

EXPLANATORY STATEMENT

Issued by the authority of the Tuition Protection Service Director

Education Services for Overseas Students (TPS Levies) Act 2012

Education Services for Overseas Students (TPS Levies) (Risk Rated Premium and Special Tuition Protection Components) Instrument 2022

AUTHORITY

Paragraph 54B(f) of the *Education Services for Overseas Students Act 2000* (ESOS Act) provides that a function of the Tuition Protection Service Director (TPS Director) is to make a legislative instrument each year for the purposes of subsections 9(3) and 10(2) of the *Education Services for Overseas Students (TPS Levies) Act 2012* (the Act).

Subsection 9(3) of the Act requires the TPS Director, before the beginning of each year, to make a legislative instrument specifying certain matters in relation to the risk rated premium component of the TPS levy. Subsection 10(2) of the Act requires the TPS Director, before the beginning of each year, to make a legislative instrument specifying a percentage for that year for the special tuition protection component of the TPS Levy.

Subsection 11(1) of the Act requires the matters in subsection 9(3) and 10(2) to be included in the same legislative instrument.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides 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. The repeal of the *Education Services for Overseas Students (TPS Levies) (Risk Rated Premium and Special Tuition Protection Components) Instrument 2021* (F2021L01891) (the Former Instrument) at Schedule 1 to the *Education Services for Overseas Students (TPS Levies) (Risk Rated Premium and Special Tuition Protection Components) Instrument 2022* (the Instrument) is made in reliance on this power.

PURPOSE AND OPERATION

The TPS arrangements, including the TPS levy, commenced on 1 July 2012 and are designed to establish a universal tuition protection framework in respect of overseas students. 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 overseas students make in an Australian education, and to protect and enhance Australia's reputation as a destination of choice for overseas students.

Under Part 2 of the Act, all providers registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) on 1 January of a year are liable to pay a TPS levy for the year. The amount of the TPS levy payable is the sum of a provider's:

- administrative fee component (section 6 of the Act);
- base fee component (section 7 of the Act);
- risk rated premium component (section 9 of the Act); and
- special tuition protection component (section 10 of the Act).

The administrative fee and base fee components are determined in a legislative instrument made by the Minister and are not dealt with in the Instrument.

The purpose of the Instrument is to specify 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. A non-exempt provider is any CRICOS registered provider that is not exempted by the Minister under paragraph 12(b) of the Act from paying the risk rated premium component of the TPS levy.

To provide ongoing relief to the international education sector in recognition that COVID-19 pandemic challenges continue, the TPS Director has set the risk rated premium component largely in line with the settings for the 2022 TPS levy, and has only made minor changes to the student volatility risk factor and the percentage for the risk rated premium component. The TPS Director has set the special tuition protection component at 0%.

With the international education sector emerging from the COVID-19 pandemic, international borders reopening and the Australian Government's business support ceasing, calls on the Overseas Students Tuition Fund (the Fund) may revert to medium-term levels. Acknowledging this risk and following advice from the Australian Government Actuary (AGA) and the TPS Advisory Board (the Board), the TPS Director has increased the percentage for the risk rated premium component and made changes to the student volatility risk factor.

The Explanatory Memorandum to the Act explains that the purpose of the special tuition protection component is to build additional insurance in the Fund. The Fund is currently within its target range and therefore the TPS Director considers it is not necessary to impose a value for the special tuition protection component.

Subsection 11(4) of the Act provides that before the TPS Director makes a legislative instrument setting the risk rated premium and special tuition protection components for the TPS levy, the Treasurer must approve the legislative instrument in writing. The Treasurer approved the Instrument on 16 December 2022.

REGULATORY IMPACT

The regulatory impact of the introduction of the TPS levy and its four components, including the risk rated premium component and special tuition protection component to which the

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 the Instrument is machinery in nature and has no additional regulatory impact, and therefore no RIS is required (OBPR ID: 25749).

FINANCIAL IMPACT

The Instrument will result in a projected revenue of approximately \$1.6 million from the risk rated premium component of the TPS levy.

Given the funds are credited to a special account, and are derived from industry contributions, the funds cannot be directed toward any other program or portfolio, as the funds can only be appropriated for the purposes of the special account.

In determining the matters relevant to the calculation of the risk rated premium component and special tuition protection component of the TPS levy, the TPS Director considered not only the sustainability of the Fund, but also the impact of current economic conditions on businesses and education in Australia. The TPS Director's focus and intention in determining those matters was on supporting Australian businesses.

COMMENCEMENT

The Instrument commences on 31 December 2022 and repeals the Former Instrument on 1 January 2023.

CONSULTATION

Consultation with the TPS Advisory Board

Under subsection 11(2) of the 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 (in line with the membership requirements set out in section 55C of that Act). The Board currently comprises up to seven non-government sector representatives, selected based on their qualifications and experience in the sector, and six government representatives.

The Board has a role in providing advice to the TPS Director on the setting of the risk rated premium and special tuition protection components of the TPS levy. One of the representatives on the Board is a representative from the AGA. The AGA prepares an in-depth report for the Board modelling revenue and sector impact based on the draft settings and using industry data supplied by the Department of Education as an evidence base for decision making. In its advice to the TPS Director dated 26 October 2022 on the recommended settings for the risk rated premium and special tuition protection components of the TPS levy, 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 (ASQA) and Tertiary Education Quality and Standards Agency (TEQSA)) and industry peak bodies, the impact of the COVID-19 pandemic on the sector, and the quantum of funds required for the long-term sustainability of the Fund.

In recognition that the sector continues to face COVID-19 pandemic challenges and that calls on the Fund could revert to medium-term levels with the ceasing of the Australian Government's business support, the Board supported the re-adoption of most of the 2022 settings in relation to the risk rated premium component and special tuition protection component to provide ongoing relief to the sector.

The Board recommended changing the percentage of the risk rated premium component from 0.0% to 0.04% and changing the student volatility risk factor to reflect that if a registered provider has less students in 2022 than in 2021, it should attract a higher risk factor. The Board also recommended that all providers with no overseas student enrolments in 2022, or more overseas student enrolments in 2022 than 2021, should have a zero risk factor.

In making the Instrument, the TPS Director has accepted the Board's advice. The Board's final advice was published on the TPS website (<https://tps.gov.au>) on 9 November 2022.

Consultation with regulators and peak bodies

In finalising its advice and recommendations, and consistent with its previous practice, the Board and the TPS Director consulted with international education stakeholders and representatives of the two national regulatory bodies: ASQA and TEQSA.

Specifically, the Board and the TPS Director consulted with the following peak bodies:

- Universities Australia
- Independent Tertiary Education Council Australia
- Australian Government Schools International
- TAFE Directors Australia
- Independent Higher Education Australia
- English Australia
- International Education Association of Australia
- Independent Schools Australia
- Council of International Students Australia
- National Union of Students

On 12 September 2022, the Board provided draft recommendations to the TPS Director for the 2023 TPS levy settings. The Board's draft advice was posted on the TPS website (<https://tps.gov.au>) on 13 September 2022, inviting feedback from all CRICOS registered providers on the proposed settings of the levy.

In September and early October 2022, the TPS Director conducted eight information and consultation sessions around the country and online, inviting feedback on the draft settings

for the TPS levy. Over 400 education providers participated in these sessions and/or provided feedback via email.

Key issues from the consultation sessions which were shared with the Board included concerns regarding visa processing delays, the implications of the student volatility risk factor imposing a higher risk factor for registered providers with declining student numbers and the maximum overseas source country concentration risk factor. Whilst these issues were raised by stakeholders, they were also countered with an agreement that the levy collection for 2023 was supported.

No adjustments to the Board's draft advice were deemed necessary as a result of these significant consultations. In a growth period with borders reopening, the increase in the student volatility risk factor for providers with a decline in enrolments was considered appropriate, as, if providers were declining in these conditions, it was a risk to the Fund and to overseas students. COVID has also demonstrated the value of diverse source countries as a strategy to manage risk, so maintaining the maximum overseas source country concentration risk factor at its previous setting (as set out in the Former Instrument) was considered prudent.

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 2022

The *Education Services for Overseas Students (TPS Levies) (Risk Rated Premium and Special Tuition Protection Components) Instrument 2022* (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 TPS arrangements, including the TPS levy, commenced on 1 July 2012 and are designed to establish a universal tuition protection framework in respect of overseas students. 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 overseas students make in an Australian education, and to protect and enhance Australia's reputation as a destination of choice for overseas students.

Under Part 2 of the *Education Services for Overseas Students (TPS Levies) Act 2012* (the Act), all providers registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) on 1 January of a year are liable to pay a TPS levy for the year. The amount of the TPS levy payable is the sum of a provider's:

- administrative fee component (section 6 of the Act);
- base fee component (section 7 of the Act);
- risk rated premium component (section 9 of the Act); and
- special tuition protection component (section 10 of the Act).

The administrative fee and base fee components are determined in a legislative instrument made by the Minister and are not dealt with in the Instrument.

The purpose of the Instrument is to specify 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. A non-exempt provider is any CRICOS registered provider that is not exempted by the Minister under paragraph 12(b) of the Act from paying the risk rated premium component of the TPS levy.

To provide ongoing relief to the international education sector in recognition that COVID-19 pandemic challenges continue, the TPS Director has set the risk rated premium component largely in line with the settings for the 2022 TPS levy, and has only made minor changes to the student volatility risk factor and the percentage for the risk rated premium component. The TPS Director has set the special tuition protection component at 0%.

With the international education sector emerging from the COVID-19 pandemic, international borders reopening and the Australian Government's business support ceasing, calls on the Overseas Students Tuition Fund (the Fund) may revert to medium-term levels. Acknowledging this risk and following advice from the Australian Government Actuary (AGA) and the TPS Advisory Board (the Board), the TPS Director has increased the percentage for the risk rated premium component and made changes to the student volatility risk factor.

The Explanatory Memorandum to the Act explains that the purpose of the special tuition protection component is to build additional insurance in the Fund. The Fund is currently within its target range and therefore the TPS Director considers it is not necessary to impose a value for the special tuition protection component.

Subsection 11(4) of the Act provides that before the TPS Director makes a legislative instrument setting the risk rated premium and special tuition protection components for the TPS levy, the Treasurer must approve the legislative instrument in writing. The Treasurer approved the Instrument on 16 December 2022.

Human rights implications

Right to education

The Instrument promotes 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 overseas students by education service providers registered under the *Education Services for Overseas Students Act 2000*.

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 Instrument assists the TPS Director to manage the Overseas Tuition Protection Fund (the Fund) and ensure that sufficient funds are credited to the Fund. The Fund supports the TPS framework, which assists overseas students by placing them in alternative courses of study or providing refunds in the event of a provider default (that is, the provider is unable to continue to provide the course to the student). The management of the balance of the Fund will ensure that the Fund remains within the current target range of \$35 million to \$60 million as recommended by the Australian Government Actuary and endorsed by the TPS Advisory Board (which provides advice to the TPS Director on the setting of the risk rated premium and special tuition protection components of the TPS levy).

Conclusion

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

Melinda Hatton, TPS Director

EDUCATION SERVICES FOR OVERSEAS STUDENTS (TPS LEVIES) (RISK RATED PREMIUM AND SPECIAL TUITION PROTECTION COMPONENTS) INSTRUMENT 2022

EXPLANATION OF PROVISIONS

PART 1—INTRODUCTION

Section 1: Name

1. This section specifies the name of the instrument as the *Education Services for Overseas Students (TPS Levies) (Risk Rated Premium and Special Tuition Protection Components) Instrument 2022* (the Instrument).

Section 2: Commencement

2. This section sets out the commencement dates of the Instrument. Parts 1 to 3 of the Instrument commence on 31 December 2022 and Schedule 1 of the Instrument, which repeals the *Education Services for Overseas Students (TPS Levies) (Risk Rated Premium and Special Tuition Protection Components) Instrument 2021* (the Former Instrument) commences on 1 January 2023.

Section 3: Authority

3. The Instrument is made by the TPS Director under sections 9 and 10 of the *Education Services for Overseas Students (TPS Levies) Act 2012* (the Act).

Section 4: Definitions

4. This section provides definitions for terms used in the Instrument. Many of the definitions are self-explanatory or are the same as in the *Education Services for Overseas Students Act 2000* (ESOS Act).
5. The definitions of *annual registration charge* and *entry to market charge* in the Instrument refer to those charges as they existed in the *Education Services for Overseas Students (Registration Charges) Act 1997* (ESOS (Registration Charges) Act), prior to the repeal of the relevant provisions on 1 January 2022.
6. The annual registration charge and entry to market charge imposed by the ESOS (Registration Charges) Act are the applicable charges prior to 1 January 2022 for the purposes of the Instrument.
7. *Risk management* is defined for the purposes of item 6 of subsection 11(2) of the Instrument.
8. Item 6 provides that an increase factor applies to a provider where the provider applies for renewal of registration and, due to *risk management*, is renewed for a

period less than the maximum period allowed. The maximum period allowed under the ESOS Act is seven years.

9. The definition of *risk management* ensures that providers who are renewed for a period less than the maximum period allowed are not penalised if the shorter renewal is for administrative purposes. Only providers who are renewed for a shorter period because the ESOS agency considers there are risks involved with a longer renewal period are subject to the increase factor of 1.0 at item 6 of subsection 11(2). This will only be attributed to providers who, due to their risk profile, are given shortened registration renewals.

Section 5: Schedules

10. This section clarifies that Schedule 1 is effective on its terms to repeal the Former Instrument.

PART 2—RISK FACTORS FOR RISK RATED PREMIUM COMPONENT

Section 6: Risk rated premium component

11. This section sets out the risk rated premium component of the TPS levy.
12. Subsection 6(1) provides that 0.04% is the percentage for 2023 for the purposes of paragraph 9(3)(a) of the Act.
13. Subsection 6(2) sets out the risk factors specified for the purposes of paragraph 9(3)(b) of the Act. The five risk factors to be applied in 2023 are as follows: base risk factor; length of operation; volatility in overseas student enrolments; maximum overseas source country concentration; and non-compliance and registration renewal.
14. The risk rated premium 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 Act, which is reproduced below.

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

15. Each of the risk factors specified at subsection 6(2) are given a numerical value in sections 7 to 11 of the Instrument to provide the relevant increase factors used in the overall calculation of the risk rated premium component of the TPS levy.
16. In accordance with subsection 9(1) of the 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.

Section 7: Risk factor – base risk factor

17. Section 7 sets out the risk factor, base risk factor, which applies to all non-exempt providers (subsection 7(1)).
18. Subsection 7(2) specifies a numerical increase factor of 1.0 for the base risk factor for the purposes of paragraph 9(3)(c) of the Act.

Section 8: Risk factor – length of operation

19. Section 8 sets out the risk factor, length of operation, which applies to all non-exempt providers (subsection 8(1)).
20. Subsection 8(2) provides the numerical increase factors set out in the table for the length of operation broken down by periods of time for the purposes of paragraph 9(3)(c) of the Act.

Section 9: Risk factor – volatility in overseas student enrolments

21. Section 9 sets out the risk factor, volatility in overseas student enrolments, which applies to non-exempt providers that fulfil the criteria specified in subsection 9(1).
22. Subsection 9(2) provides the numerical increase factors set out in the table for the volatility of overseas student enrolments if the provider is a 'shrinking provider' (as determined under subsection 9(3)), with different increase factors specified depending on the provider's length of operation.
23. Subsection 9(3) provides that a registered provider is a 'shrinking provider' if the provider had overseas student enrolments in 2021 and the number of overseas student enrolments in 2021 was greater than the number of overseas student enrolments in 2022.
24. Subsections 9(4) and 9(5) provide the method for working out a registered provider's volatility in overseas student enrolments. Subsection 9(4) provides that, if a registered provider did not have overseas enrolments in 2022, or the provider is not a shrinking provider, the registered provider's volatility in overseas student enrolments is 0%. Subsection 9(5) provides a formula 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 a shrinking provider under subsection 9(2).
25. Examples of how the risk factor for volatility in overseas student enrolments is calculated for a registered provider are set out below.
 - A non-exempt registered provider, that has been in operation for 4 years, has more than 20 student enrolments and \$600,000 in tuition fee income, had 40 student enrolments in 2022 and 150 student enrolments in 2021. The percentage of the registered provider's volatility in overseas student

enrolments using the formula in subsection 9(5) would be 73%. As the provider has been in operation for 4 years, its risk factor would be 2.6.

- A non-exempt registered provider, that has been in operation for 6 years, has more than 20 student enrolments and \$760,000 in tuition fee income, had 300 student enrolments in 2022 and 210 student enrolments in 2021. The registered provider would not be a shrinking provider under subsection 9(3), and the registered provider's volatility in overseas student enrolments would be 0% (in line with subsection 9(4)).

26. As a temporary COVID-19 relief measure, the TPS Director has set the risk factor for providers that are not shrinking providers, to zero on the basis the drivers of increasing student enrolments in 2023 will be different from those in pre-COVID times. With the return of overseas students, it is expected registered providers may experience unusually high growth in student enrolments.

Section 10: Risk factor – maximum overseas source country concentration

27. Section 10 sets out the risk factor, maximum overseas source country concentration, which applies to non-exempt providers that fulfil the criteria specified in subsection 10(1).
28. Subsection 10(2) provides the numerical increase factors set out in the table for the maximum overseas source country concentration broken down as a percentage for the purposes of paragraph 9(3)(c) of the Act.
29. 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: Risk factor – non-compliance and registration renewal

30. Section 11 sets out the risk factor, non-compliance and registration renewal, which applies to all non-exempt providers (subsection 11(1)).
31. Subsection 11(2) specifies the numerical increase factors in the table for non-compliance and registration renewal for the purposes of paragraph 9(3)(c) of the Act.
32. The increase factors set out in the table under subsection 11(2) are subject to subsection 11(3). The factors will apply if a registered provider has a weighted late payment measure, had action mentioned in section 83 of the ESOS Act taken against it in 2022, or if the provider applied under section 10D of the ESOS Act to renew its registration and, for risk management reasons, the period of registration set out in the notice given in 2022 is less than the maximum period allowed.
33. The table is intended to operate on the basis that only one of items 1-4 can apply (given that a provider can only have one late payment measure, depending on

whether, and how late, it has paid its charges and levies in the past), but that items 5 and 6 could apply as well (depending on whether compliance action was taken against the provider under section 83 of the ESOS Act, or whether the provider was renewed for less than the maximum period due to risk management). This means that a provider may have an applicable factor in column 3 for one, two or three items (that is, one of items 1-4, and possibly also the factor that applies for items 5 and/or 6).

34. In view of this, subsection 11(3) provides that where more than one item in the table at subsection 11(2) applies, the increase factor is the sum of the factors in column 3.
- For example, if a registered provider has a weighted late payment measure of 30 days or more (item 1), had action mentioned in section 83 of the ESOS Act taken against it in 2022 (item 5) and also applied under section 10D of the ESOS Act to renew its registration and, for risk management reasons, the period of registration in the notice is less than the maximum period allowed (item 6), then the increase factor would be 4 (2.0 plus 1.0 plus 1.0).
35. Subsection 11(4) provides the formula to work out the weighted late payment measure (paragraphs (a) to (c)), and defines the terms 'ARC', 'CARC', 'EMC', and 'TPSL'.

Section 12: Recalculation of risk factors when registrations amalgamated and national registration on CRICOS is finalised during 2022

36. Section 12 sets out the recalculation of risk factors when a provider amalgamates 2 or more registrations on CRICOS into a single registration through the national registration process in 2022. If a provider has amalgamated registrations on CRICOS, its overseas student tuition fees should represent all fees the provider received across all courses the provider delivers at all locations for its amalgamated registration.
37. Paragraph 12(2)(a) provides for the recalculation of the risk factor, length of operation. The recalculated risk factor applies to the resultant amalgamated registration.
38. Paragraph 12(2)(b) provides for the recalculation of the risk factor, volatility in overseas student enrolments, based on treating the number of overseas student enrolments for a year as the sum of all student enrolments for all registrations.
39. Paragraph 12(2)(c) provides for the recalculation of the risk factor, maximum overseas students source country concentration, specifying that the sum of enrolments for all registrations must be used for the number of enrolments for that overseas source country and for the total number of enrolments.
40. Paragraph 12(2)(d) provides for the recalculation of the risk factor, non-compliance and registration renewal. The recalculated risk factor applies to the resultant amalgamated registration.

41. Paragraph 12(2)(e) provides that the overseas student's tuition fee income for the 2022 year is to be calculated as the sum of the overseas students' tuition fee income for the courses in relation to all registrations that were amalgamated into the single registration.

PART 3 – SPECIAL TUITION PROTECTION COMPONENT

Section 13: Special tuition protection component

42. Under subsection 10(2) of the 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 Act provides that the percentage specified can be zero.
43. Section 13 sets the specified percentage of the special tuition protection component for 2023 as zero for the purposes of subsection 10(2) of the Act.
44. The purpose of the special tuition protection component is to build additional insurance in the Overseas Tuition Protection Fund (the Fund). The Fund is currently within its target range and therefore the TPS Director considers it is not necessary to impose a value for the special tuition protection component of the levy.

SCHEDULE 1—REPEALS

Item 1: the whole of the instrument

45. Schedule 1 to the Instrument repeals the Former Instrument from 1 January 2023.

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