

EXPLANATORY STATEMENT

Determination made under subsection 41-45(1B) of the Higher Education Support Act 2003

Higher Education Support (Maximum Payments for Other Grants) Determination 2020

Authority

Subsection 41-45(1B) of the *Higher Education Support Act 2003* (the Act) provides that the Minister for Education (the Minister) must, by legislative instrument, determine the total payments made under Part 2-3 (Other grants) of the Act in respect of a year starting on or after 1 January 2017. A determination made under this subsection for a year must be made before the start of the relevant year.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument. The repeal of the *Higher Education Support (Maximum Payments for Other Grants) Determination 2019* by the Schedule to this instrument relies on that provision.

Purpose

The *Higher Education Support (Maximum Payments for Other Grants) Determination 2020* (the Determination):

- repeals the *Higher Education Support (Maximum Payments for Other Grants) Determination 2019*; and
- sets out the maximum total payments that can be made under Part 2-3 of the Act for the 2020 to 2024 calendar years. The total amount of grants made under Part 2-3 each year must not exceed the amount specified for each year.

The amounts determined for 2021 to 2024 are expressed with the 2021 indexation factor applied. The indexation factors for 2022 to 2024 are yet to be determined.

Commencement

The Determination takes effect the day after it is registered on the Federal Register of Legislation.

Availability of merits review

The Commonwealth makes grants to eligible providers under Part 2-3 (Other grants) of the Act. These decisions are not made under the Determination but are made taking into account the maximum amounts set out in the Determination.

Section 206-1 of the Act specifies the types of decisions made under the Act that are reviewable decisions. This is an exhaustive list. Funding decisions made under Part 2-3 of the Act are not specified at section 206-1 as decisions that are reviewable. The Determination does not create new decision making powers, or provide the Minister with the power to establish a new review mechanism in addition to the review process available under the Act.

Consultation

Consultation was not undertaken on the Determination as it does not create any new rights or liabilities or make any grants under Part 2-3 of the Act. Rather, the Determination is a technical step that must be taken by the Minister before any grants can be made to eligible bodies corporate. As such, it was not appropriate for consultation to be undertaken on the Determination.

Explanation of provisions

Section 1 provides the name of the Determination.

Section 2 provides for the commencement of the Determination the day after it is registered on the Federal Register of Legislation.

Section 3 states that the Determination is made under subsection 41-45(1B) of the Act.

Section 4 provides definitions for certain expressions used in the Determination.

Section 5 provides that the instrument specified in the Schedule to the Determination is repealed.

Section 6 sets out the amounts which the total payments made under Part 2-3 of the Act must not exceed for the years 2020 to 2024. The amount for the 2020 year was originally determined in the *Higher Education Support (Maximum Payments for Other Grants) Determination 2019*, but has been updated in 2020 to reflect the recent creation of new programs under the *Other Grants Guidelines (Education) 2012*.

Schedule 1

Section 1 repeals the *Higher Education Support (Maximum Payments for Other Grants) Determination 2019*.

Statement of Compatibility with Human Rights

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

Higher Education Support (Maximum Payments for Other Grants) Determination 2020

This *Higher Education Support (Maximum Payments for Other Grants) Determination 2020* (Determination) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Determination

Subsection 41-45(1B) of the *Higher Education Support Act 2003* (the Act) provides that the Minister for Education (the Minister) must, by legislative instrument, determine the total payments made under Part 2-3 in respect of a year starting on or after 1 January 2017.

The Determination:

- revokes the *Higher Education Support (Maximum Payments for Other Grants) Determination 2019*; and
- sets out the maximum total payments that can be made under Part 2-3 of the Act for the 2020 to 2024 calendar years. The total amount of grants made under Part 2-3 each year must not exceed the amount specified for each year.

Human rights implications

Right to education

The Determination engages the right to education contained in Article 13 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Article 13(2)(c) of the ICESCR provides that ‘higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.’

The Determination will support the payment of grants for the purposes specified in the table in section 41-10 of the Act. The purposes specified in this table include the promotion of equality of opportunity in higher education, the support of diversity and structural reform and the support of the training of research students (amongst other purposes). The Determination provides clarity of funding for programs that support these purposes, and the maximum amounts are capped having regard to reasonable, necessary and proportionate constraints on spending. The Determination is therefore compatible with, and does not impermissibly limit, the right to education.

Conclusion

This Determination is compatible with human rights because it provides clarity of funding for programs that support access and equality in higher education.

The Hon Dan Tehan MP, Minister for Education