

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Indigenous Affairs

Higher Education Support Act 2003

*Higher Education Support (Maximum Payments for Indigenous Student Assistance Grants)
Determination 2016*

Purpose

Part 2-2A of the *Higher Education Support Act 2003* (the Act) provides for grants to higher education providers to assist Indigenous students. Grants under Part 2-2A are payable to higher education providers in respect of a year.

Subsection 38-45(1) provides that the total payments made under Part 2-2A in respect of a year must not exceed the amount determined by the Minister in respect of the year.

Subsection 38-45(2) provides that the Minister may, by legislative instrument, determine the total payments made under Part 2-2A in respect of a year. A single legislative instrument may determine amounts for multiple years.

This instrument determines the total maximum payments made under Part 2-2A in respect of the years 2017 to 2021 for the purposes of subsection 38-45(2) of the Act.

Background

Part 2-2A of the Act, as inserted by Schedule 1 of the *Higher Education Support Legislation Amendment (2016 Measures No. 1) Act 2016* (Higher Education Support Legislation Amendment Act), provides for grants to higher education providers to assist Indigenous students.

The Higher Education Support Legislation Amendment Act inserted section 38-45 to provide that:

- (i) total payments made under Part 2-2A in respect of a year must not exceed the amount determined by the Minister in respect of the year; and
- (ii) the Minister may, by legislative instrument, determine the total payments made under Part 2-2A in respect of a year.

Item 8 of the Higher Education Support Legislation Amendment Act is a transitional provision which allows for the maximum payments determination for the year 2017 to be made after the start of year 2017.

Determining maximum amounts for up to five years is considered appropriate to give higher education providers an indication of the funding that is expected to be available. The requirement for the Minister to determine maximum payments for grants under Part 2-2A by legislative instrument is consistent with arrangements under section 41-45 of the Act for Other Grants under Part 2-3 and under section 46-40 of the Act for Commonwealth Scholarships under Part 2-4.

This instrument is one of a suite of instruments implementing the Indigenous Student Success in Higher Education 2016 Budget measure. This measure consolidates existing funding for Indigenous higher education under Part 2-2A of the Act.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make an instrument of a legislative character, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions to repeal, rescind, revoke, amend, or vary any such instrument.

Regulatory Impact Statement

The Office of Best Practice Regulation has advised that a Regulatory Impact Statement is not required for this instrument (OBPR reference: 20239).

Commencement

The instrument commences at the same time as Schedule 1, Part 1 of the Higher Education Support Legislation Amendment Act.

Consultation

Consultation was undertaken with the Department of Education and Training, which also administers the Higher Education Support Act. As this instrument is machinery in nature, no further consultation was undertaken.

Explanation of provisions

Item 1 sets out the name of the instrument, being the *Higher Education Support (Maximum Payments for Indigenous Student Assistance Grants) Determination 2016*.

Subitem 2(1) provides for a 3 column table setting out commencement information for this instrument. Each provision of the instrument specified in column 1 of the table commences (or is taken to have commenced) in accordance with column 2 of the table and any other statement in column 2 has effect according to its terms.

The table has the effect of providing that the instrument commences at the same time as Schedule 1, Part 1 of the Higher Education Support Legislation Amendment Act. However, this instrument does not commence at all if Schedule 1, Part 1 of that Act does not commence.

The note provides that the commencement information only relates to the provisions of the instrument as originally made. It will not be amended to deal with any later amendments to this instrument.

Subitem 2(2) provides that column 3 of the table is for additional information which may be added to or edited in any published version of the instrument but that information is not part of the instrument.

Item 3 specifies that the instrument is made under the authority of subsection 38-45(2) of the Act.

Item 4 defines key terms contained in the instrument.

Item 5 determines the maximum total payments that may be made under Part 2-2A of the Act in respect of the years 2017 to 2021, for the purposes of subsection 38-45(2) of the Act.

Item 5 provides that the total payments made under Part 2-2A in respect of the years 2017 to 2021 must not exceed the payment amount that is specified in the table next to each year.

The amounts determined for 2017 to 2021 are expressed with the 2017 indexation factor applied. The indexation factors for 2018 to 2021 are yet to be determined.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

HIGHER EDUCATION SUPPORT (MAXIMUM PAYMENTS FOR INDIGENOUS STUDENT ASSISTANCE GRANTS) DETERMINATION 2016

This 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

This instrument determines the maximum total payments that may be made under Part 2-2A of the Act in respect of the years 2017 to 2021, for the purposes of subsection 38-45(2) of the Act.

This instrument is one of a suite of instruments implementing the Indigenous Student Success in Higher Education 2016 Budget measure. This measure consolidates existing funding for Indigenous higher education under Part 2-2A of the Higher Education Support Act.

Human rights implications

This instrument is mechanical in nature as it determines the maximum total payments that may be made under Part 2-2A of the Higher Education Support Act for the purposes of subsection 38-45(2) of the Higher Education Support Act. As such, this instrument does not engage any human rights.

However, this instrument does enable grants under Part 2-2A of the Act to be made to higher education providers. In this respect, the instrument facilitates the promotion of the right to education under Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the right of equality and non-discrimination under Articles 2, 16, and 26 of the International Covenant on Civil and Political Rights (ICCPR), Article 2 of the ICESCR, and Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

Right to education

Article 13 of the ICESCR, recognises the ‘right of everyone to education.’

This instrument facilitates the promotion of the right to education as it enables grants to be made to higher education providers. The purposes of the grants are to assist Indigenous students to undertake higher education and to increase the number of Indigenous students enrolling in, progressing in, and completing courses leading to higher education awards.

The instrument also determines the maximum total payments that may be made to higher education providers under Part 2-2A of the Act for up to five years. This gives higher education providers an indication of the funding that is expected to be available and will allow them to plan ahead for the provision of activities to assist Indigenous students.

Right of equality and non-discrimination

The right of equality and non-discrimination is contained in Articles 2, 16 and 26 of the ICCPR, Article 2 of the ICESCR and Article 5 of the CERD.

The right of equality and non-discrimination recognises that all human beings have the right to be treated equally and to not be discriminated against.

To the extent that measures in relation to Indigenous Student Assistance under Part 2-2A of the Higher Education Support Act mean Indigenous persons are provided with a different level of assistance to access higher education than other persons, Part 2-2A is intended to be a 'special measure' within the meaning of Article 1(4) of the CERD and subsection 8(1) of the *Racial Discrimination Act 1975*.

While this instrument itself is not a special measure, the instrument facilitates the provision of a special measure. The instrument facilitates the provision of grants to higher education providers to enable them to provide targeted assistance to Indigenous students and allow them to better access, progress in and complete higher education awards in order to address the disparity in access to, and completion of, higher education as exists between Indigenous persons and other persons.

The requirement for the Minister to determine maximum payments for grants under Part 2-2A by legislative instrument is also consistent with arrangements under section 41-45 of the Higher Education Support Act for Other Grants under Part 2-3 and under section 46-40 of the Higher Education Support Act for Commonwealth Scholarships under Part 2-4. This ensures that grants for Indigenous student assistance are dealt with in the same way as grants for non-Indigenous student assistance.

Conclusion

The instrument is compatible with human rights.

Minister for Indigenous Affairs, the Hon Nigel Scullion