



KEMENTERIAN PENDIDIKAN TINGGI



**JABATAN PENDIDIKAN TINGGI
DEPARTMENT OF HIGHER EDUCATION**

**GUIDING PRINCIPLES
ON REGULATORY PRACTICES
OF PRIVATE HIGHER EDUCATIONAL SECTOR
TRANSFORMATION**

**GOVERNANCE DIVISION (S)
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BACKGROUND

The private higher education sector has contributed much to the nation and its people in terms of access to higher education services. The private higher educational institutions (PHEIs) that operated initially as tuition centres have evolved effectively to become one of the main contributors towards the nation's educational and economic sector.

The achievements of the private sector, partly, are a result of the regulatory practices stipulated in the Private Higher Educational Institutions Act 1996 (Act 555) and Regulations. The intentions and design emphasised in the Act 555 has resulted in a lot of changes and benefits to the private higher education sector.

Among the benefits gained by the PHEIs are the ability to be competitive globally, able to indulge in research, participate in global ranking systems, obtaining various excellent awards and performing equally well as the public institutions in national evaluation and rating systems. This clearly suggests that the private higher education sector has evolved and matured beneficially to the people, community and nation. Part of the success comes from the regulatory emphasis in quality services, resources and practices of PHEIs. It is believed such regulatory emphasis has led to the PHEIs to be able to guarantee and maintain quality, competitiveness and sustainability.

However, great changes are taking place as a result of global phenomena like liberalisation, internationalisation and globalisation, national policies, commercialisation that requires review of the existing regulatory practices to allow healthier and productive growth in the private higher education sector.

An important enabler to such growth is the liberalisation of the private higher education sector that requires a more transparent and open review of the policies and regulations underlying and connected with the Act to ensure a more conducive business environment and competitive private higher education sector.

Other guiding principles that are considered critical to the development of the private higher education sector in Malaysia includes but are not limited to the continuing role of

PHEIs, creating an innovative economy, better quality PHEIs, strengthening marketability of graduates, and new internationalising mapping.

The review of the existing regulatory practices was carried out by research groups appointed by the Ministry of Higher Education. The findings summary suggested that it was necessary that a balance between academic and business excellence be established to address the needs and requirements of a good regulatory practice under the influences of the developments described earlier.

Without losing the essence of quality higher education, the provisions of the Act 555 together with the regulations and the supporting roles of criteria, standards, conditions and guidelines were reviewed and amended appropriately and relevantly to suit the intended needs of a good regulatory practice.

GENERAL PRINCIPLES

These Guiding Principles are grounded in recognition of

- a) The role of private higher education in ‘realizing the vision towards academic excellence and professional and technical enhancement whilst meeting the manpower needs” and the role of private higher educational institutions (PHEIs) established by companies under Act 555, is in ‘providing sufficient educational infrastructure as well as increasing the capacity to meet the demand for higher education.”
- b) The regulatory existing obligations to “facilitate and regulate private higher educational institutions so as to ensure its healthy development and the provision of quality education.”
- c) The need to extend respect, protect and fulfil the requirements of the latest developments of liberalization, Trans Pacific Partnership Agreement (TPPA), and internationalization on the governance and management through the regulation of the private higher education sector ;

- d) The need to amend the provisions of the Act 555, procedures of approvals, criteria and standards, breach and non-compliance to align with the needs and demands of these latest developments through an appropriate and effective **transformation**;
- e) The need of guiding assistance to private higher educational institutions (PHEIs) in understanding the transformation and prepare for the appropriate and new approach in regulatory practices;
- f) The spirit of facilitation through the Company's and PHEIs' internal regulation to improve the governance and management towards a more effective responsibility and accountability practice;
- g) The needs of the Company Limited By Shares (CLBS) and Company Limited By Guarantee (CLBG) towards establishing a private higher educational institution;
- h) The role of these companies as specialized business entities to ensure compliance with all applicable laws and requirements for the establishment of a private higher educational institution;
- i) The need to facilitate appropriately and effectively the operations of both the company and PHEI to excel both in academic and economic requirements.
- j) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

These Guiding Principles apply to companies incorporated as a Company Limited by Shares (CLBS) or Company Limited by Guarantee (CLBG) under Companies Act 1965 (AS 1965) that intends to establish or has established a private higher educational institution under Act 555.

These Guiding Principles should be understood as informing the stakeholders the primary objective is to ensure the need for amendments in Act 555, and is important and necessary in order to meet the challenges of the future directions of private higher education sector among which includes quality, sustainability and competitiveness.

These Guiding Principles should be read as strengthening the opportunity provided to companies and PHEIs to grow healthily through the transformational approach of performance based regulation. They should also be read as being informed that the consequences of non-compliance to rules and regulations will be difficult and expensive for PHEIs as the transformational approach is facilitative in nature.

Finally, these Guiding Principles should be implemented in a manner to ensure that the appropriate and relevant process and procedures and quality compliance mechanisms linked with the regulatory provisions are available for use. However, as these are major changes in the regulatory practices, the proposed amendments are expected to face multiple challenges especially when the process and procedures involve use of technology and trust. The success will depend on the collective efforts of all parties concerned.

I. THE REGULATOR'S DUTY TO CONTINUE TO PROTECT STAKEHOLDERS

A. FOUNDATION PRINCIPLES

- 1. The regulatory practice must continue to protect investors including students and parents against poor quality and uncertain private higher education services provided by registered private higher educational institutions (PHEIs). This requires taking appropriate and relevant steps to prevent, investigate, punish and rectify such services through effective policies, legislation, regulations and adjudication despite the need to adopt good regulatory practices to meet the requirements of the creating a conducive business environment.**

Commentary

The private higher education sector is undergoing challenges to remain competitive as the effects of liberalization, internationalization, digitization and globalization sets in. The requirement to adopt good regulatory practice implies that creating a conducive business environment is a necessity. And while the traditional requirement of quality services, resources and practices be maintained and guaranteed, facilitation to business opportunities should be viewed as important and necessary.

The changes created challenges to improve the PHEIs capacity and capability to guarantee quality, sustainability and competitive. New standards, criteria, conditions, regulations and guidelines are unavoidable to meet and match changing global needs for PHEIs to remain competitive. These developments should be reviewed and amended appropriately and effectively to realise the nation's aspirations to become a regional education hub with global standards.

In order to ensure that private higher educational institutions (PHEIs) develop healthily and provide quality education, the Private Higher Educational Institutions Act 1996 (Act 555) & Regulations remain relevant and effective with new directions and challenges, provisions, procedures and standards must be reviewed and amended. Act 555 is an Act to provide for the establishment, registration, management and supervision of, and the control of the quality of education provided by, private higher educational institutions and for matters connected therewith that should be retained as an obligation to stakeholders including the students' higher education activity including students' experience, while amending to provide the facilitation for conducive business environment.

However, in order to support such a facilitative approach, confidence and trust must be established by the PHEIs to allow differential treatment. Hence, this

requires taking appropriate steps to prevent, investigate and punish a company that mismanages the governance of the PHEIs.

2. Government should consider the new requirements for good regulatory practices to promote business excellence together with academic excellence that is already emphasized. This requires a transformation in the regulatory practices to suit the new additional requirements.

Commentary

The Act 555 has been designed and implemented to emphasise compliance to quality standards determined on services, resources and practices for all types of registered private higher educational institutions irrespective of size, type, origin and locality.

The application based regulation impacts the PHEI operations if delays in approvals are resulted. As the number of institutions is big and with 23 types of applications involved, the approval process takes time. One such undesirable impact is the delay to reputable and quality complying PHEI that needs to act fast to meet strategic planning and implementation targets. Another impact is a loss in income.

The Act 555 under good regulatory practices should have an obligation to facilitate the reputable and quality complying PHEIs to improve their global competitiveness that could benefit the community, institution and nation educationally and economically. Hence, differential treatment is a solution to mixed PHEIs that could allow performing and complying institutions to develop and improve their competitiveness as well as provide opportunity for growth.

B. OPERATIONAL PRINCIPLES

In order to meet the fundamental principles towards transforming the regulatory practices from one size fits all to a more flexible performance based regulation, several operational principles should be considered for implementation in the existing Act 555 while retaining the fundamentals.

- a) The regulatory practice must continue to protect the stakeholders including students in the PHEIs;
- b) The practice must continue to ensure that quality services, resources and good governance and management practices in the company and PHEI are guaranteed;
- c) The provisions in Act 555 must be reviewed and amended appropriately to provide clarity, strengthening consistency and correcting inadequacies under the transformational requirements.
- d) The practice must ensure that effective enforcement and investigation is provided for in the Act 555 to match appropriate punishment for non-compliance.
- e) A proposed transformed regulatory practice must allow different business models to operate under profit and non-profit based companies with matching and qualifying criteria, standards, conditions and guidelines to ensure operational quality and sustainability as well as competitiveness.

2. THE REGULATORY FUNCTION'S OBLIGATION TO ALLOW COMPANY LIMITED BY SHARES (CLBS) AND COMPANY LIMITED BY GUARANTEE (CLBG) TO ESTABLISH PRIVATE HIGHER EDUCATIONAL INSTITUTIONS (PHEIs)

C. FOUNDATION PRINCIPLES

Some of the companies that are incorporated under the Companies Act 1965 (CA 1965) have intentions to indulge in businesses under the education category. The nature of these companies determines them as profit or non-profit oriented. In general, the profit oriented companies govern and manage to generate profit to be distributed to the members in the form of dividends whereas profit generated by non-profit oriented companies are channeled back to fund the objects of the company. Under the CA 1965, the Company Limited By Shares (CLBS) is profit oriented while the Company Limited By Guarantee (CLBG) is non-profit oriented.

The CLBS is shareholder based whereas the CLBG is not and the liability of the members in the companies also differs. In the CLBS, the amount is limited to the extent of any sums unpaid on any shares held by them whereas for CLBG, the amount is that undertaken by members to contribute to the assets of the company in the event of winding up. The objects of the CLBS are more commercial whereas the non-profit companies are more charitable. Hence, the mode of funding the different companies differ through different income generation activities and hence varying conditions are imposed on them under the CA 1965.

This suggests that CLBS and CLBG can sustain their company if the corporate governance and management is effectively carried out which is a consideration for allowing such companies to establish a PHEI. However, appropriate and effective incorporation of CLBS and CLBG, especially on compliance on

relevant requirements and practices is highly important and hence regulation is necessary as improper governance and mismanagement can lead to operational issues as well as problems to student protection.

D. OPERATIONAL PRINCIPLES

In order to meet the fundamental principles towards allowing a CLBS and CLBG to establish a PHEI, several operational principles should be considered for implementation in the existing Act 555.

- a) Act 555 should have a provision that requires a company which intends to establish a private higher educational institution (PHEI) must be incorporated under section 24 of the Companies Act 1965 (AS 1965).
- b) Allowance for CLBG together with CLBS for consideration to establish a PHEI should be provided in Act 555.
- c) The details for the establishment by CLBS and CLBG through an application process, in particular the application forms, must be effectively carried out by ensuring requirements for the incorporation of companies under AS 1965 by the Ministry of Domestic Trade, Co-Operatives and Consumerism (KPDNKK) and regulation of a company that intends to establish a PHEI is carried out in accordance with Act 555 by Ministry of Higher Education are matched appropriately and effectively.
- d) This principle sets out clearly the expectation that all companies intending to establish a PHEI respect and comply the requirements from the different laws and identified requirements to avoid breach which may have implications on the operations of the PHEI later that could threaten the continuity of students' interests and the image of the nation's private higher education sector.
- e) The government's regulatory practices on the governance and management of private higher educational institutions through Act 555 require that the practices respect, protect and fulfil the services as determined. This includes

the duty to protect against poor governance and management services by the company that establishes the PHEI.

3. THE ROLE OF THESE COMPANIES AS SPECIALIZED BUSINESS ENTITIES TO ENSURE COMPLIANCE WITH ALL APPLICABLE LAWS AND REQUIREMENTS FOR THE ESTABLISHMENT OF A PRIVATE HIGHER EDUCATIONAL INSTITUTION;

E. FOUNDATION PRINCIPLES

The private higher education sector is observed as a complement to the public higher education sector in terms of access and opportunity to meet the higher education services needs of Malaysians and others. In order to ensure that private higher educational institutions (PHEIs) develop healthily and provide quality education, the Private Higher Educational Institutions Act 1996 (Act 555) & Regulations was enforced. Act 555 is an Act to provide for the establishment, registration, management and supervision of, and the control of the quality of education provided by, private higher educational institutions and for matters connected therewith.

The Act 555 also has an obligation to protect the students' higher education activity including experience, in the private higher educational institution. This requires taking appropriate steps to prevent, investigate and punish a company that mismanages the governance of the PHEIs.

This principle sets out clearly the expectation that all companies intending to establish a PHEI respect and comply the requirements from the different laws and identified requirements to avoid breach which may have implications on the operations of the PHEI later that could threaten the continuity of students' interests and the image of the nation's private higher education sector.

F. OPERATIONAL PRINCIPLES

In order to meet the fundamental principles towards good corporate governance for good PHEI governance, several operational principles should be considered for implementation in the existing Act 555.

- a) The regulatory process should ensure that provision of general and specific requirements for the establishment of a PHEI is necessary and must be met in order for approval to be considered.
- b) The fundamental general requirements should be clarified in the Act 555 and the relevant specific requirements in the regulations or guidelines should be adopted and clarified as part of good governance of the private higher education sector.
- c) Both CLBS and CLBG differ in characteristic that requires different conditions and standards to meet qualifying requirements for the type of company defined as suitable for consideration to establish a PHEI. There must be a provision in the Act 555 that addresses such needs for good corporate governance.
- d) This provision should refer to the company's Memorandum and Association of Articles (M&A) as the appropriate and effective tool for good corporate requirements and practices and be made mandatory for consideration to establish a PHEI.
- e) The proposed mandatory M&A template should address the good governance requirements and practices needs for CLBS and CLBG and provided for in the Act 555 & Regulations appropriately and effectively.
- f) The main concern of good corporate governance of CLBS and CLBG is the financial management to ensure company's sustainability and special focus should emphasise in the M&A on the business model to be adopted. In particular, section 12 of Act 555 should provide the specific requirements for both CLBS and CLBG for consideration to establish a PHEI.

- g) An equally important requirement is the provision in the Act 555 to ensure good regulatory practices leading to quality and sustainable PHEIs is ensuring good institutional governance. Act 555 has made the constitution as a requirement for approval to establish a PHEI.
- h) To support the intentions of good institutional governance, a template of the constitution for the mixed institutional types should be made mandatory. The template should carry the most fundamental requirements and practices that guarantees desired good institutional governance.

4. THE NEED FOR RIGHTS AND OBLIGATIONS TO BE MATCHED TO APPROPRIATE AND EFFECTIVE REMEDIES WHEN BREACHED.

G.FOUNDATION PRINCIPLES

In order to ensure good corporate and good institutional governance is practiced, the mandated templates for the establishment of a PHEI, the regulatory process does not wish to restrict or limit creativity in those governances. The effects of liberalization, globalization, Trans National Education and internationalization will have impacts on both corporate and institutional governance.

Hence, apart from the mandated provisions in the templates, additional provisions allows the company and PHEI to encourage creativity in the both the governances of company and institution. However, application for approvals for the additional or changes to existing provisions in the templates should remain as a condition to ensure alignment to resulting outcomes.

Designing and implementing a comprehensive and effective M&A and Constitution should transfer the responsibility and accountability of governing and managing to the company and the PHEI respectively. This is part of the

good regulatory practices encouraged to facilitate the governance of company and PHEI.

As this principle allows deregulation of several of the governance, monitoring and management activities, facilitation of the application process is made possible. With the facilitation, approval process will be accelerated for qualifying PHEIs that could be trusted in their quality, sustainability and compliance to requirements and practices.

It is the intention, then, as monitoring and governance being transferred to company and PHEI, the penalty imposed for non-compliance be stiffer and stricter.

H. OPERATIONAL PRINCIPLES

- a) Act 555 should have a provision that emphasizes the company and PHEI should be governed and managed in accordance with the M&A and Constitution to ensure good internal regulatory practices.
- b) An offence should be tied with non-compliance and non-accordance with the provisions in the M&A and Constitution so that and assigned stiffer and stricter penalties when offence is committed.
- c) to discourage enforcement actions The establishment of a company is under section 24 of Act AS 1965. There are several requirements in order to incorporate a CLBS or CLBG under such provision that do not match the requirements of a company that intends to establish a PHEI under Act 555.
- d) The nature of the CLBS and CLBG is different. While certain activity matters can be commonalised, several other matters are main characteristics of the company type. Companies in Malaysia are generally classified according to liability or private or public status. Such classification necessitates several differing conditions imposed towards the company type that is seen as relevant and appropriate in the incorporation of the company type under AS 1965.

- e) However, the conditions that are imposed for the company type are allowed to be unconditioned with application for approvals. Several of the conditions imposed are seen as a threat to the sustainable and quality operations of a PHEI that must be addressed and imposed as the Ministry's conditions for company type towards establishing a PHEI.
- f) An appropriate and effective way to match those differing conditions is to prepare a template for the corporate governance of the company types that fulfils both Act AS 1965 and Act 555 requirements. The template, which is the Memorandum and Articles of Association, that carries the most fundamental conditions and provisions that meets the requirement should be drafted and implemented as part of the requirement for approvals for establishment of a PHEI.
- g) As risks are involved in determining approvals for CLBS or CLBG for establishing a PHEI, appropriate provisions should be added in Act 555, regulations and guidelines to ensure only deserving and qualifying companies get consideration with rejection of application or revocation of approval as consequence of non-compliance.

CONCLUDING REMARKS

The review and amendments of Act 555 and Regulations is an ongoing process that requires responding appropriately and effectively to changing needs of new developments and directions of the private higher education sector. These changes can be addressed through provisions, regulations and circulars as stipulated in Act 555 and should be done so in the spirit of facilitation to allow healthier growth among the differing nature and performance of PHEIs while retaining the fundamentals of quality, sustainability, competitiveness and student protection.

These foundation and operational principles drawn are expected to be relevant until changes require further review and amendments. However, the PHEIs are expected to understand and play their role effectively in order for the proposed amendments to the regulatory practice to be implemented successfully. In fact all stakeholders including interested parties should cooperate and work collectively for a higher success rate to benefit individuals, community and nation.