

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Education

***Education Services for Overseas Students Act 2000***

***Education Services for Overseas Students (Calculation of Refund) Instrument 2024***

### **AUTHORITY**

Subsection 46D(7) of the *Education Services for Overseas Students Act 2000* (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.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary such instrument. The repeal of the *Education Services for Overseas Students (Calculation of Refund) Specification 2014* (the Former Instrument) by the Schedule to this instrument relies on that provision.

### **PURPOSE AND OPERATION**

The purpose of the *Education Services for Overseas Students (Calculation of Refund) Instrument 2024* (the Instrument) is to repeal and replace the Former Instrument, which was due to sunset (or automatically repeal) on 1 October 2024 in accordance with the *Legislation Act 2003*. The Instrument specifies methods for working out the amount of unspent tuition fees and amounts to be refunded for the purposes of sections 46D and 46E of the ESOS Act.

Where a registered provider has defaulted in providing a course to a student (failed to start or finish providing a course to a student, as set out in section 46A of the ESOS Act), section 46D of the ESOS 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. Subsection 46D(6) of the ESOS Act provides that where a refund is payable, the refund amount is calculated in accordance with the method specified in a legislative instrument made under subsection 46D(7). The Instrument specifies the method for calculating a refund in those circumstances.

Under section 47B of the ESOS Act, providers are required to enter into written agreements with each international student, setting out the refund requirements if the student defaults. Section 47D of the ESOS Act generally requires providers to pay refunds to defaulting

overseas students or intending overseas students in accordance with the written agreement. However, section 47D(5) and subparagraph 47E(1)(b)(i) of the ESOS Act set out exceptions to this general requirement where the student has been refused a student visa or where a provider has not entered into an agreement with a student that meets the requirements of section 47B of the ESOS Act. In these instances, the provider must pay the student a refund under section 47E of the ESOS Act, calculated in accordance with the method specified in the legislative instrument made under subsection 47E(4). The Instrument outlines the method to be used for calculating those refund amounts.

### **IMPACT ANALYSIS**

In July 2024 a preliminary impact analysis assessment by the Office of Impact Analysis determined that a detailed impact analysis is not required under the Australian Government's Policy Impact Analysis Framework. Reference number OIA24-07391 refers to this assessment.

### **CONSULTATION**

During 2023 and 2024 the Department of Education (the department) undertook consultation with the Tuition Protection Service (TPS) Director on the draft Instrument. The TPS Director determines if a student is eligible for a refund paid out of the Overseas Students Tuition Fund (OSTF). Staff supporting the TPS Director calculate and arrange a refund of unspent tuition fees for the student. The TPS Director did not raise any issues regarding the draft Instrument.

In June and August 2024, the TPS Advisory Board was advised the Former Instrument was due to sunset on 1 October 2024 and provided with opportunities to comment on the draft Instrument. No issues were raised regarding the draft. The TPS Advisory Board provides advice and makes recommendations to the TPS Director on the settings of the TPS levies. The international TPS levy is paid into the OSTF.

The TPS Advisory Board includes representatives from peak organisations for the international education sector. Education providers were not directly consulted as remaking the Instrument without changes will ensure continuity of arrangements with no additional cost or impact to education providers.

### **COMMENCEMENT**

The Instrument commences on the day after it is registered on the Federal Register of Legislation.

## 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 (Calculation of Refund) Instrument 2024***

The *Education Services for Overseas Students (Calculation of Refund) Instrument 2024* (the 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 purpose of the Instrument is to repeal and replace the *Education Services for Overseas Students (Calculation of Refund) Specification 2014* (the Former Instrument), which was due to sunset (or automatically repeal) on 1 October 2024 in accordance with the *Legislation Act 2003*. The Instrument specifies methods for working out the amount of unspent tuition fees and amounts to be refunded for the purposes of the sections 46D and 46E of the ESOS Act.

Where a registered provider has defaulted in providing a course to a student (failed to start or finish providing a course to a student, as set out in section 46A of the ESOS Act), section 46D of the ESOS 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. Subsection 46D(6) of the ESOS Act provides that where a refund is payable, the refund amount is calculated in accordance with the method specified in a legislative instrument made under subsection 46D(7). The Instrument specifies the method for calculating a refund in those circumstances.

Under section 47B of the ESOS Act, providers are required to enter into written agreements with each international student, setting out the refund requirements if the student defaults. Section 47D of the ESOS Act generally requires providers to pay refunds to defaulting overseas students or intending overseas students in accordance with the written agreement. However, section 47D(5) and subparagraph 47E(1)(b)(i) of the ESOS Act set out exceptions to this general requirement where the student has been refused a student visa or where a provider has not entered into an agreement with a student that meets the requirements of section 47B of the ESOS Act. In these instances, the provider must pay the student a refund under section 47E of the ESOS Act, calculated in accordance with the method specified in the legislative instrument made under subsection 47E(4). The Instrument outlines the method to be used for calculating those refund amounts.

#### **Human rights implications**

##### Right to education

The Instrument engages the right to education in Article 13 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). The right to education recognises the important personal, societal, economic and intellectual benefits of education.

Australia's strong domestic regulatory system underpins the quality of all courses delivered to domestic and overseas students, creating a strong international education system and allowing Australia to promote and support the right to education. The ESOS Act provides additional protections for overseas students and upholds Australia's reputation for quality education and training services.

The Instrument is compatible with the right to education because, by specifying the calculations that apply where students are owed a refund as a result of circumstances outside a student's control such as visa refusal, provider default, or provider failure to enter into a required written agreement, it provides clarity in relation to providers' refund obligations. By clearly setting out relevant calculations, the Instrument helps to ensure that refunds are calculated and paid consistently, and that overseas students are protected as they pursue education in Australia.

### **Conclusion**

The Instrument is compatible with human rights because it promotes the right to education.

**Minister for Education, the Hon Jason Clare MP**

**EDUCATION SERVICES FOR OVERSEAS STUDENTS (CALCULATION OF REFUND)**  
**INSTRUMENT 2024**

**EXPLANATION OF PROVISIONS**

**Section 1: Name**

1. This section provides that the name of the instrument is the *Education Services for Overseas Students (Calculation of Refund) Instrument 2024* (Instrument).

**Section 2: Commencement**

2. This section specifies that the Instrument commences on the day after it is registered on the Federal Register of Legislation.

**Section 3: Authority**

3. This section provides that the Instrument is made under subsections 46D(7) and 47E(4) of the *Education Services for Overseas Students Act 2000* (the ESOS Act).

**Section 4: Definitions**

4. This section defines Act and student for the purposes of the Instrument. It also notes that a number of key expressions used in the Instrument are already defined in section 5 of the ESOS Act.

**Section 5: Schedules**

5. This is a technical provision that explains that the instrument that is specified in the Schedule to the Instrument, being the *Education Services for Overseas Students (Calculation of Refund) Specification 2014* (the Former Instrument), is repealed as set out in the items in the Schedule concerned.

**Section 6: Meaning of *weekly tuition fee***

6. This section sets out the meaning of weekly tuition fee for the purposes of the Instrument. It provides that 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.

### **Section 7: Meaning of weeks in default period**

7. This section sets out the meaning of the term “weeks in default period” for the purposes of the Instrument.
8. The “weeks in default period” in relation to a course during which a registered provider or a student defaulted, and for which the provider received payment of tuition fees in respect of the student, means the number of weeks calculated by dividing the number of calendar days from the default day to the end of the period to which the payment relates by 7, and rounding up to the nearest whole number.
9. This means that, 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.
10. Note that 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, because of the operation of subsection 36(1) of the *Acts Interpretation Act 1901*.

### **Section 8: Method for working out amount of refund of tuition fees in event of provider default**

11. This section sets out the method for calculating the refund amount payable by a provider in event of a provider default for the purposes of subsection 46D(6) of the ESOS Act. The refund amount is calculated by multiplying the weekly tuition fee for the course with the “weeks in default period” (worked out under section 7).
12. This is the proportion of 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.

### **Section 9: Method for working out amount of refund if provider does not enter into compliant student default agreement**

13. This section sets out the method for calculating the refund amount payable by a provider for the purposes of subsection 47E(2) of the ESOS Act, if a registered provider is required to provide a refund to a student under subsection 47E(1) of the ESOS Act because the provider has not entered into an agreement with the student

that meets the requirement of section 47B of the ESOS Act. The refund amount in that case must be calculated by multiplying the weekly tuition fee for the course with the “weeks in default period” (worked out under section 7).

14. 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 ESOS Act, and therefore the consequence should be commensurate with the provider default provisions.

### **Section 10: Method for working out amount of refund in event of student visa refusal**

15. This section sets out the method for calculating the refund amount payable by a provider for the purposes of subsection 47E(2) of the ESOS Act, if a registered provider is required to provide a refund to a student under subsection 47E(1) of the ESOS Act, and the provider is not required to pay a refund to the student because of subsection 47D(5) of the ESOS Act.
16. Subsection 10(2) provides that if the student was refused a student visa, and the refusal caused the student to fail to start the course at the location on the agreed day, consistent with subparagraph 47D(5)(b)(i) of the ESOS Act, the amount of the refund payable by the provider is the course fees received by the provider in respect of the student 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.
17. Subsection 10(3) defines “course fees” as the sum of the tuition fees received by the provider in respect of the student and the non-tuition fees (if any) received by the provider in respect of the student.
18. Subsection 10(4) provides that, if the student was refused a student visa and the refusal caused the student to withdraw from the course at that location, or fail to pay an amount that they were liable to pay the provider to undertake the course, consistent with subparagraphs 48D(5)(b)(ii) and (iii) of the ESOS Act, the amount of refund payable by the provider is the product of the weekly tuition fees for the course and the weeks in default period.

### **Schedule 1 - Repeals**

#### **Item 1 – The whole of the instrument**

19. Schedule 1 repeals the Former Instrument.