Higher Education Support Amendment (VET FEE-HELP Student Protection) Bill 2018

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Portfolio: Education and Training

Commencement: Schedule 1
  commences 1 January 2019. Schedule 2
  commences 1 January 2020.

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 Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at November 2018.
Purpose of the Bill

The Higher Education Support Amendment (VET FEE-HELP Student Protection) Bill 2018 (the Bill) is the latest in a series of legislative responses to unscrupulous conduct by some vocational education and training (VET) providers, which resulted in inappropriate lending through the former VET FEE-HELP loan scheme, which was part of the Higher Education Loans Program (HELP) from 2009 to 2016.  

This Bill proposes to amend the Higher Education Support Act 2003 (HESA) and the Ombudsman Act 1976 to:

• extend the circumstances in which the responsible Secretary (currently the Secretary of the Department of Education and Training) may re-credit a person’s FEE-HELP balance due to inappropriate conduct by a VET provider or provider’s agent
• allow the VET Student Loans Ombudsman (VSLO) to make recommendations to the Secretary in relation to the re-crediting of a FEE-HELP balance and
• allow the Commonwealth to recover the re-credited amount from the provider.

The Bill also proposes consequential amendments to both Acts, to account for the Higher Education Support Legislation Amendment (Student Loan Sustainability) Act 2018, which replaces the FEE-HELP balance with the HELP balance from 1 January 2020.

Background—the VET FEE-HELP scheme

In 2008, the establishment of the VET FEE-HELP loan scheme extended the opportunity to defer the cost of a tertiary education course and repay the debt through the Australian Taxation Office (ATO) to eligible VET students undertaking a higher level qualification. Originally conceived as a way to support VET as a pathway to higher education, with restrictions in place to ensure only providers with a credit transfer arrangement with universities could offer the loans, VET FEE-HELP became progressively more vulnerable as these restrictions were lifted from 2009. The issues for students resulting from the ‘debacle’ have been well documented elsewhere, but in short involved some providers and their agents using inducements and misinformation to sign students up to take out VET FEE-HELP loans for courses of questionable benefit.

According to the Department of Education and Training (DET), between 2009 and 2015:

- The numbers of students accessing VET FEE-HELP jumped by 5,000 per cent, from 5,262 to 272,000.
- Average course costs more than tripled, from around $4,000 to $14,000.
- The value of loans landing as debts to students, and as Commonwealth borrowings, blew out from $26 million to $2.9 billion.

References:
2. Ibid. The scheme was established under the Howard Government by the Higher Education Support Amendment (Extending FEE-HELP for VET Diploma, Advanced Diploma, Graduate Diploma and Graduate Certificate Courses) Act 2007.
Although concerns about VET FEE-HELP began to emerge almost immediately, in 2010 issues became progressively more widespread in subsequent years and gained attention at the federal level in 2014. From 2015 a number of changes were implemented to improve the monitoring and enforcement capabilities of DET and the national VET regulator, the Australian Skills Quality Authority (ASQA). Changes included banning the use of inducements to encourage students to enrol in a course, limiting allowable marketing and recruitment practices, clarifying student rights and obligations, and introducing stricter provider eligibility and charging requirements and a civil penalty regime.

In December 2016 the VET Student Loans Act 2016 was passed by the Parliament which replaced the VET FEE-HELP scheme with VET Student Loans and introduced tighter provider eligibility requirements and lending controls from 1 January 2017, with some students remaining in the old scheme under grandfathering arrangements. The performance of VET Student Loans is subject to ongoing monitoring, and early signs are that it is performing well.

Financial implications

In June 2016, the Australian Government Actuary estimated that a total of $1.2 billion of VET FEE-HELP debts had been issued inappropriately in 2014 and 2015.

The Explanatory Memorandum to the Bill states that an accurate estimate of the financial implications of the Bill is not possible, due to uncertainties about the number of students specifically affected by inappropriate conduct, the amount of VET FEE-HELP debt incurred by these students, and the likelihood of recovering any re-credited amounts from VET providers shown to have engaged in inappropriate conduct.

The Explanatory Memorandum also indicates that while ‘it is hoped that all student complaints relating to inappropriate conduct by providers will be resolved by 31 December 2020, it is not possible to predict whether this will be the case.’

Committee consideration

Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills has considered the Bill and sought advice from the Minister regarding the appropriateness of leaving matters such as what may constitute inappropriate conduct to the VET Guidelines. The Scrutiny Digest states:

6. Griffiths, VET Student Loans Bill 2016 (and) VET Student Loans (Charges) Bill 2016 (and) VET Student Loans (Consequential Amendments and Transitional Provisions) Bill 2016, op. cit., p. 12; S Bird (Shadow Minister for Vocational Education), Government must act to protect quality in the training sector, media release, 7 October 2014; S Bird, Additional action needed on quality in VET sector, media release, 9 October 2014.
The committee’s view is that significant matters, such as what constitutes inappropriate conduct in the context of a student loan re-crediting scheme, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The committee notes in this regard that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in making changes through an amending bill.13

At the time of writing this Digest, the Minister’s response had not been received by the Committee.15

**Policy position of non-government parties/independents**

At the time of writing no non-government parties or independents have commented on the Bill.

**Position of major interest groups**

The Bill has attracted little attention from interest groups so far, likely due to its continuation of the Government’s established approach of working to address the consequences of the VET FEE-HELP program as the scope of issues become clearer over time. TAFE Directors Australia (TDA), the national peak body for publicly owned TAFE institutions and university VET divisions, provided information about the Bill in a recent newsletter.16 Although TDA included little analysis of the Bill, it did observe:

> Where debts are waived, the training provider will be required to repay the Commonwealth, although in many instances, the colleges in question have long since vanished.17

**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.18

**Parliamentary Joint Committee on Human Rights**

The Parliamentary Joint Committee on Human Rights reports that the Bill does not raise human rights concerns.19

**Key issues and provisions**

**Remitting a person’s VET FEE-HELP debt**

**Current arrangements**

Remitting a person’s VET FEE-HELP debt is dealt with in Part 2 of Schedule 1A of HESA, under Subdivision 7-B. The current arrangements are summarised below.20

15. Senate Standing Committee for the Scrutiny of Bills, Ministerial responses, The Senate, Canberra.
16. TAFE Directors Australia (TDA), ‘Student’s [sic] failed by unscrupulous colleges to have loan debts cancelled’, TDA Newsletter, 24 September 2018.
17. Ibid.
18. The Statement of Compatibility with Human Rights can be found at pages 4–7 of the Explanatory Memorandum to the Bill.
20. To avoid confusion, under HESA remitting the debt refers to cancelling or forgiving the student loan debt, whereas re-crediting refers to applying this decision to the FEE-HELP balance (which accrues up to the FEE-HELP borrowing limit), to ensure the forgiven debt no longer counts against the amount the student is able to borrow.
• Under subclause 46(2), the VET provider (or the Secretary, if the provider is unable to act) must re-credit a person’s FEE-HELP balance with the amount of VET FEE-HELP debt incurred for a unit if the person applies in writing and meets ‘special circumstances’ requirements under clause 48—that is, if they were unable to complete the requirements of the unit due to circumstances beyond their control that emerged after they could withdraw from the unit without incurring the debt.

• Under clause 46A, the Secretary must re-credit the FEE-HELP balance for the debt incurred for a VET FEE-HELP unit if the person applies in writing within three years (or was genuinely unable to meet that deadline) and the Secretary is satisfied that the VET provider was involved in ‘unacceptable conduct’ in relation to the unit or the course of study of which it formed a part, on or after 1 January 2016.\(^2\) Part 6 of the *Higher Education Support (VET) Guideline 2015* (the VET Guideline) details what constitutes unacceptable conduct and includes:
  - publishing information suggesting that VET FEE-HELP assistance is not a loan
  - engaging in inappropriate marketing, including providing inducements and cold calling
  - providing inducements
  - failure to provide a VET FEE-HELP notice to the student
  - failure to comply with student requests to cancel the student’s enrolment in the course, or withdraw the request for VET FEE-HELP assistance, or enrolling the student in another course of study without the student’s permission
  - failure to advise the student about the timelines that apply to making a request for VET FEE-HELP assistance
  - failure to charge fees in accordance with Part 7 of the Guideline, which covers census dates, fee variations, repaying tuition fees, and what can be included in a fee and
  - failure to publish information about the tuition fees for the unit in a readily accessible way on the provider’s website by the day before the student enrolled in the unit.

• Under clause 46B, the VET provider (or the Secretary, if the provider is unable to act) must re-credit a person’s FEE-HELP balance with the amount of VET FEE-HELP debt incurred for a unit if the provider reasonably believes the debt for the unit contributed to the student’s borrowings exceeding the provider’s notional loan account amount (effectively a VET FEE-HELP cap which sets the maximum amount available to a provider’s students), and they are advised by the Secretary of these circumstances.

• Under clause 47, the VET provider (or the Secretary, if the provider is unable to act) must re-credit a person’s FEE-HELP balance with the amount of VET FEE-HELP debt incurred for a unit if the person is not eligible for HELP assistance because they do not have a tax file number.

• Under clause 51, the VET provider (or the Secretary, if the provider is unable to act) must re-credit a person’s FEE-HELP balance with the amount of VET FEE-HELP debt incurred for a unit if the provider ceases to provide the course of which the unit forms a part before the student has completed the requirements of the unit.

Currently, under clause 56, if a person’s FEE-HELP balance is re-credited under the arrangements outlined above, the provider is liable to re-pay the amount to the Commonwealth, unless the student had enrolled in the unit as a replacement unit under tuition assurance requirements, and the loan amount is being remitted under special circumstances arrangements.

**Proposed inappropriate conduct provisions**

Schedule 1 of the Bill proposes to insert into Schedule 1A provisions to remit a VET FEE-HELP debt in cases of ‘inappropriate conduct’ by a provider or provider’s agent. Proposed clause 46AA (at item 3 of Schedule 1 to the Bill) sets out arrangements for re-crediting the FEE-HELP balance under these circumstances.

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21. See subitem 24(7) of Schedule 1 to the *Higher Education Support Amendment (VET FEE-HELP Reform) Act 2015*. 
Importantly, unlike the unacceptable conduct provisions under clause 46A, proposed subclause 46AA(1) will allow the Secretary to use their own discretion to initiate re-crediting, providing they are satisfied that the person has not completed the relevant unit of study and that it is ‘reasonably likely’ the VET provider engaged in inappropriate conduct towards the person in relation to the unit or the course of study of which it forms a part.

Like unacceptable conduct, the matters to be considered to meet the standard of inappropriate conduct are to be prescribed in the VET Guideline—they are not set out in the Bill. Proposed subclause 46AA(2) specifies that the VET Guidelines may prescribe the same matters to be considered for inappropriate conduct as are considered for unacceptable conduct, leaving open the way to include all the elements of unacceptable conduct plus (potentially) other elements as matters for the Secretary to consider as inappropriate.

 Proposed subclause 46AA(3) clarifies that a person may apply to the Secretary for a VET FEE-HELP debt to be remitted under the inappropriate conduct arrangements, in the same way as they would currently under the unacceptable conduct arrangements—that is, in writing, in the approved form, and accompanied by any information required by the Secretary. Proposed subclause 46AA(3) also specifies the application must meet any application requirements set out in the VET Guidelines.

Proposed subclause 46AA(4) requires that before the Secretary finalises a decision to refuse to re-credit a person’s FEE-HELP balance, the Secretary must notify the person of the decision the Secretary is considering making and the reasons for the refusal.

Proposed subclause 46AA(6) requires that before the Secretary finalises a decision to re-credit a person’s FEE-HELP balance, if the provider would be required to repay the amount to the Commonwealth, the Secretary notify the provider of the decision they are considering making and the reasons for this.

In each case, these proposed subclauses require that the person or provider be given 28 days to make a written submission about why the Secretary should not make the decision they are considering, and advised that if no submission is received the Secretary may proceed to make the decision. In making the final decision, the Secretary is required to take into account any submission received by the person (proposed subclause 46AA(5)) or the VET provider (proposed subclause 46AA(7)) within the 28 day period.

Proposed subclause 46AA(8) requires that if the decision is made to re-credit the FEE-HELP balance under the inappropriate conduct provisions, the Secretary must advise the person and (if the VET provider will be required to repay the amount to the Commonwealth) the provider, ‘as soon as practicable’.

Proposed subclauses 46AA(9) and 46AA(10) limit the use of the inappropriate conduct provisions up to 31 December 2020, unless a later date is prescribed in the VET Guidelines. This flexible deadline, coupled with the lack of a three year application deadline (as exists in the unacceptable conduct provisions under clause 46A), means this Bill proposes to provide much more scope than currently exists to address the ongoing issues arising from inappropriately issued VET FEE-HELP debts. Additionally, the application provisions at item 9 of the Bill specify the inappropriate conduct provisions under proposed clause 46AA of Schedule 1A will apply in relation to conduct engaged in by a VET provider (or agent) before or after the commencement of the Schedule. That is, unlike the unacceptable conduct provisions, which apply from 1 January 2016 only, the arrangements proposed in the Bill will give the Secretary scope to remit debts incurred during the full period for which VET FEE-HELP operated.
Proposed subclause 56(4) (at item 5 of Schedule 1 to the Bill) adds inappropriate conduct to the list of reasons a VET provider can be required to repay VET FEE-HELP funding to the Commonwealth, but specifies the VET provider is only liable to repay the amount if the inappropriate conduct involved treating the person as being entitled to VET FEE-HELP assistance when they were not. The recovery of debts under this subclause is likely to be complicated by provider closures, which increased significantly in the latter years of VET FEE-HELP, from 98 closures in 2015 to 180 in 2016.

The role of the VET Student Loans Ombudsman

The VET Student Loans Ombudsman (the VSLO) investigates complaints about VET Student Loans and VET FEE-HELP from current and former students, and people who were inappropriately signed up for a loan under either scheme. Under the Ombudsman Act the VSLO is responsible for, in respect to the VET Student Loans and VET FEE-HELP schemes:

- investigating, making recommendations, and reporting on, VET loan assistance and compliance with legislated requirements
- giving providers advice and training about best practice complaint handling and
- developing, promoting, and reviewing a code of practice relating to services and complaints.

Further, the VSLO may conduct an investigation in response to a complaint, or on their own initiative. The VSLO does not have powers to re-credit student loans or compel providers to re-credit loans or take any other action. When a complaint relates to a matter that could be dealt with more effectively by another body, the VSLO must refer the complaint that body.

The Bill proposes to add making recommendations to the Secretary about re-crediting FEE-HELP balances of a person or class of persons in cases of unacceptable or inappropriate conduct (proposed paragraph 20ZM(1)(ca)) to the VSLO’s responsibilities (item 7 of Schedule 1 to the Bill). Importantly, this opens the way for the VSLO to prompt the Secretary to use their discretionary powers under proposed subclause 46AA(1) (discussed above) to initiate the process of re-crediting VET FEE-HELP debts for groups of debtors targeted by providers engaged in widespread inappropriate conduct.

According to the most recent quarterly update from the Commonwealth Ombudsman’s Office, the VSLO ‘will work with DET on which complaints made to us will be eligible for consideration by the Secretary under the new legislation and how the process will operate.’ The most recent statistics suggest some issues are widespread enough to warrant a more straightforward way of resolving issues of inappropriate conduct by a particular provider than the current individual application-based approach under the unacceptable conduct arrangements. The VSLO received 6,405 complaints in the 2017–18 financial year. Of all closed complaints at 30 June 2018, the most common reason for a person to seek assistance from the VSLO was a debt the complainant was
not aware of, either because they weren’t aware of having signed up for the course, or they weren’t aware that enrolling would incur a debt (800 complaints or 19 per cent of total). Disputes over loan amounts (371 or nine per cent of complaints), and complaints about unsolicited contact to enrol (363 or eight per cent of complaints) and inducements to sign up for study (259 or six per cent of complaints) were also common.\(^{31}\)

Proposed paragraph 20ZX7(e) (at item 7 of Schedule 1 to the Bill) adds a requirement that the number of persons whose FEE-HELP balances the VSLO recommends to the Secretary for re-crediting be included in the VSLO’s annual and other reports. The application provisions at item 9 specify this new reporting requirement will apply for an annual report from the financial year ending after Schedule 1 commences. The proposed commencement date for Schedule 1 specified at clause 2 is 1 January 2019, making the first annual report to require these figures the 2018–19 annual report.

Concluding comments

This is a relatively uncontroversial Bill that proposes to deal with the ongoing consequences of some VET providers’ conduct under the discontinued VET FEE-HELP loan scheme, by introducing new discretionary powers for the Secretary to remit VET FEE-HELP debts in cases of inappropriate conduct by VET providers over the full term of the scheme. The Bill also proposes to support these new arrangements by extending the responsibilities of the VSLO to make recommendations to the Secretary in relation to re-crediting a person’s or class of persons’ FEE-HELP balance in cases of inappropriate or unacceptable provider conduct.

While is not clear how the definition of inappropriate conduct will differ from that of unacceptable conduct, since this will be specified in the VET Guidelines, the Bill allows for overlaps in these definitions. Also, by expanding the timeframe for consideration and role for both the Secretary and the VSLO, the inappropriate conduct provisions will have much broader application even if the definition of inappropriate conduct itself is not substantially different from unacceptable conduct.

While the Bill also proposes to make VET providers liable for repaying re-credited amounts to the Commonwealth if the inappropriate conduct resulted in a person being treated as eligible for VET FEE-HELP assistance when they were not, no information is provided about how much the Commonwealth expects to recover through this mechanism. Issues may arise due to the hundreds of provider closures that occurred in the later years of the scheme; however this will not have an impact on achieving the primary purpose of the Bill, which is to ensure that people who incurred VET FEE-HELP debts due to inappropriate VET provider conduct are able to have these debts remitted.

30. Ibid., p. 6.
31. Ibid.