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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

EDUCATION LEGISLATION AMENDMENT (PROVIDER INTEGRITY AND OTHER MEASURES) BILL 2017

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Education and Training, Senator the Honourable Simon Birmingham)

EDUCATION LEGISLATION AMENDMENT (PROVIDER INTEGRITY AND OTHER MEASURES) BILL 2017

OUTLINE

This Bill makes important changes to key legislation governing higher and international education to strengthen regulatory controls and student protections in these sectors. This will proactively address instances of unscrupulous providers transitioning operations into the FEE-HELP scheme and international education sector in the wake of reforms to vocational education and training (VET) student loan arrangements.

The Government's actions to address unscrupulous practices in the VET sector have resulted in a surge of VET providers, including some which had their VET FEE-HELP approval revoked, seeking to transition their operations into the higher education and international education sectors. It is clear that amendments to the higher education and international education legislative settings are necessary, when viewed against reforms to enhance regulatory tools and protections in VET Student Loans (VSL).

The *Higher Education Support Act 2003* (HESA) is the main piece of legislation providing funding for higher education in Australia, providing for Government subsidies and tuition support for students. The *Tertiary Education Quality and Standards Agency Act 2011* (TEQSA Act) provides regulatory enforcement powers and quality assurance mechanisms to assure the reputation of higher education.

The *Education Services for Overseas Students Act 2000* (ESOS Act) is the key legislation governing international education to enable the Government to take action to monitor, prevent and address unscrupulous businesses from gaining registration to deliver education services to overseas students. The ESOS Act sets out the legal framework governing delivery of education to overseas students in Australia on a student visa. The ESOS Act governs the registration process and obligations of registered international education providers, the Tuition Protection Service (TPS) and associated enforcement and compliance arrangements.

The Bill amends HESA, the TEQSA Act and the ESOS Act to protect students from unscrupulous providers. The amendments will bolster enforcement powers and oversight capabilities of relevant regulators, enabling them to intervene as necessary to prevent malicious practices across the higher and international education sectors.

It is critical to implement measures to ensure appropriately high standards are in place to assess applications and ensure ongoing compliance by those seeking to enter the higher education sector and the international education sector, the latter of which is Australia's largest service export worth $21.8 billion in 2016.

There is a corresponding need to ensure that the TEQSA Act provides appropriately stringent controls to protect students from potentially unscrupulous provider actions. The proposed amendments to the TEQSA Act will improve student

protection mechanisms by ensuring greater scrutiny of providers in the registration process and during a registration period. The amendments also improve the Tertiary Education Quality and Standards Agency's (TEQSA) capacity to efficiently perform its functions by clarifying that TEQSA may delegate its powers or functions to its Chief Executive Officer.

The measures contained in Schedule 1 (amendments to the ESOS Act) will:

- strengthen fit and proper person provisions to increase the scope of matters and persons which may be taken into consideration
- expand reporting of certain events to the ESOS agency
- extend information sharing provisions to allow the Secretary of the department responsible for administering education and training, and ESOS agencies, to share information with the Overseas Students Ombudsman, as well as any enforcement body to assist with its enforcement activities
- allow the Secretary and ESOS agencies to share and publish information about the exercise of functions of education agents
- amend late payment penalties to ensure the timeframe for payment is appropriate.

The measures contained in Schedule 2 (amendments to the TEQSA Act) will enhance TEQSA's compliance capabilities and introduce more stringent provider application requirements to better equip TEQSA to implement robust student protection mechanisms, by:

- enabling TEQSA to take into account the history of related entities, as well as the history of a provider's delivery of education generally, in its regulatory decision-making
- introducing a requirement that all registered higher education providers, and key personnel for those providers, must be fit and proper persons
- expanding the scope of matters about which providers must notify TEQSA
- addressing administrative efficiencies by clarifying that TEQSA may delegate its functions or powers to the Chief Executive Officer
- providing greater protection of Australian qualifications – this includes clarifying the definition of 'vocational education and training course' to make clear that courses which lead to Diplomas, Advanced Diplomas, Graduate Diplomas and Graduate Certificates are required to be accredited under the TEQSA Act or under vocational education laws
- bolstering financial viability and transparency requirements – these include requiring general purpose financial statements for providers of a certain size, and amending the definition of 'qualified auditor' to ensure that the auditor of a higher education provider's financial statements must be a 'registered auditor' for the purposes of the *Corporations Act 2001* or otherwise be approved by TEQSA.

The measures contained in Schedule 3 (amendments to HESA) will:

- enhance student protections by prohibiting unscrupulous marketing practices and barriers to withdrawal from study; and requiring that in order for a student to be and remain entitled to FEE-HELP they must be a 'genuine student', have been assessed as academically suited to undertake the relevant unit of study, and have a reasonable unit completion rate

- improve compliance capabilities including the ability for the Minister to vary conditions of approval for providers, to vary determinations relating to advance payments where there are concerns as to whether a provider is reporting genuine students, the introduction of civil penalties in cases of non-compliance, and adding provisions to ensure HESA is subject to monitoring under the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act)
- introduce more stringent provider application requirements – these include requiring a history of course delivery from the provider, the expansion of the fit and proper person requirement, an application exclusion period of six months after a failed application, and provisions for Commonwealth, State and Territory-established bodies to be exempt from the body corporate requirement
- increase financial viability and transparency requirements, including enhancing audit requirements for providers, and introducing the capacity to add additional financial viability or reporting requirements in the *Higher Education Provider Guidelines 2012* (Higher Education Provider Guidelines).

These measures are directed at reducing the risks to students and taxpayers associated with providers seeking to transition operations and/or students to the higher education sector following reforms to VET student loan arrangements. Accordingly they currently apply to providers not listed in Table A, B or C of HESA, and to students enrolling at these providers. These are generally private, non-university providers who offer courses of study eligible for FEE-HELP assistance. The Bill extends to providers approved under section 16-25 of HESA. Providers listed in Tables A-C, primarily universities, are subject to a range of oversights and legislative requirements including through their establishing legislation and under program specific accountability arrangements. The specific risks targeted by these measures arise in respect of a sub-set of providers which operate outside of the legislative and accountability requirements which apply to universities and which potentially presents a significantly higher risk to Government in terms of their organisation, business structures and student outcomes.

Collectively, these measures are intended to target and mitigate unscrupulous behaviour by higher and international education providers while avoiding interference with the operations of legitimate and reputable providers operating in the sector. This Bill is intended to mitigate similar provider compliance and conduct issues that occurred in the VET sector.

FINANCIAL IMPACT STATEMENT

The amendments to the *Higher Education Support Act 2003*, the *Education Services for Overseas Students Act 2000* and the *Tertiary Education Quality and Standards Agency Act 2011* have no financial implications.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation considers the measures in the Bill are likely to have only minor regulatory impacts on business, community organisations and individuals. A regulatory impact statement is not required for this Bill (OBPR reference number 22313).

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

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This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

This Bill makes important changes to key legislation governing higher and international education, to strengthen regulatory controls and student protections in the higher education and international education sectors. This will proactively address instances of unscrupulous providers transitioning operations into the FEE-HELP scheme and international education sector in the wake of reforms to vocational education and training (VET) student loan arrangements.

The Government's actions to address unscrupulous practices in the VET sector have resulted in a surge of VET providers seeking to transition their operations into the higher education and international education sectors. It is clear that amendments to the higher education and international education legislative settings are necessary, when viewed against reforms to enhance regulatory tools and protections in VET Student Loans (VSL).

The *Higher Education Support Act 2003* (HESA) is the main piece of legislation providing funding for higher education in Australia, providing for Government subsidies and tuition support for students. The *Tertiary Education Quality and Standards Agency Act 2011* (TEQSA Act) provides regulatory enforcement powers and quality assurance mechanisms to assure the reputation of higher education.

The *Education Services for Overseas Students Act 2000* (ESOS Act) is the key legislation governing international education to enable the Government to take action to monitor, prevent and address unscrupulous businesses from gaining registration to deliver education services to overseas students. The ESOS Act sets out the legal framework governing delivery of education to international students in Australia on a student visa. The ESOS Act governs the registration process and obligations of registered international education providers, the Tuition Protection Service (TPS) and associated enforcement and compliance arrangements.

The Bill amends HESA, the TEQSA Act and the ESOS Act to protect students from unscrupulous practices of some providers. The amendments will bolster enforcement powers and oversight capabilities of relevant regulators, enabling them to intervene as necessary to prevent malicious practices across the higher and international education sectors.

It is critical to implement measures to ensure an appropriately high standard is in place to assess applications and ensure ongoing compliance by those seeking to enter the higher education and international education sectors, the latter of which is Australia's largest service export worth $21.8 billion in 2016.

There is a corresponding need to ensure that the TEQSA Act provides appropriately stringent controls to protect students from potentially unscrupulous provider actions. The proposed amendments to the TEQSA Act will improve student protection mechanisms by ensuring greater scrutiny of providers in the registration process and during a registration period. The amendments also improve the Tertiary Education Quality and Standards Agency's (TEQSA) capacity to efficiently perform its functions by clarifying that TEQSA may delegate its powers or functions to its Chief Executive Officer.

These measures are intended to target and mitigate unscrupulous behaviour by higher education and international education providers while avoiding interference with the operations of legitimate and reputable providers operating in the sector. This Bill is intended to mitigate similar provider compliance and conduct issues that occurred in the VET sector.

The measures contained in Schedule 1 (amendments to the ESOS Act) will:

- strengthen fit and proper person provisions to increase the scope of matters and persons which may be taken into consideration
- expand reporting of certain events to the ESOS agency
- extend information sharing provisions to allow the Secretary of the department responsible for administering education and training and ESOS agencies to share information with the Overseas Students Ombudsman, as well as any enforcement body to assist with its enforcement activities
- allow the Secretary and ESOS agencies to share and publish information about the exercise of functions of education agents
- amend late payment penalties to ensure the timeframe for payment is appropriate.

The measures contained in Schedule 2 (amendments to the TEQSA Act) will enhance TEQSA's compliance capabilities and introduce more stringent provider application requirements to better equip TEQSA to implement robust student protection mechanisms, by:

- enabling TEQSA, in its regulatory decision-making, to take into account the history of related entities, as well as the history of a provider's delivery of education generally
- introducing a requirement that all registered higher education providers, and key personnel for those providers, must be fit and proper persons
- expanding the scope of matters that providers must notify TEQSA about
- addressing administrative efficiencies by clarifying that TEQSA may delegate its functions or powers to the Chief Executive Officer
- providing greater protection of Australian qualifications– this includes clarifying the definition of 'vocational education and training course' to make clear that courses which lead to Diplomas, Advanced Diplomas, Graduate Diplomas and Graduate Certificates are required to be accredited under the TEQSA Act or under vocational education laws

- bolstering financial viability and transparency requirements – these include requiring general purpose financial statements for providers of a certain size, and amending the definition of 'qualified auditor' to ensure that the auditor of a higher education provider's financial statements must be a 'registered auditor' for the purposes of the *Corporations Act 2001* or otherwise be approved by TEQSA.

The measures contained in Schedule 3 (amendments to HESA) will:

- enhance student protections by prohibiting unscrupulous marketing practices and barriers to withdrawal from study; and requiring that in order for a student to be and remain entitled to FEE-HELP they must be a 'genuine student', have been assessed as academically suited to undertake the relevant unit of study, and have a reasonable unit completion rate
- improve compliance capabilities including the ability for the Minister to vary conditions of approval for providers, to vary determinations relating to advance payments where there are concerns as to whether a provider is reporting genuine students, the introduction of civil penalties in cases of non-compliance, and adding provisions to ensure HESA is subject to monitoring under the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act)
- introduce more stringent provider application requirements – these include requiring a history of course delivery from the provider, the expansion of the fit and proper person requirement, an application exclusion period of six months after a failed application, and provisions for Commonwealth, State and Territory established bodies to be exempt from the body corporate requirement
- increase financial viability and transparency requirements, including mandatory general purpose financial statements for providers of a certain size, amending the definition of an auditor, and introducing revenue diversification requirements for providers.

These measures apply to providers not listed in Table A, B or C of HESA, and to students enrolling at these providers. These are generally private, non-university providers who offer courses of study eligible for FEE-HELP assistance. Providers listed in Tables A-C, primarily universities, are subject to a range of oversights and legislative requirements including through their establishing legislation and under program-specific accountability arrangements. The specific risks targeted by these measures arise in respect of a sub-set of providers which operate outside of the legislative and accountability requirements which apply to universities and which present a significantly higher risk to students and taxpayers in terms of their organisation and business structures, and student outcomes.

Analysis of human rights implications

The Bill engages the following human rights:

- the right to work - Article 6 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- the right to education - Article 13 of the ICESCR
- the right to privacy and reputation - Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR)

- the right to a fair and public hearing and the right to be presumed innocent until proven guilty - Article 14 of the ICCPR
- minimum fair trial guarantees (relating to the imposition of penalty provisions) – Article 15 of the ICCPR
- the rights of the child - Article 3 of the Convention on the Rights of the Child (CRC).

Article 6: Right to work

This Bill engages the right to work which is set out in Article 6 of the ICESCR.

Under Article 6(1) States Parties are required to recognise the right to work, which includes the right of everyone to the opportunity to gain their living by work which they freely choose or accept. Article 6(2) provides that the steps to be taken by States Parties to achieve the full realisation of this right include providing technical and vocational education plans to facilitate access to employment.

This right is engaged by virtue of an objective of the Bill, which is to ensure loans to students are provided for higher education that meets workplace needs and improves employment outcomes. The measures introduced by the Bill are reasonable and proportionate to systemic problems encountered in the FEE-HELP scheme.

This right is limited in that the Bill introduces some measures which may make it more difficult for some prospective students to access the Higher Education Loan Program (HELP), which removes up-front cost barriers to tertiary education by providing income-contingent loans. Such measures include requiring students to be genuine students, strengthening the academic suitability provisions and raising the bar for providers to be approved in the new program. However, these measures represent a reasonable and proportionate limitation on the right to work.

Introducing requirements that students are ‘genuine’ and are assessed by providers as academically suited to undertake their proposed unit of study in order to be entitled to FEE-HELP assistance will protect vulnerable people from being expediently enrolled in higher education courses by less scrupulous providers and incurring a FEE-HELP debt where they are not in a position to undertake and complete the course.

By expanding the ability for the Minister to vary conditions of approval for higher education providers, this Bill also establishes a new framework to limit course eligibility for higher education loans to those courses approved by the Minister and introduces maximum loan amounts or number of places for eligible courses. This measure may limit the right to work by confining the scope of higher education courses that the provider offers for which students are eligible to receive FEE-HELP assistance and, by extension, may discourage students from studying thereby impacting their employability. However, the limitation is justified as it supports the legitimate policy objective of restricting the ability of unscrupulous higher education providers to exploit grants and other payments provided under HESA. It ensures that the focus of the higher education loan program is to provide financial support for genuine students to study, thereby enhancing the opportunities for employment and vocational or professional advancement.

This Bill is compatible with the right to work.

Article 13: Right to education

This Bill engages the right to education under Article 13 of the ICESCR. Article 13 recognises the important personal, societal, economic and intellectual benefits of education.

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

The intent of the FEE-HELP assistance scheme is to make higher education more accessible to students who may not otherwise have had access. Seeking to bolster regulatory oversight and accountability of approved course providers within the marketplace supports and augments the broader policy objective of enhancing the quality of higher education and the integrity of sector participants responsible for its delivery. These measures engage and promote the right to education as they are designed to enhance oversight of the sector, improve standards of compliance by sector participants and ensure integrity and accountability of operators. In this way the measures serve to maximise educational outcomes by prioritising Commonwealth assistance loans to accord with skills needs and ensuring overall fiscal sustainability for the Commonwealth to effectively regulate the higher education sector.

Measures contained in Schedule 1 (amendments to the ESOS Act) engage the right to education, contained in Article 13 of the ICCPR, insofar as it relates to the provision of education services to international students by education service providers registered under the ESOS Act.

The Australian Government has the overarching responsibility for protecting the reputation of Australia's international education sector, supporting the capacity of the sector to provide quality education and training services, and maintaining the integrity of the student visa program.

The measures contained in Schedule 1 enhance international students' right to education by ensuring the integrity of the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) registration processes and ensuring that unscrupulous providers do not gain access to, or maintain their registration in, the international education sector. In particular, measures contained in Schedule 1 enhance the right to education by:

- supporting the effective administration of the ESOS legislative framework by the Australian Government and State and Territory governments
- establishing and safeguarding Australia's international reputation as a provider of high quality education and training by ensuring that education and training for overseas students meets nationally consistent standards
- providing ESOS agencies with the necessary powers to undertake their functions and ensure standards of education to overseas students are maintained
- ensuring the integrity of registered providers.

Schedules 2 and 3 of the Bill contain a number of measures which promote the right to education by strengthening Australia's higher education system and ensuring the ongoing quality and operational integrity of the sector. The enhanced compliance requirements in these Schedules ensure that access to education at high quality higher education providers continues to be accessible for eligible students through FEE-HELP assistance, which can be used to defer tuition fees and be repaid once a student reaches the minimum repayment threshold.

Schedule 3 of the Bill ensures access to higher education on the basis of capacity by requiring providers not listed in Table A, B or C of HESA to properly assess the academic suitability of students who wish to enrol for a course of study. By mandating that students meet requisite academic suitability standards, access to (and the ability of students to benefit from) higher education is promoted by ensuring courses undertaken are commensurate with academic capability. This promotes academic empowerment and fulfilment in education yielding important developmental benefits to students in accordance with, and in furtherance of, the principles contained in Article 13.

In addition, minimum registration and trading history requirements will be introduced for non-Table A, B or C higher education providers who are applying for approval under HESA. This is intended to enhance the integrity of the scheme, and preserve the quality of the higher education sector by ensuring that all providers are suitably experienced and able to provide quality education.

Measures such as the prohibition of certain marketing practices and the prohibition on withdrawal fees promote the right to education by ensuring that the higher education sector does not come into disrepute. In particular, the Bill implements strengthened measures in relation to marketing of higher education courses and Commonwealth student loans to address actual and anticipated unscrupulous behaviour by higher education course providers. Without adequate understanding of what students are signing up to, or through pressure sales tactics, a Commonwealth student loan can represent a significant financial liability to the student. This may negatively impact the student's future ability to engage in education courses suited to the student's interests and abilities.

Further, measures which extend the circumstances in which a student can seek re-credit of their FEE-HELP loan debt balances and remission of a debt similarly engage and promote the right to education and support students' access to education. The circumstances include if the student is not a genuine student or if the provider has failed to comply with certain obligations under the Bill and the failure has adversely affected the student. Re-crediting of a FEE-HELP loan debt will continue to be available in special circumstances and if there has been unacceptable behaviour by a higher education provider at the time of the student's application for a loan. These measures increase protections available to students, which is consistent with, and promotes, the right to education.

The above measures collectively affirm and promote the right to education as they are directly aimed at enhancing the probity and efficacy of higher education service delivery. In particular, the measures are legitimately aimed at maximising educational outcomes through a series of protective provisions to ensure that higher education providers are not able to subvert the intention of the FEE-HELP loan framework. This is achieved, for example, through: more stringent financial

viability reporting obligations for providers (including revenue diversification requirements); bolstering the fit and proper person test for approved provider eligibility; and increasing monitoring capabilities and expanding regulatory powers exercisable by TEQSA and the department under HESA to investigate instances of non-compliance by approved providers.

The Bill also introduces measures which may limit the right to education. In particular:

Eligibility requirements and academic suitability may limit accessibility to certain units of study or higher education courses

Amendments to section 104-1 of HESA (items 22 to 25 of Schedule 3) will require students to meet certain eligibility requirements and satisfy academic suitability standards to be entitled to FEE-HELP assistance for higher education units of study.

Requiring providers to develop and apply appropriate student entry procedure requirements to ensure that a student is properly assessed as being academically suitable for a higher education course before enrolling, or that the student meets the requirement of being a 'genuine student' may technically limit a student's ability to access education in a higher education course. However, the limitation is a reasonable and proportionate response directed to protecting vulnerable students who do not have the academic ability to undertake a higher education course from being burdened with a significant debt with limited or no prospects for a positive educational or training outcome. The genuine student requirement is also reasonable and proportionate to the objective of ensuring that higher education resources are directed to students who have a genuine desire and interest in pursuing higher education.

More robust eligibility requirements will be introduced in respect of providers seeking approval as higher education providers, such as the introduction of a requirement that consideration will be given to whether a higher education provider has sufficient experience in delivering higher education (items 3 and 4 of Schedule 3). This is intended to enhance the integrity of the HELP program by ensuring that providers are properly scrutinised to ensure they have experience in providing higher education, satisfy financial viability requirements and meet governance and management standards.

To the extent that this measure may limit a student's ability to access higher education, that limitation is reasonable, proportionate and supports the legitimate policy objective to improve the integrity, demonstrated performance and regulatory compliance of the sector.

Limiting FEE-HELP eligibility may limit the scope of Commonwealth loan assisted courses

New subsection 16-60(3) of HESA (item 6 of Schedule 3) allows the Minister to impose, as a condition of a higher education provider's approval, a maximum value of loans that may be offered by that provider, or impose a limit on the courses that the provider offers for which students are eligible to receive FEE-HELP assistance.

These conditions may be imposed at the same time as initial approval or as a condition of continuing provider approval.

This measure could be regarded as limiting the right to education to the extent that the proposed conditions may limit students' access to FEE-HELP eligible courses delivered by particular providers and thereby confine course choice. This limitation is a proportionate response to the broader policy objective of mitigating the ability of higher education providers to exploit grants and other payments provided under HESA. It seeks to promote quality output from providers and build in a high level of accountability and transparency across the sector, by requiring providers to meet more rigorous financial and operational standards in order to gain and maintain their approved status.

Overall, the loan cap determination measure promotes the right to education in that it enhances the Commonwealth's power to act in response to unscrupulous behaviours on the part of approved providers, where factors such as the adverse outcomes of compliance audits undertaken under section 19-80 of HESA, the conduct of the body, its lack of compliance with its responsibilities as an approved provider and misreporting of course information and student estimates, can be taken into consideration in determining ongoing access to subsidised loan revenue via FEE-HELP.

Importantly, the imposition of a cap on a provider's loan threshold does not displace students' eligibility if all eligibility criteria are satisfied. There is also an express statutory safeguard against the cap being set at a lower level than the provider's current student load or total value of loans currently being incurred by students enrolled in a course through a particular provider. This supporting measure ensures that students already subscribed to a course or eligible for a student loan are not disadvantaged.

Imposing FEE-HELP eligibility standards is a reasonable and justifiable limitation designed both to protect students and ensure fiscal accountability and quality output from providers within the sector. Further, the measures in Schedule 3 seek to protect vulnerable people from being signed up for courses they are not academically suitable for, or from enrolling with providers who are unable to provide quality education – as shown by low or no completion rates. These measures are aimed at preventing vulnerable people from exploitation by unscrupulous providers who would leave these individuals with significant debt and no educational outcome. These measures will particularly benefit regional students, the unemployed, culturally and linguistically diverse communities, people with a disability and the elderly. This will enhance their access to higher education by ensuring that only providers who operate high quality courses with integrity are able to access the FEE-HELP loan scheme.

This Bill is compatible with the right to education in that the measures which promote that right or, to the extent any such measures limit, or purport to limit, that right, are reasonable, proportionate and are in furtherance of legitimate policy objectives to improve and enhance integrity of the sector and maximise the quality of educational outcomes for students.

Articles 14 and 15: Right to fair and public hearing/ right to be presumed innocent until proven guilty and minimum procedural safeguards

This Bill engages with Article 14(1) and 14(2) of the ICCPR, which state that 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law' and 'everyone shall have the right to be presumed innocent until proved guilty according to law'.

The Bill triggers the regulatory powers contained in the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act). This approach allows for a streamlined and consistent approach with other Commonwealth legislation with respect to regulatory powers. Further, in triggering the Regulatory Powers Act, the intention is to also establish consistency from a human rights perspective with a whole of Government approach to civil enforcement mechanisms.

Parts 2 (monitoring powers), 3 (investigation powers), 4 (civil penalties), 5 (infringement notices), 6 (enforceable undertakings) and Part 7 (injunctions) of the Regulatory Powers Act are triggered and are part of a multifaceted approach to ensure the integrity of the HELP program and protect the program and students against unscrupulous conduct by providers. Each of the regulatory powers triggered by the Bill are appropriately limited, by ensuring a narrow scope of who is an authorised person, who is an authorised applicant, who may be appointed as an investigator and what is a relevant court. This ensures the powers will only be used in defined circumstances.

Civil penalty provisions and infringement notices

The Bill engages the right to a fair and public hearing through the imposition of civil penalty provisions for non-compliance by higher education providers with HESA and through the incorporation of an infringement notice scheme.

The civil penalties allow for the punishment of non-Table A or B higher education providers' misconduct without the need to impose criminal liability.[1] The magnitude of the civil penalties imposed is such that they are sufficient to act as a deterrent, although not carrying the stigma of a criminal conviction.[2]

Establishing a strong civil enforcement regime protects the integrity of the program to ensure providers provide quality education and training, and that students obtain value and quality outcomes for their investment in higher education. The serious nature of some of the civil penalty provisions justifies the existence of these powers and their exercise from time to time. The monitoring and investigation powers are also subject to the implied privilege against self-incrimination at common law. The protections pertaining to the right to a fair and public hearing provided for in the Regulatory Powers Act are expressly invoked by reference to that Act's enforcement provisions.

An infringement notice can be issued by an infringement officer for contraventions of a civil penalty provision of the Bill. The Bill triggers Part 5 of the Regulatory

[1] Australian Law Reform Commission Report 95, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, 13 March 2003, Statement of Principle, paragraph 3.110.
[2] Ibid, paragraph 2.61.

Powers Act, which creates a framework for using infringement notices in relation to provisions in the Bill and attendant safeguards. Moreover, the right of a person to a fair and public hearing by a competent, independent and impartial tribunal is preserved by the Bill as its provisions invoke the powers in the Regulatory Powers Act which allow a person to elect to have the matter heard by a court rather than pay the amount specified in the notice.

The provisions of the Regulatory Powers Act also specify requirements for what must be included in an infringement notice issued with the civil penalty, ensuring that a person issued with an infringement notice is aware of their right to have the matter heard by a court. Further, the Regulatory Powers Act relies on the common law presumption against the abrogation of core rights to preserve the privilege against self-incrimination and legal professional privilege. Sections 17 and 47 of that Act are intended to make certain that the privilege against self-incrimination and legal professional privilege have not been abrogated. These protections contained in the Regulatory Powers Act guarantee the fair trial rights protected in articles 14(3)(d) and (g) of the ICCPR by limiting the operation of the questioning powers to authorised officers under that Act.

Triggering of the civil penalty and infringement provisions in the Regulatory Powers Act is compatible with the right to liberty and security of the person and freedom from subjection to arbitrary arrest or detention, as set out in Article 9 of the ICCPR.

The right of a person to a fair and public hearing by a competent, independent and impartial tribunal is preserved by the Bill as its provisions invoke the powers in the Regulatory Powers Act which allow a person to elect to have the matter heard by a court rather than pay the amount specified in the notice.

The Bill is compatible with the right to a fair and public hearing, and the right to be presumed innocent until proved guilty according to law.

Criminal process rights (Articles 14 and 15 of the ICCPR)

The Parliamentary Joint Committee on Human Rights' Practice Note 2 specifies that civil penalty provisions may engage criminal process rights under Articles 14 and 15 of the ICCPR, regardless of the distinction between criminal and civil penalties in domestic law. When a provision imposes a civil penalty, an assessment is required as to whether it amounts to a criminal penalty for the purposes of the ICCPR.

The Bill creates civil penalty provisions in Divisions 19, 169, 174 and 238 of HESA which need to be assessed for this purpose. The relevant factors for assessing whether a penalty is a criminal penalty for the purposes of human rights law include the classification of the penalty in domestic law, the nature of the penalty and the severity of the penalty.

The purpose of these penalties is to encourage compliance and by extension deter non-compliance with HESA. The penalties only apply to the regulatory regime of HESA rather than to the public in general. Further, the imposition of the civil penalties is not dependent on a finding of guilt. These factors all suggest that the civil penalties imposed by Bill are civil rather than criminal in nature. The severity of the relevant civil penalties should be considered low. They are pecuniary penalties,

there is no sanction of imprisonment for non-payment of penalties and only courts may apply a pecuniary penalty. The pecuniary penalties are set at levels which are consistent with the nature and severity of the corresponding contraventions. On this basis, they are rightly characterised as civil as opposed to criminal penalty provisions for the purposes of international human rights law.

Article 17: Right to privacy and reputation

This Bill engages with Article 17(1) and 17(2) of the ICCPR, which states that 'no one shall be subject to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation' and that 'everyone has the right to the protection of the law against such interference or attacks'.

The right to privacy under Article 17 can be permissibly limited in order to achieve a legitimate objective and where the limitations are lawful and not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. In this case, the legitimate end is the protection of students, the efficacy of educational outcomes and the accountability of providers as a part of the broader policy to ensure a high level of performance and integrity across the higher education sector.

The following measures in Schedule 1 engage the right to privacy:

- new paragraph 17(1)(aa) of the ESOS Act which provides that registered providers must notify their ESOS agency (which under section 6C of the ESOS Act are TEQSA, the National VET Regulator, the Secretary of the department or another entity determined by regulation) of convictions for serious criminal offences by an associate or high managerial agent which occurred up to 5 years ago
- new subsection 175(1) of the ESOS Act which provides that information obtained or received for the purposes of the Act may be shared with enforcement agencies if the Secretary or ESOS agency is satisfied that giving the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, the enforcement body.

Obligation on associates and high managerial agents to notify ESOS agency of convictions for recent past serious convictions

New paragraph 17(1)(aa) (item 4, Schedule 1) broadens the obligations on registered providers under section 17 of the ESOS Act to notify their ESOS agency of serious offences that an associate or high managerial agent (being an employee, agent or officer) of the provider has been convicted of. This provision limits the right to privacy by requiring higher education providers to disclose to an ESOS agency sensitive personal information about prior convictions recorded against associates or high managerial agents of that provider which occurred up to 5 years ago.

The obligation to disclose recent serious convictions is sufficiently confined in scope as to be reasonably proportionate to the policy objective and should not be regarded as an arbitrary interference with a high managerial agent's or associate's right to privacy. This is because:

- the offences which are notifiable under new paragraph 17(1)(aa) are at the serious end of the spectrum (attracting a minimum of 120 penalty units or a term of imprisonment of two or more years). Convictions for summary offences or low level regulatory infractions such as minor traffic offences would not be reportable
- only convictions imposed by a court of law are reportable (as opposed to mere charges)
- the reporting obligation is limited to recent convictions (5 years or less). This means convictions for crimes committed over 5 years prior do not need to be notified under the new subsection
- the disclosure obligation is subject to the statutory protections which apply under the spent convictions scheme in Part VIIC of the *Crimes Act 1914*. The Commonwealth Spent Convictions Scheme allows an individual to not disclose certain criminal convictions after a sufficient period of good behaviour, and also prohibits unauthorised disclosure and use of this information. It covers convictions for less serious Commonwealth, State (including the Northern Territory and ACT) and foreign offences, with varying protections available according to which type of offence (Commonwealth, State or foreign) gave rise to the conviction. The Scheme also covers pardons and quashed convictions. A conviction for a State offence may also be covered by a spent conviction scheme in the relevant State or Territory. There are some exclusions to the Scheme, but these are very limited.

Any limitation on the right to privacy and reputation is reasonable and proportionate to achieve a legitimate policy objective. Namely, to ensure the integrity and fitness of those seeking prominent and influential positions in the international education sector and who are given responsibility for assisting current and prospective overseas students. These students are vulnerable in that they are new to, and unfamiliar with, the Australian education setting, and are heavily reliant upon associates and high managerial agents of providers for guidance not only in relation to their education, but their broader welfare and transition to life in Australia. Serious convictions in recent history by an associate or high managerial agent, however characterised, have genuine bearing on whether such persons are capable of fulfilling their obligations under the ESOS Act, in terms of compliance with their regulatory responsibilities but also being a person who can credibly operate in a relationship of trust with overseas students, as a vulnerable student group within the sector.

It is important that ESOS agencies are made aware of serious convictions on the part of agents and associates of providers they register. Agents and associates directly represent providers who are considered fit and proper to operate in the sector on the basis of their registered status. Requiring a provider to notify the ESOS agency of the suspension, cancellation or other regulatory action against a high managerial agent's or associate's previous approval for a Government service, program or activity is a necessary and targeted provision to monitor unscrupulous persons moving between sectors and will support the Government to protect the integrity of international education.

Overseas students (many of whom have English as a second language, and some of whom are minors) may be regarded as a group highly susceptible to the effects of unscrupulous practices. Associates and high managerial agents are, for all practical purposes, in a position of trust and confidence in terms of monitoring

students' welfare and taking appropriate steps to ensure fair and equitable treatment in an unfamiliar educational setting. To that end, information about serious convictions (especially for crimes such as fraud, embezzlement, offences against the person such as assault, aggravated assault or child sexual offences) is critically important to enable ESOS agencies to properly assess and evaluate the probity of high level operators entering the sector who will have a significant degree of influence and control over decision making processes involving overseas students, especially where such students are minors.

Including a broader range of offences than those currently provided for in the ESOS Act is a legitimate objective, particularly in circumstances where in practice the class of offences is not sufficiently broad to capture conduct which is jeopardising the integrity of the provision of educational services to overseas students.

The types of offences which may pose a risk to the provision of high quality educational services are not limited to those, for example, involving the commission of fraud, misuse of Commonwealth monies or breaches of the *Corporations Act 2001*. Other serious offences also go to the suitability of participants in the education sector, such as assault and sexual offences. This is so particularly because overseas students are a vulnerable subset within the educational setting. They rely significantly on the guidance and good counsel of associates and high managerial agents within the sector, who have what is tantamount to pastoral responsibilities to students, by assisting them to navigate the system and provide for their welfare. Students entering the sector have a high susceptibility to deceptive conduct and exploitative treatment.

Sharing of information about convictions with enforcement agencies

Items 13, 14 and 15 of Schedule 1 broaden the ability of information to be shared under section 175 of the ESOS Act.

In particular, new subsection 175(1A) (item 14) will permit information obtained or received for the purposes of the ESOS Act to be given by the Secretary or an ESOS agency to an enforcement body (as that term is defined under the *Privacy Act 1988* (Privacy Act)) if the Secretary or ESOS agency is satisfied that the giving of the information is reasonably necessary for one or more enforcement related activities (within the meaning of the Privacy Act) conducted by, or on behalf of, the enforcement body.

For example, this allows the department to initiate sharing of relevant student information with the Fair Work Ombudsman (FWO) to assist in combating student worker exploitation, without needing the FWO to make a request. This provision will give students a better study experience and ensure Government is agile in identifying and responding to unscrupulous practices occurring across its programs and services.

The right to privacy is engaged by this measure because it authorises the on-sharing of personal information. However this is reasonable and proportionate and aligned with the legitimate policy objective of ensuring that the Secretary or an ESOS agency may make an informed assessment of the probity of a provider and their suitability to provide educational services to overseas students. That is,

ensuring the integrity, optimal performance and accountability of the higher education sector and its key personnel.

Facilitating information sharing within the limited confines of enforcement agency disclosure for a defined policy purpose is neither arbitrary nor an unreasonable interference with the privacy of providers. Providers of education to overseas students engage with a particularly vulnerable subset of students as many are from non-English-speaking backgrounds and some are minors. In this regard, providers registered to deliver education to overseas students have responsibilities for the student which extend to welfare and pastoral care, not just delivering a service.

A key constraint on the operation of the information sharing provisions which goes to the permissibility of the limitation on privacy resulting from this measure is that information will only be released to a trusted set of 'enforcement bodies', as defined under the Privacy Act.

Further, the purpose of disclosure is strictly circumscribed to enforcement related activities conducted by or on behalf of the enforcement agency. An additional safeguard on the operation of the provisions is that information will only be disclosed where it is reasonably necessary for one or more enforcement related activities. 'Reasonable necessity' is not a low threshold. For example, it would not be 'reasonably necessary' for the Secretary or an ESOS agency to disclose information if it is merely helpful or expedient in exercising powers or performing functions under the ESOS Act.

As such, the scope of permissible disclosures of personal information directly mirrors Australian Privacy Principle (APP) 6.2(e) in the Privacy Act.

In addition, enforcement bodies are governed by stringent statutory obligations around the use, handling, on-sharing or secondary disclosure of sensitive and personal information under the Privacy Act and under Acts which establish them as enforcement agencies. To that end, in addition to obligations under the Privacy Act, they are obligated to treat information, including that which is highly sensitive, in accordance with stringent requirements under their authorising legislation. For example, under section 69A of the *Australian Federal Police Act 1979 (Cth)* personnel must comply with their obligations under the Privacy Act in addition to secrecy provisions which apply to enforcement activities under applicable legislation.

Information sharing relating to the exercise of functions by education agents of providers

Item 15 of Schedule 1 to the Bill amends section 175 of the ESOS Act by adding new subsections 175(3), (4) and (5).

The new subsection 175(3) provides that the Secretary or the ESOS agency for a provider or registered provider may give information relating to the exercise of functions by education agents of providers to registered providers, or publish such information, for the limited purpose of promoting compliance with the ESOS Act, the *National Code of Practice of Providers of Education and Training to Overseas Students 2017* (National Code), the English Language Intensive Courses for

Overseas Students Standards and the Foundation Program Standards or with the conditions of a particular student visa or visas, or of student visas generally.

The new subsection 175(4) provides that the Secretary may also publish information relating to the exercise of functions by education agents or providers.

Such information as set out in subsections 175(3) and (4) may include (without limitation):

- the number of applications for student visas made by or on behalf of students recruited or otherwise dealt with by an agent that have been either granted, refused, withdrawn or are invalid
- the number of student visas granted to students recruited or otherwise dealt with by an agent that have been cancelled or have ceased to be in effect
- the number of students accepted for enrolment in courses provided by registered providers by students recruited or otherwise dealt with by an agent
- the completion rates of accepted students recruited or otherwise dealt with by agents.

The purpose of new subsection 175(3) is to enable the limited release of information the Secretary holds about education agents in the form of performance reports to providers, including, for example, education agent performance data linked to outcomes or completion rates of students they help to enrol for an expressly defined purpose. This supports due diligence by enabling providers to make an informed choice about which agents they work with, and assisting providers to meet their obligation to work with ethical education agents under Standard 4 of the National Code.

Permitting the publication of information relating to education agents of providers under new subsection 175(4) similarly engages and limits the right to privacy. However, this limitation is also reasonable and proportionate and consistent with the legitimate policy objective of ensuring that those permitted to provide services to overseas students are compliant with their obligations under the ESOS Act and associated codes and standards. The publication of information is for a strictly limited purpose. This is for promoting compliance with the ESOS Act, the National Code, the ELICOS Standards and the Foundation Program Standards, or promoting compliance with the conditions of a particular student visa or visas, or of student visas generally. It will only apply where there is a nexus between the provision of this information and the exercise of their functions as agents of providers or registered providers.

Provisions which allow the Secretary or ESOS agency to share information about the functions of education agents with providers, or broadly publish information, for the purposes of promoting compliance with the ESOS Act or student visas will significantly increase the transparency of education agents' performance and assist both international students and education providers to identify and use high quality agents. This will protect Australia's continued reputation as a high quality study destination.

Further, information shared or published about education agents will be done in a manner consistent with APP requirements, since this information is classified as personal information for the purposes of the Privacy Act.

As required by APP 5, which concerns the notification of the collection of personal information, reasonable steps are being taken to notify education agents of the matters referred to in APP 5.2, or to otherwise ensure the individual is aware of any such matters. This has been done through amending the privacy notice on the department's Provider Registration and International Student Management System (PRISMS), where the information is held, to state that users' personal information may be collected and disclosed. Education providers are also being encouraged to include a similar statement in their written agreements with education agents.

The use and disclosure of personal information about agents is consistent with the requirements under APP 6.2(b), which allows the disclosure of information for a purpose other than the purpose it was collected for (i.e. a secondary purpose) without obtaining the individual's consent if that use or disclosure is required, or authorised by, or under an Australian law or a court/tribunal order.

To the extent that the measures in the Bill limit the right to privacy, this is necessary and proportionate to the legitimate policy objective.

The measures in Schedules 2 and 3 to the Bill enhance the existing fit and proper person requirements in HESA and the TEQSA Act. A determination that a person is not fit and proper will be undertaken within the Government or Government agencies such as TEQSA. The details of the determination, including personal information, will not be distributed or disclosed to the public. This measure will not limit a person's right to privacy and reputation.

Additionally the enhanced monitoring powers under Schedules 2 and 3 to the Bill may have implications for the right to privacy. The Secretary is granted the ability to request information from a provider.

The minimum amount of personal information required will be collected, and there are strict limitations on use and disclosure of such information in HESA and the TEQSA Act. As the use and disclosure of this potentially personal information is for the purposes of ensuring the quality of providers in the higher education sector, any limitation on the right to privacy is reasonable, necessary and proportionate to the policy objective.

The Bill is compatible with the right to privacy and reputation.

Article 3: Rights of the Child

The Bill engages and promotes the rights of the child which is provided for in Article 3 of the CRC. Article 3 provides that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

The Bill protects vulnerable minors by requiring students to be assessed by a course provider as academically suitable to undertake the course concerned. This

measure seeks to protect children to ensure that they are only signed up to higher education courses where they are academically suited to the course.

The Bill also contains strengthened measures in relation to marketing of higher education courses and student loans to address unscrupulous behaviour of course providers. Without adequate understanding of what they are signing up to, or through pressure sales tactics, a loan can represent a significant financial liability for a child. By preventing such behaviour from occurring, the rights of the child are being preserved.

The Bill also requires enhanced reporting by international education providers of serious criminal convictions of their agents and associates (see above under 'Right to Privacy and Reputation'), which can provide additional protection for vulnerable minors. This measure enhances protections for students under the age of 18 by ensuring that providers notify the relevant ESOS agency where they become aware a high managerial agent, associate, or other significant decision-maker has been convicted of a serious offence under Commonwealth or State or Territory law, as described in the Bill. This ensures that ESOS agencies will be aware if key persons involved with a provider that enrols minors have been convicted of serious offences, and can actively consider if the provider is fit and proper to continue teaching minors. This measure provides additional protection to vulnerable minors in the international education setting.

This Bill is compatible with, and promotes, the rights of the child.

Conclusion

The Bill is compatible with human rights because, to the extent that it may limit human rights, the limitations are reasonable, necessary and proportionate.

EDUCATION LEGISLATION AMENDMENT (PROVIDER INTEGRITY AND OTHER MEASURES) BILL 2017

NOTES ON CLAUSES

Clause 1 – Short title

Clause 1 provides for the Act to be the *Education Legislation Amendment (Provider Integrity and Other Measures) Act 2017*.

Clause 2 – Commencement

Subclause 2(1) inserts a three column table setting out commencement information for various provisions in the Bill. Each provision of the Bill specified in column 1 of the table commences (or is taken to have commenced) in accordance with column 2 of the table and any other statement in column 2 has effect according to its terms.

The table to clause 2 provides that the whole Act is to commence the day after the Act receives the Royal assent.

Subclause 2(2) provides that information in column 3 of the table at subclause 2(1) is not part of the Act and information may be inserted into column 3 or information in it may be edited in any published version of the Act.

Clause 3 – Schedule(s)

Clause 3 provides that any legislation that is specified in a schedule is amended or repealed as set out in the applicable items in that schedule and that any other item in a schedule has effect according to its terms.

LIST OF ABBREVIATIONS

APPs	Australian Privacy Principles
Crimes Act	*Crimes Act 1914*
Corporations Act	*Corporations Act 2001*
CRICOS	Commonwealth Register of Institutions and Courses for Overseas Students
EFTSL	Equivalent full-time student load
ELICOS	English Language Intensive Courses for Overseas Students
ELICOS Standards	The ELICOS Standards made by the Minister under section 176B of the ESOS Act
ESOS Act	*Education Services for Overseas Students Act 2000*
Fair Work Act	*Fair Work Act 2009*
Foundation Program Standards	The Foundation Program Standards made by the Minister under section 176C of the ESOS Act

FWO	Fair Work Ombudsman
HESA	*Higher Education Support Act 2003*
Higher Education Provider Guidelines	Higher Education Provider Guidelines 2012
Legislation Act	*Legislation Act 2003*
National Code	National Code of Practice for Providers of Education and Training to Overseas 2017
NVETR Act	*National Vocational Education and Training Regulator Act 2011*
Ombudsman Act	*Ombudsman Act 1976*
OSO	Overseas Students Ombudsman
PRISMS	Provider Registration and International Student Management System
Privacy Act	*Privacy Act 1988*
Regulatory Powers Act	*Regulatory Powers (Standard Provisions) Act 2014*
TEQSA Act	*Tertiary Education Quality and Standards Agency Act 2011*
TEQSA	Tertiary Education Quality and Standards Agency
Threshold Standards	Under section 5 of the TEQSA Act 'Threshold Standards' means the Provider Standards and the Qualification Standards
Threshold Standards 2011	Higher Education Standards Framework (Threshold Standards) 2011
Threshold Standards 2015	Higher Education Standards Framework (Threshold Standards) 2015
TPS	Tuition Protection Service
VET	Vocational education and training
VFH scheme	VET FEE-HELP assistance scheme
VET Student Loans Rules	VET Student Loans Rules 2016
VSL Act	*VET Student Loans Act 2016*
VSL program	VET student loan program

Schedule 1 *Amendments relating to education services for overseas students*

Summary

The Government is taking action to monitor and prevent unscrupulous businesses from gaining registration to deliver education to overseas students. The Bill contains five key measures to enable greater scrutiny in relation to providers seeking registration on CRICOS.

Strengthening the fit and proper person requirements

This measure will enable the Minister to specify, through a legislative instrument, additional matters, if any, to be taken into consideration by the ESOS agencies when determining whether a provider meets, or no longer meets, the fit and proper person requirements for registration purposes. This measure will ensure that the persons governing individual education providers are fit to deliver high quality services, which will preserve the integrity of the international education sector and protect students' interests.

Expanding notifiable event requirements

This measure will expand the scope of events that a provider must report to ESOS agencies. Registered providers will be required to notify the relevant ESOS agency when they become aware of the occurrence of any event that will significantly affect the provider's ability to comply with the ESOS Act. A notification must also be made if the provider becomes aware a related person has been convicted of a serious offence under a Commonwealth, State or Territory law, or has had regulatory action taken against the person's approval to deliver programs, services and activities on behalf of, or with funding by the Commonwealth, States or Territories.

This measure will protect the integrity of international education by supporting the Government to monitor and prevent unscrupulous persons who are operating in one sector from entering another sector.

Extending information sharing provisions

This measure will enable the Government to be responsive in identifying and responding to unscrupulous practices occurring across its programs and services. It enables the Secretary of the department responsible for administering education and training, or ESOS agencies, to share information obtained or received for the purposes of the ESOS Act with any enforcement body (within the meaning of the Privacy Act), to assist the body in its enforcement activities, or with the OSO.

An additional measure allows the Secretary or ESOS agency to share information about the functions of education agents to providers, or publish this information more broadly, for the purposes of promoting compliance with the ESOS legislative

framework or student visa conditions. This will increase transparency about education agents' performance and assist both international students and education providers to use high quality agents.

Amending late payment penalties

This administrative measure removes a requirement for providers who are late in paying the Annual Registration Charge, Entry to Market Charge, or Tuition Protection Service (TPS) Levy to pay the associated late payment penalty within seven days of being given a written notice. Giving providers only seven days to pay a late payment penalty does not align with current Government money collection practices, which are to allow a 30-day payment period for any invoice issued.

Detailed explanation

Part 1 – Amendments

Education Services for Overseas Students Act 2000

Items 1 and 2 – Section 7A

Section 7A of the ESOS Act concerns decisions to be made by ESOS agencies and designated State authorities about whether providers registered, or applying to be registered, under the ESOS Act, are fit and proper persons.

Subsection 7A(2) specifies the matters that an ESOS agency or designated State authority must have regard to when making such decisions. Item 1 amends subsection 7A(2) by adding a new paragraph 7A(2)(ga), which requires regard to be given to any matters that the Minister specifies in a legislative instrument made under new subsection 7A(2A).

Item 2 amends section 7A by adding a new subsection 7A(2A) which provides that the Minister may, by legislative instrument, specify matters for the purposes of paragraph 7A(2)(ga).

Including this content in a legislative instrument provides the Minister with the flexibility to supplement and refine the considerations that relevant regulatory agencies must take into account when making decisions about the suitability of persons to provide education services students. This flexibility is important to ensure that the fit and proper person requirements remain responsive to market developments and are sufficiently detailed to properly articulate the circumstances which may be relevant to such determinations. This will ensure that the individuals governing education providers are fit to deliver high quality services, preserve the integrity of the international education sector and protect students' interests.

Item 3 – At the end of section 7A

This item inserts a new subsection 7A(5) which provides that if the Minister determines that an entity is an ESOS agency for a provider or a registered provider under subsection 6C(2) or (3); and the entity is not a Commonwealth authority

(within the meaning of section 85ZL of the Crimes Act); then the entity is taken to be a Commonwealth authority for the purposes of Part VIIC of the Crimes Act.

There is a provision in the ESOS Act for an ESOS agency for specified kinds of providers to be determined by the Minister (see section 6C of the Act). In theory, this means a non-Commonwealth authority (within the meaning of section 85ZL of the Crimes Act) could be named as an ESOS agency in a subordinate determination. While the ESOS Act does not compel the disclosure of spent, quashed or pardoned convictions that would otherwise be protected under Part VIIC of the Crimes Act (see subsection 17(2)), the protections afforded by the spent convictions scheme under Part VIIC of the Crimes Act would not apply in cases where an ESOS agency was a non-Commonwealth authority. The implication of this is that proposed new paragraph 17(1)(aa) could require a person to disclose a quashed or pardoned conviction, which would ordinarily be protected by disclosure limitations from the date those convictions were quashed or pardoned.

This amendment explicitly provides that an ESOS agency is a Commonwealth authority for the purposes of section 85ZL of the Crimes Act. By deeming an entity to be a Commonwealth authority for the purposes of Part VIIC of the Crimes Act, the disclosure limitations which apply under that Part in relation to quashed or pardoned convictions will apply to protect Commonwealth or Territory convictions disclosed to any person or where State convictions are disclosed to a Commonwealth authority (see sections 85ZT and 85ZV of the Crimes Act).

Items 4, 5 and 6 – Section 17

Section 17 of the ESOS Act concerns the requirement for registered providers to notify their ESOS agency of offences committed by, or other disciplinary or regulatory actions being taken against, their associates and high managerial agents.

Subsection 17(1) lists the matters that the registered providers must notify the ESOS agency of. Items 4, 5 and 6 add new matters to the subsection 17(1) list. Under new paragraphs 17(1)(aa), (ba) and (da), registered providers must inform their ESOS agency, as soon as practicable, if they become aware that an associate or agent of the provider:

- has ever been convicted of an offence under any Commonwealth or State or Territory law (the definition of ‘State’ in section 5 includes the Australian Capital Territory and the Northern Territory) that is punishable by 2 years’ imprisonment or longer, or a fine of 120 penalty units or more at any time during the last 5 years (item 4 – new paragraph 17(1)(aa))
- is or has ever been approved (however described) to provide a program, service or activity on behalf of, or with funding from, the Commonwealth or a State and has ever had their registration cancelled or suspended other than at the associate’s or agent’s own request (item 5 – new paragraph 17(1)(ba))
- is or has ever been approved (however described) to provide a program, service or activity on behalf of, or with funding from, the Commonwealth or a State and has ever had disciplinary, remedial or other compliance action taken in relation to their approval (item 6 – new paragraph 17(1)(da)).

The expansion of the notifiable events under section 17 is intended to facilitate monitoring of unscrupulous providers which may be or have been operating

between different educational sectors, and more broadly between different programs administered by State or Commonwealth governments, particularly where provision of public funding is involved.

By way of illustration, such notifiable events may include:

- serious criminal convictions, such as those involving fraud, embezzlement, misappropriation of Commonwealth or State monies, identity theft, tax evasion, assaults on the person, child sexual offences
- adverse regulatory or other compliance action taken in relation to:
    - approval to administer Commonwealth or State funding for the provision of education and training services
    - registration as a higher education provider or as an National VET Regulator registered training organisation, or
    - approval to operate as a school or as a child care service provider.

Requiring a provider to notify the ESOS agency of convictions for any serious offences under a law of the Commonwealth, State or Territory is not an unreasonable interference with the privacy of individuals providing education services to vulnerable people. Overseas students are a particularly vulnerable cohort, as many are from non-English-speaking backgrounds and some are minors. In this regard, providers registered to deliver education to overseas students have responsibilities which extend to student welfare and pastoral care. They are not simply delivering a service.

The new paragraph 17(1)(aa) contains limitations to ensure the right to privacy is sufficiently protected. It only requires convictions to be reported, not charges, so the person must have been found guilty by a court. In addition, only recent convictions, up to 5 years old, need to be reported. Finally, the provision is subject to the spent convictions scheme in Part VIIC of the Crimes Act.

Item 7 – Paragraph 17(1)(e)

This item makes a consequential machinery change to the paragraph numbering in paragraph 17(1)(e) in recognition of new paragraphs 17(1)(aa),(ba) and (da) inserted by items 4, 5 and 6.

Item 8 – At the end of section 17

Subsection 17(1) provides that a registered provider must inform its ESOS agency as soon as practicable if the provider becomes aware that an associate or high managerial agent of the provider has been engaged in conduct or activities enumerated in paragraphs (a) to (e).

This item inserts a new subsection 17(3) which provides that if the Minister determines that an entity is an ESOS agency for a provider or a registered provider under subsection 6C(2) or (3); and the entity is not a Commonwealth authority (within the meaning of section 85ZL of the Crimes Act); then the entity is taken to be a Commonwealth authority for the purposes of Part VIIC of the Crimes Act.

There is a provision in the ESOS Act for an ESOS agency for specified kinds of providers to be determined by the Minister (see section 6C of the Act). In theory,

this means a non-Commonwealth authority (within the meaning of section 85ZL of the Crimes Act) could be named as an ESOS agency in a subordinate determination. While the ESOS Act does not compel the disclosure of spent, quashed or pardoned convictions that would otherwise be protected under Part VIIC of the Crimes Act (see subsection 17(2)), the protections afforded by the spent convictions scheme under Part VIIC of the Crimes Act would not apply in cases where an ESOS agency was not a Commonwealth authority. The implication of this is that proposed new paragraph 17(1)(aa) could require a person to disclose a quashed or pardoned conviction, which would ordinarily be protected by disclosure limitations from the date those convictions were spent, quashed or pardoned.

This amendment explicitly provides that an ESOS agency is a Commonwealth authority for the purposes of section 85ZL of the Crimes Act. By deeming an entity to be a Commonwealth authority for the purposes of Part VIIC of the Crimes Act, the disclosure limitations which apply under that Part in relation to spent, quashed or pardoned convictions will apply to protect Commonwealth or Territory convictions disclosed to any person or where State convictions are disclosed to a Commonwealth authority (see sections 85ZT and 85ZV of the Crimes Act).

Item 9 – After section 17

This item adds a new section 17A to the ESOS Act entitled 'Registered providers must notify their ESOS agency of certain other events'.

New subsections 17A(1) and (2) provide that a registered provider must notify its ESOS agency of the occurrence of an event that would significantly affect its ability to comply with the ESOS Act, within 10 business days after the occurrence of the event.

New subsection 17A(3) provides that a registered provider must notify its ESOS agency of:

- any prospective changes to the ownership of the provider
- any prospective or actual change to a related person of the provider.

A related person includes associates and high managerial agents of the provider. A high managerial agent of a provider is an employee, agent or officer of the provider with duties of such responsibility that his or her conduct may fairly be assumed to represent the provider in relation to the business of providing courses. An associate includes significant decision-makers of the provider as described in the ESOS Act.

Notice of these changes must be given as soon as practicable before the change occurs, unless (in the case of a change of managerial agent) the change cannot be determined before it takes effect – in which case, the notice must be given within 10 business days of the change taking effect.

A notice of change of ownership or related person must include information that allows the ESOS agency to make a decision under section 7A of the Act as to whether the provider is fit and proper to be registered (subsection 17A(4)). Personnel changes can directly impact the continued operational integrity of international education providers. Therefore, when such changes occur, this

measure triggers a fit and proper person evaluation. This ensures that ESOS agencies apply ongoing scrutiny to providers as appropriate, and swiftly detect any unscrupulous persons seeking to operate in the sector.

Subsection 17A(5) allows an ESOS agency to specify the manner and form of the notice to be given to it under subsection (1) or (3).

A note to section 17A clarifies that, if a registered provider breaches the section, the ESOS agency for the provider may take action under Division 1 of Part 6 of the ESOS Act against the provider.

The purpose of this measure is to mitigate the risk of key persons of influence associated with former VET FEE-HELP providers who had their approval revoked, and more broadly any provider with poor business practices, seeking registration in the international education sector. It is imperative that ESOS agencies have the necessary capabilities to identify and monitor organisational linkages across the sectors in order to prevent individuals formerly associated with unscrupulous VET FEE-HELP providers, and more broadly any provider with poor business practices, from entering the international education sector. Changes in ownership or key managerial personnel of providers can be a key precursor to a diminution in the effective management, performance, compliance handling and future solvency of a provider entity.

Items 10 and 11 – Paragraphs 23(2)(b), 23A(3)(b) and 53D(2)(b)

Currently, providers who do not pay an annual registration charge (under paragraph 23(2)(b) of the ESOS Act), second and third entry to market charge (under paragraph 23A(3)(b)), or TPS levy charge on time (under paragraph 53D(2)(b)) must pay a late payment penalty for that charge. The amount of the late payment penalty is set out in section 172 of the ESOS Act.

This administrative measure removes a requirement for providers to pay the associated late payment penalty within seven days of being given a written notice.

Giving providers only seven days to pay a late payment penalty does not align with current Government money collection practices, which are to allow a 30-day payment period for any invoice issued. This amendment will ensure the timeframe for payment is appropriate and also ensure providers are not automatically suspended due to non-payment of the late payment penalty within seven days of receiving a notice. It will still ensure providers are automatically suspended if they do not pay the original amount within seven days of receiving the notice.

These items therefore amend paragraph 23(2)(b), paragraph 23A(3)(b) and paragraph 53D(2)(b) to remove reference to the late payment penalty, thereby allowing for invoicing of late payments only after the provider has paid the original amount.

Item 12 – Section 175 (heading)

This item repeals the heading to section 175 and replaces it with a new heading ‘Giving information to relevant bodies etc.’ to reflect the expanded information sharing capabilities for the purposes of that section.

Item 13 – After paragraph 175(1)(g)

Section 175 of the ESOS Act concerns the giving of information by the Secretary or an ESOS agency.

Under subsection 175(1), the Secretary or the ESOS agency for a provider or registered provider may give information obtained or received under the ESOS Act for the purposes specified in paragraphs 175(1)(a) to (d) to the persons and bodies listed in paragraphs 175(1)(e) to (h).

Item 13 amends the list of persons and bodies to whom the information can be given by adding a new paragraph 175(1)(ga).

Under new paragraph 175(1)(ga), the information can also be given to the OSO, the statutory office established under Part IIC of the Ombudsman Act to investigate complaints about private providers registered under the ESOS Act. Information held by the Secretary may assist the OSO in investigating student complaints in a timely and effective manner, which will support the student experience in Australia.

This rectifies a long-standing omission in the list of recipients of information in subsection 175(1) of the ESOS Act, and clarifies that information can be given to the OSO without the need for the Ombudsman to formally require production of that information using his or her compulsive powers in the Ombudsman Act. Nevertheless, any information given to the OSO will still be protected by the secrecy provisions in the Ombudsman Act.

Item 14 – After subsection 175(1)

This item adds a new subsection 175(1A) to section 175, which will authorise the Secretary or an ESOS agency to give information obtained or received under the ESOS Act to an enforcement body, if the Secretary or ESOS agency is satisfied that giving the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, the enforcement body.

The terms ‘enforcement body’ and ‘enforcement related activities’ have the same meanings as in the Privacy Act.

Subsection 175(1A) will allow the provision of information about education providers, students and agents by the department to other enforcement bodies to assist their enforcement activities. For example, this clarifies that information can be given to the FWO without the need for the Ombudsman to formally require production of that information using his or her compulsive powers in the Fair Work Act. Nevertheless, any information given to the FWO will still be protected by the secrecy provisions in the Fair Work Act. This provision will give students a better study experience and ensure the Government is agile in identifying and responding to unscrupulous practices occurring across its programs and services.

Item 15 – At the end of section 175

Item 15 amends section 175 by adding new subsections 175(3), (4) and (5). The new subsection (3) provides that the Secretary or the ESOS agency for a provider or registered provider may give information relating to the exercise of functions by

education agents of providers to registered providers for the limited purpose of promoting compliance with the ESOS Act, the National Code, the ELICOS Standards and the Foundation Program Standards or with the conditions of a particular student visa or visas, or of student visas generally.

The new subsection (4) provides that the Secretary may also publish information relating to the exercise of functions by education agents of providers.

Such information, given or published under subsections (3) and (4) may include (without limitation):

- the number of applications for student visas made by or on behalf of students recruited or otherwise dealt with by an agent that have been either granted, refused, withdrawn or are invalid
- the number of student visas granted to students recruited or otherwise dealt with by an agent that have been cancelled or have ceased to be in effect
- the number of students accepted for enrolment in courses provided by registered providers by students recruited or otherwise dealt with by an agent
- the completion rates of accepted students recruited or otherwise dealt with by agents.

The purpose of new subsection 175(3) is to enable the limited release of information the Secretary holds about education agents in the form of performance reports to providers, including, for example, education agent performance data linked to outcomes or completion rates of students they help to enrol for an expressly defined purpose. This supports due diligence by enabling providers to make an informed choice about which agents they work with, and assisting providers to meet their obligation to work with ethical education agents under Standard 4 of the National Code.

The new subsection (4) will enable the Secretary to publish information about the performance of education agents and will significantly increase the transparency of education agents' performance and assist both international students and education providers to identify and use high quality agents, which will protect Australia's continued reputation as a high quality study destination.

Information shared with providers or published under this provision would be classified as personal information for the purposes of the Privacy Act and the associated APPs. Accordingly, any information shared or published will be done in a manner consistent with APP requirements.

As required by APP 5, which concerns the notification of the collection of personal information, reasonable steps are being taken to notify education agents of the matters referred to in APP 5.2, or to otherwise ensure the individual is aware of any such matters. This has been done through amending the privacy notice on PRISMS, where the information is held, to state that users' personal information may be collected and disclosed. Education providers are also being encouraged to include a similar statement in their written agreements with education agents.

The use and disclosure of personal information permitted in item 14 is consistent with the requirements under APP 6.2(b), which allows the disclosure of information

for a purpose other than the purpose it was collected for (i.e. a secondary purpose) without obtaining the individual's consent if that use or disclosure is required, or authorised by, or under an Australian law or a court/tribunal order.

Part 2 – Application provisions

Item 16 – Application of amendments

Item 16 sets out the application provisions relating to measures contained in the ESOS Act amended by Schedule 1.

Subitem 16(1) provides that the amendments to section 7A of the ESOS Act made by Schedule 1 apply in relation to:

- applications for registration made after the commencement of the Schedule
- applications for registration made before the commencement of the Schedule but not yet decided
- providers registered before or after the commencement of the Schedule.

Subitem 16(2) provides that the amendments to section 17 of the ESOS Act apply in relation to providers registered before or after the commencement of Schedule 1.

Subitem 16(3) provides that new section 17A inserted into the ESOS Act applies in relation to providers registered before or after the commencement of Schedule 1.

Subitem 16(4) provides that the amendments to sections 23, 23A and 53D of the ESOS Act apply in relation to notices given after the commencement of Schedule 1.

Subitem 16(5) provides that the amendments to section 175 of the ESOS Act made by Schedule 1 apply in relation to information given or published after the commencement of the Schedule, regardless of when the information was obtained or received.

Schedule 2 *Amendments relating to the Tertiary Education Quality and Standards Agency*

Summary

Reforms to the VFH scheme and the recent passage of the VSL Act have led to a rise in interest from VET providers seeking to transition their operations into the higher education sector. To be agile and responsive to convergent activities in the higher education sector there is a need to ensure that the TEQSA Act provides appropriately stringent controls to protect students from potentially unscrupulous provider actions.

It is critical to implement measures to ensure an appropriately high standard is in place to assess applications by those seeking to enter the higher education sector, which is Australia's largest service export worth $21.8 billion in 2016. These amendments improve student protection mechanisms by ensuring greater scrutiny of providers in the registration process and during a registration period. This is consistent with the VSL arrangements legislated in 2016. The amendments will also:

- enable TEQSA to take into account the history of related entities, as well as the history of a provider's delivery of education services
- introduce a requirement that all registered higher education providers, and key personnel for those providers, must be fit and proper persons
- amend the definition of 'qualified auditor' to ensure that auditors of a higher education provider's financial statements must be a 'registered auditor' for the purposes of the Corporations Act or otherwise be approved by TEQSA
- clarify that TEQSA may delegate its functions or powers to the Chief Executive Officer
- clarify the definition of 'vocational training and education course' to make clear that courses which lead to the awards of Diplomas, Advanced Diplomas, Graduate Diplomas and Graduate Certificates are required to be accredited under the TEQSA Act or under vocational education laws.

Consistent with the VSL arrangements legislated in 2016, the proposed amendments to the TEQSA Act will better equip TEQSA to implement robust student protection mechanisms.

Detailed explanation

Part 1 – Amendments

Tertiary Education Quality and Standards Agency Act 2011

Item 1 – Section 5

This item provides that the term 'fit and proper person', when used in the TEQSA Act, has a meaning affected by new section 7A (item 4).

7A Fit and proper person

(1) In determining whether a person is a fit and proper person for the purposes of this Act, regard may be had to the matters (if any) specified in an instrument under subsection (2).

(2) TEQSA may, by legislative instrument, make a determination specifying matters for the purposes of subsection (1).

(3) TEQSA must not make an instrument under subsection (2) unless the Minister has given written approval to the making of the instrument.

(4) TEQSA must give the Minister such information as the Minister reasonably requires for the purposes of making a decision under subsection (3).

Item 2 – Section 5 (paragraphs (a) to (c) of the definition of qualified auditor)

To strengthen the financial reporting requirements under the TEQSA Act, this item repeals and substitutes the definition of 'qualified auditor' in section 5. Under the new definition, a qualified auditor means a registered company auditor (within the meaning of the Corporations Act or a person otherwise approved by TEQSA under subsection 27(4) of the TEQSA Act. Amending the definition of 'qualified auditor' ensures a high degree of probity in that auditors of a higher education provider's financial statements must be a 'registered company auditor' for the purposes of the Corporations Act or otherwise be approved by TEQSA.

Section 9 of the Corporations Act defines registered company auditor as follows:

registered company auditor:
(a) means a person registered as an auditor under Part 9.2; and
(b) in relation to a body corporate that is not a company—includes a person qualified to act as the body's auditor under the law of the body's incorporation.

Providers will be given adequate notice and time to prepare for this amendment as it is not being required for any financial reporting until the reporting period commencing on or after 1 July 2018.

Item 3 – Section 5 (definition of *vocational education and training course*)

This item amends the definition of vocational education and training course in section 5 of the TEQSA Act to remove reference to 'a course of a similar kind'. The new amended definition of vocational education and training course is a VET course within the meaning of the NVETR Act.

The TEQSA Act currently excludes 'an award offered or conferred for the completion of a vocational education and training course' from TEQSA's remit. The definition of 'vocational education and training course' includes both courses accredited (or required to be accredited) under vocational education laws such as the NVETR Act, as well as 'a course of a similar kind'.

The purpose of this amendment is to ensure that Diplomas, Advanced Diplomas, Graduate Diplomas and Graduate Certificates are required to be accredited under the TEQSA Act or under vocational education and training laws.

Item 4 – At the end of Division 3 of Part 1

Division 3 of Part 1 of the TEQSA Act contains interpretative provisions for the TEQSA Act. This item inserts section 7A that affects the meaning of 'fit and proper person' where it is used in the Act.

Subsection 7A(1) provides that in determining whether a person is a fit and proper person for the purposes of this Act, regard may be had to the matters (if any) specified in a legislative instrument made under new subsection 7A(2).

New subsection 7A(2) provides that TEQSA may, by legislative instrument, make a determination specifying matters for the purposes of subsection 7A(1).

New subsection 7A(3) provides that TEQSA must not make an instrument under subsection 7A(2) unless the Minister has given written approval to the making of the legislative instrument.

New subsection 7A(4) provides that TEQSA must give the Minister such information as the Minister reasonably requires for the purposes of making a decision under subsection 7A(3).

Currently, the TEQSA Act does not contain a requirement that a registered provider, or the persons who make or participate in making decisions that affect a registered provider, must be fit and proper for the provision of higher education. The Threshold Standards 2015 include a requirement at Standard 6.1.2 in Part A that members of a provider's corporate governing body 'are fit and proper persons', though there is no explanation of the basis on which a judgement about whether those members are fit and proper persons is made.

This measure is intended to ensure that all registered providers in the higher education sector, as well as those persons who make, or participate in making, decisions that affect the whole, or a substantial part, of the registered providers' affairs, are required to be fit and proper persons. This is consistent with the arrangements for VSL legislated in 2016.

Regulatory determinations around whether a provider is a fit and proper person to be an approved provider is properly a matter for TEQSA. The matters informing this assessment and evaluation may be set out in a legislative instrument and decision-making for the purposes of subsection 7A(1) is subject to direct Ministerial oversight in terms of the need for written approval under subsection 7A(3) and the requirement to provide the Minister with information as is reasonably required in order for the Minister to grant such approval.

Item 5 – Section 15

This item inserts '(1)' before the term 'TEQSA'. This is a machinery change to section 15 to reflect that it will now include additional subsections.

Item 6 – Subparagraph 15(a)(iv)

Section 15 of the TEQSA Act concerns the principle of reflecting risk (section 13 requires TEQSA to comply with the principles of regulatory necessity, reflecting risk and proportionate regulation, when exercising powers under the Act).

Paragraph 15(a) of the TEQSA Act provides that TEQSA complies with the principle of reflecting risk if, in exercising its powers in relation to a regulated entity, it has regard to the entity's history. Pursuant to subparagraph 15(a)(iv), this includes compliance with the Threshold Standards, the TEQSA Act and its associated provisions and other laws regulating higher education.

This item amends subparagraph 15(a)(iv) to change 'higher education' to read 'education' (i.e. removing the reference to 'higher'). This will require TEQSA to have regard to an entity's compliance with other laws regulating education, such as the NVETR Act.

The Threshold Standards 2011 previously included a requirement that a 'higher education provider's history, and the history of its parent entities, its predecessors and related entities, shows a sound track record in managing business operations and in the provision of education or related services at an acceptable level of quality and in accordance with any applicable regulatory or accreditation requirements.' However, that instrument was revoked by the Threshold Standards 2015 from 1 January 2017, which did not include the previous requirement mentioned above. For this reason, paragraph 15(a)(iv) is being expanded to ensure that the history of parent entities, predecessors and related entities are considered as part of the matters relating to risk when regard is had to the history of persons related to the entity for the purposes of the new paragraph 15(b)(iii) (item 7).

Item 7 – At the end of paragraph 15(b)

Paragraph 15(b) currently specifies matters relating to the risk of an entity not complying with the Threshold Standards, the TEQSA Act or its associated provisions in the future, including those relating to internal quality assurance mechanisms; and financial status and capacity.

This item adds to the specified matters a new subparagraph 15(b)(iii) which enables TEQSA to take into consideration the history of persons related to the entity.

The Threshold Standards 2011 previously included a requirement that a 'higher education provider's history, and the history of its parent entities, its predecessors and related entities, shows a sound track record in managing business operations and in the provision of education or related services at an acceptable level of quality and in accordance with any applicable regulatory or accreditation requirements.' However that instrument ceased to have effect in relation to applications received after 1 January 2017.

This measure is intended to ensure that TEQSA can take account of the history of entities related to an applicant or registered higher education provider, as well as the history of the applicant or registered provider.

Item 8 – At the end of section 15

As noted above, item 7 adds a new subparagraph 15(b)(iii) to section 15 to extend the risk reflection principles to related entities.

Item 8 inserts a new subsection 15(2) that defines the persons that are related to a regulated entity for the purposes of the new subparagraph 15(b)(iii). A person is related to a regulated entity if the person:

- is able to control, or to materially influence, the entity's activities or internal affairs
- is able to determine, or to materially influence, the entity's financial or operating policies
- is financially interested in the entity's success or failure or apparent success or failure
- is a holding company of the entity
- is a subsidiary of the entity
- is a subsidiary of a holding company of the entity.

The intent of subparagraph 15(b)(iii) is to capture instances where that entity or organisation exercises control or material influence over a regulated entity's affairs, including in relation to its financial governance or operating policies, interests in its solvency or liquidity, and any companies which form part of the same corporate group as the regulated entity.

The purpose of the descriptions in new subsection 15(2) is to encompass not only related entities, as the term applies in the context of bodies corporate or relational terminology under the Corporations Act, but also more broadly to all regulated entities, including individuals and bodies politic. The term 'regulated entity' is defined in section 5 of the TEQSA Act.

Item 9 – Subsection 21(1)

This item repeals subsection 21(1) (which currently provides that TEQSA may grant an application for registration if TEQSA is satisfied that the applicant meets the Threshold Standards) and substitutes a new subsection titled 'Grant of application for registration'.

New subsection 21(1) provides that TEQSA may grant an application for registration if TEQSA is satisfied that:

- the applicant meets the Threshold Standards (paragraph 21(1)(a))

- the applicant, and each person who makes or participates in making decisions that affect the whole or a substantial part, of the applicant's affairs, is a fit and proper person (paragraph 21(1)(b)).

The purpose of new subsection 21(1) is to bolster the process for provider approval by including a requirement that an applicant not only satisfies the Threshold Standards as defined under section 5 of the TEQSA Act, but also that the applicant and each person involved in the decision-making processes for the conduct of its affairs is a fit and proper person. This empowers TEQSA to exercise a higher degree of rigour in its assessment, by requiring it to consider the probity of key personnel associated with the applicant's operations and to scrutinise participants in the applicant's intended enterprise prior to granting an application.

Item 10 – After section 25

Division 2 of Part 3 of the TEQSA Act sets out various conditions of registration that must be complied with by registered higher education providers.

There is currently no condition requiring that a registered provider, or the persons who make or participate in making decisions that affect the provider, must be fit and proper for the provision of higher education. The Threshold Standards 2015 include a requirement at Standard 6.1.2 that members of a provider's corporate governing body 'are fit and proper persons', although there is no explanation as to the basis upon which a judgement about whether those members are fit and proper persons is made.

This item adds a new section 25A titled 'Condition – fit and proper person' to the conditions in Division 2 of Part 3 of the TEQSA Act.

New subsection 25A provides that a registered higher education provider and all persons who make or participate in the provider's decisions that affect the whole, or a substantial part, of the provider's affairs, must be fit and proper persons.

Item 11 – Subsection 36(1)

This item repeals subsection 36(1) (which deals with a registered higher education provider's application for renewal of registration with TEQSA) and substitutes a new subsection 36(1), which provides that upon receiving a registered higher education provider's application for renewal of registration, TEQSA may renew the provider's registration if TEQSA is satisfied that:

- the provider continues to meet the Threshold Standards
- the provider, and each person who makes or participates in making decisions that affect the whole, or a substantial part, of the provider's affairs, is a fit and proper person.

Currently, the TEQSA Act contains no requirement that a registered provider, or the persons who make or participate in making decisions that affect the provider, must be fit and proper for the provision of higher education. The Threshold Standards

2015 include a requirement at Standard 6.1.2 in Part A that members of a provider's corporate governing body 'are fit and proper persons', though there is no explanation of the basis on which a judgement about whether those members are fit and proper persons is made.

This amendment ensures that all providers, as well as those persons who make, or participate in making, decisions that affect the whole, or a substantial part, of the body's affairs, are required to be fit and proper persons.

This is achieved by making it a condition on the renewal of registration of each registered higher education provider that the provider, and all persons who make, or participate in making, decisions that affect the whole, or a substantial part, of the provider's higher education affairs, are required to be fit and proper persons.

Item 12 - After paragraph 199(1)(a)

Currently, under subsection 199(1) of the TEQSA Act, TEQSA may, by writing, delegate any or all of its functions and powers to a Commissioner, or to a member of the staff of TEQSA at the APS Executive Level 1 classification or higher (or an equivalent classification).

This item amends subsection 199(1) to enable TEQSA to also delegate its functions and powers to its Chief Executive Officer. This amendment is aimed at strengthening TEQSA's decision making capacity, in the context of a record number of initial registration applications, as well as a higher proportion of complex or high risk cases than at any previous time in TEQSA's history.

Part 2 – Application provisions

Item 13 – Application of amendments

Item 13 sets out the application provisions relating to measures contained in the TEQSA Act amended by Schedule 2.

Subitem 13(1) provides that the amendment of the definition of 'qualified auditor' in section 5 of the TEQSA Act made by Schedule 2 applies in relation to financial statements for annual financial reporting periods commencing on or after 1 July 2018.

Subitem 13(2) provides that the amendment of subsection 21(1) of the TEQSA Act made by Schedule 2 applies in relation to:

- applications for registration made after the commencement of the Schedule
- applications for registration made before the commencement of the Schedule but not yet decided before commencement.

Subitem 13(3) provides that new section 25A inserted into the TEQSA Act by Schedule 2 applies in relation to registered higher education providers registered either before or after the commencement of Schedule 2.

Subitem 13(4) provides that the amendment of subsection 36(1) of the TEQSA Act made by Schedule 2 applies in relation to:

- applications for renewal of registration made after the commencement of the Schedule
- applications for renewal of registration made before the commencement of the Schedule but not yet decided before commencement.

Schedule 3 Amendment to the Higher Education Support Act 2003

Summary

The measures in Schedule 3 to the Bill amend HESA to:

- introduce specific powers to allow for the capping of the value of loans, the number of loan supported places and the range or delivery methods of courses which a provider may offer under the FEE-HELP program where necessary
- introduce a definition as to what constitutes a 'genuine student' for the purposes of reporting and claiming FEE-HELP liabilities
- provide additional student protection mechanisms to FEE-HELP students through the banning of inducements to enrolment, predatory marketing practices and fees or administrative barriers to withdrawal from units of study
- apply more stringent application requirements for FEE-HELP providers allowing the Minister to consider: the relevant experience level and expertise a provider has in delivering higher education; expanded the fit and proper person requirements; an application exclusion period of six months for failed FEE-HELP applicants; and provisions for State and Territory-established bodies to be exempt from body corporate requirements
- vary determinations relating to advance payments where there are concerns as to whether a provider's reported liabilities represent genuine students
- introduce more stringent financial viability requirements for FEE-HELP providers including a tightening of requirements in relation to who may conduct audits of providers' financial information and adding the capacity to amend the Higher Education Provider Guidelines to add additional financial viability or reporting requirements
- introduce specific powers for the Minister or the Minister's delegate to re-credit students' FEE-HELP balances where necessary
- provide the department with specific monitoring and regulatory powers to investigate instances of non-compliance and issue civil penalties.

These measures apply to providers not listed in Table A, B or C of HESA, and to students enrolling at these providers. These are generally private, non-university providers who offer courses of study eligible for FEE-HELP assistance.
Overall, these measures are broadly consistent with the VSL arrangements legislated in 2016.

Detailed explanation

Part 1 – Amendments

Higher Education Support Act 2003

Item 1 – Section 16-1

Because of the insertion of new subsections to section 16-1 of HESA by item 2, this item makes a technical amendment to section 16-1, to insert the subsection number '(1)' at the very start of the section.

Item 2 – At the end of section 16-1

Section 16-1 defines 'higher education provider' as a body corporate that is approved under Division 16 of HESA.

This item adds new subsections 16-1(2) to (5) into section 16-1 to allow for exemptions to the body corporate requirement for approved higher education providers.

New subsection 16-1(2) provides that despite the definition of 'higher education provider' in subsection 16-1(1), a body other than a body corporate may be approved under Division 16 as a 'higher education provider' if the body is covered by an exemption under new subsection 16-1(3).

New subsection 16-1(3) provides that the Minister may, in writing, exempt a body for the purposes of section 16-1 if the body is established by or under a law of the Commonwealth, a State or a Territory.

New subsection 16-1(4) provides that if the Minister exempts a body under subsection 16-1(3), references in HESA, other that this section, to a body corporate, are taken to include the exempted body.

New subsection 16-1(5) provides that an exemption given under this section is not a legislative instrument. This provision is declaratory of the law and is not intended as an exemption to the Legislation Act, but is included to assist readers in the interpretation of the legislation and for the avoidance of doubt.

This measure is intended to confer discretion on the Minister to exempt a provider that is owned by the Commonwealth, or a State or Territory government, or represents a body established by the Commonwealth or a State or Territory Government, from the requirement to be a body corporate in order to be approved as a higher education provider under HESA.

This measure is directed at resolving anomalies where, for example, currently the Bureau of Meteorology and the Australian Federal Police are registered higher education providers approved by TEQSA. However, as they are not bodies corporate, they are unable to gain approval under HESA, and therefore cannot offer FEE-HELP.

Item 3 – After paragraph 16-25(1)(fa)

Currently, subsection 16-25(1) provides that the Minister may, in writing, approve a body corporate as a higher education provider if the body established under the law of the Commonwealth, a State or Territory, carries on business in Australia, has its central management and control in Australia and is either a university, or a self-accrediting provider or a non self-accrediting provider that either fulfils the tuition assurance requirements under subsection 16-30(2) or is exempted from these requirements under subsection 16-30(2).

The body corporate must also apply for approval in the form and manner provided for in section 16-40 and satisfy the Minister that it is willing and able to meet the quality and accountability requirements set out in Division 19. If the body corporate is a non self-accrediting provider, it must meet the additional requirements in section 16-35. Subsections 16-25(2), (3) and (4) define a 'university', a 'self-accrediting provider' and a 'non self-accrediting provider' respectively.

Item 3 inserts a new paragraph 16-25(1)(fb). New paragraph 16-25(1)(fb) specifies that the Minister must be satisfied that the body has sufficient experience in the provision of higher education.

Currently, higher education providers may apply for approval under HESA with no experience in delivering higher education courses. This amendment will impose a minimum experience requirement on all applicants for approval as a higher education provider. The minimal experience requirement is flexible in that matters contained in new subsection 16-25(2A) (see item 4) are matters for consideration as opposed to being determinative or a condition precedent to approval. These arrangements are similar to those in place for VSL.

Item 4 – After subsection 16-25(2)

This item inserts new subsection 16-25(2A) which provides that, for the purposes of new paragraph (1)(fb) inserted by item 3 (which requires the Minister to be satisfied that the body has sufficient experience in the provision of higher education), the Minister may have regard to the following, non-exhaustive factors:

- whether the body has been a registered higher education provider (that is, a higher education provider registered under Part 3 and listed on the National Register of Higher Education Providers under paragraph 198(1)(a) of the TEQSA Act) for 3 or more years
- the history of the body, and each person who makes or participates in making decisions that affect the whole, or a substantial part, of the body's affairs, in delivering higher education
- the scope of courses and level of qualifications the body, and each person who makes or participates in making decisions that affect the whole, or a substantial part, of the body's affairs, has experience in providing.

The purpose of new subsection 16-25(2A) is to provide guidance to the Minister in considering whether the body, including its key personnel, has the requisite level of experience as an education provider for the purposes of the new paragraph 16-25(1)(fb), based on its performance record and history of service delivery

(including in relation to the scope of courses and the particular qualification levels the provider and its key personnel are proposing to deliver).

Item 5 – After subsection 16-40(1)

Subsection 16-40(1) provides that a body corporate that is a registered higher education provider may apply, in writing, to the Minister for approval as a higher education provider under HESA.

This item inserts a new subsection 16-40(1A) which provides that if the body corporate makes an application (the earlier application) under subsection 16-40(1) and the Minister decides not to approve the earlier application, the body corporate is precluded from making another application for approval as a higher education provider within 6 months after the day on which notice of the decision on the earlier application was given to the body corporate.

The purpose of this amendment is to limit the ability of a body corporate who has applied unsuccessfully to become a higher education provider from making another application in short succession.

By introducing the exclusion period the quality of applications is expected to rise as providers will not wish to run the risk of a six month delay of access to FEE-HELP. Additionally, the exclusion period will encourage providers who fail to gain approval to take adequate time to address the reasons for their non-approval rather than immediately resubmitting an application.

Item 6 – At the end of section 16-60

Section 16-60 of HESA enables the Minister to impose conditions on the approval of a body as a higher education provider.

This item inserts a new subsection 16-60(3) which empowers the Minister to impose certain conditions of approval aimed at limiting the ability of any unscrupulous higher education providers to exploit grants and other payments provided under HESA. The amendment enables the Minister to give qualified approval to a body by imposing specific conditions on its approval, and is not limited to imposing conditions only at the time the body is notified of its approval as an approved provider. The Minister may also impose or vary a condition any time after a body has been approved.

Under paragraphs 16-60(3)(a) to (e), the Minister may impose the following conditions:

- that a specified limit on the total number of students entitled to FEE-HELP assistance applies to the provider for a specified period
- that a specified limit on the total amount of FEE-HELP assistance payable to the provider applies to the provider for a specified period
- that FEE-HELP assistance is payable only in relation to specified units of study offered by the higher education provider
- that FEE-HELP assistance is not payable in relation to specified units of study offered by the higher education provider

- that units of study provided in a specified manner or by a specified mode of delivery by the higher education provider are units in relation to which FEE-HELP assistance is unavailable.

Because of the breadth of the power, these conditions were included to provide clarity around the types of additional conditions that may be applied to providers.

This mirrors arrangements in the VET sector, as legislated in 2016.

New subsection 16-60(4) clarifies that new subsection 16-60(3) does not limit the conditions the Minister may impose on the approval of a higher education provider.

Items 7 and 8 – Subsection 19-10(2)

Subsection 19-10(2) specifies the requirements for a financial statement that a higher education provider must give to the Minister, pursuant to subsection 19-10(1), for each annual financial reporting period in which the provider receives assistance under Chapter 2 or a student of the provider receives assistance under Chapter 3 of HESA.

The financial statement must be in the form approved by the Minister, must be provided together with a report on the statement by a qualified auditor, and must be provided within 4 months after the end of the 'annual financial reporting period' for which the statement was given. An 'annual financial reporting period' for a higher education provider is the period of 12 months to which the provider's accounts relate that is notified in writing to the Minister as the provider's annual financial reporting period (subsection 19-10(3)).

Item 7 inserts a new paragraph 19-10(2)(ab), which requires that the financial statement must comply with the requirements prescribed by the Higher Education Provider Guidelines.

Item 8 inserts a new subsection 19-10(2A) which provides that requirements made for the purposes of new paragraph 19-10(2)(ab) may make different provision in relation to different kinds of providers, circumstances or any other matter. That is, the financial reporting requirements can be adjusted to the composition of the provider, their mode of operation or other matters which may bear on the provider's ability to adhere to the Higher Education Provider Guidelines.

The purpose of these items is to ensure that providers with annual revenue of $10 million or more are adhering to all accounting standards and provide the department with general purpose financial statements. The measures are intended to mirror financial reporting requirements for higher education providers with high annual revenue as currently apply to all VET providers with high annual revenue eligible to offer VET student loans under section 113 of the VET Student Loans Rules.

Item 9 – Section 19-12

Section 19-12 currently provides that, in determining whether a higher education provider is financially viable, and likely to remain so, the Minister must have regard to any financial statement provided by the provider under section 19-10.

This item repeals and replaces section 19-12 with a new section 19-12 to be titled 'Minister to have regard to financial information and matters prescribed in Higher Education Provider Guidelines'. The new section 19-12 sets out matters that the Minister must have regard to in making a determination as to whether or not a higher education provider is financially viable. These factors are:

- any financial statement provided by the provider under section 19-10
- the matters (if any) prescribed by the Higher Education Provider Guidelines.

The replacement section provides for a higher level of granularity as to the factors which must be considered by the Minister in making a determination as to financial viability. This is achieved by requiring the Minister to have regard to any matters prescribed by the Higher Education Provider Guidelines. These Guidelines will prescribe the form of the financial statements approved by the Minister or delegate under section 19-10(2) of HESA.

Item 10 – After section 19-35

This item inserts a suite of new sections into Division 19 (dealing with quality and accountability requirements). These provisions are directed to protecting students from unscrupulous behaviour on the part of providers and, by extension, enhancing the integrity of the higher education sector and making education and training providers more accountable for their recruitment and enrolment practices.

Section 19-36 – Misrepresenting assistance under Chapter 3

New section 19-36 prohibits a higher education provider from representing (whether in writing or through any verbal representation) that assistance payable under Chapter 3 is either not a loan or does not need to be repaid. Contravention of this section attracts a civil penalty of 240 penalty units to reflect the particularly serious nature of the contravention and deter such conduct. The application of civil penalties mirrors VSL arrangements legislated in 2016.

It is imperative to protect students from enrolling in higher education courses based on a misunderstanding as to the nature of a HELP loan and the requirement to repay the loan.

Section 19-36A – Offering certain inducements

New subsection 19-36A(1) prohibits a provider from offering, or providing a benefit, or causing a benefit to be offered or provided, if such a benefit would be reasonably likely to induce a person to make a request for Commonwealth assistance in relation to enrolling in a unit of study with the provider. Contravention of this provision carries a civil penalty of 120 penalty units to reflect the serious nature of the contravention. This provision is consistent with VSL arrangements legislated in 2016.

Subsection 19-36A(2) provides that the prohibition on inducements contained in subsection 19-36A(1) does not apply in relation to the benefit specified in the Higher Education Provider Guidelines. For example, promoting the content and quality of a higher education course, a record of high completion rates, or graduate

employment outcomes would not be a benefit contemplated within the ambit of the prohibition in subsection 19-36A(1) while, for example, offering cash incentives for enrolment, or inducements such as free tablet devices, would be within the ambit of the new prohibition.

The intent of new subsection 19-36A is to ensure students are not induced to apply for Commonwealth assistance for a course or unit of study by inappropriate benefits or inducements. This provision is intended to avoid situations that occurred historically in the context of the VFH scheme, in which students were induced to enrol in a VET course and apply for a loan with the offer of free laptops, money and vouchers for goods and services. The prohibition on the offering of inducements extends to any marketing, advertising or material which does or could involve promoting of an inducement.

Section 19-36B – Engaging in cold-calling

New section 19-36B prohibits a higher education provider from cold calling another person to market, advertise or promote a unit or course of study where in doing so, or as a result of doing so, the provider mentions the possible availability of assistance (however described) under Chapter 3 for students undertaking the course. Contravention of this provision carries a civil penalty of 60 penalty units. Cold-calling is defined in subsection 19-36B(3) to include making unsolicited contact with a person (namely a student or prospective student) in person, by telephone, email or other form of electronic communication. This definition is not exhaustive and is intended to be interpreted broadly as any form of uninvited solicitation by a provider in an attempt to convince a person to purchase the provider's educational product or service.

The purpose of new section 19-36B is to ensure that, unless a student or prospective student has provided his or her express consent to being contacted by a provider, the provider cannot mention the availability of assistance under Chapter 3 (i.e. HELP loans) for students undertaking that course. For example, this would preclude a provider approaching a prospective student in a shopping centre and mentioning the availability of higher education assistance.

New subsection 19-36B(4) enables the Higher Education Provider Guidelines to set out conduct that is deemed to be cold-calling for the purposes of new section 19-36B.

These arrangements mirror those in place for VSL.

Section 19-36C – Use of third party contact lists

New section 19-36C provides that a higher education provider contravenes this provision if the provider receives a student's contact details from another person, contacts the student to market, advertise or promote a course and when doing so, or as a result of doing so, mentions the possible availability of assistance (however described) under Chapter 3 for students undertaking the course. Contravention of this section attracts a civil penalty of 60 penalty units. This is consistent with VSL arrangements currently in place.

This section is intended to prevent higher education providers from contacting (unless the person has expressly consented to being contacted by that particular provider) prospective students to market or promote courses and the availability of higher education assistance, where the provider has obtained the person's contact details from contact lists procured from third parties, in instances where, for example, the person has provided broad consent to direct marketing (for example, job seek websites).

Section 19-36D – Other marketing requirements

New section 19-36D enables the Higher Education Provider Guidelines to set out requirements in relation to the marketing of courses in circumstances where HELP assistance may be payable by the Commonwealth under Chapter 3. Failure to comply with these requirements is a contravention that carries a civil penalty of 60 penalty units.

This provision recognises and provides for the need to allow for more detailed and specific rules and limitations in relation to the marketing of courses to be specified in the Higher Education Provider Guidelines. This allows for the Guidelines to be updated to deal with or target emergent practices and remain responsive to the changing higher education environment in order to combat the evolving practices of the less scrupulous higher education providers. The civil penalty is justified as a deterrent to unscrupulous marketing practices by higher education providers and as a further mechanism to protect prospective students from exposure to such sharp practices.

Section 19-36E – Requirements relating to requests for Commonwealth assistance

New section 19-36E provides that a higher education provider must not complete any part of a request for Commonwealth assistance that the student is required to complete.

A provider will contravene new section 19-36E if the provider completes or assists with completing (including, for example, by arranging for a third party to complete or assist with completing) any aspect or part of a request for Commonwealth assistance that a student must complete in his or her own right. This measure is designed to circumvent attempts by unscrupulous providers in procuring applications for student loans nefariously or on unjust or deceptive terms.

Contravention of this section attracts a civil penalty of 120 penalty units to reflect the serious nature of the contravention and deter such conduct.

This is consistent with VSL arrangements legislated in 2016.

Item 11 – At the end of subsection 19-40(1)

This item imposes a civil penalty of 60 penalty units for contravention of obligations under subsection 19-40(1) which deals with higher education provider compliance with tuition assurance requirements. This mirrors arrangements currently in place in for VSL.

The current requirements ensure that students get a refund of their fees or are placed in a similar course with another provider. This measure is intended to enhance protections for students where a provider is no longer able to offer the course of study in which the student is enrolled, for example if it loses its TEQSA accreditation.

Item 12 – After section 19-40

Section 19-42 – Assessment of students as academically suited

This item inserts a new section 19-42 into HESA after section 19-40.

Before enrolling a student in a unit of study, a student must have been assessed by the higher education provider as being academically suited to undertake the unit in question (subsection 19-42(1)). Contravention of this subsection attracts a civil penalty of 120 penalty units to reflect the serious nature of the contravention and deter such conduct.

Subsection 19-42(2) provides that this assessment must be done in accordance with any requirements set out in the Higher Education Provider Guidelines.

This provision is intended to deter any less scrupulous providers from undertaking on behalf of students, or assisting students to complete, the academic suitability assessments. For example, if a student does not have adequate English language skills to undertake higher education, they may not be academically suitable for a particular course of study. It is an important policy imperative to ensure students do not incur debts for units of study which are beyond their academic capability. This is reflected in the imposition of a civil penalty of 120 penalty units for contravention of section 19-42(1). The measure ensures that higher education providers are only enrolling students who have skills and capabilities which are aligned and commensurate to the chosen academic undertaking.

Item 13 – At the end of subsection 19-45(5)

Section 19-45 provides that a higher education provider must have a grievance procedure dealing with complaints by the provider's students relating to academic matters and a review procedure for dealing with review of decisions made by the provider under Chapter 3 of HESA.

Subsection 19-45(5) provides that the provider must comply with its grievance and review procedures.

This item provides for the imposition of a civil penalty of 60 penalty units if a provider fails to comply with its obligations under subsection 19-45(5). This is consistent with VSL arrangements legislated in 2016.

Item 14 – At the end of section 19-70

Subsection 19-70(1) provides that higher education providers must, if notified to do so in writing, give the Minister any requested statistical and other information relating to the provision of higher education by the provider, and compliance by the provider with the requirements under HESA.

This item inserts a new subsection 19-70(4) imposing a civil penalty provision of 60 penalty units if a higher education provider fails to met information management or compliance obligations specified under section 19-70. This mirrors arrangements currently in place for VSL.

Item 15 – After section 19-70

This item inserts new sections which impose additional obligations on higher education providers that are intended to ensure the integrity of the Australian higher education sector.

Section 19-71 – Co-operation with HESA and TEQSA investigators

New subsection 19-71(1) provides that a higher education provider must co-operate with HESA investigators and TEQSA investigators who are performing functions or exercising powers under HESA, and must not obstruct or hinder a HESA investigator or a TEQSA investigator who is performing functions or exercising powers under HESA. A failure to comply with this subsection attracts a civil penalty of 60 penalty units (subsection 19-71(2)).

The purpose of subsection 19-71(1) is to ensure higher education providers co-operate with HESA inspectors and TEQSA inspectors where these officials are performing statutory functions or exercising powers under HESA. In addition to the positive obligation to co-operate with HESA and TEQSA inspectors, higher education providers must conversely not obstruct or hinder inspectors in exercising their powers or performing their functions under HESA.

Section 19-72 – Providers must keep records

New section 19-72 provides that higher education providers must keep records of a kind, in the manner and for the period specified in the Higher Education Provider Guidelines. Contravention by a provider attracts a civil penalty of 60 penalty units (subsection 19-71(2)).

Details as to record keeping and record retention obligations are best set out in the Guidelines. This is because these requirements are technical and prescriptive in nature, yet there needs to be an ability to flexibly and efficiently revise record management frameworks in order to adapt to regulatory settings and add rigour. These matters are appropriate for subordinate legislation as they include the detail underpinning the primary provisions imposing the obligation. They are not procedural matters that go to the essence of the legislative scheme nor do the record keeping obligations in the Guidelines purport to create offences, confer enforceable rights, impose primary obligations or otherwise affect the operation of the primary legislation.

Section 19-73 – Providers must publish information

New subsection 19-73(1) provides that a higher education provider must publish information of the kind, in the manner and within the period specified in the Higher Education Provider Guidelines. A failure to comply with this subsection attracts a civil penalty of 60 penalty units (subsection 19-73(2)).

Including details as to information type, manner of publication and logistics around compliance with technical requirements in subordinate legislation provides both flexibility in the implementation of the policy and scope for adaptability in light of industry requirements (while still being subject to scrutiny and Parliamentary oversight). Guidelines are the preferable legislative vehicle for setting out such matters.

Items 16 and 17– At the end of 19-75, 19-77 and 19-78(1)

Section 19-75 requires a higher education provider to notify the Minister of any event affecting the provider (or related body corporate of the provider) that may affect the provider's capacity to meet the conditions of grants under Chapter 2 or the quality and accountability requirements.

Section 19-77 requires a higher education provider to notify the Minister of any event affecting the provider; or a related body corporate of the provider; or that relates to the provider's authority to accredit courses of study leading to higher education awards; or the accreditation by a government accreditation authority, of such courses offered by the provider.

Subsection 19-78(1) provides that a higher education provider must inform the Minister of any event significantly affecting the provider or a related body corporate of the provider that relates to the provider's registration by TEQSA as a registered higher education provider.

Items 16 and 17 amend sections 19-75 and 19-77 and subsection 19-78(1) to provide that contravention by a provider of its obligations under those provisions carries a civil penalty of 60 penalty units. This is consistent with arrangements for VSL.

The compliance obligations contained in these provisions are now subject to civil penalties as a deterrent to non-compliance by higher education providers in relation to functions linked to the probity and accountability of their operations. This also reflects the seriousness with which the Government and the community view conduct, which goes to the integrity of grant allocations and the continuing effective performance and operation of approved higher education providers.

Item 18 – After subsection 19-80(3)

This item adds a new subsection 19-80(3A) which provides that if a higher education provider is being audited under section 19-80, a failure to fully co-operate with the auditing body in the course of the audit is a contravention which carries a civil penalty of 60 penalty units. This mirrors penalties applicable under VSL.

Item 19 – Subsection 19-82(4)

This item repeals existing subsection 19-82(4) (dealing with compliance notices) and substitutes a new subsection (4) which similarly provides that a higher education provider must comply with a compliance notice given under section 19-82, but changes the treatment of a breach of compliance in this context.

The effect of this change is that a failure to comply with a compliance notice can now be sanctioned by way of the imposition of a civil penalty of 60 penalty units in addition to it being dealt with as a breach of a quality and accountability requirement potentially leading to the suspension or revocation of the provider's approval in accordance with sections 22-15 and 22-30. This amendment is consistent with reforms under the Bill to enhance the compliance and regulatory frameworks of the sector and align with the policy to extend civil penalty provisions to compliance obligations more broadly. Note that failure to comply with a compliance notice will still be a failure to comply with a quality and accountability requirement, and can still be dealt with under sections 22-15 and 22-30 of HESA.

These arrangements are consistent with VSL.

Item 20 – At the end of subsection 19-95(2)

This item provides that a failure to comply with the requirement to provide specified information in the provider's schedule of student contribution amounts for places and tuition fees for all the units of study it provides or proposes to provide in accordance with the Higher Education Provider Guidelines for the purposes of subsection 19-95(2) is a contravention which carries a civil penalty of 60 penalty units. This is consistent with VSL arrangements legislated in 2016.

This measure ensures that providers have a strong deterrent from hiding, failing to publish or otherwise not providing information on their tuition fees to prospective students. Fully informed students are able to make better choices in relation to their study and to any HELP loans they agree to incur.

Item 21 – At the end of subsection 19-95(3)

This item provides that a failure by a provider to comply with the requirement under subsection 19-95(3) to withdraw and replace a previous schedule of student contribution amounts for places and tuition fees where that provider has varied a student contribution amount or a tuition fee in that schedule and submitted it to the Minister is a contravention of section 19-95 which carries a civil penalty of 60 penalty units. This mirrors arrangements currently in place for VSL.

Items 22, 23, 24, 25 – Amendments to subsection 104-1

These items make amendments to subsection 104-1 to ensure that only genuine and competent students are entitled to FEE-HELP assistance under HESA.

Item 22 – Subsection 104-1(1)

This item inserts reference to the new section 104-1A (inserted by item 26) in subsection 104-1(1), with the effect that a student is not entitled to FEE-HELP assistance in the circumstances set out in section 104-1A.

Item 23 – After paragraph 104-1(1)(a)

This item inserts new paragraphs 104-1(ab) and (ac), which set out two new mandatory requirements for a student to be entitled to FEE-HELP assistance for a unit of study. In order to be entitled to FEE HELP assistance, a student must:

- be a genuine student (by reference to matters specified in the Higher Education Provider Guidelines) (new paragraph 104-1(1)(ab))
- have been assessed by the higher education provider as being academically suited to undertake the particular unit of study (new paragraph 104-1(1)(ac)).

The purpose of this amendment is to ensure that a person's ability to satisfy the genuine student criteria (as determined in accordance with new section 104-43) and their academic suitability to undertake a particular unit of study are now factors in order for a person to be entitled to FEE-HELP assistance for a unit of study under section 104-1(1).

This is consistent with VSL arrangements legislated in 2016.

Item 24 – After subsection 104-1(1)

This item inserts new subsections 104-1(1A) and (1B) in section 104-1, which are intended to assist the Minister to determine a genuine student and to determine whether the student has been properly assessed for academic suitability for the purposes of new paragraphs 104-1(1)(ab) and 104-1(1)(ac) respectively.

New subsection 104-1(1A) provides that, in determining whether a student is a 'genuine student', regard may be had to the matters (if any) specified in the Higher Education Provider Guidelines. The definition of genuine student to be contained in the Higher Education Provider Guidelines will be broadly equivalent to the definition of 'genuine student' in section 5 of the VET Student Loans Rules, and will include considerations such as level of engagement with course content or materials, demonstrated knowledge of the course, its content and duration, and satisfying prerequisites for entry into the course.

The genuine student arrangements are consistent with VSL provisions legislated in 2016.

New subsection 104-1(1B) provides that a student's academic suitability to undertake a particular course must be done in accordance with the Higher Education Provider Guidelines, as required by new section 19-42 (see item 12).

These requirements are a further safeguard and deterrent against opportunistic and disingenuous enrolment of people by higher education providers in courses for reasons other than genuine pursuit of a course of study and learning pathway. This will protect vulnerable students who do not have the academic capability to undertake a particular unit from being burdened with a significant FEE HELP debt with limited or no educational or training outcome.

Item 25 – At the end of section 104-1

This item inserts two new subsections 104-1(3) and (4) which impose additional restrictions on a student's entitlement to FEE-HELP assistance.
Firstly, under new subsection 104-1(3) a student is not entitled to FEE-HELP assistance for a unit of study provided, or to be provided, by a higher education provider once the provider has reached a limit of students or FEE-HELP assistance payable – for example, under conditions imposed under section 16-60 (see item 6).

The purpose of expressly limiting FEE-HELP entitlement (both in terms of the number of qualifying students and total amount of assistance funding conferred to the provider for student allocation) and not permitting a student to obtain FEE-HELP assistance once a nominated limit has been reached is to ensure FEE-HELP assistance is directed to eligible students.

Secondly, under new subsection 104-1(4) a student is not entitled to FEE-HELP assistance for a unit of study if a higher education provider completes any part of the student's request for Commonwealth assistance that the student is required to complete (see new section 19-36E inserted by item 10). This is consistent with VSL arrangements.

The purpose of new subsection 104-1(4) is to actively discourage higher education providers from completing any part of the application for Commonwealth assistance that the student is required to complete. Not only will such conduct attract a civil penalty of 60 penalty units under section 19-36E, but the student will not be entitled to any FEE-HELP assistance, meaning the provider will not financially benefit from the enrolment.

The measure is intended to proactively prevent and countermand issues which arose historically in the context of VET student loans, where less scrupulous providers completed students' requests for VFH assistance without the student being fully aware of the details or their loan commitments. Notably, the limitation on eligibility contained in subsection 104-1(4) applies to units of study in the particular course of study with the provider in question. The provision does not impede students' ability to enrol at a different provider, or in a different course of study in the future (subject to eligibility requirements under HESA).

Item 26 – After Section 104-1

This item inserts a new section 104-1A after section 104-1. New section 104-1A will make a student's entitlement to FEE-HELP assistance for a later unit of study at a provider contingent on student's successful completion of a certain number of earlier units of study at that provider.

Paragraph 104-1A(1)(a) provides that a student is not entitled to FEE-HELP assistance for a unit of study provided by a provider that is part of a course of study leading to the award of a bachelors degree or higher qualification where the student has already undertaken 8 or more other units of study with that provider and has not successfully completed at least 50% of those other units.

Paragraph 104-1A(1)(b) provides that a student is not entitled to FEE-HELP assistance for a unit of study provided by a provider (other than one referred to in paragraph (a)) where the student has already undertaken 4 or more other units of study with that provider and has not successfully complete at least 50% of those other units.

Subsection 104-1A(2) provides that the study completion requirement will not apply if a student applies in writing for an exemption from the requirement under subsection 104-1A(1) and the higher education provider is satisfied that special circumstances apply to the student (see section 104-30).

Similar arrangements are currently in place for VSL.

Item 27 – Subsection 104-10(4)

This item repeals subsection 104-10(4) which provides that a determination by the Minister under subsection 104-10(2) in relation to courses for which FEE-HELP assistance will be available must not be made later than 6 months before the day that students are able next to commence the specified course, or courses, with the provider.

Subsection 104-10(4) is being repealed because the common practice of enrolling students throughout the year means that the Minister may effectively never make such a determination. In making any determination that a specified course is not eligible for FEE-HELP, the Minister must still have regard to the effect of the determination on students undertaking the course or courses under subsection 104-10(3).

Item 28 – Subsection 104-30(1)

This item amends subsection 104-30(1) (which sets out the special circumstances requirements for HECS-HELP fee remission) consequential to the enactment of section 104-1A (see item 26).

The effect of this amendment is to make a referencing change to subsection 104-30(1) to include a reference to paragraph 104-1A(2)(b). This amendment will ensure that the special circumstances considerations contained in section 104-30 apply equally to the exemption contained in section 104-1A(2)(b) whereby a student will not be disentitled to FEE-HELP assistance where that student has failed to complete previous units of study with that higher education provider where they have applied for an exemption from the application of 104-1A(1) and special circumstances apply to that student.

Item 29 – At the end of Subdivision 104-B of Division 104

This item inserts new sections 104-43 and 104-44 into Subdivision 104-B of Division 104 of HESA.

Section 104-43 – Re-crediting a person's FEE-HELP balance if not a genuine student

New section 104-43 provides that a higher education provider must, on the Secretary's behalf, re-credit a person's FEE-HELP balance if the Secretary is satisfied that the person is not a genuine student. The amount re-credited is the amounts of FEE-HELP assistance that the student received for the unit of study provided by the provider.

The note accompanying section 104-43 clarifies that a FEE-HELP debt relating to a unit of study will be remitted if the FEE-HELP balance in relation to the unit is re-credited: see subsection 137-10(4).

The Secretary can re-credit a person's FEE-HELP balance if the provider is unable to do so.

The factors relevant to the determination of whether a student is a genuine student will be addressed in the Higher Education Provider Guidelines (see item 24).

To further the broader objective of enhancing the integrity and accountability of the sector, the purpose of this provision is to ensure that FEE-HELP assistance is provided to genuine students legitimately intending to pursue higher education. Enabling the Secretary to re-credit a student's FEE-HELP balance if the student is not a genuine student should deter providers from enrolling students in higher education course where such students have little or no real interest in undertaking the course. Similar arrangements are currently in place for VSL.

Section 104-44 – Re-crediting a person's FEE-HELP balance if provider completes request for assistance etc.

New section 104-44 sets out a number of other circumstances in which a higher education provider must recredit a person's FEE-HELP balance for FEE-HELP assistance received by the person for a unit of study provided by the provider where:

- the provider has completed any part of the request for Commonwealth assistance in relation to the unit that the student is required to complete (subsection (1))
- the Secretary is satisfied that the student was not entitled to FEE-HELP assistance for the unit (subsection (2))
- the student has not been assessed by the provider as academically suited to undertake the unit (subsection (3)).

The Secretary can re-credit a person's FEE-HELP balance in these circumstances if the provider is unable to do so (subsection (4)).

A note to subsection 104-44(1) clarifies that a FEE-HELP debt relating to a unit of study will be remitted if the FEE-HELP balance in relation to the unit is re-credited under this section: see subsection 137-10(4). Similar arrangements are currently in place for VSL.

Items 30 and 31 – Subsections 110-5(1) and 137-10(4)

Subsection 110-5(1) provides that if a higher education provider re-credits a person's FEE-HELP balance with an amount relating to FEE-HELP assistance for a unit of study, the provider must pay to the Commonwealth an amount equal to the amount of FEE-HELP assistance to which the person was entitled for the unit.

Subsection 137-10(4) provides that a person's FEE-HELP debt is remitted if the person's FEE-HELP balance is re-credited.

These items amend subsections 110-5(1) and 137-10(4) as a consequence of the insertion of new sections 104-43 and 104-44 (see item 28).

Item 32 – At the end of section 159-1

This item amends the guide to Chapter 5 of HESA to add a new dot point relating to the application of the Regulatory Powers Act to HESA (see new Part 5-8 inserted by item 37).

Item 33 – After subsection 164-10(1)

This item inserts new subsection 164-10 (1AA) which provides that the Secretary may vary or revoke a determination made under subsection 164-10(1).

This will allow variations in relation to amounts payable in advance to providers to be made, or for the determination that funds are payable in advance to be revoked. This will limit the exposure of Government funds, and limit the creation of false student loan debt, where a determination has been made that a proportion of a provider's students are non-genuine students. This measure will ensure funding is only directed to providers with students actively engaged in study.

Item 34 – After section 169-15

This item inserts new section 169-17 after section 169-15 of HESA.

Section 169-17 – Requirements relating to withdrawal from units of study

New section 169-17 provides that the Higher Education Provider Guidelines may prescribe requirements to be complied with by higher education providers in relation to student withdrawal from units of study (subsection 169-17(1)).

Subsection 169-17(2) provides that the Higher Education Provider Guidelines can:

- require that fees (however described) must not be charged by higher education providers for withdrawal, either generally or in specified circumstance
- specify requirements to be met in relation to reenrolment after withdrawal
- specify requirements in relation to establishing and operating processes and procedures dealing with student withdrawal from units of study.

Subsection 169-17(3) provides that a higher education provider that fails to comply with a requirement prescribed under subsection 169-17(1) contravenes the subsection and is subject to a civil penalty of 120 penalty units, reflecting the serious nature of the contravention and as a deterrent to such conduct.

The policy intent of section 169-17 is to explicitly prohibit higher education providers creating financial barriers for students to withdraw from a course. This is consistent with arrangements for VSL.

The Higher Education Provider Guidelines will be amended to prescribe the processes and procedures that a provider must have in place for a student to withdraw from a course of study (equivalent to those contained in section 86 of the VET Student Loans Rules). For example, a provider's processes and procedures must include:

- procedures for a student to withdraw from a course of study, or unit of study
- a procedure for a student to enrol in a part of a course of study with the provider in circumstances where the student had earlier withdrawn from a part of the course undertaken with the provider.

The procedures for a student to withdraw from a course of study, or unit of study, before a census day for the course, or the unit, must not involve financial, administrative or other barriers to the withdrawal.

If a student withdraws from a course of study, or unit of study, the course provider must not, after the withdrawal, enrol the student in a course of study or unit of study without the written permission of the student (which must be given after the withdrawal).

Item 35 – At the end of subsections 169-25(3) and (4)

Section 169-25 provides that a higher education provider must, for each unit of study it provides or proposes to provide during a year, determine the census date and EFTSL value for the unit. This includes requirements around the publication of the census date and EFTSL value for the unit in accordance with the Administration Guidelines. The provider must also obtain written approval from the Minister to vary the census date or EFTSL for the unit after publication.

This item provides that a failure by a higher education provider to comply with requirements under section 169-25 will be a contravention of the section attracting a civil penalty of 60 penalty units. This mirrors VSL arrangements legislated in 2016.

Item 36 – After subsection 174-5(1)

This item inserts new section 174-5(1A) which provides for the imposition of a civil penalty if a higher education provider is subject to a requirement under section 174-5(1) and fails to comply with any of the requirements specified under that subsection. Contravention of section 174-5(1A) attracts a civil penalty of 60 penalty units. This is consistent with the VSL arrangements legislated in 2016.

Subsection 174-5(1) provides that the Administration Guidelines may require or permit information or documents to be given by a student to a higher education provider (or a provider to a student) in accordance with particular information technology requirements on a particular kind of data storage device or by means of a particular kind of electronic communication.

This subsection is intended to facilitate appropriate, consistent and reliable electronic communication and ensure that information is able to be conveyed and received effectively, and with a strong deterrent for failure to comply.

Item 37 – New Part 5-8

This item inserts a new Part 5-8 entitled ‘Regulatory Powers’ in Chapter 5 of HESA.

Part 5-8 triggers all of the powers in the Regulatory Powers Act in relation to HESA. The Regulatory Powers Act provides for a standard suite of provisions in relation to

monitoring and investigation powers, as well as enforcement provisions through the use of civil penalties, infringement notices, enforceable undertakings and injunctions.

The regulatory powers are in addition to the wide variety of mechanisms HESA (as amended by this Bill) provides the Minister with to maintain the integrity of the higher education assistance program, and to monitor and enforce compliance by approved higher education providers. For example, the Minister can impose conditions on provider approvals, suspend and revoke provider approvals, issue compliance notices and require a compliance audit of a provider. Under Part 3, the Minister can manage payments of Commonwealth assistance loan amounts to providers, and require repayment of FEE HELP assistance amounts.

The Regulatory Powers Act has been triggered by the Bill to ensure that the department and TEQSA have an appropriate framework and powers for monitoring compliance and purported compliance with the new civil penalty provisions, and that information given in compliance or purported compliance with the civil penalty provisions, is appropriately subject to monitoring.

The Bill also extends the powers of HESA and TEQSA investigators with respect to monitoring and investigation of provider compliance activities. The Bill does this by making the civil penalty provisions and compliance obligations subject to monitoring by HESA and TEQSA investigators under Part 2 (Monitoring) of the Regulatory Powers Act. Similarly, the civil penalty provisions are also made subject to investigation under Part 3 (Investigation) of the Regulatory Powers Act by HESA and TEQSA investigators.

Triggering the Regulatory Powers Act ensures that HESA and TEQSA investigators have sufficient monitoring and investigation capabilities under HESA to monitor and investigate compliance and purported compliance with respect to the civil penalties provisions inserted by the Bill, which are enforceable by recourse to Part 4 of the Regulatory Powers Act.

By triggering the Regulatory Powers Act, the new monitoring and investigation capabilities provide greater scope for the department to access, or, if necessary, seize relevant information in cases of suspected non-compliance.

These powers are in addition to the variety of compliance mechanisms under HESA and introduced by this Bill. However, the regulatory powers provisions as incorporated allow for monitoring and investigation powers, as well as the use of civil penalty provisions, with the attendant safeguards to the exercise of those powers that apply under the Regulatory Powers Act. These additional powers ensure that the department is able to take effective action in cases of non-compliance beyond revocation of approval and, therefore, mitigate loss of Commonwealth funding.

Application of the Regulatory Powers Act is consistent with the VSL arrangements legislated in 2016.

Part 5-8 – Regulatory Powers

Section 215-1 – What this Part is about

Section 215-1 provides a general guide to the content of new Part 5-8 of HESA.

Section 215-5 – Monitoring powers

Section 215-5 provides HESA investigators and TEQSA investigators with monitoring powers by triggering Part 2 of the Regulatory Powers Act. It provides that the Bill is subject to monitoring under Part 2 of the Regulatory Powers Act, as is any information given in compliance or purported compliance with a provision of this Bill.

Part 2 of the Regulatory Powers Act creates a framework for monitoring whether this Bill has been complied with and whether information given in compliance or purported compliance with the Bill is correct. Part 2 of the Regulatory Powers Act includes powers of entry and inspection.

Subsection 215-5(3) defines the persons and positions that are granted functions and powers under Part 2 of the Regulatory Powers Act:

- HESA investigators and TEQSA investigators are authorised applicants and authorised persons
- a judicial officer (as defined in HESA) is an issuing officer
- the Secretary is the relevant chief executive for HESA investigators, and the TEQSA Commissioner is the relevant chief executive for TEQSA investigators
- each applicable court (as defined in HESA) is a relevant court.

Subsection 215-5(4) enables HESA investigators and TEQSA investigators to be assisted by other persons when exercising powers or performing functions or duties under Part 2 of the Regulatory Powers Act in relation to this Bill. HESA investigators and NVETR investigators are appointed under section 215-35.

Section 215-10 – Investigation powers

This section provides HESA investigators and TEQSA investigators with investigation powers by triggering Part 3 of the Regulatory Powers Act.

Any offence or civil penalty provision under this Bill, or an offence against the Crimes Act or the Criminal Code that relates to this Bill, will be subject to investigation under Part 3 of the Regulatory Powers Act.

Part 3 of the Regulatory Powers Act creates a framework for gathering material relating to the contravention of offence and civil penalty provisions. It includes powers of entry, search and seizure.

Subsection 215-10(2) defines the persons and positions that are granted functions and powers under Part 3 of the Regulatory Powers Act:

- HESA investigators and TEQSA investigators are authorised applicants and authorised persons
- a judicial officer (as defined in HESA) is an issuing officer
- the Secretary is the relevant chief executive for HESA investigators, and the TEQSA Commissioner is the relevant chief executive for TEQSA investigators
- each applicable court (as defined in HESA) is a relevant court.

Subsection 215-10(3) enables HESA investigators and TEQSA investigators to be assisted by other persons in exercising powers or performing functions or duties under Part 3 of the Regulatory Powers Act in relation to HESA.

Section 215-15 – Civil penalty provisions

This section provides that each civil penalty provision of the Bill is enforceable under Part 4 of the Regulatory Powers Act. Part 4 of that Act allows a civil penalty provision to be enforced by obtaining an order for a person to pay a pecuniary penalty for the contravention of the provision.

Subsection 215-15(2) specifies who are the authorised applicants and which are relevant courts for the purposes of Part 4 of the Regulatory Powers Act as it applies in relation to HESA.

Section 215-20 – Infringement notices

Section 215-20 provides that a civil penalty provision of HESA is subject to an infringement notice under Part 5 of the Regulatory Powers Act.

Note 1 clarifies that Part 5 of that Act creates a framework for using infringement notices in relation to provisions. Note 2 clarifies that Schedule 1A of HESA contains separate monitoring and investigation powers in relation to matters deal with in the Schedule (see Subdivision 5A-B of Schedule 1A).

A person who is given an infringement notice can choose to pay the amount specified as an alternative to having court proceedings brought against them for the contravention.

Subsection 215-20(2) defines the persons and positions that are granted functions and powers under Part 5 of the Regulatory Powers Act:

- SES employees and Executive Level 2 employees of TEQSA, and SES employees of the Department are infringement officers
- the TEQSA Commissioner is the relevant chief executive for TEQSA employees and the Secretary is the relevant chief executive for HESA employees.

Section 215-25 – Enforceable undertakings

This section provides that the provisions of HESA are enforceable under Part 6 of the Regulatory Powers Act. Part 6 of the Regulatory Powers Act creates a framework for accepting and enforcing undertakings relating to compliance with statutory requirements.

Subsection 215-25(2) specifies who are the authorised persons and which are relevant courts for the purposes of Part 6 of the Regulatory Powers Act as it applies in relation to HESA.

Section 215-30 – Injunctions

This section provides that the provisions of HESA are enforceable under Part 7 of the Regulatory Powers Act. Part 7 of the Regulatory Powers Act creates a framework for using injunctions to enforce statutory requirements.

Subsection 215-30(2) specifies who are authorised persons and which are the relevant courts for the purposes of Part 7 of the Regulatory Powers Act.

This section enables injunctions (including interim injunctions) under Part 7 of the Regulatory Powers Act to be used to restrain a person from contravening a provision of this Bill, or to compel compliance with a provision of this Bill. This provides an additional tool with which the Commonwealth can enforce compliance with the Bill.

This provision is declaratory of the law and is not a legislative instrument within the meaning of subsection 8(1) of the Legislation Act, but is included to assist readers in the interpretation of the legislation and for the avoidance of doubt.

Section 215-35 – Appointment of investigators

This section provides that the Secretary and the Chief Executive Officer for TEQSA may appoint HESA investigators and TEQSA investigators respectively.

Prior to making an appointment, the appointer must be satisfied that the person to be appointed has appropriate and suitable knowledge or experience to properly exercise the powers of an investigator. For example, the person must understand their legal rights and obligations and the scope and limits of their powers. The person must also understand the functions and duties of an investigator. This is to ensure that investigators are able to carry out their role properly and effectively.

The section also specifies that an investigator must comply with any directions of the appointer in exercising the powers of an investigator. This is also intended to ensure that investigators carry out their functions and responsibilities appropriately.

This provision is declaratory of the law and is not a legislative instrument within the meaning of subsection 8(1) of the Legislation Act, but is included to assist readers in the interpretation of the legislation and for the avoidance of doubt.

Section 215-40 – Delegation of regulatory powers

This section enables the Secretary and the TEQSA Commissioners to delegate, in writing, their functions under the Regulatory Powers Act as it applies in relation to HESA.

The power to delegate ensures that regulatory powers under the Bill will be able to be carried out efficiently and effectively in an operational environment where the Secretary or a TEQSA Commissioner may not have the capacity to undertake all regulatory functions and powers conferred upon them by Part 5-8 of HESA.

In exercising powers or performing functions under a delegation, a delegate must comply with any directions of the delegator (subsection 215-40(3)). This limitation is to ensure that there are appropriate constraints on the delegate's exercise of the regulatory powers. An instrument that is a direction to a delegate is not a class of instrument that is a legislative instrument pursuant to section 6(1) of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

Section 215-45 – Contravening offence and civil penalty provisions

This section clarifies that, if a provision of HESA provides that a person contravening another provision of HESA ('conduct provision') commits an offence or is liable to a civil penalty, then for the purposes of this Bill, and the Regulatory Powers Act (to the extent it relates to HESA), a reference to a contravention of an offence or civil penalty provision includes a reference to a contravention of the conduct provision. Therefore, the person would have contravened both the conduct provision and the offence or civil penalty provision.

This is to avoid having to expressly provide in each instance that a contravention of the offence or civil penalty provision is also a contravention of the conduct provision.

Section 215-50 – Certain references to higher education provider include references to agent

This section provides that a reference in a civil penalty provision to a higher education provider includes a reference to a person acting on behalf of the higher education provider.

This provision extends the application of the civil penalty provisions to persons such as agents or associates who may be acting for a financial gain or other incentive on behalf of the higher education provider.

This section is intended to operate inclusively, so, depending on the circumstances, the civil penalty provisions could apply to either or both the higher education provider, or a person acting on behalf of the higher education provider.

Section 215-55 – Other enforcement action

This section is an avoidance of doubt provision which clarifies that taking action under Part 5-8 of HESA does not prevent or limit the taking of action under any other provision of HESA.

Item 38 – Before section 238-1

This item inserts a new section 238-1A titled 'Giving false or misleading information' before section 238-1 of HESA.

New section 238-1A provides that a person is liable for a civil penalty if the person provides false or misleading information or documents under HESA or if the person omits any matter or thing without which the information or document is misleading. This provision would apply, for example, to information provided by a higher

education provider to a student that misrepresents a HELP loan as Government support that a student does not have to repay, or information provided by a higher education provider to the department in respect of non-genuine students.

It will not be a contravention of this section if the information or document provided is not false or misleading in a material particular. False or misleading information or documents relating to a material particular means false or misleading information or documents which are not trivial or inconsequential.

The maximum civil penalty for a contravention is 60 penalty units. It is important to ensure persons (including students, the Minister and Secretary) have access to information that is relevant, reliable and correct for the effective administration of the higher education sector. This mirrors the VSL arrangements legislated in 2016.

Item 39 – Subsection 238-10(1) (table item 6)

This item makes a machinery change to subsection 238-10(1) to ensure that the definition of genuine student in the Higher Education Provider Guidelines is incorporated by inserting new section 104-1 after Part 2-1 into table item 6 in the Chapter/Part/Section column.

Items 40, 41, 42 and 43

These items amend or insert definitions into the Dictionary of HESA (Schedule 1), as a consequence of the amendments made by other items in Schedule 3 to the Bill.

Item 41 inserts a new definition of ***HESA investigator***. The term ***HESA investigator*** means a person appointed under new section 215-30.

Item 42 repeals paragraphs (a) to (c) of the definition of ***qualified auditor*** which provided that a qualified auditor includes the Auditor-General of a State, of the Australian Capital Territory or of the Northern Territory; or a person registered as a company auditor or a public accountant under a law in force in a State, the Australian Capital Territory or the Northern Territory; or a member of the Institute of Chartered Accountants in Australia, or of the Australian Society of Certified Practising Accountants.

A ***qualified auditor*** is now defined as a registered company auditor (within the meaning of the Corporations Act) (inserted by new paragraph (a)) and a person approved by the Minister in writing as a qualified auditor for the purposes of this Act (existing paragraph (d) of the definition).

Item 43 inserts a new definition of ***TEQSA investigator***, which means a person appointed under section 215-35.

Part 2—Application provisions

The amendments only apply to providers approved under section 16-25 of HESA.

Analysis by the department has shown that universities listed in Tables A, B and C of HESA, and providers approved under section 16-25 of HESA present

significantly different risk profiles. Universities traditionally have stable administrative structures and business models, while many higher education providers restructure or change ownership. While this enables some higher education providers approved under section 16-25 to be more flexible and responsive to market needs or business requirements, large staff turnover or new management is likely to present compliance risks.

Additionally, there is evidence that, as a cohort, the ability of providers approved under section 16-25 of HESA to deliver courses is significantly lower. Students enrolled at providers approved under section 16-25 generally have lower completion rates, and take longer to complete their degrees when compared to students enrolled in the same course of study at a university listed in a Table of HESA.

Further, there is evidence to suggest that providers who previously gained approval under the VET FEE-HELP program and lost approval upon the transition to VSL are now seeking approval as higher education providers under section 16-25 of HESA. Should they gain approval, stronger regulatory powers, including enhanced monitoring capabilities, should be sufficient to ensure that similar unscrupulous behaviour does not occur in the higher education sector.

Item 44 – Application of amendments

Item 44 inserts Part 2 setting out the application provisions relating to measures contained in HESA amended by Schedule 3 to this Bill.

Subitem 44(1) provides that the amendments to section 16-25 of HESA made by Schedule 3 apply in relation to:

- applications for approval by providers made after the commencement of Schedule 3
- applications for approval by providers made before the commencement of this Schedule but not decided before that commencement date.

Subitem 44(2) provides that the amendments of sections 19-10 and 19-12 of HESA made by Schedule 3 will apply in relation to higher education providers approved under section 16-25, whether approved before or after the commencement of Schedule 3.

Subitem 44(3) provides that new sections 19-36 to 19-36E of HESA inserted by Schedule 3 will apply on and after 1 January 2018 in relation to higher education providers approved under section 16-25, whether approved before or after the commencement of the Schedule.

Subitem 44(4) provides that the amendments to sections 19-40, 19-45 and 19-70 of HESA made by Schedule 3 will apply in relation to higher education providers approved under section 16-25, whether approved before or after the commencement of the Schedule.

Subitem 44(5) provides that the new section 19-42 of HESA inserted by Schedule 3 will apply in relation to higher education providers approved under section 16-25, whether approved before or after the commencement of the Schedule.

Subitem 44(6) provides that new sections 19-71 to 19-73 of HESA as inserted by Schedule 3, will apply in relation to higher education providers approved under section 16-25, whether approved before or after the commencement of the Schedule.

Subitem 44(7) provides that the amendments of sections 19-75, 19-77, 19-78, 19-80, 19-82 and 19-95 of HESA made by Schedule 3 will apply in relation to higher education providers approved under section 16-25, whether approved before or after the commencement of the Schedule.

Subitem 44(8) provides that section 104-1 of HESA made by Schedule 3 will apply in relation to a unit of study if:

- the unit of study is undertaken as part of a course of study
- the student enrolled in the course of study on or after 1 January 2018
- the unit of study has a census date that occurs on or after 1 January 2018
- the unit is provided by a higher education provider approved under section 16-25, whether approved before or after the commencement of the Schedule.

Subitem 44(9) provides that section 104-1A of HESA as inserted by Schedule 3 will apply in relation to a unit of study if:

- the unit of study is undertaken as part of a course of study
- the student enrolled in the course of study on or after 1 January 2018
- the unit of study has a census date that occurs on or after 1 January 2018
- the unit is provided by a higher education provider approved under section 16-25, whether approved before or after the commencement of the Schedule.

Subitem 44(10) provides that sections 104-43 and 104-44 of HESA, as inserted by Schedule 3, will apply in relation to higher education providers approved under section 16-25, whether approved before or after the commencement of this Schedule.

Subitem 44(11) provides that section 169-17 of HESA, as inserted by Schedule 3, applies in relation to students enrolled in units of study:

- with census dates that occur on or after the commencement of the Schedule (whether the units of study are part of a course commenced before or after that commencement)
- that are provided by higher education providers approved under section 16-25, whether approved before or after the commencement of the Schedule.

Subitem 44(12) provides that amendments to sections 169-25 and 174-5 of HESA made by Schedule 3 will apply in relation to providers approved under section 16-25, whether those providers were approved before or after the commencement of this Schedule.

Subitem 44(13) provides that the amendment of the definition of ‘qualified auditor’ in subclause 1(1) of Schedule 1 of HESA made by Schedule 3 applies in relation to

financial statements provided for annual financial reporting periods that commence on or after 1 July 2018.