry training agents to charge a fee of employers who apply for a training advisory certificate.

The "statutory fee upper limit" as defined in section 4 limits the amount which may be charged by the RITA, and is automatically indexed.

Clause 13 - Training advisory certificate given by a training advisory body

This clause also amends section 43 of the Principal Act, subsection 43(2) of which provides that the training advisory body must issue a certificate to the Commissioner or a RITA if one or the other so requests.

This proposed subsection ~~allows the~~ training ~~advisory body to~~ charge a fee of a RITA making such a request. This is in recognition of the fact that the issuing of certificates by the training advisory body will involve costs, and that the certificate may result in revenue for the RITA.

The amount which may be charged is limited by the "statutory fee upper limit" of $500 in 1991/92.

Clause 14 - Review of industry training agent's refusal to give a training advisory certificate

This clause amends section 61 of the Principal Act, which allows for an appeal in writing to the training advisory body by an employer who has been refused a certificate by a RITA.

This clause provides the authority for the training advisory body to charge a fee for this review. This is consistent with the other provisions of this Act and allows the training advisory body to meet the administrative costs of providing this service, on a user pays principle.

This amendment does not alter the provisions allowing for appeal to the Administrative Appeals Tribunal for review of decisions made by the training advisory body.

Clause 15 - Cancellation of Registration

This clause amends section 93 of the Principal Act to ensure that action can be taken against a RITA which charges more than the statutory fee upper limit as a fee for a training advisory certificate.

This clause provides to the training advisory body the power to cancel the registration of a RITA which has either openly charged more than the allowed fee or which has otherwise attempted to defeat the object of the Section which stipulates that fees may not exceed that limit. This is to prevent RITAs charging their clients other non-authorised amounts for consideration of their application which, together with the fee, exceed the statutory upper limit.

Proposed sub-section 93(3) clarifies that the training advisory body must cancel the registration of a RITA if the RITA so requests. The Industry Training Guidelines No 1 (section 9) made pursuant to the Principal Act currently provide for this situation but it is considered more appropriate that such a provision should appear in the Act.

Clause 16 - Fees for training advisory certificates

This clause inserts a new section 101A into the Principal Act, the purpose of which is to clarify the intentions of the original legislation in respect of fees charged by RITAs and by the training advisory body.

This provision makes quite clear that fees charged by RITAs on application by an employer for a training advisory certificate and fees charged by the training advisory body of RITAs on request for review of a refusal, are payable to RITAs and to the training advisory body in their own right and not as agents for the Commonwealth.

Proposed subsection 101A(4) allows a RITA or the training advisory body to recover unpaid fees as a debt due to it and 101A(5) provides that fees charged may not exceed the statutory fee upper limit as defined in section 4.

Clause 17 - Regulations

Section 102 of the Principal Act provides for the Governor-General to make regulations consistent with the Act prescribing all matters, particularly in relation to fees "for the issue of training advisory certificates".

This clause amends that section by omitting the provision relating to fees for the issue of certificates. Earlier amendments in this Bill make alternative provisions both for setting fees - via the statutory fee upper limit - and for charging of fees on application for rather than on issue of a certificate. This enables those bodies to charge a fee for a service even when a certificate is not issued.

Clause 18 - Repeal of Part 12 and Schedule

This is a technical amendment repealing, without affecting amendments made by, Part 12 and the Schedule to the Principal Act. These provisions dealt with consequential amendments to certain other Acts in relation to the Training Guarantee Charge and it is no longer necessary that they appear in subsequent prints.

Clause 19 - Application of Amendments

This clause provides details of the application dates for individual amendments, and should be read in conjunction with Clause 2 - commencement.

Certain of the amendments are to apply to assessments of Training Guarantee charge and related matters from 1 July 1990, which is the beginning of the first year of the scheme's operation. These amendments are primarily to re-express the provisions of the Act, and do not alter its operation (paragraphs 3(a) to (d) and sections 5 and 6, dealing with partners, associations, trusts and with grouping provisions).

The amendment allowing the recognition of alternative training levy schemes (section 4) applies from this date to allow an industry which may have an operational alternative scheme to apply for recognition in respect of 1990/91, the first year of the Training Guarantee.

The parts of paragraphs 3(b) and (c), section 5 and paragraph 6(a) which apply to offences introduce new provisions and therefore should, more appropriately, apply either at the beginning of a new financial year (1 July 1991) or, if Royal Assent has not been received by then, on Royal Assent when, by virtue of Clause 2, this section commences.

The amendments relating to new arrangements (outstanding trainers, and the meaning of an eligible training program) are clearly not appropriate for retrospective application but, because the Training Guarantee is administered on a financial year basis, should commence at the beginning of a financial year for administrative feasibility. Accordingly, these provisions are intended to apply to applications or requests made on or after the date of commencement which will not be before 1 July 1991.

The other amendments apply from the commencement date of the section which is, in the case of subsection 19(4), (the provision which alters the definition of eligible training expenditure for employers participating in alternative training levy schemes), the day on which the Act receives Royal Assent or, in the case of subsections 19(5) and (6), (the provisions relating to fees for training advisory certificates and for s102 fees), as is provided in the Commencement Clause, sub-section 2(2).

Clause 20 - Amendment of assessments

This is a technical provision ensuring that the implementation of this Act is not impeded by section 49 of the Principal Act, a section empowering the Commissioner of Taxation to amend assessments of the Training Guarantee charge.