

EXPLANATORY STATEMENT

Education Services for Overseas Students (TPS Levies) (Risk Rated Premium and Special Tuition Protection Components) Instrument 2019

Summary

The *Education Services for Overseas Students (TPS Levies) (Risk Rated Premium and Special Tuition Protection Components) Instrument 2019* (the ‘Instrument’) is made by the Tuition Protection Service (TPS) Director, pursuant to sections 9 and 10 of the *Education Services for Overseas Students (TPS Levies) Act 2012* (the *ESOS (TPS Levies) Act*).

The TPS arrangements commenced on 1 July 2012, and are designed to establish a universal tuition protection framework. This framework benefits overseas students affected by a provider default, by providing students with placement options or refunds where placement is not available. The arrangements are also 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 Instrument commences on 31 December 2019, and repeals the *Education Services for Overseas Students (TPS Levies) (Risk Rated Premium and Special Tuition Protection Components) Instrument 2018* (F2018L01832) on 1 January 2020.

Authority

Subsection 54B(f) of the *Education Services for Overseas Students Act 2000* (the *ESOS Act*) provides that one of the TPS Director’s functions is to, by way of a legislative instrument, specify a method for working out the risk rated premium component of the TPS levy for a year for the purposes of subsection 9(3) of the *ESOS (TPS Levies) Act*, and a special tuition protection component of the TPS levy for a year for the purposes of subsection 10(2) of the *ESOS (TPS Levies) Act*. This Instrument is made by the TPS Director under sections 9 and 10 of the *ESOS (TPS Levies) Act*.

Purpose and operation

The purpose of this Instrument is to specify a method for working out the amount payable by all *non-exempt* Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) registered providers for the risk rated premium and special tuition protection components of the TPS levy.

The Minister has prescribed the following entities under the *Education Services for Overseas Students (TPS Levies) (Levy exemptions) Determination 2012 (No. 1)* as providers who are exempt from paying the risk rated premium component of the TPS levy: Table A providers under the *Higher Education Support Act 2003*, Government schools, and State or Territory VET institutions. This determination is made under subsection 12(b) of the *ESOS (TPS Levies) Act*. A *non-exempt provider* is any CRICOS registered provider other than the entities covered by this determination, and as provided for in section 5 of the determination.

The TPS levy is payable into the Overseas Student Tuition Fund (the Fund), which is established under section 52A of the *ESOS Act*. The Fund is a special account for the purposes of the *Public Governance, Performance and Accountability Act 2013*.

The TPS Director is accountable for the appropriate and sustainable management of the Fund. This Instrument assists the TPS Director in exercising his or her functions under the *ESOS Act* by maintaining a high level of student protection and ensuring sufficient funds are held in the Fund to refund or place students in the event of provider closures.

Under Part 2 of the *ESOS (TPS Levies) Act*, all CRICOS registered providers are liable to pay a TPS levy for the year. The amount of the TPS levy payable is the sum of:

- the provider’s administrative fee component (section 6 of the *ESOS (TPS Levies) Act*);
- the provider’s base fee component (section 7 of the *ESOS (TPS Levies) Act*);
- the provider’s risk rated premium component (section 9 of the *ESOS (TPS Levies) Act*); and
- the provider’s special tuition protection component (section 10 of the *ESOS (TPS Levies) Act*).

Provider National Registration Process – national registration finalised in the period from 1 January to 31 December 2019

If two or more registrations amalgamate their registration into a single, master registration on CRICOS under the Provider National Registration Process, section 12 of the Instrument provides for the alternative recalculation of risk factors to determine the risk rated premium component of the TPS levy payable.

Administrative and base fees

In 2017, the Australian Government amended the *ESOS Act* and the *ESOS (TPS Levies) Act* to enable the Minister for Education and Training (‘the Minister’) to proactively manage the balance in the Fund by making a legislative instrument to set the administrative and base fee components of the TPS levy.

In October 2017, the Minister made the *Education Services for Overseas Students (TPS Levies) (Administrative and Base Fees) Determination 2017* which reduced the administrative and base fee settings by 75 per cent.

The fees are subject to annual indexation and for 2020 are as follows:

administrative fee for each provider	base fee for each provider
The sum of: \$111 and \$0.57 per enrolment	The sum of: \$223 and \$1.41 per enrolment

These fees remain the same (except for the application of annual indexation) unless the Minister changes them by making a determination.

Risk rated premium component of the TPS levy

Under subsection 9(3) of the *ESOS (TPS Levies) Act*, before the beginning of each year, the TPS Director must, by legislative instrument, specify the following elements of the risk rated premium component of the TPS levy:

- a) percentage for that year;
- b) one or more risk factors that reflect the risk of calls being made on the Fund in respect of registered providers with that factor or those factors;
- c) for each risk factor, the increase factor by which the specified percentage for that year is multiplied.

These three elements allow the risk components for each risk factor to be calculated.

The specified percentage for the risk rated premium in 2020 is 0.07%, the same as the percentage that applied in 2019. The five risk factors to be applied in 2020 are as follows:

1. base risk factor
2. length of operation
3. volatility in overseas student enrolments
4. maximum overseas source country concentration, and
5. non-compliance history.

The risk component of a provider's levy is worked out for each risk factor in accordance with the formula set out in subsection 9(2) of the *ESOS (TPS Levies) Act*, which is reproduced below.

$$\left(\begin{array}{cc} \text{Specified} & \text{Increase factor} \\ \text{percentage} & \text{for the risk factor} \\ \text{for the year} & \text{for the year} \end{array} \right) \times \begin{array}{c} \text{Provider's overseas student} \\ \text{tuition fees} \\ \text{for the previous year} \end{array}$$

That is, the specified percentage for the year is multiplied by the increase factor (or weighting) for each risk factor that applies to a provider. This is then multiplied by the provider's overseas student tuition fee income for the previous year to determine the risk component for that factor.

If a provider has amalgamated registrations on CRICOS, its "provider's overseas student tuition fees" should represent all fees the provider received across all courses the provider delivers at all locations.

Consistent with subsection 9(1) of the *ESOS (TPS Levies) Act*, if more than one risk factor is applicable for a provider for a year (as set out in subsections 7(1), 8(1), 9(1), 10(1) and 11(1) of the Instrument), the provider's risk components for the relevant factors will be added together to calculate the risk rated premium component of the TPS levy.

As an example, if a provider has three risk factors, such as:

- risk factor 'base risk factor' with an increase factor of 1
- risk factor 'length of operation' with an increase factor of 1
- risk factor for 'source country concentration' with an increase factor of 0.3

and this is combined with tuition fee income of \$250,000, then the risk components for the provider would be:

$$0.07/100 \times 1 \times 250000 = \$175 \text{ for base risk}$$

$0.07/100 \times 1 \times 250000 = \175 for length of operation
 $0.07/100 \times 0.3 \times 250000 = \52.50 for source country concentration

The risk rated component of the TPS levy would be the sum of these amounts, that is, a levy of \$402.50 would be payable by this provider to account for the risk rated premium component of the TPS levy.

The following approach, ensuring no disadvantage to providers, is utilised for the calculation of the risk rated premium component of the 2020 TPS levy, in the context of the Provider National Registration process and in accordance with the Instrument:

1. Base risk factor – no change expected as virtually all providers already had an increase factor of 1.0 under the former Payment in arrears risk factor;
2. Length of operation – will be calculated for the resultant merged entity (or registration) as operating for the same period as the oldest registration date which has been amalgamated, commencing from the oldest registration and ending on 31 December 2019;
3. Volatility in overseas student enrolments - will be calculated for the resultant merged entity (or registration) by using the sum of student enrolments for all registrations that were amalgamated into the single registration;
4. Maximum overseas students source country concentration – will be calculated for the resultant merged entity (or registration) by using the sum of all nationalities for all registrations that were amalgamated into the single registration;
5. Non-compliance history – will be calculated for the resultant merged entity (or registration), including late payment measure and the sanctions for non-compliance under Division 1 of Subdivision A of section 83 of the *ESOS Act*, in the year 2019.

Special tuition protection component of the TPS levy

Under subsection 10(2) of the *ESOS (TPS Levies) Act*, before the beginning of each year, the TPS Director must, by legislative instrument, specify a percentage for a special tuition protection component of the TPS levy for that year. Subsection 10(3) of the *ESOS (TPS Levies) Act* provides that the percentage specified can be zero.

A registered provider's special tuition protection component for a year is worked out in accordance with the formula in subsection 10(1) in the *ESOS (TPS Levies) Act*, as reproduced below.

$$\frac{\text{Specified percentage for the year}}{\times} \frac{\text{Provider's overseas student tuition fees for the previous year}}$$

The Explanatory Memorandum to the *Education Services for Overseas Students (TPS Levies) Bill 2011*, explains that the purpose of subclause 10(2) – the special tuition protection component – is to build additional insurance in the Fund. This component is expressed as a percentage of overseas student tuition fee income, as determined by the TPS Director following advice of the TPS Advisory Board (the Board).

The specified percentage rate for the special tuition protection component for 2020 is zero.

Consultation with TPS Advisory Board

Under subsection 11(2) of the *ESOS (TPS Levies) Act*, in making an instrument, the TPS Director must have regard to any advice of the Board in relation to the instrument, and the sustainability of the Fund.

The Board is appointed by the Minister under section 55D of the *ESOS Act* (taking into account the membership specifications set out in section 55C). The Board currently comprises four non-government sector representatives, selected on the basis of their qualifications and experience in the sector, and five government representatives.

In addition to considering any advice of the Board, in determining the risk rated premium and special tuition protection components of the TPS levy, under subsection 11(3) of the *ESOS (TPS Levies) Act*, the TPS Director may have regard to any other matters he or she considers appropriate.

The TPS Director works extensively with the Australian Government Actuary (AGA) in determining the risk factors and increase factors of the risk rated premium component of the TPS levy. In its advice to the TPS Director dated 23 October 2019, the Board noted it had considered a number of issues including the strategic risk environment, the advice of the AGA, the views of the regulators (the Australian Skills Quality Authority and Tertiary Education Quality and Standards Agency) and industry peak bodies, the findings of the levy review undertaken by the TPS Director and Board and the quantum of funds required for the long-term sustainability of the Overseas Students Tuition Fund (OSTF).

The Board also noted it reviewed the risk factors in consultation with the AGA and that it agreed with the AGA's recommendation that changes be made to the risk scores for the risk factors *Length of operation* and *Variation in overseas student enrolments* to better align with the experience of failure while targeting a similar level of revenue. That is, the Board recommended:

- for '*Length of operation*', reduce the scope to the first two years (rather than five) of operation; and
- for '*Volatility in overseas student enrolments*', reduce the exemption from five years to two years of operation.

The Board also recommended that the Risk factor '*Payment in arrears*' be renamed to '*Base risk factor*' with a uniform risk score of one (1) for all non-exempt providers for the 2020 levy.

Supplementary process requirements

In order to work out the total amount of TPS levy owed, registered providers are required under section 26 of the *ESOS Act* to enter the total of their overseas student tuition fee income for the previous calendar year into the specified field in the Provider Registration and International Student Management System (PRISMS).

Tuition fees is defined at section 7 of the *ESOS Act*. If a registered provider does not provide its overseas student tuition fees for the previous year by the due date, the ESOS agency may take action under Division 1 of Part 6 of the *ESOS Act* against the registered provider.

Before the TPS Director makes a legislative instrument under subsections 9(3) and 10(2) of the *ESOS (TPS Levies) Act*, the Treasurer must approve the legislative instrument in writing, pursuant to subsection 11(4) of the *ESOS (TPS Levies) Act*. The Treasurer approved the Instrument on 16 December 2019.

Consultation with regulators and peak bodies

In making this Instrument, the TPS Director has had regard to advice from the Board.

In finalising its advice and recommendations and consistent with its previous practice, the Board consulted with international education stakeholders and representatives of the two national regulatory bodies: the Australian Skills Quality Authority and the Tertiary Education Quality and Standards Agency.

On 31 July 2019, the Board provided draft recommendations for the 2020 TPS levy settings. The draft fee settings were posted on the TPS website on 26 August 2019, inviting feedback from all CRICOS providers on the proposed settings of the levy.

Consistent with his previous practice, the TPS Director also consulted widely on the Board's draft recommendations before their finalisation. The TPS Director wrote to all international education peak bodies inviting them to provide comments on the proposed levy settings. The TPS Director and the Board Chair either met or spoke on the telephone with the peak bodies and a news item was posted on the TPS website inviting feedback. The feedback was taken into consideration in finalising the settings for the 2020 TPS levy.

Regulatory Impact Statement

The regulatory impact of the introduction of the TPS levy and its four components, to which this Instrument relates, was considered in the ESOS (Tuition Protection Service and other related measures) Regulatory Impact Statement (RIS) which was assessed as adequate by the Office of Best Practice Regulation (OBPR) on 2 February 2012. OBPR also confirmed this Instrument is machinery in nature and has no additional regulatory impact.

OBPR reconfirmed on 22 October 2019 that this Instrument remains machinery in nature and no regulation impact statement (RIS) is required (OBPR reference 25749).

Explanation of Provisions

Part 1 – Introduction

Section 1

Section 1 provides the name of the Instrument.

Section 2

Section 2 sets out the commencement dates of the Instrument. Parts 1 to 3 of the Instrument commence on 31 December 2019 and Schedule 1 of the Instrument commences on 1 January 2020.

Section 3

Section 3 sets out the TPS Director’s legal authority to make the Instrument.

Section 4

Section 4 provides for the amendment or repeal of instruments specified in the Schedules.

Section 5

Section 5 provides definitions for terms used in the Instrument.

The note explains that the expression ‘risk rated premium component’ is used in the Instrument and is defined in the *ESOS (TPS Levies) Act*.

Part 2 – Risk factors for risk rated premium component

Section 6

Section 6 sets out the risk rated premium component of the TPS levy.

Subsection 6(1) provides that 0.07% is the percentage for 2020 for the purposes of paragraph 9(3)(a) of the *ESOS (TPS Levies) Act*.

Subsection 6(2) sets out the risk factors specified for the purpose of paragraph 9(3)(b) of the *ESOS (TPS Levies) Act*.

Each of the risk factors specified at subsection 6(2) are given a numerical value in sections 7 to 11 of this Instrument to provide the relevant increase factors used in the overall calculation of the risk rated premium component of the TPS levy.

Section 7

Section 7 sets out the risk factor of base risk applying to all non-exempt providers (subsection 7(1)).

Subsection 7(2) provides the numerical increase factor for the base risk factor for the purposes of paragraph 9(3)(c) of the *ESOS (TPS Levies) Act*.

Section 8

Section 8 sets out the risk factor of length of operation applying to non-exempt providers (subsection 8(1)).

Subsection 8(2) provides the numerical increase factors for the length of operation broken down by periods of time for the purposes of paragraph 9(3)(c) of the *ESOS (TPS Levies) Act*.

Section 9

Section 9 sets out the risk factor of volatility in overseas student enrolments applying to non-exempt providers that fulfil the criteria specified in paragraphs (a) and (b) of subsection 9(1).

Subsection 9(2) provides the numerical increase factors for the volatility of overseas student enrolments for the purposes of paragraph 9(3)(c) of the *ESOS (TPS Levies) Act* broken down as a percentage and where the provider is an expanding provider (as determined under subsection 9(4) of the Instrument).

Subsection 9(3) provides the numerical increase factors for the volatility of overseas student enrolments for the purpose of paragraph 9(3)(c) of the *ESOS (TPS Levies) Act* broken down as a percentage and where the provider is not an expanding provider (as determined under subsection 9(4) of the Instrument).

Subsection 9(4) sets out the criteria for determining if a provider is an expanding provider.

Subsections 9(5) to 9(9) provide the formulae to work out the percentage of a registered provider's volatility in overseas student enrolments. The resulting percentage is used to determine which numerical increase factor applies to the provider under subsection 9(2) and 9(3) of the Instrument.

Section 10

Section 10 sets out the risk factor of maximum overseas source country concentration applying to non-exempt providers that fulfil the criteria specified in subsection 10(1).

Subsection 10(2) provides the numerical increase factors for the maximum overseas source country concentration for the purposes of paragraph 9(3)(c) of the *ESOS (TPS Levies) Act* broken down as a percentage.

Subsection 10(3) provides the formula to work out the maximum overseas source country concentration percentage and defines the terms 'largest number of overseas student enrolments for a country' and 'total number of overseas student enrolments'.

Section 11

Section 11 sets out the risk factor of non-compliance history applying to non-exempt providers (subsection 11(1)).

Subsection 11(2) provides the numerical increase factor for non-compliance history for the purposes of paragraph 9(3)(c) of the *ESOS (TPS Levies) Act* depending on the number of days a provider has a weighted late payment measure owing.

Subsection 11(3) provides the formulae to work out the weighted late payment measure (paragraphs (a) to (c)), and defines the terms ‘ARC’, ‘ETMC’, and ‘TPSL’.

Section 12

Section 12 sets out the recalculation of risk factors applying when registrations are amalgamated and national registrations on CRICOS are finalised during 2019 (subsection 12(1)).

Paragraph 12(2)(a) provides for the recalculation of the risk factor length of operation. The recalculated risk factor applies to the resultant merged entity (or registration).

Paragraph 12(2)(b) provides for the recalculation of the risk factor volatility in overseas student enrolments, but specifies that the number of overseas student enrolments for a year is the sum of all student enrolments for all registrations.

Paragraph 12(2)(c) provides for the recalculation of the risk factor maximum overseas students source country concentration, but specifies that the sum for all registrations must be used for the number of enrolments for that overseas source country and for the total number of enrolments.

Paragraph 12(2)(d) provides for the recalculation of the risk factor non-compliance history. The recalculated risk factor applies to the resultant merged entity (or registration).

Paragraph 12(2)(e) provides that the overseas student’s tuition fee income for the 2019 year is to be calculated as the sum of the overseas students’ tuition fee income for all registrations that were amalgamated into one single registration.

Part 3 – Special tuition protection component

Section 13

Section 13 sets the specified percentage of the special tuition protection component for 2020 as zero for the purposes of subsection 10(2) of the *ESOS (TPS Levies) Act*.

Schedule 1

Schedule 1 to the Instrument repeals the *Education Services for Overseas Students (TPS Levies) (Risk Rated Premium and Special Tuition Protection Components) Instrument 2018* (F2018L01832) from 1 January 2020.

Statement of Compatibility with Human Rights

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

Education Services for Overseas Students (TPS Levies) (Risk Rated Premium and Special Tuition Protection Components) Instrument 2019

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

Overview of the Instrument

The *Education Services for Overseas Students (TPS Levies) (Risk Rated Premium and Special Tuition Protection Components) Instrument 2019* (the ‘Instrument’) is made by the Tuition Protection Service (TPS) Director, pursuant to subsections 9(3) and 10(2) of the *Education Services for Overseas Students (TPS Levies) Act 2012* (*ESOS (TPS Levies) Act*), and sets out the relevant risk rated premium, and special tuition protection components to assist in the overall calculation of the TPS levy for a provider for a year under section 5 of the *ESOS (TPS Levies) Act*.

The TPS arrangements commenced on 1 July 2012, and are designed to establish a universal tuition protection framework for overseas students. This framework supports overseas students affected by a provider closure by providing students with placement options or refunds where placement is not available. The arrangements are also 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.

The purpose of this Instrument is to specify a method for working out the amount payable by all *non-exempt* Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) registered providers for the risk rated premium and special tuition protection components of the TPS levy.

Human rights implications

Right to education

This Instrument engages the right to education, contained in Article 13 of the *International Covenant on Economic, Social, and Cultural Rights*, insofar as it relates to the provision of high quality education services to international students by education service providers registered under the *Education Services for Overseas Students Act 2000*.

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

The Australian Government has overarching responsibility for protecting the reputation of Australia’s education and training industry and supports the capacity of the international education industry to provide high quality education and training services. The TPS delivers assistance to students by placing students in an alternative course of study or refunds them where there is no suitable alternative course.

The Instrument will enhance the right to education by ensuring that the TPS Director specifies a method for working out the amount payable by all *non-exempt* CRICOS registered providers for the risk rated premium and special tuition protection components of the TPS levy, after having regard to the advice of the TPS Advisory Board and the sustainability of the Overseas Students Tuition Fund ('the Fund').

This will ensure that the Fund remains within the current target range of \$35 million to \$60 million recommended by the Australian Government Actuary and endorsed by the TPS Advisory Board. Education providers will only be charged the amount of levy required to maintain the safe reserve in the Fund as recommended by the Australian Government Actuary.

Conclusion

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