

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Education

Australian Education Act 2013

Australian Education Regulations 2023

Authority

Subsection 130(1) of the *Australian Education Act 2013* (the Act) empowers the Governor-General to make regulations prescribing matters required or permitted by the Act to be prescribed by the regulations, or necessary or convenient to be prescribed for carrying out or giving effect to 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.

Subsection 50(1) of the *Legislation Act 2003* repeals a legislative instrument on the first 1 April or 1 October falling on or after the tenth anniversary of registration of the instrument, unless the instrument was registered on 1 January 2005. As the *Australian Education Regulation 2013* ('the 2013 Regulations') was registered on 31 July 2013, that instrument will sunset on 1 October 2023. This instrument, the *Australian Education Regulations 2023* ('the Regulations') repeals and replaces the 2013 Regulations.

Legislative background

The Act is the principal legislation by which the Australian Government provides Commonwealth financial assistance for schools, and commenced on 1 January 2014.

Financial assistance under the Act is provided to states and territories for distribution to approved authorities for government and non-government schools, block grant authorities, capital grants authorities and non-government representative bodies. Entities approved to receive Commonwealth financial assistance under the Act, including states and territories in their capacity as approved authorities for government schools, must meet and maintain the conditions of approval outlined in the Act.

The 2013 Regulations support the operation of the Act.

Purpose and operation

The Regulations are made in substantively the same form as the 2013 Regulations. The purpose of the Regulations is to prescribe a range of matters concerning:

- matters related to grants of financial assistance to States and Territories under the Act;

- matters related to Commonwealth grants of recurrent funding for schools to States and Territories;
- matters related to Commonwealth grants of capital and other funding for schools to States and Territories;
- requirements on approved authorities, block grant authorities and non-government representative bodies;
- ongoing conditions on those authorities and bodies, including requirements to provide information;
- matters related to actions the Minister may take in relation to non-compliance with the Act or regulations;
- circumstances in which the Minister may determine amounts of ‘prescribed circumstances’ funding; and
- other matters relevant to carrying out or giving effect to the Act.

The matters prescribed by the Regulations are materially the same as the 2013 Regulations, with some minor exceptions, and with some modernisation of drafting and other necessary updates arising from the repeal and remaking of the 2013 Regulations.

In particular:

- the drafting of the Regulations has been modernised in relation to the consistent use of certain expressions;
- updates have been made to web addresses (and the year in which they could be accessed);
- some provisions now refer to the 2013 Regulations (for example, sections 19A and 19B) where necessary to ensure they operate effectively;
- minor grammatical changes have been made to some provisions;
- certain provisions of the 2013 Regulations which stated that particular instruments were not legislative instruments have not been remade;
- section 12 has been re-drafted to better mirror the language of the enabling provision in the Act;
- the operation of subsection 65(2) has been clarified to put beyond doubt that disclosures under that provision may be made to ‘persons or bodies’; and
- transitional and application provisions have been included to deal with the application of the Regulations to 2023 and later years, and to ensure continuity with the 2013 Regulations.

Preconditions

Subsection 130(5) of the Act requires that before the Governor-General makes regulations for the purposes of subsection 22(1), section 22A or section 24 of the Act, or a regulation that will affect an approved authority for a government school for the purpose of section 77 or 78 of the Act, the Minister must consult the Ministerial Council (i.e. the Education Ministers Meeting) and have regard to any relevant decisions of that body.

This requirement affects a range of provisions in the Regulations. The Minister has consulted with the Ministerial Council in relation to a draft of the Regulations, and has had regard to decisions of the Ministerial Council.

Subsection 15(2) of the Act requires that, before the Governor-General makes regulations for the purpose of prescribing levels of education for a State or Territory, the Minister must have regard to arrangements for providing education at government schools located in the State or Territory.

This requirement affects sections 7 and 9 of the Regulations. The Minister has considered the arrangements for providing education at government schools in every State and Territory in developing those sections. These provisions do not substitute for State and Territory legislation establishing the years of primary and secondary education. Rather, these provisions specify the levels of education which constitute primary and secondary education for the purposes of the Act.

Subsection 68(4) of the Act requires that, before the Governor-General makes regulations for the purposes of subsection 68(3), the Minister must have regard to indexes of building prices and wage costs prescribed by the Regulations and student enrolment in non-government schools.

This requirement affects section 24A of the Regulations. The Minister has considered student enrolment in non-government schools, and considered the index of building prices and the index of wage costs as prescribed by section 24B of the 2013 Regulations.

Impact Analysis

The Office of Impact Analysis (OIA) has been consulted and advised the instrument in its operation has a more than minor impact (ID: OIA23-04785). The Commonwealth has self-assessed that the instrument is operating effectively and supports current funding policy arrangements, in lieu of an Impact Analysis. This assessment was based on the continued operation of the Regulations over 2013-2023, which has been subject to multiple amendments and consultation with states and territories and national non-government schooling sector representative bodies. The certification of the assessment will be published on OIA's website.

Commencement

The Regulations will commence the day after registration.

Consultation

The Minister for Education consulted on an exposure draft of the proposed Regulations with stakeholders, including all State and Territory Education Ministers through the Education Ministers Meeting and the Australian Education Senior Officials Committee. Stakeholders did not raise concerns with the remaking of the regulations, and noted it supports current funding policy. The feedback that was given by the stakeholders was not material to the operation of the regulations and has been considered and adopted by the department where appropriate, or further explanation provided to stakeholders.

Statement of Compatibility with Human Rights

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

Australian Education Regulations 2023

The *Australian Education Regulations 2023* (the Regulations) 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

The *Australian Education Act 2013* (the Act) is the principal legislation by which the Australian Government provides Commonwealth financial assistance for schools.

The purpose of the Regulations is to prescribe a range of matters concerning:

- conditions of grants of financial assistance to States and Territories under the Act;
- matters related to Commonwealth grants of recurrent funding for schools to States and Territories;
- matters related to Commonwealth grants of capital and other funding for schools to States and Territories;
- requirements on approved authorities, block grant authorities and non-government representative bodies;
- ongoing conditions on those authorities and bodies, including requirements to provide information;
- matters related to actions the Minister may take in relation to non-compliance with the Act or Regulations;
- circumstances in which the Minister may determine amounts of ‘prescribed circumstances’ funding; and
- other matters relevant to carrying out or giving effect to the Act.

The matters prescribed by the Regulations are materially the same as the *Australian Education Regulation 2013* (‘the 2013 Regulations’), with some minor exceptions, and with some modernisation of drafting and other necessary updates arising from the repeal and remaking of the 2013 Regulations.

In particular:

- the drafting of the Regulations has been modernised in relation to the consistent use of certain expressions;
- updates have been made to web addresses (and the year in which they could be accessed);
- some provisions now refer to the 2013 Regulations (for example, sections 19A and 19B) where necessary to ensure they operate effectively;
- minor grammatical changes have been made to some provisions;
- certain provisions of the 2013 Regulations which stated that particular instruments were not legislative instruments have not been remade;

- section 12 has been re-drafted to better mirror the language of the enabling provision in the Act;
- the operation of subsection 65(2) has been clarified to put beyond doubt that disclosures under that provision may be made to ‘persons or bodies’; and
- transitional and application provisions have been included to deal with the application of the Regulations to 2023 and later years, and to ensure continuity with the 2013 Regulations.

Human rights implications

The Regulations engage the following human rights:

- the right to education – Article 13 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and Articles 28 and 29 of the *Convention on the Rights of the Child* (CRC) , Article 5(e)(v) and 7 of the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) as well as Article 10 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW),
- the right of equality and non-discrimination – Articles 2 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR), Article 2(2) of the ICESCR and Article 2 of the CRC,
- the rights of persons with disabilities – Articles 9 and 24 of the *Convention on the Rights of Persons with Disabilities* (CRPD), and
- the right to privacy – Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 16 of the CRC.

Right to education

The Regulations engage and promote the right to education. The right to education is contained in Article 13 of the ICESCR, Articles 28 and 29 of the CRC, Article 5(e)(v) and 7 of CERD, Articles 10 of the CEDAW and Article 24 of the CRPD.

Article 13 of the ICESCR recognises the right of everyone to education, which is directed towards the full development of the human personality and the sense of its dignity and to enable all persons to participate effectively in society. It also recognises the liberty of parents and legal guardians to choose non-government schools for their children, provided those schools conform to the minimum educational standards as set out and approved by the Australian Government. The right to education recognises the important personal, societal, economic and intellectual benefits of education. It requires that education be available, safe, and appropriately resourced, dependent on the needs of the child. The United Nations Committee on Economic, Social and Cultural Rights has stated that education should be available, ‘accessible to all, especially the most vulnerable groups’ without discrimination on any of the prohibited grounds, physically accessible and economically accessible (General Comment 13). The right to education is promoted through the needs-based system of education funding being supported and given effect to by the Regulations.

In particular, the Regulations provide for matters relevant to providing grants for recurrent funding for schools (Part 3 of the Regulations), matters relevant to grants for capital funding, special circumstances funding and funding for non-government representative bodies (Part 4 of the Regulations). The Regulations also set out the conditions of approval of approved

authorities which are the entities provided with recurrent funding for the purposes of providing school education (Part 5 of the Regulations). The Regulations also provide for conditions of approval for block grant authorities and non-government representative bodies which also have responsibilities for distribution of funds relating to school education (Part 5 of the Regulations).

The provisions in the Regulations promote the right to education by providing the necessary framework to give effect to the funding arrangements for school education under the Act.

Rights of equality and non-discrimination

The Regulations engage the right to equality and non-discrimination. This right is protected in a range of international human rights treaties, including Articles 2 and 26 of the ICCPR, Article 2(2) of the ICESCR and Article 2 of the CRC.

The right to equality and non-discrimination provides that all people are born equal and require the same respect and treatment, regardless of factors such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or birth. The rights recognise that, to achieve equality, it may be necessary to treat people differently, for example, due to age, place of residence within a country or disability.

The right to equality and non-discrimination is promoted within the measures contained in the Regulations. The Regulations set out the conditions on which financial assistance is provided to States and Territories. Under the Regulations, States and Territories will be required to implement the national policy initiatives for school education as a condition of funding. Amongst the requirements, a State or Territory must ensure that there is an improvement in the provision of school education to meet nationally agreed outcomes, objectives and targets, including for students with particular needs. In addition, policies and programs must be implemented to ensure that all children are engaged in and benefit from schooling which supports the most disadvantaged students. The Regulations also set out a range of matters in Part 3, Division 1 which are related to the funding formula prescribed in the Act, which will ensure that funding is provided to States and Territories in respect of students through fair, transparent and needs-based arrangements.

The measures in the Regulations have a positive effect in promoting the right to equality and non-discrimination, as the Regulations support the funding of school education on a needs basis to ensure that all students, regardless of where they live, their socioeconomic background, social origin, disability, language or disability, to have fair and equitable access to education.

Rights of persons with disabilities

The Regulations engage Articles 9 and 24 of the CRPD. Article 9 recognises the right of persons with disabilities to participate fully in all aspects of life, and Article 24 recognises the right of persons with disabilities to an inclusive education.

The Regulations will help ensure schools are appropriately resourced to provide school education to students with disability, better targeting funding to students' need. The Regulations provide for the *Nationally Consistent Collection of Data on School Students with Disability* (NCCD). A key aspect of the NCCD is determining the number of students who

are being provided with ‘a reasonable adjustment to access education because of disability’ and recording the level of that adjustment. This data allows school funding to more effectively provide for students with disability and promote their right to fully participate in education.

The Regulations prescribe disability loading percentages by level of educational adjustment identified in the NCCD and level of education to allow for funding to be provided at different rates based on students’ need. Calculating student with disability loadings by reference to disability loading percentages ensures that funding more accurately reflects the needs of the students at that particular school, and can be indexed aligned with the indexation of recurrent funding. This approach also recognises that students with disability have the right to an inclusive education. Disability loading percentages apply based on the level of education and the required adjustment, not the type of school.

This measure is compatible with the rights of persons with disabilities, and will promote the right of persons with disabilities to participate in education.

Right to privacy

The right to privacy is set out in Article 17 of the ICCPR and Article 16 of the CRC, which provides that no child shall be subjected to arbitrary or unlawful interference with his or her privacy.

The Regulations prescribe a limited number of purposes for which the Minister may use or disclose ‘school education information’ (which is information obtained under or for the purposes of the Act) for the purposes of section 125 of the Act. A note in subsection 125(1) of the Act makes it clear that a use or disclosure in accordance with the regulations constitutes an authorisation for the purposes of other laws, including the *Privacy Act 1988*. Although such information *may* include personal information, most information reporting requirements under the Regulations relate to aggregate information or require that individual students not be explicitly identified (see for example sections 48, 50 and 58A).

Although the Regulations largely do not alter what was prescribed by the 2013 Regulations, a small change has been made to confine disclosures of school education information by the Minister to State or Territory bodies responsible for school education to only be made ‘for the purposes of school education’.

Although the Regulations do provide, in section 39, for the access to premises and documents without consent, that provision allows the department to perform its regulatory role effectively to investigate and collect evidence from approved authorities to ensure they meet the eligibility requirements for funding under the Act.

For the reasons above, the right to privacy is protected as the Regulations provide for minimal levels of personal information to be collected under the Regulations. To the extent that the regulations do provide authority for the disclosure of personal information in accordance with Australian Privacy Principle 6.2(b) (that the disclosure is authorised by an Australian law), the authority that the Regulations provide and the parties to whom it can be disclosed is narrow.

This measure is compatible with the right to privacy.

Conclusion

The Regulations are compatible with human rights because they promote the right to education under the ICESCR and the UNCRC. The Regulations are compatible with the rights of persons with disabilities and will promote the right of persons with disabilities to participate in education. The Regulations are compatible with the right to privacy.

Jason Clare
Minister for Education

Detailed explanation of the provisions of the *Australian Education Regulations 2023*

Part 1 – Preliminary

Section 1 – Name

Section 1 provides that the title of the instrument is the *Australian Education Regulations 2023* (the Regulations).

Section 2 – Commencement

Section 2 provides that the Regulations commence on the day after registration on the Federal Register of Legislation.

Section 3 – Authority

Section 3 provides that the authority that the Regulations are made under is the *Australian Education Act 2013* (the Act).

Section 3A – Schedule 4

Section 3A gives effect to Schedule 4, which provides for the repeal of the *Australian Education Regulation 2013* (the 2013 Regulations).

Section 4 – Definitions

Section 4 is an interpretative provision which contains definitions of the terms and expressions used in the Regulations. A note at the beginning of the provision makes it clear that a number of expressions used in the Regulations are defined in the Act.

Subsection 130(4) of the Act permits the Regulations to provide in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or other writing as in force or existing from time to time. The Regulations define certain terms with reference to other written materials.

The definition of ***Australian Accounting Standards*** incorporates the accounting standards issued or adopted by the Australian Accounting Standards Board as existing from time to time. The Australian Accounting Standards can be viewed on the Board's website (<http://www.aasb.gov.au>).

The definition of ***Australian Auditing Standards*** incorporates the auditing standards issued or adopted by the Auditing and Assurance Standards Board as existing from time to time. The Australian Auditing Standards can be viewed on the Board's website (<http://www.auasb.gov.au>).

The definition of ***Australian Professional Standards for Teachers*** incorporates the standards of that name issued by the Australian Institute for Teaching and School

Leadership Limited and as existing from time to time. The standards can be viewed on Institute's website (<http://www.aitsl.edu.au>).

The definition of ***Australian Statistical Geography Standard*** incorporates the geographical framework of that name published by the Australian Bureau of Statistics, as existing from time to time. The Australian Statistical Geography Standard can be viewed on the Australian Bureau of Statistics' website (<http://www.abs.gov.au>).

The definition of ***Capital Grants Program Guidelines*** incorporates the *Capital Grants Program Guidelines* issued by the Department of Education, as existing from time to time. The guidelines may be found on the department's website (<http://www.education.gov.au>).

The definition of ***Choice and Affordability Fund Guidelines*** incorporates the *Choice and Affordability Fund Guidelines* issued by the Department of Education, as existing from time to time. The guidelines may be found on the department's website (<http://www.education.gov.au>).

The definition of ***Data Standards Manual: Student Background Characteristics*** incorporates the *Data Standards Manual: Student Background Characteristics* issued by Australian Curriculum, Assessment and Reporting Authority (ACARA), as existing from time to time. The Data Standards Manual: Student Background Characteristics can be viewed on ACARA's website (<http://www.acara.edu.au>).

The definition of ***DMI methodology document*** incorporates the *Direct Measure of Income Methodology Document* issued by the Department of Education, as existing from time to time. The guidelines may be found on the department's website (<http://www.education.gov.au>).

The definition of ***Local Schools Community Fund Guidelines*** incorporates the *Local Schools Community Fund Guidelines* issued by the Department of Education, as existing from time to time. The guidelines may be found on the department's website (<http://www.education.gov.au>).

The definition of ***Ministerial Council disability guidelines*** incorporates the guidelines for the Nationally Consistent Collection of Data on School Students with Disability approved by the Ministerial Council for the year and as existing from time to time. The guidelines may be found at <https://www.nccd.edu.au>.

The definition of ***NAPLAN Online Data Extract Dictionary*** incorporates the NAPLAN Online Data Extract Dictionary issued by ACARA, as existing from time to time. The NAPLAN Online Data Extract Dictionary can be viewed on ACARA's website (<http://www.acara.edu.au>).

The definition of ***Non-Government Reform Support Guidelines*** incorporates the *Non-government Reform Support Fund Guidelines* issued by the Department of Education, as existing from time to time. The guidelines may be found on the department's website (<http://www.education.gov.au>).

The definition of *NSSC Collection Manual* incorporates the National Schools Statistics Collection (NSSC) - Collection Manual issued by the Australian Bureau of Statistics as existing from time to time.

Section 5 – Meanings of *census day* and *census reference period*

Section 5 of the Regulations provides for the Minister to determine a non-government school's *census day*. Section 5 of the Regulations also define the school's *census reference period* by reference to its census day. In turn, determining a 'census day' enables approved bodies to meet certain obligations to provide information prescribed by the Regulations for the purposes of paragraph 77(2)(f) of the Act. There is no automatic consequence for the breach of these requirements, unless the Minister decides to take compliance action under the Act which would be reviewable as set out in section 118 of the Act. A determination under section 5 is not a reviewable decision because it is a preliminary or procedural step in the making of a substantive decision, which means it is not suitable for merits review (see paragraphs [4.3] – [4.4] of the Administrative Review Council's guidance *What decisions should be subject to merit review?*).

Subsection (2) provides that the Minister may determine, in writing, a school's census day for a year. Subsection (3) provides that the Minister must not determine a school's census day on a day that is less than 10 weeks before the census day determined, unless the Minister is satisfied that special circumstances justify the determination. Where the Minister is satisfied that special circumstances exist, the Minister may determine any day, including a day that is in the past to be a school's census day.

Subsections (4) and (5) provide that the Minister must give notice of the census day to a school's approved authority, and do so in a way that makes it reasonably likely the approved authority will be become aware of the census day. Such notification must be given at least 10 weeks before the census day, or as soon as practicable where the Minister makes a determination in special circumstances in accordance with subsection (3).

The instrument made by the Minister under subsection (2) may be either administrative or legislative in character, depending on how the power is exercised and the substance of the instrument. Any instrument made under that provision that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

Section 6 – Overseas students

Commonwealth funding under the Act is not provided for overseas students: overseas students are excluded from the definitions of primary students and secondary students for the purposes of the funding formulas in the Act.

Section 6 of the Regulations sets out the following classes of individuals who are excluded from the definition of overseas student for the purpose of section 6 of the Act (and who therefore attract funding under the Act):

- a dependant of a person receiving a sponsorship or scholarship for the purpose of undertaking a course provided by an institution in Australia specified in Table A or

Table B of the *Higher Education Support Act 2003* and is meeting the full cost of the education component of the course;

- a student taking part in a registered Student Exchange Program; and
- a person or dependent of a person receiving a sponsorship or scholarship from the Commonwealth for the purpose of undertaking a course provided in Australia.

Section 6A – SRS indexation factor

Section 6A prescribes that for the purposes of subsection 11A(5) of the Act, the Schooling Resource Standard (SRS) indexation factor for 2019 and 2020 is 1.0356. Section 11A of the Act sets out the formula for calculating the SRS indexation factor to be used for indexing SRS funding amounts (contained in section 34 of the Act) and certain loadings. Subsection 11A(5) of the Act allows the Regulations to set the SRS indexation factor for a year instead.

Section 7 – Levels of education that constitute primary and secondary education for schools other than special schools

Section 7 provides that for the purposes of section 15 of the Act, with the exception of special schools, foundation to year 6 are ‘primary education’ for a school, and that years 7 to 12 are ‘secondary education’ for a school. ‘Foundation’ is defined in section 4 and means the year of schooling immediately before year 1.

Section 9 – Levels of education that constitute primary and secondary education for special schools

Section 9 provides that for the purposes of section 15 of the Act, for a special school, ‘primary education’ is the education provided to students aged 4 to 11 at the school, and ‘secondary education’ is the education provided to students aged 12 to 21 at the school.

Section 9A – Government schools

Section 9A provides that the ***census day enrolment*** for government schools is the number of students who are included in the National Schools Statistics Collection. Provision is also made for the counting of students not undertaking a full-time study load, and in such cases those students are to be counted as the fraction of the full-time study load the student is undertaking.

Section 9B – Non-government schools

Section 9B provides that the ***census day enrolment*** for non-government schools is the number of students who are enrolled as at the census day at the school, have a regular pattern of attendance at school, and meet the minimum census reference period attendance requirement at a location for the school.

Provision is also made for the counting of students not undertaking a full-time study load, and in such cases those students are to be counted as the fraction of the full-time study load the student is undertaking.

Subsection (3) provides that the Minister may also determine that a person who does not meet the requirements to be included in a non-government school's census day enrolment is to be included as either a primary or secondary student (including as a part time student) if the Minister is satisfied that special circumstances justify the determination. Subsection (6) provides that an approved authority for a school may make an application for a determination under subsection (3) within 14 days of the school's census day, or a longer period if the Minister allows a longer period in writing.

Such a determination is a reviewable decision for the purposes of subsection 118(2) of the Act, and the 'relevant person' for the reviewable decision is the approved authority for the school concerned. The effect of this is that the approved authority may seek review of such a decision, generally through internal review at first and, if unsatisfied, subsequently seek review by the Administrative Appeals Tribunal (AAT). The availability of internal review allows an approved authority to have the decision reconsidered by an officer who was not involved in the original decision and who is at least as senior as the officer who made the initial decision (per the requirements of subsection 120(3) of the Act). The availability of internal review promotes a quick and effective reconsideration of the decision in advance of review by the AAT in the event the approved authority is still dissatisfied with the outcome.

The instrument made by the Minister under subsection (3) and (6) may be either administrative or legislative in character, depending on how the power is exercised and the substance of the instrument. Any instrument made under that provision that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

Subsection 9B(6) allows the Minister to beneficially determine a longer period of time within which an approved body can apply for a determination under subsection 9B(3) of the Regulations. This is a procedural decision related to the decision that may be made under subsection 9B(3) (itself a reviewable decision). Further, it would still remain open to the Minister to make a determination under subsection 9B(3) on the Minister's own initiative in appropriate cases, where an application has not been made within time. As this decision is a preliminary or procedural step in the making of a substantive decision, this means it is not suitable for merits review (see paragraphs [4.3] – [4.4] of the Administrative Review Council's guidance *What decisions should be subject to merit review?*).

Part 2 – Grants of financial assistance to States and Territories

Section 10A – Starting State-Territory Shares

Section 10A prescribes the starting State-Territory shares as a percentage for 2018 and each later year for government schools and non-government schools in the specified states and territories, in accordance with subsection 22A(3) of the Act. The prescribed starting State-Territory shares are to be used to calculate the State-Territory share for a year in accordance with subsections 22A(3) and (4) of the Act, unless the State or Territory's school education reform agreement specifies the State-Territory share.

Starting State-Territory shares have been determined based on information provided by states and territories.

A State or Territory's school education reform agreement is the agreement with the Commonwealth that paragraph 22(2)(b) of the Act requires a State or Territory to be a party to as a condition of financial assistance under the Act. If the State or Territory's school education reform agreement specifies a State-Territory share for a year, the share specified in the agreement will set the State or Territory's funding obligation for the year instead of the default, as referred to in subsections 22A(3), (4) and (6) of the Act.

At the time of making this instrument, all States and Territories have their funding obligations set by their agreements, rather than section 10A.

Section 11 – Condition of financial assistance – recovering amounts

Under the Act, the Commonwealth pays financial assistance for a non-government school to the State or Territory in which the school is located. In turn, the State or Territory must pass this funding on to the approved authority, block grant authority, or non-government representative body for the non-government school. The Commonwealth will not have a contractual relationship with the authority for a non-government school in relation to financial assistance paid to it by a State or Territory in accordance with the Act, and is unable to recover funds from the authority without the assistance of the relevant State or Territory.

Under paragraph 110(1)(a) of the Act the Minister is able to determine that a State or Territory pay to the Commonwealth a specified amount as a result of a failure to comply with the Act as set out in section 108 of the Act, or because of an overpayment or other debt as set out in section 109 of the Act. Subject to regulations for the purposes of section 24 of the Act, the amount set out in such a determination is a debt due by the State or Territory to the Commonwealth in accordance with subsection 111(1) of the Act.

Section 11 of the Regulations is made for the purposes of section 24 of the Act. It provides that where the Minister makes a determination under paragraph 110(1)(a) of the Act, the State or Territory must pay the amount by the time specified in the determination.

Where the circumstances giving rise to the issue of the determination by the Minister are the responsibility of the State or Territory (as in the case of an overpayment to a State for its government schools), the State or Territory must make the payment itself.

However, where the circumstances giving rise to the issue of the determination by the Minister are the responsibility of an approved authority, block grant authority, or non-government representative body, in relation to a non-government school, the State or Territory has a couple of other options.

Subsection 11(2) and (3) requires that the State or Territory must have in place arrangements in relation to each approved authority, block grant authority or non-government representative body to whom the State or Territory may pay Commonwealth funding under the Act. The arrangement must provide that if the Minister makes a determination under

paragraph 110(1)(a) of the Act as a result of one of the following circumstances in relation to the authority or body:

- non-compliance or a breach under section 108 of the Act;
- an overpayment under subsection 109(1) of the Act;
- a recoverable payment under subsection 109(2) of the Act;
- an unpaid amount under an Act specified in section 109(3)(a) of the Act; or
- recovering capital funding as set out in subsection 109(4) of the Act;

then the amount mentioned in the determination is a debt due to the State or Territory and may be recovered by the State or Territory (or another person on its behalf) in a court.

Subsection 11(4) then provides that the State or Territory has the option of either assigning to the Commonwealth its right to recover the debt (and the Commonwealth must accept any such assignment), or promptly recovering the debt from the authority or body.

If the State or Territory assigns its right to recover the authority's debt to the Commonwealth, the debt may be recovered by the Minister on behalf of the Commonwealth, and the debt due by the State or Territory to the Commonwealth that arises under subsection 111(1) of the Act is taken to be extinguished. This is so whether or not the Commonwealth chooses to exercise the assigned right, or how successful it is in recovering the debt from the non-government authority or body.

This section prescribes matters related to a decision of the Minister under paragraph 110(1)(a) and (b) of the Act, which are themselves reviewable decisions in accordance with the Act. A decision that is a preliminary or procedural step in the making of a substantive decision is generally not suitable for merits review (see paragraphs [4.3] – [4.4] of the Administrative Review Council's guidance *What decisions should be subject to merit review?*). Section 11 is not a reviewable decision for this reason.

Section 12 – Pro-rating of recurrent funding

Commonwealth recurrent funding for schools is determined by the Minister under section 25 of the Act. The Commonwealth funding is calculated on a full-year basis. Section 27 of the Act provides for this funding to be calculated on a pro-rata basis in the specified circumstances in accordance with the Regulations. Section 27 directly relates to decisions made under section 26 of the Act about a school's total entitlement to Commonwealth financial assistance, which itself is a reviewable decision under the Act. Section 12 of the Regulations prescribes the following circumstances for the purposes of section 27:

- no student receives primary education or secondary education at a school, or at a location of a school, during a part of the year (except school holidays);
- a school becomes entitled to financial assistance under Part 3 of the Act;
- a school ceases to be entitled to financial assistance under Part 3 of the Act.

In determining a school's pro-rated entitlement, the Minister must have regard to:

- the proportion of the school year during which the school was providing education or was entitled to financial assistance,

- the time during the school year when the school began or ceased to provide education or be entitled to financial assistance, and
- in the case of a school that has ceased to provide education or be entitled to financial assistance – the amount of any financial assistance that has already been paid to the school for the year.

A small change has been made to section 12 as compared to section 12 in the 2013 Regulations. The circumstance that ‘no student receives primary education or secondary education at a school, or at a location of a school, during a part of the year (except school holidays)’ has replaced the former circumstance of a school beginning to provide primary or secondary education or ceasing to provide primary or secondary education. This is a minor change to better mirror the statutory language in section 27 of the Act.

Decisions made under section 26 of the Act are reviewable decisions. The operation of section 12 of the Regulations is able to be considered on merits review, were an approved body to request review of its total entitlement.

Part 3 – Recurrent funding for schools

Section 14 – ARIA index value

ARIA (Accessibility/Remoteness Index of Australia) is an index that measures relative geographic remoteness of locations in Australia. It is a relevant factor in determining the location and size loadings for a school in Division 3 of Part 3 of the Act. Section 6 of the Act provides that the ARIA index value of a school has the meaning given by the Regulations.

Section 14 of the Regulations provides that a school’s ARIA index value is the average ARIA+ score for the Statistical Area Level 1 (defined in section 4) in which the school is located.

In accordance with subsection 130(4) of the Act, this provision incorporates by reference ARIA+ scores (2011). Note 1 explains that average ARIA+ scores are obtained from the Hugo Centre for Population and Migration Studies. The Hugo Centre for Population and Migration Studies is responsible for the development and dissemination of the ARIA+ (2011) index.

The second note refers to section 18 of the Act. Where a school has more than one location, the Minister may determine the location of the school for the purposes of working out the school’s ARIA index value.

Section 16 – Definition of *Aboriginal and Torres Strait Islander student*

Section 16 provides the definition of Aboriginal and Torres Strait Islander student which is relevant for the calculation of the loading for Aboriginal and Torres Strait Islander students.

Section 16AA – Base amounts for schools

Section 16AA prescribes 45 per cent for the purpose of determining a percentage of the SRS funding amount for a student for the purpose of paragraph 33(4)(b) of the Act.

A school's base amount is used in the formula in section 32 of the Act to work out the amount of financial assistance that is payable to a State or Territory for a year for a school under Division 2 of Part 3 of the Regulations.

Section 33(3) of the Act sets out the formula to work out the base amount for a school (that is not covered by subsection 54(1) of the Act) at which there are distance education students. In the absence of the Regulations prescribing another percentage, paragraph 33(4)(a) of the Act prescribes 35 per cent as the percentage of the SRS funding amount for a student under subparagraph 33(3)(b)(ii) for the purpose of calculating the base amount for a school under subsection 33(3). Section 16AA prescribes a higher 45 per cent as the percentage of the SRS funding amounts for a student for that purpose.

Section 17 – Disability loading – disability loading percentage

Section 17 prescribes disability loading percentages by level of educational adjustment and level of education for the purposes of amended subsection 36(5) of the Act.

Section 36 of the Act provides how to calculate the student with disability (SWD) loading for a school for a year, as a component of the school's annual recurrent funding. The SWD loading is calculated with reference to SRS funding amounts, the disability loading percentages and the number of students with disability receiving certain levels of educational adjustment (supplementary, substantial and extensive) at the school for the year.

Calculating SWD loadings by reference to disability loading percentages, amongst other things, helps to continue to ensure that funding for students with disability for a particular school more accurately reflects the needs of the students at that school.

The SWD loading reflects and support efforts undertaken by schools to support their students with disability to access and participate in school education on the same basis as other students.

The *Nationally Consistent Collection of Data on School Students with Disability* (NCCD) collects a range of information about the number of students with disability in schools and the educational adjustments they receive. The requirement for approved authorities to provide data for the NCCD is set out in sections 52 and 58A of the Regulations. Akin to the school census requirements, to enable the Commonwealth to accurately calculate SWD loadings for individual schools, the department must receive accurate NCCD information at the school level.

Section 17A – Disability loading – levels of adjustment

Section 17A provides that the number of students with disability at a school by each level of adjustment for the purposes of subsection 36(6) of the Act is the number counted by that school in the NCCD.

Section 18 – Other loadings

Section 18 prescribes the method used to calculate the number of students at a school for a year in quartiles 1 and 2 for the purposes of the school’s socio-educational disadvantage loading in section 38 of the Act (see subsections 38(4) and 38(7) of the Act).

In addition, it prescribes the method for working out the number of students at a school for a year who have low English proficiency for the purposes of the school’s low English proficiency loading in section 39 of the Act (see subsection 39(2) of the Act).

The percentage of students that the Australian Curriculum, Assessment and Reporting Authority (ACARA) identifies as being in quartiles 1 and 2, and who have low English proficiency, is to be multiplied with the total number of students at the school reported in the school’s census. This will ensure that the number of students used in sections 38 and 39 of the Act reflects the proportion of students at the school in quartiles 1 or 2, or who have low English proficiency, as identified by ACARA.

Section 19 – Transition years for non-government schools

Section 19 prescribes the final transition year for non-government schools as either 2023 or 2029, depending on whether the school has a Commonwealth share of 80 per cent in 2023. For non-government schools that have reached the share of 80 per cent in 2023, transition concludes that year. For non-government schools that have a Commonwealth share of greater than 80 per cent in 2023, transition will conclude in 2029. A school that starts receiving Commonwealth funding between 2020 and 2029 will have a Commonwealth share of 80 per cent from its first year of funding under new subsection 19D(2). The final transition year for a school that starts receiving Commonwealth funding between 2022 and 2029 is its first year of funding, after which paragraph 35A(b) of the Act will apply to it.

Section 19A – Commonwealth share for non-government schools worked out using the notional starting share for 2019

Section 19A prescribes the method to work out a non-government school’s Commonwealth share for 2019 using notional starting shares. Section 19A prescribes the transition pathway for non-government schools for certain years using a 2019 notional starting share. The section applies to all non-government schools in 2020, regardless of the basis for calculation of the school’s Capacity to Contribute (CTC) score for 2020. In addition, section 19A applies to certain non-government schools in later years if the basis of the school’s CTC score remains the same as for previous years.

If the notional starting share for the non-government school for 2019 is less than or equal to 80 per cent (which is the Commonwealth share for a non-government school under paragraph 35A(b) of the Act), the Commonwealth share for the school for the transition year is the percentage worked out using the following formula:

$$\text{Notional starting share for 2019} + \frac{1}{4} \left(4 - \frac{\text{2023 transition period}}{\text{period}} \right) \times \left(0.8 - \text{Notional starting share for 2019} \right)$$

The formula calculates a non-government school's yearly Commonwealth share increment by multiplying these two items:

- i. The difference between a school's 2019 notional starting share and the target share of 80 per cent of the SRS
- ii. One over four (calculated by reference to a school's 2023 transition period, or the number of years from 2020 to 2023).

The result of the multiplication is then added to the school's 2019 notional starting share to work out the school's 2020 Commonwealth share.

If the notional starting share for the school for 2019 is greater than 80 per cent (which is the Commonwealth share for a non-government school under paragraph 35A(b) of the Act), the Commonwealth share for the school for the transition year is the percentage worked out using the following formula:

$$\text{Notional starting share for 2019} + \frac{1}{10} \left(10 - \frac{2029 \text{ transition period}}{\text{period}} \right) \times \left(0.8 - \frac{\text{Notional starting share for 2019}}{\text{share for 2019}} \right)$$

The formula calculates a non-government school's yearly Commonwealth share increment by multiplying these two items:

- i. The difference between a school's 2019 notional starting share and the target share of 80 per cent of the SRS
- ii. One over ten (calculated by reference to a school's 2029 transition period, or the number of years from 2020 to 2029).

The result of the multiplication is then added to the school's 2019 notional starting share to work out the school's 2020 Commonwealth share.

The formulae prescribed by sections 19B and 19C use these same principles as described above.

A minor change to this provision as compared to its counterpart in the 2013 Regulations is that paragraph (1)(d) now refers to section 19A of the 2013 Regulations (rather than in this instrument), as the former regulations would have applied in 2022.

Section 19B – Commonwealth share for non-government schools worked out using the notional starting share for 2020

Section 19B prescribes the method used to work out a non-government school's Commonwealth share for 2020 using notional starting shares. Section 19B prescribes the transition pathway for non-government schools for certain years using a 2020 notional starting share. The section applies to schools that had a CTC score for 2021 that was calculated using a different basis to that which was used to calculate its CTC score for 2020. In addition, this transition pathway applied to a school in 2022 if, in 2021, the basis for calculating the CTC score for that school was different to the basis used to calculate its CTC score in 2020 but, the basis used to calculate its CTC score in 2022 is the same as that used in

2021. Where this is the case, this section will also apply to that school for a transition year that is 2023 or later.

A minor change to this provision as compared to its counterpart in the 2013 Regulations is that paragraphs (1)(b) and (c) now refers to section 19B of the 2013 Regulations (rather than itself), as they would have applied in 2022.

Section 19C – Commonwealth share for non-government schools worked out using the notional starting share for 2021

Section 19C prescribes the method used to work out a non-government school's Commonwealth share for 2021 using notional starting shares. Section 19C prescribes the transition pathway for non-government schools for 2022 or later using a 2021 notional starting share, where the school is covered by neither section 19A nor 19B for the transition year.

Section 19D – Commonwealth share for new non-government schools

Section 19D prescribes the Commonwealth share for new non-government schools that first receive Commonwealth funding in 2020 or later. Subsection (2) provides that the Commonwealth share for these schools is 80 per cent for their first funding year. A new school that first received funding in 2020 or 2021 may then have its transition pathway reset in 2021, 2022 or later years in accordance with sections 19A, 19B or 19C (whichever is applicable). The note to subsection (3) clarifies that, for a school that first receives funding in 2022 or later, its first funding year is also its last transition year. Those schools will then continue to have a Commonwealth share of 80 per cent for subsequent years due to the application of paragraph 35A(b) of the Act.

Section 19E – Notional starting share for non-government schools

Section 19E defines notional starting shares. The purpose of notional starting shares is to reset the Commonwealth shares for non-government schools to smooth out any fluctuations that may otherwise result from a change in methodology and set out a transition pathway to 80 per cent of the SRS. The CTC-adjusted SRS amount and notional funding amount are used to work out a notional starting share and have the meanings given by sections 19F and 19G respectively. It should be noted that the notional funding amount for a school may not necessarily reflect the school's financial assistance for the year worked out under Division 2 of Part 3 of the Act.

Section 19E specifies the formula for working out the notional starting share for non-government schools. The purpose of this section is to define a new notional starting share for transition and to allow all non-government schools to transition at the individual school level, rather than at an approved authority level.

Section 19E also prescribes a different notional starting share for two schools, as follows:

- Bacchus Marsh Grammar (AGEID 16082) of 75.255235070306 per cent for 2019, and
- All Saints College (AGEID 13863) of 184.130020331571 per cent for 2021.

This was to provide more appropriate starting shares for those schools than would have resulted from the default formulas, due to structural changes in those schools.

A minor change from the 2013 Regulations is the addition of a percentage symbol in relation to the notional starting shares prescribed for Bacchus Marsh Grammar and All Saints College. While it was implicit in the concept of a notional starting share that these figures were a percentage, the symbol has been added for the avoidance of any doubt.

Section 19F – CTC-adjusted SRS amount

Section 19F defines the CTC-adjusted SRS amount for the non-government school for the year that is used to calculate the notional starting share. It is what 100 per cent of the SRS amount for the school would be for the year if the Socio-Economic Status score (SES score) or the CTC score for the school in that year was the CTC score of the school for the following year.

Section 19G – Notional funding amount

Section 19G defines the notional funding amount that is used to calculate the notional starting share. For schools that are not part of an approved system authority, the notional funding amount is simply the school's total entitlement for the year. Under subsection 19G(2) the notional funding amount is worked out differently if: the approved authority for a school in 2019 was also (a) the school's approved authority in 2017, and (b) the school's approved system authority as defined in section 5 of the Regulations as in force immediately before 1 January 2018. If an approved authority would have met these criteria but for changing its legal entity status after 2017, the school's approved authority for 2017 is taken to be the same approved authority for the school in 2019.

Section 21 – CTC score

Section 21 is made for the purposes of subsection 52(4) of the Act. Subsection 52(4) of the Act requires the Minister to, in making a determination of a non-government school's CTC score under subsection 52(1), comply with the Regulations (unless the Minister is satisfied doing so would result in a CTC score that does not accurately reflect the capacity of the persons responsible for students at the school to contribute financially to the operation of the school).

This section specifies how a non-government school's CTC score will be worked out in 2020 and 2021, and for 2022 and onwards.

For 2020 and 2021, a non-government school's CTC score was its 2011 SES score, 2016 SES score, or average DMI score depending on which score is the most financially beneficial score for the school.

For 2022 or later years, a non-government school's CTC score will be the school's average DMI score or the refined area based score. Under subsection 21(3), the refined area based score may only be used where the Minister is satisfied that using the average DMI score is not reasonably practicable and that at least 95% of student addresses provided by a school can be assigned to the Statistical Area Level 1 (unless it is appropriate to disregard this). The

note clarifies the Minister retains their discretion under the Act to determine a CTC score for a non-government school other than in accordance with the Regulations for the reasons mentioned in subsection 52(4) of the Act.

This section provides for preliminary decisions of the Minister in working out a CTC score for a school under section 52 of the Act. A determination made by the Minister under subsection 52(1) of the Act may be reviewed under Division 3 of Part 9 of the Act. To avoid doubt, a review of this decision may involve a fresh reconsideration of the basis for calculating the non-government school's CTC score under this provision of the Regulations. For instance, a decision maker conducting a review would not be precluded from being satisfied that it was reasonably practicable to calculate a school's CTC score using the average DMI score and proceed to do so, even if the original decision maker had reached a different conclusion and used the refined area based score. As such, the operation of section 21 is able to be considered on merits review, were an approved body to request a review of its CTC score.

Section 22 – Average DMI score

Section 22 provides the meaning of average DMI score, introduces a cap and floor on the movement of average DMI scores for small and very small schools, and includes a method statement for how a DMI score is worked out.

While a three-year rolling average is the preferred approach, given that there were only two years of suitable linked data available to create a CTC score using a DMI methodology for 2020, a two-year average of DMI scores is used for 2020. This is because the address collection conducted pursuant to section 58B of the Act as in force in relation to 2017 did not contain the names and residential addresses of each person responsible for the student. From 2021 and onwards, three years of linked data is available and thus three years of DMI scores is used to calculate the average DMI score.

Subsection 22(3) also describes the cap and floor on the movement of average DMI scores for small schools. Analysis has shown that small and very small schools are likely to experience greater volatility due to the annual changes in the student cohort, even with the application of an average DMI score. To reduce negative impacts on small and very small schools, there will be a cap and floor of two points from 2022 and onwards where the DMI methodology is used.

Subsection 22(4) sets out the method statement for working out a non-government school's DMI score for a year. The method uses the family income for each student, worked out by adding up the annual income of each person responsible for the student for the year, to calculate the median family income for the school. The final step is to standardise and weight the family income for the school. Further detail on each of these steps is set out in the DMI methodology document published by the department.

Section 23 – Refined area based score

Section 23 is made for the purposes of subparagraph 21(3)(b)(i) and provides the circumstances for use of the refined area based score, and the applicable formula.

There will be instances where it is not reasonably practicable for a school's CTC score to be calculated using the DMI methodology.

Subsection 23(1) provides a non-exhaustive list of circumstances where the Minister may be satisfied that a refined area-based score may be used as the CTC score. Without limitation, this could be due to privacy concerns (often in the case of small schools), or newly established schools, or where data quality is low (for example low coverage where the circumstances of some population groups are not included due to a lack of data, impacting on the accuracy of results).

Paragraph 23(1)(c) specifies one of the circumstances by reference to the *Capacity to Contribute Data Validation and Quality Assurance Process* document published by the department and as in force from time to time. This is accompanied by a note stating that the document could in 2023 be viewed on the department's website. Subsection 130(4) of the Act provides the legislative authority for the document to be incorporated into the Regulations. In particular, subsection 130(4) provides that, despite the operation of the *Legislation Act 2003*, the Regulations may provide in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or other writing as in force or existing from time to time. The is freely available on the department's website.

The refined area-based score uses a similar methodology to the SES score, but the calculation focuses on the income dimensions of the Statistical Area Level 1 to which student residential addresses are assigned. The method would use the latest Australian Bureau of Statistics (ABS) Census data available (currently the 2016 ABS Census of Housing and Population) combined with the latest available statement of student addresses, and apply from 2022 where appropriate.

This section provides for preliminary decisions of the Minister in working out a CTC score for a school under section 52 of the Act. Decisions under subsection 52(1) of the Act are the substantive determination of a school's CTC score and are reviewable decisions under the Act. As such, the operation of section 23 of the Regulations is able to be considered on merits review, were an approved body to request review of its CTC score.

Section 24 – SES score

Section 24 prescribes the method for calculating 2011 SES scores and 2016 SES scores. The formula in subsection (7) mirrors that for SES scores in the previous subsection 23(1) of the 2013 Regulations. The 2011 SES score uses the most recent statement of student addresses between 2012 and 2016, otherwise the oldest statement after 2016. This is to maintain the previous methodology for calculating the capacity to contribute of a school, providing consistency and a period of transition. The 2016 SES score uses the oldest statement of student addresses provided for 2017 or a later year. The 2016 SES score provides an alternative CTC score based on the latest ABS Census data and provides consistency for schools by using the oldest statement of addresses.

Section 24AAA – Publication of CTC score if determined other than in accordance with this regulation

Section 24AAA states that, if the Minister makes a determination of a CTC score for a school other than in accordance with the Regulations for the reason mentioned in subsection 52(4) of the Act, the Minister must publish, in a way the Minister considers appropriate, the CTC score for the school and reasons for making the determination. The publication must occur within 30 days of making the determination. The purpose of this provision is to maintain transparency of CTC scores that are determined other than in accordance with the Regulations. The required information will be published on the department's website. This provision relies on the power in paragraph 130(1)(b) of the Act to make regulations that are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Part 4 – Capital and other funding

Section 24AA – Base assistance amount

Section 24AA prescribes the base assistance amount of capital funding for various years. Section 24AA is made for the purposes of section 68 of the Act.

Section 68 of the Act sets a limit on the total amount of capital funding that can be provided for block grant authorities for non-government schools for a year (the base assistance amount). Section 68 provides that the base assistance amount for a year can be set either through prescribing an amount in the Regulations, see paragraph 68(1)(b)(ii), or by indexing the previous year's base assistance amount in accordance with subsections 68(2) and (3), see paragraph 68(1)(b)(i).

The base assistance amount is prescribed in the Regulations, through section 24AA. The amount prescribed has been informed by the growth in non-government school student enrolments over the period, and the index specified in section 24B of the Regulations.

Section 24A – Indexation percentage

Section 24A provides the indexation percentage for various years for the purposes of paragraph 68(3)(b) of the Act. In order to provide the base assistance amount for a year, the indexation percentage is multiplied by the total amount available for capital funding for block grant authorities (base assistance amount) for the previous year.

Section 24B Indexes of building prices and wage costs

Section 24B prescribes the indexes of building prices and wage costs for the purposes of paragraphs 68(4)(a) of the Act.

Subsection 130(4) of the Act permits the Regulations to provide in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or other writing as in force or existing from time to time. The relevant indexes prescribed by this provision are incorporated as existing from time to time. A note in the provision makes clear that the indexes can be viewed on the Australian Bureau of Statistics' website.

Section 25 – Special circumstances funding

Payments of Commonwealth capital funding and special assistance funding may be made for schools.

The Minister is able to determine an amount of Commonwealth financial assistance for a school where the Minister is satisfied that special circumstances justify the determination under section 69 of the Act. Section 25 of the Regulations sets out the matters that the Minister may have regard to in relation to making this decision.

The Minister may have regard to whether:

- the special circumstances would not have been reasonably foreseeable by a competent approved authority;
- the special circumstances would, or are likely to result in severe financial difficulty requiring the school to cease a large part of its educational activities or lower the quality of education it provides;
- on receipt of special circumstances funding from the Commonwealth the school would be able to resume operating satisfactorily within two years or continue operating until the end of the year;
- having exhausted all other options to remedy the financial situation of the school, there is still a need for the special circumstances funding to address the school's immediate financial difficulties;
- the approved authority for the school has complied with the Act and the Regulations;
- the approved authority proposes to use the special circumstances funding:
 - to pay tax debts to the Commonwealth;
 - to lower the amount of debt the authority owes; or
 - as capital expenditure;
- the approved authority proposes to use the Commonwealth special circumstances funding in relation to the school, and the school has provided education for less than 5 years; and
- the approved authority requires the Commonwealth special circumstances funding due to financial loss resulting from inadequate insurance for capital facilities.

This section prescribes matters to be taken into account in making a decision under the Act to determine an amount of financial assistance under section 69 of the Act. Section 69 of the Act provides for a substantive decision. Although this decision is not itself reviewable, it is generally not considered suitable for merits review on the basis that it involves the allocation of a finite resource between competing applicants (see paragraph [4.11] of the Administrative Review Council's guidance *What decisions should be subject to merit review?*).

Section 25A – Funding in prescribed circumstances

Section 25A provides that Schedule 1 has effect. Schedule 1 deals with financial assistance payable under sections 69A and 69B of the Act.

Section 25B – Funding for non-government representative bodies

Section 25B prescribes, for the purposes of paragraph 130(2)(b) of the Act, matters the Minister must have regard to in determining the amount of financial assistance that is payable under section 70 to a State or Territory for a year for a non-government representative body for a non-government school.

The Minister must have regard to the Choice and Affordability Fund Guidelines, the Non-Government Reform Support Fund Guidelines, any written arrangement entered into between the Secretary and the non-government representative body, and the amount specified in subsection (2) as the total amount of financial assistance under Division 4 of Part 5 of the Act for the matters set out in the Choice and Affordability Fund Guidelines for all non-government representative bodies for the year.

The total amount for 2020 for all non-government representative bodies approved for non-government schools that are Catholic systemic schools was \$61.5 million and for all other non-government representative bodies approved for non-government schools it was \$41.5 million.

For each later year the amount is the amount worked out by multiplying the total amount of financial assistance for the previous year by the SRS indexation factor for the current year.

This section prescribes matters to be taken into account in making a decision under the Act to determine an amount of financial assistance under section 70 of the Act. Section 70 of the Act provides for a substantive decision. Although this decision is not itself reviewable, it is generally not considered suitable for merits review on the basis that it involves the allocation of a finite resource between competing applicant (see paragraph [4.11] of the Administrative Review Council's guidance *What decisions should be subject to merit review?*).

Part 5 – Approved authorities and bodies

Part 5 of the Regulations prescribes matters related to approved authorities and certain approved bodies.

Subsection 73(1) of the Act provides that the Minister may approve a person as an approved authority provided, among other things, that the Minister is satisfied that the person satisfies and will continue to satisfy the basic requirements of approval set out in section 75, including not-for-profit, financial viability and fit and proper person requirements. Matters that the Minister may have regard to are set out in subsection 75(6) of the Act. The Regulations may prescribe further matters, in accordance with paragraph 132(2)(b) of the Act.

Approved authorities of government schools may be taken to satisfy these requirements. The basic requirements apply to all approved authorities.

Subsection 83(1) of the Act provides that the Minister may approve a person as a block grant authority provided, among other things, that the Minister is satisfied that the person satisfies and will continue to satisfy the basic requirements of approval set out in section 84, including not-for-profit, financial viability and fit and proper person requirements. Matters

that the Minister may have regard to are set out in subsection 84(6) of the Act. The Regulations may prescribe further matters, in accordance with paragraph 132(2)(b) of the Act.

Subsection 91(1) of the Act provides that the Minister may approve a person as a non-government representative body provided, among other things, that the Minister is satisfied that the person satisfies and will continue to satisfy the basic requirements of approval set out in section 92, including not-for-profit, financial viability and fit and proper person requirements. Matters that the Minister may have regard to are set out in subsection 92(6) of the Act, with further matters set out in the Regulations.

Section 26 – Not-for-profit requirement

Section 26 sets out the matters that the Minister may have regard to for the purposes of the not-for-profit requirements in relation to approving authorities (subsection 75(3) of the Act), approving block grant authorities (subsection 84(3) of the Act), and approving non-government representative bodies (subsection 92(3) of the Act). Decisions not to approve, or to vary or revoke an approval, are reviewable in accordance with section 118 of the Act. The operation of section 26 may be considered in merits review where a decision not to approve, or to vary or revoke an approval is reviewed.

Subsection 75(3) of the Act provides that in relation to approved authorities, the Minister must be satisfied that the person does not conduct for profit any school in relation to which the application is made.

Whether a school is considered to operate for profit or not is considered on a case by case basis considering the actual circumstances of the school's financial operations. Critically, school income must be applied for the benefit of the school or schools of the approved authority and not applied for the benefit of the owners of the approved authority or any third party. Approved authorities can be for profit organisations, provided the schools of the authority are not conducted for profit. In contrast, block grant authorities and non-government representative bodies must be not-for-profit organisations in accordance with subsections 84(3) and 92(3) of the Act.

Section 26 sets out the following matters the Minister may have regard to for the purposes of determining whether the person satisfies these not-for-profit requirements:

- whether the person has not-for-profit status under a Commonwealth, State or Territory law;
- whether the person has financial policies and practices for the schools relevant to the person's application as an approved authority, block grant authority or non-government representative body, and quality of any such policies and practices;
- whether money derived from or relating to a relevant school has been applied for the purposes of the school or for the purposes of the functions of the authority or body, or has been distributed to an owner of the authority or body or any other person; and
- if the person is a body corporate – the requirements in any legislation under which the person is established, or in its constitution.

A note states that a law of the Commonwealth under which a person may have a not-for-profit status is the *Australian Charities and Not-for-Profits Commission Act 2012*.

Section 27 – Financial viability requirement

Section 27 sets out the matters that the Minister may have regard to for the purposes of the financial viability requirements in relation to approving authorities (subsection 75(4) of the Act), approving block grant authorities (subsection 84(4) of the Act), and approving non-government representative bodies (subsection 92(4) of the Act). In each case the Minister must be satisfied that the person is financially viable. Subsections 84(6) and 92(6) also list matters the Minister may have regard to in determining whether a block grant authority or a non-government representative body, respectively, is financially viable. Decisions not to approve, or to vary or revoke an approval, are reviewable in accordance with section 118 of the Act. The operation of section 27 may be considered in merits review where a decision not to approve, or to vary or revoke an approval is reviewed.

Section 27 provides the following matters that the Minister may have regard to for the purposes of determining whether the person is financially viable:

- whether the person is a body corporate that is being wound up;
- whether the affairs of the person are under any form of external control;
- whether the Minister considers that the liabilities of the person are greater than the person's assets;
- whether the Minister considers that the person is (and is likely to continue for a substantial period to be) unable to pay its debts as and when they fall due for payment; and
- whether an audit conducted in accordance with Commonwealth, State or Territory law is expressed to be qualified or expresses concern about the financial viability of the person.

Section 28 – Fit and proper person requirement

Section 28 sets out the matters that the Minister may have regard to for the purposes of determining fit and proper person requirements in relation to approving authorities (subsection 75(5) of the Act), approving block grant authorities (subsection 84(5) of the Act), and approving non-government representative bodies (subsection 92(5) of the Act). Decisions not to approve, or to vary or revoke an approval, are reviewable in accordance with section 118 of the Act. The operation of section 28 may be considered in merits review where a decision not to approve, or to vary or revoke an approval is reviewed.

Subsection 28(1) sets out the following matters that the Minister may have regard to for the purposes of determining whether a person is fit and proper to be an approved authority for a school:

- whether the person, or a key individual of the person (defined in section 4) has experience and expertise in administering a school and providing education at a school;

- whether the person has governance arrangements in place including arrangements for managing and supervising the provision of education at the school, and arrangements to ensure compliance with Commonwealth, State and Territory laws relating to the provision of school education; and
- whether the person has debts due to the Commonwealth in relation to the provision of school education.

Subsection 28(2) sets out the following matters that the Minister may have regard to in relation to the fit and proper person requirements for approved authorities, block grant authorities and non-government representative bodies:

- whether the person has governance arrangements in place, including arrangements to receive independent and professional advice in relation to compliance with obligations under the Act and the Regulations;
- whether a debt recovery arrangement of a kind mentioned in subsections 11(2) and (3) of the Regulations is in force in relation to the person;
- whether the person or a key individual of the person has a record of financial management taking into account whether the person or individual has been bankrupt, insolvent or placed under external administration;
- whether the person or key individual has been convicted of, or charged with, an offence, including an offence in relation to children, dishonesty or violence; and
- whether the person or key individual of the person has engaged in a deliberate pattern of immoral or unethical behaviour.

Section 29 – Approved authorities

Paragraph 78(2)(a) of the Act provides that one of the ongoing funding requirements for approved authorities is the requirement that the approved authority deals with certain Commonwealth financial assistance payable to an authority under the Act (recurrent funding, capital and special circumstances funding) in accordance with the Regulations.

Subsection 29(1) provides that an approved authority for a school must spend or commit to spend recurrent funding payable under the Act for the purpose of providing school education. Subsection 29(2) sets out a non-exhaustive list of expenditure activities that are considered for the purpose of providing school education.

An approved authority for a school has committed to spend funds if it has entered into a binding agreement for the exchange of a specified quantity of goods or services at a specified price on a specified future date or dates.

Subsection 29(3) provides that financial assistance must not be spent, or committed to be spent as security for a loan, credit or other interest or in relation to litigation (except litigation by a State or Territory to recover a debt from an authority or body as mentioned in paragraph 11(4)(b)). Paragraph (c) would also provide some additional purposes for which a school must not spend financial assistance, where that school's capacity to contribute percentage is 0%. Schools with a capacity to contribute score of 0% includes a government school, a special school, a special assistance school, a school that is a majority Aboriginal or

Torres Strait Islander school for a year, and a sole provider school in accordance with subsection 54(1) of the Act. These additional purposes are:

- the purchase of land or a building for the school
- the construction of a building or part of a building for the school
- capital improvements, and
- any form of loan, credit or other interest in relation to the above three bullet points.

However, subsection 29(4) provides that recurrent funding may be used to make payments of interest on any such loan, credit or other interest listed in paragraph (c).

Subsection 29(5) provides that an approved authority must spend or commit to spend Commonwealth special circumstances funding in accordance with any written directions of the Minister, and subsection (6) provides that the Minister may give such directions.

Subsection 29(7) provides that the Commonwealth financial assistance for recurrent funding and special circumstances funding must be spent or committed to be spent in the year (defined in section 7 of the Act as calendar year) in which the financial assistance is paid to the approved authority, or before the day specified in a determination made in writing by the Minister, and subsection (8) provides that the Minister may make such a determination.

Subsection 29(9) makes it clear that interest earned on financial assistance is subject to the same principles as financial assistance.

The instruments made by the Minister for the purposes of subsections (5) and (7) may be either administrative or legislative in character, depending on how the power is exercised and the substance of the instrument. Any instrument made under that provision that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

This section generally deals with circumstances where it may be appropriate for additional direction to be provided to an approved body on its use of Commonwealth financial assistance. There is no automatic consequence for failing to comply with such directions, unless the Minister decides to take compliance action under the Act which would be reviewable as set out in section 118 of the Act.

Section 30 – Block grant authorities

Paragraph 85(2)(a) of the Act provides that one of the ongoing funding requirements for block grant authorities is the requirement that the block grant authority deals with Commonwealth capital funding payable under the Act in accordance with the Regulations.

Subsection 30(1) provides that a block grant authority for a school must spend or commit to spend capital funding payable by the Commonwealth under the Act for the purpose of capital expenditure in relation to a school for which the block grant authority is approved, and in accordance with any written directions of the Minister and the Capital Grants Guidelines.

Subsection 30(2) provides that this financial assistance must be spent or committed to be spent in the year (defined in section 6 of the Act as calendar year) in which the financial assistance is paid to the block grant authority, or before a day specified in a determination made in writing by the Minister.

Subsection 30(3) and (4) provide that financial assistance paid to a block grant authority and then recovered as a result of savings on capital expenditure or capital expenditure that has not proceeded must be spent or committed to be spent on alternative capital expenditure in relation to a school for which the block grant authority is approved. This must occur within one year of the assistance being recovered, or another period determined by the Minister and in accordance with any written directions from the Minister and the Capital Grants Program Guidelines.

Subsection 30(5) provides that the block grant authority may retain interest earned on the Commonwealth capital funding, but the block grant authority must spend or commit to spend the interest on capital expenditure in relation to a school for which the block grant authority is approved in accordance with any written directions from the Minister and the Capital Grants Program Guidelines.

Subsection (6) provides that the Minister may give written directions for the purposes of subsections (1), (4) and (5).

The instruments made by the Minister for the purposes of subsections (1), (2) and (4) may be either administrative or legislative in character, depending on how the power is exercised and the substance of the instrument. Any instrument made under that provision that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

This section generally deals with circumstances where it may be appropriate for additional direction to be provided to an approved body on its use of Commonwealth financial assistance. There is no automatic consequence for failing to comply with such directions, unless the Minister decides to take compliance action under the Act which would be reviewable as set out in section 118 of the Act.

Section 31 – Non-government representative bodies

Paragraph 93(2)(b) of the Act provides that one of the ongoing requirements for approval of a non-government representative body is the requirement that the non-government representative body deals with financial assistance for non-government representative bodies payable under the Act in accordance with the Regulations.

Section 31 provides that this financial assistance must be spent or committed to be spent (a) for the purpose of supporting school education, (b) in accordance with the Non-Government Reform Support Fund Guidelines, (c) in accordance with the Choice and Affordability Fund Guidelines, (d) in accordance with any written agreement between the Secretary and non-government representative body, and (e) in accordance with any written directions of the Minister.

The instruments made by the Minister under paragraph (1)(e) may be either administrative or legislative in character, depending on how the power is exercised and the substance of the instrument. Any instrument made under that provision that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

This section generally deals with circumstances where it may be appropriate for additional direction to be provided to an approved body on its use of Commonwealth financial assistance. There is no automatic consequence for failing to comply with such directions, unless the Minister decides to take compliance action under the Act which would be reviewable as set out in section 118 of the Act.

Section 32 – Application of this Subdivision

Approved authorities, block grant authorities and non-government representative bodies are all required to comply with requirements prescribed by the Regulations in relation to monitoring the authority or body's compliance with the Act in accordance with paragraphs 78(2)(b), 85(2)(b), and 93(2)(c) of the Act, respectively. Section 32 clarifies that this Subdivision sets out the monitoring compliance requirements for this purpose.

Section 33 – Minister may appoint authorised persons

The Australian Government provides significant Commonwealth financial assistance under the Act for approved bodies representing government and non-government schools.

The provision of this financial assistance carries responsibilities and requirements for approved bodies under the Act, for example as set out in section 75 (requirements relating to operating not for profit, being fit and proper and maintaining financial viability), section 77 (ongoing policy requirements including implementing the Australian Curriculum, participating in the National Assessment Program – Literacy and Numeracy, and reporting), and section 78 (ongoing requirements on use of public funding).

The Department of Education administers the Act and Regulations, and has established processes for monitoring the compliance of approved bodies with their legislative responsibilities and requirements including, if necessary, taking appropriate action in instances of non-compliance.

The requirements under sections 33, 39 and 39A of the Regulations are essential to the ongoing monitoring of approved bodies' compliance with the Act and Regulations. These powers further continue in substance the same requirements that were imposed under the previous *Australian Education Regulations 2013* (the 2013 Regulation).

Section 33 provides that the Minister may appoint a person as an authorised person if the Minister is satisfied that the person has suitable qualifications or experience. This is relevant for the purposes of section 39 and section 39A where an authority or body must give an authorised person access to records. The nature of the qualifications or experience that may be considered suitable will vary depending on the nature of the inquiries or compliance activities to be undertaken by the person.

An authorised person could be a legal practitioner, investigator, auditor, former regulator, or forensic accountant depending on the specific details to be investigated. By way of example, if an investigation related to the financial matters of an approved body, the Minister could consider whether a person has suitable experience in auditing or accounting. In addition, when appointing an authorised person to undertake auditing activities of approved bodies' compliance with the Act and Regulations, for example the requirements in sections 75 and 77 of the Act, consideration could be given to demonstrated compliance audit qualifications and suitable associated expertise and experience.

As section 33 is a decision to appoint a person to undertake a specific function, it is not considered appropriate for merits review (see paragraphs [4.40] to [4.43] of the Administrative Review Council's guidance *What decisions should be subject to merit review?*).

Section 34 – Certificate to be given to Secretary

Section 34 provides that a certificate must be provided to the Secretary by an approved authority, block grant authority or non-government representative body for a school relating to a year. If the approved authority is a State or Territory, the certificate must be prepared by the Auditor-General of the State or Territory, or a person appointed by the State or Territory Minister for the school. In all other cases the certificate must be prepared by a qualified accountant (defined at subsection 34(4)). Subsection 34(5) provides that and the Minister may, in writing, approve a person where the Minister is satisfied that the person has relevant qualifications or experience.

The certificate must state whether an amount equal to the sum paid to the authority or body under the Act has been spent or committed to be spent in accordance with sections 29 (approved authorities, broadly, for the purpose of providing school education), 30 (block grant authorities, for the purpose of capital expenditure relating to the provision of school education) and 31 (non-government representative bodies, for the purpose of supporting school education) as relevant; and in relation to block grant authorities, that interest earned on capital funding paid by the Commonwealth under the Act has been spent or committed to be spent in accordance with section 30.

Paragraph 34(3)(c) provides that this certificate must be given to the Secretary on or before 30 June the next year, or on another day determined in writing by the Minister.

The instruments made by the Minister under subsection (5) and paragraph (3)(c) may be either administrative or legislative in character, depending on how the power is exercised and the substance of the instrument. Any instrument made under that provision that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

Section 35 – Requirement relating to financial assistance and financial operations – government schools

Section 35 provides that an approved authority of a government school (a State or Territory) must give the Secretary a report prepared by the Auditor-General for the State or Territory, or a person appointed by the State or Territory Minister for the school, for each year.

The report must contain the total amount of financial assistance paid in accordance with the Act that is allocated by the authority to schools for the year. For each school, the report must contain the amount of financial assistance paid in accordance with the Act that is allocated by the authority to the school for the year and the amount of financial assistance paid in accordance with the Act and allocated by the authority to the school because the circumstances mentioned in Schedule 1 applied in relation to the school for the year.

Subsection 35(2) provides that an approved authority is not required to include information about the amount of financial assistance paid to a school because of the circumstances in Schedule 1 unless the Minister requests this in writing.

Subsection 35(3) provides that the report mentioned in subsection (1) must be prepared by either the Auditor-General of the State or Territory, an independent third party agreed to in writing by the Minister, the Chief Executive Officer of the approved authority, the Chief Financial Officer of the approved authority.

Subsection 35(4) provides that the report must be given to the Secretary no later than the day determined by the Minister and in a way determined by the Minister, where the Minister makes such a determination.

The instrument made by the Minister under subsection (4) may be either administrative or legislative in character, depending on how the power is exercised and the substance of the instrument. Any instrument made under that provision that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

Section 36 – Requirement relating to financial assistance and financial operations – non-government schools

Subsection 36(1) sets out the requirements for an approved authority, block grant authority or non-government representative body for a non-government school to provide a report to the Secretary for each year.

Paragraphs 36(1)(a) to (g) provide that the report must include the following statements:

- (a) the total amount of financial assistance paid in accordance with the Act that is allocated by the authority to the school for the year;
- (b) a statement about how the financial assistance paid in accordance with the Act was used or is intended to be used by the authority or body and the school;

- (c) a statement about whether the authority or body and the school has in place satisfactory internal accounting systems, controls and procedures for records kept by the authority in accordance with section 37 (requirement to keep records);
- (d) a statement about the financial operations of the authority or body and the school including the authority or body's financial viability, funding sources and:
 - recurrent income and expenditure;
 - capital income and expenditure;
 - trading activities;
 - loans for recurrent or capital purposes;
 - assets and liabilities;
 - any other financial information required by the Minister;
 - for approved authorities, refundable enrolment deposits.
- (e) the total amount of financial assistance paid in accordance with the Act to the authority that is not allocated by the authority to a school;
- (f) for an approved authority that is an approved system authority – the amount of financial assistance paid in accordance with the Act and allocated by the authority to a school because the circumstances mentioned in Schedule 1 applied in relation to the school for the year,
- (g) for an approved authority for more than one school – information showing how each amount mentioned in paragraph (a) for a school was determined in accordance with the authority's needs-based funding arrangement.

Subsection 36(2) provides that an approved authority is not required to include information about the amount of financial assistance paid to a school because of the circumstances in Schedule 1 unless the Minister requests this in writing.

Subsection 36(3) provides that the report must also identify any records kept by the authority or body in accordance with section 37 (requirement to keep records), and include a copy of any financial statement and audit document prepared in accordance with section 38 (requirement for authorities or bodies for non-government schools to prepare and audit financial statements).

Subsection 36(4) provides that the report must not include information that would identify a donor as a funding source for the school.

Subsection 36(5) provides that the report must be given to the Secretary no later than the day determined by the Minister and in a way determined by the Minister, where the Minister makes such a determination.

Subsection 36(6) provides that a block grant authority for a non-government school must give the Secretary a report for the year in accordance with the Capital Grants Program Guidelines.

Subsection 36(7) provides that a non-government representative body for a non-government school must give the Secretary a report for the year which is in accordance with the Capital Grants Program Guidelines, the Non-Government Reform Support Fund Guidelines and, any written arrangement entered into between the Secretary and the body relating to financial assistance.

The instruments made by the Minister under subparagraph (1)(d)(vi) and paragraphs (5)(a) and (b) may be either administrative or legislative in character, depending on how the power is exercised and the substance of the instrument. Any instrument made under that provision that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

This section provides for a procedural decision. There is no automatic consequence for failing to meet requirements that are affected by decisions under these provisions, unless the Minister decides to take compliance action under the Act which would be reviewable as set out in section 118 of the Act.

Section 37 – Requirement to keep records

Section 37 sets out the records that must be kept by an approved authority, block grant authority and non-government representative body. These records must be identifiably separate from other records that the authority or body may hold for the purposes of other undertakings the authority or body conducts or to which the authority or body is related, and be kept for seven years.

An approved authority of a non-government school must keep records relating to the authority's compliance with the Act and the Regulations (including records relating to enrolments and attendance rolls at school), the financial administration of the authority, and the financial administration of the school. The records must identify all income and expenditure that relates to any financial assistance paid to the authority in accordance with the Act.

A block grant authority or non-government representative body must keep records relating to the body's compliance with the Act and the Regulations, and the financial administration of the authority or body. The records must identify all income and expenditure that relates to any financial assistance paid to the authority in accordance with the Act.

Section 38 – Requirement for authorities or bodies for non-government schools to prepare and audit financial statements

Section 38 provides that approved authorities, block grant authorities or non-government representative bodies for non-government schools must prepare financial statements in accordance with Australian Accounting Standards (defined in section 4) that relate to any financial assistance paid in accordance with the Act; and have those statements audited in accordance with Australian Auditing Standards and generally accepted auditing practices.

This section does not apply to approved authorities of government schools.

Section 39 – Requirements for access to records and premises

Section 39 sets out the requirements for access to records kept by an approved authority, block grant authority and non-government representative body relating to their compliance, in circumstances where it is not otherwise available to the department. The authority or body

must allow an authorised person full and free access to certain records. The Minister may appoint a person as an authorised person if the Minister is satisfied that the person has suitable qualifications or experience in accordance with section 33.

Subsection 39(2) provides:

- approved authorities of government schools must allow the authorised person full and free access to records relating to the authority's compliance with the Act and the Regulations;
- approved authorities of non-government schools must allow the authorised person full and free access to records relating to the authority's compliance with the Act and the Regulations, records relating to the financial administration of the authority, and records relating to financial administration of the school; and
- block grant authorities and non-government representative bodies must allow the authorised person full and free access to records relating to the authority or body's compliance with the Act and the Regulations, and records relating to the financial administration of the authority or body.

Subsection 39(3) provides that the authority or body must allow the authorised person to take extracts from, and make copies of, the records.

Subsection 39(4) provides that an approved authority, block grant authority or non-government representative body for a non-government school must, for the purposes mentioned in subsections (2) or (3), allow the authorised person to have full and free access to any premises occupied by the authority or body in its capacity as such an authority or body, and in the case of approved authorities for non-government schools, full and free access to the schools to inspect the school and count students at the school.

Subsection 39(5) provides that the authority or body must give or arrange for any help the authorised person requires for the purposes of this provision.

Subsection 39(6) provides that an authority or body is not required to comply with these requirements unless the authorised person gives reasonable notice to the authority or body of access required and that access occurs at reasonable times.

Subsection 39(7) provides that an authorised person must seek and consider the views of the relevant authority or body on any access required by the authorised person under subsection (2) or (4).

This provision is essential to ensure the ongoing integrity and accountability of Commonwealth financial assistance provided under the Act, and provide an appropriate and balanced mechanism for investigating non-compliance including misuse of financial assistance.

This provision may be used to require an approved body to provide access to records about its expenditure of Commonwealth financial assistance, the evidentiary basis for financial and other reporting to the department (including where that may have directly influenced the calculation of Commonwealth financial assistance – such as school census), and to ensure

that it has appropriate and suitable governance arrangements for its schools and management of public funding.

Section 39 is limited in its application to records related to compliance with the Act or Regulations, and associated financial administration. This limitation confines the exercise of section 39 to require information in relation to matters that are directly connected to approved bodies meeting their responsibilities and requirements for Commonwealth financial assistance.

An additional safeguard is the limited scope of section 39 – the requirements apply only to bodies that have been approved under the Act to receive Commonwealth financial assistance. The provisions do not operate more broadly and do not prescribe any offence or civil penalty for failure to comply. The imposition of these requirements strike an appropriate balance between the rights and liberties of those bodies, and the obligations that flow from receiving public funding under the Act.

This provision may be used in order to conduct the annual Census Post-enumeration exercise that is directed to ensuring the accuracy of payments of recurrent funding to schools, and in appropriate cases, the recovery of overpayments. Additionally, this provision applies where section 33 is used to appoint professionals such as auditors or accountants to undertake audits where non-compliance is suspected or has been identified. External contractors are appointed as authorised persons to validate the accuracy of self-reported student counts through the annual non-government schools census. Reports from authorised persons inform decision making in determining whether to take compliance action, and where appropriate the compliance action to take.

This power is investigative in nature and relates to a body's compliance with the law, and so is not considered appropriate for merits review (see paragraph [4.31] to [4.33] of the Administrative Review Council's guidance *What decisions should be subject to merit review?*).

Collection of personal information under section 39

Section 39 is limited in scope to information and records that relate to compliance with the Act and Regulations, and associated financial administration. Information of this kind would generally not be personal information as it consists of financial records, governance arrangements, and operational records.

Personal information may however be accessed either incidentally, or in certain specific circumstances where the nature of the investigation or auditing activity may require information about an individual. For example, in considering whether an approved body meets the basic ongoing requirements to be 'fit and proper', it may be necessary to take into account information about individual officers of that body. By way of another example, certain student records (for example, enrolment and attendance) may be required to be accessed, to ensure the veracity and completeness of school census reporting used in calculating Commonwealth financial assistance. This is essential to ensuring the integrity of the primary purpose for the Act and the Regulations.

To the extent that personal information is accessed under section 39, the *Privacy Act 1988* will apply to that information, and would be required to be collected, used and disclosed consistently with the Australian Privacy Principles.

Section 39A – Requirement to provide information and records

Subsection 39A(1) requires a block grant authority, non-government representative body or an approved authority for a non-government school to provide information or records requested by the Minister or authorised person that relate to:

- the authority or body's compliance with the Act and the Regulations;
- the financial administration of the authority or body;
- the financial administration of the school.

Subsection (2) provides that information or records must be provided in the manner and by the day specified in writing by the Minister or the authorised person.

The instruments made by the Minister under subsections (1) and (2) may be either administrative or legislative in character, depending on how the power is exercised and the substance of the instrument. Any instrument made under that provision that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

This provision is essential to ensure the ongoing integrity and accountability of Commonwealth financial assistance provided under the Act, and provide an appropriate and balanced mechanism for investigating non-compliance including misuse of financial assistance.

This provision may be used to require an approved body to provide access to information and records about its expenditure of Commonwealth financial assistance, the evidentiary basis for financial and other reporting to the department (including where that may have directly influenced the calculation of Commonwealth financial assistance – such as school census), and to ensure that it has appropriate and suitable governance arrangements for its schools and management of public funding.

Section 39A is limited in its application to information and records related to compliance with the Act or Regulations, and associated financial administration. This limitation confines the exercise of section 39A to require information in relation to matters that are directly connected to approved bodies meeting their responsibilities and requirements for Commonwealth financial assistance.

An additional safeguard is the limited scope of section 39A – the requirements apply only to bodies that have been approved under the Act to receive Commonwealth financial assistance. The provisions do not operate more broadly and do not prescribe any offence or civil penalty for failure to comply. The imposition of these requirements strike an appropriate balance between the rights and liberties of those bodies, and the obligations that flow from receiving public funding under the Act.

This section allows the Minister to require information to be produced by certain approved bodies related to the body's compliance with the Act or the Regulations, or in relation to certain financial matters. This power is investigative in nature and relates to a body's compliance with the law, and so is not considered appropriate for merits review (see paragraph [4.31] to [4.33] of the Administrative Review Council's guidance *What decisions should be subject to merit review?*).

Collection of personal information under section 39A

Section 39 is limited in scope to information and records that relate to compliance with the Act and Regulations, and associated financial administration. Information of this kind would generally not be personal information as it consists of financial records, governance arrangements, and operational records.

Personal information may however be obtained either incidentally, or in certain specific circumstances where the nature of the investigation or auditing activity may require information about an individual. For example, in considering whether an approved body meets the basic ongoing requirements to be 'fit and proper', it may be necessary to take into account information about individual officers of that body. By way of another example, certain student records (for example, enrolment and attendance) may be required to be provided, to ensure the veracity and completeness of school census reporting used in calculating Commonwealth financial assistance. This is essential to ensuring the integrity of the primary purpose for the Act and the Regulations.

To the extent that personal information is accessed or obtained under section 39 and 39A, the *Privacy Act 1988* will apply to that information, and would be required to be collected, used and disclosed consistently with the Australian Privacy Principles.

Section 40 – Requirement to keep Minister informed

Section 40 sets out the changes of circumstances that must be notified to the Minister in writing by an approved authority, block grant authority or non-government representative body for a school. In each case, the authority or body must notify the Minister of any changes to any information in the authority or body's approval under Part 6 of the Act (including basic and ongoing requirements for approval). An authority (other than an approved system authority) or body for a non-government school must also notify the Minister of any changes of key individuals (defined in section 4) of the authority or body. An approved system authority must also notify the Minister of any changes to the person who is the chief executive officer or chief finance officer or who is undertaking the tasks of the chief executive officer or chief finance officer of the authority.

Section 42 – Implementing a curriculum

Section 42 provides that approved authorities must implement the Australian Curriculum that is authorised by the Ministerial Council or another curriculum assessed by ACARA as allowing comparable outcomes to the Australian Curriculum and included on ACARA's Recognition Register.

Subsection 42(2) provides that the curriculum must be fully implemented in the learning areas, and by the times, agreed by the Ministerial Council.

Full implementation is explained in subsection 42(3) as teaching, assessing and reporting on student achievement, including to parents, using the content, including the cross-curriculum priorities and the general capabilities, and achievement standards in the curriculum.

It is important to note that ACARA's recognition process does not replace State and Territory school registration processes and requirements, which continue to apply.

In relation to reporting, section 59 of the Regulations provides that student achievement must be reported to parents and carers against any available national standards. For schools implementing the Australian Curriculum, it would be expected that schools would report against the Australian Curriculum achievement standards. For schools implementing alternative curriculum it is expected that they would report against achievement standards in the curriculum that was assessed by ACARA as meeting comparable outcomes to the Australian Curriculum.

The requirements in section 42 are made pursuant to paragraph 77(2)(b) of the Act, which requires an approved authority to implement a curriculum at the school in accordance with the Regulations.

Subsection 130(4) of the Act permits the Regulations to provide in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or other writing as in force or existing from time to time. The Regulations prescribes the Australian Curriculum, and any curriculum on ACARA's Recognition Register, as existing from time to time. The note in the provision explains that in 2023, the Australian Curriculum could be viewed at <https://v9.australiancurriculum.edu.au> and ACARA's Recognition Register could be viewed on ACARA's website (<http://www.acara.edu.au>).

Section 43 – Student assessments

Section 43 provides that approved authorities must ensure that each school continues to participate in the National Assessment Program as per current arrangements, as set out in the Assessments table included in section 43, and other assessments as agreed by the Ministerial Council (a note provides that these other assessments would be outlined on the National Assessment Program website which in 2023 is accessible at www.nap.edu.au).

The Assessments table in section 43 includes each assessment that must be participated in at column 1, the frequency of the assessments at column 2, and the students who must undertake the assessments at column 3. Assessments in items 1 to 3 of the table (NAP annual assessment in reading, writing and language conventions, NAP annual assessment in numeracy, NAP annual assessment in science literacy) must be undertaken at all schools. Assessment in the remaining items 4 to 9 are sample assessments that must be undertaken if the school is selected to participate in a sample. Schools are selected using a scientific stratified random sampling design and notified well in advance of the sample assessment by the organisation that has been contracted to conduct the sample assessment.

Subsection 43(2) provides that the assessments must be undertaken with the frequency mentioned in column 2 of the table and no later than a day or days determined by the Minister. A note is included referencing related reporting requirements at section 53.

Subsection 43(3) requires approved authorities to provide data to ACARA that is collected from enrolment information relating to students undertaking assessments mentioned in the table in subsection (1) and specified in the Data Standards Manual: Student Background Characteristics.

Subsection 43(4) requires the information mentioned in subsection (3) to be provided to ACARA by the day and in a way determined by the Minister.

Subsection 43(5) requires the approved authority to participate in all activities associated with the NAP in accordance with any written directions of the Minister. Subsection 43(6) provides that the Minister can make a written direction to an approved authority for this purpose.

The student assessment requirements are made pursuant to paragraph 77(2)(c) of the Act, which requires an approved authority to ensure that the schools participate in the national assessment program in accordance with the Regulations. Subsection (5) is made in reliance on the power in subsection 130(1) of the Act that allows the Regulations to prescribe matters 'necessary or convenient' for carrying out or giving effect to the Act.

The instruments made by the Minister under subsections (4) and (6) may be either administrative or legislative in character, depending on how the power is exercised and the substance of the instrument. Any instrument made under that provision that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

This section provides for a procedural decision. There is no automatic consequence for failing to meet requirements that are affected by decisions under this provision, unless the Minister decides to take compliance action under the Act which would be reviewable as set out in section 118 of the Act.

Section 46 – Providing information about a school's census

Under paragraphs 77(2)(f) and 77(3)(a) of the Act, approved authorities are required to provide information in accordance with the Regulations as part of their ongoing policy requirements. Subdivision C requires an approved authority to provide certain information about a school's census. The census requirements recognise the conduct, under the authority of the Australian Bureau of Statistics (ABS), of an annual census for national statistics. Each jurisdiction carries this out for government schools and supplies the data to the ABS. The department conducts this on behalf of non-government schools. The requirements in the Act and the Regulations draw on those elements of the statistical census carried out by States and Territories that the department needs to calculate financial assistance under the Act.

Further information regarding the use of the school census information can be found at section 65 concerning the use and disclosure of school education information.

Subsection 46(1) provides that the approved authority of a school must provide the Secretary with information each year relating to the school's census in accordance with this section.

Subsection 46(2) provides that an approved authority for a school must provide the relevant information set out in sections 47 to 50. An approved authority for a government school must provide the information set out in sections 47 (information about the schools) and 48 (information about students). The information is required to enable the calculation of payments of financial assistance. An approved authority of a non-government school must provide the information set out in sections 49 (information about the school) and 50 (information about the students). This information is required to enable the calculation of payments of financial assistance and to provide statistical information to the ABS on behalf of non-government schools.

Subsection 46(3) provides that this information must be provided for each location of the school, and in the form and manner approved by the Secretary.

Subsection 46(4) clarifies that there is no need for an approved authority of more than one school to provide an individual census return for each school; rather, a single census return may include information for each of the schools of the approved authority. However, the census return must provide census data in a way that allows for the breakdown by individual school.

Subsection 46(5) provides that the census return for a non-government school must be provided to the Secretary no later than 7 days after the school's census day for the year, or if the Secretary allows a longer period, before the end of that period. For example, a longer period may be appropriate to ensure the necessary data has been thoroughly checked. Nevertheless, the data will need to be available at the time the department needs to make calculations of schools' yearly funding entitlements.

Subsection 46(6) provides that the census return for a government-school must be provided to the Secretary by the day determined by the Minister.

The instruments made by the Secretary or Minister under subsections (3), (5) and (6) may be either administrative or legislative in character, depending on how the power is exercised and the substance of the instrument. Any instrument made under that provision that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

This section provides for a procedural decision. There is no automatic consequence for failing to meet requirements that are affected by decisions under this provision, unless the Minister decides to take compliance action under the Act which would be reviewable as set out in section 118 of the Act.

Section 47 – Government schools—information about the schools

Section 47 provides that the following information about government schools must be included in the census return each year:

- the name of each school;
- the street address of each location (or campus) of each school;
- the years of schooling offered by each school;
- whether each school is a primary school, a secondary school or a combined school; and
- whether each school is a special school or special assistance school.

Section 48 – Government schools—information about students

Section 48 provides that the following information about students receiving primary or secondary education at government schools on the schools' census day for a year must be included in a census return for the schools for the year:

- the number of students at each school for the year. A note is included referencing section 9A which provides information relevant to calculating the number of students at a school for a year, including how to count part-time students (in practice, government authorities will need to provide full-time equivalent figures that combine the count of full time students and the aggregated fractions of a full time load for part time students);
- for each year of schooling at each school - the number of students at the school in each of the following categories:
 - Aboriginal and Torres Strait Islander students;
 - students receiving distance education.

Subsection 48(2) provides that for each year of schooling, the number of overseas students and the number of students who hold or are included in a visa in force under the *Migration Act 1958* must be included in the census return. An overseas student is taken to be a student for these purposes.

Subsection 48(4) provides that the information must not explicitly identify any student.

Subsection 48(5) provides that where a government school has more than one location (or campus), the data required must be provided for each location of the school, with the exception of data regarding students receiving distance education.

Section 49 – Non-government schools—information about the school

Section 49 provides that the following information about non-government schools must be included in the census return each year:

- the name of each school;
- the street address of each location of each school;
- the postal address of the school;

- the school’s email address;
- the years of schooling offered by each school;
- whether each school is a primary school, a secondary school or a combined school
- whether the school is a special school or special assistance school; and
- the number of staff at the school in the following categories on the school’s census day for the year:
 - teaching staff;
 - staff who are not teaching staff;
 - full-time staff;
 - part-time staff;
 - full-time equivalent (FTE) staff;
 - Aboriginal and Torres Strait Islander staff;
 - if the school is a combined school, FTE staff providing primary education, FTE staff providing secondary education; and
 - if students board at the school, FTE staff with boarding duties and FTE staff without boarding duties.

Section 50 – Non-government school—information about students

Section 50 provides that the following information about students receiving primary or secondary education at non-government schools on the school’s census day must be included in the census return each year:

- the number of students at the school for the year, and the number of full-time and part-time students at the school for the year. A note is included referencing section 9B, which provides information relevant to calculating the number of students at a school for a year, including how to count part-time students;
- for each year of schooling, the number of students by the following characteristics, as specified by the Secretary in writing:
 - age;
 - sex;
 - Aboriginal and Torres Strait Islander students;
 - students with disability;
 - students receiving distance education;
 - students who board.

Subsection 50(2) provides that for each year of schooling, the number of overseas students and the number of students who hold or are included in a visa in force under the *Migration Act 1958* must be included in the census return. An overseas student is taken to be a student for these purposes.

Subsection 50(4) provides that the information must not explicitly identify any student.

Subsection 50(5) provides that where a school has more than one location (or campus), the data required must be provided for each location of the school, with the exception of data regarding students receiving distance education.

Section 52 – Information for the purposes of a national program to collect data on schools and school education

Under paragraphs 77(2)(f) and 77(3)(b) of the Act, approved authorities are required to provide information in accordance with the Regulations as part of their ongoing policy requirements. Subdivision D requires an approved authority to provide certain information for the purposes of a national program to collect data on schools and school education.

Section 52 requires an approved authority to provide the information set out in sections 53 (required information – performance measures), 54 (form of information – performance measures), 55 (required information – general information), 56 (required information – information about a school’s students) and 57 (required information – secondary schools and combined schools).

Subsection 52(2) provides that information mentioned in section 53 must be given to the Minister no later than the day or days determined by the Minister if such a determination has been made, or if no determination has been made, no later than a day that will allow publication of the report within one year after the end of each year. For example, if no determination is made and the information relates to the 2014 calendar year, the information must be provided in time to allow publication of the information in the form of a report before 31 December 2015. The approved authority must also give the information in the way or ways determined by the Minister, if such a determination has been made. The information in section 53 is required for a number of national performance reports.

Subsection 52(3) provides that information mentioned in sections 55 to 57 must be given to ACARA no later than the day or days determined by the ACARA if such a determination has been made, or if no determination has been made, no later than a day that will allow publication of the report within one year after the end of each year. The approved authority must also give the information in the way or ways determined by ACARA, if such a determination has been made. These provisions enable ACARA to receive data files in a way that allows identification of schools. These sections require information for the My School website (www.myschool.edu.au) that is not collected elsewhere.

Subsection 52(4) requires that information mentioned in section 58A must be given to the Department, or a person determined in writing by the Minister, on the day and in the manner determined in writing by the Minister. Subsection (5) requires the Minister to have regard to the Ministerial Council disability guidelines for the relevant year in doing so.

Subsection 52(6) provides that information mentioned in section 58B must be given to the Department, or a person determined in writing by the Minister, and on the day and in the manner determined in writing by the Minister.

Subsection 52(7) defines the reporting period as the period determined by the Minister to which the information or a specified class of the information relates.

The instruments made by the Minister or ACARA under subsections (2), (4), (6) and (3) may be either administrative or legislative in character, depending on how the power is exercised and the substance of the instrument. Any instrument made under that provision that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This

process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

This section provides for a procedural decision. There is no automatic consequence for failing to meet requirements that are affected by decisions under this provision, unless the Minister decides to take compliance action under the Act which would be reviewable as set out in section 118 of the Act.

Section 53 – Required information—performance measures

Section 53 provides a table that sets out the performance measures for the following categories:

- English literacy (item 1);
- numeracy and mathematics (item 2);
- science (item 3);
- civics and citizenship (item 4);
- ICT literacy (item 5);
- vocational education and training (item 6); and
- student participation (item 7).

These performance measures relate to the student assessments that must be undertaken in accordance with section 43.

Two notes are included to clarify the reporting of these performance measures. The first refers to the calculation of the attendance rate that is set out at subsection 4(2) and relevant for the performance measure regarding student attendance. The second note is provided for clarity, confirming that an approved authority is not required to provide performance measures in relation to items 4 to 8 of the table in subsection 43(1) unless the school is selected to participate in the sample.

The performance measures listed include, where relevant, the applicable levels of proficiency. Levels of proficiency do not of themselves represent standards of educational proficiency. For any given level of proficiency to be set as a standard, expert advice needs to be considered and agreed by Ministerial Council. In the case of international assessments such as the Programme for International Student Assessment (PISA) the proficiency levels are as agreed by the governing body for the assessment.

For sample assessments, the proficiency level indicated reflects the agreed standard. For example, for the NAP sample science assessment, the level is at or above level 3.2 of the proficient standard. For NAP annual assessments, these are the proficiency level that is the national minimum standard for the relevant assessment. For example, for the Year 3 English Literacy assessments the level is proficiency level 2 and for Year 5 English Literacy assessments the proficiency level is level 4. Revised proficiency standards will be added to the Regulations when the Ministerial Council agrees any changes.

Section 54 – Form of information—performance measures

Section 54 sets out those performance measures that must be reported in a format that enables publication to be broken down into specified categories.

In relation to the performance measures listed in:

- paragraphs (a) and (b) of item 1;
- paragraphs (a) and (b) of item 2;
- paragraphs (a) and (c) of item 3;
- item 4; and
- item 5,

of the table in section 53, the specified categories are sex; Aboriginal and Torres Strait Islander students; socioeconomic background; language background; disability; and geographic location.

In relation to performance measures listed in:

- paragraph (d) of item 1;
- paragraphs (d) and (e) of item 2;
- paragraphs (e) and (f) of item 3; and
- item 7,

of the table in section 53, the specified categories are sex; Aboriginal and Torres Strait Islander students; socioeconomic background; geographic location; and either students in each of years 1 to 10, or ungraded primary or secondary students.

The categories of sex, Aboriginal and Torres Strait Islander students, socioeconomic background and language background are as described in the Data Standards Manual: Student Background Characteristics. The geographic location category is as approved by the Ministerial Council at its meeting in July 2001. This is classified according to the Ministerial Council for Education, Early Childhood Development and Youth Affairs School Geographic Location Classification System. This is based on the locality of individual schools and is used to disaggregate data according to Metropolitan, Provincial, Remote and Very Remote regions.

Section 55 – Required information—general information

Section 55 requires that the following information be provided by an approved authority in relation to each school:

- a short statement about the school which may include information listed in paragraph (a);
- whether the school is part of the Catholic school sector, the independent school sector or the government school sector;
- the number of teaching staff at the school during the reporting period including the number of teaching staff and full-time equivalent teaching staff, the positions of

teaching staff; and the number of teaching staff at each level of the Australian Professional Standards for Teachers (definitions in relation to teaching staff are those used by the Australian Bureau of Statistics for the National School Statistics Collection);

- the number of staff who are not teaching staff during the reporting period including the number of full-time equivalent non-teaching staff;
- a statement specifying whether students, parents and teachers were satisfied with the school during the reporting period, including (if applicable) data collected using the National School Opinion Survey; and
- a statement of the financial information for the school during the reporting period compliant with the *My School Financial Reporting: Key Principles and Methodology*.

This information is used for the purposes of the *My School* website (www.myschool.edu.au).

Subsection 130(4) of the Act permits the Regulations to provide in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or other writing as in force or existing from time to time. The *My School Financial Reporting: Key Principles and Methodology* are incorporated as existing from time to time and may be accessed on the *My School* website per the note in the provision, and at the link above.

Section 56 – Required information—information about a school’s students

Section 56 requires that the following information regarding students be provided by an approved authority in relation to each school:

- the total number of full-time equivalent students at the school during the reporting period;
- the number of students who have a language background other than English during the reporting period;
- the attendance rate at the school for students at the school during the reporting period (a note refers to the calculation of attendance rate at subsection 4(2));
- the attendance rate broken down by sex, year of schooling, Aboriginal and Torres Strait Islander students;
- student results from each of the NAP annual assessments at the school, in a manner that does not identify students (see section 43 regarding student assessments);
- any other information specified in the Data Standards Manual: Student Background Characteristics.

This information is used for the purposes of the *My School* website.

Section 57 – Required information—secondary schools and combined schools

Section 57 requires that the following information be provided by an approved authority in relation to a secondary or combined school for the reporting period:

- the number of students who:

- participated in vocational education and training, including: the number enrolled in a vocational education and training course; the number of vocational education and training qualifications that were completed; the level of vocational education and training qualifications that were completed; and the industry with which each vocational education and training course enrolled in was associated;
- undertook a school-based apprenticeship;
- undertook a school-based traineeship;
- attained year 12 or an equivalent level; and
- at the end of their schooling completed a qualification other than year 12 or an equivalent level;
- in relation to those students who ended their schooling during the reporting period:
 - a statement of the tertiary entrance results of students;
 - a statement of the destination of students (an indication of the destination of the students to further education or training, into the workforce or other).

This information is used for the purposes of the *My School* website.

Section 58 – Form of information—information required under sections 55 to 57

Section 58 provides that the Minister may determine by legislative instrument the categories into which the information required under section 55 to 57 is to be broken down. That is, the Minister may determine that the information be provided in a different format to allow disaggregation of data for analysis to assist in the evaluation of school education policies.

This section provides for a decision to determine matters by legislative instrument. Decisions of general application that are legislation-like are considered unsuitable for merits review on the basis that they are more properly subject to the regime of scrutiny and publication that applies to those instruments (see paragraph [3.3] of the Administrative Review Council’s guidance *What decisions should be subject to merit review?*).

Section 58A – Required information – students with disability

Section 58A provides the reporting requirements for approved authorities for both government and non-government schools for the purposes of the NCCD. Subsection 58A(1) ensures that the students that approved authorities are required to provide information on are those students falling within the class of students set out in the Ministerial Council disability guidelines for the NCCD and which are within the same cohort of students reported on for a school’s census.

Subsection 58A(2) sets out the kinds of student information required to be reported by approved authorities, which includes information set out in the Ministerial Council disability guidelines for the NCCD. Subsection 58A(3) provides that an overseas student is taken to be a student for these purposes.

Subsection 58A(4) ensures that any information provided by approved authorities must not explicitly identify a student.

Subsection 58A(5) provides that where a school has more than one location (e.g. campus), the data required must be provided for each location of the school.

Subsection 58A(6) sets out necessary definitions for the operation of section 58A.

This section provides for a decision to determine matters by legislative instrument. Decisions of general application that are legislation-like are considered unsuitable for merits review on the basis that they are more properly subject to the regime of scrutiny and publication that applies to those instruments (see paragraph [3.3] of the Administrative Review Council's guidance *What decisions should be subject to merit review?*).

Section 58B – Required information – information about students at certain schools

Section 58B requires the provision of certain additional information in relation to each student at certain schools.

The information required by section 58B is:

- the name and residential address of each person responsible for the student;
- the residential address of the student;
- whether the student is a distance education student;
- whether the student is a primary or secondary student;
- whether the student boards at the school; and
- any other information determined by the Minister, by legislative instrument.

In addition, if the school has more than one location (i.e. campus), the information must be provided for each location of the school.

The capacity to require an approved authority to provide any other information determined by the Minister, through legislative instrument, will simplify the administrative process for incorporating information into future collections, whilst ensuring such changes continue to be subject to Parliamentary oversight.

The requirement to provide the information set out in section 58B does not extend to government schools, special schools, special assistance schools, sole provider schools and majority Aboriginal and Torres Strait Islander schools. In addition to this, the requirement to provide the information set out in section 58B does not extend to distance education students.

This section provides for a decision to determine matters by legislative instrument. Decisions of general application that are legislation-like are considered unsuitable for merits review on the basis that they are more properly subject to the regime of scrutiny and publication that applies to those instruments (see paragraph [3.3] of the Administrative Review Council's guidance *What decisions should be subject to merit review?*).

Section 59 – Student reports

Under paragraphs 77(2)(f) and 77(3)(f) of the Act, approved authorities are required to provide information in accordance with the Regulations as part of their ongoing policy

requirements. Subdivision E requires an approved authority to provide certain information to persons responsible for students at a school.

Subsection 59(1) provides that an approved authority for a school must provide a report to each person responsible for each student at the school in accordance with this section. For example, this may include providing a report to both parents/carers of the child if the parents/carers are separated.

Subsection (2) provides that the report must be readily understandable to the person responsible for the student. Subsection (3) provides that a report must be provided at least twice a year.

Subsection (4) sets out the information that must be contained in the report for a student who is in years 1 to 10. The report must give an accurate and objective assessment of a student's progress including an assessment of the student's achievement. This assessment, for students in years 1 to 10, must be against any available national standards, and relative to the performance of the student's peer group, and reported as A to E (or equivalent) for each subject studied, defined against specific learning standards. The peer group for a student will usually be the students in their class, but may in some cases be the students in all the related classes of a system, or for students with special learning needs that cohort for the system. Alternatively, the report must contain information the Minister determines as equivalent to this.

The instrument made by the Minister under subsection (4) may be either administrative or legislative in character, depending on how the power is exercised and the substance of the instrument. Any instrument made under that provision that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

A note is included to acknowledge that an approved authority for a school may have obligations under the *Privacy Act 1988* in providing this information.

This section provides for a procedural decision. There is no automatic consequence for failing to meet requirements that are affected by decisions under this provision, unless the Minister decides to take compliance action under the Act which would be reviewable as set out in section 118 of the Act.

Section 60 – Making information publicly available annually

Under paragraphs 77(2)(f) and 77(3)(g) of the Act, approved authorities are required to provide information in accordance with the Regulations as part of their ongoing policy requirements.

Section 60 requires the following information for a school must be publicly available within 6 months after the end of a year (defined in section 6 of the Act as a calendar year):

- contextual information about the school including the characteristics of students at the school;

- teacher standards and qualifications (as mandated in the State or Territory in which the school is located);
- workforce composition, including numbers of staff who identify as Aboriginal or Torres Strait Islander;
- student attendance at the school including the attendance rates for each year of schooling and a description of how non-attendance is managed by the school (a note refers to the calculation of attendance rate at subsection 4(2));
- student results in NAP annual assessments;
- parent, student and teacher satisfaction with the school, including (if applicable) data collected using the National School Opinion Survey (see further information at Section 55 above);
- school income broken down by funding source; and
- where secondary education is provided:
 - senior secondary outcomes, including the percentage of year 12 students undertaking vocational training or training in a trade, and the percentage of year 12 students attaining a year 12 certificate or equivalent vocational education and training qualification; and
 - post-school destinations.

A note clarifies that information that has been made publicly available for the purposes of section 44 is not required to be made separately publicly available for the purposes of this section if the publication of that information complies with this section.

Subsection 60(2) clarifies that an approved authority can make other information publicly available and that this section only sets out the minimum amount of information to be made publicly available.

Subsection 60(3) provides that the information must be made publicly available by placing the information on the internet and where requested, the approved authority must provide this information to a person responsible for a student who does not have access to the internet.

A note is included to acknowledge that an approved authority for a school may have obligations under the *Privacy Act 1988* in providing this information.

Section 62 – Information to the public about financial assistance

Under paragraphs 85(2)(c) and 93(2)(d) of the Act, block grant authorities and non-government representative bodies are required to provide information in accordance with the Regulations as part of their ongoing requirements for approval. Division 4 requires a block grant authority and non-government representative body to provide certain information to the public about financial assistance.

Section 62 provides that a block grant authority or a non-government representative body must publish:

- the amount of financial assistance received under the Act (if any);
- the application of that financial assistance;

- information about the way or manner in which the school applies for financial assistance; and
- how decisions of the authority or body to allocate financial assistance are reviewed.

As is the current practice, block grant authorities are required to provide a process for a school to apply for a capital grant and have in place a formal process to allow for a school to have a decision reviewed. The intention of these Regulations is to ensure that block grant authorities have transparent processes in place and are accountable to both the Commonwealth and their member schools for their decisions.

Once a school has been approved for a grant, the block grant authority and the school enter into an agreement that outlines the obligations on both parties and an associated payment schedule.

A note is included to clarify that this information can be published by placing the information on the internet.

Subsection 62(2) provides that this section sets out the minimum information required to be published and that a block grant authority and non-government representative body can make other information publicly available.

A note is included to acknowledge that the authority or body may have obligations under the *Privacy Act 1988* in publishing this information.

Section 62A – Continuing requirements

Section 62A prescribes requirements on approved authorities, block grant authorities and non-government representative body that continue to apply if the authority or body is no longer approved under the Act. These requirements are specified for the purposes of section 96A of the Act, which provides that former approved authorities or bodies must meet the continuing requirements prescribed in the Regulations. These continuing requirements are those set out in Division 2 of Part 5 of the Regulations (ongoing policy and funding requirements for authorities and bodies) but:

- section 40 (requirement to keep Minister informed) is excluded, and
- section 36 (requirement relating to reporting on financial assistance and financial operations), subsections 37(1), (2) and (4) (requirement to keep records) and section 38 (requirement for approved authorities or bodies for non-government schools to prepare and audit financial statements) are modified so they only apply in relation to a year in which the authority or body spent, or committed to spend, financial assistance under the Act.

This section increases accountability and supports action against non-compliant authorities or bodies funded under the Act, by prescribing certain requirements that continue to apply even if the authority or body is no longer approved.

Part 6 – Actions Minister may take for failure to comply with the Act or this instrument, and to require amounts to be repaid

Section 63 – Limits on recovery of overpayments, recoverable payments and other unpaid amounts

Under paragraph 110(1)(a) of the Act, the Minister is able to determine that a State or Territory pay to the Commonwealth a specified amount as a result of a failure to comply with the Act or because of an overpayment or other reason set out in section 109. Section 63 limits the amount that can be determined by the Minister where an approved authority, block grant authority, or non-government representative body has received more funding (whether under the Act or a prior schools' funding Act) than it was entitled to.

This section provides that the determined amount can be no higher than (as relevant):

- the amount by which an overpayment exceeded the amount to which the authority or body was entitled to;
- the amount of the recoverable payment; or
- the amount that remains unpaid in relation to other Acts, as set out in paragraph 109(3)(b) of the Act.

This section prescribes matters related to a decision of the Minister under paragraph 110(1)(a) and (b) of the Act, which are themselves reviewable decisions in accordance with the Act. A decision that is a preliminary or procedural step in the making of a substantive decision is generally not suitable for merits review (see paragraphs [4.3] – [4.4] of the Administrative Review Council's guidance *What decisions should be subject to merit review?*). Section 63 is not a reviewable decision for this reason.

Section 64 – Recovering capital funding when a school ceases to provide education

Under paragraph 110(1)(a) of the Act, the Minister is able to determine that a State or Territory pay to the Commonwealth a specified amount where a school that has received Commonwealth capital funding ceases to provide primary or secondary education in accordance with subsection 109(4) of the Act. Subsection 64(1) contains a table that specifies the method for calculating the recoverable amount of Commonwealth capital funding that can be determined by the Minister in these circumstances.

Subsection 64(2) provides that if a school ceases to provide primary or secondary education during the first half of the designated use period specified in column 2 of the table in section 64, the amount determined by the Minister must not exceed the capital funding amount.

Subsection 64(3) provides that if a school ceases to provide primary or secondary education during the second half of the designated use period specified in column 2 of the table in section 64, the amount determined by the Minister must not exceed the amount that remains if, each year in the second half of the designated use period, the capital funding amount were reduced by equal proportions. A note is included to provide an example of how this amount is calculated in practice.

Subsection 64(4) provides that in determining a period for the purposes of subsections 64(2) or (3), the period is rounded to the nearest full year.

Part 7 – Miscellaneous

Section 65 – Using or disclosing school education information

Paragraph 125(1)(a) of the Act provides that the Minister may use and disclose school education information in accordance with the Regulations. School education information is defined under section 6 of the Act as information obtained under or for the purposes of the Act.

Subsection 65(1) specifies the purposes for which the Minister may use or disclose school education information, which are:

- the purposes of the Act or the Regulations;
- the National School Resourcing Board;
- programs administered by the Minister;
- research into matters of relevance to the department;
- statistical analysis of matters of relevance to the department;
- policy development; and
- any other purpose determined by the Minister by legislative instrument in accordance with subsection 65(4).

Subsection 65(2) specifies the organisations that the Minister may disclose school education information to, being:

- ACARA for the purposes of its functions;
- the Australian Bureau of Statistics for the purposes of its functions;
- the Productivity Commission for the purposes of its functions;
- a State or Territory body responsible for school education in the State or Territory for the purposes of its functions; and
- any other person determined by the Minister by legislative instrument in accordance with subsection 65(4).

Minor changes have been made to subsection (2) as compared to the version in the 2013 Regulations, to clarify that subsection (2) lists persons and bodies.

For the avoidance of doubt, and without limiting subsection (1) or (2), the Minister may also disclose school education information to the Australian Bureau of Statistics for the purposes of its assistance in determining a CTC score for a school.

Subsection (5) is included for the avoidance of doubt, and makes it clear that the section does not limit any other lawful use or disclosure of school education information.

Subsections (1), (2) and (3) prescribe matters for the purposes of subsection 125(1) of the Act, which allows the Minister to use or disclose school education information in

accordance with the Regulations. Decisions under that provision are not reviewable, however they are not considered suitable for merits review as they are decisions for which there would be no appropriate remedy (see paragraph [4.49] of the Administrative Review Council's guidance *What decisions should be subject to merit review?*).

Subsection (4) provides for a decision to determine matters by legislative instrument. Decisions of general application that are legislation-like are considered unsuitable for merits review on the basis that they are more properly subject to the regime of scrutiny and publication that applies to those instruments (see paragraph [3.3] of the Administrative Review Council's guidance *What decisions should be subject to merit review?*).

Section 66 – Giving notice to persons of proposed decisions

Subsection 66(1) sets out the decisions the Minister may make under the Act which require the provision of a written notice. These are:

- a decision that an approved authority for a government school is not taken to satisfy basic requirements under subsection 76(2); and
- a decision to take action under subsection 110(1) of the Act because of a matter mentioned in section 108 of the Act (actions the Minister may take for failure to comply with the Act).

Subsection 66(2) provides that the Minister must provide a written notice containing the terms of the proposed decision and the reasons for the proposed decision, and provide the person with at least 28 days in which to make a submission.

Subsection 66(3) provides that the written notice must be given to the relevant person for the decision, which is defined in section 6 of the Act by reference to section 118 of the Act.

Where the proposed decision is that an approved authority for a government school is not taken to satisfy basic requirements under subsection 76(2) of the Act, the notice must be given to the approved authority.

Subsection 66(4) requires the Minister to have regard to any submission made under this section when making the final decision.

Section 66 is made in reliance on paragraph 130(2)(b) of the Act. It requires the Minister to provide written notice of a proposed decision, for the purposes of giving an opportunity for the relevant person or approved authority to make submissions about the proposed decision, which the Minister is then required to have regard to in making the decision.

Section 67 – Application of this instrument

Section 67 is an application provision that makes it clear that the Regulations apply to 2023 and later years, and that the 2013 Regulations continue to apply in relation to previous years as if they had not been repealed.

Financial assistance under the Act is calculated on the basis of a calendar year. The 2013 Regulations applied until their repeal by the Regulations during the 2023 calendar year. As

the 2013 Regulations are repealed during the year it is therefore necessary for the Regulations to prescribe matters in relation to that year as well, so as to avoid any gap in the continuity of the matters prescribed by the 2013 Regulations and the Regulations. The Regulations will prescribe matters in relation to financial assistance in respect of the current calendar year and future years, and will not affect financial assistance in respect of previous years.

To the extent that the Regulations may have retrospective application the matters to be prescribed are substantially the same as were prescribed by the 2013 Regulations. There will accordingly be no disadvantage to a person's rights as at the time the instrument is registered, nor will liabilities be imposed on any person in respect of anything done or omitted to be done when the instrument is registered. The liabilities and obligations of a person as provided for under the 2013 Regulations will be materially the same under the Regulations.

Section 68 – Things done under the 2013 Regulations

Section 68 is a transitional provision that preserves the effect of things done under the 2013 Regulations before the commencement of the Regulations.

Schedule 1 – Funding in prescribed circumstances

Schedule 1 is given effect by section 25A of the Regulations. It deals with financial assistance payable under sections 69A and 69B of the Act.

Part 1, Schedule 1 – Additional support for Northern Territory government schools

Clause 1, Schedule 1 – Prescribed circumstances

Clause 1 of Schedule 1 provides that the Minister may determine, under section 69B of the Act,¹ additional funding amounts for government schools located in the Northern Territory in a transition year (2018 to 2027 inclusive), if the Northern Territory Government has entered into an arrangement with the Minister relating to the use of the funding.

The clauses in Part 1 of Schedule 1 provide for additional support for Northern Territory government schools to support the transition to the new funding arrangement by 2028. The additional funding is, primarily, used to assist in the implementation of evidence-based school education initiatives in Northern Territory government schools, to help assist vulnerable and disadvantaged students in those schools. The detailed arrangements for the use of the funding are set out in the bilateral agreement between the Australian Government and the Northern Territory Government.

¹ Section 69B of the Act empowers the Minister to determine an amount of funding for a transitioning school for a year between 2018 and 2027 (inclusive) in the circumstances set out in the Regulations. Funding under section 69B must be appropriated annually.

Clause 2, Schedule 1 – Amounts payable

For the purposes of paragraph 69B(4)(a) of the Act, Clause 2 of Schedule 1 prescribes the total of the amounts that may be determined by the Minister for relevant transition years, taken together, in relation to the circumstances prescribed by clause 1. Clause 2 prescribes the total amount as \$78.453 million.

Clause 3, Schedule 1 – Purpose for which funding is spent or committed to be spent

Clause 3 of Schedule 1 prescribes that funding must be spent for the purpose of supporting school education and in accordance with any conditions outlined in the arrangement between the Minister and the Northern Territory Government. Unless otherwise directed by the Minister in writing, funding (and any interest earned on it) must be spent or committed to be spent in the year in which it is paid.

Any instrument made under clause 3 of Schedule 1 that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

Part 2, Schedule 1 - Additional financial assistance and adjustment funding for non-government schools

Clause 4, Schedule 1 – Circumstances

Clause 4 of Division 1, Part 2 of Schedule 1 prescribes circumstances for a school for 2018 that the Minister must be satisfied apply in order for this additional financial assistance under section 69A of the Act.² The circumstances are:

- the school is a non-government school,
- the school's approved authority is not an approved system authority, and
- the school's Commonwealth share for that year is greater than 80%.

Where these criteria are met, the Minister may exercise the discretion conferred by section 69A of the Act to consider providing adjustment funding for certain non-government schools, in order to assist those schools which experience low growth or funding reductions in 2018 under the new funding arrangements.

Clause 5, Schedule 1 – Amounts payable

Funding was provided in 2018 only under this measure, and capped at the school level. The most the Minister can determine for a particular school for a year was the difference between:

² Section 69A of the Act empowers the Minister to determine an amount of funding for a school in the circumstances set out in the Act. Funding under section 69A is supported by the standing appropriation in section 126 of the Act.

- the school’s total recurrent funding for 2018 (as calculated under section 32 of the Act), and
- the per student amount for the school for 2017 indexed by 3%, multiplied by the number of students at the school for 2018.

The per student amount for a school for 2017 is either the amount set out in Schedule 2 of the Regulations, for the school, or (if the school isn’t specified in Schedule 2) the 2017 recurrent funding for the school’s approved authority (worked out under subsection 35B(3) of the Act) divided by the number of students at the schools of the approved authority for 2017.

The Australian Government committed to provide additional funding to certain non-government schools with low or negative funding growth between 2017 and 2018 that become financially vulnerable and require additional assistance during their transition to a consistent Commonwealth funding share.

Non-government schools that are part of an approved system authority (which has its own needs-based funding arrangement) were not eligible for this funding, on the basis that such approved authorities are able to redistribute financial assistance available to the authority to support schools during the transition period.

Clause 6, Schedule 1 – Purpose for which funding is spent or committed to be spent

Under clause 6, funding payable under section 69A(1) of the Act in the circumstances mentioned in clause 4 must effectively be spent in the same way as recurrent funding, and in accordance with any directions given by the Minister. Unless otherwise directed by the Minister, funding (and any interest earned on it) must be spent or committed to be spent before 31 December 2022. This extended period allows approved authorities greater flexibility to manage the transition of their schools to a consistent Commonwealth funding share.

Any instrument made under clause 6 of Schedule 1 that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

Division 2, Part 2, Schedule 1 – Adjustment funding for low-growth non-government schools for 2019

Clause 7, Schedule 1 – Circumstances

Clause 7 of Schedule 1 sets out the circumstances for a school for 2019 that the Minister must be satisfied apply for this additional financial assistance under subsection 69A(1) of the Act for 2019. The circumstances are:

- the school is a non-government school; and
- subsection 78(6) of the Act does not apply to the approved authority for the school for that year.

Clause 8, Schedule 1 – Total amount payable

Clause 8 of Schedule 1 prescribes the total of the amounts determined by the Minister under subsection 69A(1) for the purposes of paragraph 69A(4)(a) of the Act for 2019 in relation to these circumstances mentioned in clause 7, to be \$36.49 million. As per paragraph 69A(4)(a) of the Act, the amounts that the Minister determines under subsection 69A(1) for 2019 in relation to the circumstances mentioned above must not exceed this total.

Clause 9, Schedule 1 – Matters that Minister may have regard to

Clause 9 of Schedule 1 prescribes the matters to which the Minister may have regard being the total amount, if any, of financial assistance payable for the school in the circumstances mentioned in clause 20. Accordingly, in making a decision under subsection 69A(1) of the Act about the amount of financial assistance that is payable for a school in the circumstances mentioned in clause 7 (Adjustment funding for low-growth non-government schools for 2019), the Minister may have regard to the total amount, if any, of financial assistance payable for the school in the circumstances mentioned in clause 20 (Additional financial assistance for non-government schools (2016 census data arrangements)) for 2019.

Clause 10, Schedule 1 – Purpose for which funding is spent or committed to be spent

Under clause 10, funding payable under section 69A(1) of the Act in the circumstances mentioned in clause 7 must effectively be spent in the same way as recurrent funding, and in accordance with any directions given by the Minister. Unless otherwise directed by the Minister, funding (and any interest earned on it) must be spent or committed to be spent before 31 December 2022.

Any instrument made under clause 10 of Schedule 1 that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

Part 3, Schedule 1 – Adjustment assistance for ACT non-government schools

Clause 11, Schedule 1 – Circumstances

Clause 11 of Schedule 1 Part 3 prescribes the circumstances for a school for that the Minister must be satisfied apply for this additional financial assistance under subsection 69A(1) of the Act. The circumstances are that the school is a non-government school located in the Australian Capital Territory.

This Part provides for supplementary funding for certain non-government schools located in the Australian Capital Territory (ACT), which have historically received additional funding in order to assist with what are particular disadvantage characteristics in the ACT. This discretionary, and limited, supplementary funding assists in a smooth transition for these schools to the new Commonwealth schools funding arrangements.

Clause 12, Schedule 1 – Amounts payable

Clause 12 of Schedule 1 prescribes the total of the amounts determined by the Minister under subsection 69B(1) for the purposes of paragraph 69B(4)(a) of the Act for the years 2018 to 2017 (inclusive) in relation to these circumstances mentioned in clause 11, to be \$46.073 million. As per paragraph 69B(4)(a) of the Act, the total of the amounts that the Minister determines under subsection 69B(1) for the years 2018 to 2027 (inclusive) in relation to the circumstances mentioned above must not exceed this total.

Clause 13, Schedule 1 – Purpose for which funding is spent or committed to be spent

Under clause 13, funding payable under section 69A(1) of the Act in the circumstances mentioned in clause 11 must effectively be spent in the same way as recurrent funding, and in accordance with any directions given by the Minister. Unless otherwise directed by the Minister, funding (and any interest earned on it) must be spent or committed to be spent before 2028.

Any instrument made under clause 13 of Schedule 1 that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

Part 4, Schedule 1 - Additional financial assistance for system weighted average SES schools for 2018

Clause 14, Schedule 1 – Circumstances

Part 4 of Schedule 1 provides for supplementary funding for 2018 for approved system authorities for non-government schools, that had their SES scores determined under the *Australian Education (SES Scores) Determination 2013* ('system-weighted average SES scores') in 2017.

These system-weighted average SES scores were replaced in 2018 with SES scores determined for each individual school under the 2013 Regulations. To the extent that the change in SES scores for these schools results in the approved system authority receiving less funding for 2018, than what it would have received for 2018 if the system-weighted average SES scores were maintained, the Minister was able to provide supplementary funding for the schools under section 69A of the Act in accordance with this Part of Schedule 1.

Clause 14 of Schedule 1 prescribes circumstances for the purposes of subsection 69A(1) of the Act. The circumstances it prescribes for a school in 2018 are that in 2017 the approved authority for the school was an approved system authority; and the SES score for the school for 2017 was specified in the *Australian Education (SES Scores) Determination 2013*.

Clause 15, Schedule 1 – Amounts payable

Subclause 15(1) of Schedule 1 prescribes the total of the amounts determined by the Minister under subsection 69A(1) for the purposes of paragraph 69B(4)(a) of the Act for 2019 in

relation to these circumstances mentioned in clause 14, to be the sum of the total amounts determined by the Minister under subclause 15(2).

Subclause 15(2) prescribes, for the purposes of paragraph 69A(2)(b) of the Act, the total of the amounts determined by the Minister for a school for 2018, in relation to the circumstances mentioned in clause 14, which must not exceed the difference between: the amount payable under section 32 of the Act for the school for 2018 and the amount that would be payable under section 32 of the Act for the school for 2018 if that amount were calculated using the SES score for the school for 2017.

As per paragraph 69A(4)(a) of the Act, the amounts that the Minister determines under subsection 69A(1) for 2018 in relation to the circumstances mentioned above must not exceed this total.

Clause 16, Schedule 1 – Purpose for which funding is spent or committed to be spent

Under clause 16, funding payable under section 69A(1) of the Act in the circumstances mentioned in clause 14 must effectively be spent in the same way as recurrent funding, and in accordance with any directions given by the Minister. Unless otherwise directed by the Minister, funding (and any interest earned on it) must be spent or committed to be spent before 31 December 2022.

Any instrument made under clause 16 of Schedule 1 that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

Part 5, Schedule 1 – Financial assistance certainty for non-government schools

Clause 17, Schedule 1 – Circumstances

Clause 17 of Schedule 1 sets out the circumstances for a school for 2019 that the Minister must be satisfied apply for this additional financial assistance under subsection 69A(1) of the Act for 2019. The circumstances are:

- the school is a non-government school; and
- subsection 78(6) of the Act applies to the approved authority for the school for 2019; and
- the school's Commonwealth share for that year is more or less than 80%.

A further prescribed circumstance is that the approved authority was an approved system authority in 2017 and had an SES score for 2017 specified in the *Australian Education (SES Scores) Determination 2013*.

Clause 18, Schedule 1 – Total amount payable

Clause 18 of Schedule 1 prescribes the total of the amounts determined by the Minister under subsection 69A(1) for the purposes of paragraph 69A(4)(a) of the Act for 2019 in relation to these circumstances mentioned in clause 17, to be \$82.74 million. As per paragraph

69A(4)(a) of the Act, the amounts that the Minister determines under subsection 69A(1) for 2019 in relation to the circumstances mentioned above must not exceed this total.

Clause 19, Schedule 1 – Purpose for which funding is spent or committed to be spent

Under clause 19, funding payable under section 69A(1) of the Act in the circumstances mentioned in clause 17 must effectively be spent in the same way as recurrent funding, and in accordance with any directions given by the Minister. Unless otherwise directed by the Minister, funding (and any interest earned on it) must be spent or committed to be spent before 31 December 2022.

Any instrument made under clause 19 of Schedule 1 that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

Clause 20, Schedule 1 – Circumstances

Clause 20 of Schedule 1 provides that, for the purposes of subsection 69A of the Act, for this additional financial assistance the circumstance for a school for 2019 is that the school is a non-government school.

Clause 21, Schedule 1 – Total amount payable

Clause 21 of Schedule 1 prescribes the total of the amounts determined by the Minister under subsection 69A(1) for the purposes of paragraph 69A(4)(a) of the Act for 2019 in relation to the circumstances mentioned in clause 20, to be \$79.28 million. As per paragraph 69A(4)(a) of the Act, the amounts that the Minister determines under subsection 69A(1) for 2019 in relation to the circumstances mentioned above must not exceed this total.

Clause 22, Schedule 1 – Purpose for which funding is spent or committed to be spent

Under clause 10, funding payable under section 69A(1) of the Act in the circumstances mentioned in clause 20 must effectively be spent in the same way as recurrent funding, and in accordance with any directions given by the Minister. Unless otherwise directed by the Minister, funding (and any interest earned on it) must be spent or committed to be spent before 31 December 2022.

Any instrument made under clause 22 of Schedule 1 that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

Part 6, Schedule 1 – Local Schools Community Fund

Clause 23, Schedule 1 – Circumstances

Clause 23 of Schedule 1 sets out the circumstance for a school for 2019 or 2020 that the Minister must be satisfied apply in relation to the school, for this financial assistance under

subsection 69A(1) of the Act for 2019 or 2020. The circumstance is that a project for the school has been approved by the Minister, in writing, for the year in accordance with the Local Schools Community Fund Guidelines.

Clause 24, Schedule 1 – Total amount payable

Clause 24 of Schedule 1 prescribes the total amounts determined by the Minister under subsection 69A(1) for the purposes of paragraph 69A(4)(a) of the Act for 2019 and 2020, taken together, in relation to these circumstances mentioned at clause 23, to be \$30.2 million. As per paragraph 69A(4)(a) of the Act, the amounts that the Minister determines under subsection 69A(1) for 2019 and 2020, taken together, in relation to the circumstances mentioned above must not exceed this total.

Clause 25, Schedule 1 – Purpose for which funding is spent or committed to be spent

Subclause 25(1) of Schedule 1 sets out, for the purposes of paragraph 78(2)(a) of the Act, that an approved authority for a school must spend, or commit to spend, financial assistance that is payable for the school under subsection 69A(1) of the Act, in the circumstances mentioned in clause 23 of Schedule 1:

- for the purposes of the project mentioned in paragraph 23 of Schedule 1; and
- in accordance with the Local Schools Community Fund Guidelines or as otherwise directed in writing by the Minister.

Subclause 25(2) provides that the financial assistance mentioned in subclause 25(1) must be spent, or committed to be spent, before 1 January 2021 or as otherwise directed in writing by the Minister.

Subclause 25(3) provides that for the purposes of paragraphs 25(1)(b) and 25(2)(b) of this clause, the Minister may give written directions to an approved authority.

Subclause 25(4) provides that any interest earned on financial assistance mentioned in subclause (1) must be spent, or committed to be spent, in the same way as the financial assistance.

Part 7, Schedule 1 – Schools Upgrade Fund

Clause 30, Schedule 1 – Circumstances

Clause 30 of Schedule 1 sets out the circumstance that the Minister must be satisfied apply in relation to a school, for this financial assistance under subsection 69A(1) of the Act. The circumstance is that the school is located in a State or Territory that has been affected by the COVID-19 pandemic and there is a need for capital expenditure in relation to the school.

Clause 31, Schedule 1 – Total amount payable

Clause 31 of Schedule 1 prescribes the amount, for the purposes of paragraph 69A(4)(a) of the Act for 2022 and 2023, taken together, in relation to the circumstance mentioned at clause 30, to be \$21.6 million. The effect is that the total of the amounts that the Minister determines

under subsection 69A(1) of the Act for 2022 and 2023, in relation to the circumstance mentioned above must not exceed the prescribed amount.

Clause 32, Schedule 1 – Ongoing funding requirements

Subclause 32(1) sets out, for the purposes of paragraph 78(2)(a) of the Act, that an approved authority for a school must spend, or commit to spend, financial assistance that is payable for the school under subsection 69A(1) of the Act, in the circumstance mentioned in clause 30 of Schedule 1:

- on a project to upgrade the school that was a funding commitment made before the general election in 2022 by the party that formed government after that election; or
- in accordance with any written directions given by the Minister.

Subclause 32(2) provides that financial assistance mentioned in subclause 32(1) must be spent, or committed to be spent, before 1 January 2024, or as otherwise directed in writing by the Minister.

Subclause 32(3) provides that for the purposes of paragraphs 32(1)(b) and 32(2)(b) of the clause, the Minister may give written directions to an approved authority.

Subclause 32(4) provides that any interest earned on financial assistance mentioned in subclause 32(1) must be spent, or committed to be spent, in the same way as the financial assistance.

Any instrument made under clause 32 of Schedule 1 that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

Clause 33, Schedule 1 – Providing information about financial assistance under this Division

Subclause 33(1) sets out, for the purposes of paragraph 77(2)(f) of the Act, that an approved authority for a school must provide to the Secretary information determined, in writing, by the Minister.

Subclause 33(2) provides that information mentioned in subclause 33(1) must be provided to the Secretary in the manner, and by the day, determined by the Minister.

Subclause 33(3) provides that, for the purposes of subclauses 33(1) and 33(2) of the clause, the Minister may determine:

- information for a specified school or for a class of schools, which must relate to financial assistance that is payable under subclause 69A(1) of the Act in circumstance mentioned in clause 30 of Schedule; and
- the manner in which, and the day by which, such information is to be provided.

Any instrument made under new clause 33 of Schedule 1 that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

Clause 34, Schedule 1 – Circumstances

New clause 34 of Schedule 1 sets out the circumstance for a school that the Minister must be satisfied apply in relation to a school, for this financial assistance under subsection 69A(1) of the Act. The circumstance is that the school is located in a State or Territory that has been affected by the COVID-19 pandemic and there is a need for capital expenditure in relation to the school.

Clause 35, Schedule 1 – Total amount payable

Clause 35 of Schedule 1 prescribes the amount for the purposes of paragraph 69A(4)(a) of the Act for 2022 and 2023, taken together, in relation to these circumstance mentioned in clause 34, to be \$32 million. The effect is that the total of the amounts that the Minister determines under subsection 69A(1) for 2022 and 2023 in relation to the circumstance mentioned above must not exceed the prescribed amount.

Clause 36, Schedule 1 – Ongoing funding requirements

Subclause 36(1) sets out, for the purposes of paragraph 78(2)(a) of the Act, that an approved authority for a school must spend, or commit to spend, financial assistance that is payable for the school under subsection 69A(1) of the Act, in the circumstance mentioned in clause 34 of Schedule 1, in accordance with any written directions given by the Minister.

Subclause 36(2) provides that financial assistance mentioned in subclause 36(1) must be spent, or committed to be spent, before 1 January 2024, or as otherwise directed in writing by the Minister.

Subclause 36(3) provides that for the purposes of paragraphs 36(1) and 36(2)(b) of the clause, the Minister may give written directions to an approved authority.

Subclause 36(4) provides that any interest earned on financial assistance mentioned in subclause 36(1) must be spent, or committed to be spent, in the same way as the financial assistance.

Any instrument made under clause 36 of Schedule 1 that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

Clause 37, Schedule 1 – Providing information about financial assistance under this Division

Subclause 37(1) sets out, for the purposes of paragraph 77(2)(f) of the Act, that an approved authority for a school must provide to the Secretary information determined, in writing by the Minister.

Subclause 37(2) provides that information mentioned in subclause 37(1) must be provided to the Secretary in the manner, and by the day, determined by the Minister.

Subclause 37(3) provides that, for the purposes of subclauses 37(1) and 37(2) of the clause, the Minister may determine:

- information for a specified school or for a class of schools, which must relate to financial assistance that is payable under subsection 69A(1) of the Act in circumstance mentioned in clause 34 of Schedule; and
- the manner in which, and the day by which, such information is to be provided.

Any instrument made under clause 37 of Schedule 1 that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

Clause 38, Schedule 1 – Providing information about financial assistance under this Division

Clause 38 of Schedule 1 sets out the circumstances that the Minister must be satisfied apply in relation to a school, for the purposes of making a determination of financial assistance for the school under subsection 69A(1) of the Act. The circumstances are that for a school for a year from 2023 to 2026 (inclusive):

- the school is an independent school, being one other than a government school or a Catholic systemic school; and
- the school is a majority Aboriginal and Torres Strait Islander school, or a special assistance school, or a special school; and
- the school is included in the table in Schedule 3; and
- the approved authority for the school has provided the information mentioned in section 56 of the Principal Regulation that is relevant to working out the school’s socio-educational disadvantage loading (SED loading) and low English proficiency loading (LEP loading) for the year; and
- the SED loading and LEP loading amounts for the school for the year, when worked out using information provided under section 56 of the Regulations, is lower than the SED loading and LEP loading amounts for the school for the year when worked out using numbers identified by the Australian Curriculum Assessment and Reporting Authority (ACARA) for the year by using the method it used in 2022 to work out the number of students by the application of fixed percentages.

The amount of financial assistance that a school attracts for a year is worked out using the formula in Division 2 of Part 3 of the Act. The financial assistance consists of a base amount for the school, plus loadings for schools with students with greater needs. Under section 38 of the Act and subsections 18(1) and (2) of the Regulations, the formula for working out the SED loading requires the input of ‘the number of students at the school for the year identified by ACARA as being in the lowest, and second lowest, socio-educational disadvantage quartile. Similarly, under section 39 of the Act and subsection 18(3) of the Regulations, the formula for working out the LEP loading requires the input of ‘the number of students at the school for the year identified by ACARA as disadvantaged language background other than English students’.

In 2022 ACARA to identified the relevant student numbers (in quartile 1, quartile 2, and who have a disadvantage language background) by applying fixed percentages of the schools' total student numbers. This method was used as an interim measure because accurate data was not available for certain highly disadvantaged independent majority Aboriginal and Torres Strait Islander schools, special assistance schools and special schools. The fixed percentages used were:

- for independent majority Aboriginal and Torres Strait Islander schools: 90% of students are in quartile 1, 10% of students are in quartile 2, and 90% of students have a disadvantaged language background other than English.
- for independent special schools and independent special assistance schools: 80% of students are in quartile 1, and 20% of students are in quartile 2.

Clause 39, Schedule 1 – Providing information about financial assistance under this Division

Clause 39(1) of Schedule 1 prescribes that the maximum amount payable for a school for a year, for the purposes of paragraph 69A(2)(b) of the Act, in relation to the circumstances mentioned in clause 38, must not exceed:

- for 2023 – 100% of the base adjustment amount for the school specified in the table at Schedule 3,
- for 2024 – 75% of the base adjustment amount for the school specified in the table at Schedule 3,
- for 2025 – 50% of the base adjustment amount for the school specified in the table at Schedule 3, and
- for 2026 – 25% of the base adjustment amount for the school specified in the table at Schedule 3.

Clause 39(2) of Schedule 1 provides that the total of the amounts that the Minister determines for a year, for the purposes of paragraph 69A(4)(a) of the Act, in relation to the circumstances mentioned above, must not exceed \$62,774,474 for 2023, \$47,080,856 for 2024, \$31,387,237 for 2025 and \$15,693,619 for 2026.

Clause 40, Schedule 1 – Providing information about financial assistance under this Division

Clause 40(1) sets out, for the purposes of paragraph 78(2)(a) of the Act, that an approved authority for a school must spend, or commit to spend, financial assistance that is payable for the school under subsection 69A(1) of the Act, in the circumstances mentioned above:

- for the purpose of providing school education at a school for which the authority is approved; and
- in accordance with any written directions given by the Minister.

Clause 40(2) has the effect that the purpose of providing school education includes the purposes set out in subsections 29(2) and does not include the purposes set out in subsection 29(3) of the Regulations.

Clause 40(3) provides that financial assistance mentioned in subclause 40(1) must be spent, or committed to be spent:

- by the day or within the period directed in writing by the Minister; or
- if there is no such direction, in the year in which the assistance is paid to the approved authority.

Clause 40(4) provides that for the purposes of clauses 40(1) and 40(3)(a), the Minister may give written directions to an approved authority.

Clause 40(5) provides that any interest earned on financial assistance mentioned in subclause 40(1) must be spent, or committed to be spent, in the same way as the financial assistance.

Any instrument made under new clause 40 of Schedule 1 that is of a legislative character would be registered in accordance with the *Legislation Act 2003*. This process would be managed by the department and there would be no additional administrative burden on the state and territory governments, schools or their approved authorities.

Schedule 2 - Per-student amounts for 2017 for certain schools

Schedule 2 sets out the per student amounts for 2017 for certain schools, for the purposes of Divisions 1 and 2 of Part 2 of Schedule 1.

Clause 1, Schedule 2 – Per-student amounts for 2017 for certain schools

This clause is to establish the per student amounts for schools whose approved authority is approved for more than one school, but which does not have its own need-based funding arrangement (i.e., is not an approved system authority). This is for the purposes of establishing whether these schools meet the prescribed circumstances relating to adjustment funding for non-government schools set out in Part 2 of Schedule 1. This clause will also provide a per-student amount for one school that began operating late in 2017, so that its per-student amount can reflect what it would have been had the school been open for the whole of 2017, and not pro-rated.

The per student amounts have been calculated by dividing the recurrent funding amount attracted by the relevant school for 2017 by the number of full-time equivalent students at the school for 2017.

Schedule 3 – Adjustment funding for highly disadvantaged independent school students

Clause 1, Schedule 3 – Schools and base adjustment amounts

Clause 1 of Schedule 3 provides the base adjustment amounts for the purposes of Part 9 of Schedule 1 to the Regulations.

The schools included in Schedule 3 were selected based on the following criteria:

- in 2022, the school was an independent majority Aboriginal and Torres Strait Islander school, special assistance school, or special school; and
- the school's SED loading and LEP loading amounts for 2022 were greater than zero; and
- the number of students in quartiles 1 and 2 relied upon in working out the SED loading amount for 2022, and the number of students with a disadvantaged language background other than English relied upon in working out the LEP loading amount for 2022, was the number identified by ACARA by the application of fixed percentages.

The base adjustment amounts for each school in Schedule 3 have been calculated to reflect an estimate of the reduced amount of SED loading and LEP loading to the schools due to these fixed percentages no longer being used to calculate those loadings. The amount is inclusive of both the Commonwealth funding share and an assumed 20 per cent state and territory share. Specifically, the base adjustment amounts reflect the difference between:

- the SED loading and the LEP loading amounts for the school for 2023, when worked out using 'fixed percentages', forecasted as at 7 December 2022, and
- the SED loading and LEP loading amounts for the school for 2023, when worked out using 2022 actual student background data from ACARA, forecasted as at 7 December 2022.

Schedule 4 - Repeals

Clause 1, Schedule 4 – The whole of the instrument

Schedule 4 repeals the *Australian Education Regulation 2013*.