Higher Education Support Amendment (VET FEE-HELP Reform) Bill 2015

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Date introduced: 15 October 2015
House: House of Representatives
Portfolio: Education and Training
Commencement: Sections 1 to 3 commence on Royal Assent. Schedule 1 commences on 31 December 2015. Schedule 2 commences on Proclamation. However, if Schedule 2 does not commence within 12 months of Royal Assent, it is repealed.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.
When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.
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The Bills Digest at a glance

What the Bill does

- The Bill places additional requirements on providers who wish to be approved to offer VET FEE-HELP loans to students, designed to better safeguard potential and current students in the vocational education and training (VET) sector.
- VET FEE-HELP loans are part of the broader Higher Education Loan Program (HELP) suite of income-contingent loans that assist students in tertiary education with eligible student costs, such as fees. VET FEE-HELP loans support eligible VET students by allowing them to repay their fees when they reach a certain income threshold.
- The Department of Education and Training approves VET providers for the purposes of offering VET FEE-HELP. The Bill will thereby ensure the Department takes these new requirements into account when assessing VET providers’ fitness to offer VET FEE-HELP loans to students.
- The Bill also creates a new civil penalty and enforcement structure. This grants monitoring and investigation powers to officers of the Department of Education and Training and the national VET regulator, the Australian Skills Quality Authority (ASQA), as well as allowing for civil penalties and infringement notices when a provider fails to meet certain obligations.
- As a result, these requirements may ‘raise the bar’ for VET FEE-HELP students and providers beyond those students in receipt of other HELP loans, or students generally undertaking studies in the VET sector without the support of a VET FEE-HELP loan.

How the Bill works

- The Bill requires potential VET FEE-HELP providers to have operated for an as-yet-unspecified period of time, to set minimum academic standards for their students, and institutes new processes such as a ‘cool off’ period, increased notification to VET-FEE HELP students, ensures proper consent is given in case of students under the age of 18 who are applying for a VET FEE-HELP loan, and clarifies the process for re-crediting a student in case they have entered into a VET FEE-HELP loan without appropriate consent or knowledge.
- The specifics of the minimum academic standards and the trading history of the VET provider will be set out in a revised edition of the VET Guidelines.
- The Bill also addresses the need for investigative and information seeking powers in order to demonstrate infringement of the civil penalty regime. The framework for the governance of these powers is provided by the Regulatory Powers (Standard Provisions) Act 2014.

Why the Bill has been introduced

- This Bill gives effect to a part of a previously announced policy measure in the 2015–16 Budget. The other aspects of this measure have already been enacted.
Purpose of the Bill

The purpose of the Higher Education Support Amendment (VET FEE-HELP Reform) Bill 2015 (the Bill) is to amend the administrative legislation for VET FEE-HELP loans, being the Higher Education Support Act 2003 (HESA) to allow for a new compliance regime.¹

The new compliance regime will enable the Department of Education and Training to better scrutinise VET providers who wish to offer VET FEE-HELP loans to their students, and ensure that both the Department and Australian Skills Quality Authority (ASQA) have increased investigative and punitive powers to act when certain standards are breached. The Bill ‘triggers’ the Regulatory Powers (Standard Provisions) Act 2014 (Regulatory Powers Act) to provide a governance framework for the use of these investigative powers.²

The new requirements for providers include:

- a minimum period for operating as a registered training organisation
- a minimum period for providing courses leading to award of qualifications in the Australian Qualifications Framework
- a ‘student entry procedure’, including minimum academic standards, for VET FEE-HELP students
- ensuring the consent of a responsible adult is provided in case of students under the age of 18 applying for VET FEE-HELP loans and
- creating a two-day ‘cool off’ period to ensure that prospective students have time to reflect on their VET enrolment before they seek a VET FEE-HELP loan.

The amendments also provide new powers to the Secretary of the Department to re-credit a student’s FEE-HELP balance in certain circumstances, essentially cancelling their VET FEE-HELP loan. The amendments also provide that the decision to re-credit, or not to re-credit, are reviewable decisions. If the Secretary determines that the FEE-HELP balance is to be re-credited, the amendments require the provider to repay the Commonwealth the outstanding loan amount.

These requirements are designed to address quality and probity issues in the sector, by ensuring that VET FEE-HELP providers have an established track record of sound corporate and training practice, only accept students who are capable of completing courses, and who properly consent to taking on a VET FEE-HELP loan.

Civil penalties have also been included in the Bill to ensure compliance. The new civil penalties framework:

- provides that the Secretary, an SES employee, or acting SES employee of the Department are ‘authorised applicants’ under the Regulatory Powers Act and therefore able to exercise enforcement powers, including by applying to a court for a civil penalty order (proposed subsection 39DA(2) of HESA, at item 26 of Schedule 1 to the Bill)
- establishes who an ‘infringement officer’ is in relation to the civil penalties framework and how they may issue infringement notices where such an officer reasonably thinks a provision has been contravened (proposed section 39E of HESA, at item 26 of Schedule 1 to the Bill)
- establishes a process for the appointment of ‘investigators’ and the exercise of monitoring and investigatory powers to pursue possible breaches of the provisions (proposed sections 39GA and 39GB of HESA, at item 26 of Schedule 1 to the Bill)
- creates a maximum penalty of 60 penalty units where the provider does not make clear, in information that it provides or publishes, that the VET FEE-HELP loan will have to be repaid³ (proposed section 39DB of HESA, at item 26 of Schedule 1 to the Bill)

³ Section 4AA of the Crimes Act 1914 (Cth) provides that a penalty unit is equal to $180. Therefore the maximum penalty for breaching this requirement is $10,800.
creates a maximum penalty of 60 penalty units where the provider offers an inappropriate benefit to induce the student to enrol in a VET unit or course with the provider, and apply for VET FEE-HELP assistance (proposed section 39DC of HESA, at item 26 of Schedule 1 to the Bill)

creates a maximum penalty of 60 penalty units where a provider fails to comply with the existing notification requirements (proposed section 39DE of HESA, at item 26 of Schedule 1 to the Bill)

creates a maximum penalty of 60 penalty units where a provider fails to address a VET FEE-HELP student’s request to cancel or withdraw from a unit of study in certain circumstances, and thereby leaves the student with a VET FEE-HELP debt (proposed section 39DF of HESA, at item 26 of Schedule 1 to the Bill)

creates a maximum penalty of 60 penalty units where a provider accepts a request for Commonwealth assistance in the form of a VET FEE-HELP loan when the student is not entitled to that assistance (proposed section 39DH of HESA, at item 26 of Schedule 1 to the Bill)

creates a maximum penalty of 60 penalty units where a provider fails to advise a student about the requirements of applying for VET FEE-HELP assistance (proposed section 39DI of HESA, at item 26 of Schedule 1 to the Bill) and

creates a maximum penalty of 60 penalty units where tuition fees are improperly charged (proposed section 39DJ of HESA, at item 26 of Schedule 1 to the Bill).

Structure of the Bill

The Bill is divided into two Schedules.

- **Schedule 1** of the Bill deals with the substantive changes to HESA set out in two parts:
  - **Part 1** details amendments to the regulatory framework for VET FEE-HELP, including additional requirements on providers and new powers for the Secretary of the Department and
  - **Part 2** provides for the operation of the new civil penalty regime.

- **Schedule 2** includes other amendments which will be required should the Higher Education and Research Reform Bill 2014 pass the Parliament.⁴

Background

**Policy and legislative history**

VET FEE-HELP was introduced in June 2007 by the Howard Government, as part of legislative amendments to HESA.⁵ At the time, it extended the existing loan scheme for full-fee paying higher education students (FEE-HELP) to those vocational education and training (VET) students undertaking full-fee paying Diploma, Advanced Diploma, Graduate Diploma and Graduate Certificate qualifications.

The focus on full-fee paying students was in line with the existing FEE-HELP scheme; this was supposed to offer financial support to those students who would not otherwise receive subsides to undertake a VET qualification, thereby expanding the pool of students who could access VET. States and territories typically offer various subsidies at a jurisdictional level, making it cheaper for students to undertake particular VET courses in line with determined skills needs, or because the student in question is deemed eligible for a concession fee.⁶

In addition, the introduction of VET FEE-HELP was regulated by the use of credit transfer arrangements. These required the VET provider to have a credit transfer arrangement in place with a higher education provider (for example, a university). This meant that the higher education provider had assessed the training offered by the VET provider and was willing to accept the VET qualification as credit towards a higher education qualification.

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⁴ The Higher Education and Research Reform Bill 2014 was negatived on the second reading by the Senate on 17 March 2015. It is listed as not proceeding.


⁶ As an example, the Australian Capital Territory government maintains a Skilled Capital Qualifications List as part of its Skilled Capital training program, which indicates what VET units of study and qualifications it is willing to subsidise, the amount of the subsidy, the number of places available (often capped in order to contain costs) and the maximum concession. The list is updated in line with skills needs to ensure there is not a glut of particular qualifications. See ACT Directorate of Education and Training, Skilled Capital Qualification List, The Directorate, Canberra, September 2015, accessed 25 November 2015.
While it did not mean there was an entirely independent audit of the VET provider, the higher education provider had a reputational reason to ensure that it only recognised qualifications and students who were capable of meeting its own particular standards and articulating into one of its own courses.

Amendments in 2008 followed, both to HESA and to the authorising VET FEE-HELP guidelines, to ensure students in Graduate Certificate and Graduate Diploma qualifications could access VET FEE-HELP as intended. At the same time, these amendments maintained the existing credit transfer arrangements and restrictions on students who were otherwise subsidised.

Removal of restrictions on VET FEE-HELP

The combination of the credit transfer provisions and the restrictions on subsidised students accessing a VET FEE-HELP loan reduced the potential take-up. Credit transfer requirements were seen to discriminate against new Registered Training Organisations that might not have the established curricula and necessary relationships with higher education providers; a focus on full-fee paying students did not take into account the financial pressures placed on all VET students.

At a state level, Victoria moved to introduce contestable VET funding from 2009. This meant that any qualified provider could competitively tender for funding to provide training. In theory this was meant to create a more responsive and efficient training market, and ensure that any Victorian who wanted to undertake a VET course would be able to get a place. Funding would simply flow to where the student was.

The Australian Government promised to support this initiative by reforming the VET FEE-HELP scheme, thereby providing access to up-front loans to students regardless of provider and fee status. This was achieved through amendments to the VET FEE-HELP Guidelines in 2009, which removed the restrictions for any state deemed to be a ‘Reform State’. At the time, only Victoria was listed, but the other jurisdictions had been encouraged to similarly reform their VET sectors and open funding up to a variety of providers.

Contestable funding and regulatory arrangements

VET reform was flagged in the 2010–11 Budget on 11 May 2010, with the announcement of a national entitlement to a training place, expanding access to VET FEE-HELP to further VET qualifications, transparent information for students, and a new national VET regulator. At the time, the government indicated that 477,000 students would benefit from an income contingent loan.

These four elements of reform could be seen as complementary:

- creating a national entitlement to a training place would make the VET sector become demand-driven and in theory more responsive to student needs, rather than funded through block grants and capped places
- transparent information for students would ensure they undertook qualifications to address skills shortages and industry needs, increasing their chances of employment
- expanding access to VET FEE-HELP would encourage more students to take up certain VET qualifications, and the increased likelihood of employment would ensure they could repay their loan and
- a new national VET regulator, taking over from existing state and territory regulators, would ensure a seamless experience for both providers and students, as well as quality assurance.

The appropriate Ministerial Council discussed the role of the proposed national VET regulator on 9 June 2010, and noted that agreement with Victoria and Western Australia had not yet been reached. The then Gillard Government announced interim Chairs and CEOs for the proposed VET regulatory agency on 6 July 2010.

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11. Ibid.
The National Vocational Education and Training Regulator Act 2011 received royal assent on 12 April 2011, creating ASQA.\textsuperscript{14} ASQA came into operation on 1 July 2011, with coverage of the ACT, NT and NSW, and became the regulator for Tasmania on 15 February 2012, South Australia on 26 March 2012 and Queensland on 1 July 2012.\textsuperscript{15} As Victoria and Western Australia did not refer powers to the Commonwealth, ASQA only regulates those Registered Training Organisations who enrol students from beyond their state boundaries—that is, international students undertaking VET in Victoria or WA, or RTOs who enrol students from other states and territories via distance or online learning methods. Registered training organisations in Victoria and Western Australia who enrol domestic students located in their own jurisdictions continue to be regulated by their state-based regulators.

The creation of a new National Partnership in 2012, the National Partnership on Skills Reform (NPSR) was intended to progress reforms of the VET sector.\textsuperscript{16} At this stage, it has not been continued past its end-date of 2016–17, although a review has been flagged by state, territory and Commonwealth ministers with responsibility for skills.\textsuperscript{17} The agreed reforms aimed to create:

- accessible training for working-age Australians and, in particular, a more equitable training system, which provides greater opportunities for participation in education and training
- a transparent VET sector, which enables better understanding of the VET activity that is occurring in each jurisdiction
- a higher quality VET sector, which delivers learning experiences and qualifications that are relevant to individuals, employers and industry and
- a more efficient VET sector, which is responsive to the needs of students, employers and industry.\textsuperscript{18}

This went hand-in-hand with the expansion of VET FEE-HELP: as each jurisdiction implemented the agreed reforms of the NPSR, they each became ‘Reform States’, allowing students to enrol as they wished and directing funding in the form of state or territory subsidies, as well as VET FEE-HELP loans, in line with student preferences. It also extended access to VET FEE-HELP loans for selected Certificate IV qualifications as part of a trial.

As the new national VET regulator, ASQA was given responsibility for regulating registered training organisations over which it had jurisdiction. This involved assessing a provider’s capacity against the relevant Standards, both for those organisations applying to be registered and become an RTO, and existing RTOs. Once a provider was registered with ASQA, it could then apply separately to the Department of Education and Training in its various incarnations to be approved to offer VET FEE-HELP loans to its students. The VET FEE-HELP process was governed by a separate set of guidelines under HESA.

Media and political attention

The first concerns were flagged by a review undertaken by the Victorian government in 2010, indicating that some VET students were unwilling to take out VET FEE-HELP loans ‘because they were afraid of debt’.\textsuperscript{19} Concerns about student debt are common to the HELP suite of loans more generally: it was not until 2012 that critical media attention emerged specifically in relation to VET FEE-HELP.

With the expansion in contestable funding, TAFE and other providers often raised fees to derive greater revenue from the student, with VET FEE-HELP loans designed to ensure the student would not have to pay those fees up
front. As more states were declared ‘Reform States’ under the NPSR, media reported on the experience of Victoria, with increased fees and funding cuts.

The debt profile associated with the HELP suite of loans was first analysed in 2014 by the Grattan Institute. Section 3.5 of the report dealt specifically with VET FEE-HELP and found that people with a vocational education diploma or advanced diploma were 50 per cent less likely to repay their loan than those in higher education. Any default on existing student loans would be a potential cost to the budget.

The expansion of VET FEE-HELP loans was also reported as having changed the business model of the VET sector. As the loan involved an upfront payment to a provider, new providers had incentive to enter the market and utilise methods to build up their student numbers quickly. Private providers often were largely dependent on government funding from VET FEE-HELP loans. There were no penalties in place should a student fail to complete a qualification, nor would the provider have to pay back the loan amount. In order to entice more students – and get more funding, VET FEE-HELP providers started to utilise aggressive marketing techniques, including brokers, agents, inducements and potentially misleading advertising practices to direct students to their particular course offerings.

The Opposition first raised VET FEE-HELP quality concerns in response to media reports in October 2014. The Department of Education’s capacity to properly administer and scrutinise the scheme was criticised by the Australian Greens’ spokesperson in the same month. Media reports of registered training organisations using inducements such as iPads or laptops to sign up students who were not academically suited to undertake qualifications continued. And the removal of the credit transfer requirements was criticised by one of the original academics who advised on the establishment of VET FEE-HELP.

Government response to VET FEE-HELP issues

The Government responded in a variety of ways to the growing media reports of issues with VET FEE-HELP. First, the relevant Standards for registered training organisations were updated, following a process of consultation and agreement from relevant COAG ministers. These became effective as of 1 January 2015, with ASQA being provided with additional funding of $68 million to enforce them.

The then Minister indicated that this funding and the clarity provided by the new Standards would stop ASQA from acting as a ‘bookkeeper’ with onerous red tape requirements as it had under the Labor Government and to take a more effective risk-based approach. The new Standards included new requirements for VET trainers and providers.

31. I Macfarlane (Minister for Industry), Australian Government bolsters skills and training with $68bn of new funding and new standards, media release, 8 October 2014, accessed 26 November 2015. ASQA also produced a variety of explanatory material to assist RTOs in transitioning to the new Standards. See Standards for Registered Training Organisations 2015, op. cit.
32. Ibid.
assessors, for example. The new Standards would apply to all RTOs, regardless of whether they offered VET FEE-HELP and would have a sector-wide impact.

Second, to address particular issues with VET FEE-HELP, the relevant guidelines were revised in March 2015, to ban RTOs from providing inducements such as laptops, iPads, vouchers or cash. This was intended to allow the student to focus solely on the quality and price of the VET training offered by the provider, however it had the unintended effect of holding VET FEE-HELP providers to a different standard as RTOs who did not offer VET FEE-HELP.

The VET guidelines (for VET FEE-HELP) were revised again in June 2015, with elements becoming effective in July 2015 and January 2016. These measures were intended to ensure VET FEE-HELP providers gave accurate information to students about the nature of VET FEE-HELP loans, marketed VET FEE-HELP assistance responsibly, were held accountable for the agents they had contracted to sign-up students, did not create any barriers to withdrawal for students, to ensure they couldn’t delay withdrawal and so ‘skim’ the VET FEE-HELP funding off an enrolment, and to prevent a VET FEE-HELP provider charging more than 25 per cent of the fee in any one fee-period.

Further media concern and Senate inquiry

A continued concern was not only the quality of the training outcomes associated with VET FEE-HELP but the way in which the VET reforms exposed all governments to significant debt and provider rent seeking. An initial analysis suggested that some of the profitability of newly established private RTOs depended entirely on government funding. Private provider Vocation’s stock trading was put on hold after it revealed that the Victorian government was demanding repayment of almost $20 million in government funding following quality issues associated with two of its RTOs.

The Australian Education Union commissioned a report from the University of Sydney to analyse the way for-profit providers were being supported by public funding. Based on scrutiny of annual reports and publicly available financial accounts, the report found that for every dollar of public subsidy paid to for-profit providers, 30 cents went to the company’s shareholders as profit.

As a result of these mounting issues, the Senate Education and Employment References Committee established an inquiry into ‘the operation, regulation and funding of private vocational education and training (VET) providers in Australia’ on 24 November 2014. The Terms of Reference included an examination of the ‘operation of VET FEE-HELP’. The final report was tabled on 15 October 2015.

Key issues identified by the Senate report included:

- the approach of ASQA—its risk-based regulatory approach means that it focuses on the provider, rather than assessing the qualifications provided to the student. The Committee view was that ‘there was every reason to doubt ASQA is fit for purpose’.

33. ASQA produced guidance on the transition from the 2012 set of Standards to the new Standards, indicating the differences and its regulatory expectations. See ASQA, Summary mapping and treatment of non-compliances – Standards for RTOs against SNRs, ASQA website, accessed 27 November 2015.
35. Amendment No. 1 to the VET Guidelines 2015, as made 18 June 2015, accessed 27 November 2015.
42. Ibid., p. 3.
• the capacity of the Department of Education and Training, as well as ASQA, to monitor VET FEE-HELP arrangements

• the use of brokers by RTOs and their clear financial interest in signing up students to courses regardless of the student’s need or proficiency

• the ability of RTOs to subcontract out their training to unregistered organisations, lowering the level of scrutiny and

• the lack of clarity regarding review or assistance for domestic students who have issues with VET FEE-HELP debts, as a separate Ombudsman for overseas students already exists.

The Coalition Senators’ dissenting report largely blamed the previous ALP government for the introduction of VET FEE-HELP without appropriate safeguards and stated that the changes to the VET Guidelines as introduced throughout 2015 would address the issues.43

The legislative amendments in the current Bill represent further change, in conjunction with the changes to the VET Guidelines, designed to tighten the administration of the VET FEE-HELP scheme. Iterative reform to the VET FEE-HELP scheme was announced as part of the 2015-16 Budget.

Committee consideration

Senate Education and Employment Legislation Committee

The Bill has been referred to the Senate Education and Employment Legislation Committee for inquiry and report by 30 November 2015. Details of the inquiry are available on the Committee’s website.44

Senate Standing Committee for the Scrutiny of Bills

In its recent Alert Digest, the Senate Standing Committee for the Scrutiny of Bills had no comment on the Bill.45

Policy position of non-government parties/independents

Following the introduction of the Bill, the Labor Opposition Shadow Minister for Higher Education, Research, Innovation and Industry Senator Kim Carr and the Labor Shadow Minister for Vocational Education Sharon Bird released a joint press release setting out the ALP’s proposed amendments to the Bill.46

These amendments include:

• the creation of an industry funded national VET Ombudsman

• seeking the Auditor-General to conduct an audit on the VET FEE-HELP scheme and

• requiring the Department to write to prospective VET FEE-HELP students to inform them of their potential debt and seek consent for the loan, rather than relying on providers to do so.

The press release also flagged that in referring the Bill to a Senate Committee for consideration, the Australian Labor Party would utilise this committee inquiry to examine options for capping tuition fee levels for courses covered by VET FEE-HELP loans and to lower the lifetime limit on VET FEE-HELP student loans.47

The Australian Greens spokesperson on higher education, Senator Robert Simms, commented to the media that the Greens supported Labor amendments, but if they were not accepted, the Greens would still support the government’s legislation as an improvement on the status quo.48 Previously Senator Simms has called upon the Government to ‘fix’ the for-profit VET system, ultimately by disallowing for-profit providers from offering VET FEE-HELP.49


47. Ibid.


Position of major interest groups

The major interest groups all express a view that the Bill is essentially inadequate and provide separate responses on what more needs to be undertaken in order to achieve the Government’s stated aims.

The peak body for the private VET sector, the Australian Council for Private Education and Training (ACPET) largely supports the Bill, although it would like the two-day ‘cooling off’ period only imposed on risky providers to alleviate the administrative burden. ACPET expresses further support for the first of the Opposition amendments, the introduction of a National VET Ombudsman, and outlines what it sees as the need for further VET FEE-HELP reforms: regulation of VET agents and brokers; limits on payments to agents and brokers as a proportion of VET FEE-HELP revenues, and a review of pricing arrangements for courses associated with VET FEE-HELP.

The peak body for the TAFE sector, TAFE Directors Australia (TDA), argues for greater regulatory responsibility with higher standards across the sector and a greater use by ASQA of its existing powers, and indicates the Bill is ‘modest’. TDA opposes the Opposition proposal for an Ombudsman, as this would be ‘another level of bureaucracy’ on ‘low-risk’ provides such as TAFE; alternatively, it recommends adequately regulating the non-TAFE training sector. It also recommends extending the data sharing between ASQA and the Department to allow the Department to impose conditions or even stop providers offering VET FEE-HELP loans if ASQA has rated the RTO medium- or high-risk.

The major unions who have made submissions to the Senate inquiry into the Bill include the Australian Education Union (AEU), the National Tertiary Education Union (NTEU), and the Australian Council of Trade Unions (ACTU). The NTEU proposes limiting VET FEE-HELP to public or community providers, capping fees for courses supported by VET FEE-HELP loans, and removing the loan fees currently associated with the VET FEE-HELP scheme. The AEU calls for an immediate suspension of the VET FEE-HELP scheme, a review of TAFE and vocational funding levels, and a cap on contestable VET funding of 30 per cent, with 70 per cent guaranteed for TAFE. The ACTU supports the measures in the Bill as a start, but recommends the government also accept the Opposition amendments and place a cap on fees and loan amounts under VET FEE-HELP and introduce requirements for minimum hours training for VET FEE-HELP courses to ensure adequate learning. In the absence of these further reforms, the ACTU recommends VET FEE-HELP be suspended until they are introduced and advocates for a cap of 30 per cent on contestable VET funding.

Student representative organisation the Council of Australian Postgraduate Associations (CAPA) supports the spirit of the Bill but raises the separate treatment of VET FEE-HELP students through the proposed ‘student entry procedure’. It advocates for minimum academic standards to be applied across all VET courses, with some kind of regular review.

Industry body the Australian Chamber of Commerce and Industry (ACCI) supports the Bill without amendments and makes no comment on the Opposition proposals.

References:
53. Ibid, pp. 2–3.
54. Ibid., p. 2.
58. Ibid.
Financial implications
The Explanatory Memorandum notes that the 2015–16 Budget committed $18.2 million in departmental funding for an enhanced compliance regime associated with the reform measures, but with resulting estimated savings of $350.9 million in fiscal balance terms over the forward estimates.61

Special appropriations
There are no special appropriations associated with this Bill.

Statement of Compatibility with Human Rights
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.62

Parliamentary Joint Committee on Human Rights
The Parliamentary Joint Committee on Human Rights considers that the Bill does not give rise to human rights concerns.63

Key issues and provisions

Overview
Broadly three key issues have emerged in the commentary and policy basis which have still not been explicitly addressed by the Government in this Bill or the accompanying Explanatory Memorandum:

- the fragmented regulatory environment
- the treatment of the VET FEE-HELP sector and
- the nature of education as a product.

The Bills Digest also examines alternative regulatory approaches which may assist in addressing issues with VET FEE-HELP.

The fragmented regulatory environment
ASQA is the national regulator for the VET sector. The Department of Education and Training administers the VET FEE-HELP scheme. Existing RTOs in Victoria and Western Australia who wish to access VET FEE-HELP may have a range of compliance issues as identified by their state based regulators. Do all these organisations adequately communicate with each other to identify possible VET FEE-HELP malfeasance and systemic issues with the VET sector? Certainly the Victorian Government has complained that ASQA has not informed it adequately of regulatory findings, so that the Victorian Government was still providing funding to RTOs under investigation by ASQA.64

To date there has been no recent public review of ASQA, the Department, the state-based regulators in Victoria or WA, or their capacity to collaborate and share data. With the significant changes to the VET regulatory landscape since the introduction of measures like VET FEE-HELP and the establishment of ASQA itself, a first principles approach might be to examine the powers of each entity and see if they are fit for the current environment.

Does ASQA and the Department have a formal Memorandum of Understanding? Are there statutory barriers to the information they can share or the operations they can jointly undertake? Are they able to instigate joint activity or does it require Ministerial approval or the permission of any vested interest? How do their internal processes operate? These same questions can be asked of relationships with the existing state-based regulators. With continuing fragmentation and a lack of transparency over internal decision making, it is difficult to assess whether any of these entities are ‘fit for purpose’.

62. The Statement of Compatibility with Human Rights can be found at pages 6–11 of the Explanatory Memorandum to the Bill.
The Government’s approach is to increase the investigatory and monitoring powers available to officers of ASQA and the Department through Subdivision 5A-C of Part 1 of Schedule 1A to HESA (at item 26 of Schedule 1 to the Bill), and to allow Commonwealth officers to disclose VET personal information to the state-based regulators (item 17 of Schedule 1). This doesn’t appear to follow an analysis of the adequacy of the existing regulatory regime and whether either the Department or ASQA are using their existing powers properly. The amendments also highlight the continuing fragmented nature of the VET space: Commonwealth entities will be able to disclose VET personal information to the state-based regulators, but it’s unknown if the state-based regulators will be able to return their favour. Their capacity to work together in joint investigations is not enhanced by these amendments. Further, although oversight and monitoring of these new powers is underpinned by provisions of the Regulatory Powers Act, that Act may be unsuited to this fragmented regulatory environment. The jurisdiction of the monitoring and investigatory powers seems unclear, due to the different ‘jurisdictions’ ASQA and the Department operate under. If an ASQA investigator finds evidence relating to VET FEE-HELP, a Departmental responsibility, are they able to utilise their powers? Will they need to ‘call in’ the Department? How these powers will work in practice across administrative boundaries is unclear.

Many of these concerns relate to the capacity of administrators and regulators. Both ASQA and the Department have been accused of lacking capacity by a variety of stakeholders through the previous Senate inquiry. Extending the powers and remit of agencies will potentially allow them to ‘catch out’ inappropriate behaviour by RTOs in use of the VET FEE-HELP scheme but the Department is not a regulator by nature: it is a policy and program agency, a department of state. Its ability to develop sound investigatory and monitoring practice has been critiqued. Since the introduction of the new VET Guidelines across 2015, media reports continue to indicate that providers are still offering students now-prohibited inducements such as laptops, raising ongoing questions as to the capacity of the Department to properly enforce them.

Both the Department and ASQA appear to operate in line with what has been called the ‘cake making’ approach. This assumes that if Standards or Guidelines are adhered to – that the ingredients are all in place – the ‘cake’ will come out fine. Neither the Department or ASQA taste the ‘cake’ to ascertain its quality—they do not audit the student’s competencies, or test their qualification or specific learning experience. Both agencies are largely reactive. While ASQA can undertake strategic reviews in response to complaints or to assess whether known issues are systemic or simply one-off, the government has not responded formally to these strategic reviews. This hampers a deeper understanding of the systemic issues associated with VET provision and the adequacy of the ‘cake making’ approach.

The legislation underpinning ASQA also appears to take what might be considered a ‘redemptive’ approach: in cases of non-compliance, RTOs are given a set period of 20 days to rectify their practices, rather than immediately facing conditions or penalties. ASQA chairman Chris Robinson has criticised the substantive appeals processes provided for under ASQA’s legislation, which allow non-compliant providers to improve their performance in time for an appeal before the Administrative Appeals Tribunal and so remain registered. While an appeals process is a necessary part of natural justice principles associated with regulatory decisions—ASQA is not deemed to be infallible, after all—it remains unclear how providers may ‘game’ elements of ASQA processes in order to stay registered and authorised to receive VET FEE-HELP and so remain in receipt of funding and fees. It also remains unclear how ‘fair’ this is to both students and government who may be unaware of serious compliance issues if ASQA is unable to notify students or the Department that there are repeated breaches. This has been criticised by the Opposition, who have called on the Government to ‘turn off the tap’, withdrawing funding from RTOs currently under investigation—but not formally deregistered—by ASQA.

It’s also useful to note in this context that recent court action against RTOs has been commenced by the Australian Competition and Consumer Commission, viewing unethical RTO practices as potential breaches of consumer law, rather than the VET regulatory framework. This further underscores whether ASQA or the Department have an adequate regulatory capacity to deal with the sector.

The persistently high level of non-compliance—75% of RTOs audited in 2013–14 and 72% of RTOs audited in 2014–15 were found non-compliant with the Standard relating to quality training and assessment—could indicate systemic issues with the sector.

The treatment of the VET FEE-HELP sector

As TDA observed in its submission, the treatment of VET FEE-HELP to date implicitly assumes those providers involved are high risk. They have a double compliance burden, having to meet the sector-wide Standards under ASQA’s remit, and then also having to comply with the VET Guidelines and Departmental processes under the HESA, which apply solely to VET FEE-HELP.

The amendments in this Bill will deepen this categorisation of VET FEE-HELP providers. Certainly many of the amendments may address the reports of problems with VET FEE-HELP provision. The minimum trading history requirements in item 3 may restrict VET FEE-HELP to RTOs with a history of established sound practice, although it will depend on what particular periods are specified under revised VET Guidelines. However, a lengthy period of operating as an RTO and providing courses under the Australian Qualifications Framework (AQF) does not necessarily mean the RTO is engaged in sound practice: it simply means it hasn’t been caught. This new item 3 potentially exposes the need for the Department to be better informed about the compliance history of RTOs in its decision making, as it’s already clear that some RTOs can be found non-compliant and yet continue offering training leading to recognised AQF qualifications.

The ‘student entry procedure’ created by items 7, 9 and 15 may address the issue of students being academically unsuited to qualifications. Ideally all students should finish their qualification and so enhance their skills and employability – this should also result in the student being more likely to repay their VET FEE-HELP loan, an outcome the Commonwealth government clearly has a ‘stake’ in. At the same time, VET qualifications are often viewed as a ‘pathway’ for those students who may have had academic difficulty in the past, and as a way of encouraging students to re-engage with more practically based learning. VET FEE-HELP was intended as a measure to expand opportunity and access to VET qualifications for those less fortunate. Depending on how high the bar is set, any form of academic standard runs the risk of excluding students without achievements in formal education from the possibility of gaining a VET qualification. As certain equity groups (such as Aboriginal and Torres Strait Islander Australians) have poorer records of formal educational achievement, this new student entry procedure may implicitly discriminate against them.

Conversely, if increasing academic standards in VET (and thus the chance of completion) is a good thing, then as CAPA argued in its submission, these standards should be applied to all VET students. Seeking higher standards from VET FEE-HELP students as opposed to those other students in VET is a reminder that the Commonwealth has a vested interest in getting those students to repay their loans: including this provision for VET FEE-HELP students only treats the sector differently, increases the administrative burden for RTOs with VET FEE-HELP and non-VET FEE-HELP students, and implies that the Commonwealth prioritises completion rates of VET FEE-HELP students over those in the broader VET sector.

The two day ‘cool off’ period established by clauses in items 7, 10, 11, and 12 attempts to decouple the enrolment in a unit of study and a request for Commonwealth assistance in the form of a VET FEE-HELP loan. In theory this allows the student to properly reflect if they want to undertake the unit of study, to perhaps check what information may be available about the RTO or qualification, to consider the fee structure and to do so without the enticement offered by a VET FEE-HELP loan. This should lead to a better appreciation by the student as to what the unit of study will actually cost and what the likely outcomes are. This two day period reflects the unique nature of the VET FEE-HELP scheme: students who pay upfront will not have a budgetary impact upon

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the Commonwealth government, and so the Commonwealth doesn’t require them to consider whether they will actually benefit from the course, if it constitutes an impulse purchase, or if they can afford it.

The new re-crediting regime created by items 13, 14, 15, and 21 set out a clear process, as well as listing the potential for review, in cases where the Secretary of the Department or their delegate may determine that a student should have their FEE-HELP balance re-credited and the loan effectively cancelled. Until these powers are used in practice it will be difficult to consider what students may ‘fall through the cracks’ in their application.

There are also provisions in items 7, 18 and 19 which require the consent of a responsible adult in the case of a minor applying for a VET FEE-HELP loan. These should reduce incidents of minors taking out VET FEE-HELP loans without being fully aware of the conditions, but they also highlight the need for more broadly effective application of the VET Guidelines: what if a provider engages that responsible adult with aggressive marketing techniques? Regulatory measures cannot prevent every single possibility, but they can provide a concerted set of safeguards.

The Bill also creates a civil penalty framework through Part 2 of Schedule 1 to the Bill. The investigatory and monitoring powers have been discussed above, but the effectiveness of infringement notices relies on the agencies’ ability to issue and police them. As media reports discussed earlier have highlighted that providers continue to offer prohibited inducements, already banned under the VET Guidelines, it calls into question the effectiveness of the Department in managing further compliance measures. The Department’s scope is after all limited: regulatory functions are not its core business, its ability to develop further capacity is untested, and to put it simply, its staff cannot be everywhere. Yet invariably it will have to foot the blame should further media reports emerge of continued non-compliance with these new measures, and students and government will bear the cost and inconvenience of what looks like an increasing systemic risk.

The nature of education as a product

Fundamentally, the purpose of VET FEE-HELP loans remains unresolved by these amendments and the Government’s reforms to date. The Opposition’s amendments also do not appear to clarify the issue.

Students—and governments—do not know what they are buying until those students have finished their qualifications and are working in the sector. That is the nature of education. The quality of education may be affected for several reasons—a trainer may have a poor relationship with a student, or may be relatively new and unable to provide adequate support. There may be underfunding or governance issues which plague the provider. And students choose to undertake education for a variety of purposes themselves. The focus on completion rates (and on likely repayment) assumes that students have gotten nothing from their training if they fail to complete their qualification.

Yet the nature of the competency-based VET system means that a student may gain a skill, or finish a unit of study, without needing to complete the qualification. They can also return after several years, with a record of competencies achieved, and finish the qualification in line with their skills needs and personal capacity. Students may drop out of training or fail to complete for a variety of personal reasons: it does not automatically follow the RTO was of low quality or the training was bad, and using completion rates as a proxy neglects to take into account a student’s choice to drop out for their own reasons. It fails to take into account the broader nature of education, and reduces it to a simple product that the student has purchased off the shelf, with gaining the qualification as sole indicator of quality or success.

If access is the point, then completion rates or rates of study undertaken over the life cycle need to be taken into account—a student may finish their qualification years if not decades after they started. Is that inherently a bad thing? It puts the focus of the education more on personal attainment, and admittedly, makes it less likely the student receives the productivity and career enhancements in time to pay back their VET FEE-HELP loan.

At the same time, the data around VET FEE-HELP implies there is a problem, with low completion rates and a proliferation of providers. For example, the initial number of providers approved to offer VET FEE-HELP in 2009 was 50; this increased to 254 by the end of 2014. There is also evidence that students who do not use VET FEE-HELP loans have a higher likelihood of completing their qualification: by 2014, 34% of non-assisted students who started training between 2009 and 2012 had completed their qualification, as compared with 24% of those who used VET FEE-HELP.

students who were assisted by VET FEE-HELP. The same research found that the VET FEE-HELP cohort was more likely to be female, under 25 years of age, with a disability and studying externally. Does this mean VET FEE-HELP has removed barriers for some student cohorts who would otherwise be unlikely to study? Does that explain the differences in completion rates? Without being able to test the counterfactual and offer the VET FEE-HELP student cohort the same units of study but without the benefit of a loan it is impossible to know if VET FEE-HELP offers access to students who would otherwise not undertake VET. It’s also impossible to know if VET FEE-HELP provides an enticement for students who are academically unprepared for VET. If the VET FEE-HELP cohort is academically unprepared, is it the responsibility of the RTO? Should the government offer more support programs?

An approach which focuses on completion rates also neglects to consider what students may be able to achieve with an adequate support system, and doesn’t address issues of support services or funding adequacy. There is not, for example, student-based funding across the VET sector: VET FEE-HELP loans are based on student fees set by providers, not on the financial costs of offering a given student (who may have particular learning needs) a set level of learning and teaching. We simply do not know what quality costs in the VET sector, but governments continue to expect quality will be delivered.

Greater VET data in the longer term may help assist in knowing exactly why students utilise a VET FEE-HELP loan and what they mean to get out of the VET experience more generally.

In the meantime, Graph 1 demonstrates the main reason for existing concern over VET FEE-HELP.

**Graph 1: Tuition fees charged to students eligible for VET FEE-HELP, 2009–2014 ($M)**


The extraordinary growth in VET FEE-HELP loans suggests something is going on: and every single loan is a debt to the Commonwealth which may or may not be repaid. But there are no clear metrics for assessing the quality of VET FEE-HELP providers or the costs to government. Should a VET FEE-HELP provider be barred from offering VET FEE-HELP loans if its completion rates do not reach 50 per cent? Should it be 75 per cent? Or 40 per cent? We simply don’t know. How much should government attempt to contain costs in the VET FEE-HELP scheme? Was the scheme ‘acceptable’ in 2011, when only $205.3 million in loans were paid out? At what point did it meet the ‘something must be done’ test? $500 million? $1 billion? Without knowing what the aims or parameters are, it is hard to judge the efficacy of these reforms. If they reduce the VET FEE-HELP loans in 2016 to $1 billion, will that be an ‘adequate’ reduction?


74. Ibid.
**Alternative regulatory approaches**

Besides the Opposition amendments, there are a few alternative regulatory approaches which could be made to address the issues raised by malfeasance in the VET FEE-HELP scheme:

- a proper audit of the capacity of ASQA, the Department and state-based regulators to share information and work together to address compliance issues within the sector and/or

- increasing the powers of the Department in cases of non-compliance, leading to a regulatory presumption that RTOs under current investigation should not be in receipt of significant government funding such as VET FEE-HELP.

While the Government’s proposed amendments attempt to regulate VET FEE-HELP providers after they are approved, the above measures may act to weed out problematic providers via an enhanced approval process and prevent them from offering VET FEE-HELP loans in the first place.

It is also curious to note that despite ongoing criticism of the previous Government’s removal of regulatory requirements for VET FEE-HELP in 2009, neither Government nor Opposition has proposed restoring the credit transfer requirement. This could potentially have the most beneficial effect by also engaging with the broader higher education sector and requiring them to ‘stake their reputations’ on the quality of VET providers they enter into credit transfer agreements with. It would also ensure there was a focus on qualifications under VET FEE-HELP that would lead to pathways into higher education and so create a culture of engaged, lifelong learning.

**Concluding comments**

Not all VET students are undertaking qualifications eligible for VET FEE-HELP. Not all students eligible for VET FEE-HELP access a VET FEE-HELP loan. A variety of students across both categories may be in qualifications partly subsidised by state and territory governments in line with their separate skills and training needs. By singling out the VET FEE-HELP sector, the amendments may not fully capture the diversity of Australia’s training sector and the various needs of its students. Many of the compliance measures, such as the student entry procedure, could also be usefully extended to the VET sector more broadly, depending on whether governments see the purpose of VET as increasing qualifications to expand productivity, or expanding access to give more students the capacity to undertake some training regardless of completion. Without clarity on the purpose of VET and performance indicators such as VET FEE-HELP, assessing the long term effects of these reforms is difficult.

It is also unclear if the government’s proposed extension of regulatory powers address the existing systemic issues with the nature of VET regulation in Australia. Much depends on implementation of regulatory capacity. Asking agencies to investigate, monitor and regulate more is problematic if they have issues undertaking their current regulatory tasks. A systemic approach to rethinking regulation of the sector by improving the cooperation between agencies may also render the need for these specific amendments moot.

While representing a significant improvement on the status quo, the Bill highlights the capacity for further reform: the amendments address issues after the horse has bolted but do not go to the cultural or systemic issues of why providers with a vested financial interest in signing up as many students as possible to schemes like VET FEE-HELP can enter the system and operate without conditions. These vested interests can create internal cultures that lead to inherently bad practices. Neither ASQA nor the Department appear able to take significant elements of previous non-compliance into account in their decision making processes. Students are unaware of the regulatory history of their RTO, or whether it or an agent or broker receives a financial windfall in signing them up to VET FEE-HELP. Students are still engaged in making choices to undertake VET or take on a VET FEE-HELP loan without a clear appreciation of whether they are likely to get a qualification, benefit from the training, or enter employment. Similarly, governments continue to be unclear as to why students undertake and leave training, with implications for the fiscal sustainability of the VET FEE-HELP scheme.