Higher Education Support Amendment (Further Streamlining and Other Measures) Bill 2013

Leonie Doyle
Social Policy Section

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Higher Education Support Amendment (Further Streamlining and Other Measures) Bill 2013

Date introduced: 14 February 2013

House: House of Representatives

Portfolio: Tertiary Education, Skills, Science and Research

Commencement: This Act commences on the day after this Act receives Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose of the Bill

The purpose of the Higher Education Support Amendment (Further Streamlining and Other Measures) Bill 2013 is to amend the Higher Education Support Act 2003 to modify the operation of the Higher Education Loan Program (HELP) as it applies to higher education and vocational education and training (VET). The Bill aims to strengthen some aspects of the scheme—for example, by establishing a system of compliance—and streamline others—such as how a change of provider name is made.

Structure of the Bill

There are five Schedules in the Bill:

- **Schedule 1** establishes automatic revocation of approval of FEE-HELP and VET FEE-HELP providers whose provider registration has ceased for various reasons (reserving protections for providers who are pursuing a review or appeal)
- **Schedule 2** provides for variation of approval in the case of a change of a provider’s name
- **Schedule 3** establishes a compliance system for higher education and VET providers, giving the Minister discretion to issue and/or cancel compliance notices. Failure to comply with a notice may lead to suspension or revocation of the provider’s approval
- **Schedule 4** alters indexation requirements applying to HELP debt repayment thresholds and
- **Schedule 5** covers other amendments relating mainly to information access.

Background

The Higher Education Support Act 2003 provides the legislative framework for higher education in Australia, including provisions governing the HELP.
Federal Government income-contingent loans have been available to higher education students for about 25 years. The HELP for Commonwealth supported places (HECS-HELP) was extended to fee-paying students in 2005 (FEE-HELP) and to VET students undertaking higher-level qualifications since 2008. The VET loan scheme is known as VET FEE-HELP.

Under all of the schemes, once approved, the Government pays the student’s tuition fees directly to the approved provider. The student repays the debt through the taxation system when their income reaches a threshold amount ($49 095 for 2012–13).^1^ The VET FEE-HELP scheme has been characterised by relatively low take-up by students, which in turn results from the relatively low proportion of registered training organisations (RTOs) approved to offer loans. To illustrate:

- the proportion of eligible students accessing VET FEE-HELP increased from 27 per cent in 2009 to 56 per cent in 2011, however this is still lower than expected^2^ and
- of approximately 2000 RTOs offering higher level VET courses, only 112 are currently approved to offer VET FEE-HELP.^3^

Low take-up is thought to be due to overly complex administrative requirements and processes for approval of RTOs resulting in a difficult and slow application process (a Post Implementation Review found application processing times averaged 262 days).^4^ The Department of Industry, Innovation, Science, Research and Tertiary Education responded to the review with a discussion paper and consultation process in mid-2012.

In late 2012 the Parliament passed the Higher Education Support Amendment (Streamlining and Other Measures) Act 2012.^5^ This was the first legislative response to the Post Implementation Review and consultation process. This first tranche of amendments aimed to streamline administration and increase provider flexibility.

The current Bill proposes a number of mostly minor additional amendments designed so that the Higher Education Loan Program works more efficiently. The Bill also includes tightened controls on both higher education and VET provider registration.

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2. Explanatory Memorandum, Higher Education Support Amendment (Further Streamlining and Other Measures) Bill 2013, Regulation Impact Statement, viewed 26 February 2013, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4970_ems_86867a2c-6d11-41d4-8e75-7fc639365fbf%22
3. Ibid.
In particular, there is a proposed new compliance system and provisions establishing automatic revocation of providers who are non-compliant (subject to all review and appeal avenues being exhausted). These provisions would create a clearer and shorter process for getting such providers ‘off the books’. Fast-tracking revocation may reduce the risk to students posed by a provider that continues to offer loans despite their approval having been revoked.

The Bill also contains minor amendments to the methodology for calculating HELP repayment thresholds, to the process for recording a change of name by a provider, and consolidates the Minister’s powers to seek information under the Act.

Committee consideration

At the time of writing the Bill had not been referred to any committees.

The previous, related Bill (*Higher Education Support Amendment (Streamlining and Other Measures) Bill 2012*) was referred to the Senate Education, Employment and Workplace Relations Committee. The Committee reported on 19 November 2012. It found that the seven submissions were ‘generally favourable’ and that the amendments would improve access to education and reduce administrative burden.\(^6\)

The Australian Greens made additional comments that noted that the HELP scheme depended on subordinate legislation such as the VET Guidelines which were not subject to Committee scrutiny. The Committee recommended that the Bill be passed and also recommended that the Government continue to consult with stakeholders in the formation of the VET Guidelines provided for in the Bill.\(^7\)

Policy position of other parties and interest groups

The Bill has not attracted comment from non-government parties or independents to date. As its purpose is to make relatively minor amendments aimed at improving the functioning of the FEE-HELP and VET FEE-HELP schemes, it is unlikely to face strong resistance from these parties.

It is likely that providers and other stakeholders would support the changes, which are aimed at streamlining processes and placing appropriate controls on provision of HELP. Although they apply to both higher education and VET, the amendments can be traced to one of the recommendations of a Post Implementation Review of the VET FEE-HELP scheme:

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7. Ibid.

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Recommendation 4 – DEEWR should seek to simplify and streamline the Scheme and legislation in the context of the Higher Education Loan Program to better achieve the Scheme’s objectives, and to support a high quality, innovative and adaptive VET sector.  

The previous, related Bill was agreed to without amendment in the Federation Chamber, and was then passed by the House.  

Financial implications  

The Explanatory Memorandum states that there are no financial impacts associated with this Bill.  

One of the proposed amendments changes the way that indexation of HELP repayment thresholds is calculated because the Average Weekly Earnings (AWE) data used in the calculation is now produced by the Australian Bureau of Statistics biannually instead of quarterly. As taxable income is assessed at the end of each financial year, this should not have any effect on the income year in which HELP repayments commence.  

Statement of Compatibility with Human Rights  

The Statement of Compatibility with Human Rights can be found at page 3 of the Explanatory Memorandum to the Bill. As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.  

Key issues and provisions  

Schedule 1 – Automatic revocation of approval  

Schedule 1 establishes automatic revocation of approval of FEE-HELP and VET FEE-HELP providers whose provider registration has ceased for various reasons (there are, however, protections for providers who are pursuing a review or appeal).  

Currently under the Act, the Minister decides whether or not to approve an organisation as a higher education or VET provider for the purposes of FEE-HELP and VET FEE-HELP respectively. The notice of approval is a legislative instrument, as is revocation of approval. The Bill proposes ‘automatic revocation’. Automatic does not mean that revocation occurs independently of the Minister, but rather that the Minister must revoke approval if grounds for doing so arise.  


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Note, under the *Higher Education Support Act 2003*, a body has to be approved as a ‘VET provider’ before its students can receive VET FEE-HELP. This is different to registration of a VET provider as a Registered Training Organisation, which is a separate process controlled by VET legislation.

**Higher education providers**

*Proposed new subdivision 22-AA* states that the Minister must revoke a body’s approval as a higher education provider if:

- it is no longer a registered higher education provider (*proposed section 22-2*) or
- a winding up order is made by a court or the Australian Securities and Investments Commission (*proposed section 22-3*).

**VET providers**

*Proposed subsection 29B* and *29C* in *new subdivision 5-AA* of *Schedule 1A* inserts matching automatic revocation provisions applying to VET providers on the same grounds, that is if:

- it is no longer a Registered Training Organisation within the meaning of the relevant VET legislation and guidelines (*proposed subsection 29-B(1)*) or
- a winding up order is made by a court or the Australian Securities and Investments Commission (*proposed subsection 29-C(1)*).

**Not subject to disallowance**

The Bill proposes that, while a notice of revocation is a legislative instrument, section 42 of the *Legislative Instruments Act 2003* (disallowance) does not apply. This applies both to higher education providers (*proposed subsection 22-3(3)*) and VET providers (*proposed subsection 29B(3)*).

Essentially, a disallowable instrument must survive a period of 15 sitting days of Parliament without a motion to disallow it being passed, or a motion to disallow it being moved and not withdrawn. This is to help safeguard students against unethical behaviour by providers. It makes it less likely that a provider who is no longer approved continues to offer students FEE-HELP or VET FEE-HELP despite a pending revocation of approval.

The grounds on which a revocation takes place render the decision practically uncontroversial. Thus, while the shift from a disallowable legislative instrument may mean less parliamentary oversight, the change is unlikely to be significant.

**Subject to review**

Importantly, *proposed paragraphs 22-2(1)(b)* and *22-3(1)(b)* and *proposed paragraphs 29B(1)(b)* and *29C(1)(b)* provide that automatic revocation cannot occur if a decision of the relevant regulatory authority is set aside or quashed, and until such time as that decision is no longer ‘subject to review’. The regulatory authority for higher education is the Tertiary Education Quality and Standards Agency (TEQSA) while the regulatory authority for VET is the national VET Regulator.
Item 7 of Schedule 1 of the Bill inserts a definition of ‘subject to review’ in subclause 1(1) of Schedule 1 of the Act (the Dictionary). Under the definition, a decision is subject to review until:

- any applicable time limits for applying for review or appeal have expired and
- if there is a review or appeal, the review or appeal has been finally disposed of.

This provides some protection for providers by guaranteeing them access to all available review and appeal processes before revocation of their status as a higher education or VET provider for HELP purposes can occur. It would appear that the provider may continue to offer students FEE-HELP or VET FEE-HELP.

Schedule 2 – Variation of approval (change of name)

Currently under the Act there is no provision for a change of name of provider; the original approval must be revoked and a new, retrospective notice of approval issued and registered as a legislative instrument.

Proposed section 16-70 allows the Minister to vary an approval to reflect a higher education provider’s name change, while proposed section 12C (in subdivision 3-B of Schedule 1A) allows the Minister to vary an approval to reflect a VET provider’s name change. This allows for a one-step process and reduces paperwork. As with a notice of revocation, a notice of variation issued under these provisions is a legislative instrument.

The Explanatory Memorandum to this Bill states that this amendment is only intended to facilitate a higher education or VET provider’s name change; in each case the legal entity must remain the same.

These amendments will apply before, on or after commencement (Part 2, item 3, Schedule 2).

Schedule 3 – Compliance

The main effect of the proposed amendments is to establish a system for compliance notices issued by the Minister to higher education or VET providers. The Act already provides for compliance requirements in subdivision 19-E but does not contain specific details. The proposed amendments add detail about how compliance notices may be issued or cancelled. The grounds for issuing compliance notices are wide-ranging.
Higher education providers

**Proposed section 19-82** sets out detailed requirements for compliance notices, including:

- grounds for issuing a compliance notice (essentially that the Minister is satisfied that the higher education provider has not complied or may not comply with the Act or its regulations, the guidelines made under section 238-10 of the Act, or other conditions of the provider’s approval)
- content of the compliance notice, including action the higher education provider must take (proposed paragraph 19-82(2)(c)) and the time allowed for such action (proposed paragraph 19-82(2)(d)) and
- matters that the Minister must take into account (for example, the impact of non-compliance on students, and the provider’s history of compliance) in proposed subsection 19-82(3).

The Minister may vary or revoke a compliance notice if doing so is considered to be in the public interest (proposed subsections 19-82(5) and (6)).

**Proposed subsection 19-82(7)** states that the Minister need not issue a compliance notice before revoking a higher education provider’s approval under Division 22 of the Act.

**VET providers**

**Proposed section 26A** at the end of subdivision 4-E of Schedule 1A inserts matching compliance provisions applying to VET providers. The Minister has grounds to issue a compliance notice if satisfied that the VET provider has not complied or may not comply with the Act or its regulations, the VET Guidelines or other condition imposed on approval of the provider.

The VET Guidelines are made by the Minister under clause 99 of Schedule 1A of the Act. Created by legislative instrument, the VET Guidelines describe the quality and accountability standards that VET providers must meet.10

**Schedule 4 – Indexation**

**HELP debt repayments – some background**

The HELP defers an individual’s contribution to their tertiary education to a time when that person’s taxable income reaches a threshold that triggers repayments through the Australian taxation system. If their income drops below (or never reaches) the threshold, or if the person dies, HELP debt repayments cease.

So that the system reflects current income levels, indexation of the repayment threshold is achieved based on a formula that uses average weekly earnings (AWE) data published regularly by the ABS.


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Last year, the ABS announced a change from quarterly to biannual reporting of average weekly earnings:

> From 2013 onwards, AWE data will be produced twice a year relating to May and November.\(^{11}\)

The change was made as a result of a 2010 review of the Labour Employer Surveys ‘to assess costs, business practices and outputs’.\(^{12}\) Users of AWE data who were consulted during the review indicated that a reduction in frequency was acceptable.

**Effect of the amendment**

Note that section 137-1 lists five kinds of HELP debts including HECS-HELP, FEE-HELP and VET FEE-HELP debts, so the proposed amendments to indexation apply to both higher education and VET.

The proposed amendment to paragraph **154-25(2)(b)** is to reflect the change in frequency of AWE data from four-times yearly to twice-yearly. As taxable income is assessed at the end of each financial year, this should not have any effect on the income year in which HELP repayments commence.

**Schedule 5 – Other amendments**

The Explanatory Memorandum describes these as ‘miscellaneous amendments to improve the operation of the Act’.\(^{13}\) The proposed amendments consolidate the Minister’s information seeking powers in a single new Division and update references to the new (since 2011) Australian Qualifications Framework (AQF).

**Consolidation of powers to seek information**

Currently, the Minister has power to seek information in relation to the approval of higher education and VET providers. These powers are currently contained in eight separate provisions (four applying to higher education and four to VET):

- **sections 16-42** and **16-43** empower the Minister to seek information from the Tertiary Education Quality and Standards Agency (TEQSA) and from the VET Regulator respectively, for the purposes of approving a higher education provider

- **sections 22-22** and **22-23** empower the Minister to seek information from TEQSA and from the VET Regulator respectively, when deciding whether to revoke or suspend a higher education provider’s approval

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12. Ibid.
• clauses 9A and 9B empower the Minister to seek information from the VET Regulator and from TEQSA respectively, for the purposes of approving a VET provider and

• clauses 34A and 34B empower the Minister to seek information from the VET Regulator and from TEQSA respectively, when deciding whether to revoke or suspend a VET provider’s approval.

The Bill proposes to repeal these sections and clauses and create a new Division 182 that consolidates all of these powers into one area, with broader purposes. The current provisions are for the purposes of approving a provider or deciding whether to revoke or suspend a provider’s approval. The new provisions are for the purposes of administering, or enforcing compliance with, the Act, its regulations, guidelines applying to the provider, or a condition imposed on a provider’s approval.14

Updates to definitions

Items 5, 6, 7 and 8 of Schedule 5 of the Bill replace references to the ‘Australian Qualifications Framework Implementation Handbook’ with ‘Australian Qualifications Framework’ where the former appears in Schedule 1 of the Act in the definitions for the following qualifications:

• VET advanced diploma
• VET diploma
• VET graduate certificate and
• VET graduate diploma.

These proposed amendments reflect that the guidelines for a VET award are contained in the Australian Qualifications Framework, which replaced the Australian Qualifications Framework Implementation Handbook in July 2011.15

Concluding comments

The Bill contains the latest in a series of amendments designed to improve the operation of the VET FEE-HELP scheme, following the introduction of the scheme in 2008. A subsequent review and related consultation processes helped identify ways to fine tune the Higher Education Support Act 2003.

The proposed amendments, which apply to higher education as well as VET providers, do not present major changes and are more aimed at continuous improvement. The measures contained in

14. Proposed subsection 182-1(2).

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the Bill are consistent with the goal of an efficient, and certainly more agile, tertiary education system with income contingent loans at its centre.
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