

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Education

Australian Education Act 2013

Australian Education (Commonwealth Share for Government Schools) Regulations 2024

Authority

Subsection 130(1) of the *Australian Education Act 2013* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed by the regulations, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Subsection 130(3) of the Act provides that the regulations may allow the Minister for Education (the Minister) to determine matters in relation to anything in relation to which regulations may be made. Subsection 130(4) of the Act provides that the regulations may provide in relation to a matter by applying, adopting or incorporating any matter contained in any other instrument or other writing as in force or existing from time to time. Subsection 130(5) of the Act provides that, before the Governor-General makes a regulation for the purposes of a provision listed at paragraphs 130(5)(a) or (b), the Minister must consult, and have regard to any relevant decisions of, the Ministerial Council.

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 any such instrument.

Legislative background

The Act is the principal legislation by which the Australian Government provides Commonwealth financial assistance for schools.

Under the Act, financial assistance is provided to states and territories for distribution to entities approved to receive financial assistance under the Act, including approved authorities for government schools. Entities approved to receive financial assistance under the Act must satisfy and continue to satisfy the conditions of approval outlined in the Act.

The Act was amended by the *Better and Fairer Schools (Funding and Reform) Act 2024* (the Amendment Act). The Amendment Act was given Royal Assent on 29 November 2024.

The *Australian Education (Commonwealth Share for Government Schools) Regulations 2024* (the Regulations) contain provisions that prescribe the Commonwealth share of financial assistance to States and Territories for government schools, for a year from 2025 onwards.

The Act commenced on 1 January 2014. The Regulations do not amend the *Australian Education Regulations 2023*, and will be made as separate, standalone regulations. This is appropriate as the Regulations are exempt from disallowance under subsection 35A(5) of the Act.

Under subparagraph 130(5)(a)(iv) of the Act, before the Governor-General makes a regulation for the purposes of subsection 35A(1), which prescribes the Commonwealth share

for government schools, the Minister must consult, and have regard to any relevant decision of, the Ministerial Council.

Section 17 of the *Legislation Act 2003* (the Legislation Act) provides that the rule-maker must be satisfied that there has been undertaken any consultation that is appropriate and reasonably practicable before making a legislative instrument.

Purpose and operation of regulations

The Commonwealth, State and Territory governments provide recurrent funding to schools each year. The total amount of recurrent funding for a school payable by the Commonwealth each year is calculated in accordance with the formula in section 32 of the Act. One of the elements of the formula is the Commonwealth share for the school for the year, which is the proportion of the total amount of recurrent funding for a school that is payable by the Commonwealth.

Subsection 35A(1) of the Act was introduced by the Amendment Act and provides that the Commonwealth share for a government school is the percentage prescribed by regulations (subject to subsection 35A(2) and section 35B of the Act). The years for which the regulations can prescribe a percentage are from 2025 onwards. This is because subitem 12(1) of the Amendment Act provides that the repeal and substitution of section 35A of the Act by Part 2 of Schedule 1 to the Amendment Act applies in relation to 2025 and later years.

The purpose of the Regulations is to prescribe the Commonwealth share for a government school in a State or Territory for a year, for the purposes of subsection 35A(1) of the Act. The Regulations operate to prescribe a Commonwealth share of 20% or more for government schools in all States and Territories from 2025 onwards. The percentages prescribed in the Regulations align with the Commonwealth share for a government school set out in intergovernmental agreements between the Commonwealth and the States and Territories.

The Regulations are made in accordance with subsection 35A(2) of the Act, which provides that regulations made for the purposes of subsection 35A(1) must not prescribe a Commonwealth share for a government school for a year that is:

- less than 20% (subparagraph 35A(2)(a)(i) of the Act);
- less than 40% if the school is located in the Northern Territory and the year is 2029 or a later year (subparagraph 35A(2)(a)(ii) of the Act);
- less than a percentage that has previously been prescribed by regulations made for the purposes of subsection 35A(1) as the Commonwealth share for the school for that year or the previous year (paragraph 35A(2)(b) of the Act).

The Regulations are the first regulations to be made for the purposes of subsection 35A(1) of the Act. As such, the Regulations will set a funding floor. Paragraph 35A(2)(b) of the Act prevents future regulations from prescribing a percentage that is less than the percentage prescribed in the Regulations. Future regulations may prescribe a higher percentage, and if they do, that higher percentage becomes the new funding floor in line with paragraph 35A(2)(b) of the Act.

Section 35B of the Act provides for historical funding arrangements in relation to the Commonwealth share set for government schools for the years between 2018 and 2024, and its operation does not impact the Regulations.

The Regulations are consequential to the amendments made by Part 2 of Schedule 1 to the Amendment Act, which will commence by proclamation on 18 December 2024. The Regulations will commence on 18 December 2024, which is the same day on which Part 2 of Schedule 1 to the Amendment Act commences by proclamation.

Regulation Impact Statement

The Office of Impact Analysis (OIA) has agreed an Impact Analysis is not required in relation to the Regulations (OIA23-05144).

Commencement

The Regulations will commence on 18 December 2024.

Consultation

The Minister consulted, and considered all feedback provided by members of the Ministerial Council, comprised of all State and Territory Education Ministers, on the Regulations. Responses from Ministerial Council members were broadly supportive of the Regulations. The content of the Regulations was updated to reflect the outcomes of this consultation, including negotiations as to the Commonwealth share for jurisdictions set out in intergovernmental agreements. This consultation process adhered to the requirements of subparagraph 130(5)(a)(iv) of the Act.

The Minister consulted with and considered all responses provided by Independent Schools Australia, the National Catholic Education Committee and First Nations bodies including the Coalition of Peaks and the National Aboriginal and Torres Strait Islander Corporation on the Regulations. These stakeholders did not propose any changes to the content of the Regulations.

Parliamentary Scrutiny

The Regulations are exempt from disallowance under section 42 of the Legislation Act. This is because subsection 35(5) of the Act provides regulations made for the purposes of subsection 35(1) are exempt from disallowance.

As the Regulations are exempt from disallowance, a Statement of Compatibility with Human Rights is not required (see subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*).

Details of the proposed *Australian Education (Commonwealth Share for Government Schools) Regulations 2024*

Section 1 – Name

This section provides that the title of the Regulations is the *Australian Education (Commonwealth Share for Government Schools) Regulations 2024*.

Section 2 – Commencement

This section provides that the Regulations commence on 18 December 2024. The intention is for the Regulations to commence at the same time as Part 2 of Schedule 1 to the *Better and Fairer Schools (Funding and Reform) Act 2024* (the Amendment Act). Part 2 of Schedule 1 to the Amendment Act commences on the earlier of a single day to be fixed by Proclamation, or the first day after the end of the period of 6 months from the day the Act receives Royal Assent.

Section 3 – Authority

This section provides that the proposed Regulations are made under the *Australian Education Act 2013* (the Act).

Section 4 – Commonwealth share for government schools

This section prescribes, for the purposes of subsection 35A(1) of the Act, the Commonwealth share for a government school for a year in each State and Territory.

The table in section 4 of the Regulations sets out each State and Territory, and prescribes the Commonwealth share for a government school in that State or Territory for each of the following years: 2025, 2026, 2027, 2028 and 2029 or a later year.

The percentages prescribed in the Regulations as the Commonwealth share for a government school in these jurisdictions aligns with the amount of the Commonwealth share as agreed in intergovernmental agreements.

For a government school in Western Australia, Tasmania, the Australian Capital Territory and the Northern Territory, the Commonwealth share is prescribed above 20% for each year from 2025 onwards. This is a result of these jurisdictions being party to the Better and Fairer Schools Agreement. The Commonwealth share prescribed in the Regulations for a government school in each of these jurisdictions will reflect the agreed transitional rates set out in each jurisdiction's Bilateral Agreement.

For a government school in New South Wales, Victoria, Queensland and South Australia, the Commonwealth share is prescribed as 20% for each year from 2025 onwards. A Commonwealth share of 20% is prescribed because these jurisdictions are party to an interim school funding agreement for 2025.

The percentages prescribed for a government school in each State and Territory are at or above the amounts mentioned in paragraph 35A(2)(a) of the Act. Because the Regulations are the first set of regulations that prescribe a Commonwealth share for subsection 35A(1) of the

Act, none of the prescribed percentages are less than any previously prescribed percentage. Therefore, the Regulations are validly made in accordance with the conditions on the regulation-making power set out in paragraphs 35A(2)(a) and (b) of the Act.