THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

EDUCATION LEGISLATION AMENDMENT (TUITION PROTECTION AND OTHER MEASURES) BILL 2019

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment, Skills, Small and Family Business, Senator the Hon Michaelia Cash)
EDUCATION LEGISLATION AMENDMENT (TUITION PROTECTION AND OTHER MEASURES) BILL 2019

OUTLINE

The principal purpose of the Education Legislation Amendment (Tuition Protection and Other Measures) Bill 2019 (Bill) is to amend the VET Student Loans Act 2016 (VSL Act) and the Higher Education Support Act 2003 (HESA) to implement a new tuition protection model for students accessing VET Student Loans, FEE-HELP or HECS-HELP at a private education provider or TAFE, to provide greater tuition protection to students.

Tuition protection aims to ensure students are protected and supported in the event that their course provider defaults – that is, where the student has not withdrawn from the course and either:

- the provider fails to start to provide a course or a part of a course to the student on the day on which the course or part was scheduled to start; or
- the provider ceases to provide a course or a part of a course to the student on a day after the course or part starts but before it is completed.

The proposed tuition protection arrangements are modelled on the successful Tuition Protection Scheme (TPS) arrangements for international students under the Education Services for Overseas Students Act 2000 (ESOS Act). For many years now, Australia has been a world leader in supporting international students studying in Australia if their provider closes. The expansion of the successful TPS model to the VET Student Loans program and students in receipt of FEE-HELP and HECS-HELP at private education providers and TAFEs is part of the Government’s ongoing commitment to safeguarding the integrity and reputation of its domestic income contingent loan programs. The Bill provides for the new tuition protection arrangements to commence on 1 January 2020. Consistent with previous tuition assurance arrangements, the proposed arrangements do not apply to Table A providers (i.e. public universities) and students enrolled with Table A providers are not included in the scope of the tuition protection model, since those providers are assessed to have a low risk of default. This does not prevent Table A providers from enrolling displaced students as replacement providers.

The Bill provides the new VET Student Loans, FEE-HELP and HECS-HELP tuition protection arrangements will:

- each be administered by a Tuition Protection Director with functions specific to each sector, but for the VET Student Loans Tuition Protection and HELP Tuition Protection Directors to be the same person as the independent TPS Director appointed under the ESOS Act;
- each be supported by separate Tuition Protection Fund Advisory Board, but with the same members as those appointed to the TPS Advisory Board. The relevant board will provide advice and make recommendations to the relevant Tuition Protection Director. The members of the Boards are a combination of sector and government representatives to ensure there is a diverse range of views factored into decision making;
require non-exempt providers to contribute annual levies, commensurate with their size and risk, under the accompanying VET Student Loans (VSL Tuition Protection Levy) Bill 2019 and Higher Education Support (HELP Tuition Protection Levy) Bill 2019. The levy system ensures the new arrangements are sustainable and can respond to trends in each sector;

establish two new separate special accounts: the VET Student Loans Tuition Protection Fund and the HELP Tuition Protection Fund. The special accounts will be used to make payments in relation to the arrangements to support displaced students of that sector; and for the remuneration and allowances of the Tuition Protection Director and Board;

provide assistance to students who may complete their studies with another provider or may have their loan balance re-credited for units of study commenced but not completed due to the provider’s default:
  o VET Student Loans students will receive assistance to continue their studies in a suitable replacement course with a replacement provider. Where there is no such course, a student will receive a re-credit to their HELP balance equal to the amount of the VET Student Loan used to pay tuition fees for the part of their original course which was not completed due to the provider’s default;
  o HELP students will be able to choose between continuing their studies in a suitable replacement course with a replacement provider, or a re-credit of the amount of FEE-HELP assistance, or HECS-HELP assistance received by the student for the affected unit. This reflects the small and diverse nature of the sector, where it can be unlikely for a student to find a suitable replacement course;

impose obligations on defaulting providers to notify the relevant Tuition Protection Director and students of the default in a timely manner, and cooperate with the Tuition Protection Director;

impose obligations on replacement providers to enrol students as soon as practicable, give the student course credits in recognition of their prior completed studies, as appropriate, and not charge students for the replacement component of the replacement course. These requirements facilitate efficient and fair treatment of students to allow them to continue their studies with minimal disruption.

A minor amendment is also proposed to the VSL Act to enable the Secretary of the department administering the VSL Act to refuse to revoke an approval on request if certain compliance action is being taken.
FINANCIAL IMPACT STATEMENT

The measure to expand the international TPS to cover VSL students, FEE-HELP or HECS-HELP students studying at a private education provider or TAFE is expected to generate $3 million over the forward estimates. This is a result of the projected revenue collected through the levy system.

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<tbody>
<tr>
<td>New tuition protection measures</td>
<td>-0.5</td>
<td>+0.2</td>
<td>+1.6</td>
<td>+1.7</td>
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STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

EDUCATION LEGISLATION AMENDMENT (TUITION PROTECTION AND OTHER MEASURES) BILL 2019

The Education Legislation Amendment (Tuition Protection and Other Measures) Bill 2019 (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

The principal purpose of the Bill is to amend the VET Student Loans Act 2016 (VSL Act) and the Higher Education Support Act 2003 (HESA) to implement a new tuition protection model for students participating in the VET Student Loans program, and for students accessing FEE-HELP or HECS-HELP assistance, to provide greater tuition protection to students.

Tuition protection aims to ensure students are protected and supported in the event that their course provider defaults – that is, where the student has not withdrawn from the course and either:

- the provider fails to start to provide a course or a part of a course to the student on the day on which the course or part was scheduled to start; or
- the provider ceases to provide a course or a part of a course to the student on a day after the course or part starts but before it is completed.

The proposed tuition protection arrangements are modelled on the successful Tuition Protection Scheme (TPS) arrangements for international students under the Education Services for Overseas Students Act 2000 (ESOS Act). For many years now, Australia has been a world leader in supporting international students studying in Australia if their provider closes. The expansion of the successful TPS model to the VET Student Loans program and students in receipt of FEE-HELP and HECS-HELP at private and TAFE education providers is part of the Government’s ongoing commitment to safeguarding the integrity and reputation of its domestic income contingent loan programs. The Bill provides for the new tuition protection arrangements to commence on 1 January 2020. Consistent with previous tuition assurance arrangements, the arrangements do not apply to Table A providers and students enrolled with Table A providers are not included in the scope of the tuition protection model, since those providers are assessed to have a low risk of default. This does not prevent Table A providers from enrolling displaced students as replacement providers.
The Bill provides the new VET Student Loans, FEE-HELP and HECS-HELP tuition protection arrangements will:

- each be administered by a Tuition Protection Director with functions specific to the sector, but for the VET Student Loans Tuition Protection and HELP Tuition Protection Directors to be the same person as the independent TPS Director appointed under the ESOS Act;
- each be supported by a separate Tuition Protection Fund Advisory Board but with the same members as those appointed to the TPS Advisory Board. The relevant Board will provide advice and make recommendations to the relevant Tuition Protection Director. The members of the Boards are a combination of sector and government representatives to ensure there is a diverse range of views factored into decision making;
- require non-exempt providers to contribute annual levies, commensurate with their size and risk, under the accompanying VET Student Loans (VSL Tuition Protection Levy) Bill 2019 and Higher Education Support (HELP Tuition Protection Levy) Bill 2019. The levy system ensures the new arrangements are sustainable and can respond to trends in each sector;
- establish two new separate special accounts: the VET Student Loans Tuition Protection Fund and the HELP Tuition Protection Fund. The special accounts will be used to make payments in relation to the arrangements to support displaced students of that sector and for the remuneration and allowances of the Director and Board;
- wherever practical, VET Student Loans students will be provided assistance to enable them to continue their studies in the same or similar course with a replacement provider, and where there is no suitable replacement course, be provided with a re-credit to their HELP balance in respect of tuition fees paid for part of their original course which was not completed due to the provider’s default;
- HELP students will be able to choose between continuing their studies in the same or similar course with a replacement provider or a re-credit of the amount of FEE-HELP assistance or HECS-HELP assistance received by the student for the affected unit. This reflects historical arrangements for this sector and its small and diverse nature which can mean that it is unlikely for a student to find a suitable replacement course.
- impose obligations on defaulting providers to notify the relevant Tuition Protection Director and students of the default in a timely manner, and cooperate with the Tuition Protection Director;
- impose obligations on replacement providers to enrol students as soon as practicable, give the student course credits in recognition of their prior completed studies as appropriate, and not charge students for the replacement component of the replacement course. These requirements facilitate efficient and fair treatment of students to allow them to continue their studies with minimal disruption.

A minor amendment is also proposed to the VSL Act to enable the Secretary of the department administering the VSL Act to refuse to revoke an approval on request if certain compliance action is being taken.

**Analysis of human rights implications**

The Bill engages the following human rights:
• the right to education – Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
• the right to privacy – Article 17 of the International Covenant on Civil and Political Rights (ICCPR)
• the right to a fair and public hearing – Article 14 of the ICCPR
• the right to be presumed innocent - Article 14 of the ICCPR

As the Bill also triggers Parts 4 and 5 of the Regulatory Powers (Standard Provisions) Act 2014 (Regulatory Powers Act), this Statement of Compatibility with Human Rights also considers the human rights impact of the Regulatory Powers Act in conjunction with the Bill.

Right to Education

The Bill engages the right to education, which is set out in Article 13 of the ICESCR. Article 13 recognises the important personal, societal, economic and intellectual benefits of education.

Article 13 provides that secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means.

The intent of the Bill is to implement a new tuition protection model for students participating in the VET Student Loans program, and students who are in receipt of FEE-HELP or HECS-HELP assistance for higher education studies. The Bill aims to ensure that students are protected and supported in the event that their approved course provider or higher education provider defaults – that is where the student has not withdrawn from the course and:

• the provider fails to start to provide a course or a part of a course to the student on the day on which the course or part was scheduled to start; or
• the provider ceases to provide a course or a part of a course to the student on a day after the course or part starts but before it is completed.

The Bill establishes the offices of the VSL Tuition Protection Director and the HELP Tuition Protection Director, who have the role and function of facilitating tuition protection for students and managing and administering the VSL Tuition Protection Fund and the HELP Tuition Protection Fund respectively.

The measures in the Bill promote the right to education as they are designed to ensure that in the event that a student’s provider defaults, the student will be assisted to continue his or her studies in a suitable replacement course or receive a re-credit to his or her HELP balance in respect of the affected part of the course. Where students receive a re-credit, they will be able to independently seek to continue to undertake further education or training.

The Bill also imposes obligations on providers in the event that they default – such as a requirement to notify students and the Tuition Protection Director of the default. It also imposes obligations on providers in their capacity as replacement providers – such as to enrol the students in the replacement courses as soon as practicable, to give them course
This Bill is compatible with and promotes the right to education.

**Right to Privacy**

The Bill engages the right to privacy which is set out in Article 17 of the ICCPR. Article 17 provides that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful attacks on their honour and reputation.

The VSL Tuition Protection Director, the HELP Tuition Protection Director, and the members of the Tuition Protection Fund Advisory Boards are Commonwealth officers. Thus the scope of the existing provisions in the VSL Act and HESA that deal with the use and disclosure of personal information collected under those Acts are extended in their application to these persons.

Extending the rights and powers regarding the use and disclosure of relevant personal information to these persons is necessary to ensure that they have the information they need to carry out their powers and functions in relation to the tuition protection arrangements. In the case of the Directors, this includes assisting students whose provider has defaulted; and in the case of the Board members, this includes providing advice to the Director regarding the tuition protection levy.

These persons are subject to the same limitations and offences in respect of the use of information set out at Part 9 of the VSL Act and Division 179 of HESA that apply to other Commonwealth officers. This protects the personal information of students and other parties.

The Bill is compatible with and promotes the right to privacy by ensuring that appropriate safeguards and limitations apply to persons who use and disclose personal information collected under the VSL Act and HESA.

**Right to a Fair and Public Hearing**

Article 14 of the ICCPR ensures that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The Bill engages the right to a fair and public hearing, including through incorporation of an infringement notice scheme. An infringement notice can be issued by an infringement officer for contraventions of an offence provision or a civil penalty provision in the proposed new Part 5A of the VSL Act and the proposed new Part 5-1A of HESA. The Bill triggers Part 5 of the Regulatory 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 a matter heard by a court rather than pay the amount specified in a notice.

The provisions of the Regulatory Powers Act which are invoked also specify requirements for what must be included in an infringement notice, ensuring that a person issued with an infringement notice is aware of the person’s right to have the matter heard by a court.

The Bill also invokes the provisions of Part 4 of the Regulatory Powers Act for the enforcement of civil penalty provisions. The civil penalties allow a course provider or higher education provider to be sanctioned for misconduct without the need to impose a criminal penalty. The size of the civil penalties capable of being imposed is sufficient to act as a deterrent.

The Bill also introduces new strict liability offences, including in relation to:
- giving notice to the VSL Tuition Protection Director or the HELP Tuition Protection Director (as relevant) and students in relation to a default;
- when providing a replacement course to students: granting students course credits as appropriate, not charging them tuition fees for the affected part of their course; and enrolling them in the course as soon as practicable;
- complying with requests for information from the VSL Tuition Protection Director or the HELP Tuition Protection Director (as relevant).

Compliance by providers with these provisions is necessary to ensure the integrity of the tuition protection arrangements. Applying strict liability to these offences is consistent with the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.

The Bill is compatible with the right to a fair and public hearing.

**Right to be Presumed Innocent**

Article 14 of the ICCPR requires that, in the determination of any criminal charge, everyone shall be entitled to a set of minimum guarantees and that anyone convicted will have the right to review and compensation if the conviction is not upheld. Article 14 of the ICCPR also requires that anyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to the law.

The Bill triggers, in a limited and proportionate manner, relevant regulatory powers contained in the Regulatory Powers Act. This approach allows for a streamlined and consistent approach with other Commonwealth legislation in 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.

This Bill triggers Parts 4 (civil penalties) and 5 (infringement notices) of the Regulatory Powers Act.

Each of the regulatory powers triggered by the Bill is limited appropriately, by ensuring a narrow scope of who is an authorised applicant, an infringement officer and a relevant chief
executive, and to which Parts of the VSL Act and HESA these powers apply, ensuring that the powers will only be used in appropriate circumstances.

There are also strict liability offences that apply to factual scenarios, including in relation to:

- giving notice to the VSL Tuition Protection Director or the HELP Tuition Protection Director (as relevant) and students in relation to a default;
- when providing a replacement course to students: granting students course credits as appropriate, not charging them tuition fees for the affected part of their course, and enrolling them in the course as soon as practicable;
- complying with requests for information from the VSL Tuition Protection Director or the HELP Tuition Protection Director (as relevant).

These offences are proportionate to the value of maintaining adequate safeguards in relation to the students’ and providers’ participation in the legislative tuition protection arrangements. It is considered reasonable in these cases to impose strict liability offences to ensure the integrity of the tuition protection arrangements and to facilitate students being able to continue their education with minimal disruption in the event of their provider defaulting. Each of these offences is subject to the infringement notice scheme. Applying strict liability to these offences is consistent with the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.

Establishing a strong civil enforcement regime better facilitates students obtaining value and quality outcomes from their investment in education and training and allows them to continue their education with minimal disruption in the event of a provider default.

The Bill is compatible with the right to be presumed innocent.

**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.
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>ESOS Act</td>
<td><em>Education Services for Overseas Students Act 2000</em></td>
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<td>HELP</td>
<td>Higher Education Loan Program</td>
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<tr>
<td>HESA</td>
<td><em>Higher Education Support Act 2003</em></td>
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<tr>
<td>Higher Education Provider Guidelines (or Guidelines)</td>
<td><em>Higher Education Provider Guidelines 2012</em></td>
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<td>TPS Director</td>
<td>the person appointed under section 54A of the ESOS Act</td>
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<td>VET</td>
<td>vocational education and training</td>
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<td>VSL</td>
<td>VET Student Loan</td>
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<tr>
<td>VSL Act</td>
<td><em>VET Student Loans Act 2016</em></td>
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<tr>
<td>VSL Rules (or rules)</td>
<td><em>VET Student Loans Rules 2016</em></td>
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Clause 1 - Short title
Clause 1 provides for the short title of the Act to be the *Education Legislation Amendment (Tuition Protection and Other Measures) Act 2019*.

Clause 2 - Commencement
The table in this clause provides for the commencement of the provisions in the Bill, when enacted.

Clauses 1 to 3 of the Bill, and Schedule 3 (which gives the Secretary the discretion to refuse to revoke the approval of an approved course provider under the VSL Act where compliance action is underway) commence on the day the Bill receives Royal Assent.

The new tuition protection provisions for both the VET and higher education sectors (Schedule 1 and Schedule 2, Part 1) commence on 1 January 2020. Part 2 of Schedule 2 also commences on 1 January 2020 but immediately after the commencement of Schedule 3 to the *Higher Education Support Legislation Amendment (Student Loan Sustainability) Act 2018*.

Clause 3 - Schedules
Clause 3 provides that any legislation that is specified in a Schedule is amended or repealed as set out in the applicable items in the Schedule and that any other item in a Schedule has effect according to its terms.
Schedule 1  VET Student Loans tuition protection

Summary

Schedule 1 to the Bill comprises two parts. Part 1 sets out the main amendments to the VSL Act, which repeal all provisions in the VSL Act that relate to the existing tuition assurance arrangements and insert new provisions that provide for the new arrangements relating to tuition protection for students. Division 2 of Part 1 sets out the transitional provisions, which ensure the repealed provisions of the VSL Act continue to apply where courses were not delivered to completion before the commencement of Part 1. Part 2 sets out the consequential amendments to the ESOS Act.

Detailed explanation

Part 1 – Main amendments

Division 1 – Amendments

VET Student Loans Act 2016

Item 1 – Section 5

Item 1 inserts a short description of the proposed Part 5A and Part 5B of the VSL Act into the simplified outline in section 5 of the VSL Act. This outline is included to assist readers understand the substantive provisions of Part 5A and Part 5B of the Bill but is not intended to be comprehensive. Readers should rely on the substantive provisions.

Item 2 – Section 6
Item 3 – Section 6 (definition of approved tuition assurance arrangement)
Item 4 – Section 6
Item 5 – Section 6 (definition of officer of a tuition assurance scheme operator)
Item 6 – Section 6
Item 7 – Section 6 (definition of tuition assurance arrangement)
Item 8 – Section 6 (definition of tuition assurance scheme operator)
Item 9 – Section 6 (paragraph (d) of the definition of VET officer)
Item 10 – Section 6

These items amend section 6 of the VSL Act which contains definitions of terms and expressions used in the Act. The amendments insert new definitions required for the new arrangements relating to tuition protection and repeal those definitions consequential to the repeal of Division 4 of Part 4 of the Act and the concept of a tuition assurance arrangement.

More particularly, the definitions of the following are repealed: approved tuition assurance arrangement, officer of a tuition assurance scheme operator, tuition assurance arrangement, tuition assurance scheme operator and paragraph (d) of the definition of VET
officer, which refers to an officer of a tuition assurance scheme operator that is a party to an approved tuition assurance arrangement.

The following definitions are inserted into section 6 of the VSL Act:

- **affected part** of an original course. This means a part of the original course that a student was enrolled in when the student’s approved course provider defaulted in relation to the student;

- **default** is defined by reference to new section 66B which sets out the circumstances in which a provider defaults in relation to a student;

- **Education Minister** is defined to mean the Minister who administers the *Education Services for Overseas Students Act 2000* – this definition is introduced predominantly for the purposes of proposed sections 66P and 66Q;

- **eligible student** is defined by reference to the existing section 9 of the VSL Act, which already contains a definition of this term;

- **listed course provider** is defined by reference to subsection 27(2) of the VSL Act, which already contains a definition of this term;

- **original course** means an approved course in relation to which an approved course provider has defaulted;

- **replacement component** means a part of a replacement course that replaces an affected part of an original course. As provided for in new section 66G, students cannot be charged for a replacement component if tuition fees have already been paid for the affected part of the original course;

- **replacement course** means an approved course that enables a student to finish an original course or a course that is equivalent to an original course;

- **VSL Tuition Protection Director** is defined by reference to new section 66M. The office of the VSL Tuition Protection Director will be held by the same person who holds the office of the TPS Director. The functions of the VSL Tuition Protection Director include administering tuition protection and managing the VSL Tuition Protection Fund;

- **VSL Tuition Protection Fund** means the VSL Tuition Protection Fund established by new section 66J;

- **VSL Tuition Protection Fund Advisory Board** means the VSL Tuition Protection Fund Advisory Board established by new section 66Q. The members of the VSL Tuition Protection Advisory Board are the members of the TPS Advisory Board;

- **VSL tuition protection levy** means the levy imposed under the proposed *VET Student Loans (VSL Tuition Protection Levy) Act 2019.*
Item 11 – Section 23

Item 11 repeals section 23 of the VSL Act. Section 23 sets out the circumstances when a tuition assurance scheme operator and an approved course provider are jointly and severally liable to pay a debt due to the Commonwealth. This change is consequential to the repeal of Division 4 of Part 4 and the concept of a tuition assurance arrangement.

Despite its repeal, subitem 42(2) of Division 2, Part 1 to Schedule 1 of the Bill preserves section 23 in relation to liabilities that arose before the commencement of Schedule 1.

Item 12 – Paragraph 25(2)(g)

Item 12 repeals paragraph 25(2)(g) of the VSL Act, which requires that a body must be a party to an approved tuition assurance arrangement to meet the course provider requirements. This amendment is consequential to the repeal of Division 4 of Part 4 and the concept of a tuition assurance arrangement.

Item 13 – Subsection 25(3)

Item 13 repeals subsection 25(3) of the VSL Act and substitutes a new subsection. This change is consequential to the amendment proposed by item 12 above such that it is no longer necessary for the Secretary to have the discretion to exempt a body from the requirement to be a party to an approved tuition assurance arrangement. The new subsection 25(3) retains the Secretary’s discretion to exempt a body from the requirement in paragraph 25(2)(h) to be a member of an approved external dispute resolution scheme.

Item 14 – Section 39

This item repeals section 39 of the VSL Act and substitutes a new provision. This change will require the Secretary to notify not only the VET Regulator in writing if the approval of an approved course provider is revoked or suspended, but also the VSL Tuition Protection Director of such an occurrence. It is important the VSL Tuition Protection Director is alerted to such information since it is highly likely to have a bearing on default by a provider.

Item 15 – Division 4 of Part 4

Item 15 repeals Division 4 of Part 4 of the VSL Act, which sets out the requirements for tuition assurance arrangements as well as the obligations on tuition assurance scheme operators. These concepts will no longer apply once the new arrangements governing tuition protection in proposed new Parts 5A and 5B commence. Despite the repeal of Division 4, subitem 42(2) of Division 2, Part 1 of Schedule 1 sets out the circumstances in which Division 4 of Part 4 and any rules made for the purpose of that Division continue to apply.

Item 16 – After paragraph 46(b)

Item 16 inserts a new paragraph (ba) into section 46 of the VSL Act. It includes the VSL Tuition Protection Director in the list of persons a provider must cooperate fully with in ensuring compliance with, and the efficient and effective administration of, the VSL Act.
The new Part 5A of the VSL Act imposes additional obligations on providers if they default or if they are acting as replacement providers. The proposed functions of the VSL Tuition Protection Director also include facilitating and monitoring the placement of students and managing the VSL Tuition Protection Fund. Therefore, it is relevant and necessary to require providers to cooperate with the VSL Tuition Protection Director and deter non-compliance. Contravention of section 46 carries an existing civil penalty of 60 penalty units.

**Item 17 – Paragraph 48(2)(c)**

Section 48 of the VSL Act provides that the rules may require an approved course provider to have specified processes and procedures in place.

Item 17 repeals paragraph 48(2)(c), which refers to ‘tuition assurance’, and substitutes it with a new paragraph that provides that the rules may require a provider to have processes and procedures that relate to tuition protection, including requirements about offering replacement courses. This is a consequential amendment reflecting the new terminology that applies with the introduction of tuition protection in proposed new Part 5A.

**Item 18 – At the end of Division 1 of Part 5**

Item 18 adds new section 49A into Division 1 of Part 5 relating to the VSL tuition protection levy. Division 1 of Part 5 sets out the general requirements that apply to approved course providers.

New subsection 49A(1) requires an approved course provider to whom Part 5A applies to pay the VSL tuition protection levy and any late payment penalty, when it is due and payable. Part 5A applies to all approved course providers, other than Table A providers and any providers prescribed by the rules. A note explains that the VSL tuition protection levy is imposed by the *VET Student Loans (VSL Tuition Protection Levy) Bill 2019* (once enacted), and that amounts of levy for a year are either determined before, or indexed on, 1 August in the year.

Consistent with the approach regarding the approved course provider charge (imposed under the *VET Student Loans (Charges) Act 2016*), the detail about the collection and recovery of the VSL tuition protection levy and any late payment penalties is proposed to be dealt with in the rules.

Accordingly, new subsection 49A(2) provides that the rules may make provision for, or in relation to, a number of matters including:

- issuing notices setting out the amount of the VSL tuition protection levy payable by a provider;
- when the VSL tuition protection levy is due and payable;
- issuing notices extending the time for payment of VSL tuition protection levy and late payment penalties;
- the refund, remission or waiver of the VSL tuition protection levy and any late payment penalties;
- the notional liability of the Commonwealth to pay VSL tuition protection levy; and
• the review of decisions made under the rules in relation to the collection or recovery of VSL tuition protection levy.

These matters are proposed to be dealt with in the rules rather than the primary legislation, as these are primarily matters of administration and process regarding the collection and recovery of the levy amounts and do not impact on the setting of the levy amounts payable by the providers. The nature of any reviewable decisions that may be provided for in the rules will be decisions on relatively minor or administrative issues, such as whether a provider’s late payment penalty should be waived or errors in the calculation of the levy. It is anticipated these decisions will be dealt with through internal review and will not be subject to external merits review given they should not impact significantly on the rights of any provider and it could be disproportionately costly and time consuming if a provider were able to pursue the issue at the Administrative Appeals Tribunal.

**Item 19 – At the end of paragraph 52(2)(b)**

Subsection 52(1) of the VSL Act provides that the rules may set out ongoing information requirements for the purposes of ensuring approved course providers are complying with the Act and that the Secretary has access to information and documents related to the operation of the Act.

Paragraph 52(2)(b) provides that the ongoing information requirements may require an approved course provider to provide the Secretary with specified information or documents, including in relation to a number of matters.

Item 19 adds an additional paragraph in subsection 52(2) to enable the rules to require an approved course provider provide the Secretary with specified information or documents in relation to tuition protection. For example, this may include information about the provider’s default or its obligations as a replacement provider.

**Item 20 – After Part 5**

Item 20 inserts new Parts 5A and 5B into the VSL Act. New Part 5A sets out the arrangements relating to tuition protection and new Part 5B establishes the VSL Tuition Protection Fund, the office of the VSL Tuition Protection Director and the VSL Tuition Protection Fund Advisory Board.

**Part 5A – Tuition protection**

New Part 5A comprises two divisions. Division 1 provides which approved course providers the new tuition protection arrangements apply to and defines when a provider defaults in relation to a student. Division 2 sets out the obligations of various persons when a provider defaults, including those of the provider, the VSL Tuition Protection Director and a replacement provider.
Division 1 – Preliminary

Section 66A – Application of this Part

New subsection 66A(1) provides that Part 5A of the Bill applies to all approved course providers other than Table A providers or providers of a kind prescribed by the VSL Rules. Table A providers are defined in section 16-15 of HESA, and essentially comprise Australian public universities. As well as being higher education providers, some Table A providers are approved course providers under the VSL Act. They have been excluded from the application of Part 5A because, as a class of providers, they are considered to be at very low risk of defaulting and in the event that they do default, should have the capacity and capability to place students in suitable replacement courses without the assistance of the VSL Tuition Protection Director.

Other kinds of providers prescribed by the rules may also be exempt from the application of Part 5A. This is to provide for flexibility should it become apparent that the risk of another class of providers defaulting is also low and they have adequate processes and procedures in place to provide tuition protection to their students. This approach allows the tuition protection arrangements to evolve responsively based on evidence and experience. Notably, only classes of providers can be exempted in this way and not individual providers.

New subsection 66A(2) provides that despite subsection 66A(1), the obligations placed on replacement providers by sections 66F and 66G apply to all approved course providers. This reflects that, in some cases, Table A providers and other providers exempted by the rules may agree to act as replacement providers for students whose providers have defaulted. In these circumstances, it is appropriate that the VSL Tuition Protection Director can require a potential replacement provider to provide information about suitable replacement courses for a student. It is also appropriate to ensure the same protections apply for these students, namely that the replacement providers are required to grant them course credits as appropriate, not charge them tuition fees for the replacement component and enrol them as soon as practicable.

Section 66B – When an approved course provider defaults in relation to a student

This section sets out the circumstances in which a provider defaults in relation to a student. These circumstances include where the provider:

- fails to start to provide a course or part of a course to the student on the day on which the course or part was scheduled to start; or
- ceases to provide a course or part of a course on a day that is after the course or part starts but before it is completed; and

the student has not withdrawn before that day, and either a VET Student Loan has been approved for the student for the course on or before that day, or the student is eligible for a VET Student Loan for the course (in accordance with Division 2, Part 2 of the VSL Act) and has a HELP balance greater than zero on that day.

It is a matter of fact based on the circumstances whether or not a provider defaults. Similarly, the cause of the default does not matter, whether it occurs because the provider of their own accord ceases to provide a course or whether it is the result of compliance action taken against the provider.
The new subsection 66B(3) enables the rules to prescribe circumstances which, if they occur, will mean that a provider is in default. This provision is not intended to extend the broad circumstances described in new subsections 66B(1) and (2) but rather allow for greater precision and clarity in respect of what situations will, in practice, give rise to a default. For example, the rules may set out situations such as if the provider ceases to be a registered training organisation or enters into liquidation, both of which inevitably mean the provider can no longer be delivering the course to a student.

Division 2 – Obligations when a provider defaults in relation to a student

Section 66C – Approved course providers must give notice of default to VSL Tuition Protection Director

This new section applies if an approved course provider defaults in relation to a student.

New subsection 66C(2) requires an approved course provider to give written notice to the VSL Tuition Protection Director of the circumstances of a default within 24 hours of the default occurring. Being aware of the default as soon as possible will allow the VSL Tuition Protection Director to begin assisting students.

New subsection 66C(3) requires an approved course provider to give written notice to the VSL Tuition Protection Director of certain matters within 3 business days of the default. The notice must detail the following information for each student to whom the provider has defaulted:

- the student’s full name and contact details;
- the course, or part of parts of the course that the student was enrolled in at the time of the default;
- the amount of the tuition fees for each course, or part of the course in which the student was enrolled in at the time of the default;
- details about the payment of those tuition fees, including the amounts that are covered fees; and
- any other matter prescribed by the rules.

A notice given under new subsection 66C(3) must comply with any requirements prescribed by the rules. For example, the rules may prescribe the manner by which the information is to be delivered, such as by a secure USB, or for it to be reasonably compatible with existing systems.

The above information is necessary for the VSL Tuition Protection Director to be able to liaise with students and possible replacement providers as soon as possible and identify whether there are any suitable replacement courses for the students. Providers are already required to keep and maintain this information and so they should be able to collate the material for each student without undue burden and within the 3 business day timeframe.

New subsection 66C(4) requires an approved course provider that has defaulted in relation to a student to give the VSL Tuition Protection Director, if requested in writing, for the parts of the course that the student has completed, either:

- a copy of the student’s statement of attainment or other Australian Qualifications Framework certification documentation issued by the course provider or an
authorised issuing organisation in accordance with the Australian Qualifications Framework; or
- a copy of an authenticated VET transcript prepared by the Registrar under the Student Identifiers Act 2014.

Providers are already required, under their obligations as registered training organisations, to give the above documents to students. This provision enables the Director to obtain these documents, where necessary.

Failure to comply with new section 66C gives rise to a civil penalty (see subsection 66C(6)) and is also an offence of strict liability (see subsection 66C(7)). In both instances, the penalty is 60 penalty units. Making contravention of this provision subject to a civil penalty is appropriate as it deters providers from non-compliance in circumstances where non-compliance will negatively impact on the VSL Tuition Protection Director’s ability to assist students whose provider has defaulted. In addition this provision is subject to an infringement notice scheme.

Strict liability for this offence is appropriate (having regard to the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers) because the offence:
- is subject to an infringement notice scheme (see proposed amendment to section 85 of the VSL Act);
- is punishable by a fine of up to 60 penalty units and it is not punishable by imprisonment; and
- will enhance the effectiveness of the enforcement regime under the VSL Act in deterring non-compliance.

Section 66D – Approved course providers must give notice of default to affected students

New section 66D applies if an approved course provider defaults in relation to a student.

The approved course provider is required to give written notice of the default to students in relation to whom the provider has defaulted within 24 hours. It is important that students are notified as soon as possible of the default. The notice must comply with any requirements prescribed by the rules. It is appropriate that these matters are prescribed in the rules since they are likely to be of an administrative nature.

Contravention of this requirement gives rise to a civil penalty (see subsection 66D(4)) and is also an offence of strict liability (see subsection 66D(5)). In both instances the penalty is 60 penalty units. Making contravention subject to a civil penalty scheme, and imposing strict liability for this offence is appropriate for the same reasons described in respect to new section 66C above.

Section 66E – Student placement service

New subsection 66E(1) provides that, when an approved course provider defaults in relation to a student, the VSL Tuition Protection Director must decide whether there are any suitable replacement courses for the student.
The matters the VSL Tuition Protection Director must have regard to in deciding whether there is a suitable replacement course are:

- whether the replacement course leads to the same or a comparable qualification as the original course;
- whether the mode of delivery of the replacement course is the same as the mode of delivery of the original course;
- the location where the replacement course will be primarily delivered;
- whether a student will incur additional fees for the replacement course that are unreasonable;
- whether the student will be able to attend the replacement course without unreasonably impacting on the student’s prior commitments; and
- any other matters prescribed by the rules.

A course that is a suitable replacement course for one student affected by a provider’s default may not be a suitable replacement course for another student affected by the same default.

In some circumstances, a course may still be a suitable replacement course even where not all of the above matters are met; for example, a student may agree to online delivery of the replacement course despite the original course being face-to-face. An example of when a replacement course may unreasonably impact on a student’s prior commitments is if the teaching hours for the replacement course interfere with the student’s prior work commitments.

If the VSL Tuition Protection Director is satisfied that there is one or more suitable replacement courses for a student, the Director must give a written notice to the student. Amongst other requirements, this notice must include:

- a description of each suitable replacement course including the qualification it leads to;
- the contact details of the provider of each suitable replacement course;
- an explanation that, if tuition fees have already been paid for the affected part of the course, tuition fees would not be payable for the replacement component of a replacement course;
- an explanation that, if the student chooses to enrol in another course, there is no obligation on the provider of the other course to offer a replacement component without charge to the student;
- an explanation of the matters the Director must have regard to in deciding whether there is a suitable replacement course; and
- information about the student’s right to request a review of the Director’s decision and that, if following reconsideration it is determined that there is no suitable replacement course, the student will be given a re-credit of his or her HELP balance for the affected part of the original course.

The inclusion of the above information is to ensure that a student is given information about the replacement course options available, the contact details of the proposed replacement provider(s) so that the student can undertake their own enquiries, and details to assist the student should they seek a review of the decision that a course is a suitable replacement course. The student’s right of review is for a reconsideration of the Director’s decision,
which is not reviewable by the Administrative Appeals Tribunal. An explanation about the absence of external merits review for this decision is provided at item 27.

The student is then able to contact the provider of their preferred suitable replacement course and the formal offer and acceptance of enrolment will be dealt with between the student and the replacement provider.

If the VSL Tuition Protection Director is not satisfied that there is a suitable replacement course, the VSL Tuition Protection Director is required to give the student a notice that:

- explains the matters the Director is required to consider for the purposes of deciding whether there is a suitable replacement course;
- explains the student’s right to request a reconsideration of the decision;
- a statement that to facilitate early re-crediting, the student can notify the VSL Tuition Protection Director in writing at any time during the 28 days that they will not seek review of the decision; and
- a statement that, if the decision is not reconsidered or is confirmed, an amount equal to the amount that has been used to pay tuition fees for the student for the affected part will be re-credited to the student’s HELP balance.

Similar to the situation where a suitable replacement course is available, the review of the Director’s decision that there is no suitable replacement course is undertaken internally by the Director or their delegate, and is not reviewable by the Administrative Appeals Tribunal. An explanation about the absence of external merits review for this decision is provided at item 27.

If a student notifies the Director prior to the expiry of the 28 days that they will not seek review of the decision, this does not mean that the actual re-crediting will occur within the 28 days, but rather that the process to facilitate the re-credit will occur sooner. Pursuant to proposed section 66H, providers are given the opportunity to make written submissions about the amount of the re-credit which submissions the Secretary is required to consider before re-crediting the student’s HELP balance.

It is to be noted that pursuant to the Higher Education Support Legislation Amendment (Student Loan Sustainability) Act 2018, the term ‘FEE-HELP balance’ currently referred to in the VSL Act will be replaced by ‘HELP balance’ as from 1 January 2020.

Section 66F – Obligations of providers to provide information about replacement courses

This new section allows the VSL Tuition Protection Director to issue a notice which requires an approved course provider to provide information the Director reasonably requires to make a decision as to whether there is a suitable replacement course for a student.

The information must be provided in a form (if any) approved by the Director and in accordance with any other requirements of the Director.
Failure to comply with new section 66F gives rise to a civil penalty (see subsection 66F(3)) and is also an offence of strict liability (see subsection 66F(4)). In both instances, the penalty is 60 penalty units. Making contravention of this provision subject to a civil penalty is appropriate as it deters providers from non-compliance in circumstances where non-compliance will negatively impact on the VSL Tuition Protection Director’s ability to identify a suitable replacement course for a student affected by a provider default. In addition this provision is subject to an infringement notice scheme.

Imposing strict liability for this offence is appropriate for the same reasons described in respect to new section 66C above.

**Section 66G – Obligations of replacement provider**

This new section sets out the obligations that apply to an approved course provider when a student accepts an offer of a replacement course with the provider.

The provider must give written notice to the VSL Tuition Protection Director within 14 days after the student has accepted the offer of a replacement course with the provider. This is important to ensure that the Director is made aware that the student has been successfully placed in a replacement course.

The provider must also ensure that the student is:

- granted course credits for parts of the original course successfully completed by the student – as evidenced by a statement of attainment or other Australian Qualifications Framework certification documentation issued in accordance with the Australian Qualifications Framework or a copy of an authenticated VET transcript prepared by the Registrar under the Student Identifiers Act 2014;
- not charged tuition fees for a replacement component of the replacement course, if the tuition fees for the affected part of the original course have been paid; and
- enrolled in the replacement course as soon as practicable.

These requirements ensure that the student is afforded appropriate protections when enrolling in the replacement course.

Contravention of this provision is a civil penalty (see subsection 66G(4)) and it is also an offence of strict liability (see subsection 66G(5)). In both instances, the penalty is 60 penalty units.

Making contravention of this provision subject to a civil penalty is appropriate as it deters providers from non-compliance in circumstances where non-compliance will impact on the ability of students, whose provider has defaulted, to continue their training in suitable replacement courses. In addition this provision is subject to an infringement notice scheme.

Imposing strict liability for this offence is appropriate for the same reasons described in respect to new section 66C above.
Section 66H – Obligations where there is no replacement course

New section 66H places obligations on the VSL Tuition Protection Director if an approved course provider defaults in relation to a student and the Director decides under new paragraph 66E(1)(b) that there is no suitable replacement course for a student.

In these circumstances, the VSL Tuition Protection Director must give a written notice to the Secretary of that fact and a written notice to the provider:

- stating that an amount equal to the amount of the VET Student Loan used to pay tuition fees for the student for the affected part of the original course will be re-credited to the student’s HELP balance and will be required to be paid by the provider to the Commonwealth; and
- inviting the provider to make written submissions to the Director about the amount of the re-credit within 28 days.

The note to new section 66H explains that the amount is re-credited by the Secretary under new section 72A of the VSL Act. The Secretary is required to take into account any submissions received by the Director from the provider within the 28 day period before re-crediting a student’s HELP balance.

Part 5B – VSL Tuition Protection Fund, VSL Tuition Protection Director and VSL Tuition Protection Fund Advisory Board

New Part 5B comprises three Divisions. Division 1 establishes the VSL Tuition Protection Fund; Division 2 establishes the office of the VSL Tuition Protection Director; and Division 3 establishes the VSL Tuition Protection Fund Advisory Board.

Division 1 – VSL Tuition Protection Fund

Section 66J – Name of Fund

New section 66J establishes the VSL Tuition Protection Fund and provides that it is a special account for the purposes of the Public Governance, Performance and Accountability Act 2013.

Section 66K – Credits to the VSL Tuition Protection Fund

New section 66K provides that there must be credited to the VSL Tuition Protection Fund amounts equal to the following:

- each amount of VSL tuition protection levy received from an approved course provider;
- each amount paid by a course provider to the Commonwealth under section 22 that relates to an amount re-credited under the new section 72A, if the balance of the Fund had previously been reduced under paragraph 66L(1)(f) in relation to that amount. Subsection 22(1) of the VSL Act requires an approved course provider to pay the Commonwealth an amount equal to a loan amount that was used to pay tuition fees for a student for a course and re-credited to the student’s HELP balance. The amount a provider is required to pay under that provision is a debt due to the Commonwealth. If the re-credit occurs pursuant to new section 72A, either the
Secretary or the VSL Tuition Protection Director could take action to recover the debt but if recovered, the amount is required to be credited into the VSL Tuition Protection Fund, if the balance of the Fund had previously been reduced in respect of that amount under paragraph 66L(1)(f);

- any other money appropriated by the Parliament for the purposes of the VSL Tuition Protection Fund – for example this includes the initial amount appropriated by Parliament for the VSL Tuition Protection Fund;
- any penalties for late payment of VSL tuition protection levy. Details will be provided in the rules regarding when a provider incurs a late payment penalty, and the calculation, recovery or waiver of any such late payment penalty;
- each amount received by the Commonwealth for the purposes of the VSL Tuition Protection Fund, for example, this covers any insurance payments received as a result of a claim made by the VSL Tuition Protection Director under any insurance policy in place for the tuition protection arrangements.

There are two notes under new section 66K to assist the reader. The first note explains that if any of the purposes of a special account is a purpose covered by an item in an Appropriation Act (whether or not the item expressly refers to the account) then amounts may be debited against the appropriation for that item and credited to that special account. The second note reminds the reader that the VSL tuition protection levy is imposed under the VET Student Loans (VSL Tuition Protection Levy) Act 2019 (when enacted), and the rules will deal with its collection from providers.

Section 66L – Purposes of the VSL Tuition Protection Fund

This new section sets out the purposes of the VSL Tuition Protection Fund, which are as follows:

- making payments in connection with tuition protection;
- paying or discharging the costs, expenses and other obligations incurred by the Commonwealth in the performance of the VSL Tuition Protection Director’s functions, including management of the VSL Tuition Protection Fund. For example, this might include costs incurred in paying a consultant engaged to assist the VSL Tuition Protection Director perform his or her functions – it is anticipated that the Director will engage a service provider to provide case management and student placement services for students affected by a provider default. Other examples may include: paying premiums for insurance coverage for the tuition protection arrangements where the VSL Tuition Protection Fund is below its target size; and paying for actuarial advice to inform the setting of levy components;
- paying any remuneration and allowances payable to the VSL Tuition Protection Director and members of the VSL Tuition Protection Fund Advisory Board. These amounts will be as determined by the Remuneration Tribunal;
- paying any amount that is required or permitted to be repaid. This is to allow the Commonwealth to meet any legal obligation it might have to pay amounts out of the Fund;
- reducing the balance of the account (and therefore the available appropriation for the account) without making a real or notional payment. This purpose enables amounts to be transferred from the Fund (which as a special account is part of consolidated revenue) elsewhere to the Commonwealth which is also part of consolidated revenue. For example, this would enable a “payment” from the Fund to the part of
consolidated revenue affected when an amount equal to the tuition fees for an affected part of an original course is re-credited to a student’s HELP balance under the new section 72A. It would also enable the VSL Tuition Protection Director to repay funding appropriated by Parliament to establish the Fund once the Fund is self-sustaining.

A note underneath new subsection 66L(1) reminds the reader that section 80 of the Public Governance, Performance and Accountability Act 2013 deals with special accounts.

New subsection 66L(2) enables the rules to make provision in relation to the purpose under new paragraph 66L(1)(a), that is making payments in connection with tuition protection. This includes making rules about the circumstances in which payments may be made; amounts of different kinds of payments; and methods for calculating different kinds of payments. A note underneath new subsection 66L(2) provides an example of such a payment is that a provider may receive a transfer payment if a student accepts a place in a replacement course with the provider. Another example is that the rules may give the VSL Tuition Protection Director the discretion to pay a third party (for example a liquidator) to provide information required for the purpose of facilitating placement of a student in a suitable replacement course or re-crediting the student’s HELP balance for the affected part of an original course.

The power to make Rules in respect of these payments will facilitate greater specificity and transparency around payments that may be made to providers and other persons in connection with tuition protection. It is desirable to deal with this in the rules to avoid being overly prescriptive in the primary legislation, which might inadvertently limit the VSL Tuition Protection Director’s practical administration of tuition protection.

New subsection 66L(3) specifies that the purpose of the Fund does not include paying or discharging any costs, expenses or other obligations associated with services provided to the VSL Tuition Protection Director by an employee or officer of a Commonwealth entity (within the meaning of the Public Governance, Performance and Accountability Act 2013).

**Division 2 – VSL Tuition Protection Director**

**Section 66M – VSL Tuition Protection Director**

New subsection 66M(1) provides that there is to be a VSL Tuition Protection Director.

New subsection 66M(2) provides that the office of VSL Tuition Protection Director is to be held by the person who holds the office of TPS Director under section 54A of the ESOS Act. A note provides that the TPS Director also holds the office of HELP Tuition Protection Director under the Higher Education Support Act 2003.

New subsection 66M(3) clarifies that the reference in new subsection 66M(2) to the person who holds the office of the TPS Director includes a reference to a person acting in that office because of an appointment under section 54K of the ESOS Act. This is to ensure that, where a person holding the office of TPS Director is only doing so temporarily, this person will also temporarily hold the office of the VSL Tuition Protection Director.
Section 66N – Functions of the VSL Tuition Protection Director

New section 66N sets out the functions of the VSL Tuition Protection Director which are:

- facilitating and monitoring the placement of students in relation to whom an approved course provider has defaulted;
- paying amounts out of, or reducing the balance of, the VSL Tuition Protection Fund under section 66L;
- reporting to the Minister on the operation of Part 5A (tuition protection) and the financial status of the VSL Tuition Protection Fund;
- managing the VSL Tuition Protection Fund in a way that ensures that it is able to meet all its liabilities from time to time;
- making the legislative instrument each year for the purposes of section 12 of the VET Student Loans (VSL Tuition Protection Levy) Act 2019 (when enacted);
- recommending that the Secretary take action against an approved course provider that has defaulted in relation to a student or has otherwise not complied with the VSL Act;
- any other function conferred by this Bill or any other law of the Commonwealth; and
- any other function that is incidental or conducive to the performance of the above functions.

New subsection 66N(2) provides that the VSL Tuition Protection Director has power to do all things necessary or convenient to be done for, or in connection with, the performance of the Director’s functions.

Section 66P – Administrative provisions relating to the VSL Tuition Protection Director

Section 66P describes administrative provisions relating to the VSL Tuition Protection Director by reference to provisions from the ESOS Act that relate to the TPS Director. Subsection 66P(1) sets out a table that refers to a number of provisions from the ESOS Act which are set out at subsection 66P(2).

The effect of this provision is to replicate the provisions set out in subsection 66P(2) so that they govern the functions of the VSL Tuition Protection Director in the context of the VSL Act in a similar way as they govern the functions of the TPS Director under the ESOS Act.

These provisions apply to the offices of the VSL Tuition Protection Director, HELP Tuition Protection Director and TPS Director in a similar way, as they deal with administrative issues such as: remuneration and allowances (section 54C of the ESOS Act), leave of absence (section 54D), restriction on outside employment (section 54E), disclosure of interests (54F), other terms and conditions (section 54J), consultants (54L) and application of finance law (section 54N).

Currently the Minister responsible for administering the ESOS Act (defined in a new definition in section 6 as the Education Minister) is different to the Minister responsible for administering the VSL Act. In many instances it is the Education Minister that is made responsible for administrative matters relating to the VSL Tuition Protection Director, for example, remuneration, restriction on outside employment and leave of absence. This is appropriate given the VSL Tuition Protection Director is the same person as the HELP Tuition Protection Director and the TPS Director. The VSL Tuition Protection Director is,
however, required to disclose any interests, pecuniary or otherwise, that could conflict with the proper performance of his or her duties to both the Minister administering the VSL Act and to the Education Minister.

New subsection 66P(3) provides that, for the purpose of section 54E of the ESOS Act, the Education Minister is taken to have given approval for the TPS Director to engage in paid employment as the VSL Tuition Protection Director. This provision is included for the avoidance of doubt, as paragraph 54E prohibits the TPS Director from engaging in paid employment outside the duties of his or her office without the Minister’s approval.

New subsection 66P(4) provides that the Education Minister can terminate the appointment of the TPS Director, if the TPS Director engages (except with the Education Minister’s approval) in paid employment outside the duties of his or her office as VSL Tuition Protection Director, or where the VSL Tuition Protection Director fails without reasonable excuse to give the Education Minister and the Minister administering the VSL Act written notice of interests that could conflict with the proper performance of his or her duties as the VSL Tuition Protection Director.

Division 3 – VSL Tuition Protection Fund Advisory Board

Section 66Q – Establishment and membership

New section 66Q establishes the VSL Tuition Protection Fund Advisory Board. The members of this Board are to be the same as the members of the TPS Advisory Board appointed under the ESOS Act, including acting members.

The Chair (including any person acting in this role) and Deputy Chair of the Tuition Protection Fund Advisory Board are the Chair and Deputy Chair of the TPS Advisory Board.

New subsection 66Q(7) provides that, despite subsection 55(2) of the ESOS Act, a person is eligible to be appointed to the TPS Advisory Board if the Education Minister is satisfied that the person has qualifications or experience that the Education Minister considers relevant to the performance of the VSL Tuition Protection Fund Advisory Board’s functions.

Subsection 55(2) of the ESOS Act provides that a person is not eligible for appointment as a Board member under paragraph 55(1)(b) unless the Minister is satisfied that he or she has qualifications or experience that the Minister considers relevant to the performance of the Board’s functions. The purpose of subsection 66Q(7) is to recognise that, as VSL Tuition Protection Fund Advisory Board members will also be members of the HELP Tuition Protection Fund Advisory Board and the TPS Advisory Board, in some cases the member may have been appointed for his or her specific qualifications or experience that is most relevant to one, or two, but not all three Advisory Boards.

Section 66R – Function of the VSL Tuition Protection Fund Advisory Board

New section 66R provides that the function of the VSL Tuition Protection Fund Advisory Board is to provide advice and make recommendations in relation to the making of a legislative instrument each year under section 12 of the VET Student Loans (VSL Tuition Protection Levy) Act 2019 (once enacted). The Board can give advice and recommendations
on its own initiative or following a request from the VSL Tuition Protection Director. The limited function of the VSL Tuition Protection Fund Advisory Board is the same as that which applies to the TPS Advisory Board.

**Section 66S – Administrative provisions relating to the VSL Tuition Protection Fund Advisory Board**

New section 66S describes administrative provisions relating to the VSL Tuition Protection Fund Advisory Board by reference to provisions from the ESOS Act that relate to the TPS Advisory Board. Subsection 66S(1) sets out a table that refers to a number of provisions from the ESOS Act, which are set out at subsection 66S(2).

The effect of the clause is to replicate the provisions set out in subsection 66S(2) so that they govern the functions of the VSL Tuition Protection Fund Advisory Board in the context of the VSL Act in the same way as they govern the functions of the TPS Advisory Board under the ESOS Act.

These provisions apply across the three Advisory Boards in largely the same way as they deal with the following administrative issues: remuneration and allowances (section 55E of the ESOS Act), disclosure of interests (section 55H), disclosure of interests to the Board (section 55J), termination (section 55L), and meetings of the Board (sections 56A – 56G). The only difference is that a Member of the VSL Tuition Protection Fund Advisory Board must disclose any interests that could conflict with the proper performance of his or her functions to the Minister administering the VSL Act.

**Item 21 – section 69**

Item 21 repeals section 69 of the VSL Act. Section 69 sets out circumstances in which the course provider must, on the Secretary’s behalf, re-credit a student’s HELP balance when a course is not provided to completion. This amendment is consequential to the repeal of Division 4 of Part 4 and the concept of a tuition assurance arrangement. The substance of section 69 – that is a student having their HELP balance re-credited when a course is not provided until completion – will instead be provided for in new section 72A.

Despite the repeal of section 69, on account of subitem 42(2) of Division 2, Part 1 of Schedule 1, in limited circumstances this section may continue to apply.

**Item 22 – After section 72**

This item inserts a new section 72A into the VSL Act. This section will require the Secretary to re-credit a student’s HELP balance if the student has not completed the requirements for the course or part of the course because the provider defaults in relation to the student and the VSL Tuition Protection Director decides that there is no suitable replacement course for the student.

This reflects that, in the first instance, the VSL Tuition Protection Director will attempt to identify one or more suitable replacement courses for students to allow them to continue their studies; and re-credit to the student’s HELP balance for the affected part of the original
course occurs only where the Director is not satisfied that there is a suitable replacement course for the student.

If the Director is satisfied there is no suitable replacement course, the Secretary must re-credit the student’s HELP balance with an amount equal to the amount of the VET Student Loan used to pay tuition fees for the student for the affected part of the original course.

In determining this amount, the Secretary must take into account any submissions that the VSL Tuition Protection Director has received from the provider under new subsection 66H(3). This allows for procedural fairness to the provider should it dispute the amount of the re-credit. In this regard, it is the responsibility of the provider to ensure the information it is required to provide to the Secretary about a student’s completion status is up to date since this will be one of the key sources of information to the Secretary in assessing whether or not a student has completed the requirements for a course or part of a course.

The Secretary is required to notify the student and the provider in writing of the Secretary’s decision in relation to the amount that has been re-credited as soon as practicable.

There is a note under subsection 72A(1) to assist the reader. The note provides that a course provider may be required to pay an amount as a result of re-crediting under this section. That amount may be debited from the VSL Tuition Protection Fund. If the amount is debited from the Fund a later payment of the amount by the provider is credited to the Fund.

**Item 23 – Subsection 73(1)**

Item 23 inserts an exception into the requirement in section 73 of the VSL Act that the Secretary give the provider a notice and invite submissions before re-crediting a student’s HELP balance in accordance with Division 3, such that the requirement will not apply if the re-crediting occurs under new section 72A.

The request for submissions from a provider is not necessary for re-credits under new section 72A since the VSL Tuition Protection Director would already have invited submissions from the provider under new subsection 66H(3).

**Item 24 – Section 74 (after item 2 of the table)**

**Item 27 – At the end of section 80**

Item 24 adds the following two additional items into the table of reviewable decisions at section 74 of the VSL Act:

- a decision by the VSL Tuition Protection Director under paragraph 66E(1)(a) – that the VSL Tuition Protection Director is satisfied that there are one or more suitable replacement courses for a student;
- a decision by the VSL Tuition Protection Director under paragraph 66E(1)(b) – that the VSL Tuition Protection Director is not satisfied that there is a suitable replacement course for a student.

As these decisions are reviewable decisions, the process for the internal reconsideration of reviewable decisions set out in Divisions 1 and 2 of Part 7 (except section 80) apply to these decisions.
Item 27 adds a new subsection 80(3) to provide that the above two decisions are not subject to review by the Administrative Appeals Tribunal. The reasons for the absence of external merits review are:

- clear parameters are set out at subsection 66E(3) about what the VSL Tuition Protection Director must have regard to in determining whether a course is a suitable replacement course. This is intended to ensure that the first instance decision is reasonable and justifiable, in respect of which students may seek internal review;
- in practice, the Director will actively work with providers and students to identify suitable replacement courses for a student. It is intended that, to the extent possible, a student would be provided with the option of several suitable replacement courses to choose between;
- when a provider defaults, it would be in the best interests for students to receive a resolution of the issue of whether or not there is a suitable replacement course as soon as practicable to allow them to continue their studies. Engaging in the potentially lengthy external merits review process may mean that students are unable to continue their studies until the matter is resolved;
- in respect of a decision that there is no suitable replacement course for a student – the student will receive a re-credit of his or her HELP balance for the affected part of their course, which means they should not be financially disadvantaged should there not be a suitable replacement course;
- further, legislation does not compel a replacement provider to enrol a student in a replacement course, which means practically, if an external merits review may consider there are potentially suitable replacement courses, it cannot assist the students if no providers are prepared to deliver that course to the student.

**Item 25 – Section 78 (heading)**

Item 25 revises the heading to section 78 of the VSL Act, to distinguish it from the new section 78A inserted by item 26.

**Item 26 – After section 78**

Item 26 inserts a new section 78A into the VSL Act, which provides that the delegate of the VSL Tuition Protection Director who made a decision under review must not be the delegate that reconsiders that decision. This is to allow for a fair and unbiased reconsideration of the initial decision.

A reviewable decision may be reconsidered by another delegate of the VSL Tuition Protection Director, but only if that delegate was not involved in making the decision and occupies a position that is at a level not lower than that of the delegate who made the initial decision. These measures are to allow for an accountable and transparent reconsideration of the decision and to avoid issues of conflict of interest, inexperience, or pressure felt by a more junior officer to confirm a more senior officer’s decision.

**Item 28 – At the end of section 84**

Section 84 of the VSL Act provides that each civil penalty provision of the Act 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.

Item 28 adds a new subsection 84(3) to provide that the VSL Tuition Protection Director is an authorised applicant for the purposes of Part 4 of the Regulatory Powers Act as it applies in relation to Part 5A and to the new section 104A of the VSL Act – that is, the Director can apply to a relevant court for a civil penalty order against a person for a contravention of a civil penalty provision in Part 5A or new section 104A.

**Item 29 – At the end of section 85**

Section 85 of the VSL Act provides that, an offence or civil penalty provision of the Act is subject to an infringement notice under Part 5 of the Regulatory Powers Act. Part 5 of that Act creates a framework for using infringement notices in relation to provisions. A person given an infringement notice has the choice of paying the amount specified as an alternative to having court proceedings brought against them for the contravention.

Item 29 adds a new subsection 85(3) to provide that for the purposes of Part 5 of the Regulatory Powers Act, as it applies in relation to Part 5A and to the new section 104A of this Act, the VSL Tuition Protection Director is both an infringement officer and the relevant chief executive – that is, the Director can issue, extend the time to pay, and withdraw infringement notices for contraventions of offence and civil penalty provisions in Part 5A and new section 104A.

**Item 30 – After subsection 89(1)**

Item 30 inserts a new subsection 89(1A) to provide that the VSL Tuition Protection Director may, in writing, delegate his or her powers and functions under the Regulatory Powers Act as it applies in relation to Part 5A and to the new section 104A, to an SES employee, or an acting SES employee, in the Department administered by the Minister that administers the VSL Act, or the Department administered by the Education Minister. The power to delegate ensures that the VSL Director’s regulatory powers under the Act are able to be carried out efficiently and effectively should the Director not have the capacity to undertake all the regulatory functions or powers in a timely fashion. Subsection 89(4) provides appropriate constraints on the delegate’s exercise of the regulatory powers by ensuring the delegate must comply with any directions of the delegator. Subsection 89(1A) is consistent with the Secretary’s capacity to delegate his or her powers under the Regulatory Powers Act under subsection 89(1).

**Item 31 – Paragraph 92(1)(c)**

Item 31 repeals paragraph 92(1)(c). Paragraph 92(1)(c) deals with the use and disclosure of information by an officer of a tuition assurance scheme operator that is a party to an approved tuition assurance arrangement. This amendment is consequential to the repeal of Division 4 of Part 4. (Use and disclosure of VET information by the VSL Tuition Protection Director for the purposes of the Act is governed by section 91, as the Director is a Commonwealth officer).
Item 32 – Section 94
Item 33 – At the end of section 94
Items 32 and 33 add a new subsection 94(2) to the VSL Act; section 94 deals with disclosure of VET information for law enforcement purposes.

New subsection 94(2) provides that the VSL Tuition Protection Director may disclose VET information to:
- a Department, agency or authority of the Commonwealth, a State or a Territory; or
- an enforcement body (within the meaning of the Privacy Act 1988);
if the Director believes on reasonable grounds that the disclosure of the information is necessary for an enforcement related activity (within the meaning of the Privacy Act).

In managing tuition protection, the Director may at times need to disclose information for law enforcement reasons, for example when prosecuting an offence provision under new Part 5A or if the Director has information that suggests that a provider has committed an offence under another law.

It is imperative that the Director is able to share information with these bodies to ensure the integrity and quality of vocational education and training in Australia is protected; the protection of such interests supports the interests of the students. This outcome is assisted by facilitating the sharing of information to assist the Commonwealth (and where relevant, a State or Territory) to take action against course providers that have engaged in conduct that is in breach of a law or criminal offence.

Item 34 – After section 104
Item 34 inserts a new section 104A into the VSL Act to enable the VSL Tuition Protection Director to require a person to provide information about compliance with new Part 5A. This is similar to the Secretary’s powers under section 104.

This new section provides that the Director may, by written notice, require a person, who the Director believes on reasonable grounds has information or documents relevant to determining whether Part 5A has been complied with, to give the information or documents to the Director. This provision may be used, for example, to require a student or a provider to produce information or documents relevant to determining compliance by the provider with Part 5A.

The information must be provided in a form (if any) approved by the Director and in accordance with other requirements specified by the Director.

Contravention of this clause is a both an offence of strict liability as well as a civil penalty provision; both have a maximum penalty of 60 penalty units.

Strict liability for this offence is appropriate (having regard to the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers) because the offence:
- is subject to an infringement notice scheme (see proposed amendment to section 85 of the VSL Act);
- is punishable by a fine of up to 60 penalty units and it is not punishable by imprisonment; and
• will enhance the effectiveness of the enforcement regime under this Bill in deterring such conduct.

Note that the provision does not override the privilege against self-incrimination.

**Item 35 – After section 105**

Item 35 inserts a new section 105A into the VSL Act to enable the VSL Tuition Protection Director to arrange for the use, under the Director’s control, of computer programs for any purposes for which the Director may make decisions under the Act. This is similar to the Secretary’s powers under section 105.

A decision made under such an arrangement is, for the purposes of the Act, taken to be a decision made by the Director. This provides the flexibility for the use of technology to facilitate decision-making processes to the extent appropriate. It is not currently envisaged that any decisions will be made by computer programs, but when there is greater technical capabilities, computer programs might be used to assist in decision making.

**Item 36 – Subsections 110(3) and (4)**

This item provides for subsections 110(3) and (4) to be repealed. These subsections provide for the continuing application of the Act to a person or body who was a tuition assurance scheme operator. This amendment is consequential to the repeal of Division 4 of Part 4 and reflects that the concept of such a person no longer applies.

**Item 37 – After paragraph 112(1)(a)**

Item 37 includes in the list of persons referred to in subsection 112(1) of the VSL Act, the VSL Tuition Protection Director and a member of the VSL Tuition Protection Fund Advisory Board.

Section 112 provides the persons listed in subsection 112(1) are protected from civil actions where they have been acting in good faith in performing or exercising their functions and powers under the Act. This proposed amendment extends this protection to the VSL Tuition Protection Director and a member of the VSL Tuition Protection Fund Advisory Board.

**Item 38 – After section 113**

Item 38 inserts a new section 113A into the VSL Act which requires that, before 1 July 2021, the Minister must commence a review into the operation of new Parts 5A and 5B of the VSL Act. For example, such a review may examine the operations of the tuition protection arrangements, the role and function of the VSL Tuition Protection Director, the VSL Tuition Protection Fund Advisory Board and the management of the VSL Tuition Protection. This review is to be conducted at the same time as the reviews under new section 238-7 of HESA and new section 176A of the ESOS Act in respect of the operation of the tuition protection arrangements under those Acts. The Minister is required to cause a report to be prepared of the review and to be tabled in each House of the Parliament within 15 sitting days after the completion of the preparation of the report.
Item 39 – Subsection 114(1)
Item 40 – Subsection 114(2)
Section 114 enables the Secretary to delegate any or all of his or her powers under the VSL Act to certain persons. Items 39 and 40 amend section 114 to extend the ability to delegate to apply to “performing functions” in addition to the existing concept of “exercising powers” for completeness.

Item 41 – At the end of section 114
Item 41 adds two new subsections 114(3) and (4) to enable the VSL Tuition Protection Director to delegate any or all of his or her powers or functions under the Act, other than the function under new paragraph 66N(1)(e), to certain APS employees. Paragraph 66N(1)(e) gives the VSL Tuition Protection Director the function of making a legislative instrument under section 12 of the VET Student Loans (VSL Tuition Protection Levy) Act 2019 (once enacted), which function will be exercised by the Director exclusively.

The Director may, in writing, delegate to an APS employee, who holds or performs the duties of an APS 6 position or above in the Department administered by the Minister who administers the VSL Act or the Department administered by the Education Minister, all or any of the powers or functions of the Director under the Act. It is anticipated that the VSL Tuition Protection Director will be supported by officers in one or both of these departments. In exercising powers under the delegation, the delegate is required to comply with any directions of the Director.

It is anticipated that the VSL Tuition Protection Director’s powers and functions would only be delegated to officers, who have been allocated as resources dedicated to assisting the VSL Tuition Protection Director. It is anticipated delegated powers would primarily be exercised by officers at EL1 and EL2 levels. The power to delegate to an employee at the APS 6 level has been included as:

- the current disposition of staff that will be assigned to assist the VSL Tuition Protection Director in the exercise of his or her functions has not yet been determined; and
- the VSL Tuition Protection Director’s work load may unexpectedly increase significantly, for example in the event of multiple provider defaults. Officers at the APS 6 level may need to exercise delegated powers to ensure that affected students are able to receive assistance as soon as practicable.

Division 2—Application and transitional provisions
Item 42 – Application and transitional provisions
Certain of the provisions which are to be repealed under Part 1 of Schedule 1 to the Bill need to continue to apply after the commencement of the new tuition protection arrangements. This is necessary since the Bill only applies from 1 January 2020 and the Commonwealth is still working with approved course providers and former tuition assurance scheme operators to assist students of providers that ceased to provide courses before 1 January 2020.
Subitem 42(1) provides that the amendments of section 25 apply in relation to applications for approval made after the commencement of this Part; or before the commencement of this Part, if the application had not been decided before the commencement. This means that bodies that applied for approval prior to 1 January 2020 but whose applications had not been decided at that time) are not required to be a party to an approved tuition assurance arrangement (and, of course, bodies that apply for approval on or after 1 January 2020).

Subitem 42(2) provides that, if before the commencement of Part 1 of Schedule 1 to the Bill, a course was not delivered to completion by a provider, then the VSL Act and any instruments in force under the Act immediately before that commencement continue to apply, after that commencement, in relation to the provider as if the amendments and repeals made by this Part of the Bill had not happened.

This provision ensures that the legal arrangements in place for tuition assurance prior to 1 January 2020 will continue in effect for any tuition assurance events (e.g. cessation of courses) that occurred prior to that time.

In the 2018-2019 calendar years, the Secretary exempted approved course providers from the obligation under paragraph 25(2)(g) of the VSL Act to be a party to an approved tuition assurance arrangement, pursuant to paragraph 25(3)(a) of the VSL Act. The exemptions were given subject to conditions imposed under subsection 25(4) of the VSL Act. These exemption conditions include applying section 69 despite there being no tuition assurance arrangement. At the same time, the department imposed further conditions of approval on providers under subsection 34(1), which includes for the higher risk providers, having to provide bank guarantees and the like to cover the financial risk to the Commonwealth (relating to section 69 re-credits). Some of the conditions also include providers being compelled to provide replacement courses in certain circumstances. Subitem 42(2) ensures the obligations imposed on approved course providers through conditions in respect to any course closures in the 2018-2019 calendar years will continue to apply.

Subitems 42(3) and 42(4) provide that:

- the proposed amendments of sections 46 and 48 of the VSL Act under Schedule 1, Part 1 of this Bill; and
- new section 49A, subparagraph 52(2)(b)(x) and Part 5A of the VSL Act, as inserted by Schedule 1, Part 1 of this Bill;

apply in relation to an approved course provider after the commencement of this Part, regardless of when the provider was approved. This is to ensure that all approved course providers are required to comply with the new and amended obligations imposed on providers, even if providers were approved prior to the commencement of this Part.
Part 2 – Consequential amendments

Education Services for Overseas Students Act 2000

Item 43 – After paragraph 52C(1)(b) (before the note)
Item 44 – Subsection 52C(2)

Items 43 and 44 amend section 52 of the ESOS Act to provide that the purposes of the Overseas Students Tuition Fund includes paying any remuneration and allowances payable to the TPS Director. It remains the case that the purposes of the Overseas Students Tuition Fund do not include paying or discharging any costs, expenses or other obligations associated with services provided to the TPS Director by any employee or officer of the Department.

Item 45 – Subsection 54A(1) (note)
Item 46 – At the end of subsection 54A(1) (after the note)

Items 45 and 46 insert a new Note 2 to subsection 54A(1) of the ESOS Act. The new note explains that the TPS Director is also the VSL Tuition Protection Director under the VSL Act and the HELP Tuition Protection Director under HESA.

Item 47 – At the end of section 55A

Item 47 adds a note at the end of section 55A, which explains that the members of the TPS Advisory Board are also members of the VSL Tuition Protection Fund Advisory Board under the VSL Act and members of the HELP Tuition Protection Fund Advisory Board under HESA.

Item 48 – After subparagraph 55C(1)(a)(i)

Item 48 amends paragraph 55C(1)(a) to provide that membership of the TPS Advisory Board also includes a representative from the Department administered by the Minister administering the VSL Act.

Item 49 – Subsection 55C(2A)

Item 49 omits the words “the international education and training sector” and substitutes “the education and training sectors”. This will ensure that Board members of the TPS Advisory Board, as a group, will have qualifications or experience relevant to the VSL Tuition Protection Fund Advisory Board and the HELP Tuition Protection Fund Advisory Board and not just the international sector.

Item 50 – After section 176

Item 50 inserts a new section 176A into the ESOS Act which requires that before 1 July 2021, the Minister must commence a review of the operation of Parts 5 (about tuition protection service) and 5A (about the Overseas Students Tuition Fund and related matters).
This review is to be conducted at the same time as the reviews under new section 238-7 of HESA and new section 113A of the VSL Act in respect of the operation of the tuition protection arrangements under those Acts. The Minister is required to cause a report to be prepared of the review and for the report to be tabled in each House of the Parliament within 15 sitting days after the completion of the preparation of the report.
Schedule 2 HELP Tuition Protection

Summary

Schedule 2 to the Bill comprises two parts. Division 1 of Part 1 sets out the main amendments to HESA, which repeal all provisions in HESA that relate to the existing tuition protection requirements and inserts new provisions that provide for the new requirements relating to tuition protection for students. Division 2 of Part 1 sets out the application and transitional provisions, which ensure the repealed provisions of HESA continue to apply where a higher education provider ceased to provide a unit of study prior to the commencement of Part 1. Part 2 replaces references to FEE-HELP balance with references to HELP balance, an amendment which is due to commence on 1 January 2020.

Detailed Explanation

Part 1 – Main amendments

Division 1 – Amendments

Higher Education Support Act 2003

Item 1 – Subsection 5-1(2)

Item 1 inserts a new table item 2A in the ‘Application of Act to Table C providers’ table. This table item states that section 19-66A (tuition protection requirements) applies to the Australian branch of Table C providers, and to students undertaking or proposing to undertake units of study at those branches. This is a consequence of the repeal of section 19-40 (in Subdivision 19-D of HESA) and the enactment of a new section 19-66A in its place (in Subdivision 19-E of HESA).

Item 2 – Paragraph 16-25(1)(c)

Item 2 repeals paragraph 16-25(1)(c), and substitutes a new paragraph 16-25(1)(c) requirement that the Minister may approve a body as a higher education provider if, amongst other things, the Minister is satisfied that a body will meet the tuition protection requirements (if applicable).

Item 3 – Sections 16-30 and 16-31

Item 3 repeals sections 16-30 and 16-31, and substitutes a new section 16-30 that defines the new tuition protection requirements for the purposes of HESA. The tuition protection
requirements are the requirements set out in Part 5-1A of HESA (including in the Higher Education Provider Guidelines made for the purposes of that Part), as well as any requirements set out in the Higher Education Provider Guidelines for the purposes of paragraph 16-30(b).

**Item 4 – Section 19-40**

Item 4 repeals section 19-40, which required higher education providers, other than those higher education providers which were exempt, to comply with the tuition assurance requirements. Section 19-40 is replaced by section 19-66A (see item 5).

**Item 5 – Before section 19-67**

Item 5 inserts a new section 19-66A in subdivision 19-E of Division 19 of HESA.

New subsection 19-66A(1) provides that a higher education provider to whom Part 5-1A applies must comply with the tuition protection requirements.

A note explains that section 166-5 identifies providers to whom Part 5-1A applies.

Contravention of subsection 19-66A(1) carries a civil penalty of 60 penalty units.

New subsection 19-66A(2) requires a higher education provider to whom Part 5-1A applies to pay the HELP tuition protection levy and any penalty for late payment of the HELP protection levy. A note explains that the HELP tuition protection levy is imposed by the *Higher Education Support (HELP Tuition Protection Levy) Act 2019* (once enacted), and that amounts of levy for a year are either determined before, or indexed on, 1 August in the year. A provider that fails to pay the levy or late payment penalty when it is due and payable is breaching a quality and accountability requirement under HESA, for which action can be taken by the Minister against the provider under Subdivision 22-B of the Act.

New subsection 19-66A(3) states that the Higher Education Provider Guidelines may make provision for, or in relation to, a number of matters including:

- issuing notices setting out the amount of the HELP tuition protection levy payable by a provider;
- when the HELP tuition protection levy is due and payable;
- issuing notices extending the time for payment of HELP tuition protection levy and late payment penalties;
- the refund, remission or waiver of the HELP tuition protection levy and any late payment penalties; and
- the review of decisions made under the Higher Education Provider Guidelines in relation to the collection or recovery of HELP tuition protection levy.

These matters will be dealt with in the Higher Education Provider Guidelines rather than in the primary legislation, as these are primarily matters of administration and process regarding the collection and recovery of the levy amounts. They do not impact on the setting of the levy amounts payable by the providers. The nature of any reviewable decisions that may be provided for in the Guidelines will be decisions on relatively minor or administrative issues, such as whether a provider’s late payment penalty should be waived...
or errors in the calculation of the levy. It is anticipated these decisions will be dealt with through internal review and will not be subject to external merits review given they should not impact significantly on the rights of any provider and it could be disproportionately costly and time consuming if a provider were able to pursue the issue in the Administrative Appeals Tribunal.

**Item 6 – Paragraph 36-20(3)(a)**
**Item 7 – Subsection 36-20(4)**
**Item 8 – Section 36-24A (heading)**

These items replace words and phrases in HESA with new terminology reflecting the principal amendments to the Act.

**Item 9 – Subsection 36-24A(1)**

Item 9 repeals and substitutes a new subsection 36-24A(1). The new subsection 36-24A(1) provides the circumstances in which a higher education provider must determine that the section applies to a person.

New subsection 36-24A(1) states that a higher education provider must, on the Secretary’s behalf, determine that the section applies to a person if:

- the person has been enrolled as a Commonwealth supported student with the provider in a unit of study; and
- the unit would, if completed, form part of a course of study undertaken with the provider; and
- the person has not completed the requirements for the unit during the period during which the person undertook, or was to undertake, the unit because the provider defaulted in relation to the person; and
- Part 5-1A applied to the provider at the time of default; and
- either the HELP Tuition Protection Director decides, under paragraph 166-25(1)(b), that they are not satisfied that there is a suitable replacement course for the person, or the person elects, under subparagraph 166-25(3)(a)(iii), to have an amount equal to the amounts of HECS-HELP assistance that the person received for the unit re-credited to the student’s HELP balance.

A note explains that the HECS-HELP debt of a person to whom this section applies is remitted under subsection 137-5(4) of HESA.

**Item 10 – Section 104-42 (heading)**
**Item 13 – Paragraph 110-5(1A)(b)**
**Item 14 – Subsection 110-5(1B)**

These items replace words and phrases in HESA with new terminology reflecting the principal amendments to the Act.

**Item 11 – Paragraphs 104-42(1)(b), (c) and (d) (not including the note)**

Item 11 repeals the paragraphs, and substitutes paragraphs which require a higher education provider, on the Secretary’s behalf, to re-credit a student’s FEE-HELP balance for a unit of study the person has been enrolled in with the provider if:
• the person has not completed the requirements for the unit during the period during which the person undertook, or was to undertake, the unit because the provider defaulted in relation to the person; and
• Part 5-1A applied to the provider at the time the provider defaulted in relation to the person; and
• either the HELP Tuition Protection Director decides, under paragraph 166-25(1)(b), that the Director is not satisfied that there is a suitable replacement course for the person, or the person elects, under subparagraph 166-25(3)(a)(iii), to have an amount equal to the amounts of FEE-HELP assistance that the person received for the unit re-credited to the student’s HELP balance.

**Item 12 – Subsection 104-42(2)**

Item 12 repeals subsection 104-42(2) and substitutes a new subsection. This change provides that the Secretary may re-credit a person’s HELP balance under subsection 104-42(1) where the Secretary is satisfied that the higher education provider has failed to do so within a reasonable period.

**Item 13 – Paragraph 110-5(1A)(b)**

Item 13 provides that “unit in circumstances that make it a replacement unit within the meaning of the *tuition assurance requirements*” is to be substituted with “unit as a *replacement unit*. This is because “replacement unit” is now a defined term.

**Item 14 – Subsection 110-5(1B)**

Item 14 provides that “the tuition assurance requirements” is to be substituted with “the *tuition assurance requirements*”. This is because “tuition assurance requirements” is a defined term.

**Item 15 – Section 159-1**

Item 15 inserts two new items in the table in section 159-1 of HESA, to specify that Chapter 5 of the Act also deals with the following matters:
• tuition protection (in Part 5-1A); and
• the HELP Tuition Protection Fund, the HELP Tuition Protection Director and the HELP Tuition Protection Fund Advisory Board (in Part 5-1B).

**Item 16 – After Part 5-1**

Item 16 inserts new Parts 5-1A and 5-1B into HESA. Part 5-1A sets out the arrangements relating to tuition protection.

**Part 5-1A – Tuition protection**

New Part 5-1A comprises two divisions. Division 1 provides which approved providers the new tuition protection arrangements apply to and defines when a provider defaults in relation to a student. Division 2 sets out the obligations of various persons when a provider
defaults, including those of the provider, the HELP Tuition Protection Director and a replacement provider.

**Division 1 – Preliminary**

**Section 166-1 – What this Part is about**

New section 166-1 provides an outline for the purpose of Part 5-1A.

**Section 166-5 – Application of this Part**

New section 166-5 provides that Part 5-1A applies to all higher education providers other than Table A providers or providers of a kind prescribed by the Higher Education Provider Guidelines.

Table A providers have been excluded from the application of Part 5-1A because, as a class of providers, they are considered to be at very low risk of defaulting and in the event that they do default, should have the capacity and capability to place students in suitable replacement courses without the assistance of the HELP Tuition Protection Director. Other kinds of providers prescribed by the Guidelines may also be exempt from the application of Part 5-1A. This is to provide for flexibility should it become apparent that the risk of another class of providers defaulting is also low with adequate processes and procedures in place to provide tuition protection to their students. This approach allows the tuition protection arrangements to evolve responsively based on evidence and experience.

New subsection 166-5(2) provides that the Minister may determine that Part 5-1A applies, or does not apply, to specified higher education providers. New subsection 166-5(3) provides that a determination made under subsection 166-5(2) may be made either unconditionally or subject to conditions, and may be expressed to be in force indefinitely or for a specified period.

This is to provide for additional flexibility should it become apparent that the risk of a particular provider defaulting is low, and in circumstances where that provider has demonstrated that it has adequate processes and procedures in place to provide tuition protection to their students. For example, currently one Table B provider is exempt from the tuition assurance requirements.

New subsection 166-5(4) provides that a determination made under subsection 166-5(2) is not a legislative instrument.

The ability to exempt providers from the tuition protection requirement by class through the Guidelines, or individually by administrative decision by the Minister reflects the current arrangements under sections 16-31 and 19-40 of HESA.

New subsection 166-5(5) provides that, despite subsection 166-5(1), sections 166-27 and 166-30 apply to all higher education providers. A note explains that section 166-27 deals with provider obligations to provide information about replacement courses, and that 166-30 deals with obligations of providers of replacement courses.
Section 166-10 – When a higher education provider defaults in relation to a student

New section 166-10 sets out the circumstances in which a provider defaults in relation to a student. These circumstances include where the provider:

- fails to start to provide a unit of study to the student on the day on which the unit was scheduled to start; or
- ceases to provide a unit of study on a day after the unit starts but before it is completed; and

the student has not withdrawn before that day, and the student was entitled, or would have been entitled, to FEE-HELP assistance or HECS-HELP assistance for the unit of study.

It is a matter of fact based on the circumstances whether or not a provider defaults. Similarly, the cause of the default does not matter, whether it occurs because the provider of their own accord ceases to provide a course or whether it is the result of compliance action taken against the provider, such as the provider’s approval being suspended or revoked.

New subsection 166-10(3) enables the Higher Education Provider Guidelines to prescribe circumstances which, if they occur, will mean that a provider is in default. This provision is not intended to extend the broad circumstances described in subsections 166-10(1) and (2) but rather allow for greater precision and clarity in respect of what situations will, in practice, give rise to a default. For example, the Guidelines may provide that if the provider enters into liquidation, the provider is taken to be in default, since this is a circumstance which inevitably means the provider can no longer be delivering the unit of study to a student.

Division 2 – Obligations when a provider defaults in relation to a student

Section 166-15 – Higher education providers must give notice of default to HELP Tuition Protection Director

This new section applies if a higher education provider defaults in relation to a student.

New subsection 166-15(2) requires a higher education provider to give written notice to the HELP Tuition Protection Director of the circumstances of a default within 24 hours of the default occurring. Being aware of the default as soon as possible will allow the HELP Tuition Protection Director to begin assisting students.

New subsection 166-15(3) requires a higher education provider within 3 business days of defaulting to give written notice to the HELP Tuition Protection Director specifying the following information for each student to whom the provider has defaulted:

- the student’s full name and contact details;
- the units of study and the course of study that the student was enrolled in at the time of the default;
- the amount of the tuition fees for each unit of study in which the student was enrolled in at the time of the default;
- details about the payment of those tuition fees; and
- any other matter prescribed by the Guidelines.

The above information is necessary for the HELP Tuition Protection Director to liaise with students and possible replacement providers and identify whether there are any suitable
replacement units of study for the students. Providers are already required to keep and
maintain this information and so they should be able to collate the material for each student
without undue burden and within the 3 business day timeframe.

New subsection 166-15(4) requires a higher education provider, if requested in writing by
the HELP Tuition Protection Director, to give to the Director for a student in respect of
whom the provider has defaulted a copy of a student’s record of results for the units of study
that the student has completed.

A notice given under new subsection 166-15(4) must comply with any requirements
prescribed by the Higher Education Provider Guidelines. For example, the Guidelines may
prescribe the manner by which the information is to be delivered.

Failure to comply with new section 166-15 gives rise to a civil penalty and it is also an
offence of strict liability. In both instances, the penalty is 60 penalty units.

Strict liability for this offence is appropriate (having regard to the Guide to Framing
Commonwealth Offences, Infringement Notices and Enforcement Powers) because the
offence:
• is subject to an infringement notice scheme (see proposed amendment to section 215-20
  of HESA);
• is punishable by a fine of up to 60 penalty units and it is not punishable by
  imprisonment; and
• will enhance the effectiveness of the enforcement regime under HESA in deterring non-
  compliance.

Section 166-20 – Higher education providers must give notice of default to affected
students

This new section applies if a higher education provider defaults in relation to a student.

The higher education provider is required to give written notice of the default to students in
relation to whom the provider has defaulted within 24 hours. It is important students are
notified as soon as possible of the default. The notice must comply with any requirements
prescribed by the Higher Education Provider Guidelines. It is appropriate these matters are
prescribed in the Guidelines since they are likely to be of an administrative nature.

Contravention of section 166-20 gives rise to a civil penalty and is also an offence of strict
liability. In both instances the penalty is 60 penalty units. Strict liability for this offence is
appropriate for the same reasons described in relation to new section 166-15 above.

Section 166-25 – Student placement service

This new section provides that, when a higher education provider defaults in relation to a
student, the HELP Tuition Protection Director must decide whether there are any suitable
replacement courses for the student.

The matters the HELP Tuition Protection Director must have regard to in deciding whether
they are satisfied that there is a suitable replacement course are:
whether the replacement course leads to the same or a comparable qualification as the original course;
what course credits the student may receive for the units of study of the original course successfully completed by the student;
whether the mode of delivery of the replacement course is the same as the mode of delivery of the original course;
the location where the replacement course will be primarily delivered;
whether a student will incur additional fees for the replacement course that are unreasonable;
whether the student will be able to attend the replacement course without unreasonably impacting on the student’s prior commitments; and
any other matters prescribed by the Guidelines.

A course that is a suitable replacement course for one student affected by a provider’s default may not be a suitable replacement course for another student affected by the same default.

In some circumstances, a course may still be a suitable replacement course even where not all of the above matters are met; for example, the HELP Tuition Protection Director may consider that a replacement course delivered online is suitable despite the original course being delivered face-to-face. An example of when a replacement course may unreasonably impact on a student’s prior commitments is if the teaching hours for the replacement course interfere with the student’s prior work commitments.

If the HELP Tuition Protection Director is satisfied that there is one or more suitable replacement courses, the Tuition Protection Director must give a written notice to the student. Amongst other requirements, this notice must include:

- a description of each suitable replacement course including the qualification it leads to;
- the contact details of the provider of each suitable replacement course;
- an explanation that, if tuition fees have already been paid for the affected unit of the original course, tuition fees would not be payable for the replacement unit of a replacement course;
- an explanation that, if the student chooses to enrol in another course, there is no obligation on the provider of the other course to offer a replacement unit without charge to the student;
- an explanation of the matters the Director must have regard to in deciding there is a suitable replacement course;
- anything else required by the Higher Education Provider Guidelines.

The inclusion of the above information is to ensure that a student is given information about the replacement course options available, the contact details of the proposed replacement providers so that the student can undertake their own enquiries, and details to assist the student should they seek a review of the decision that a course is a suitable replacement course.

The student will then contact the provider of the preferred suitable replacement course and the formal offer and acceptance of enrolment will be dealt with between the student and the replacement provider.
If the HELP Tuition Protection Director is not satisfied that there is a suitable replacement course, the HELP Tuition Protection Director is required to give the student a notice that:

- explains the matters the Director must have regard to in determining whether there were any suitable replacement courses;
- explains the student’s right to request a review of the decision within 28 days;
- an explanation that the student’s HELP balance will be re-credited if they do not seek review of the Director’s decision;
- a statement that, to facilitate early remittal or re-crediting, the student can notify the HELP Tuition Protection Director in writing at any time during the 28 days that they will not seek review of the decision.

If a student notifies the Director prior to the expiry of the 28 days that they will not seek review of the decision, this does not mean that the actual re-crediting will occur within the 28 days but rather that the process to facilitate the remittance or re-credit will occur sooner.

**Section 166-27 – Obligations of providers to provide information about replacement courses**

This new section provides that the HELP Tuition Protection Director may, by notice in writing, require a higher education provider to provide such information that the Director reasonably requires to enable the Director to make a decision regarding suitable replacement courses for a student in relation to whom a provider has defaulted.

The information must be provided in a form (if any) approved by the HELP Tuition Protection Director and in accordance with such other requirements as the Director makes.

Contravention of section 166-27 gives rise to a civil penalty and is also an offence of strict liability. In both instances the penalty is 60 penalty units. Strict liability for this offence is appropriate for the same reasons described in respect to new section 166-15.

**Section 166-30 – Obligations of replacement providers**

This new section sets out the obligations that apply to a higher education provider when a student accepts an offer of a replacement course with the provider.

The provider must give written notice to the HELP Tuition Protection Director within 14 days after the student has accepted the offer of a replacement course with the provider. This is important so the Director is made aware that the student has been successfully placed in a replacement course.

The higher education provider must also ensure that the student is:

- granted course credits for units of study of the original course successfully completed by the student;
- if the student has been charged a student contribution amount or a tuition fee for an affected unit – is not charged a student contribution amount or a tuition fee for a replacement unit of the replacement course; and
- enrolled in the replacement course as soon as practicable.
There requirements ensure that the student is afforded appropriate protections when enrolling in the replacement course.

Contravention of this provision is a civil penalty and it is also an offence of strict liability. In both instances, the penalty is 60 penalty units. Strict liability for this offence is appropriate for the same reasons described in respect to new section 166-15.

Section 166-32 – Obligations of replacement providers regarding enrolment information

This new section requires a replacement provider to keep up to date records of the following in relation to affected students:

- the student’s full name and contact details;
- the name of the replacement course and the units of study the student is currently enrolled in;
- any student contribution amounts or tuition fees charged to the student for any units of the replacement course;
- details of the units of study successfully completed by the student;
- details of the course credits for the units of study of the original course successfully completed by the student granted to the student.

Contravention of section 166-32 is a civil penalty and it is also an offence of strict liability. In both instances, the penalty is 60 penalty units. Strict liability for this offence is appropriate for the same reasons described in respect to new section 166-15.

Section 166-35 – Notification obligations where there is no replacement course or student elects re-crediting

This new section places notification obligations on the HELP Tuition Protection Director if a higher education provider defaults in relation to a student and either the Director decides under new paragraph 166-25(1)(b) that there is no suitable replacement course for a student, or the student elects under new subparagraph 166-25(3)(a)(iii) to have their HELP balance re-credited or the student elects under sub-paragraph 166-25(3)(a)(iii) to have an amount equal to the amounts of FEE-HELP assistance or HECS-HELP assistance that the student received for the affected unit re-credited to the student’s HELP balance.

In these circumstances, the HELP Tuition Protection Director must give a written notice to the Secretary of that fact and a written notice to the provider stating that an amount equal to the amounts of FEE-HELP assistance or HECS-HELP assistance that the student received for the affected unit will be re-credited to the student’s HELP balance.

Part 5-1B – HELP Tuition Protection Fund, HELP Tuition Protection Director and HELP Tuition Protection Fund Advisory Board

New Part 5-1B comprises three divisions. Division 1 establishes the HELP Tuition Protection Fund, Division 2 establishes the office of the HELP Tuition Protection Director, and Division 3 establishes the HELP Tuition Protection Fund Advisory Board.
Division 1 – HELP Tuition Protection Fund

Section 167-1 – Name of Fund

New section 167-1 establishes the HELP Tuition Protection Fund and provides that it is a special account for the purposes of the Public Governance, Performance and Accountability Act 2013.

Section 167-5 – Credits to the HELP Tuition Protection Fund

New section 167-5 provides that there must be credited to the HELP Tuition Protection Fund amounts equal to the following:

- each amount of HELP tuition protection levy received from a higher education provider;
- each amount recovered by the Commonwealth under paragraph 36-24A(2)(b) or subsection 110-5(1) because of re-crediting under section 104-42, if the balance of the Fund had previously been reduced under paragraph 167-10(1)(f) in relation to that amount. Paragraph 36-24A(2)(b) of HESA requires a defaulting provider to pay the Commonwealth an amount equal to any HECS-HELP assistance to which an affected student was entitled. Subsection 110-5(1) of HESA requires a defaulting provider to pay the Commonwealth an amount equal to any FEE-HELP assistance to which an affected student was entitled. The amounts a provider is required to pay under paragraph 36-24A(2)(b) and subsection 110-5(1) are debts due to the Commonwealth. If the re-credit occurs under section 104-42, either the Secretary or the HELP Tuition Protection Director could take action to recover the debt but if recovered, the amount is required to be credited into the HELP Tuition Protection Fund, if the balance of the Fund had previously been reduced in respect of that amount under paragraph 167-10(1)(f), any other money appropriated by the Parliament for the purposes of the HELP Tuition Protection Fund – for example this includes the initial amount appropriated by Parliament for the HELP Tuition Protection Fund;
- any penalties for late payment of HELP tuition protection levy. Details will be provided in the Guidelines regarding when a provider incurs a late payment penalty, and the calculation, recovery or waiver of any such late payment penalty;
- each amount received by the Commonwealth for the purposes of the HELP Tuition Protection Fund, for example, this covers any insurance payments received as a result of a claim made by the HELP Tuition Protection Director under any insurance policy in place for the tuition protection arrangements.

There are two notes under section 167-5 to assist the reader. The first note explains that, if any of the purposes of a special account is a purpose covered by an item in an Appropriation Act (whether or not the item expressly refers to the account), then amounts may be debited against the appropriation for that item and credited to that special account. The second note reminds the reader that the HELP tuition protection levy is imposed under the Higher Education Support (HELP Tuition Protection Levy) Act 2019 (when enacted).

Section 167-10 – Purposes of the HELP Tuition Protection Fund

This new section sets out the purposes of the HELP Tuition Protection Fund, which are as follows:
• making payments in connection with tuition protection;
• paying or discharging the costs, expenses and other obligations incurred by the Commonwealth in the performance of the HELP Tuition Protection Director’s functions, including management of the HELP Tuition Protection Fund. For example, this might include costs incurred in paying a consultant engaged to assist the HELP Tuition Protection Director perform his or her functions – it is anticipated that the Director will engage a service provider to provide case management and student placement services for students affected by a provider default. Other examples may include: paying premiums for insurance coverage for the tuition protection arrangements where the HELP Tuition Protection Fund is below its target size; and paying for actuarial advice to inform the setting of levy components;
• paying any remuneration and allowances payable to the HELP Tuition Protection Director and members of the HELP Tuition Protection Fund Advisory Board. These amounts will be as determined by the Remuneration Tribunal;
• paying any amount that is required or permitted to be repaid. This is to allow the Commonwealth to meet any legal obligation it might have to pay amounts out of the Fund;
• reducing the balance of the Fund (and therefore the available appropriation for the Fund) without making a real or notional payment. This purpose enables amounts to be transferred from the Fund (which as a special account is part of consolidated revenue) elsewhere to the Commonwealth which is also part of consolidated revenue. For example, this would enable a “payment” from the Fund to part of consolidated revenue when an amount equal to the tuition fees for an affected part of an original course is re-credited to a student’s FEE-HELP balance under section 104-42. It would also enable the HELP Tuition Protection Director to repay funding appropriated by Parliament to establish the Fund once the Fund is self-sustaining.

A note underneath new subsection 167-10(1) reminds the reader that section 80 of the Public Governance, Performance and Accountability Act 2013 deals with special accounts.

New subsection 167-10(2) enables the Higher Education Provider Guidelines to make provision in relation to the purpose under new paragraph 167-10(1)(a), that is making payments in connection with tuition protection. This includes making Guidelines about the circumstances in which payments may be made; amounts of different kinds of payments; and methods for calculating different kinds of payments.

A note underneath new subsection 167-10(2) provides an example of such a payment is that a provider may receive a transfer payment if a student accepts a place in a replacement course with the provider. Another example is that the Guidelines may give the HELP Tuition Protection Director the discretion to pay a third party (for example a liquidator) to provide information required for the purpose of facilitating placement of a student in a suitable replacement course or re-crediting the student’s FEE-HELP balance for the affected unit of an original course.

The power to make Guidelines in respect of these payments will facilitate greater specificity and transparency around payments that may be made to providers and other persons in connection with tuition protection. It is desirable to deal with this in the Guidelines to avoid being overly prescriptive in the primary legislation, which might inadvertently limit the HELP Tuition Protection Director’s practical administration of tuition protection.
New subsection 167-10(3) specifies that the purposes of the Fund do not include paying or discharging any costs, expenses or other obligations associated with services provided to the HELP Tuition Protection Director by an employee or officer of a Commonwealth entity (within the meaning of the Public Governance Performance and Accountability Act 2013).

Division 2 – HELP Tuition Protection Director

Section 167-15 – HELP Tuition Protection Director

New section 167-15 provides that there is to be a HELP Tuition Protection Director.

New subsection 167-15(2) provides that the office of HELP Tuition Protection Director is to be held by the person who holds the office of TPS Director under section 54A of the ESOS Act. A note provides the TPS Director also holds the office of VSL Tuition Protection Director under the VET Student Loans Act 2016.

New subsection 167-15(3) clarifies that the reference in new subsection 167-15(2) to the person who holds the office of the TPS Director includes a reference to a person acting in that office because of an appointment under section 54K of the ESOS Act. This is to ensure that, where a person holding the office of TPS Director is only doing so temporarily, this person will also temporarily hold the office of the HELP Tuition Protection Director.

Section 167-20 – Functions of the HELP Tuition Protection Director

New section 167-20 sets out the functions of the HELP Tuition Protection Director which include:

- facilitating and monitoring the placement of students in relation to whom a higher education provider has defaulted;
- paying amounts out of, or reducing the balance of, the HELP Tuition Protection Fund under section 167-10;
- reporting to the Minister on the operation of Part 5-1A (tuition protection) and the financial status of the HELP Tuition Protection Fund;
- managing the HELP Tuition Protection Fund in a way that ensures that it is able to meet all its liabilities from time to time;
- making the legislative instrument each year for the purposes of section 12 of the Higher Education Support (HELP Tuition Protection Levy) Act 2019 (when enacted);
- recommending that the Secretary take action against an approved higher education provider that has defaulted in relation to a student;
- any other function conferred by this Bill or any other law of the Commonwealth; and
- any other function that is incidental or conducive to the performance of the above functions.

New subsection 167-20(2) provides that the HELP Tuition Protection Director has power to do all things necessary or convenient to be done for, or in connection with, the performance of the Director’s functions.
Section 167-25 – Administrative provisions relating to the HELP Tuition Protection Director

New section 167-25 describes administrative provisions relating to the HELP Tuition Protection Director by reference to provisions from the ESOS Act that relate to the TPS Director. Subsection 167-25(1) sets out a table that refers to a number of provisions from the ESOS Act which are set out at subsection 167-25(2).

The effect of this provision is to replicate the provisions set out in subsection 167-25(2) so that they govern the functions of the HELP Tuition Protection Director in the context of HESA in the same way as they govern the functions of the TPS Director under the ESOS Act.

These provisions apply to the offices of the HELP Tuition Protection Director, VSL Tuition Protection Director and TPS Director in the same way, as they deal with administrative issues such as: remuneration and allowances (section 54C), leave of absence (section 54D), restriction on outside employment (section 54E), disclosure of interests (54F), other terms and conditions (section 54J), consultants (54L) and application of finance law (section 54N). This is appropriate because the HELP Tuition Protection Director is the same person as the VSL Tuition Protection Director and the TPS Director.

New subsection 167-25(3) provides that for the purposes of section 54E of the ESOS Act, the Minister is take to have given approval to the TPS Director to engage in paid employment as the HELP Tuition Protection Director and vice versa. This provision is included for the avoidance of doubt, as paragraph 54E prohibits the TPS Director from engaging in paid employment outside the duties of his or her office without the Minister’s approval.

New subsection 167-25(4) provides that the Minister may terminate the appointment of the TPS Director if:

- the TPS Director engages, except with the Minister’s approval, in paid employment outside the duties of his or her office as HELP Tuition Protection Director; or
- the HELP Tuition Protection Director fails, without reasonable excuse, to comply with section 54F of the ESOS Act in relation to disclosure of interests.

New subsection 167-25(5) provides that the HELP Tuition Protection Director is not personally subject to any liability to any person (other than the Commonwealth) in respect of anything done, or omitted to be done, in good faith in the exercise or performance of powers or functions under HESA or the Higher Education Support (HELP Tuition Protection Levy) Act 2019 (when enacted).

Division 3 – HELP Tuition Protection Fund Advisory Board

Section 167-30 – Establishment and membership

New section 167-30 establishes the HELP Tuition Protection Fund Advisory Board. The members of this Board are to be the same as the members of the TPS Advisory Board appointed under the ESOS Act, including acting members.
The Chair (including any person acting in this role) and Deputy Chair of the Tuition Protection Fund Advisory Board are the Chair and Deputy Chair of the TPS Advisory Board.

New subsection 167-30(7) provides that, despite subsection 55(2) of the ESOS Act, a person is eligible to be appointed to the TPS Advisory Board if the Minister is satisfied that the person has qualifications or experience that the Minister considers relevant to the performance of the HELP Tuition Protection Fund Advisory Board’s functions.

Subsection 55(2) of the ESOS Act provides that a person is not eligible for appointment as a Board member under paragraph 55(1)(b) unless the Minister is satisfied that he or she has qualifications or experience that the Minister considers relevant to the performance of the Board’s functions. The purpose of subsection 167-30(7) is to recognise that given HELP Tuition Protection Fund Advisory Board members will also be members of the VSL Tuition Protection Fund Advisory Board and the TPS Advisory Board, in some cases the member may have been appointed for his or her specific qualifications or experience that is most relevant to one, or two, but not all three Advisory Boards.

Section 167-35 – Function of the HELP Tuition Protection Fund Advisory Board

New section 167-35 provides that the function of the HELP Tuition Protection Fund Advisory Board is to provide advice and make recommendations in relation to the making of a legislative instrument each year under section 12 of the Higher Education Support (HELP Tuition Protection Levy) Act 2019 (when enacted). The advice and recommendations can be on its own initiative or following a request from the HELP Tuition Protection Director. The limited function of the HELP Tuition Protection Fund Advisory Board is the same as that which applies to the TPS Advisory Board.

Section 167-40 – Administrative provisions relating to the HELP Tuition Protection Fund Advisory Board

New section 167-40 describes administrative provisions relating to the HELP Tuition Protection Fund Advisory Board by reference to provisions from the ESOS Act that relate to the TPS Advisory Board. Subsection 167-40(1) sets out a table that refers to a number of provisions from the ESOS Act which are set out at subsection 167-40(2).

The effect of the section is to replicate the provisions set out in subsection 167-40(2) so that they govern the functions of the HELP Tuition Protection Fund Advisory Board in the context of HESA in the same way as they govern the functions of the TPS Advisory Board under the ESOS Act.

These provisions apply across the three Advisory Boards in the same way as they deal with the following administrative issues: remuneration and allowances (section 55E), disclosure of interests (section 55H), disclosure of interests to the Board (section 55J) and meetings of the Board (sections 56A – 56G).

New subsection 167-40(3) provides that the a member of the HELP Tuition Protection Advisory Board is not personally subject to any liability to any person (other than the Commonwealth) in respect of anything done, or omitted to be done, in good faith in the
exercise or performance or powers of functions under HESA and the Higher Education Support (HELP Tuition Protection Levy) Act 2019 (when enacted).

**Item 17 – Subsections 169-15(1A) and (2A)**

Item 170 omits “in circumstances that make it a replacement unit within the meaning of the *tuition assurance requirements*” and substitutes “that is a *replacement unit*”.

**Item 18 – Subsection 169-15(4)**

Item 18 repeals subsection 169-15(4) and substitutes a new subsection 169-15(4) which specifies that subsection 169-15(3) does not apply in circumstances where a student is no longer enrolled in a unit at the end of a census date because the provider defaulted in relation to the student and the student accepts an offer of a place in a replacement course.

**Item 19 – Section 206-1 (at the end of the table)**

Item 19 adds 3 table items to the table of reviewable decisions in HESA in section 206-1. These table items outline that the following are reviewable decisions under HESA:

- a determination by the Minister that Part 5-1A applies, or does not apply, to a specified higher education provider (subsection 166-5(2));
- a decision by the HELP Tuition Protection Director that the Director is satisfied that there are one or more suitable replacement courses for a student (paragraph 166-25(1)(a)); and
- a decision by the HELP Tuition Protection Director that the Director is not satisfied that there is a suitable replacement course for a student (paragraph 166-25(1)(b)).

**Item 20 – After section 209-10(4)**

Item 20 inserts a new section after subsection 209-10(4) that provides that the reviewer of a reviewable decision is not required to reconsider the decision if the decision was made under paragraph 166-25(1)(b), and a person whose interests were affected by that decision gives a notice in writing under paragraph 166-25(4)(c) that the person would not seek reconsideration of the decision.

**Item 21 – Section 212-1**

**Item 22 – At the end of section 212-1**

Items 21 and 22 insert a new subsection 212-1(2) which indicates that, despite subsection 212-1(1), an application to the Administrative Appeals Tribunal cannot be made for the review of a decision made under paragraph 166-25(1)(a) or (b) (about suitable replacement courses).

The reasons for the absence of external merits review are:

- clear parameters are set out at new subsection 166-25(2) about what the HELP Tuition Protection Director must have regard to in determining whether a course is a suitable replacement course. This is intended to ensure that the first instance decision is reasonable and justifiable, in respect of which students may seek internal review;
• in practice, the Director will actively work with providers and students to identify suitable replacement courses for a student. It is intended that, to the extent possible, a student would be provided with the option of several suitable replacement courses to choose between;
• when a provider defaults, it would be in the best interests for students to receive a resolution of the issue of whether or not there is a suitable replacement course as soon as practicable to allow them to continue their studies. Engaging in the potentially lengthy external merits review process may mean that students are unable to continue their studies until the matter is resolved;
• in respect of a decision that there is no suitable replacement course for a student – the student will receive a re-credit of his or her HELP balance for the affected part of their course which means they should not be financially disadvantaged should there not be a suitable replacement course. Further, legislation does not compel a replacement provider to enrol a student in a replacement course which means practically, if an external merits review may consider there are potentially suitable replacement courses, it cannot assist the students if no providers are prepared to deliver that course to the student.

**Item 23 – At the end of section 215-15**

Section 215-15 of HESA provides that each civil penalty provision of the Act 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.

Item 23 adds a new subsection 215-15(3) to provide that the HELP Tuition Protection Director is an authorised applicant for the purposes of Part 4 of the Regulatory Powers Act as it applies in relation to Part 5-1A – that is, he or she can apply to a relevant court for a civil penalty order against a person for a contravention of a civil penalty provision in Part 5-1A.

**Item 24 – At the end of section 215-20**

Section 215-20 of HESA provides that an offence or civil penalty provision of the Act is subject to an infringement notice under Part 5 of the Regulatory Powers Act. Part 5 of that Act creates a framework for using infringement notices in relation to provisions. A person given an infringement notice has the choice of paying the amount specified as an alternative to having court proceedings brought against them for the contravention.

Item 24 adds a new subsection 215-20(3) to provide that, for the purposes of Part 5 of the Regulatory Powers Act, as it applies in relation to Part 5-1A, the HELP Tuition Protection Director is both an infringement officer and the relevant chief executive – that is he or she, can issue, extend the time to pay, and withdraw infringement notices for contraventions of offence and civil penalty provisions in Part 5-1A.

**Item 25 – After subsection 215-40(1)**

Item 25 inserts a new subsection 215-40(1A) to provide that the HELP Tuition Protection Director may, in writing, delegate his or her powers and functions under the Regulatory
Powers Act as it applies in relation to Part 5-1A, to an SES employee, or an acting SES employee, in the Department. The power to delegate ensures that the HELP Director’s regulatory powers under the Act are able to be carried out efficiently and effectively should the Director not have the capacity to undertake all the regulatory functions or powers in a timely fashion. Subsection 215-40(3) provides appropriate constraints on the delegate’s exercise of the regulatory powers by ensuring the delegate must comply with any directions of the delegator. New subsection 215-40(1A) is consistent with the Secretary’s capacity to delegate his or her powers under the Regulatory Powers Act under subsection 215-40(1).

Item 26 – After paragraph 238-5(1)(a)

Item 26 inserts a new paragraph 238-5(1)(aa), which allows the Minister to delegate to the HELP Tuition Protection Director all or any of the Minister’s powers under HESA (other than under section 41-45 or section 46-40).

Item 27 – After section 238-5

Item 27 inserts a new section 238-6, which deals with delegations by the HELP Tuition Protection Director. New subsection 238-6(1) provides that the HELP Tuition Protection Director may, in writing, delegate all or any of their functions or powers under HESA (other than paragraph 167-20(1)(e)) to an APS employee who holds or performs the duties of an APS 6 position, or an equivalent or higher position, in the Department.

A note under new subsection 238-6(1) explains that paragraph 167-20(1)(e) gives the HELP Tuition Protection Director the function of making a legislative instrument under section 12 of the Higher Education Support (HELP Tuition Protection Levy) Act 2019 (when enacted).

New subsection 238-6(2) provides that, in exercising the powers or performing the functions under a delegation made under subsection 238-6(1), the delegate must comply with any directions of the HELP Tuition Protection Director.

It is anticipated that the HELP Tuition Protection Director’s powers and functions would only be delegated to departmental officers who have been allocated as resources dedicated to assisting the HELP Tuition Protection Director. It is anticipated delegated powers would primarily be exercised by departmental officers at EL1 and EL2 levels. The power to delegate to an employee at the APS 6 level has been included as:

- the current disposition of staff that will be assigned to assist the HELP Tuition Protection Director in the exercise of his or her functions has not yet been determined; and
- the HELP Tuition Protection Director’s work load may unexpectedly increase significantly, in the event of multiple provider defaults. Departmental officers at the APS 6 level may also need to exercise delegated powers to ensure that affected students are able to receive assistance as soon as practicable.

Item 28 – Section 238-7

Item 28 repeals and substitutes a new section 238-7. New section 238-7 provides that, before 1 July 2021, the Minister must commence a review into the operation of Parts 5-1A and 5-1B.
For example, such a review may examine the operations of the tuition protection arrangements, the role and functions of the HELP Tuition Protection Director and Advisory Board, the management of the HELP Tuition Protection Fund, and the use of the special accounts.

The review must be carried out in conjunction with the reviews of the tuition protection arrangements under the ESOS Act and the VSL Act. The Minister is required to cause a report of the review to be prepared and to be tabled in each House of the Parliament within 15 sitting days after the completion of the report.

**Item 29 – Subsection 238-10(1) (table item 6, column headed “Chapter/Part/section”)**

Item 29 inserts in column 3 of table item 6, prior to section 169-17, Parts 5-1A and 5-1B as provisions of HESA that contain matters that may be prescribed in the Higher Education Provider Guidelines.

**Item 30 – After subsection 238-10(1A)**

Item 30 inserts a new subsection 238-10(2), which provides that the Minister may, by legislative instrument, make the Higher Education Provider Guidelines providing for matters required or permitted by the Higher Education Support (HELP Tuition Protection Levy) Act 2019 (when enacted) to be provided by the Guidelines.

**Item 31 – Subclause 1(1) of Schedule 1**

Item 31 inserts the following definitions into Schedule 1 of HESA:

- **affected unit**, of an original course, means the unit of study that a student was undertaking as part of a course of study when a higher education provider defaulted in relation to the student.

- **default** is defined by reference to new section 166-10, which sets out the circumstances in which a provider defaults in relation to a student.

- **HELP Tuition Protection Director** is defined by reference to new section 167-15. The office of the HELP Tuition Protection Director will be held by the same person who holds the office of the TPS Director. The functions of the HELP Tuition Protection Director include administering tuition protection and managing the HELP Tuition Protection Fund.

- **HELP Tuition Protection Fund** is defined by reference to new section 167-1, and means the fund established under that section.

- **HELP Tuition Protection Fund Advisory Board** is defined by reference to new section 167-30, and means the board established under that section. The members of the HELP Tuition Advisory Board are the members of the TPS Advisory Board.
• **HELP tuition protection levy** means the levy imposed under the *Higher Education Support (HELP Tuition Protection Levy) Act 2019*.

• **original course** means a course of study in relation to which a higher education provider has defaulted.

• **replacement course** means a course of study that enables a student to finish either an original course, or a course that is equivalent to an original course.

• **replacement unit** means a unit of study of a replacement course that replaces an affected unit of an original course.

**Item 32 – Subclause 1(1) of Schedule 1 (definition of tuition assurance requirements)**

Item 32 of Schedule 1 repeals the definition of tuition assurance requirements because as a result of this Bill it is no longer required.

**Item 33 – Subclause 1(1) of Schedule 1**

Item 33 of Schedule 1 inserts a new definition of tuition protection requirements, by reference to new section 16-30.

**Division 2 – Application and transitional provisions**

**Item 34 – Application and transitional provisions**

Certain provisions, which are to be repealed under the Bill, need to continue to apply after the commencement of this Part. This is necessary since the tuition protection arrangements for which the Bill provides only apply from 1 January 2020, and the Commonwealth is still working with higher education providers and former tuition assurance scheme operators to assist students of providers that ceased to provide courses before 1 January 2020. In addition it is important to clarify that the new and amended obligations imposed on approved course providers under this Part, apply to all providers, even if providers were approved prior to the commencement of this Part.

Subitem 34(1) provides that subsection 5-1(2) of HESA applies in relation to a Table C provider after commencement of this Part, regardless of when the provider was approved. This ensures that the application of HESA to Table C providers will continue, regardless of when the Table C provider was approved.

Subitem 34(2) provides that the amendment of section 16-25 of HESA made by this Part applies in relation to applications for approval made after the commencement of this Part, or before the commencement of this part if the application had not been decided before that commencement.

Subitem 34(3) provides that if, prior to the commencement of this Part, a provider ceased to provide a unit of study, then HESA and any instruments in force under HESA prior to commencement continue to apply after that commencement. This is necessary to ensure that former providers and former tuition assurance scheme operators are required to continue to
comply with tuition assurance obligations to assist students affected by a provider default that occurred prior to the commencement of this Part.

Subitem 34(4) provides that section 19-66A and Part 5-1A of HESA, as inserted by this Part, apply in relation to a higher education provider after the commencement of this Part, regardless of when the provider was approved. This is to ensure that all approved course providers are required to comply with the new obligations imposed on providers.

Subitem 34(5) provides that the amendments of section 169-15 of HESA made by this Part apply in relation to enrolments in a unit of study that occur after the commencement of this Part.

**Part 2 – Amendments commencing immediately after the commencement of HELP loan limits changes**

*Higher Education Support Act 2003*

**Item 35 – Section 97-42 (heading)**
**Item 36 – Paragraphs 97-42(1)(b), (c) and (d)**

Items 35 and 36 amend provisions in HESA affected by Part 1 of Schedule 2 to the Bill, as a consequence of amendments made by Schedule 3 to the *Higher Education Support Legislation Amendment (Student Loan Sustainability) Act 2018*, which commences on 1 January 2020. That Act amends the nomenclature of “FEE-HELP balance” to “HELP balance” throughout HESA, as a consequence of applying the FEE-HELP loan limit to HECS-HELP assistance.
Schedule 3 - Other minor amendments

An amendment the VSL Act will also be made to provide for the Secretary to refuse a request by an approved course provider to cancel its approval in certain circumstances.

VET Student Loans Act 2016

Item 1 – Section 38
Item 2 – At the end of section 38

Item 2 adds a new subsection (2) to section 38. This amendment enables the Secretary to decline a provider’s request for voluntary revocation of its approval, in certain limited circumstances when:

- the Secretary has issued an intention notice under subsection 36(2) regarding suspension or revocation, but has not issued a decision notice under subsection 36(4); or
- if the Secretary has given the provider written notice under subsection 36(4) or 37(2) of its suspension, and the suspension has not ended.

The intention is to strengthen the Secretary’s rights regarding revocation to prevent a provider requesting that its approval status is revoked voluntarily to circumvent compliance action being taken against it. This is an important issue as when a provider is revoked as a result of compliance issues, this may impact on the provider’s ability to re-apply for approval as an approved course provider and may also impact on its applications in other Commonwealth programs.

Item 1 is a consequential renumbering amendment.