

Explanatory Statement

Australian Education (Financial Assistance for Non-participating States and Territories) Determination 2018

Summary

The *Australian Education (Financial Assistance for Non-participating States and Territories) Determination 2018* (Determination) is made by the Minister for Education (pursuant to item 44 of Schedule 1 to the *Australian Education Amendment 2017* (Amendment Act)), under subsections 65(3) and 65(7) of the *Australian Education Act 2013* as in force immediately before 1 January 2018 (being the *Australian Education Act 2013* (Compilation No.5) (Federal Register of Legislation reference no. C2017C00205) (Act)).

The purpose of the Determination is to define the total amount of 2017 recurrent school funding entitlement for non-participating schools for the purposes of the Act, and to define the manner in which that total amount will be divided between the non-participating States and Territories.

Background

The Amendment Act amended a range of measures in the *Australian Education Act 2013* including by, amongst other things, repealing Part 4 of the Act (Recurrent funding for non-participating schools through a national specific purpose payment). This amendment was made to remove the distinction between participating and non-participating states and territories to align with the Government's policy to fund states and territories under consistent needs-based funding arrangements.

However, item 44 of Schedule 1 to the Amendment Act states that the *Australian Education Act 2013* as in force immediately before the commencement of item 44 (1 January 2018) continues to apply in relation to financial assistance for years before 2018. The Determination is made pursuant to item 44 of Schedule 1 to the Amendment Act, under subsection 65(3) and 65(7) of the Act, in respect of financial assistance to be provided for the year 2017.

Prior to the repeal of Part 4 of the *Australian Education Act 2013*, the Act provided for (amongst other things) Commonwealth recurrent funding for "participating schools" and "non-participating schools". Participating schools are all non-government schools, and government schools of "participating States and Territories"; non-participating schools are government schools of States and Territories that are not participating States and Territories.

The *Australian Education (Participating States and Territories) Determination 2014*, made under subsection 14(2) of the Act, determined the participating States and Territories as New South Wales, South Australia and the Australian Capital Territory. All other States and Territories are therefore non-participating States and Territories.

Recurrent funding for participating schools is calculated as set out in Part 3 of the Act, which provides for needs based funding (consisting of a base amount per student for a school plus loadings for educational disadvantage) and associated transitional arrangements.

Recurrent funding amounts for non-participating schools were set out in Part 4 of the Act. Essentially, Part 4 provided for the calculation of a total amount payable for all non-participating

schools by multiplying the amount payable for non-participating schools in the previous year by an indexation factor determined by the Minister. These funding arrangements are consistent with the previous arrangements for government schools under the *Federal Financial Relations Act 2009*. While Part 4 was repealed by the Amendment Act on 1 January 2018, item 44 to Schedule 1 to the Amendment Act is a transitional provision that provides that the *Australian Education Act 2013* as in force immediately before the commencement of item 44 (1 January 2018) continues to apply in relation to financial assistance for the years before 2018. Accordingly, the Determination is made in relation to financial assistance for the year 2017 in accordance with Part 4.

In particular, paragraph 65(2)(b) of the Act provides that, for any year other than 2014, the total amount of financial assistance that is payable to all non-participating States and Territories for a year for non-participating schools located in those States or Territories, is the total amount payable for the previous year under Part 4 for those States and Territories, indexed in the manner determined by the Minister by legislative instrument made under subsection 65(3) of the Act. The determination the Minister may make, by legislative instrument under subsection 65(3) of the Act, must include a statement of the total amount for that year (in this instance, being 2017).

Subsection 65(7) of the Act then provides that the Minister may determine, by legislative instrument, the manner in which the total amount of financial assistance worked out under subsection 65(2) of the Act, is to be divided between the non-participating States and Territories.

Subsection 65(8) of the Act provides that in making a determination in relation to the indexation and distribution of financial assistance under subsections 65(3) and 65(7) of the Act, the Minister must have regard to any relevant arrangement of the non-participating States and Territories (in their capacity as approved authorities for government schools). For the purposes of the Determination, the relevant arrangement is the *Intergovernmental Agreement on Federal Financial Relations* (IGA FFR). The Minister has had regard to the IGA FFR in making this Determination.

Operation of determination

The Determination:

1. sets out the manner in which the total amount of financial assistance payable for the previous year (2016) for non-participating States and Territories under Part 4 of the Act, is indexed to produce the total amount payable to non-participating States and Territories for non-participating schools for 2017 (section 5);
2. sets out the total amount of financial assistance payable to non-participating States and Territories for 2017 (section 6); and
3. sets out how the total amount of financial assistance payable to non-participating States and Territories for 2017 is divided between the non-participating States and Territories (section 7).

The Determination gives effect to the commitment by the Australian Government to pay Commonwealth schools funding to States and Territories on the same basis, irrespective of whether they are participating or non-participating under the Act. That is, the total amount payable to non-participating States and Territories for 2017, and the amount for each non-participating State and Territory, are the same as they would have been had the amounts been calculated under Part 3 of the Act (recurrent funding for participating schools).

Consultation

There was extensive consultation with representatives of State and Territory education authorities in the lead up to the preparation of the Act. Consultation included significant negotiation on funding matters, including specifically on the requirements under the Act for a State or Territory to be funded as a participating State or Territory under Part 3, or as a non-participating State or Territory under Part 4. The Determination gives effect to the outcome of that consultation.

Recurrent funding for government schools is calculated on the basis of government school student information reported by States and Territories. Consultation occurs with States and Territories throughout the relevant year on both the accuracy of this data and the funding calculations that will occur as a result.

Regulatory Impact Statement

This Determination does not require a Regulatory Impact Statement or a Business Cost Calculator Figure. The Determination gives effect to a policy already enacted through the Amendment Act, and is simply the mechanism to give effect to that policy.

Authority

Pursuant to item 44 of Schedule 1 of the Amendment Act, the Determination is made under subsections 65(3) and (7) of the Act.

Explanation of Provisions

Sections 1 and 2

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

Section 3

Section 3 provides that the Determination is made under the authority of subsections 65(3) and 65(7) of the Act, and item 44 in Schedule 1 of the Amendment Act.

Section 4

Section 4 of the Determination defines the term “the Act” for the purposes of the Determination.

Section 5

Section 5 of the Determination provides that the manner of indexing the total amount payable for the previous year for non-participating States and Territories under Part 4 of the Act is by multiplying that amount by **1.105614190797**. This indexation factor ensures that the non-participating States and Territories receive as much Commonwealth funding for their schools as if they had been participating States and Territories.

Section 6

Section 6 of the Determination sets out the total amount of financial assistance that is payable under Part 4 of the Act to non-participating States and Territories for 2017, as **\$4,082,663,937**.

Section 7

Section 7 of the Determination sets out how the total amount mentioned in section 6 is to be divided amongst the non-participating States and Territories, as follows:

Item	Non-participating State or Territory	Amount:
1	Victoria	\$1,534,852,121
2	Queensland	\$1,551,450,770
3	Western Australia	\$619,970,554
4	Northern Territory	\$193,689,562
5	Tasmania	\$182,700,930

Statement of Compatibility with Human Rights

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

Australian Education (Financial Assistance for Non-participating States and Territories) Determination 2018

This legislative instrument 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 Legislative Instrument

The Amendment Act amended a range of measures in the *Australian Education Act 2013* including by, amongst other things, repealing Part 4 of the Act (Recurrent funding for non-participating schools through a national specific purpose payment). This amendment was made to remove the distinction between participating and non-participating states and territories to align with the Government's policy to fund states and territories under consistent needs-based funding arrangements.

However, item 44 of Schedule 1 to the Amendment Act states that the *Australian Education Act 2013* as in force immediately before the commencement of item 44 (1 January 2018) continues to apply in relation to financial assistance for years before 2018. The Determination is made pursuant to item 44 of Schedule 1 to the Amendment Act, under subsection 65(3) and 65(7) of the Act, in respect of financial assistance to be provided for the year 2017.

Prior to the repeal of Part 4 of the *Australian Education Act 2013*, the *Australian Education Act 2013* provided for (amongst other things) Commonwealth recurrent funding for "participating schools" and "non-participating schools". Participating schools are all non-government schools, and government schools of "participating States and Territories"; non-participating schools are government schools of States and Territories that are not participating States and Territories.

The *Australian Education (Participating States and Territories) Determination 2014*, made under subsection 14(2) of the Act, determined the participating States and Territories as New South Wales, South Australia and the Australian Capital Territory. All other States and Territories are therefore non-participating States and Territories.

Recurrent funding for participating schools is calculated as set out in Part 3 of the Act, which provides for needs based funding (consisting of a base amount per student for a school plus loadings for educational disadvantage) and associated transitional arrangements.

Recurrent funding amounts for non-participating schools were set out in Part 4 of the Act. Essentially, Part 4 provided for the calculation of a total amount payable for all non-participating schools by multiplying the amount payable for non-participating schools in the previous year by an indexation factor determined by the Minister. These funding arrangements are consistent with the previous arrangements for Commonwealth funding of government schools under the *Federal Financial Relations Act 2009* (FFR Act).

The *Australian Education (Financial Assistance for Non-participating States and Territories) Determination 2018* (Determination) is made under Part 4 of the Act, and:

1. sets out the manner in which the total amount payable for 2016 for non-participating States and Territories under Part 4 of the Act is indexed to produce the total amount payable to non-participating States and Territories for non-participating schools for 2017 (section 5);
2. sets out that total amount (section 6); and
3. sets out how the total amount is divided between the non-participating States and Territories (section 7).

The Determination gives effect to the commitment by the Australian Government to pay Commonwealth schools funding to States and Territories on the same basis, irrespective of whether they are participating or non-participating under the Act. That is, the total amount payable to non-participating States and Territories for 2017, and the amount for each non-participating State and Territory, are the same as they would have been had the amounts be calculated under Part 3 of the Act (recurrent funding for participating schools).

Human rights implications

The Determination engages the following human rights:

- the right to education contained in Article 13 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, Article 28 of the *Convention on the Rights of the Child (CRC)*, and Article 24 of the *Convention on the Rights of Persons with Disability (CRPD)*; and
- the right to equality and non-discrimination contained in Articles 2 and 26 of the *International Covenant on Civil and Political Rights (ICCPR)*, Article 2 of the CRC, and Articles 3, 4, 5 and 13 of the CRPD.

Right to Education

The Determination engages the right to education. The right to education recognises the right of everyone to education, and the important personal, societal, economic and intellectual benefits of education (see Article 13(1) of the ICESCR). The right to education requires that functioning educational institutions and programs are available in sufficient quantity within a country (see Article 13(2) of the ICESCR), including that primary and secondary education is available and accessible, safe, and appropriately resourced. The right to education also recognises the liberty of parents and guardians to choose non-government schools for their children, provided the school conforms to minimum educational standards set by the state (see Article 13(3) of the ICESCR)

The CRPD and CRC contain similar provisions to Article 13 of the ICESCR. The CRC recognises the right of the child to education, on the basis of equal opportunity (see Article 28 of the CRC) and that the education of the child is to be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential (see Article 29 of the CRC). The CRPD also recognises the right of persons with disabilities to education, and that persons with disabilities should not be excluded from quality, free primary and secondary education on the basis of disability (see Article 24 of the CRPD).

The Determination engages and promotes the right to education by providing financial assistance to non-participating States and Territories in accordance with the Act. The Determination facilitates the targeting of resourcing to schools to assist them in providing appropriately resourced education to all school-aged students.

The Determination is compatible with the right to education.

Right to Equality and Non-Discrimination

The Determination engages the right to equality and non-discrimination. The right to equality and non-discrimination affirms that all human beings are born free and equal, and presupposes that all individuals have the same rights and are deserving of the same respect (see Article 2 of the ICCPR). It also recognises that it may be necessary at times to treat people differently in order to achieve equality. Articles 2 and 26 in the ICCPR specify grounds on which differential treatment among persons or groups is impermissible, and includes discrimination based on race, colour, sex, language, religion, political or other opinion, national or social original, property, birth or other status. Article 2(2) of the CRC requires parties to take all appropriate measures to ensure the child is protected against all discrimination or punishment on the basis of status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members. The CRPD also affirms the right to equality and non-discrimination for persons with disabilities (see Articles 3, 4, 5 and 12 of the CRPD).

This Determination engages and promotes the right to equality and non-discrimination by qualifying schools in non-participating States and Territories to be eligible for financial assistance in accordance with funding entitlements provided for in Part 3 of the Act. This enables comparable access to recurrent funding for non-participating States and Territories as participating States and Territories, thereby increasing equity in access for all school-aged children to school education.

The legislative instrument is therefore compatible with the right to equality and non-discrimination.

Conclusion

This legislative instrument is compatible with human rights and specifically promotes the human rights to education, equality and non-discrimination.

Dan Tehan
Minister for Education