



Provider default obligations under the ESOS Act

Guide

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Introduction

The *Education Services for Overseas Students 2000* (the ESOS Act) requires training providers to provide tuition assurance for overseas students for courses for which they have paid, and refunds where applicable.

Providers have certain obligations in situations where they default in relation to an overseas student, or intending overseas student. Registered providers also have obligations to report defaults, and the actions they take after defaulting, in relation to an overseas student.

This guide is designed to assist providers registered under the ESOS Act with their compliance obligations under the ESOS Framework. It has been developed specifically for providers that are registered with and regulated by the Australian Skills Quality Authority (ASQA).

Providers that are registered by other ESOS agencies, such as the Tertiary Education and Skills Quality Agency (TEQSA) or the Department of Education, Skills and Employment (DESE), are encouraged to contact their respective ESOS agency for guidance in circumstances of provider default.

The guide references requirements under the:

- Education Services for Overseas Students Act 2000
- Education Services for Overseas Students (Notifying provider default—requirements for a notice) Determination 2012 (No. 1)
- Education Services for Overseas Students (Provider default—discharge of obligations—requirements for a notice) Determination 2012 (No. 1)
- Education Services for Overseas Students (Calculation of Refund) Specification 2014
- National Code of Practice for Providers of Education and Training to Overseas Students 2018.

Using this guide

The guide is divided into the following sections:

- [What is a provider default?](#)
- [Summary of default obligations](#)
- [Your student obligations when a default occurs](#)
- [Your reporting obligations when a default occurs](#)

What is a provider default?

The legal definition of a provider default is specified under section 46A of the *Education Services for Overseas Students Act 2000* (ESOS Act):

1. *A registered provider defaults, in relation to an overseas student or intending overseas student and a course at a location, if:*
 - a) *either of the following occurs:*
 - i) *the provider fails to start to provide the course to the student at the location on the agreed starting day;*
 - ii) *the course ceases to be provided to the student at the location at any time after it starts but before it is completed; and*
 - b) *the student has not withdrawn before the default day.*

Causes of provider default

The most common causes of provider default are:

- provider closure
- failure to deliver a particular course.

Other scenarios that may result in provider default include:

- ceasing to provide courses to overseas students altogether
- rejection of an application to renew registration
- a provider decision to reduce student numbers in an existing course at a location, resulting in notification to students that they cannot continue or commence the course at that location
- a provider decision to not commence a student at an agreed location and starting day, without the agreement of that student
- a provider moving a student or students in a course to a different location (whether a registered location or not) without the student agreeing to move location.

Default exception notices

Sometimes a provider default may occur because of a change of legal entity.

For example, a parent company that owns several registered providers that exist as separate legal entities decides to consolidate those entities. Even if this does not otherwise affect current students, technically, the original registered provider has ceased providing the course to its students.

In this situation, ASQA may issue a default exception notice under section 46A(4) of the ESOS Act. This default exception notice will allow you to continue providing courses under the new legal entity title to overseas students who [have already commenced](#).

When to request a default exception notice from ASQA

You should contact ASQA (via enquiries@asqa.gov.au) for a default exception notice, if you meet the following three criteria:

- 1 Your legal entity has changed.
- 2 As a result of a legal entity change, your registration has changed to a new registered provider.
- 3 You currently have studying overseas students in courses that will not change for those students in any way as a consequence of the change to legal entity.

Before serving this notice, ASQA will consider:

- the effect of the change on the delivery of courses and outcomes for students
- any relevant advice provided by another ESOS agency.

If you are granted a default exception notice:

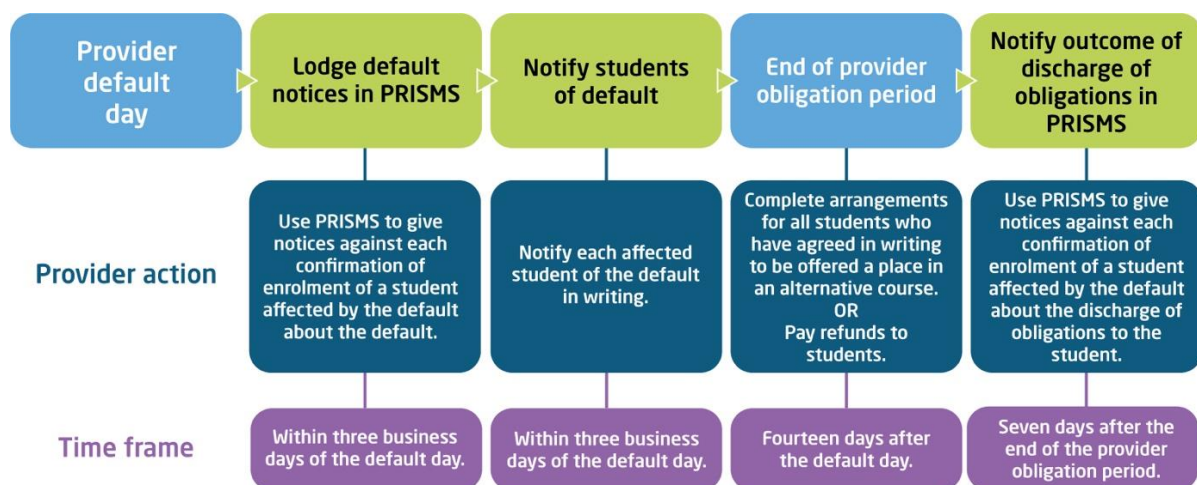
- You **have not defaulted** in respect of overseas students who have commenced their course. You may continue providing the course to these students.
- You **have defaulted** in respect of intending overseas students who have not yet commenced. You must meet the default obligations to these intending overseas students.

If a change of legal entity occurs and ASQA **has not** given you a default exception notice, then you have defaulted in respect of all overseas students for a course at a location.

Summary of default obligations

The diagram below provides a summary of your obligations if you default, and the time frames in which you will need to complete them.

Note: [PRISMS](#) is a secure database developed jointly by the [Department of Education, Skills and Employment](#) and the [Department of Home Affairs](#).



Your student obligations when a default occurs

If you default in respect of an overseas student or intending overseas student, within 14 days you must either:

- [Place the student](#)
- [Refund the student](#)

Provider obligation period

You must fulfil your default obligations to an overseas student within 14 days of the original default day, which is the provider obligation period. The “default day” for a provider default is the day the provider ceased providing the course to its current studying students, or the day the provider failed to start providing the course on the agreed starting day to its intending students.

Meeting your obligations within this period is a statutory requirement under section 46E of the ESOS Act. Failure to do so is an **offence**, and can attract a significant penalty. This offence applies even if you are no longer a registered provider.

Defences for delays—for example, waiting for the student to ‘get in touch’ or ‘submit a particular form’—do not apply in situations of provider default.

Following a default, it is important that you have written evidence of any agreements made with the student as a result of your provider obligations.

Student placement in an alternative course

You can arrange for an overseas student or intending overseas student to be placed in an alternative course. You must have that student’s written agreement.

This alternative course may be:

- a course you offer that is not subject to default
- a course offered by a different provider who has agreed to enrol the student.

An alternative course does not have to be the same course that the student was undertaking prior to the default—it can be a different course that the student is capable of entering and that they have agreed to undertake.

You cannot charge the student any kind of fee for arranging an alternative placement.

Any unspent tuition fees that the student has paid towards their course must be transferred as payment towards the alternative course.

All overseas students must be given the option of refusing an alternative placement. If the overseas student does refuse the placement, they are entitled to a [refund of their unspent tuition fees](#).

Where the student has not paid any tuition fees (or has no remaining unspent tuition fees), they must still be given the option of refusing the placement and accepting a refund. In this case, the provider’s refund to the student will be ‘nil’ tuition fees.

You do not have to arrange for a student to be offered a place in an alternative course. If you do not do so, you are obliged to refund any unspent tuition fees instead.

Arranging an alternative course placement

When arranging a placement for a student after a default, it is important that you:

- clearly advise the student of the default
- make the student aware that they may choose a refund instead of an alternative placement
- ensure that any agreement is in writing—signed and dated—and clearly identifies:
 - the alternative course in which the student has been offered a place
 - the registered provider that will provide the alternative course
 - that the student has been advised of their options, and they have chosen to accept the alternative course offered.

If you have agreed to place a student at an alternative course, but cannot do so within the provider obligation period, you must refund the student any unspent tuition fees before the end of the provider obligation period.

Alternative course suitability

If you are arranging for a student to be placed in an alternative course that you deliver, it is **your responsibility** to ensure they are a suitable candidate for that course.

If the student is being placed with a different registered provider, it is the **responsibility of this alternative provider** to ensure the student is a suitable candidate for the course.

In both cases, the student's English language competency, prior qualifications and work experience should be verified by the responsible provider as being adequate for entry into the alternative course.

Student placement compliance

When placing an overseas student in an alternative course, it is important that you can demonstrate you have complied fully with your provider obligations.

To demonstrate compliance when placing a student in an alternative course, you should:

- retain evidence to show the student has been informed of their options and has freely accepted placement in an alternative course
- hold records for each student who has accepted a place in an alternative course
- ensure each record you retain clearly identifies:
 - full details of each student who has accepted placement; for example, the student's full name, date of birth and provider student ID
 - the date the student accepted placement
 - the course in which the student has accepted a placement
 - the provider who will deliver the alternative course.

To avoid any doubt about the authenticity of a student's acceptance, consider having the signature of the student witnessed at the time of signing.

ASQA monitors compliance with the ESOS Act and associated legislative instruments. You may be found to have breached the ESOS Act if you cannot produce, at ASQA's request:

- a written acceptance for each student who is placed in an alternative course
- evidence to show that you meet your requirements within the provider obligation period of 14 days after the default day.

Anticipated default—intending students

If you have ceased delivering a course but have students who are enrolled but not yet commenced, you must:

- provide a release letter for any student who wishes to transfer to another provider
- make arrangements for the student to be offered a place in an alternative course that the student freely agrees to, and who is suitable for that course, within 14 days, or
- fully refund any intending students within 14 days of the originally agreed starting date.

Within your official transfer policy, you must state that students are entitled to transfer if:

- you fail to deliver the course as outlined in the written agreement
- there is evidence that an overseas student's reasonable expectations about their current course are not being met.

If you default, any intending student seeking to transfer their enrolment must be granted a release free of cost. This is a requirement under Standard 7 of the *National Code of Practice for Provider of Education and Training* (the National Code 2018).

Refunding students

You must refund any unspent tuition fees to affected overseas students in the following situations:

- You have defaulted and chosen not to arrange an alternative course.
- You have defaulted and are unable to arrange an alternative course within 14 days of the default date.
- A student has not accepted the alternative course you have arranged within 14 days after the default date.

Tuition fees under the ESOS Act are fees 'directly related to the provision of a course that the provider is providing, or offering to provide, to the student'.

Refund amount

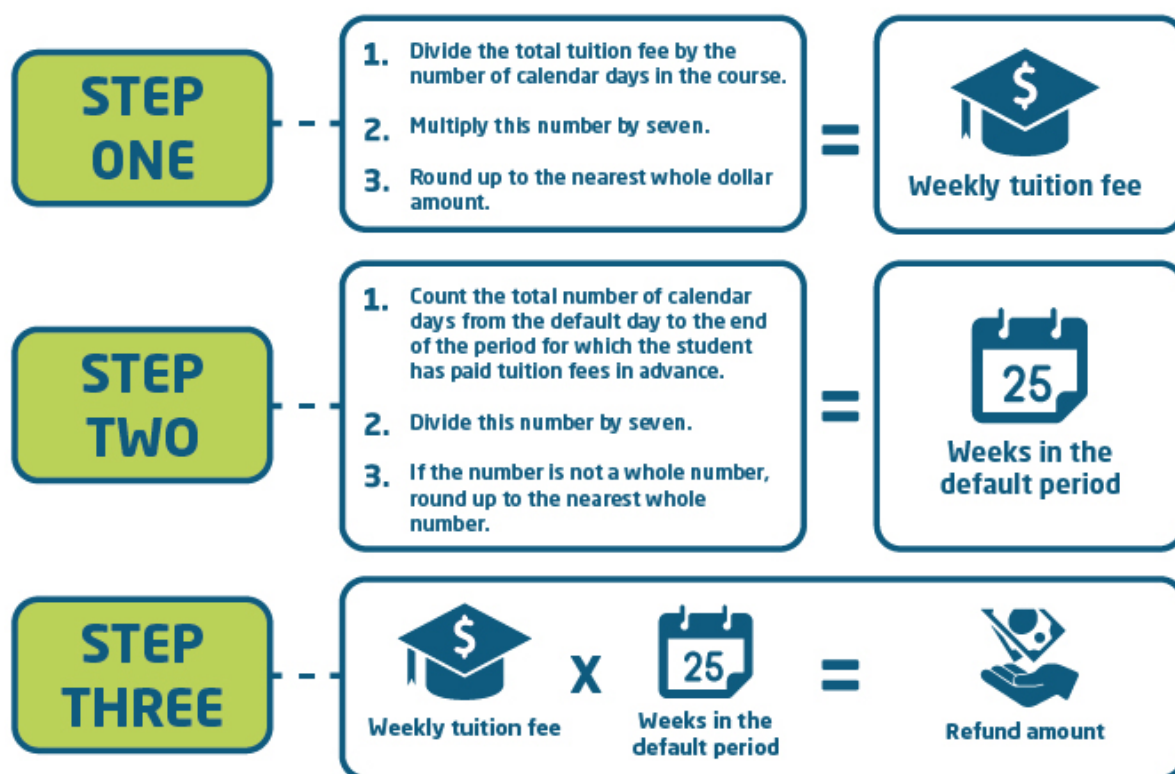
For any overseas student who has paid tuition fees towards a course at a location, but has not yet commenced that course, you must refund 100 per cent of the tuition fees to the student.

For any overseas student who has paid tuition fees and has commenced the course at the location, you may retain the spent portion of the student's fees, but must refund the unspent portion.

The method for calculating the amount of refund owed to an overseas student as a result of a provider default is set out under the Education Services for Overseas Students (Calculation of Refund) Specification 2014 (the ESOS Refund Specification).

How to calculate the refund amount

There are three steps involved in calculating the amount of refund owed to a student:



Applying this calculation is a statutory requirement. You cannot apply your own deductions to the refund of tuition fees for a student.

If you have paid any part of the tuition fees to an agent involved in the recruitment of the overseas student, you **may not deduct** this agent fee from the tuition fees that you must refund the student.

Example—calculating the refund for a student

Lee is undertaking a 48 week Advanced Diploma of Hospitality Management at Hospitality Training 4U. The total tuition fee for the course is \$8200.

Lee has prepaid \$4100 in tuition fees towards his course. He commenced on 7 January 2019.

Hospitality Training 4U has defaulted in respect of Lee and his course on 6 May 2019.

Weekly tuition fee calculation:

\$8200 (total tuition fees) divided by 336 (total calendar days in course) = \$171 (rounded up to nearest dollar amount).

Weeks in default period:

Lee has paid \$4100 to date. This means he has paid in advance up until 24 June 2019.

There are 49 calendar days between 6 May 2019 (the default day) and 24 June (the date student has prepaid until).

49 days divided by 7 = 7 weeks in default period

Refund amount:

\$171 (weekly tuition fee) multiplied by 7 (weeks in default period) = \$1197 refund

Your reporting obligations when a default occurs

You have reporting obligations if you default in relation to a student.

You must lodge reports using the Provider Registration and International Student Management System (PRISMS), and provide:

- detailed information about each overseas student affected by the default
- evidence that you have provided students with tuition assurance or refunds.

How to lodge notices of default in PRISMS

You must give notices of provider default **within three business days** of the default occurring. These notices relate to each overseas student enrolled in, or undertaking, the course affected by the default.

Notices must be lodged in PRISMS for **each confirmation of enrolment (CoE)** of an affected student.

Each notice must include:

- the circumstances of the default (the date the default occurred and the reason for the default)
- the details of each overseas student affected by the default (physical and email address, home and mobile number)
- advice on:
 - whether the provider intends to discharge its obligations to each student
 - how the provider intends to discharge those obligations (if appropriate).

These notices are provided through PRISMS to ASQA (or another relevant ESOS agency) and the TPS Director (The TPS Director manages the Tuition Protection Service for overseas students).

If you have large numbers of overseas students affected by a default, remember that:

- you will need to report the event against each individual CoE
- reports may only be completed by an authorised user of PRISMS.

For guidance in giving these notices in PRISMS, see section 4.29 of the [Provider User Guide](#). This guide is prepared by the Department of Education, Skills and Employment and available on <https://prisms.education.gov.au>.

Lodgement of these notices is a requirement under 46B(2) of the ESOS Act and under the *Education Services for Overseas Students (Notifying provider default – requirements for a notice) Determination 2012 (No. 1)*,

Notifying students of a default

You are required to notify every affected student as soon as practicable after the default.

At a minimum, the notice of default to students must:

- be provided in writing
- be given to every affected overseas student
- specify the relevant course at the location which has ceased being provided.

Your notice should:

- be in plain English and easy to understand
- clearly identify the particular course or courses affected
- clearly identify the provider sending the communication.

You must have a process in place to ensure student contact details are updated at a minimum of every six months, and that important information can be communicated to each overseas student.

Student notification and record-keeping processes are requirements under sections 46D(4) and 21 of the ESOS Act, respectively.

You are not required to advise of how you intend to meet your obligations—alternative placements or refunds—in your initial default communication to students.

Demonstrating reporting compliance—default notification obligations

You may be required to demonstrate your compliance default notification obligations under the ESOS Act.

To demonstrate this compliance, you must:

- ensure all necessary information has been entered in PRISMS against each individual CoE of an overseas student affected by the default
- ensure all information entered in PRISMS is complete, accurate and entered within three business days of the default date—PRISMS will automatically record the date the information was entered
- retain copies of any written communication sent to students, and the date the communication was given
- ensure all written notices are clear, easily understood, and identify the relevant course or courses and defaulting provider

- have a clear procedure, under section 21 of the ESOS Act, to make sure student records are updated at a minimum of every six months.

Discharge of obligations—outcome notification

You are required to produce notices demonstrating the outcome of your obligations following a provider default.

These notices must be lodged in PRISMS within **seven days** of the end of the provider obligation period (the provider obligation period ends 14 days after the default day, and the notices must be lodged seven days after the end of the provider obligation period—so the notices must be lodged no later than 21 days in total after the default day).

Each notice must include:

- details on whether you have discharged your obligations to students
- information on whether you have arranged alternative courses including:
 - details of students you have arranged alternative courses for
 - details of the courses you have arranged
 - evidence of each student's acceptance of an offer of a place in an alternative course
- information on any refunds you have provided including:
 - details of the students you provided refunds to
 - the individual dollar amounts of the refunds provided.

You will need to report the event against each individual student CoE in PRISMS. These reports may only be completed by an authorised PRISMS user.

If you have not discharged your obligations for each overseas student, you must still enter these notices in PRISMS within seven days of the end of the provider default period. In this instance, the notice will state that you have failed to meet your obligations.

For guidance in giving these notices in PRISMS, see section 4.29 of the [Provider User Guide](#). This guide is prepared by DESE and available on <https://prisms.education.gov.au>.

Notices demonstrating the outcome of your obligations are required under sections 46D and 46F of the ESOS Act, and under the *Education Services for Overseas Students (Provider default – discharge of obligations – requirements for a notice) Determination 2012 (No. 1)*.

Demonstrating reporting compliance—outcome notification obligations

You may be required to demonstrate your compliance outcome notification obligations.

To demonstrate this compliance, you must ensure:

- necessary information has been entered against each individual CoE of an overseas student affected by the default
- all information entered into PRISMS is complete, accurate and entered within seven days after the end of the provider obligation period—PRISMS will automatically record the date the information was entered
- information in PRISMS matches other retained records—signed placement agreements, refund receipts and any other relevant records.