**EXPLANATORY STATEMENT**

**Issued by the authority of the Minister for Education**

***Higher Education Support Act 2003***

***Higher Education Provider Guidelines 2023***

## AUTHORITY

The *Higher Education Provider Guidelines 2023* (‘Guidelines’) are made under section 238-10 of the *Higher Education Support Act 2003* (‘the Act’). In particular, item 6 of the table in subsection 238-10(1) of the Act specifies that the Minister for Education (‘the Minister’) may make Higher Education Provider Guidelines to give effect to matters under various provisions in the Act.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), 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. The repeal of the *Higher Education Provider Guidelines 2012* (the Former Guidelines)by the Schedule to the Guidelines relies on that provision.

## PURPOSE AND OPERATION

The Guidelines are made for the purposes of setting out:

* requirements for higher education providers in relation to tuition protection;
* the fee to accompany an application to be approved as a higher education provider;
* requirements for higher education providers to have in place grievance procedures and procedures for reviewing decisions in relation to assistance under Chapter 3 of the Act;
* requirements for higher education providers in relation to student contribution amounts and tuition fees;
* requirements for higher education providers when determining fees in respect of overseas students;
* criteria for determining whether a fee is of a kind that is incidental to studies that may be undertaken with a higher education provider;
* additional quality, accountability and other administrative requirements for higher education providers;
* matters that the Secretary of the Department of Education must consider in determining whether a student is a genuine student; and
* requirements in relation to the higher education provider charge.

The purpose of the Guidelines are to repeal and replace the Former Guidelines, which were due to sunset on 1 April 2023. The Guidelines are largely the same as the Former Guidelines and are made to ensure that the above requirements will continue to be in place.

Some minor changes have been made to the Guidelines to clarify and include additional procedural matters relating to the tuition protection requirements to:

* specify further circumstances as to when a provider defaults in relation to a student and providing an exception where a student was unable to enrol in any units of study because of the student’s personal circumstances (including but not limited to their medical, financial or employment circumstances) or family circumstances (including but not limited to the family’s medical, financial or employment circumstances); and
* require additional matters that the Higher Education Tuition Protection Director must include in its written notice to a student where a suitable replacement course is available.

Other changes to the Guidelines include making updates to the:

* minimum indicative course fees for overseas students;
* requirements for financial statements that higher education providers must give to the Minister; and
* matters that the Minister must have regard to when determining the financial viability of a higher education provider under Division 19 of the Act.

## IMPACT ANALYSIS

The Office of Impact Analysis (OIA) has been consulted and advised the instrument in its operation has a more than minor impact and requires an Impact Analysis. The Department has self-assessed that the instrument is operating efficiently and effectively in lieu of an Impact Analysis. The certification of the assessment will be published on OIA’s website. (*Office of Impact Analysis reference number*: OIA23-04624).

## COMMENCEMENT

The Guidelines commence the day after they are registered on the Federal Register of Legislation.

## CONSULTATION

The Guidelines are largely the same as the Former Guidelines and only minor changes were made to clarify and include additional procedural and administrative matters. Feedback from higher education providers over the course of business-as-usual communication with the Department of Education was considered in making the Guidelines. The consultation process involved:

* regular feedback on higher education issues through the Higher Education Loan Program (HELP) Communications provider working group meetings that occur four times a year; and
* email communication between higher education providers, other key stakeholders and the Department of Education dealing with higher education matters.

As part of ongoing communication and provider feedback sessions, providers will be requested to comment on the administrative utility of the Guidelines as they comply with its requirements.

The Departmental areas related to the subject areas in the Guidelines were consulted.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Higher Education Provider Guidelines 2023

The *Higher Education Provider Guidelines 2023* (‘the Guidelines’) are 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**

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* requirements for higher education providers in relation to tuition protection;
* the fee to accompany an application to be approved as a higher education provider;
* requirements for higher education providers to have in place grievance procedures and procedures for reviewing decisions in relation to assistance under Chapter 3 of the Act;
* requirements for higher education providers in relation to student contribution amounts and tuition fees;
* requirements for higher education providers when determining fees in respect of overseas students;
* criteria for determining whether a fee is of a kind that is incidental to studies that may be undertaken with a higher education provider;
* additional quality, accountability and other administrative requirements for higher education providers;
* matters that the Secretary of the Department of Education must consider in determining whether a student is a genuine student; and
* requirements in relation to the higher education provider charge.

The purpose of the Guidelines are to repeal and replace the Former Guidelines, which were due to sunset on 1 April 2023. The Guidelines are largely the same as the Former Guidelines and are made to ensure that the above requirements will continue to be in place.

Some minor changes have been made to the Guidelines to clarify and include additional procedural matters relating to the tuition protection requirements to:

* specify further circumstances as to when a provider defaults in relation to a student and providing an exception where a student was unable to enrol in any units of study because of the student’s personal circumstances (including but not limited to their medical, financial or employment circumstances) or family circumstances (including but not limited to the family’s medical, financial or employment circumstances); and
* require additional matters that the Higher Education Tuition Protection Director must include in its written notice to a student where a suitable replacement course is available.

Other changes to the Guidelines include making updates to the:

* minimum indicative course fees for overseas students;
* requirements for financial statements that higher education providers must give to the Minister; and
* matters that the Minister must have regard to when determining the financial viability of a higher education provider under Division 19 of the Act.

**Human rights implications**

The Guidelines engage the following human rights:

* right to education under Article 13 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR);
* right to an effective remedy under Article 2(3) of the *International Covenant on Civil and Political Rights* (ICCPR);
* right to a fair hearing under Article 14(1) of the ICCPR; and
* right to privacy under Article 17 of the ICCPR.

Right to education

The Guidelines engage the right to education in Article 13 of the ICESCR. Article 13(2)(c) of the ICESCR provides that ‘higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education’.

The Guidelines provide for requirements that must be met by Australian higher education providers to ensure that providers continue to maintain high standards in the delivery of education services and support to students, for example, requirements relating to financial information that must be provided to the Minister to assess the provider’s financial viability and obligations to keep student records. These requirements also support the right to education by providing further clarity on matters that affect a student’s education, for example, the imposition of fees in respect of overseas students and having procedures to withdraw from units of study.

Further, the Guidelines aim to ensure integrity in the higher education sector, for example, by providing for tuition protection requirements to ensure that higher education providers have arrangements in place so students are guaranteed to be able to complete their course of study and, if necessary, to obtain a refund for any incomplete portion of their course, in the event that the provider is no longer able to deliver the course. There are also requirements for grievance and review procedures in the Guidelines to ensure that providers have appropriate processes in place to guarantee effective and fair handling of complaints about academic and non-academic matters.

Rights to an effective remedy and a fair hearing

The Guidelines engage the rights to an effective remedy and a fair hearing contained in Articles 2(3) and Article 14(1) 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 Guidelines provide for the availability of independent merits review by the Administrative Appeals Tribunal (AAT) for decisions made by the Higher Education Tuition Protection Director under section 11(3) of the Guidelines and by the Secretary under section 57(3) of the Guidelines.

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 certain government decisions made under 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 privacy

The Guidelines engage the right to privacy outlined in Article 17 of the ICCPR. Article 17 of the ICCPR provides that no one shall be subject to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor the unlawful attacks on their honour and reputation.

Section 19-36C of the Act concerns the use of third-party contact lists by higher education providers approved under section 16-25 of the Act to market, advertise or promote a unit of study or a course of study, or enrol a student in a unit or course of study. A provider is prohibited from mentioning the possible availability of FEE-HELP assistance for the students undertaking the unit or course of study other than in the circumstances specified in the Guidelines. The Guidelines engage the right to privacy as they specify that a student may be so contacted by the provider when the student has given express consent and when a student should be taken to have provided such consent.

The Guidelines further engage the right to privacy as a higher education provider which defaults must provide to the Higher Education Tuition Protection Director, in a written notice, information about the mode, delivery, location and other requirements of a student’s units of study. This is additional to a provider’s obligations to provide student information when notifying the Higher Education Tuition Protection Director of the details of a default at subsection 166-15(3) of the Act. The sharing of this information enables the Higher Education Tuition Protection Director to identify suitable replacement courses and to offer affected students the option of continuing their studies at another higher education provider. The Higher Education Tuition Protection Director is a Commonwealth officer, thus the scope of the existing provisions at Division 179 of the Act, that deal with the use and disclosure of personal information collected under the Act, apply.

These measures augment the right to privacy for students as they place important further protective limitations around the authorised use and dissemination of their contact information under the Act and the Guidelines, namely by imposing the strict requirement that there be express consent for contact from a provider to occur as well as including specifications around the provision of express consent. The management of students’ personal information also remains subject to existing safeguards under the privacy legislation and the Act which continue to ensure the lawful collection, storage, record keeping, access, use and disclosure of personal information.

**Conclusion**

The Guidelines are compatible with human rights because they support the rights to education, an effective remedy, a fair hearing, and privacy.

**Minister for Education, The Hon Jason Clare MP**

**HIGHER EDUCATION PROVIDER GUIDELINES 2023**

## EXPLANATION OF PROVISIONS

*Chapter 1 – Preliminary*

**Section 1: Name**

1. This section specifies the name of the instrument as the *Higher Education Provider Guidelines 2023* (‘the Guidelines’).

**Section 2: Commencement**

1. This section specifies that the Guidelines commence on the day after registration on the Federal Register of Legislation.

**Section 3: Authority**

1. This section provides that the Guidelines are made by the Minister under section 238‑10 of the *Higher Education Support Act 2003* (‘the Act’).

**Section 4: Definitions**

1. This section provides definitions for certain expressions used in the Guidelines, and notes that a number of expressions used in the Guidelines are already defined in Schedule 1 to the Act.

**Section 5: Schedules**

1. This section provides that the instrument that is specified in the Schedule (the *Higher Education Provider Guidelines 2012*) is repealed.

*Chapter 2 – The tuition protection requirements*

**Section 6: Overview**

1. This section specifies the tuition protection requirements for the purposes of paragraph 16-30(b) of the Act. In accordance with section 16-30 of the Act, the tuition protection requirements are the requirements set out in Part 5‑1A of the Act and this chapter of the Guidelines.
2. The note to this section explains that the Minister must be satisfied that a body will meet the tuition protection requirements (if applicable) in order to be approved as a higher education provider under paragraph 16-25(1)(c) of the Act.
3. The tuition protection requirements specified in this Chapter of the Guidelines support the work of the Higher Education Tuition Protection Director as part of the Tuition Protection Service (TPS). The TPS is sector funded and supported by the Department of Education. Higher education providers are automatically covered by the TPS. There is no need to register for the TPS. Providers pay annual TPS levies commensurate to their size and risk.
4. The TPS protects higher education students at private education providers when their provider defaults, whether the students pay their tuition fees up-front or use a HELP loan. A provider defaults when they stop offering a course or unit of study, or fail to start a course or unit of study with enrolled students.
5. The TPS helps higher education students to either continue their studies with a replacement provider in an equivalent or similar course, or receive a refund of their tuition fees paid up-front and/or receive a re-credit of their Higher Education Loan Program (HELP) balance for parts of the course that the student commenced but could not complete due to the provider default.
6. While most universities, TAFEs and Government funded providers are exempt from the tuition protection requirements, this does not prevent those providers from enrolling affected students as replacement providers.

**Section 7: Application of tuition protection requirements**

1. This section is made for the purposes of paragraph 166-5(1)(b) of the Act to prescribe the kind of providers to whom Part 5-1A of the Act does not apply, which includes Commonwealth, State and Territory owned higher education providers.

**Section 8: Notice of amount of HELP tuition protection levy**

1. Subsection 8(1) sets out, for the purposes of paragraphs 19-66A(3)(a) and (b) of the Act, the matters which the Higher Education Tuition Protection Director must include in a written notice to each higher education provider who is liable to pay the HELP tuition protection levy.
2. Subsection 8(2) clarifies that even if the Higher Education Tuition Protection Director does not give a provider a notice in accordance with subsection (1), the provider is still liable to pay the HELP tuition protection levy. The notes under subsection (2) outline that the HELP tuition protection levy is imposed on a higher education provider to whom Part 5-1A of the Act applies and a provider is required to pay the HELP tuition protection levy when it is due and payable.
3. Subsection 8(3) explains that a notice under subsection 8(1) does not need to be given to the higher education provider if the provider’s liability to pay the HELP tuition protection levy is waived under section 10.

**Section 9: Overdue notice**

1. Subsection 9(1) provides that, for the purposes of paragraph 19-66A(3)(a) of the Act, the Higher Education Tuition Protection Director may give a written overdue notice to the higher education provider to comply with a notice issued under subsection 8(1) after the date the HELP tuition protection levy is due and payable.
2. Subsection 9(2) specifies the matters the overdue notice must include.

**Section 10: Waiver**

1. This section provides that, for the purposes of paragraph 19-66A(3)(f) of the Act, the liability to pay the HELP tuition protection levy is waived if prior to the time the Higher Education Tuition Protection Director issues a notice under subsection 8(1), the higher education provider’s approval is revoked under the Act, or the provider’s registration is cancelled under the *Tertiary Education Quality and Standards Agency Act 2011* or the provider is no longer in operation.
2. The note to this section provides that liability to pay the HELP tuition protection levy was waived for all higher education providers for the calendar years 2020 and 2021.

**Section 11: Internal review of notice issued under subsection 8(1)**

1. This section sets out, for the purposes of paragraph 19-66A(3)(g) of the Act, the process for internal review of a notice issued under subsection 8(1).
2. Subsection 11(1) provides that a higher education provider may request the Higher Education Tuition Protection Director to reconsider a notice issued under subsection 8(1) in relation to the determination of any components of the HELP tuition protection levy (**decision**).
3. Subsection 11(2) provides that the request by a higher education provider must be in writing and given to the Higher Education Tuition Protection Director within 14 days after the day on which the provider received the notice.
4. Subsection 11(3) provides that after receiving the provider’s request, the Higher Education Tuition Protection Director must reconsider the decision and confirm the decision, or vary the decision, or set the decision aside and substitute a new decision.
5. Subsection 11(4) provides that the Higher Education Tuition Protection Director must ensure written notice of the Higher Education Protection Director’s decision under subsection 11(3) (**internal review decision**) is given to the higher education provider.
6. Subsection 11(5) provides that notice of the internal review decision must be given within 7 days, contain a statement of the reasons for the internal review decision and, where the decision is varied, or set aside and substituted, also include a new notice under subsection 8(1) with a due date of the HELP tuition protection levy at least 30 days after the date the provider is notified of the internal review decision.
7. Subsection 11(6) provides that, for the purposes of paragraph 19-66A(3)(g) of the Act, a higher education provider may make an application to the Administrative Appeals Tribunal for the review of the internal review decision. This allows a provider to apply for independent merits review at the Administrative Appeals Tribunal of the Higher Education Tuition Protection Director’s internal review decision.

**Section 12: When a higher education provider defaults in relation to a student**

1. Subsection 12(1) sets out, for the purposes of subsection 166-10(3) of the Act, circumstances where a higher education provider defaults in relation to a student. A provider defaults where:

* the student is enrolled in a course of study with that provider and is not enrolled in any units of study within that course; and
* the provider fails to commence the course on the day the course was scheduled to start or ceases to provide the course on a day after the course starts but before it is completed; and
* unless subsection 12(2) applies in relation to the student, either:
  + the student was previously enrolled in one or more units of study for that course and the census date for each of those units of study was 24 months or less before the date on which the provider fails to commence the course or ceases to provide the course; or
  + the student was not enrolled in any prior units of study within that course and the date on which the student enrolled in the course was 24 months or less before the date on which the provider fails to commence the course or ceases to provide the course.

1. Subsection 12(2) sets out exceptions to a provider default in relation to a student where:

* the student was unable to enrol in any units of study in the applicable 24 month period referred to in paragraph 12(1)(c) because of the student’s personal circumstances, including but not limited to the student’s medical, financial or employment circumstances; or
* the student was unable to enrol in any units of study in the applicable 24 month period referred in paragraph 12(1)(c) because of the circumstances of the student’s family, including but not limited to the family’s medical, financial or employment circumstances.

**Section 13: Notifying the Higher Education Tuition Protection Director of the details of the default**

1. Subsection 13(1) sets out, for the purposes of paragraph 166-15(3)(b) of the Act, additional information on the details of the default that a higher education provider must notify the Higher Education Tuition Protection Director about in a written notice given under subsection 166-15(3) of the Act.
2. Subsection 13(2) provides that, for the purposes of subsection 166-15(5) of the Act, the notice given to the Higher Education Tuition Protection Director under subsection 166-15(2) of the Act must include information about the number of students in relation to whom the higher education provider has defaulted.
3. Subsection 13(3) provides that the information required under subsection 166-15(3) of the Act must be given to the Higher Education Tuition Protection Director in a manner and form approved by the Director.

**Section 14: Requirements of notice to student**

1. Subsection 14(1) specifies the information a higher education provider must include in a written notice of default to students under section 166-20(3) of the Act.
2. Subsection 14(2) specifies how the provider must send the notice to the student:

* to the student’s personal email address as advised by the student;
* to the student’s postal address as advised by the student; or
* to the student by another method agreed to by the student.

**Section 15: Providers to notify of outcome of discharge of obligations**

1. This section provides, for the purposes of subsection 166-26A(3) of the Act, that the higher education provider must include in its written notice to the Higher Education Tuition Protection Director evidence of the arrangement between the student and replacement provider, including any payment arrangements relating to tuition fees, if the provider arranged a replacement unit or replacement course.

**Section 16: Payments in connection with tuition protection**

1. Subsection 16(1) provides that, for the purposes of paragraph 167-10(1)(a) of the Act, if a student accepts an offer of a replacement unit or replacement course, the Higher Education Tuition Protection Director must ensure payments of such amounts that the Director considers appropriate is made to the replacement provider or to another person in order to facilitate a student’s placement in a replacement unit or replacement course.
2. Subsection 16(2) provides that in determining whether to make a payment, and the amount of such a payment, the Higher Education Tuition Protection Director must have regard to the sustainability of the Higher Education Tuition Protection Fund and may have regard to any other matters the Director considers relevant.

**Section 17: Additional matters for notice by the Higher Education Tuition Protection Director where suitable replacement course available**

1. Subsection 17(1) provides that, for the purposes of paragraph 166-26B(4)(g) of the Act, the Higher Education Tuition Protection Director must include in its written notice to the student a statement that, if the student elects to have an amount equal to the amounts of FEE-HELP assistance or HECS-HELP assistance that the student received for the affected unit re-credited to the student’s HELP balance, the student must notify the Director in writing within the period specified in subsection (2).
2. Subsection 17(2) specifies that the period is within 30 days after the Director gives notice under section 166-26B(4) of the Act, or, if the Director considers that exceptional circumstances apply, any shorter or longer period (not exceeding   
   12 months) determined in writing by the Director.

**Section 18: Other tuition protection requirements – special circumstances**

1. Subsection 18(1) sets out, for the purposes of subsection 36-20(4) of the Act, the amount that the defaulting provider is to pay to the person if a higher education provider determines that section 36-20 of the Act applies to a person (i.e. amongst other requirements, is satisfied that special circumstances apply to the person under section 36-21 of the Act) and the person enrolled in the unit as a replacement unit, then the defaulting provider must:

* pay the person an amount equal to the payment, or sum of the payments, that the person made in relation to their student contribution amount for the affected unit; and
* pay to the Commonwealth an amount equal to any HECS-HELP assistance to which the person was entitled to for the affected unit.

1. Subsection 18(2) provides that, if the defaulting provider is unable to repay the person for the purposes of paragraph (1)(a), the Higher Education Tuition Protection Director must ensure the person is paid an amount equal to the payment, or sum of the payments, that the person made in relation to their student contribution amount for the affected unit.
2. Subsection 18(3) provides that if the Higher Education Tuition Protection Director makes a payment under subsection (2), the defaulting provider must repay that amount to the Commonwealth for the purposes of the Higher Education Tuition Protection Fund.
3. Subsection 18(4) sets out the tuition protection requirements for the purposes of subsection 110-5(1B) of the Act to provide that where the circumstances at subsection 110-5(1A) of the Act apply, then the defaulting provider must pay to the Commonwealth an amount equal to any FEE-HELP assistance to which the person was entitled to for the affected unit which the replacement unit replaces.

*Chapter 3 – Higher education provider application fee*

**Section 19: Higher education provider application fee**

1. The table in this section sets out, for the purposes of paragraph 16-40(2)(c) of the Act, the amount of the application fee that must accompany a body corporate’s application to be approved as a higher education provider, which depends on the year in which the application is made.

*Chapter 4 – Grievance and review procedures*

**Section 20: Requirements for grievance procedures**

1. Subsection 20(1) provides that, for the purposes of paragraphs 19-45(1)(a) and (b) and subsection 19-45(2) of the Act, a higher education provider, other than a Table A provider, must have a grievance procedure that meets the requirements specified in subsection (2) to ensure effective and fair handling of complaints from students and persons seeking enrolment relating to non-academic matters, and from students relating to academic matters.
2. Subsection 20(2) sets out the necessary elements that must be included in the grievance procedures.
3. Subsection 20(3) lists other requirements for providers in formulating and implementing grievance procedures such as a mechanism for implementing the grievance procedures, general and specific fairness provisions, the communication of grievance procedures to the public and staff, and record keeping requirements.
4. Subsection 20(4) requires that the grievance procedures cover all students or people seeking to enrol regardless of the location at which the grievance arose, the student’s place of residence or mode of study.
5. Subsection 20(5) provides that the procedures set out in the grievance procedures document do not replace or modify procedures or any other responsibilities that may arise under other higher education provider policies or under statute or any other law.

**Section 21: Requirements for reviewing decisions of a higher education provider in relation to assistance under Chapter 3 of the Act**

1. Subsection 21(1) provides that, for the purposes of subparagraph 19-45(1)(c)(ii), subsection 19-45(3) and paragraph 19-45(4)(b) of the Act, a review officer of a higher education provider must follow the procedures and comply with this section and Division 209 of the Act when reviewing reviewable decisions made under Chapter 3 of the Act.
2. Subsection 21(2) requires the higher education provider to acknowledge, in writing, the receipt of an application for review and notify the applicant that the original decision is taken to be confirmed if the reviewer has not advised the applicant of a decision within 45 days of receiving the application for review.
3. Subsection 21(3) requires the review officer to inform the applicant of their right to appeal the decision to confirm, vary or set aside the reviewable decision under section 209-5 or 209-10 of the Act to the Administrative Appeals Tribunal and also requires the review officer to provide contact details of the closest Administrative Appeals Registry and the approximate cost of lodging the application.

*Chapter 5 – Requirements for student contribution amounts and tuition fees*

**Section 22: Period in which a higher education provider provides or proposes to provide a unit of study**

1. This section provides that, for the purposes of subsections 19-87(1), 19-90(1) and 19-95(1) of the Act, the period commences on the earliest enrolment date for the unit of study as determined by the higher education provider and ends on the completion date for the unit of study as determined by the provider.

**Section 23: Date by which, and manner by which, a higher education provider must publish the schedule of student contribution amounts for places and tuition fees for a particular period**

1. This section provides that, for the purposes of paragraph 19-95(2)(b) of the Act, a higher education provider must publish a schedule of student contribution amounts for places and tuition fees on the higher education provider’s website on or before the earliest enrolment date for the unit of study as determined by the provider.

**Section 24: Matters to which a provider must not have regard to when determining more than one student contribution amount or tuition fee**

1. This section sets out the matters which a higher education provider must not have regard to when determining a student contribution amount under subsection 19-87(2A) of the Act or a tuition fee under subsection 19-90(3) of the Act for a unit of study.

**Section 25: Varying a student contribution amount or tuition fee**

1. Subsection 25(1) provides that, for the purposes of paragraph 19-87(3)(a) and paragraph 19-90(4)(a) of the Act, a higher education provider may only vary a published student contribution amount or tuition fee if the variation occurs prior to the published census date for the unit of study, and:

* the variation does not disadvantage a student enrolled, or a person seeking to enrol; and
* the variation is necessary to correct the published student contribution amount or tuition fee due to administrative error or circumstances that did not apply at the time the student contribution amount or tuition fee was determined.

1. Subsection 25(2) provides that, without limiting the generality of paragraph 25(1)(a), a student will be disadvantaged by a variation that increases the student contribution amount or tuition fee.
2. Subsection 25(3) provides that, in relation to replacement schedules under subsection 19-95(3) to the Act, the method by which a higher education provider must withdraw the previous schedule, inform the Minister of the variation and give the Minister a replacement schedule incorporating the variation is by publishing the replacement schedule on the higher education provider’s website as soon as practicable after making that decision.

**Section 26: The form in which a higher education provider must give the Minister a schedule of student contribution amounts for places and tuition fees**

1. This section sets out, for the purposes of subsection 19-95(1) of the Act, the form in which a higher education provider must give a schedule of student contribution amounts and tuition fees to the Minister, that is, by publishing the schedule on the provider’s website.

*Chapter 6 – Fees in respect of overseas students*

**Section 27: Requirements for determining fees for overseas students**

1. This section sets out, for the purposes of paragraph 19-102(3)(d) of the Act, requirements for a higher education provider when determining fees for overseas students.

**Section 28: Circumstances in which the requirements for determining fees for overseas students do not apply**

1. Subsection 28(1) sets out an exemption to the requirements in section 27 for formal exchange students and particular categories of postgraduate research students:

* overseas students undertaking study in Australia as part of a formal exchange program; and
* overseas students undertaking study in Australia towards a research Masters degree or a research Doctoral degree who have been awarded a scholarship for that study on the basis of merit following a competitive application process.

1. Subsection 28(2) defines ‘formal exchange program’ for the purposes of paragraph 28(1)(a) as a program established under a formal agreement between an Australian higher education provider and an overseas higher education institution (‘overseas institution’) that provides for:

* students of the Australian higher education provider to undertake study at the overseas institution, where the study at the overseas institution contributes to the requirements of a course of study being undertaken by the students with the Australian higher education provider;
* students of the overseas institution to undertake study at the Australian higher education provider, where the study at the Australian higher education provider contributes to the requirements of a course of study being undertaken by the students with the overseas institution; and
* the exchange of students between the Australian higher education provider and the overseas institution to be reciprocal over time.

1. Subsection 28(3) requires that all students of the Australian higher education provider undertaking study in accordance with paragraph 28(2)(a) are charged student contribution amounts and tuition fees in accordance with the Act and are not charged fees at the overseas institution.
2. Subsection 28(4) requires that all students of the overseas institution undertaking study in accordance with paragraph 28(2)(b) are charged fees in accordance with the practices of that overseas institution and are not charged fees at the Australian higher education provider.

**Section 29: Minimum indicative course fees**

1. Subsection 29(1) sets out, for the purposes of paragraph 19-102(3)(d) of the Act and paragraph 27(1)(b), the minimum indicative course fees for 2023.
2. Subsection 29(2) also requires indexation of amounts in subsection 29(1) in accordance with the method set out in Division 198 of Chapter 5 of the Act.

*Chapter 7 – Fees for goods and services incidental to studies*

**Section 30: Fee of a kind that is incidental to studies that may be undertaken with a higher education provider**

1. This section sets out, for the purposes of paragraph 19-102(3)(f) of the Act, the categories of fees that are to be considered incidental to studies that may be undertaken with a higher education provider:

* it is a charge for a good or service that is not essential to the course of study;
* it is a charge for an alternative form, or alternative forms, of access to a good or service that is an essential component of the course of study but is otherwise made readily available at no additional fee by the higher education provider;
* it is a charge for an essential good or service that the student has the choice of acquiring from a supplier other than the higher education provider and is for:
  + equipment or items which become the physical property of the student and are not consumed during the course of study; or
  + food, transport and accommodation costs associated with the provision of field trips that form part of the course of study;
* it is a fine or a penalty, provided it is imposed by the higher education provider principally as a disincentive and not in order to raise revenue or cover administrative costs.

*Chapter 8 – Quality, accountability and other administrative requirements*

**Section 31: Overview**

1. This section explains that Chapter 8 specifies additional quality, accountability and other administrative requirements that apply to higher education providers.

**Section 32: Financial statements**

1. Subsection 32(1) provides that this section is made for the purpose of paragraph   
   19-10(2)(ab) of the Act and only applies to higher education providers approved under section 16-25 of the Act.
2. Subsection 32(2) sets out the requirements for the financial statement for the annual financing reporting period if the higher education provider is a for-profit private sector entity.
3. Subsection 32(3) sets out the requirements for the financial statement for the annual financing reporting period if the higher education provider is a not-for-profit private sector entity and had total revenue of $10 million or more for the previous annual financial reporting period.
4. Subsection 32(4) set out the requirements for the financial statement for the annual financing reporting period if the higher education provider is a not for-profit private sector entity and had total revenue of less than $10 million.
5. Subsection 32(5) sets out the information that the financial statement for the annual financial reporting period must be accompanied by if the higher education provider is part of a consolidated entity.

**Section 33: Financial viability**

1. This section sets out, for the purposes of paragraph 19‑12(b) of the Act, the matters the Minister must have regard to when determining whether a higher education provider is financially viable, and likely to remain so.

**Section 34: Offering certain inducements**

1. This section provides, for the purposes of subsection 19-36A(2) of the Act, the specified benefits that subsection 19-36A(1) of the Act does not apply to:

* the content and quality of the unit of study;
* the amount of the tuition fees for the unit of study;
* the availability of FEE‑HELP assistance and HECS-HELP assistance for the unit of study;
* marketing merchandise up to the total value of $30 per person;
* the offering of money in the form of scholarships or bursaries.

**Section 35: Use of third party contact lists**

1. Subsection 35(1) provides that, for the purposes of subsection 19-36C(3) of the Act, subsection 19‑36C(2) of the Act does not apply if the student has given express consent to being contacted by the higher education provider.
2. Subsection 35(2) sets out, subject to subsection 35(3), the circumstances that the student is taken to have provided express consent.
3. Subsection 35(3) sets out that the student is taken to have provided express consent if the student initiates contact with a third party for the purpose of:

(a) giving information relating to education and training to the provider; or

(b) obtaining information relating to higher education from the provider.

**Section 36: Keeping records**

1. Subsection 36(1) sets out, for the purposes of section 19‑72 of the Act, that a higher education provider must keep records relating to:

* how the provider assessed a student as academically suited to undertake a unit of study before enrolling the student in the unit of study being undertaken as part of a course of study; and
* if the provider is satisfied that special circumstances apply to a student for the purposes of section 104-1A of the Act—the grounds on which the provider is so satisfied; and
* if the provider determines that undertaking a unit will not impose an unreasonable study load on a person for the purposes of subsections 36-12(2) and 104-1AA(2)—the grounds on which the provider made such a determination.

1. Note 1 to subsection 36(1) explains that the requirement to undertake the assessment mentioned in paragraph 36(1)(a) is imposed under section 19‑42 of the Act.
2. Note 2 to subsection 36(1) explains that section 104-30 of the Act provides for when special circumstances apply to a person.
3. Subsection 36(2) provides that the records must be kept in a manner so that they can be readily provided upon request to the student concerned, the Minister or the Secretary.
4. Subsection 36(3) sets out the period that a record is required to be kept by a higher education provider, which must be for the period of 7 years starting from when the record was made by the provider.

**Section 37: Publishing information**

1. Subsection 37(1) sets out, for the purposes of section 19-73 of the Act, the kinds of information that a higher education provider must publish in relation to each unit of study offered by the provider.
2. Subsection 37(2) sets out that the information must be published by the provider prominently on its website, and in a manner that is easily accessible without provision of login or contact information.
3. Subsection 37(3) provides that the information must be published by the provider before the earliest day for enrolment in the unit of study and must remain published at least until the end of the period in which the unit can be undertaken.

**Section 38: Withdrawal from units of study**

1. Subsection 38(1) provides that, for the purposes of section 169-17 of the Act, a higher education provider must have processes and procedures for dealing with student withdrawal from a unit of study or a course of study and a procedure for a student to enrol in a unit of study that was part of a course of study with the provider in circumstances where the student had earlier withdrawn from a unit of study of that course undertaken with the provider.
2. Subsection 38(2) provides that the procedures for a student to withdraw from a unit of study or a course of study, on or before a census date for the unit or course, must not involve financial, administrative or other barriers to the withdrawal.Barriers to withdrawal may include charging a fee for withdrawal from the unit on or before a census date or making it mandatory for a student to submit an application for a refund of their student contribution amount or tuition fees paid upfront if the student withdraws on or before a census date. The student withdrawing on or before the census date should be sufficient to trigger an automatic refund of the relevant fees.
3. Subsection 38(3) provides that if a student withdraws from a unit of study or a course of study, the provider must not, after the withdrawal, enrol the student in a unit of study or course of study without the written permission of the student (which must be given after the withdrawal).

*Chapter 9 – Determining whether a student is a genuine student*

**Section 39: Genuine student**

1. This section sets out, for the purposes of subsections 36-5(6) and 104-1(1AB) of the Act, the matters that the Secretary must take into account in determining whether a student undertaking a unit of study provided by a higher education provider is a genuine student:

* whether the student is reasonably engaged in the course;
* whether the student has been provided with information about the requirements for the course, and the cost and duration of the course;
* whether the student has satisfied course requirements for the course or participated in assessment activities for the course;
* if the course is an online course—the number of occasions on which the student has logged in to the course is not insignificant;
* whether the student has provided up to date contact details that enable the Department to contact the student to verify the student’s enrolment in the course; and
* if the student is enrolled in another course—the number of the enrolments and associated course loads would not make successful completion of a course by the student impossible or highly improbable.

*Chapter 10 – Collection and recovery of higher education provider charge*

**Section 40: Overview**

1. This section provides an overview of the Chapter, which is to specify various matters in relation to the collection and recovery of higher education provider charge for the purposes of subsection 19-66(2) of the Act.
2. The note to this section explains that higher education provider charge is imposed by the *Higher Education Support (Charges) Act 2019*. The charge is imposed on a body, for a year starting on or after 1 January 2020, if the body is a higher education provider (within the same meaning of the Act) at any time during that year.

**Section 41: Notice of amount of higher education provider charge**

1. Subsection 41(1) sets out, for the purposes of paragraphs 19-66(2)(a), (b) and (h) of the Act, the matters to be included in a written notice issued by the Secretary to each higher education provider who is liable to pay the higher education provider charge:

* the year to which the charge relates;
* the total amount of the provider’s charge;
* an explanation of how the provider’s charge was calculated;
* the day by which the charge is due and payable by the provider, which must be at least 30 days after the day the notice is given;
* the method or methods by which the provider must pay the charge; and
* information about the consequences of a late payment.

1. The note to subsection 41(1) clarifies that a failure to give the notice to a higher education provider does not affect the liability of the provider to pay the charge.
2. Subsection 41(2) provides that the Secretary does not need to give a notice if the liability to pay the charge is waived in accordance with section 45 or if the amount of higher education charge for a higher education provider for the relevant year is nil.

**Section 42: When higher education provider charge due for payment in the event of revocation of approval**

1. This section provides that, for the purposes of paragraph 19-66(2)(b) of the Act, where a higher education provider’s approval is revoked under Division 22 of   
   Part 2-1 of the Act, the amount of the charge may be due and payable on a day after the date that revocation takes effect and either before or after the end of the year. This makes clear that the revocation of a provider’s approval does not discharge a provider’s liability to pay higher education provider charge for a year.

**Section 43: Extension notice**

1. This section provides that, for the purposes of paragraphs 19-66(2)(c) of the Act, the Secretary may issue a written extension notice to a higher education provider that specifies a day that is later than the day specified in subsection 41(1) as the day on which higher education provider charge is due and payable. The extension notice has effect according to its terms.

**Section 44: Late payment penalty**

1. Subsection 44(1) specifies, for the purposes of paragraph 19-66(2)(d) of the Act, the formula for calculating the penalty for late payment of the charge payable by a higher education provider if it remains unpaid after the day on which it is due and payable.
2. Subsection 44(2) clarifies that a late payment penalty that a provider is liable to pay is due and payable immediately.

**Section 45: Waiver of higher education provider charge and late payment penalty**

1. Subsection 45(1) provides that, for the purposes of paragraph 19-66(2)(f) of the Act, the Secretary may, on behalf of the Commonwealth, waive the payment of the whole or a part of the higher education provider charge or late payment penalty (or both) that is payable by a higher education provider.
2. Subsection 45(2) provides that the Secretary may do so on his or her initiative or on written application by the relevant higher education provider.

**Section 46: Recovery of higher education provider charge and late payment penalty**

1. This section provides, for the purposes of paragraph 19-66(2)(f) and (h) of the Act, that the amount of higher education provider charge and late payment penalty may be recovered by the Secretary, on behalf of the Commonwealth, from a higher education provider as debts due to the Commonwealth.

**Section 47: Refund of higher education provider charge and late payment penalty**

1. Subsection 47(1) provides, for the purposes of paragraph 19-66(2)(f) of the Act, the Secretary may refund the whole or a part of the higher education provider charge or late payment penalty (or both) if the Secretary is satisfied that special or unusual circumstances exist that cause the charge or late payment penalty to be unreasonable or inequitable.
2. Subsection 47(2) provides that the Secretary may do so on his or her initiative or on written application by the relevant higher education provider.

**Section 48: Reviewable decisions**

1. This section provides that, for the purposes of paragraph 19-66(2)(g) of the Act, a reviewable decision is:

* a decision to issue a notice under subsection 41(1) in relation to the determination of the higher education provider charge;
* a decision not to waive the payment of the whole or a part of an amount of the charge or late payment penalty under subsection 45(1) following an application by a higher education provider;
* a decision not to refund the payment of the whole or a part of an amount of the charge or late payment penalty under subsection 47(1) following an application by a higher education provider.

**Section 49: Internal review**

1. Subsection 49(1) provides that, for the purposes of paragraph 19-66(2)(g) of the Act, a higher education provider may request the Secretary to reconsider a reviewable decision.
2. Subsection 49(2) requires that a higher education provider’s request for review be made in writing and be given to the Secretary within 14 days, or such longer period as the Secretary allows, after the day on which the provider received the notice under subsection 41(1) or notice of the decision under subsections 45(1) or 47(1).
3. Subsection 49(3) provides that, after receiving the request, the Secretary must reconsider the decision and confirm or vary the decision, or set the decision aside and substitute a new decision.
4. Subsection 49(4) requires the Secretary to give notice of his or her decision under subsection 49(3) (**internal review decision**). This requirement is not intended to limit the obligation imposed on the Secretary under section 27A of the *Administrative Appeals Tribunal Act 1975*.
5. Subsection 49(5) requires that the notice of the internal review decision must:

* be given within 14 days after the internal review decision is made;
* contain a statement of reasons for the internal review decision; and
* include a new notice under subsection 41(1) where the reviewable decision is varied or set aside and a new decision substituted, with a due date at least 30 days after the date the provider is notified of the internal review decision.

1. Subsection 49(6) provides that a higher education provider may make an application to the Administrative Appeals Tribunal for the review of a decision that has been confirmed, varied or set aside under subsection 49(3). This allows a provider to apply for external merits review of the Secretary’s internal review decision.

*Chapter 11 – Application, saving and transitional provisions*

**Section 50: Things done under the *Higher Education Provider Guidelines 2012***

1. This section clarifies that things done under the *Higher Education Provider Guidelines 2012* should continue to be valid and have effect as though they were done under this instrument. In particular, subsection 50(1) provides that if a thing was done for a particular purpose under the *Higher Education Provider Guidelines 2012* as in force immediately before that instrument was repealed, and the thing could be done for that purpose under this instrument, the thing has effect as if it had been done under this instrument.

*Schedule 1 – Repeals*

**Section 1: The whole of the instrument**

1. This section repeals the *Higher Education Provider Guidelines 2012*.