**EXPLANATORY STATEMENT**

***A New Tax System (Goods and Services Tax) (Tertiary Courses) Determination 2014***

**Summary**

The *A New Tax System (Goods and Services Tax) (Tertiary Courses) Determination 2014* (the Determination) is a legislative instrument made under paragraph (b) of the definition of ‘tertiary course’ in section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act). That paragraph allows the Education Minister (being the Minister administering the *Student Assistance Act 1973* (Student Assistance Act)) to determine that a course of study or instruction is a tertiary course for the purposes of the GST Act.

The Determination specifies that a course of study or instruction that is not full-time (referred to in this Explanatory Statement as ‘part-time’), is determined to be a tertiary course under paragraph (b) of the definition of ‘tertiary course’ in section 195-1 of the GST Act, if it would meet the requirements for a tertiary course under subsection 5D(1) of the Student Assistance Act as specified in the Student Assistance Determination (as defined in section 3), if it were full-time. The effect of the Determination is that under the GST Act, goods and services tax (GST) is not payable on the supply of a part‑time tertiary course that otherwise meets the requirements of the Student Assistance Determination.

**Background**

Section 38‑85 of the GST Act provides that the supply of an education course and administrative services directly related to the supply of such a course (if they are supplied by the supplier of the course) are GST-free. An ‘education course’ is defined in section 195-1 of the GST Act to include a ‘tertiary course’, which is relevantly defined in that section to include:

(a) a course of study or instruction that is a [tertiary course](http://www.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s195.1.html#tertiary_course) determined by the [Education Minister](http://www.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s195.1.html#education_minister) under [subsection 5D(1)](http://www.austlii.edu.au/au/legis/cth/consol_act/saa1973217/s5d.html) of the [*Student Assistance Act 1973*](http://www.austlii.edu.au/au/legis/cth/consol_act/saa1973217/)for the purposes of that Act; or

(b)  any other course of study or instruction that the [Education Minister](http://www.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s195.1.html#education_minister) has determined is a [tertiary course](http://www.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s195.1.html#tertiary_course) for the purposes of this Act.

Under section 195-1 of the GST Act, ‘Education Minister’ means the Minister administering the Student Assistance Act.

The power to determine that a course of study or instruction is a tertiary course under paragraph (a) of the definition of ‘tertiary course’ in section 195‑1 of the GST Act was exercised by the then Education Minister under the *Student Assistance (Education Institutions and Courses) Determination 2009 (No. 2)* (Student Assistance Determination). That Determination (which commenced on 27 November 2009) and the previous Determination, the *Student Assistance (Education Institutions and Courses) Determination 2009 (No. 1)* (which commenced on 21 March 2009), relevantly state that for the purposes of the Student Assistance Act, a tertiary course is a full-time course. Prior to 21 March 2009, a tertiary course was determined to include both full-time and part-time courses.

As the Education Minister has not determined that part-time tertiary courses are tertiary courses for the purposes of the GST Act, an unintended consequence of the change in the meaning of a tertiary course under the current and previous Student Assistance Determinations is that part-time tertiary courses do not meet the definition of ‘tertiary course’ under the GST  Act. The purpose of the Determination is to address this technical error by specifying that certain courses are determined to be a tertiary course for the purposes of the GST Act, despite their not being provided on a full-time basis. To reflect the policy intent and to correct the technical error, this change is taken to have effect from 21 March 2009, which is when the change to the Student Assistance Determination first occurred.

**Explanation of Provisions**

**Section 1** of the Determination states the name of the Determination as the *A New Tax System (Goods and Services Tax) (Tertiary Courses) Determination 2014.*

**Section 2** states that the Determination is taken to have commenced on 21 March 2009.

The Determination has retrospective application from the date that the previous Student Assistance Determination (that is, the *Student Assistance (Education Institutions and Courses) Determination 2009 (No. 1)*) commenced. This is to ensure that the Taxation Commissioner is not required to treat relevant part-time tertiary courses supplied on or after 21 March 2009 as taxable. This is consistent with the ongoing policy intent and the treatment of relevant part-time tertiary courses as GST-free by the Australian Taxation Office (ATO) to date.

Subsection 12(2) of the *Legislative Instruments Act 2003* does not apply as the Determination does not affect the rights of a person, other than the Commonwealth, so as to disadvantage that person, nor does it retrospectively impose any liabilities upon a person.

**Section 3** defines the terms used in the Determination.

The term ‘Education Minister’ is defined as the Minister administering the Student Assistance Act.  This may be the Minister responsible for administering the Student Assistance Act under the Administrative Arrangements Order, or another Minister that the first-mentioned Minister has authorised, under subsection 34AAB(1) of the *Acts Interpretation Act 1901*, to perform functions and duties and exercise powers under the Student Assistance Act on his or her behalf.

The term ‘Student Assistance Determination’ is defined as the legislative instrument made by the Education Minister under subsection 5D(1) of the Student Assistance Act for the purposes of that Act, as in force from time to time. This is intended to ensure that the meaning of ‘tertiary course’ for the purposes of the GST Act remains consistent with any changes to the requirements for tertiary courses determined by the Education Minister under subsection 5D(1) of the Student Assistance Act for the purposes of that Act, except for the requirement applying under the Student Assistance Determination that such courses are full‑time. The legislative instrument made under subsection 5D(1) in force at the time the Determination is made is the *Student Assistance (Education Institutions and Courses) Determination 2009 (No. 2)*.

**Section 4** states that a course of study or instruction that is not full-time is a tertiary course for the purposes of the GST Act, but only if it would meet the requirements for a tertiary course under subsection 5D(1) of the Student Assistance Act, as those requirements are specified in the Student Assistance Determination, if it were provided on a full-time basis.

This Determination is made under paragraph (b) of the definition of ‘tertiary course’ in section 195-1 of the GST Act.  The effect of section 4 of the Determination is that the supply of a part-time tertiary course is GST-free under section 38‑85 of the GST Act.

Section 4 of the Determination incorporates the Student AssistanceDeterminationwhich is defined in section 3, and is intended to ensure that any changes to the requirements for tertiary courses determined by the Education Minister under subsection 5D(1) of the Student Assistance Act, are also applied to tertiary courses for the purposes of the GST Act. However, the requirement under the Student Assistance Determination that courses are provided on a full-time basis will not apply for the purposes of this Determination.

**Consultation**

The ATO, the Treasury, the Department of Education and the Department of Employment were consulted in relation to the Determination.

Public consultation was not necessary for this Determination because the instrument is of a minor or machinery nature, confirms existing ATO practice and is not expected to have a practical impact on taxpayers.

**Regulatory Impact Analysis**

The Office of Best Practice Regulation was consulted in relation to the Determination and advised that the Determination does not require a Regulatory Impact Statement as it is not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact.

**Statement of Compatibility with Human Rights**

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

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The Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

*Overview of the Legislative Instrument*

The *A New Tax System (Goods and Services Tax) (Tertiary Courses) Determination 2014* (the Determination) specifies that a course of study or instruction that is not full-time (referred to in this Statement as ‘part-time’), but would, if it were a full-time course, meet the requirements for a tertiary course under subsection 5D(1) of the *Student Assistance Act 1973* (Student Assistance Act), as those requirements are specified in the Student Assistance Determination, is determined to be a ‘tertiary course’ for the purposes of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

The effect of the Determination is that under the GST Act, goods and services tax (GST) is not payable on the supply of a relevant part-time tertiary course.

*Background*

The then Education Minister made the *Student Assistance (Education Institutions and Courses) Determination 2009 (No. 1)* under subsection 5D(1) of the Student Assistance Act with effect from 21 March 2009.  This Determination was repealed and replaced by the *Student Assistance (Education Institutions and Courses) Determination 2009 (No. 2)* (Student Assistance Determination) with effect from 27 November 2009, and is still current. Both of these Student Assistance Determinations relevantly determined that tertiary courses were full-time tertiary courses, however, prior to 21 March 2009, a tertiary course was determined to include both full-time and part‑time tertiary courses.  The unintended consequence of this change in the meaning of tertiary course under the current and previous Student Assistance Determinations is that part-time tertiary courses do not otherwise meet the definition of ‘tertiary course’ under the GST Act.

The purpose of the Determination is to address this technical error by specifying that a course that otherwise meets the requirements for a tertiary course under subsection 5D(1) of the Student Assistance Act, as specified in the Student Assistance Determination, is determined to be a tertiary course for the purposes of the GST Act, even if it is not a full-time course.

*Human rights implications*

The Determination engages the right to education by ensuring that the supply of relevant part-time tertiary courses is GST-free under the GST Act.  This means that GST cannot be charged by education institutions for providing relevant part-time tertiary courses, and students who undertake such part‑time tertiary courses are not required to pay GST (for example on their course fees) for the supply of such a course.

This is consistent with the policy intent and the ongoing treatment of relevant part-time tertiary courses as GST-free by the Australian Taxation Office.  This is also consistent with the position for equivalent full-time tertiary courses, and so ensures that there is no distinction between the GST treatment of such full‑time and part‑time tertiary courses.

*Conclusion*

The Determination is compatible with human rights because it promotes the right to education by ensuring that the supply of relevant part-time tertiary courses is GST-free.

**The Hon Kevin Andrews MP,**

**Minister for Social Services**