

**NATIONAL COMPETITION  
POLICY REVIEW OF  
EDUCATION  
(ACCREDITATION OF NON-  
STATE SCHOOLS) AND  
OTHER LEGISLATION  
AMENDMENT BILL 2005**

**FINAL REPORT**

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## SUMMARY

### *Title*

Education (Accreditation of Non-State Schools) and Other Legislation Amendment Bill 2005 ('the Bill').

### *Background*

The Government always intended that under the *Education (Accreditation of Non-State Schools) Act 2001* ('the Act'), only schools that are not being operated for profit should be eligible for Government funding. The Government has since identified the need to clarify provisions in the Act regarding eligibility for Government funding.

The Act does not preclude a school from operating at a profit. Rather, the Act provides in s 7 that a school is not being operated for profit 'only if any profits made from the school's operation are used entirely to advance the school's philosophy and aims...'. A school that is being operated for profit may be accredited to operate as a non-State school by the Non-State Schools Accreditation Board ('the Board') even though it would not be eligible to receive Government funding, provided the school is compliant with accreditation criteria under the Act and the governing body is considered by the Board to be suitable to be the governing body of a school.

There are 457 non-State schools in Queensland, enrolling around 190,149 students. Most of these schools are denominational or otherwise community-based.

### *Policy Objectives*

The object of the Bill is to ensure that Government funding of non-State schools does not support schools that are established to generate profits, which are not being directed towards educational objectives.

The object is to be achieved by the insertion of the following provisions.

#### *Arm's length transactions and independence of financial decisions:*

The Bill proposes that on receipt of an application for government funding, the Board must be satisfied not only that the school is, or on its establishment will be, not operated for profit, but also of the following:

- '(a) the governing body is not a party to and does not intend to enter into, a "prohibited arrangement" in relation the operation of the school; and



(b) there is no connection between the governing body and a for-profit entity, and there will not on the school's establishment be a connection between the governing body and a for-profit entity that could reasonably be expected to compromise the independence of the governing body's financial decisions.'

Further, the Bill will make it a ground for withdrawal of Government funding if an existing school is not compliant with the new criteria.

These new requirements will serve as a flag to assist the Board to identify when a governing body seeking Government funding is ostensibly operating a school for profit by generating and distributing profits to commercial ventures and their shareholders, rather than for the school.

#### *Legal status of school governing bodies and eligibility for government funding*

The Bill will prohibit companies with shareholders (an 'ineligible company') from being eligible for Government funding under the Act. The Bill defines an "ineligible company" as being a company that is not limited by guarantee.

#### *Distinction between accreditation and Government Funding*

The Act will maintain the current separation of the Board's consideration of eligibility for Government funding and accreditation. A governing body that is ineligible for Government funding is not prevented from being accredited and therefore from operating a non-State school provided the school meets the accreditation criteria and is considered by the Board to be suitable for accreditation purposes.

In relation to an the assessment of a governing body's suitability to be the governing body of a non-State school, for the purposes of accreditation, the Bill will amend the Act to clarify a range of matters the Board may take into account when making this assessment.

#### *Options*

The Department's Public Benefit Test (PBT) Plan identified the following restriction on competition in these proposals:

The Bill restricts entry to the non-State schools market by proscribing governance bodies establishing or operating ostensibly not-for-profit schools that in fact have the capacity to use government funding for for-profit activities by virtue of the governing body's relationship with shareholders or with external organisations.

The PBT Plan identified two options for meeting the Government's policy objective:

- Option 1: The status quo (that is, Act as it presently stands);



- Option 2: The Bill provisions.

The PBT compares option 2 relative to option 1 as the base case.

### ***Restriction on competition***

The PBT finds that the Bill is not restrictive of competition. The Bill clarifies the Act so as to ensure the Government's original policy intention that for-profit non-State schools not be in receipt of Government funding.

### ***Costs and benefits***

Clause 5 (1) of the *Competition Principles Agreement* states that legislation should not restrict competition unless it can be demonstrated that:

- (a) the benefits of the restrictions to the community as a whole outweigh the costs; and
- (b) the objectives of the legislation can only be achieved by restricting competition.

Both option 1 and option 2 are consistent with the policy objective that Government funding not support schools being operated for profit, other than for distribution back to the school.

The benefits of option 2, relative to the option 1 status quo include:

- reduced administrative costs for the Board in being able to identify at the accreditation application stage any for-profit arrangements that schools might have or might be likely to have, rather than relying on post-accreditation investigation and/or audit; and
- greater assurance to parents that non-State schools in receipt of Government funding will be directing that funding solely towards the education of children and that for-profit schools will not be in receipt of Government funding. Clarity in this regard may assist parents in choice of school.

The Bill provisions may impose some additional costs on applicants for accreditation and Government funding, but those additional costs are not expected to be significant.

Importantly, with the Bill, for-profit schools will continue to be eligible for accreditation even though, as at present, they will not be eligible for Government funding.

In addition, the Bill will prevent Government funding being received by schools which are established to financially advantage their proponents or related parties. However, such a school is only restricted from entering into the non-State school sector if the school



would not be financially viable without Government funding, and therefore could not be accredited.

### *Consultations*

The Minister approved the release of the Bill for consultation with the non-State school sector on 8 March 2005. A workshop involving stakeholders was held on 21 March 2005 who were invited to provide written submissions on the Bill by 11 April 2005. Written submissions on the competition implications of the Bill were received from:

- The Association of Independent Schools of Queensland Inc;
- International Colleges Australia Limited.
- Brigidine College;
- Queensland Catholic Education Commission;
- The Grammar Schools of Queensland Association Inc (acknowledgement only. The Association said that insufficient time had been provided for preparation of a written submission drawing on the views of its stakeholders).

Stakeholder comments and the Department's responses are set out in an Appendix to the PBT.

Subsequent drafting of the Bill has responded to a number of concerns raised by stakeholders including:

- Arrangements between school governing bodies and other not-for-profit entities such as school authorities and religious orders;
- The 'connections test' (test of independence of financial decision making) and its effect on relationships between school governing bodies and other non-profit entities; and
- Criteria for the suitability of governing bodies including criteria for the suitability of individual members of governing bodies.

### *Sunset/review*

The Bill provisions should be reviewed as part of any future review of the Act.



# 1 INTRODUCTION

## 1.1 INTRODUCTION

The *Education (Accreditation of Non-State Schools) Act 2001* (the Act) establishes a statutory regime for accreditation, funding and ongoing monitoring of non-State schools in Queensland. The development of the Act was driven by the recommendations of the 2000 *Report of the Review of Accreditation and Accountability Arrangements for Non-State Schools*, conducted by Professor Roy Webb (the Webb Report).

It was always the Government and the Parliament's policy intention that Government funding should not go to a governing body that is operating a school for profit, that is, that the profits generated from the operation of the school are returned to the school. This policy intention was made clear in the Webb Report and implemented in the Act.

Section 17(1)(b) of the Act provides that before the Board refers an application for Government funding to the Non-State Schools Eligibility for Government Funding Committee (the Funding Committee), it must be satisfied that the school will not, on its establishment, be operated for profit. Further, section 73(1) of the Act provides that only schools not being operated for profit are eligible for Government funding.

Section 7 of the Act provides that a school is 'not being operated for-profit' when any profits made from the school's operation are used entirely to advance the school's philosophies and aims, as stated in the school's statement of philosophies and aims. A school's statement of philosophy and aims provides the basis for the school's educational program and acts as a guide for the school's educational and organisational practices. It is a requirement of accreditation (an accreditation criterion) for a school to have a statement of philosophy and aims and to comply with that statement.

A number of recent media reports have highlighted an intention on the part of private enterprise to enter the non-State schooling sector in Queensland for the purpose of operating schools to generate profits for their shareholders. As the Act does not prescribe how the amount of profits being returned to the school are calculated, the Government is concerned that a school being used to generate profits for shareholders may still be eligible for Government funding under the Act. By way of example, a governing body may be able to argue it is returning all of its profits back to its school, but be reducing the amount of those profits, available for the operation of a school, by intentionally paying above market prices for goods or services or by paying exorbitant management fees for the provision of those services to a related entity. In so doing, a governing body could be



operating a school for-profit, but continuing to be eligible for Government funding, contrary to the Government's policy intention. In the Government's view, it is not appropriate for school profits that are being distributed through such arrangements to include a proportion of Government funding or to be supported by the provision of Government funding to the school.

To ensure public money going to non-State schools through Government funding is used entirely for the benefit of the school and its students, the *Education (Accreditation of Non-State Schools) and Other Legislation Amendment Bill 2005* ('the Bill') inserts new provisions in the Act regarding eligibility for Government funding. In this regard, the Bill amends the Act to ensure that governing bodies of non-State schools that receive Government funding:

- deal with external parties on an arm's length basis; and
- exercise independence when making their financial decisions.

These new criteria are intended to act as a flag to assist the Board to identify when a governing body seeking Government funding is ostensibly operating a school for profit by generating and distributing profits to commercial ventures and their shareholders, rather than returning all available profits to the school.

The Bill also prohibits companies, incorporated under the Commonwealth *Corporations Act 2001* as companies limited by shares, from eligibility for Government funding under the Act. This provides added assurance to the Board that applicants for Government funding are in fact (as well as ostensibly) not operating for profit.

The proposed provisions aim to strengthen the ability of the Board to implement the Government, and Parliament's, original intention regarding funding for non-State schools.

Under the Act, the Board is required to decide whether a proposed or existing governing body is suitable to be the governing body of a non-State school. Section 39 provides for this suitability assessment. The clear intention of the Act is not to limit the Board to consideration of the matters specified under the Act when assessing suitability. However, for the benefit of the Board and the non-State school sector, the Bill aims to provide more clarity about the range of matters that the Board may consider when assessing a governing body's suitability, without limiting the Board in its assessment.

On 15 November 2004, the Minister for Education and the Arts (the Minister) announced the Government's intention to amend the Act to clarify the matters that the Board may consider when assessing the suitability of a governing body and to ensure that Government funded schools are not operated for profit. As indicated in the Minister's statement, the amendments will apply to all applications to the Board made on or after 15 November 2004 for accreditation or Government funding in relation to the establishment of a new



non-State school and to applications to change an existing non-State school's governing body.

To ensure that a disparity is not created in relation to the operation of the amendments between new and existing schools, the amendments will also apply to applications from existing schools for Government funding. There are only two existing non-State schools out of the 457 accredited schools in Queensland that do not receive Government funding. One is ineligible for funding because it provides education for international students only and the other is unlikely to apply for Government funding in the future, because of its philosophical beliefs.

## 1.2 SCOPE OF THIS REVIEW

This review takes the form of a PBT of the competition restrictions contained in the policy proposal.

Clause 5(1) of the *Competition Principles Agreement* states that legislation should not restrict competition unless it can be demonstrated that:

- '(a) the benefits of the restriction to the community as a whole outweigh the costs; and
- (b) the objectives of the legislation can only be achieved by restricting competition.'

The *Competition Principles Agreement* also requires that when making the assessment, the PBT take the following into account:

- (i) government legislation and policies relating to ecologically sustainable development;
- (ii) social welfare and equity considerations including community service obligations;
- (iii) government legislation and policy relating to such matters as occupational health and safety, industrial relations and access and equity;
- (iv) economic and regional development, including employment and investment growth;
- (v) the interests of consumers or of a class of consumers;
- (vi) the competitiveness of Australian businesses; and
- (vii) the efficient allocation of resources.'



The Public Benefit Test Plan ('the PBT Plan') agreed between the Department of Education and the Arts and Queensland Treasury requires that the analysis in this PBT undertakes the following steps:

- Identification and description of the current restrictive state;
- Identification and description of viable alternative states;
- Identification of major impacts of moving from current state to alternative states;
- Valuation/assessment of impacts;
- Impact analysis;
- Presentation of results.

Because the focus and impacts of the proposed amendments are predominantly non-economic, the PBT Plan provides for a 'short form' or 'reduced PBT' to be prepared, with a focus more on risk than on quantification of costs and benefits.

### **1.3 IDENTIFIED RESTRICTION ON COMPETITION**

The following potential restriction on competition was identified in the PBT Plan:

'The Bill restricts entry to the non-State schools market by proscribing governance bodies establishing or operating ostensibly not-for-profit schools that in fact have the capacity to use government funding for for-profit activities by virtue of the governing body's relationship with shareholders or with external organisations.'

The extent of this restriction is fully analysed in section 5 of this Report.



## 2 REGULATION OF NON-STATE SCHOOLS

### 2.1 THE ACT

The Act establishes a statutory regime for accreditation, funding and on-going monitoring of non-State schools in Queensland. The development of the Act was driven by the recommendations of the 2000 *Report of the Review of Accreditation and Accountability arrangements for Non-State Schools* conducted by Professor Roy Webb ('the Webb Report').

The Act sets out its objects and the means by which they are to be achieved as follows:

#### '(3) Objects of Act

- (1) The objects of this Act are—
  - (a) to uphold the standards of education at non-State schools; and
  - (b) to maintain public confidence in the operation of non-State schools;  
and
  - (c) to foster educational choices in the State; and
  - (d) to enable non-State schools' governing bodies to become eligible for Government funding for the non-State schools; and
  - (e) to provide the basis for the efficient allocation of Government funding to non-State schools.'
- (2) The objects are to be achieved mainly by—
  - (a) establishing the Non-State Schools Accreditation Board; and
  - (b) establishing an accreditation regime for the accreditation of non-State schools complying with the accreditation criteria; and
  - (c) establishing the Non-State Schools Eligibility for Government Funding Committee; and
  - (d) establishing a formal process for deciding the eligibility of a non-State school's governing body for Government funding for the non-State school.'



The Act defines 'school' as follows:

'Meaning of *school*

A *school* means a non-State school.

(6) Meaning of non-State school

(1) A *non-State school* means a school (in the ordinary meaning of the word) established to provide the following types of education—

- (a) preschool education;
- (b) primary education
- (c) secondary education;
- (d) special education.'

In s 6(2) the Act excludes the following from the meaning of non-State school: State schools, international schools, home schooling, tutoring establishments, TAFE institutes and child care centres (provided the child care centre is used only to provide child care).

Under the Act, the Board is responsible for making decisions on the accreditation of non-State schools and the suitability of their governing bodies. The Minister is responsible for deciding on eligibility for Government funding, on the advice of the Non-State Schools Eligibility for Government Funding Committee (the Funding Committee). When an applicant is seeking to establish a new school and seeks Government funding under the Act, the Board must first be satisfied that the new school will not on its establishment be operated for profit before referring the application for funding to the Funding Committee for consideration and recommendation to the Minister.

Section 16 of the Act prescribes the process for applying for accreditation. Section 16(4) provides that an applicant for accreditation must indicate whether it is also seeking Government funding for the school.

Section 17(1)(b) of the Act provides that before the Board refers an application for Government funding to the Funding Committee for consideration and recommendation, through the Board, to the Minister, the Board must be satisfied that the school will not, on its establishment, be operated for profit.

Section 73 (1) of the Act provides that 'The governing body of an accredited school, not operated for profit, may apply for Government funding of the school.'



Section 93 of the Act prescribes the grounds for withdrawal of Government funding. Under section 93(a) it is a ground for withdrawal of Government funding if a school is being operated for profit.

Section 7 of the Act prescribes when a school is not operated for-profit:

**‘(7) School not operated for profit**

For this Act, a school is *not operated for profit* only if any profits made from the school’s operation are used entirely to advance the school’s philosophy and aims, as stated in the school’s statement of philosophy and aims.’

Section 6 of the *Education (Accreditation of Non-State Schools) Regulation 2001* (the Regulation) requires a school to have a statement of philosophy and aims. Section 6 provides that:

**‘(6) Statement of philosophy and aims**

(1) A school must have a written statement of philosophy and aims, adopted by its governing body, that is used as—

(a) the basis for the school’s educational program; and

(b) a guide for the school’s educational and organisational practices.’

Before provisionally accrediting a school, the Board must be satisfied that the applicant is suitable to be the school’s governing body and will comply with the accreditation criteria within the school’s provisional accreditation period. In this regard, section 18(1) provides:

**‘(18) Decision to provisionally accredit school**

(1) The board must consider the application and decide whether it is satisfied—

(a) the applicant is suitable to be the school’s governing body; and

(b) the school will comply with the accreditation criteria within the school’s provisional accreditation period.’

A similar assessment is required when the Board is deciding to accredit a provisionally accredited school. In this regard, section 27(2) provides:

**‘(27) Decisions**

...



(2) The board must consider the application for the accreditation of the school and decide, after assessing the school under subdivision 4, whether it is satisfied—

- (a) the applicant is suitable to be the school's governing body; and
- (b) the school is complying with the accreditation criteria.'

Accreditation criteria are prescribed in the Regulation. Section 9 provides as follows:

**'(9) Prescribing accreditation criteria**

A regulation may prescribe criteria (the *accreditation criteria*), relevant to a school's accreditation, about the following—

- (a) the school's administration and governance arrangements;
- (b) the school's financial viability;
- (c) the school's educational program and student welfare processes;
- (d) the school's resources;
- (e) the school's improvement processes.'

A school's educational program is outlined its statement of philosophy and aims. It is towards these educational programs that the profits generated from the operation of the school must be used in order for the school to be considered by the Board to not be operated for profit.

Section 39 provides for the Board's suitability assessment. Section 39 provides as follows:

**'(3) Suitability of governing body**

- (1) This section applies if the board is deciding—
  - (a) whether a school's governing body that is the applicant for the accreditation of the school is suitable to be the school's governing body; or
  - (b) whether the governing body of a provisionally accredited, or accredited, school is suitable to continue to be the school's governing body; or
  - (c) whether the proposed governing body of a provisionally accredited, or accredited, school would be suitable to be the school's governing body.



(2) If a director of a school's governing body does not have a current positive notice, the board must decide that the governing body is not suitable to be, not suitable to continue to be, or would not be suitable to be, the school's governing body.

(3) Also, in making its decision, the board may have regard to each of the following—

(a) if any of the governing body's directors have been convicted of an indictable offence—the nature, and circumstances, of the commission of the offence;

(b) if the governing body has been convicted of an offence—the nature, and circumstances, of the commission of the offence.

Subsections (2) and (3) do not limit the matters to which the board may have regard in making a decision under subsection (1).'

## **2.2 POLICY**

It was always the Government's policy intention that those schools that meet a need in a growing community or provide a significant element of choice that is not already met in the community would be eligible for Government funding. If there is adequate provision of education in an area or adequate choice, a proposed non-State school would not necessarily be eligible for Government funding.

Importantly, Government funding was also never intended to be available to a governing body that is operating a school for profit, other than for distribution back to the school for the benefit of students. This policy intention was made clear in the Webb report and implemented in the Act under sections 17(1)(b), 73, and 93.

## **2.3 EFFECTIVENESS OF THE ACT**

The Act has in the past been effective in meeting the Government's policy objective. However, several recent media reports have highlighted an intention on the part of private enterprise to enter the non-State schooling sector in Queensland and other states in Australia, to operate schools for the purpose of generating and distributing profits to their shareholders. This has raised the Government's concern that public funding could be used by schools established for this purpose, to boost profits for commercial entities and their shareholders, rather than being used solely for the benefit of students.

The Department has identified the possibility that under the current Act, a school could be established by commercial entities to generate profits for shareholders in this way, but still meet the criteria under section 17(1)(b) and 73(1) of the Act and be eligible for



Government funding. This is because, section 7, which outlines when a school is considered to not be operated for profit, does not prescribe how the amount of profit, being returned to the school is calculated. Accordingly, a governing body may be able to argue it is returning all of its profits back to its school, while it is in fact reducing the amount of those profits by intentionally paying above market prices for goods or services or by paying exorbitant management fees for the provision of those services to a related entity. In so doing, a governing body could ostensibly be operating a school for profit, outside the intentions of the Act, while maintaining their compliance with the Act.

Hence the Act in its present form exposes the Government to the risk that governing bodies, or commercial entities that establish those bodies might to seek to circumvent the Act's not-for-profit provisions as they relate to eligibility for Government funding, in order to gain access to that money for the benefit of their shareholders.

Accordingly, the Government has decided that the Act must be amended to achieve its original policy intention and ensure that only those schools that are in reality not being operated for profit receive Government funding. Section 4.2.2 of this Report details the mechanisms implemented through the Bill to achieve the policy objectives of Government in relation to Government funding of non-profit schools.



## 3 THE MARKET

### 3.1 THE MARKET

Some 638,955 students were enrolled in Queensland schools in 2004 including 448,806 in State schools and 190,149 in non-State schools (this does not include preschool enrolments). There are approximately 1,700 schools in Queensland in the State and non-State sectors. Of these 457 are non-State schools.

The numbers of State and non-State schools have remained fairly constant over the last twenty years.

According to the PBT prepared on the current Act in 2001:

‘The non-State school sector is highly segmented and is made up of a number of distinct systems each with different philosophies. These systems include:

- Catholics schools;
- Grammar schools;
- Anglican schools;
- Independent Christian schools;
- Other religious schools; and
- Other non-religious schools.

Catholic schools form the largest group, enrolling 98,000 students in 1998, equal to 60% of all non-State enrolments and 17% of total schools enrolments in Queensland. Anglican schools enrolled 17,000 students in the same year (10% of non-State enrolments; 3% of all Queensland enrolments) while other non-State schools accounted for 49,000 enrolments (30% of non-State enrolments; 8% of all Queensland school enrolments). Non-State schools are proportionately more important in the secondary system in which they enrol 35% of all students compared with 23% of primary school students. The proportion of Queensland school students enrolled in non-State schools, of 28% is slightly lower than the national



average (30%) but markedly lower than in Victoria (34%) and the ACT (36%).

The importance of the non-State school sector in Queensland has been growing in recent decades, from 24% of total enrolments in 1965 to 28% in 1998. Growth in the non-State sector has been uneven, with the non-Catholic, non-Anglican schools increasing their share of enrolments from 2.6% in 1980 to 8.3% in 1998.

### **3.2 FUNDING RECEIVED BY THE NON-STATE SCHOOL SECTION**

Government funding eligibility is a primary criterion for the payment of Queensland Government recurrent grants under s.134A(1) of the *Education (General Provisions) Act 1989*. Recurrent grants are provided to assist with the costs of teaching and general staff salaries, professional development, curriculum development and implementation, maintenance and general operations.

Under the *Education (Capital Assistance) Act 1993*, a non-state school is eligible to receive funding if it is a 'school in receipt of subsidy' within the meaning of s.134A(1) of the *Education (General Provisions) Act 1989* which, in turn, requires the school's governing body to be eligible for government funding under the Act. Furthermore, other State Government allowances such as textbook, resource and remote area tuition allowances are paid for students in schools that are accredited and are schools in receipt of subsidy. Textbook allowances can be paid either to the school or to the parent. This is usually determined by agreement between the parent and the school. Other allowances can be paid directly to parents, for instance, the remote area travel and tuition allowances.

The average amount of State Government funding received by Government funded non-State schools during 2004/05 was approximately \$1,199 per student.

If a non-State school is on a list of approved non-government schools, published by the Commonwealth Department of Education, Science and Training (DEST), it is entitled to funding from the Commonwealth Government under the *States Grants (Primary and Secondary Education Assistance) Act 2000* (Cth). Schools are included on this list if they 'are recognised' by the relevant State and Territory Minister. In Queensland, the Minister recognises non-State schools for the purposes of including them on the list published by DEST if the schools are both accredited and eligible for Government funding under the Act. Consequently, under the current Commonwealth system, funding eligibility under the Act has a significant effect on a non-State school's access to both Queensland and Commonwealth Government funding.

The Commonwealth Government's *2004 General Recurrent Grant Funding – Information for New Schools*, indicate that in order to be eligible for funding under the *General*



*Recurrent Grant Programme*, a school that is not part of a systemic system of schools must provide evidence it is not conducted for-profit.

Commonwealth funding to non-State schools in 2004/05 was approximately \$4,051 per student.

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<sup>1</sup> Department of Education and the Arts *Annual Report 2003-04*.

<sup>2</sup> See Economic Associates Pty Ltd *National Competition Policy Review of Grammar Schools and Other Legislation Amendment Bill 2003*, prepared for the Department of Education.

<sup>3</sup> Non-State Schools Accreditation Board *Annual Report 2002-03*

<sup>4</sup> See Economic Associates Pty Ltd *National Competition Policy Review of Grammar Schools and Other Legislation Amendment Bill 2003*, prepared for the Department of Education.

<sup>5</sup> See Economic Associates Pty Ltd (2001) *Accreditation of Non-State Schools-Public Benefit Test*, prepared for Education Queensland.



## 4 OPTIONS

The PBT Plan identified two options for consideration in the PBT:

- Option 1: The status quo
- Option 2: Bill provisions.

### 4.1 OPTION 1: THE STATUS QUO

In option 1 the Act and its administration would not change. The Government is concerned, however, that schools governing bodies could devise and institute arrangements that would place in effect for-profit schools in receipt of State Government funding.

### 4.2 OPTION 2: BILL PROVISIONS

#### 4.2.1 OBJECT OF THE BILL

To ensure public money going to non-State schools through Government funding is used entirely for the benefit of the school and its students, the Bill aims to strengthen the provisions in the Act regarding eligibility for Government funding to ensure that Government funding only goes to schools that are not being operated for profit, that is, all profits generated from the operation of the school are directed to the school to meet its educational purposes.

#### 4.2.2 HOW THE POLICY OBJECTIVES ARE BEING MET

The Bill addresses the policy objectives by inserting the following provisions in the Act.

##### *Arm's length and independence of financial decisions*

The Bill in clause 5 proposes that on receipt of an application for Government funding, the Board must be satisfied not only that the school is, or on its establishment will be, not operated for profit, but also of the following:

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<sup>6</sup> Discussion in this section is taken from the PBT Plan. Direct quotes are from the PBT Plan also. Amendments made to the Bill in draft subsequent to stakeholder consultation are incorporated here.



‘(a) the governing body is not a party to and does not intend to enter into, a “prohibited arrangement” in relation the operation of the school; and

(b) there is no connection between the governing body and a for-profit entity, and there will not on the school’s establishment be a connection between the governing body and a for-profit entity that could be reasonably expected to compromise the independence of the governing body’s financial decisions.’

The Bill in clause 4 defines ‘prohibited arrangement’ as follows:

**‘(7A Meaning of prohibited arrangement**

(1) A prohibited arrangement is a contract or arrangement entered into by persons not dealing with each other at arm’s length.

(2) However, a contract or arrangement entered into by a school’s governing body or proposed governing body and an entity that is not a for-profit entity (the non-profit entity) is not a prohibited arrangement only because the non-profit entity has the power to appoint, or remove, a person as a director of the governing body.’

These new criteria will serve as flags to assist the Board in identifying when a governing body seeking Government funding is operating a school for profit, by generating and distributing profits to commercial entities and their shareholders, rather than for the school. The proposed criteria have been developed in response to the circumstances identified in recent media reports. However, the provisions have been drafted broadly, so as not to be limited by any specific scenario, and to be broad enough to respond to future innovations that may jeopardise the appropriate distribution and use of Government funding.

The first criterion requires an applicant for Government funding to satisfy the Board that the applicant is not a party to, and does not intend to enter into, a prohibited arrangement in relation to the operation of the school.

The term ‘arm’s length’ is well recognised at law and adopted in a number of other Queensland Acts, including the *Cooperatives Act 1997*, *Gas Pipelines Access (Queensland) Act 1998*, *Duties Act 2001*, *Land Act 1994*, *Local Government Act 1993* and the *Petroleum and Gas (Production and Safety) Act 2004*. These Acts do not define the term ‘arm’s length’. The term is also used in Acts in other Australian jurisdictions, including Commonwealth legislation concerning income and sales tax. Some stakeholders themselves suggest that corporations law regulates arm’s length dealings. Accordingly, the concept should not be new to governing bodies of non-State schools.

It is not uncommon for the governing bodies of church run schools to lease school land from their sponsoring church or related non-profit entity. It is also common for the



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sponsoring church to have the power to appoint and remove directors of governing bodies to ensure the schools abide by the religious philosophies of the church. The proposed amendments do not aim to prevent these activities. Section 7A(2) will ensure that the ability to appoint and remove directors of a governing body in this way, will not of itself be a sufficient indicator that the dealings between the governing body and the church are not at arm's length. In this instance, the Board would require further evidence that the dealings are not at arm's length, for example, if the governing body has paid an excessive amount for a lease of the property on which the school is sited.

Schools in regional Queensland are often required to engage the services of people in their community that are in some way related to the school or the governing body. This can often be to the advantage of the school, for instance when quoted low prices for a service from, for instance, a parent of a student at the school. The new prohibited arrangement criterion is not intended to prevent related parties from contracting with each other in this way. Such arrangements are of concern however, when they result in the school paying more than a fair and reasonable market value for the goods or service provided.

The second criterion requires an applicant for Government funding to satisfy the Board that there is no direct or indirect connection between the applicant and a for-profit entity, and there will not, on the school's establishment, be a direct or indirect connection between the applicant and a for-profit entity, that could reasonably be expected to compromise the independence of the applicant when making financial decisions.

Under the Bill, 'for-profit entity' is defined to mean an entity that is carried on for profit or gain to its individual members. It is intended that for the purposes of this new criterion, 'connection' will have the ordinary dictionary meaning. The Macquarie Concise Dictionary includes references to an association, relationship and circle of friends or associates, or a member of such a circle.

This criterion aims to ensure that the governing body of a school that may potentially be influenced by commercial entities in relation to its financial decisions does not receive Government funding. This is because such lack of independence could result in the inappropriate use of public money to the detriment of the school.

Under the new criterion, it is not sufficient for the governing body to simply have a connection with a for-profit entity. That connection must reasonably be expected to compromise the independence of the applicant's financial decisions. This means that a reasonable person, in the position of the Board, would have to be satisfied, taking into account all the facts of the particular case, that the particular connection would compromise the independence of the applicant's financial decisions.

The Bill is drafted to ensure that an applicant for Government funding is able to provide evidence to the Board of its compliance with the new criteria. For instance, under the new criterion regarding independence of financial decisions, an applicant is able to provide



evidence to the Board that a connection between it and a for-profit entity could not reasonably be expected to compromise the independence of its financial decisions. In this regard, the applicant could provide evidence of the practices and procedures it has put in place to ensure that its independence will not be compromised when making financial decisions. The Board may take any evidence provided by the applicant for funding into account when considering this criterion.

Further, clause 6 of the Bill will ensure the Board is able to obtain further evidence to make its assessment under the new criteria, if necessary, by giving it the power to request the applicant to provide documents and information to make its determination.

### ***Review of the Board's decision***

Under the proposed amendments, if the Board is not satisfied that a school will not be operated for profit, or that a proposed or existing governing body is not a party to, or does not intend to enter into a prohibited arrangement, or that a proposed or existing governing body is not independent in its financial decisions, the applicant will not be eligible for Government funding. The Board will issue an information notice of this decision to the applicant. The applicant may seek a review of the decision from the Minister, in accordance with the existing review processes in the Act. Applicants aggrieved by a decision of the Board or the Minister may also seek judicial review of the decision in the Supreme Court.

### ***Legal status of school governing body and eligibility for government funding***

The Bill will prohibit companies with shareholders, incorporated under the *Corporations Act 2001*, (an “ineligible company”) from being eligible for government funding under the Act. It will be a ground for cancellation of Government funding if a governing body is an ineligible company.’

Clause 12 of the Bill inserts section 72(3) into the Act, which provides

‘(3) Also, a school’s governing body may not apply for Government funding for the school if the governing body is an ineligible company.’

Clause 14 of the Bill inserts section 91A into the Act, which provides:

#### **‘91A Restriction on type of corporation that may be eligible for Government funding for a school**

‘The governing body of a Government-funded school must not be an ineligible company.’

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<sup>7</sup> The PBT Plan notes that ‘This amendment will not prohibit other types of entities currently accredited under the Act from applying for accreditation, or continuing to be accredited under the Act.’



Clause 15 of the Bill inserts the following ground for withdrawal of Government funding into the Act in section 93 of the Act:

‘(f) the school’s governing body is an ineligible company’

Clause 23 inserts the following definitions into the Bill:

*‘company* see the Corporations Act, section 9.

*company limited by guarantee* see the Corporations Act, section 9.

*ineligible company* means a company that is not a company limited by guarantee.’

This restriction will make it difficult for entities to establish themselves in a way that will enable the distribution of revenue or profits to shareholders and members, rather than to the school. It will give the Board more confidence that a governing body seeking Government funding will not operate the school for profit, that is, that the all profits will be returned to the school, not to shareholders..

This restriction will not prohibit the range of entities currently accredited under the Act from being accredited under the Act in the future. These entities include companies limited by guarantee, incorporated associations, property trusts and other entities incorporated under the church Acts.

The Bill exempts two existing schools whose governing bodies are companies limited by shares, Fairholme College and Cannon Hill Anglican College, from the operation of the new restriction. The governing bodies of these schools will continue to be eligible for government funding provided the schools do not change governing bodies to another company limited by shares.

Exemptions have been provided to these colleges because they are long standing schools that have been operating prior to the introduction of the Act (Fairholme being established in 1917 and Cannon Hill in 1989). Examination by the Department of the constituent documents of these two schools indicate they are not operating their schools for profit and are acting in the best interests of the students at their schools. Their members do not derive benefit from the profits generated by the school and there are sufficient controls in place to ensure members do not receive property or income (other than as bona fide reimbursement for services) either from the operations of the school, or upon winding up.

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<sup>8</sup> Both of these schools are of long standing and both were established prior to the introduction of the Act, Fairholme in 1917 and Cannon Hill Anglican College in 1989. Under the Act, the governing body of school can apply to change its governing body. The Bill provides that were these two schools to apply to change a



### ***Suitability assessment for Accreditation***

Clause 7 of the Bill amends section 39 of the Act to provide that in assessing a governing body's suitability to be the governing body of a school, the Board may have regard to:

- '(a) the governing body's relationship with other entities;
- (b) whether the governing body has appropriate guiding principles and procedures for identifying, declaring and dealing with any conflict of interest a director of the governing body may have relating to an aspect of the operation of the school;
- (c) the conduct of the governing body, or its directors, relevant to the operation of the school.'

The amendment aims to more clearly prescribe the powers always envisaged for the Board in relation to assessing the suitability of a proposed or existing governing body. This clarification of section 39 aims to give the Board more confidence in its ability to make suitability decisions based on these criteria. It should also provide greater guidance to the non-State school sector about what the Board will be looking at when assessing a governing body's suitability under the Act.

As this provision aims to clarify the existing position under the Act, it is not considered to impact on competition.

### ***Distinction between Accreditation and Government Funding***

The Act will maintain the current separation of the Board's consideration of eligibility for Government funding and accreditation. A governing body that is ineligible for Government funding is not prevented from being accredited and therefore from operating a non-State school provided the school meets the accreditation criteria and is considered by the Board to be suitable to be the governing body of a non-State school.

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governing bodies, and the new governing bodies were companies limited by shares, the governing bodies would be ineligible for Government funding.



## 5 SUMMARY OF PBT ANALYSIS

The *Competition Principles Agreement* allows identified restrictions on competition to stand only if:

- ‘(a) the benefits of the restriction to the community as a whole outweigh the costs; and
- (b) the objectives of the legislation can only be achieved by restricting competition.’

### 5.1 THE IDENTIFIED RESTRICTION ON COMPETITION

The PBT Plan indicated a potential restriction to competition as a result of the Bill. The PBT Plan stated:

‘The Bill restricts entry to the non-State schools market by proscribing governance bodies establishing or operating ostensibly not-for-profit schools that in fact have the capacity to use government funding for for-profit activities by virtue of the governing body’s relationship with shareholders or with external organisations.’

After analysis however, the PBT finds that the Bill provisions are not restrictive of competition for the following reasons:

- Not-for-profit schools will continue to be eligible for accreditation and Government funding.
- For-profit schools will continue to be eligible for accreditation.
- The only schools whose access to the market may be limited would be those that, under the Act might operate ostensibly not-for-profit but in reality for-profit. The intention of the Act is clear that for-profit schools not be eligible for Government funding. That intention could be circumvented only by establishing a school governance structure which allowed profit to be transferred in various ways from the school to a related for-profit entity. The Bill provisions which provide the clarity to meet the Government’s original policy intention are not restrictive of competition.



- If there is demand in a community for a school, the non-State school market is such that if one entity is refused funding, and as a result chooses not to enter the market, another entity is likely to take up that position.
- Bill provisions regarding suitability criteria are not restrictive of competition because they clarify but do not extend the range of matters to which the Board may have regard in assessing suitability.
- The prohibition of eligible companies is not restrictive of competition firstly because not-for-profit entities typically do not adopt this legal form and secondly because, overwhelmingly, non-State schools in Queensland are not companies limited by shares. For-profit accredited schools may still adopt the shareholder company form.

### **5.1.1 IS THE RESTRICTION ON COMPETITION NECESSARY TO THE OBJECTS OF THE POLICY PROPOSAL?**

As noted in section 4.2.1, the object of the policy proposal is to ensure that Government funding of non-State schools does not support for-profit operation of schools. As outlined above, this policy intention was made clear in the Webb Report and the current Act, through sections 17(1)(b), 73(1) and 93(a).

If the Government's policy of only funding non-profit schools is to be met, some restriction is required in relation to access to Government funding. Option 1, the status quo, already confines government funding to non-State schools that are not being operated for profit and allows the Board the discretion to consider a range of criteria in assessing applications for accreditation.

The need for the Bill has arisen because the Government is concerned that with emerging developments in the non-State schools market, the current Act may not be adequate to ensure that the Government's original policy intention regarding funding of non-profit non-State schools is met.

Some stakeholders have argued that the provisions of the current Act and the corporations law is sufficient to give effect to Government's policy intentions. The potential inadequacies of the current Act are outlined in section 2.3 of this Report. The Bill provisions clarify but do not expand the Government's policy intent that Government funding of non-State schools should be directed only to not-for-profit schools. Any competitive restriction that these measures in option 2 give rise to is necessary if Government funding is not to be accessible to school governing bodies that are in effect operating for profit.

The proposed Bill (option 2) aims to ensure this intention is met by imposing financial independence requirements on governing bodies, in requiring related parties to a school's governance to act at arm's-length, and in making companies with shareholders ineligible



for government funding. These provisions are designed to ensure that non-State schools in receipt of Government funding will not be operated for profit and that non-State schools will be independent in their financial decision-making thereby allowing governing bodies to act in the best interests of their schools and their students.

Conversely, the provisions are also designed to ensure that, if a school is established by a commercial entity, there are sufficient safeguards in place to prevent the school from being influenced by the commercial entity when making its financial decisions, and that these measures are adhered to by the school. Section 4.2.2 fully outlines how the Bill aims to address these potential inadequacies.

In response to the assertion by some that the Commonwealth *Corporations Act 2001* is sufficient to ensure dealings are conducted at arm's length, the Government considers that the protections available in that Act and the common law are an entirely separate issue from the matters the Board considers appropriate for determining whether a proposed or existing governing body is eligible to apply for Government funding under the Accreditation Act. A breach of the *Corporations Act 2001* would not of itself be sufficient to withhold or withdraw Government funding to a school.

As previously stated, the Bill does not prevent a governing body from being accredited to operate a non-State school if the Board decides that governing body is operating a school on a for profit basis, or that the governing body is a party to a prohibited arrangement or that the governing body is not independent in its financial decisions. However, to be accredited the school still needs to meet the accreditation criteria under the Act and the Board must consider the governing to be suitable to be a governing body of the school.

## **5.2 COSTS AND BENEFITS**

In this discussion, costs and benefits are addressed by comparing option 2 (the Bill provisions) with option 1 (the status quo).

### **5.2.1 COSTS**

The Bill, relative to the Act is not expected to impose significant costs.

#### ***Increase applicant costs***

It is not anticipated that the Bill will increase costs for applicants for accreditation or Government funding, or for an existing school to demonstrate its compliance with the new criteria. It is anticipated that most schools operating in the non-State sector are and will continue to be compliant with the new criteria. It is intended the Board will adopt a risk-based approach to monitoring compliance with the new criteria. In relation to applications for Government funding from new or existing schools, the Board intends to tailor its application form to request some basic information that will identify when further



investigation of the applicant's circumstances is required in order to satisfy the Board about compliance with the new criterion. It is believed that most providers in the non-State sector would be compliant with the new requirements and should be able to satisfy the Board of these matters by responding to the application form questions. However, the Bill will provide the Board the power to further investigate a proposed governing body should their application indicate that such assessment may be necessary to ensure the applicant is in compliance with the new criteria.

The Board may investigate an existing school's compliance with the new requirements if concerns are raised, for example, by notification from an interested party (such as school employees, parents of students, a director of a governing body or other members of the public), through a report of an assessor or through statements in the media.

The Board conducts a five-year cyclic review of all schools in the non-State sector. The current review process simply requests schools to complete a form responding to questions regarding compliance with accreditation criteria. The Board will consider refining the form to pose similar questions to those proposed for the revised application form for new schools. Using this method, the Board will identify when further and more detailed investigation of a school's compliance with the criteria will be instituted.

### **5.2.2 BENEFITS**

The benefits of the Bill relative to the status quo under the Act are expected to fall into two categories:

#### ***Reduced cost of implementing Government policy***

The Bill is likely to lower costs for the public sector in controlling the deployment of Government funding within schools, ensuring that Government funding is directed solely towards the education of children. This is because the Bill allows the Board in determining eligibility for Government funding to 'screen out', at the accreditation stage rather than relying solely on post-accreditation investigation, those governing bodies of schools that are being used as a vehicle for generating and distributing profits to shareholders.

#### ***Greater assurance to parents***

The Bill provides increased assurance to parents that schools in receipt of government funding will be using that funding solely for the advancement of the school, even if they are associated to a commercial entity. The new criteria ensure that a school being used to generate profits for shareholders do not receive Government funding, and that if a school

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<sup>9</sup> The concepts of not-for-profit and for-profit are as used in the Act.



is affiliated with a commercial entity, the school will only receive Government funding if the governing body of the school can satisfy the Board that it is independent in its financial decisions and its contracts are entered into at arm's length.

The Bill enables Government to identify, at the accreditation stage that a governing body may be operating for profit, other than for return to the school and is therefore not eligible for Government funding. As previously noted, the school can still be accredited provided it meets the accreditation criteria under the Act and the governing body is considered suitable to be the governing body of the school. The applicant for funding must then decide whether it wishes to continue to establish the school in the absence of funding. Enabling this to occur at the accreditation stage will decrease the potential for disruption to schooling, which might occur in a situation where an existing school's funding is withdrawn.

### **5.2.3 BALANCE OF BENEFITS AND COSTS**

Because the dominant non-State school model is the community-based not-for-profit school and within that model there is already considerable and increasing diversity, any effect of the Bill (relative to the status quo) in restricting entry into the non-State school market is considered to be negligible. Accordingly, all costs identified under section 5.2 are only likely to eventuate in the extreme case, and are far outweighed by the benefits attributable to the Bill.

The Bill is necessary in order to strengthen the ability for the Board to ensure that the Government's original policy intention is maintained in relation to only funding schools that return all available profits back to the school. This optimises the best use of public funding.

Further, implementing the Bill is likely to be more beneficial than the existing legislation in reducing the Government's costs in monitoring and investigating the deployment of Government funding to non-State schools and in providing greater assurance to parents about the deployment of a school's government funding.

### **5.3 OTHER POSITIVE IMPACTS**

#### ***Ensure Government funding is directed to not-for-profit schools***

The major advantage of the Bill is that by providing for the new criteria and ineligible company prohibition, it strengthens the ability for the Board to ensure that schools in receipt of Government funding are truly not being operated for profit, i.e they are returning all profits generated from the operation of the school, back into the school for the benefit of its students. This accords with the Government's original policy objective regarding Government funding.



The ability to meet this policy objective under the current Act is questionable. This is discussed at 2.3 above. Failure to amend the Act to address its possible inadequacies may increase the risk of challenge to a decision of the Board or the Minister under the Act. As indicated in section 4.2.2 above, the new criteria regarding Government funding have been drafted in a broad way, so as not to be limited by any specific scenario, and to be broad enough to respond to future innovations that may jeopardise the appropriate distribution and use of Government funding.

The new criteria ensure that a school being used to generate profits for shareholders do not get Government funding, and that if a school is affiliated with a commercial entity, the school will only receive Government funding if the governing body of the school can satisfy the Board that it is independent in its financial decisions and its contracts are entered into at arm's length.

#### ***Ensures efficient appropriation of Government money***

As Government funding is by necessity limited, its appropriation in this context has always been on the basis that Government would only fund those schools that are not being operated for profit, as defined in the Act. By ensuring all profits are redirected back into schools, Government can be assured that Government funding is being used solely for the benefit of schools and their students. This optimises the value of public funds.

The Bill will clarify the Government's ability to meet the original policy intention and enhance its ability to ensure that intention is met.

### **5.4 ASSESSMENT AGAINST COMPETITION PRINCIPLES AGREEMENT CRITERIA**

The Competition Principles Agreement requires that options be assessed relative to the criteria in Table 1. The assessment compares option 2 (the Bill provisions) with option 1 (the Act as it presently stands).

As Table 1 shows, the impacts of the Bill provisions are expected to be slight because the non-State school sector is expected to continue to comply with legislative requirements and hence retain eligibility for funding. It might be argued that parents who send their children to a for-profit school will be denied the indirect benefit of Government funding and that the school, in not being funded might not be sustainable. However, since the Act commenced it been Government policy that for-profit non-State schools not be funded. Where this a demand for new non-State schools, the non-State schools market on the supply side has shown itself able to meet that demand. The advantages to parents of Government funding will continue to be available through the not-for-profit schools.

Accordingly the impacts in Table 1 include more efficient market operation – because the Government funding status and eligibility of non-State schools will be clear – facilitating



parents' efforts in searching for suitable schools and some improvement in administrative efficiency because the Board will have clearer sets of rules to work by.

**Table 1 Assessment of options against NCP criteria (option 2 relative to option 1'**

<b>Criterion</b>	<b>Option 2</b>
(i) Ecologically sustainable development	Not relevant
(ii) Social welfare and equity including community service obligations	Option 2 enhances assurance that Government funding will be allocated solely to the advancement of non-State school's educational aims and to the benefit of their students. The Bill will ensure that Government funding only goes to schools that are truly not being operated to generate profits other than for the benefit of the school and its students.
(iii) Occupational health and safety, industrial relations, access and equity	Not relevant
(iv) Economic and regional development including employment and investment growth	The governing body of a school that is actually being established to generate profits, other than for return to the school, is less likely to be eligible for Government funding under the new criteria proposed in option 2. If that school is not financially viable without receipt of Government funding, it may be restricted from entering the market.  It is arguable that this may impact on potential employment in the area in which it was proposed to establish the school. However, it is likely that if there is a demand in the community for a school, if one school shuts down another will take its place. Accordingly, there should be not employment impacts of the Bill.
(v) The interests of consumers generally or a class of consumers	Any ambiguity in option 1 about eligibility for Government and use of Government funding by schools would be removed, reducing parents' costs in searching for schools that satisfy their educational and philosophical preferences.
(vi) Competitiveness of Australian business	Not relevant
(vii) Efficient allocation of resources	Relative to option 1, option 2 enhances the operation of market signals between schools and parents, and should reduce costs to government in monitoring the deployment of government funding and the activities of school governing bodies.

*\*'No-regulation' signifying in the absence of the options.*

## **5.5 IMPACTS ON STAKEHOLDERS**

Table 2 addresses the potential impacts of the policy proposal on each of these stakeholder groups who would be affected by the competition restriction. The assessment compares option 2 (the Bill provisions) with option 1 (the Act as it presently stands).

**Table 2 Impacts on stakeholder groups (option 2 relative to option 1)**

<b>Stakeholder group</b>	<b>Option 2</b>
'Not-for-profit' non-State schools sector	Obligations under the Act clarified. Competition from schools which are not acting consistent with Government policy and legislative intent might be reduced but the potential for competitive impact is likely to be small



<b>Stakeholder group</b>	<b>Option 2</b>
	The potential costs that might be incurred by Schools and their representative industry in taking up the Bill provisions are considered to be minimal.
'For-profit' schools	Opportunities to enter the market other than in consistency with Government policy reduced if viability dependent on government funding.
Non-State Schools Accreditation Board	Board scrutiny still required but Board will have clearer guidance in managing relationship between 'not-for-profit status and eligibility for government funding.
Queensland Government	Option 2 more effectively delivers the Government's intention that for-profit schools not receive Government funding.
Teachers	The only schools whose access to the market may be limited through Option 2 would be those that, under the Act might operate ostensibly not-for-profit but in reality for-profit, by not returning all available profits to the school. Option 2 would therefore have the tendency to reduce tensions teachers might face between student needs and school financial objectives.
Parents	Ensures that Government finding is directed solely to school advancement. Option 2 also increases the certainty with which parents can make school selection decisions.

## 5.6 OTHER IMPACT ISSUES

The discussion below addresses, for completeness, issues that may be of concern to some stakeholders but which for the reasons outlined here are not material.

### *Increasing school fees*

It is considered that the Bill is unlikely to result in increased school fees in relation to existing non-State schools in Queensland. It is considered that most, if not all existing non-State schools in Queensland are non-profit and would be compliant with the new criteria. Accordingly, Bill should have no impact on the Government funding received by existing schools and should therefore have no impact on school fees paid by parents of students at these schools.

However, schools that are being established as commercial ventures for the purpose of generating and distributing profits to shareholders, and schools whose governing bodies are companies limited by shares will not be entitled to Government funding. Should such a school be accredited but refused Government funding, that school may increase its school fees to support its financial viability. As outlined above, it is anticipated the majority of future applicants will be compliant with the new criteria, and Government's original policy intention. As far as can be determined at this stage, the Board has only received one application for accreditation and funding from a school that has been established by a commercial entity. Further, the chance of a company limited by shares being established to operate non-profit schools is slim.



Accordingly, the potential for increased school fees as a result of the Bill is considered to be minimal. Parents sending their children to schools being operated for-profit, or contrary to the new criteria will do so on the understanding that their fees are being used to boost the profits available for distribution to shareholders.

### ***Access to school allowances***

Government funding eligibility is a primary criterion for the payment of Queensland government recurrent grants under s.134A(1) of the *Education (General Provisions) Act 1989*. Recurrent grants are provided to assist with the costs of teaching and general staff salaries, professional development, curriculum development and implementation, maintenance and general operations.

Under the *Education (Capital Assistance) Act 1993*, a non-state school is eligible to receive funding if it is a 'school in receipt of subsidy' within the meaning of s.134A(1) of the *Education (General Provisions) Act 1989* which, in turn, requires its governing body to be eligible for government funding under the Act. Furthermore, other State Government allowances such as textbook, resource and remote area tuition allowances are paid for students in schools that are accredited and are schools in receipt of subsidy. Textbook allowances can be paid either to the school or to the parent. This is usually determined by agreement between the parent and the school. Other allowances can be paid directly to parents, for instance, the remote area travel and tuition allowances.

Accordingly, a school's ineligibility for Government funding under the Act may impact on the ability of the school or parents of students at the school to receive certain allowances. Once again, the potential for a school to be refused funding under the new criteria is considered to be extremely low. Accordingly, the impact of the Bill on receipt of funding and allowances will be minimal.

If a parent sends their child to a school that has been refused Government funding, they should be aware of why funding was refused, that. because the school is distributing profits to shareholders, rather than returning profits to the school.

### ***Access to Commonwealth Funding***

Under the State's current administrative practices, non-State schools that are refused State Government funding under the Act will not be able to access Commonwealth funding. This is explained in section 3.2 above. It is a matter of Commonwealth policy not legislation, which schools it recognises for the purpose of Commonwealth funding.

Once again, the potential for a school to be refused funding under the new criteria is considered to be extremely low.

### ***Schooling options in a community***



It may be argued that preventing new schools, established by commercial entities from entering the non-State school sector, that the available educational choice for parents in a community may be reduced. However, if there is a demand in the community for a school, should an entity decide to not proceed with a school, because, for instance it is not eligible for Government funding, another entity within the non-State sector would be likely to take up the opportunity.

As it is anticipated that the majority of future applicants for accreditation and Government funding will be compliant with the new criteria, and Government's original policy intention, it is considered that the impact on choice will be negligible.

### ***Employment impacts***

It is anticipated that the Bill will have minimal employment impact as it is considered that most schools operating in the non-State school sector are already and would continue to be in compliance with the new funding requirements.

However, there may be some impact on potential employment if the proposed governing body for a new school is considered ineligible for Government funding under the new criteria, or is an ineligible company and is refused accreditation on the basis that it is not financially viable.

Once again, as it is anticipated that the majority of future applicants for accreditation and Government funding will be compliant with the new criteria, and Government's original policy intention, it is considered that the employment impact will be negligible.

### ***Less innovation in the non-State school sector***

Some stakeholders argue that the Bill acts to hamper commercial inventiveness and to entrench current education models. This is not the case. The purpose of the Bill is not to restrict entry to the market, but rather to protect the use of Government funding, ensuring that it is used solely for the benefit of schools, not shareholders.

The Bill does not aim to prevent governing bodies that are returning profits to the school for the benefit of students from establishing unique arrangements to increase operational efficiency or to provide high standards of education. However, it is not appropriate if the arrangements being entered into are done for the purpose of generating and distributing profits from the school to commercial entities and their shareholders.

A school that is established by a commercial entity to make and distribute profits to its shareholders may be accredited under the Act, provided it meets the accreditation criteria and the governing body is considered by the board to be suitable. The school will however not be entitled to Government funding. This accords with Government's original policy intention regarding funding.





## 6 CONSULTATIONS

The Minister approved the release of the Bill for consultation with the non-State school sector on 8 March 2005. A workshop involving stakeholders was held on 21 March 2005. Stakeholders were invited to provide written submissions on the Bill by 11 April 2005. Written submissions were received from:

- The Association of Independent Schools of Queensland Inc;
- International Colleges Australia Limited.
- Brigidine College
- Queensland Catholic Education Commission
- The Grammar Schools of Queensland Association Inc (acknowledgement only. The Association said that insufficient time had been provided for preparation of a written submission drawing on the views of its stakeholders).

Stakeholder comments with respect to competition expressed concern that:

- The Bill provisions unduly affect the operations of non-State schools and the competitiveness of the market;
- The Bill provisions potentially sharpen the conflicts of interest between the Department as regulator and funder of schools and the Department of provider of educational services.
- Effective mechanisms exist in the *Corporations Act* and the *Associations Incorporation Act* to control the operations of school governing bodies;
- Based on experience to date, there is only a low risk that schools would attempt to circumvent the proscription of for-profit schools being in receipt of government funding.
- Provisions regarding prohibited arrangements, composition of school governing bodies, and connection between school governing bodies and other entities would constrain normal relationships in the non-State schools sector between for example central church authorities and their affiliated schools.



- The provisions mentioned immediately above constrain community participation on school governing bodies and the ability of non-State schools to enter commercial arrangements with suppliers thereby adversely affecting the competitive edge of non-State schools.
- The Bill provisions are inconsistent with the originally envisaged role of the Board.

Subsequent to consultations, the drafting of the Bill has been amended to reflect a number of the concerns raised by stakeholders including:

- Removing from ‘prohibited arrangements’ those arrangements between school governing bodies and other not-for-profit entities;
- Redefining the ‘connection’ test so as to confine it to dealings between school governing bodies and for-profit entities, and to prohibit the connection (in terms of determining eligibility for government funding) if the connection ‘could be reasonably be expected to compromise’ the independence of a school governing body’s decision making;
- Reducing the prescriptiveness in the provision regarding suitability of a school governing body to be accredited or re-accredited. Of the factors the Board may have regard to in making accreditation decisions, reference to the business skills and experience of school governing bodies and to conflicts of interest involving individual directors have been deleted from the draft Bill, while the processes school governing bodies may have for addressing conflicts of interest have been added as a factor to which the Board may have regard.

The Government’s responses to comments made by stakeholders on competition issues are contained in the Appendix to this PBT.



## **7 CONCLUSIONS AND RECOMMENDATIONS**

### **7.1 CONCLUSIONS**

This PBT finds that

- The Bill provisions are not restrictive of competition.
- The Bill provisions are necessary to the achievement of the Government's policy intent.
- The benefits of the Bill provisions are likely to exceed their costs.

### **7.2 RECOMMENDATIONS**

This PBT recommends that the identified restriction, to the extent that it might be material, should stand because it passes the tests set out in the *Competition Principles Agreement*.

The Bill provisions should be reviewed as part of any future review of the Act.

**APPENDIX**  
**GOVERNMENT RESPONSE TO STAKEHOLDER COMMENTS ON**  
**COMPETITION ISSUES**

**Table 3 Stakeholder responses to competition issues raised in PBT Plan**

Stakeholder	Comment	Government response
	Whether issues relating to paying above market prices for goods or services, or exorbitant fees, are already dealt with under other existing laws, for example, Corporations Law	The protections available in the Corporations Act and the common law are an entirely separate issue to the matters the Board must be satisfied of in determining whether an applicant/governing body is eligible to apply for Government funding under the Accreditation Act. It is also important to note here that not all governing bodies are incorporated under the Corporations Act.
	Why are amendments necessary given that the current Act already requires that accreditation and receipt of State funding is dependent on not-for-profit operation	Currently under the Act, the Board is required to decide whether a proposed or existing governing body is suitable to be the governing body of a non-State school. The Act does not limit the Board to consideration of the matters specified under the Act when assessing suitability, but allows the Board to take account of any other matters it considers appropriate. While this position is to continue for the benefit of the non-State school sector and the Board, the Bill aims to provide greater clarity about the range of matters that the Board may consider when assessing a governing body's suitability.
		It is uncertain whether the provisions of the current Act enable the Board to consider whether an existing or proposed governing body is operating in such a way. Under the current Act, all the Board can consider, before forwarding an application for Government funding to the Funding Committee for consideration, is whether or not the school will, on its establishment be operated for profit, that is, whether all profits from the operation of the school are used entirely to advance the school's philosophy and aims
		The Government has given consideration to the Board's powers to refuse an application for eligibility for Government funding, or for a governing body's eligibility to be withdrawn, on the grounds that: (i) profits made from the school's operation may not be used entirely to advance the school's philosophy and aims; (ii) the governing body is potentially subject to the undue influence and/or control of an external party; or (iii) the governing body may be compromised in its decision making by the personal material interest of a director in an external matter.
		The Government's position is that these issues are relevant to the governance and financial status of the school and, as such,

Stakeholder	Comment	Government response
		it would be arguable that the Board can take them into account when considering not-for-profit status in relation to eligibility for government funding. It would be wise, however, to make explicit in the Act the power to do so rather than leaving it to the decision of the Supreme Court in a judicial review application.
		The Government also considers that section 39 be amended to clarify the matters the Board can take into account when assessing suitability of a governing body.
	A perceived lack of specific criteria in relation to determining suitability for accreditation	There is no need to prescribe any criteria in relation to the matters listed in s 39(2) as each of the matters is clear and self-explanatory. Further, the section only provides guidance as to the types of matters the board may consider when assessing the suitability of a governing body. The risk of any successful legal claim being brought against the Board in relation to the interpretation of any of these matters seems minimal.
	Whether these restrictions may be justified in the absence of any similar restriction on the operation of State schools.	Queensland's Competitive Neutrality Policy excludes education from the competitive neutrality requirements of the <i>Competition Principles Agreement</i> . Notwithstanding this, the Government recognises the need to ensure that as far as possible State schools do not enjoy competitive advantage over non-State schools. However, the situations of State schools and non-State school are not really analogous in this context. School Councils do not make decisions about school management or operations, nor do they have control of funds or enter into contracts. This is made clear in section 53 of the Education (General Provisions) Act 1989. Education Queensland makes decisions about general policy and procedures, and principals of schools are charged with the operations of their schools.
	There is no evidence to support the proposition in the PBT Plan that it is possible for Government funded school to deliberately reduce the profits available to the school, for example by paying above market prices or exorbitant management fees. This behaviour would constitute breaches of the Corporations Act.	Such activity can only be prevented by amending the Act. The risk of legal challenge of a decision of the Board in this regard, under the current Act, would be just as great, if not greater than under the proposed provisions. However, the Board would not be able to rely on an express power to consider these matters for the purpose of reaching its conclusion. It is also important to note that not all governing bodies are incorporated under the Corporations Act.
	Corporations Law and other similar	The protections available in the

Stakeholder	Comment	Government response
	legislation apply to incorporated legal entities including the Governing Bodies of non-State schools. The objective of the proposed amendments is already adequately covered under such laws.	Corporations Act and the common law are an entirely separate issue to the matters the Board must be satisfied of in determining whether an applicant/governing body is eligible to apply for Government funding under the Accreditation Act. It is also important to note here that not all governing bodies are incorporated under the Corporations Act.
	The PBT Plan questions whether a school could operate efficiently if above market prices are paid by a governing body to a related external supplier or if the school paid out profits as dividends to shareholders. Legislative checks would ensure that schools do not undertake activity that would be designed to reduce profit.	See comments above regarding applicability of the Corporations Act and common law.
	The proposition above (about school efficiency) implies that educational service delivery is impacted on negatively where there is private market involvement. There is evidence from international experience that private sector participation in the school sector can deliver real benefits for students.	The Bill provisions clarify the Government's legislative intent that Government funding not be directed towards for-profit non-State schools. That policy intent is embraced in the Act as it currently stands.
	The proposition above (about school efficiency) also fails to recognise the extent to which various levels of government in Australia already recognise the benefits of private sector involvement in the delivery of educational services.	See immediately preceding response. The purpose of the Bill provisions is to clarify the Government's policy that Government funding not be directed to for-profit schools.
	The proposition above (about school efficiency) implies that independent schools will be constrained from participating in private public partnership arrangements.	The Bill provisions are not germane to private public partnerships.
	The Bill provisions will impact on the attractiveness of community participation of both educators and the broader business community.	Section 39(2)(b) of the draft Bill, which allowed the Board to consider the combined business ability, knowledge and experience of the governing body's directors relevant to the operation of the school, has been removed. The communication strategy proposed by both the Board and the Department should allay stakeholders concerns in this regard.
	The Bill proposes that there be no connection between the governing body and another entity which could compromise the independence of the governing body's financial decisions. This provision could impact on the capacity for schools to involve principals and influential community members as school board members, on school contractual arrangements with	To address the concern regarding contractual dealings and dealings with financial institutions, the wording of the 'connections' test has been changed from "connection... that could compromise the independence of the applicant's financial decisions" to "connection... that could reasonably be expected to compromise the independence of the applicant when making financial decisions." The board of

Stakeholder	Comment	Government response
	businesses, on schools' relationships with banks and other financial institutions and on sponsorships and fund raising.	a governing body is entitled to seek and consider professional advice on financial matters. It follows that it is very unlikely that this limb would catch a connection between an applicant and a financier as such a connection could not reasonably be expected to compromise the independence of the applicant when making financial decisions.
		As for connections between an applicant/governing body and donors, sponsors or foundations, no problems arise in relation to the eligibility of a school for funding unless the connection could reasonably be expected to compromise the independence of the applicant/governing body when making financial decisions (which is considered unlikely in most circumstances).
	The Bill's provisions relating to the determination of the suitability of a school's governing body are also of concern including:	
	<ul style="list-style-type: none"> <li>The criteria to be applied to each of the four matters for making a determination and the process for making a determination are not included in the Bill. All of the matters can only be considered on a subjective basis. This effectively renders the provisions subject to costly and needless litigation.</li> </ul>	Section 39(2)(b) of the draft Bill, which allowed the Board to consider the combined business ability, knowledge and experience of the governing body's directors relevant to the operation of the school, has been removed. There is no need to prescribe any criteria in relation to the matters listed in s 39(2) as each of the matters is clear and self-explanatory. Further, the section only provides guidance as to the types of matters the board may consider when assessing the suitability of a governing body.
		The risk of any successful legal claim being brought against the Board in relation to the interpretation of any of these matters seems minimal.
	<ul style="list-style-type: none"> <li>The provision could effectively prevent any paid employee of a school being on the Board, and will make Boards give very careful consideration to whether or not any particular Director could the school at risk in terms of its accreditation.</li> </ul>	It is unlikely that a conflict of interest would arise on the basis that a director is also a parent of a student or a staff member, as the interests of the school (to which a director of a governing body would have regard) are likely to coincide with the personal interests of a parent or staff member.
	<ul style="list-style-type: none"> <li>Particular problems might arise in schools where the Directors are elected.</li> </ul>	Section 39(2)(b) of the draft Bill, which allowed the Board to consider the combined business ability, knowledge and experience of the governing body's directors relevant to the operation of the school, has been removed. In any event, this issue is resolved by amending this provision to require the Board to consider whether there are appropriate processes in place for identifying and resolving

Stakeholder	Comment	Government response
		conflicts of interests (rather than whether any conflict of interest exists).
	<ul style="list-style-type: none"> <li>The proposed amendments fail to recognise the legislative provisions already applying to Directors through the Corporations Law.</li> </ul>	The protections available in the Corporations Act and the common law are an entirely separate issue from the matters the Board considers appropriate for determining whether an applicant/governing body is eligible to apply for Government funding under this Act.
	The provisions in the Bill about suitability of non-State school governing bodies do not apply to members of School Councils in State schools – who it could be argued are the non-State sector’s major competitor.	School Councils do not make decisions about school management or operations, nor do they have control of funds or enter into contracts. This is made clear in section 53 of the Education (General Provisions) Act 1989. Education Queensland makes decisions about general policy and procedures, and principals of schools are charged with the operations of their schools.
	The PBT Plan states that the proposed Bill could restrict entry to the non-State school market. ICA acknowledges this intrinsically anti-competitive nature of the Bill.	The PBT Plan sets out questions for investigation in the PBT. After consideration, the PBT finds it arguable as to whether the Bill provisions restrict competition (because they merely clarify earlier provisions), but if there is any restriction the impact on competition would be small.
	The proposed Bill fails to address the unique role of the Government in its relationship with non-State schools. The Government is a competitor, financier, service provider and regulator and as such must be extremely cautious that its legislation and regulations do not create unfair restrictions on the ability of non-State schools, financiers and service providers to enter the education market.	Queensland’s Competitive Neutrality Policy excludes education from the competitive neutrality requirements of the <i>Competition Principles Agreement</i> . Notwithstanding this, the Government recognises the need to ensure that as far as possible State schools do not enjoy competitive advantage over non-State schools.
	The Queensland Government’s role as owner and operator of the public education system on the one hand and as funding providers and regulators of non-State schools on the other constitute a fundamental conflict of interest which impacts on the efficiency of the domestic market for school children and reduces the capacity for parents to exercise choice in schooling their children.	Queensland’s Competitive Neutrality Policy excludes education from the competitive neutrality requirements of the <i>Competition Principles Agreement</i> . Notwithstanding this, the Government recognises the need to ensure that as far as possible State schools do not enjoy competitive advantage over non-State schools.
	The Act restricts entry to the non-State schools’ market. The proposed amendments significantly strengthen the current provisions in the Act in a number of areas and therefore have the potential to further reduce competition. The Association is	Since the draft of the Bill reviewed by the stakeholder, the Bill has been amended in respect of the connections test, the criteria for suitability of a governing body to which the Accreditation Board may have regard and in its definition of ‘prohibited arrangement’ so that arrangements

Stakeholder	Comment	Government response
	concerned about further strengthening of the Act particularly given there appears to have been no significant change in the nature of the non-State schools sector since the introduction of the Accreditation Act in 2001.	between schools and other not-for-profit entities will not constitute prohibited arrangements.
	The Association considers there are sufficient regulatory powers available to the Government to address any governance arrangements that it considers inappropriate. AISQ believes also that there are appropriate 'checks and balances' within the non-State schooling sector to discourage any arrangements whereby government-funded not-for-profit schools enter into arrangements that could give a financial benefit to a party for private purposes.	The Government has identified changes to the Act that will be needed to ensure achievement of the Government's intention that Government funding of non-State schools only be directed to not-for-profit schools. Under the Bill provisions the existence of checks and balances referred to by the Association will assist the Accreditation Board in establishing a school's eligibility for accreditation and for Government funding.
	The provisions in relation to [prohibited] arrangements and on connections have the potential to impact on the entry of schools into the market (for example establishment of schools by religious organizations and community groups) and make it very uncertain for existing schools in terms of various operational arrangements.	The Bill has been amended to confine the connection to "for-profit" entities, accordingly curing the problem relating to religious institutes, which are unincorporated and not-for-profit entities.
	The prescribing of an 'ineligible company' is a direct restriction on competition. The fact that two schools currently operate as 'ineligible company' points to the fact that such a restriction is necessary.	This restriction will not prohibit the range of entities currently accredited under the Act from being accredited under the Act in the future. These entities include companies limited by guarantee, incorporated associations, property trusts and other entities incorporated under the church Acts. This requirement is necessary to minimise the risk that Government funding will be applied for private gain rather than for the benefit of the school for which the funding is provided. It is more usual for not-for-profit entities to be established as companies limited by guarantee or incorporated associations rather than as companies limited by shares.
	AISQ accordingly supports the alternative of the status quo as outlined in the PBT Plan.	Noted.
	Insufficient time accorded to allow Association's Executive Committee to consider competition issues through consultation with the Association's stakeholders.	Noted.
	In the PBT Plan there is a statement that 'It is not appropriate that moneys distributed through such arrangements for private benefit to include a proportion of public funding or to be	Noted.

Stakeholder	Comment	Government response
	supported by the availability of public funding to the school. To discourage such arrangements, the Bill will ensure that:	
	<ul style="list-style-type: none"> <li>• Government funded non-state schools are independent in making their financial decisions</li> </ul>	
	<ul style="list-style-type: none"> <li>• Government funded non-state schools deal with external parties on an arm's length basis, and</li> </ul>	
	<ul style="list-style-type: none"> <li>• School ownership is not used on shareholdings'</li> </ul>	
	The stakeholder is supportive of these propositions and sees that it is important for schools that operate as nor for profit to receive legislative structure that complements these principles.	
	From the Commission's perspective the proposed amendments to the legislation do not change matters in relation to competition. The Commission supports the Government's present position restricting funding to governing bodies which are not for profit and accordingly does not wish to make any further comment.	Noted.