

EXPLANATORY STATEMENT

Student Assistance (Education Institutions and Courses) Amendment Determination 2017 (No. 3)

General outline

The *Student Assistance (Education Institutions and Courses) Amendment Determination 2017 (No. 3)* (the **Amendment Determination**) is made under subsection 5D(1) of the *Student Assistance Act 1973* (the **Act**). Subsection 5D(3) of the Act provides that a determination under subsection 5D(1) is a legislative instrument.

The Amendment Determination amends the *Student Assistance (Education Institutions and Courses) Determination 2009 (No. 2)* (the **Principal Determination**).

Background

Subsection 5D(1) of the Act provides that the Minister may, for the purposes of the Act, determine in writing that:

- (a) a course of study or instruction is a secondary course, or a tertiary course; or
- (b) a part of a course of study or instruction is a part of a secondary course or part of a tertiary course.

The Principal Determination broadly outlines the institutions and courses for the purpose of subsections 3(1) and 5D(1) of the Act, specifying multiple levels of study at higher education institutions and registered training organisations. The determination of these courses for the purposes of the Act allows for students studying these courses to be eligible to receive student payments, subject to other relevant criteria being met.

The Amendment Determination

The Amendment Determination amends the Principal Determination, with effect from 1 January 2018, to ensure that vocational education and training (VET) courses at the diploma, advanced diploma, graduate certificate or graduate diploma level, can only be tertiary courses for the purposes of section 5D(1) of the Act if the relevant VET course and the course provider are approved for VET Student Loans.

Transitional arrangements are included in the Amendment Determination to ensure that students undertaking a VET course that loses approval for VET Student Loans are not disadvantaged as a result of their course losing its approval part-way through the course.

If a student receives a student payment for a VET course and the course ceases to be approved for VET Student Loans (with the result that the course would ordinarily cease to be a tertiary course), the student will continue to receive their student payment for the remainder of the course provided they continue to receive the relevant student payment without a break.

The student payments affected by this change are Youth Allowance (student), Austudy, ABSTUDY and Pensioner Education Supplement.

The Amendment Determination also amends the Principal Determination, with effect from 1 January 2018, to ensure that an undergraduate or postgraduate higher education course can only be a tertiary course for the purposes of subsection 5D(1) of the Act if it is offered by an education provider approved under the Higher Education Loan Program (HELP).

Transitional arrangements are included in the Amendment Determination to ensure that students are not disadvantaged if they are undertaking a course offered by an education provider that loses its approval under HELP part-way through the course.

If a student receives a student payment for a course and the course provider loses its approval under HELP (with the result that the course would ordinarily cease to be a tertiary course), the student will continue to receive their student payment for the remainder of the course provided they continue to receive the relevant student payment without a break.

The student payments affected by this change are Youth Allowance (student), Austudy, ABSTUDY and Pensioner Education Supplement.

Commencement

The Amendment Determination commences on 1 January 2018.

Consultation

The Department has consulted with the Departments of Human Services and Education and Training on the development of the measure contained in the Amendment Determination.

Regulation Impact Statement

A Regulation Impact Statement has been prepared. This measure would result in regulatory requirements being reduced for approximately 7,000 students per year. In order to be assessed as eligible for and to receive student payments, students must submit a claim to the Department of Human Services. The students affected by this measure would no longer have to submit a claim for a student payment. This measure would not impact on business or community organisations.

Explanation of the provisions

Section 1 provides that the name of the Amendment Determination is the *Student Assistance (Education Institutions and Courses) Amendment Determination 2017 (No. 3)*.

Section 2 provides that the Amendment Determination commences on 1 January 2018.

The instrument will be repealed on the day after its commencement by section 48A of the *Legislation Act 2003*, as the only effect of the instrument is to amend another legislative instrument.

Section 3 provides that the Amendment Determination is made under subsection 5D(1) of the Act.

Section 4 provides that each instrument that is specified in a Schedule to the Amendment Determination is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Amendment Determination has effect according to its terms.

Schedule 1 is the only schedule to the Amendment Determination and this schedule provides for amendments to the Principal Determination.

Subsection 33(3) of the *Acts Interpretation Act 1901* relevantly provides that where an Act confers a power to make any 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 (if any) to repeal, rescind, revoke, amend or vary any such instrument.

Schedule 1 to the Amendment Determination sets out the amendments to the Principal Determination.

Item 1 inserts a definition of **student payment** into section 4 of the Principal Determination. The expression 'student payment' is used in section 11 of the Principal Determination (inserted by item 4 of Schedule 1 to the Amendment Determination).

'Student payment' is defined for a student and a course, as having the meaning given by new subsection 11(4) of the Principal Determination (see item 4 of Schedule 1 to the Amendment Determination below).

Item 2 repeals paragraph 10(1)(a) of the Principal Determination and substitutes a new paragraph. The new paragraph 10(1)(a) provides that a course referred to in items 5 or 8 of the new table in Schedule 2 to the Principal Determination (see item 6 of Schedule 1 to the Amendment Determination) can only be a tertiary course under subsection 5D(1) of the Act if the course is an approved course within the meaning of the *VET Student Loans Act 2016*.

The courses referred to in item 5 of the new table in Schedule 2 are VET courses at the level of diploma, advanced diploma, graduate certificate or graduate diploma that are offered by a higher education institution or registered training organisation. Items 3 and 4 of the new table in Schedule 2 make clear that other VET courses (i.e. those not offered at the level of diploma, advanced diploma, graduate certificate or graduate diploma) are not subject to the approved course requirements in the *VET Student Loans Act 2016*.

The courses referred to in item 8 of the new table in Schedule 2 are VET courses at the level of diploma, advanced diploma, graduate certificate or graduate diploma that are offered by a higher education institution or registered training organisation participating in Open Learning. Item 7 of the new table in Schedule 2 makes clear that other VET courses offered by providers participating in Open Learning (i.e. those not offered at the level of diploma, advanced diploma, graduate certificate or graduate diploma) are not subject to the approved course requirements in the *VET Student Loans Act 2016*.

New subparagraph 10(1)(a)(iii) also provides that a course specified in item 10 of the new table in Schedule 2 to the Principal Determination will only be a tertiary course if, to the extent that the course consists of study in a VET course, the course is an approved course within the meaning of the *VET Student Loans Act 2016*.

Item 10 of the new table in Schedule 2 to the Principal Determination addresses the situation in which a person undertakes a course consisting of concurrent study in an accredited higher education course and a VET course at two different institutions, where the VET course is a course at the level of diploma, advanced diploma, graduate certificate or graduate diploma. To the extent that the VET course is a course at one of these levels, new subparagraph 10(1)(a)(iii) provides it is necessary for the course to be an approved course within the meaning of the *VET Student Loans Act 2016*.

Item 2 also inserts new paragraph 10(1)(aa) into the Principal Determination. This new paragraph provides that a course is also a tertiary course if it is a course to which the transitional arrangements in new section 11 of the Principal Determination apply (see item 4 of Schedule 1 to the Amendment Determination).

Item 3 amends subsection 10(2) of the Principal Determination. This amendment is consequential to the amendments made by item 2 of Schedule 1 to the Amendment Determination.

Item 4 provides for transitional arrangements by inserting new section 11 into the Principal Determination.

These transitional arrangements ensure that where a student receives a student payment for a VET course and the course ceases to be approved for VET Student Loans (under the *VET Student Loans Act 2016*), the student will continue to receive their student payment for the remainder of the course provided that, after the course ceases to be approved, they continue to receive the relevant student payment without a break.

These transitional arrangements also ensure that where a student receives a student payment for a higher education course and the course provider loses its approval under HELP (under the *Higher Education Support Act 2003*), the student will continue to receive their student payment for the remainder of the course provided that, after the provider ceases to be approved, they continue to receive the relevant student payment without a break.

New subsection 11(1) provides that for the purposes of new paragraph 10(1)(aa) of the Principal Determination, new section 11 applies to a course if:

- (a) the course is specified in Column 1 of item 5, 6, 8, 9, 10 or 11 of the new table in Schedule 2 to the Principal Determination (see item 6 of Schedule 1 to the Amendment Determination); and
- (b) the course commenced before, on or after 1 January 2018; and
- (c) when the course commenced, it was a tertiary course under paragraph 10(1)(a) of the Principal Determination; and
- (d) the course has ceased to be a tertiary course under that paragraph.

New subsection 11(2) then provides that new paragraph 10(1)(aa) of the Principal Determination (see item 2 of Schedule 1 to the Amendment Determination) does not apply to the course in relation to a student if, immediately before the course ceased to be a tertiary course under paragraph 10(1)(a) of the Principal Determination, the student was not receiving a **student payment** for the course.

New subsection 11(3) then provides that new paragraph 10(1)(aa) of the Principal Determination (see item 2 of Schedule 1 to the Amendment Determination) ceases to apply to the course in relation to a student if, at or after the time the course ceased to be a tertiary course under paragraph 10(1)(a) of the Amendment Determination but before the student completes the course, the student ceases to be receiving a **student payment** for the course.

New subsection 11(4) then provides that a student is receiving a student payment for the course if the student is receiving any of the following because the student is undertaking the course:

- (a) austudy payment under the *Social Security Act 1991*;
- (b) assistance under the ABSTUDY scheme;
- (c) youth allowance under the *Social Security Act 1991* because the student is undertaking full time study;
- (d) pensioner education supplement under the *Social Security Act 1991*.

Item 5 amends a note to the heading of Schedule 2 to the Principal Determination to refer to new subsection 11(1) (see item 4 of Schedule 1 to the Amendment Determination).

Item 6 repeals the table in Schedule 2 of the Principal Determination and substitutes a new table.

Most of the content of the table in Schedule 2 has been retained in the new table, with the following changes:

- Item numbers have been included in the new table in Schedule 2 to allow for easier cross-referencing between Schedule 2 and the new requirements set out in new paragraph 10(1)(a) and new section 11 (see items 2 and 4 of Schedule 1 to the Amendment Determination).

- The lists of courses in Schedule 2 have been regrouped to make it clearer as to which kinds of courses are subject to the *Higher Education Support Act 2003* approved provider requirements, which kinds of courses are subject to the *VET Student Loans Act 2016* approved course requirements and which courses are not subject to either of these requirements.
- Amendments have been made to the table in Schedule 2 (see item 6 of the new table) to ensure that undergraduate and postgraduate accredited higher education courses at the following levels can only be tertiary courses under subsection 5D(1) of the Act if they are offered by a 'higher education provider' within the meaning of the *Higher Education Support Act 2003*:
 - (a) associate degree; or
 - (b) associate diploma; or
 - (c) Bachelor degree; or
 - (d) bridging study for overseas trained professionals; or
 - (e) postgraduate bachelor degree; or
 - (f) Masters qualifying course; or
 - (g) any of the following that is not a VET course:
 - (i) diploma;
 - (ii) advanced diploma;
 - (iii) graduate certificate;
 - (iv) graduate diploma; or
 - (h) a course that:
 - (i) leads to 2 of the above qualifications; and
 - (ii) is identified as a combined course in the institution's handbooks; and
 - (iii) is not a secondary course specified in Schedule 1; and
 - (iv) is not a course accredited at Master or Doctorate level (other than a course specified in Schedule 3 of the Principal Determination).

This new approved provider requirement also applies to courses being offered by an education institution participating in Open Learning (see item 9 of the new table). This means that undergraduate and postgraduate accredited higher education courses offered by an education institution participating in Open Learning at the levels set out above in paragraphs (a) to (h) can only be tertiary courses under subsection 5D(1) of the Act if they are offered by a 'higher education provider' within the meaning of the *Higher Education Support Act 2003*.

- Item 10 in the new table in Schedule 2 ensures that a course consisting of concurrent study in two separate institutions in an accredited higher education course and a VET course must be provided by a higher education provider within the meaning of the *Higher Education Support Act 2003* in certain circumstances. The course must meet this requirement to the extent that the course consists of study in the accredited higher education course. Item 10 applies to the extent that the VET course to be combined with the higher education course is a VET course at the level of diploma, advanced diploma, graduate certificate or graduate diploma.

- Item 11 has also been included in the new table in Schedule 2 to ensure that a course consisting of concurrent study in two separate institutions in an accredited higher education course and a VET course must be provided by a higher education provider within the meaning of the *Higher Education Support Act 2003* in certain circumstances. The course must meet this requirement to the extent that the course consists of study in the accredited higher education course. Item 11 applies to the extent that the VET course to be combined with the higher education course is a VET course at a level other than diploma, advanced diploma, graduate certificate or graduate diploma.

Statement of Compatibility with Human Rights

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

Student Assistance (Education Institutions and Courses) Amendment Determination 2017 (No.3)

The *Student Assistance (Education Institutions and Courses) Amendment Determination 2017 (No. 3)* (the Amendment Determination) 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 Amendment Determination is made under subsection 5D(1) of the *Student Assistance Act 1973* (the Act). Subsection 5D(3) of the Act provides that a determination under subsection 5D(1) is a legislative instrument.

Subsection 5D(1) of the Act provides that the Minister may, for the purposes of the Act, determine in writing that:

- a course of study or instruction is a secondary course, or a tertiary course; or
- a part of a course of study or instruction is a part of a secondary course or part of a tertiary course.

The Amendment Determination amends the *Student Assistance (Education Institutions and Courses) Determination 2009 (No. 2)* (Principal Determination). The Principal Determination broadly outlines the institutions and courses for the purposes of subsections 3(1) and 5D(1) of the Act, specifying multiple levels of study at higher education institutions and registered training organisations.

The Amendment Determination amends section 10(1)(a) and the list of tertiary courses in Schedule 2 to the Principal Determination by requiring tertiary courses to be those specified in Column 1 of the table and be provided by an education institution in Column 2 of that table.

The courses listed in Schedule 2 are the tertiary courses provided by higher education providers and registered training organisations that are “tertiary courses” for the purposes of the Act. In turn, the determination of these courses as tertiary courses for the purposes of the Act allows people studying those courses to qualify for certain student payments under social security law, such as youth allowance, austudy payment and the pensioner education supplement (provided they meet eligibility for those payments). The changes will also apply to ABSTUDY.

The Amendment Determination amends the Principal Determination, with effect from 1 January 2018, to ensure that courses at diploma level and higher, can only be tertiary courses for the purposes of section 5D(1) of the Act if the relevant VET course and the course provider are approved for VET Student Loans (VSL), and a

higher education course can only be a tertiary course if it is offered by an education provider approved under the Higher Education Loan Program (HELP).

The Amendment Determination also inserts transitional arrangements applicable to current student payment recipients whose courses no longer qualify as a “tertiary course” as a result of this legislative instrument. This is to ensure that such students are not disadvantaged and will apply to current students payment recipients where there is no break in their entitlement to payment.

Human rights implications

The Amendment Determination engages the following human rights:

Right to Social Security

Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right of everyone to social security.

The right to social security requires that a system be established under domestic law, and that public authorities must take responsibility for the effective administration of the system. The social security system must provide a minimum essential level of benefits to all individuals and families that will enable them to cover essential living costs.

The United Nations Committee on Economic, Cultural and Social Rights (the Committee) has stated that a social security scheme should be sustainable and that the conditions for benefits must be reasonable, proportionate and transparent (see General Comment No.19).

Article 4 of ICESCR provides that countries may limit the rights such as to social security in a way determined by law only in so far as this may be compatible with the nature of the rights contained within the ICESCR and solely for the purpose of promoting the general welfare in a democratic society. Such a limitation must be proportionate to the objective to be achieved.

To the extent that there is an impact on a person’s right to social security by virtue of the Amendment Determination, the impact is limited.

For student payment eligibility purposes, by aligning approved VET courses to those approved for VSL and offered by a provider approved for VSL and approved higher education courses with those offered by education providers approved for HELP, the Amendment Determination enables consistency of Commonwealth support across VET and higher education courses. It also aligns with reforms to VSL and higher education funding which have sought to better target Commonwealth expenditure towards priority courses. Currently, eligibility for student payments for those undertaking higher education courses is not linked to the provision of HELP. The change to the approval of higher education courses for student payments to those courses offered by higher education providers approved for HELP will ensure that Commonwealth support is consistent across all higher education courses.

For VET courses, the amendments are designed to support students’ educational and employment prospects. Course eligibility for VSL looks at courses that have a

high national priority, meet industry needs, contribute to addressing skills shortages and align with strong employment outcomes. Courses with limited public benefit are not listed for VSL and so will no longer meet the approval criteria for student payments.

A student undertaking courses specified in Schedule 2 of the Amendment Determination will continue to qualify for certain student payments under social security law, such as youth allowance, austudy payment and the pensioner education supplement (provided they meet the other eligibility criteria for those payments). Students will also continue to qualify for ABSTUDY. Secondary school and certificate level VET courses are not affected by these amendments and these students will not be affected.

To avoid students losing access to financial support whilst undertaking their studies, current student payment recipients studying tertiary courses that will no longer be approved for student payment purposes will continue to receive their student payment for the remainder of the course provided there is no break in their entitlement. This enables students to continue to access their social security payments.

Right to Education

The Amendment Determination engages the right to education contained in Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

To the extent that there is an impact on a person's right to education by virtue of the Amendment Determination, the impact is limited.

Whilst the Amendment Determination will limit the courses approved for student payments, it will not restrict a student's right to enrol in and undertake VET and higher education courses. In respect of VET courses, as courses and education providers are subject to a rigorous assessment in order to be approved for VSL, the amendments may enable the protection of students by enhancing educational and employment outcomes and protect students from unscrupulous providers.

The Amendment Determination enables current student payment recipients to continue studying tertiary courses that will no longer be approved for student payment purposes, and provides for continuing receipt of their student payment for the remainder of their course provided there is no break in their entitlement. This ensures that student payment recipients are not disadvantaged in their access to education whilst undertaking a course, and therefore will be compatible with human rights.

Conclusion

The Amendment Determination is compatible with human rights because it does not limit the basic right to social security or education. It is a reasonable, proportionate and necessary response to achieve the legitimate objective of ensuring consistency of Commonwealth support across the VET and higher education sectors.

**[Circulated by the authority of the Minister for Social Services,
the Hon Christian Porter MP]**