

EXPLANATORY STATEMENT

Education Services for Overseas Students (Calculation of Refund) Specification 2014

Summary

The *Education Services for Overseas Students (Calculation of Refund) Specification 2014* (the specification) is a legislative instrument made by the Minister for Education, pursuant to subsections 46D(7) and 47E(4) of the *Education Services for Overseas Students Act 2000* (the ESOS Act).

As a consequence of the passage of the *Education Services for Overseas Students Amendment Bill 2013* in February 2014, the legislative instruments that previously applied to refunds no longer align with the new provisions of the ESOS Act. This specification therefore revokes the following legislative instruments that previously applied to refunds:

- *Education Services for Overseas Students (Calculation of unspent pre-paid fees – other cases) Determination 2012 (No. 1)*;
- *Education Services for Overseas Students (Calculation of unspent pre-paid fees – provider default) Determination 2012 (No. 1)*.

The specification combines those two instruments to simplify the process for calculating refunds under different scenarios, in line with the Government's tuition protection measures for international students.

The purpose of the specification is to ensure that, where a provider is required to refund a student as a result of circumstances outside the student's control, the calculation of that refund is consistent and fair. In addition, this specification provides clearer direction on the refund calculation methodology where the Tuition Protection Service (TPS) is required to refund students in situations where a provider has failed to discharge its obligations under the ESOS Act.

The specification outlines the method for working out the amount of 'unspent tuition fees' for the purposes of calculating refunds in cases where a provider is unable to deliver the course to a student (that is, in instances of provider default). It also specifies the method for calculating the refund amount payable to students in cases where the student defaults **but** the provider has failed to enter into a compliant written agreement with the student or where the default is a result of the student being refused a visa (that is, student default – refund in other cases).

In all cases, the amounts for refunds calculated under the specification are minimum amounts, and providers are able to pay higher refunds if they wish to.

Authority

Subsection 46D(7) of the ESOS Act provides that the Minister may make a legislative instrument specifying the method for working out the amount of unspent tuition fees for the purposes of subsection 46D(6) of the ESOS Act. Similarly, subsection 47E(4) of the ESOS Act provides that the Minister may make a legislative instrument specifying the method for working out the amount to be refunded to a student for the purposes of subsection 47E(2) of the ESOS Act.

Purpose and operation

Provider default calculation

Where a registered provider has defaulted in providing a course to a student (as defined in section 46A of the ESOS Act), section 46D of the Act requires the provider to either provide the student with an alternative acceptable course, or pay a refund of unspent tuition fees for the course.

Where the provider is paying the student a refund, subsection 46D(6) of the ESOS Act provides that the amount of the refund is worked out in accordance with the method specified in a legislative instrument made under subsection 46D(7).

The specification provides that the amount of the refund for the purposes of subsection 46D(6) of the Act is that proportion of the tuition fees received by the provider that represents the part of the course that will not be delivered to the student (and for which the student has paid) because of the provider's default. Mathematically, this is the product of the weekly tuition fees for the course (as defined in section 5 of the specification) and the number of weeks remaining in the paid portion of the course after the day on which the relevant default occurred (as set out in section 6 of the specification).

Note that if the provider does not pay the refund, it may be paid by the TPS Director out of the Overseas Students Tuition Fund (OSTF), under Division 4 of Part 5 of the ESOS Act.

Student default calculation – refund in other cases

Under section 47B of the ESOS Act, providers are required to enter into written agreements with each international student. The written agreement must set out the refund requirements that apply if the student defaults. Section 47D of the Act generally requires providers to pay refunds to defaulting overseas students or intending overseas students in accordance with the written agreement.

However, exceptions to a student being refunded in accordance with the written agreement are outlined in sections 47D(5) and 47E(1)(b)(i) of the ESOS Act —that is, where the student has been refused a student visa, or where a provider has not entered into an agreement with the student that meets the requirements of section 47B of the Act. In these instances, the provider must pay the student a refund under section 47E of the Act, worked out in accordance with the method specified in the legislative instrument made under subsection 47E(4). The specification outlines the method to be used for calculating the amount of refund that should be paid to the student.

Provider does not enter into a compliant written agreement

Where a provider fails to enter into a written agreement with a student in relation to refunds of course fees, the specification provides that the student be refunded using the same calculation as the provider default method – that is, the amount of the refund is the product of the weekly tuition fees for the course and the number of weeks remaining in the course after the day on which the relevant default occurred. The rationale for using this calculation is that the provider's failure to enter into an agreement with the student is a failure by the provider to satisfy its obligation under section 47B of the Act, and therefore the consequence should be commensurate with the provider default provisions.

Student visa is refused but student has paid fees

The refund calculation method for situations where a student is refused a visa is designed so that neither students nor providers are financially disadvantaged.

Where a student is refused a visa and is yet to commence the course, providers must refund all course fees except for a modest sum that represents administrative costs the provider may have incurred in relation to that student. In this case, the course fees comprise both tuition and non-tuition fees received by the provider in respect of the student.

In circumstances where a student is refused a visa but has already commenced the course, the amount of refund payable by the provider is the unspent portion of the tuition fees received by the provider, that is, the product of the weekly tuition fees for the course and the number of weeks remaining in the paid portion of the course after the day on which the relevant default occurred. The provider does not need to refund any non-tuition fees it has received in respect of the student.

Again, if the provider does not pay the required refund, it may be paid by the TPS Director out of the Overseas Students Tuition Fund (OSTF), under Division 4 of Part 5 of the ESOS Act.

Consultation

The Department of Education undertook consultation on the draft instrument during March/April 2014 with the TPS Director, Overseas Students Ombudsman, ESOS regulators (Australian Skills Quality Authority, Tertiary Education Quality and Standards Agency, States and Territories) and representatives from Universities Australia, the Australian Council for Private Education and Training, the Council of Private Higher Education, the Independent Schools Council of Australia, TAFE Directors Australia, English Australia, International Education Association of Australia, ISANA- International Education Association and the Council of International Students Australia.

Regulation Impact Statement

This refund calculation method for cases of provider default and refund in other cases is similar to the method applied under the previous instrument and the regulatory impact is of a minor nature. The Office of Best Practice Regulation has assessed the specification as having a minor regulatory impact and has advised that a Regulation Impact Statement is not required.

The regulatory impact of the introduction of the TPS, to which this determination relates, was considered in the ESOS (Tuition Protection Service and other related measures) Regulatory Impact Statement and was assessed as adequate by the OBPR on 2 February 2012.

A post-implementation review of the TPS is being progressed by the Department.

Notes on sections

Sections 1 and 2 – Name and commencement of specification

Sections 1 and 2 of the specification are formal provisions setting out the name and commencement date of the specification.

The specification will commence at the same time as Schedule 1 to the *Education Services for Overseas Students Amendment Act 2014* (the Amendment Act). That Schedule will commence on 1 July 2014.

Section 3 - Revocation

Section 3 revokes the current instruments made under subsections 46D(6) and 47E(4) of the ESOS Act that specify the methods of calculating refunds of tuition fees. Those instruments are replaced by this specification, with effect from the specification's commencement. However, the effect of item 23 of Schedule 1 to the Amendment Act is that those instruments continue to apply to calculating refunds where the default day (as defined in section 5 of the ESOS Act) occurred prior to the commencement of the specification.

Sections 4, 5 and 6 – Definitions etc.

Expressions that are used both in the ESOS Act and the specification have the same meaning in the specification as they do in the Act (paragraph 13(1)(b) *Legislative Instruments Act 2003*) – for example, “course”, “default”, “default day”, “registered provider”, “overseas student” and “tuition fee”. Sections 4, 5 and 6 go on to define particular expressions used in the specification.

Sections 5 and 6 define the two factors used in the calculation of refunds under sections 7, 8 and 10 of the specification. The ***weekly tuition fee*** for a course is the total tuition fee for the course, divided by the number of calendar days in the course, then multiplied by 7. This amount is rounded up to the nearest whole dollar.

The number of ***weeks in default period*** is essentially the number of weeks (i.e. calendar days divided by 7, rounded up to the nearest whole number) in the unexpired portion of the course after the default day, in relation to which the provider has received tuition fees. Thus, if the provider has received tuition fees for the whole course, the weeks in default period would be the number of weeks between the default day and the end of the course. On the other hand, if the provider has only received an instalment of tuition fees for part of the course, the weeks in default period would be the number of weeks between the default day and the end of the part of the course to which the instalment relates.

(When counting the number of calendar days from the default day to the end of the period to which payment relates, the default day is not included in the count – subsection 36(1) *Acts Interpretation Act 1901*).

Section 7 – Method for working out amount of refund of tuition fees in event of provider default

Section 7 sets out the method for calculating the refund amount payable by a provider in default for the purposes of subsection 46D(6) of the ESOS Act. The refund amount is the product of the weekly tuition fee for the course and the weeks in default period.

Section 8 – Method for working out amount of refund if provider does not enter into compliant student default agreement

Section 8 sets out the method for calculating the refund amount payable by a provider for the purposes of subsection 47E(2) of the ESOS Act, where the student has defaulted and the

provider has not entered into a written agreement with the student that meets the requirements of section 47B of the Act.

The refund amount in that case is the product of the weekly tuition fee for the course and the weeks in default period.

Section 9 – Method for working out amount of refund in event student fails to start course due to visa refusal

Section 9 sets out the method for calculating the refund amount payable by a provider for the purposes of subsection 47E(2) of the ESOS Act, where a student has been refused a visa and that has resulted in the student defaulting by either:

- failing to start a course at the location for the course on the agreed starting day for the course; or
- withdrawing from the course on or before the agreed starting day for the course.

In those circumstances, the amount of the refund payable by the provider is the sum of both tuition and non-tuition fees received by the provider in respect of the student (the *course fees*), less a small amount to account for administrative costs that the provider may have incurred in enrolling the student and undertaking other activities in preparation for providing the course to the student. The small amount of course fees that the provider can retain on account of administrative costs is either: 5% of the course fees received by the provider in respect of the student prior to the default day; or \$500; whichever is less.

Section 10 – Method for working out amount of refund in event of other student default

Section 10 sets out the method for calculating the refund amount payable by a provider for the purposes of subsection 47E(2) of the ESOS Act, where a student has defaulted and neither section 8 nor section 9 of the specification applies.

In practice, this section will apply where the student has been refused a visa and that refusal has resulted either in the student withdrawing from the course after it has started, or in the student failing to pay an amount he or she is liable to pay the provider to undertake the course (i.e. because of the application of paragraph 47D(5)(a) and subparagraph (5)(b)(ii) or (iii) of the Act).

The refund amount in that case is the product of the weekly tuition fee for the course and the weeks in default period.

Statement of Compatibility with Human Rights

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

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This specification 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 Specification

The specification is made by the Minister for Education under subsection 46D(7) and subsection 47E(4) of the *Education Services for Overseas Students Act 2000* (the ESOS Act).

The tuition protection mechanisms under the ESOS legislative framework are designed to protect the considerable investment international students make in an Australian education and to protect and enhance Australia's reputation as a destination of choice for international students. This determination is one of a number the Minister may make to specify in greater detail some of the Act's requirements.

This specification is central to the operation of the ESOS legislative framework as it details the calculations that apply to ensure providers refund students appropriately and fairly in circumstances where a provider defaults, a student has been refused a student visa, or, where a provider has not entered into a written agreement that complies with section 47B of the ESOS Act.

Human rights implications

Right to education

This determination engages the right to education, contained in Article 13 of the International Covenant on Economic, Social, and Cultural Rights. In particular, this determination has an effect on the provision of education services to international students by bodies corporate registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS).

In particular, this instrument has a beneficial effect on overseas students by specifying the calculations that apply where students are owed a refund. It ensures refunds are paid in a consistent manner when they are a result of circumstances outside the student's control such as provider default, visa refusal or where the provider has failed to fulfil its obligation and enter into a written agreement with the student. The clarification and consistency in the specification provide improved protection for overseas students.

To the extent that the right to education is engaged, this right is promoted by the specification.

Conclusion

This specification is compatible with human rights because it advances the protection of human rights.