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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION LAWS AMENDMENT BILL (No 2) 1992

IMMIGRATION (EDUCATION) CHARGE BILL 1992

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister
for Immigration, Local Government and Ethnic Affairs
the Honourable Gerry Hand MP)

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OUTLINE

These Bills will establish a scheme to provide for cost recovery for the provision of English language training through the Adult Migrant English Program (the AMEP). The Migration Laws Amendment Bill (No 2) 1992 also makes minor amendments to the *Migration Act 1958* to deal with refugee processing, use of specialist information and opinions in the decision making process, ascertaining the immigration status of persons on domestic routes of international flights and rectifying a recently discovered anomaly in the operation of the Migration Amendment Act 1983.

User Charging in the AMEP

The scheme in respect of new migrants that is established by the combined effect of the Bills will apply to persons applying for migrant visas or permanent entry permits on or after 1 January 1993, whose applications are granted on or after 1 March 1993 and who are over 18 and do not have functional English.

These persons will be required to pay the English Education Charge unless they have applied for an exempt visa or exempt entry permit. The charge is characterised as a tax and to comply with the requirements of s.55 of the Constitution is imposed in the Immigration (Education) Charge Bill 1992.

The exemptions set out in the Charge Bill cover all refugee, special assistance and humanitarian categories, spouse, child and aged parent classes in the preferential family category, and other classes. These other classes will be prescribed in the regulations because their titles, codes, class numbers or prescribed criteria are subject to frequent amendment. The power to prescribe further exempt classes will also permit newly created visa classes to be exempted as needed.

There is also flexibility in the level of the charge payable by non-exempt applicants. Different levels of charge can be set in respect of different categories of applicant. The maximum charge that can be set for any category of applicant is $4080.

The Migration Laws Amendment Bill (No 2) deals with the provision of English language tuition to new migrants. Once a new migrant who has paid the charge, or is exempt because the application was for an exempt visa or entry permit, becomes a permanent resident, the Commonwealth is obliged to provide that person with English language tuition.

The obligation is to provide tuition until that person has functional English, or has received 510 hours of tuition, whichever occurs first. 510 hours is estimated to be the

amount of tuition needed for a non-English speaker to acquire functional English. However, as new migrants may have some English language proficiency before their arrival, not all will require the full 510 hours and for that reason the obligation to provide tuition up to 510 hours ceases once the person reaches functional English.

The obligation also ceases if the person does not register with AMEP service providers, commence tuition or complete tuition within the time limits established in the legislation. The purpose of this aspect of the legislation is to provide an incentive to new migrants to use the AMEP to become reasonably proficient in English soon after arrival so as to facilitate their settlement in Australia.

Nevertheless, if the Secretary considers that there are circumstances which make it unreasonable for the obligation to cease in respect of a person, he or she can stipulate that the obligation is not to cease, or is to cease only at a later date. Finally, there is provision for a refund in certain limited circumstances of any charge paid.

The Migration Laws Amendment Bill (No 2) 1992 also provides for user charging of existing migrants who enrol in the AMEP after 1 January 1993. The maximum fee that can be set is $250 per year per student, and no fees are payable by health care card holders or by registered job seekers. The level of fee may vary depending on the type of course in which the student is enrolled.

Other Amendments to the Migration Act 1958

Part 4 of the Migration Laws Amendment Bill (No 2) amends other provisions of the *Migration Act 1958*. Subparagraph 22AD(2)(c) of that Act currently provides that the duty to consider a refugee status application does not arise if the applicant holds a PRC (temporary) entry permit within the meaning of regulation 119H. At present it is not clear whether the lack of duty to consider an application extends to applications lodged by holders of the entry visa granted to dependants of holders of the PRC (temporary) entry permit or to persons who will be granted the PRC (temporary) entry permit once the Migration Regulations are restructured and the relevant regulation for grant of a PRC (temporary) entry permit is no longer regulation 119H. The amendment makes it clear that there is no duty to consider applications by these persons.

Part 4 inserts a power to require passengers travelling on domestic routes of international flights to produce evidence of their authority to be in Australia. The need for this provision has arisen from the recent deregulation of air transport which allows domestic passengers to travel with international passengers in intracontinental flights. The procedures for ensuring that all international passengers undergo immigration clearance may necessitate checking the

immigration status of domestic passengers travelling with international passengers.

Part 4 also inserts a new power to make regulations concerning the use in the decision making process of certain opinions, findings, assessments or decisions by specified third persons or agencies. To remove uncertainty, the Bill ensures that regulations that have already been made are taken to have been validly made.

Part 5 corrects a recently discovered anomaly that arose in relation to the operation of subsection 8(2) of the *Migration Amendment Act 1983*, which caused persons who had been absorbed into the Australian community prior to the commencement of that Act to lose their status as lawful residents. Part 5 of the Bill restores their lawful status from the commencement of the *Migration Amendment Act 1983*.

FINANCIAL IMPACT STATEMENT

The Government estimates that cost recovery measures in the AMEP will recover $3.65 million in 1992/93 and $9.7 million in 1993/94. The introduction of cost recovery will increase available resources for the AMEP with no increase in Commonwealth appropriations.

The other amendments to the *Migration Act 1958* have no financial impact.

MIGRATION LAWS AMENDMENT BILL (NO. 2) 1992

NOTES ON INDIVIDUAL CLAUSES

Clause 1 Short Title

1 This clause provides that the Act may be cited as the *Migration Laws Amendment Act (No. 2) 1992*.

Clause 2 Commencement

2 This clause provides for the staggered commencement of the Act. Part 1 and clauses 3 and 5 of the Act commence on 1 January 1993. Clauses 4, 6 and 7 and Part 3 commence on 1 March 1993, and Parts 4 and 5, which make other amendments to the *Migration Act 1958* commences upon Royal Assent.

3 The effect of the clause is that user-charging for existing migrants starts from 1 January 1993 while user-charging for new migrants commences from 1 March 1993.

Part 2 - Amendments to the *Immigration (Education) Act 1971*

Clause 3 Principal Act

4 This clause provides that in Part 2, the term "Principal Act" refers to the *Immigration (Education) Act 1971*.

Clause 4 Interpretation

5 This clause amends section 3 of the *Immigration (Education) Act 1971* to include definitions of the terms "approved English course" and "Charge Act", "exempt entry permit", "exempt visa" and "stay visa". An approved English course is one provided under section 4 or 4B of the Principal Act, and in practice this includes English language courses provided through the Adult Migrant English Program (the AMEP). The Charge Act is the *Immigration (Education) Charge Act 1992*, which is the proposed tax Act introduced with this Bill. The terms "exempt entry permit", "exempt visa" and "stay visa" have the same meaning as in the Charge Act.

Clause 5 Insertion of new section 4A

6 This clause inserts new section 4A in the *Immigration (Education) Act 1971*. Proposed section 4A contains a power to make regulations imposing an annual fee of no more than $250 per student on persons enrolling in English language courses provided under s.4 of the Principal Act.

7 Proposed subsection (2) provides that any regulations made under subsection (1) must exempt health care card holders and registered job seekers from any such fees, and must require that fees are payable on enrolment. Proposed subsection (3) provides that regulations may allow for

different levels of fees to be charged for different types of courses. It provides that the regulations may permit the refund, reduction or waiver of fees in whatever circumstances are specified in the regulations.

9 Subsection (4) defines "health care card" as those cards identified in the regulations that are issued by Commonwealth, State or Territory authorities. Similarly, the definition of "registered job seeker" permits the regulations to identify which categories of unemployed persons will be eligible for the exemption.

Clause 6 Insertion of sections 4B to 4F

10 This clause inserts new sections 4B to 4F into the *Immigration (Education) Act 1971* to establish the scheme whereby English language tuition will be provided to new adult migrants.

11 The following clause notes relate to the proposed sections.

Section 4B Provision of English courses

12 This section provides that the Minister must arrange for English language tuition to be provided to persons who made applications for a stay visa on or after 1 January 1993, were over 18 when the stay visa came into force, do not have functional English and have paid the English Education Charge or are exempt from paying the charge.

Section 4C Obligation to provide English Tuition

13 This section imposes an obligation on the Commonwealth, which is subject to the conditions set out in subsection 4D(1), to provide 510 hours of English language tuition to persons who made applications for a stay visa on or after 1 January 1993, were over 18 when the stay visa came into force, do not have functional English and have paid the English Education Charge or are exempt from paying the charge.

Section 4D Cessation of Obligation

14 This section sets out the circumstances in which the obligation to provide 510 hours of tuition is reduced or ceases. As the purpose of the scheme is to equip new adult migrants with functional English, subparagraph (1)(a) has the effect that the Commonwealth's obligation to provide the full 510 hours of tuition is reduced in those cases where the person attains functional English prior to receiving all 510 hours of tuition. The assessment of the person's English skills is made by the provider of the course using assessment procedures approved by the Secretary in writing.

15 The obligation also ceases under subparagraph (1)(b) or (c) if the person fails to register with a provider of an

approved English course within three months after becoming an Australian permanent resident, or fails to commence a course within 12 months of that date. Similarly, the obligation ceases in respect of any remaining tuition hours not used within 3 years of becoming a permanent resident.

16 Subsection (2) modifies the operation of subsection (1) by providing the Secretary with a limited power to determine that the obligation will not cease, or will cease only at a late date. The Secretary can only exercise this power in those cases where he or she believes it would be unreasonable for the obligation to cease, or cease at that time. The provision operates as an internal review mechanism whereby a person can seek to have the consequences of subsection (1) averted or postponed.

17 The power in subsection (2) is not unfettered. Subsection (3) limits the matters which the Secretary can take into account when deciding if it would be unreasonable for the obligation to cease. The Secretary may only look at the actions or the inaction of the course providers, or, under subparagraph (3)(b) those matters which are prescribed in the Regulations for this purpose. It is envisaged that the matters to be prescribed would include matters such as the person's severe ill-health or temporary incapacitation, or an incorrect assessment by the service provider that the person had functional English.

18 Subsection (4) defines the terms "relevant visa or entry permit" and "visa commencement date" for the purposes of section 4D.

Section 4E Refunds of English Education Charge

19 This section lists the circumstances in which a person is entitled to a refund of the charge paid. No refunds are payable if the obligation has ceased under proposed section 4D(1). In other cases, refunds are payable if the application is withdrawn before the stay permit is granted or if the person dies before commencing the course. A person is also entitled to a refund if the stay visa is cancelled or lapses before the person commences the course and at the time a refund is sought the person has not applied for another stay visa other than one exempt from the charge.

20 It should be noted that where a person is not entitled to a refund following cancellation or visa lapse because he or she applied for another visa, subsection 7(2) of the proposed *Immigration (Education) Charge Act 1992* provides that the person is exempt from paying a further charge.

Section 4F Effect of Refund of Charge

21 This section provides that where a person is entitled to a refund under proposed section 4E he or she is regarded as not having paid the charge. When read with proposed sections

4B and 4C this section has the effect that the Commonwealth is not obliged to provide that person with English tuition.

Clause 7 Insertion of new section 10A

22 This clause inserts section 10A which provides the Secretary with the power to delegate his or her functions under the Act. This supplements the existing power of delegation in section 10 which permits the delegation of the Minister's powers and functions under the Act.

Part 3 - Amendments to the *Migration Act 1958*

Clause 8 Principal Act

23 This clause provides that in Part 3, the term "Principal Act" means the *Migration Act 1958*.

Clause 9 Interpretation

24 This clause amends section 4 of the *Migration Act 1958* by inserting new subsection (1). That subsection defines the term "functional English" by stating that a person has functional English if the person passes an approved test conducted by an approved testing agency, or provides other evidence of English language proficiency as prescribed in the regulations.

Clause 10 Grant or refusal of visas

25 This clause amends section 24 to provide a mechanism whereby a person's liability to pay the fee can be assessed and notified to the person. Subclause 10(a) amends section 24(3) which applies to visas other than exempt visas. The subclause provides that under new subparagraph 24(3)(ab), where it seems that an application for the visa will be granted, the Minister will consider the applicant's age and English language proficiency. If the applicant is over 18, does not have functional English and paragraphs 5(a) and (c) of the *Immigration (Education) Charge Act 1992* apply to the applicant, he or she is to be given a notice to the effect that the Minister cannot grant the visa until the English Education Charge has been paid.

26 Subclause 10(b) amends section 24(3B) so that the relevant visa cannot be granted until the charge has been paid.

27 Subclause 10(c) amends subsection 24(6) which deals with applications for visas that are exempt visas within the meaning of subsection 24(10). Subparagraph 24(6)(a) is omitted and replaced by subparagraphs (aa) and (a). The effect of the amendments is the same as in new subparagraph 24(3)(ab) described above. If the charge is then paid, the

Minister must, subject to sections 28 and 28B of the *Migration Act 1958*, grant the visa.

Clause 11 Grant or refusal of entry permits

28 Subclause 11(a) amends section 34 of the *Migration Act 1958* to insert new subparagraph 34(3)(aa). This provision makes amendments to the grant of entry permits as proposed subparagraphs 24(3)(ab) and 24(6)(aa) and (a) make in respect of the grant of visas.

29 Subclause 11(b) amends subparagraph 34(3B) to provide that an entry permit is not to be granted until any English Education Charge payable has been paid.

Part 4 - Other Amendments to the *Migration Act 1958*

Clause 12 Principal Act

30 This clause provides that in this part, the term "Principal Act" means the *Migration Act 1958*.

Clause 13 Consideration of applications for Refugee Status

31 This clause amends section 22AD by omitting current subparagraph 22AD(2)(c) and substituting a new subparagraph. This provides that the duty to consider an application does not arise in the case of a holder of an entry permit granted because the holder was a national of the People's Republic of China who was in Australia on or before 20 June 1989 or the spouse or dependant child of such a person. The amendment is intended to fully implement the original intention of subparagraph 22AD(2)(c), namely that there should be no duty to consider a refugee application where the applicant has already been granted effective protection by the Australian Government through the grant of a PRC (temporary) entry permit or entry visa.

Clause 14 Persons to identify themselves

32 This clause inserts new section 89B. Proposed subparagraph 89B(1) defines an "overseas vessel" as one on which persons travel between ports in Australia as part of a journey by that vessel from outside Australia or to outside Australia. Proposed subparagraph 89B(2) provides that persons travelling on an overseas vessel within Australia may be required to produce prescribed evidence of their identity and to give other information as required by the Act or Regulations. The purpose of the new section is to ensure that the Department has sufficient powers to regulate the entry of and departure from Australia of people on international carriers. This follows the recent deregulation of air transport which now permits domestic and international passengers to travel on the same flights.

Clause 15 Regulations about visa criteria

33 This clause inserts new section 182. This section allows for regulations to be made that either permit the Minister to have regard to opinions, assessments, findings or decisions by specified persons or organisations, or to take as correct such opinions, assessments, findings or decisions when deciding whether an applicant satisfies a particular criterion. Subclause 14(2) puts beyond doubt the validity of such regulations made before the commencement of proposed section 182.

Part 5 - Operation of the *Migration Amendment Act 1983*

Clause 16 Absorbees never prohibited non-citizens

34 This clause states that subsection 8(2) of the *Migration Amendment Act 1983* has no application in respect of persons who had ceased to be immigrants before that Act commenced, were present in Australia when that Act commenced and have not left Australia since that commencement and are here now.

35 The Attorney-General's Department recently advised that the effect of subsection 8(2) of the *Migration Amendment Act 1983* was to make absorbed persons who did not hold permits prohibited non-citizens and, following further amendments to the Act that commenced on 19 December 1989, illegal entrants. Previously the view was taken that absorbed persons who were present in Australia on 2 April 1984 and had not left since were lawfully present here as permanent residents. An absorbed person was a person who had ceased to be an immigrant for the purposes of the Commonwealth's legislative power with respect to immigration, if that person became part of, or absorbed into, the wider Australian community.

36 Before 2 April 1984, only "immigrants" needed entry permits to enter and remain lawfully in Australia. If a person was absorbed, that is, ceased to be an immigrant, he or she did not need an entry permit to enter and remain lawfully in Australia. However, from 2 April 1984 the obligation to hold an entry permit applied to all non-citizens rather than only immigrants. The effect of the amendments was that absorbed persons who did not hold entry permits lost their lawful resident status from the commencement of section 8(2) of the *Migration Amendment Act 1983*. That section provides that where a person is a non-citizen and is not the holder of an entry permit, and had ceased to be a prohibited immigrant because of section 7(4) of the *Migration Act 1958* as then in force, the person becomes a prohibited non-citizen. Section 7(4) applied to many absorbed persons, and accordingly on commencement of section 8(2) of the *Migration Amendment Act 1983* they became prohibited non-citizens. Clause 15 has the effect of restoring their lawful status from that date.

IMMIGRATION (EDUCATION) CHARGE BILL 1992

NOTES ON INDIVIDUAL CLAUSES

Clause 1 Short Title

1 This clause provides that the Act may be cited as the *Immigration (Education) Charge Act 1992*.

Clause 2 Commencement

2 This clause provides that the Act commences on 1 March 1992.

Clause 3 Interpretation

3 Subclause (1) provides that an expression defined in the *Migration Act 1958* has the same meaning in this Act unless otherwise indicated.

4 Subclause (2) defines terms used in the Act. "English Education Charge" is defined to mean the charge payable under this Act. Paragraph (a) of the definitions of "exempt entry permit" and "exempt visa" applies to visas and entry permits in the refugee, humanitarian and special assistance categories. Paragraph (b) covers dependents, spouse and aged parents, the principal classes in the preferential family category. Paragraph (c) allows for other classes to be specified as exempt in the regulations, to cover classes with frequently amended titles or criteria and new classes, where it is thought desirable to exempt those classes from the charge.

5 The subclause also defines "permanent resident" and "stay visa" for the purposes of the Act. The definition of "stay permit" is intended to apply to those visas or entry permits that confer permanent resident status on the holder.

Clause 4 Act to extend to Territories

6 This clause provides that the Act has the same territorial application as the *Migration Act 1958*.

Clause 5 Imposition of English Education Charge

7 This clause provides that the English Education Charge is imposed on applications by non-citizens in respect of applications for stay visas made after 1 January 1993, where the person has received a notice under subparagraphs 24(3)(ab), 24(6)(aa) or 34(3)(aa) of the *Migration Act 1958* and the person is not exempt from the charge under clause 7 of this Bill. 1 January was chosen as the date from which applications would be affected so that applications which have already been made or are made before then, but are not fully processed by 1 March 1993, will not be subject to the charge.

This is to ensure that affected applicants can be made aware before they apply of their potential liability to pay the charge.

8 The effect of clause 5 is that a person who applies for a non-exempt stay visa after 1 January 1993 will be liable from 1 March 1993 to pay the charge before a visa can be granted if he or she is over 18 and does not have functional English and satisfies the criteria for the grant of the stay visa. Under the amendments to the *Migration Act 1958* contained in the Migration Laws Amendment Bill (No 2) 1992 which is accompanied by this Bill, a person who is assessed as liable to pay will be sent a notice prior to the grant of the visa stating that the grant cannot occur until the outstanding charge has been paid.

Clause 6 Amount of English Education Charge

9 This clause provides that the regulations may set different amounts of English Education Charge in respect of different categories of applicants. However, the clause also provides that the maximum amount that a person can be obliged to pay is $4080.

Clause 7 Exemptions from English Education Charge

10 Subclause (1) states that no charge is payable by applicants for exempt visas or entry permits. Subclause (2) provides that no charge is payable if the application is withdrawn before the fee is paid, or if the applicant has previously paid the fee and has not received a refund. The subclause also provides that applications by permanent residents are exempt from the charge.

Clause 8 Applicant to pay charge

11 This subclause provides that the obligation to pay the fee is that of the applicant. The effect is that while a third party, such as the sponsor or nominator, may pay on the applicant's behalf, the legal liability is that of the applicant alone.

Clause 9 Delegation

12 This clause allows the Minister to make instruments delegating his or her powers under the Act to officers of the Department.

Clause 10 Regulations

13 This clause is a general regulation making power which allows regulations to be made dealing with those matters that are required or permitted to be dealt with by regulation, or for which regulations are necessary or convenient.