

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Education

Higher Education Support Act 2003

Higher Education Provider Amendment (AAT Review) Guidelines 2020

Purpose and authority

The purpose of the *Higher Education Provider Amendment (AAT Review) Guidelines 2020* (the **Amendment Instrument**) is to amend the *Higher Education Provider Guidelines 2012* (the **Guidelines**) to provide for the availability of independent merits review by the Administrative Appeals Tribunal (**AAT**) of a review decision made by the HELP Tuition Protection Director in relation to the HELP tuition protection levy (**levy**).

The Amendment Instrument is made under section 238-10 of the *Higher Education Support Act 2003* (the **Act**). The Amendment Instrument amends the Guidelines for the purposes of Part 2-1 of the Act.

Background

The *Education Legislation Amendment (Tuition Protection and Other Measures) Act 2019* amended the Act to introduce new tuition protection arrangements, commencing on 1 January 2020. The tuition protection arrangements are funded by providers through a levy model set out in the *Higher Education Support (HELP Tuition Protection Levy) Act 2020*.

The *Higher Education Provider Amendment (Tuition Protection and Other Measures) Guidelines 2019* recently amended the Guidelines (**2019 Instrument**). The 2019 Instrument inserted Chapter 2 in the Guidelines, which outlines requirements for the new tuition protection arrangements. Relevantly, the 2019 Instrument introduced new requirements for the determination and collection of levies at section 2.10 of the Guidelines.

Paragraph 19-66A(3)(g) of the Act provides that the Guidelines may make provision for, or in relation to, the review of decisions made under the Guidelines in relation to the collection or recovery of the levy. Sections 2.10.25 to 2.10.35 of the Guidelines (as inserted by the 2019 Instrument) set out the circumstances in which a leviable provider may request an internal review of a levy determination by the HELP Tuition Protection Director, the process for reviewing the decision and the notice requirements attaching to the review decision. The Guidelines provide for internal review of the levy determination; however, do not provide for independent merits review of the internal review decision.

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the **Committee**) recommended that the 2019 Instrument be amended to provide for independent merits review of decisions made under new sections 2.10.25 to 2.10.35

of the Guidelines in accordance with the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*.

The purpose of the Amendment Instrument is to include the availability of independent merits review by the AAT of internal review decisions made by the HELP Tuition Protection Director under section 2.10.30 of the Guidelines in relation to the determination of the levy.

Consultation

Consultation with the higher education sector was not deemed necessary given the operational and minor amendments made by the Amendment Instrument. Specifically, the amendment to provide for independent merits review at the AAT for decisions made by the HELP Tuition Protection Director under section 2.10.30 of the Guidelines, is a procedural detail to further support and underpin the operation of the existing HELP tuition protection arrangements set out in the Act, and the *Higher Education Support (HELP Tuition Protection Levy) Act 2020*. Higher education providers and peak industry bodies have already been consulted in relation to the enabling legislation for the existing HELP tuition protection arrangements, to which this Amendment Instrument relates.

However, the Department of Education, Skills and Employment has received comprehensive advice from the Committee about the availability of independent merits review in the Guidelines and has consulted the Attorney-General's Department regarding the introduction of AAT review for this category of decisions.

Regulatory Impact Statement

The Office of Best Practice Regulation (**OBPR**) was consulted in relation to the 2019 Instrument. Based on its advice that the proposal affected by the 2019 Instrument has minor regulatory impact, OBPR advised that a Regulatory Impact Statement (**RIS**) was not required (OBPR ID. No. 23228). The Amendment Instrument makes minor amendments to the original proposal in the 2019 Instrument and therefore no RIS was prepared.

EXPLANATION OF PROVISIONS

Sections 1, 2 and 3 of the Amendment Instrument are technical provisions that set out the name, commencement, and authority for the Instrument.

The Amendment Instrument commences on the day after the instrument is registered on the Federal Register of Legislation.

The Amendment Instrument is made by the Minister for Education under section 238-10 of the Act. The Amendment Instrument amends the Guidelines for the purposes of Part 2-1 of the Act.

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

Schedule 1 – Amendments

Schedule 1 amends the Guidelines.

Item 1 inserts new section 2.10.40 after section 2.10.35 which provides that an application may be made to the AAT for the review of a decision that has been affirmed, varied or set aside under section 2.10.30 of the Guidelines.

If a leviable provider makes a request for a review of the levy determination under section 2.10.25, the HELP Tuition Protection Director must review the decision and may affirm, vary or set aside the levy determined in the levy notice in accordance with section 2.10.30 of the Guidelines. The HELP Tuition Protection Director must give notice of the review decision in accordance with section 2.10.35. New section 2.10.40 allows a leviable provider to apply for an independent merits review by the AAT of a decision made under section 2.10.30 of the Guidelines.

Item 2 makes a technical amendment as a result of Item 1.

Item 3 makes a technical amendment to rectify an incorrect reference in section 2.15.1.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

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Human rights implications

The Amendment Instrument engages the following human rights:

- the right to a fair hearing in Article 14(1) of the International Covenant on Civil and Political Rights (**ICCPR**);
- the right to an accessible and effective remedy in Article 2(3) of the ICCPR; and
- the right to education in Article 13 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**).

Right to a fair hearing and effective remedy

The Amendment Instrument engages the right to a fair hearing under Article 14(1) and the right to an accessible and effective remedy under Article 2(3) of the ICCPR. The right to a fair hearing and the right to an effective remedy are complementary and mutually reinforcing — access to a fair hearing in an administrative or judicial forum facilitates the provision of an effective remedy.

The Amendment Instrument provides for the availability of independent merits review by the AAT for decisions made by the HELP Tuition Protection Director under section 2.10.30 of the Guidelines.

Article 2(3)(b) clearly contemplates the provision of remedies by 'administrative authorities', as a complement to judicial remedies. The United Nations Human Rights Council emphasises the importance of establishing both judicial and administrative mechanisms for addressing claims, and considers that administrative mechanisms are particularly required to give effect to the general obligation to investigate claims promptly, thoroughly and effectively through independent and impartial bodies. The AAT has the power to provide and enforce administrative redress by varying or setting aside the internal review decision of the HELP Tuition Protection Director.

The availability of merits review by the AAT is an important element in realising an individual's right to a fair hearing and effective remedy under the ICCPR and provides an accessible and impartial form of administrative oversight within this area of administrative decision-making. Having this tier of independent merits review available to providers promotes public trust and confidence in decision making which is integral to a strong and accountable civil justice system.

Therefore, the availability of AAT merits review promotes the right to a fair hearing and to an effective remedy by providing the opportunity for a provider to seek

independent review of a government decision made under section 2.10.30 of the Guidelines. The ability of the AAT to conduct contemporaneous merits review to reach the correct or preferable decision in these matters, and, in particular, to consider all the relevant facts afresh, is an integral rights-based safeguard for providers.

Right to education

The Amendment Instrument also supports the right to education under Article 13 of the ICESCR.

The Amendment Instrument is part of the broader HELP tuition protection scheme (the scheme) set out in Part 5-1A and Part 5-1B of the Act and in the *Higher Education Support (HELP Tuition Protection Levy) Act 2020*. The scheme aims to ensure students entitled or accessing HELP under the Act are protected and supported in the event that the higher education provider with whom they are enrolled for their unit of study defaults by either providing a suitable replacement course or re-credit to their HELP balance. Thereby, the scheme promotes the right to education under the ICESCR by enabling students affected by provider default to be assisted to continue their studies.

Conclusion

The Amendment Instrument is compatible with human rights because it promotes the right to a fair hearing, right to an accessible and effective remedy and right to education.