

EXPLANATORY STATEMENT

A New Tax System (Goods and Services Tax) (Tertiary Courses) Determination 2017

Summary

The *A New Tax System (Goods and Services Tax) (Tertiary Courses) Determination 2017* (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* (the **GST Act**). That paragraph allows the Student Assistance Minister (being the Minister administering the *Student Assistance Act 1973* (the **Student Assistance Act**)) to determine that a course of study or instruction is a tertiary course for the purposes of the GST Act.

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 defined in that section to mean:

- (a) a course of study or instruction that is a tertiary course determined by the *Student Assistance Minister under subsection 5D(1) of the *Student Assistance Act 1973* for the purposes of that Act; or
- (aa) a course of study or instruction accredited at Masters or Doctoral level and supplied by a *higher education institution or a *non-government higher education institution; or
- (b) any other course of study or instruction that the *Student Assistance Minister has determined is a tertiary course for the purposes of this Act.

Under section 195-1 of the GST Act, the 'Student Assistance Minister' is the Minister administering the Student Assistance Act. The Student Assistance Act is administered by the Minister for Social Services.

For the purposes of paragraph (a) of the definition of 'tertiary course' in section 195-1 of the GST Act, the Student Assistance Minister has made a determination under subsection 5D(1) of the Student Assistance Act. This is the *Student Assistance (Education Institutions and Courses) Determination 2009 (No. 2)* (the **Student Assistance Determination**).

On 15 July 2014 the Minister for Social Services made a determination under paragraph (b) of the definition of 'tertiary course' in section 195-1 of the GST Act to ensure that courses listed in the Student Assistance Determination could still be tertiary courses for the purposes of the GST Act even though

they are not offered on a full-time basis (the **2014 Determination**). This Determination continues the GST-free status of these courses.

This Determination also preserves the GST-free status of certain courses that will cease to be 'tertiary courses' once amendments to the Student Assistance Determination commence on 1 January 2018.

The Student Assistance Determination was amended by the *Student Assistance (Education Institutions and Courses) Amendment Determination 2017 (No. 3)* (the **Student Assistance Amendment Determination**) with the amendments due to commence on 1 January 2018.

The Student Assistance Amendment Determination will reduce the number of vocational education and training (VET) courses and higher education courses that can qualify as a 'tertiary course' under subsection 5D(1) of the Student Assistance Act.

The Student Assistance Amendment Determination provides that a VET course provided at the level of diploma, advanced diploma, graduate certificate or graduate diploma can only be a 'tertiary course' under subsection 5D(1) of the Student Assistance Act if it is an approved course within the meaning of the *VET Student Loans Act 2016*.

The Student Assistance Amendment Determination also provides that an undergraduate or postgraduate higher education course can only be a tertiary course under subsection 5D(1) of the Student Assistance Act if the course is provided by an approved higher education provider within the meaning of the *Higher Education Support Act 2003*.

This Determination will operate to ensure that a course that has ceased to be a 'tertiary course' under the Student Assistance Determination, as a result of the amendments made by the Student Assistance Amendment Determination, will not cease to be a tertiary course for the purposes of paragraph (b) of the definition of 'tertiary course' in section 195-1 of the GST Act. This will ensure that the supply of these courses will continue to be GST-free.

Explanation of Provisions

Section 1 of the Determination states the name of the Determination is the *A New Tax System (Goods and Services Tax) (Tertiary Courses) Determination 2017*.

Section 2 states that the Determination commences on 1 January 2018.

Section 3 provides that the Determination is 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*.

Section 4 provides that each instrument that is specified in a Schedule to the 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 Determination has effect according to its terms.

Schedule 1 (discussed in more detail below) is the only schedule to the Determination and this schedule repeals the 2014 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.

Section 5 defines the terms used in the Determination.

‘Accredited higher education course’ is defined as having the same meaning as in the Student Assistance Determination. The Student Assistance Determination defines accredited higher education course as a course that is:

- (a) accredited as a higher education course by the TEQSA (the Tertiary Education Quality and Standards Agency) or taken to be a course accredited by TEQSA in relation to the provider for the purposes of the *Tertiary Education Quality and Standards Agency Act 2011*; or
- (b) if a higher education institution is authorised by a law of the Commonwealth to accredit its own higher education courses — a course conducted and accredited as a higher education course by that institution.

‘Act’ is defined as the *A New Tax System (Goods and Services Tax) Act 1999*.

‘Approved course’ is defined as having the same meaning as in the *VET Student Loans Act 2016* (see section 13 of the *VET Student Loans Act 2016*).

‘Combined course’ is defined as a course consisting of concurrent study, at 2 different institutions, in an accredited higher education course and a VET course.

‘Higher education provider’ is defined as having the same meaning as in the *Higher Education Support Act 2003* (see section 16-1 of the *Higher Education Support Act 2003*).

‘Open Learning’ is defined as having the same meaning as in the Student Assistance Determination. The Student Assistance Determination defines Open Learning as a program of assessment based on study provided through Open Universities Australia Pty Ltd (ACN 053 431 888) trading as Open Universities Australia.

‘Student Assistance Determination’ is defined as the *Student Assistance (Education Institutions and Courses) Determination 2009 (No. 2)*.

‘Student Assistance Determination requirements’ is defined as the requirements for a tertiary course under subsection 5D(1) of the *Student Assistance Act 1973*, as those requirements are specified in the Student Assistance Determination.

‘VET course’ is defined as having the same meaning as in the Student Assistance Determination. The Student Assistance Determination defines VET course as:

- (a) the units of competency of a training package that is endorsed by the Ministerial Council which has responsibility for the VET Quality Framework;
- (b) the modules of a VET accredited course; or
- (c) the modules of a course accredited by the VET Regulator of a State which is a non-referring State within the meaning of section 7 of the *National Vocational Education and Training Regulator Act 2011*.

In the Student Assistance Determination ‘VET Quality Framework’ has the meaning that term is given in section 3 of the *National Vocational Education and Training Regulator Act 2011*.

In the Student Assistance Determination ‘VET accredited course’ means:

- (a) a course accredited by a body under a delegation from the Australian Skills Quality Authority (ASQA); or
- (b) a course accredited by ASQA.

Section 6 sets out a table containing the courses of study or instruction that are tertiary courses for the purposes of the GST Act even though they do not meet the Student Assistance Determination requirements and are therefore not ‘tertiary courses’ for the purposes of the Student Assistance Act.

In summary, this table is intended to ensure that the following four kinds of courses are still tertiary courses for the purposes of the GST Act:

- 1) a course that is not offered on a full-time basis, and therefore does not meet the Student Assistance Determination requirements for a tertiary course;
- 2) a VET course (including an Open Learning course at the level of a VET course) that does not meet the Student Assistance Determination requirements because it is not an approved course under the *VET Student Loans Act 2016*;
- 3) an undergraduate or postgraduate accredited higher education course (including an Open Learning course) that does not meet the Student Assistance Determination requirements because it is not provided by a higher education provider under the *Higher Education Support Act 2003*;
- 4) a combined course consisting of concurrent study, at 2 different institutions, in an accredited higher education course and a VET

course that does not meet the Student Assistance Determination requirements because:

- a. to the extent that the course consists of study in a VET course—the VET course is not an approved course;
- b. to the extent that the course consists of an accredited higher education course—the accredited higher education course is not provided by a higher education provider.

Schedule 1 to the Determination repeals the 2014 Determination. The Determination will continue the GST-free status of courses not provided on a full-time basis. As this was the only effect of the 2014 Determination, it was considered appropriate to repeal this instrument as the Determination provides sufficient coverage for part-time courses.

Consultation

The Australian Taxation Office (ATO) and the Treasury 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 Determination is not regulatory in nature and will have no regulatory impact on individuals, business, activity or competition.

Statement of Compatibility with Human Rights

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

A New Tax System (Goods and Services Tax) (Tertiary Courses) Determination 2017

The *A New Tax System (Goods and Services Tax) (Tertiary Courses) Determination 2017* (the 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 Determination is 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* (the GST Act).

Once a determination has been made that a course is a tertiary course, the course will be an ‘education course’ for the purposes of the definition of education course in section 195-1 of the GST Act.

Under section 38-85 of the GST Act, the supply of an education course is GST-free.

The purpose of this Determination is to determine that tertiary courses provided in accordance with this Determination are courses of study or instruction that are tertiary courses for the purposes of the Act.

This Determination preserves the GST-free status of certain courses that will cease to be ‘tertiary courses’ once amendments to the *Student Assistance (Education Institutions and Courses) Determination 2009 (No.2)* (the **Student Assistance Determination**) commence on 1 January 2018.

The Student Assistance (Education Institutions and Courses) Amendment Determination 2017 (No.3) (the **Student Assistance Amendment Determination**) will reduce the number of vocational education and training (VET) courses and higher education courses that can qualify as a ‘tertiary course’ under subsection 5D(1) of the *Student Assistance Act 1973* (the **Student Assistance Act**).

The Student Assistance Amendment Determination provides that a VET course provided at diploma level or above can only be a ‘tertiary course’ under subsection 5D(1) of the Student Assistance Act if it is an approved course within the meaning of the *VET Student Loans Act 2016*.

The Student Assistance Amendment Determination also provides that an undergraduate and postgraduate higher education course can only be a tertiary course under subsection 5D(1) of the Student Assistance Act if the course is provided by an approved higher education provider within the meaning of the *Higher Education Support Act 2003*.

This Determination will operate to ensure that a course that has ceased to be a 'tertiary course' under the Student Assistance Determination, as a result of the amendments made by the Student Assistance Amendment Determination, will not cease to be a tertiary course for the purposes of paragraph (b) of the definition of 'tertiary course' in section 195-1 of the GST Act. This will ensure that the supply of these courses will continue to be GST-free.

This Determination will also continue the GST-free status of tertiary courses that are not offered on a full-time basis.

Human rights implications

The Determination engages the following human rights:

Right to Education

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

By determining that tertiary courses are GST-free, the Determination may enable students to access education and therefore will be compatible with human rights.

Conclusion

The Determination is compatible with human rights as it enables students to access education.

Minister for Social Services, the Hon Christian Porter MP