

EXPLANATORY STATEMENT

Higher Education Support Act 2003

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

Issued by the authority of the Minister for Small and Family Business,
Skills and Vocational Education

Background

The VET FEE-HELP loan scheme, contained in Schedule 1A to the *Higher Education Support Act 2003* (HESA), operated from 2009 to 2016 and assisted students with the cost of their studies through an income contingent loan. Under the VET FEE-HELP scheme, a number of unscrupulous training providers and their agents targeted vulnerable people. Targeted students were signed up to courses for which they may not have had the academic capability or means to complete and may not have understood they were receiving a loan from the Commonwealth which needed to be repaid. Some students were not aware they had signed up to training and were not aware of debts they had incurred. As a result, the scheme left many students with debts but little or no training outcomes.

The Commonwealth replaced the VET FEE-HELP loan scheme with the vastly improved VET Student Loans program from 1 January 2017. Some continuing students accessed VET FEE-HELP under grandfathering arrangements during 2017 and 2018.

The *Higher Education Support Amendment (VET FEE-HELP Student Protection) Act 2018* (VFH Student Protection Act) amends Schedule 1A to HESA to introduce a broad remedy for students who incurred a VET FEE-HELP debt as a result of the inappropriate conduct of VET providers or their agents. This includes where that conduct occurred prior to 1 January 2016. The new remedy commences from 1 January 2019.

The *Higher Education Support (VET) Amendment (VET FEE-HELP Student Protection) Guidelines 2018* (Amendment Guidelines) amend the *Higher Education Support (VET) Guideline 2015* (VET Guideline 2015) to provide matters for the purposes of the new remedy introduced by the VFH Student Protection Act.

Authority

The Minister for Small and Family Business, Skills and Vocational Education (the Minister) makes this instrument under clause 99 of Schedule 1A to HESA.

Clause 99 of Schedule 1A provides that the Minister may make guidelines providing for matters that are required or permitted by Schedule 1A in order to carry out or give effect to the Schedule. Guidelines made under clause 99 are a legislative instrument and are known as the ‘VET Guidelines’.

Under subsection 33(3) of the *Acts Interpretation Act 1901* (AIA), where an Act confers a power to make an instrument of a legislative or administrative character, the power includes a power to amend or vary the instrument.

The Minister may, in accordance with subsection 4(2) of the AIA, exercise the power to make VET Guidelines providing for matters for the purposes of the new remedy in Schedule 1A to HESA in the period after the VFH Student Protection Act is enacted but before the enabling provisions commence (i.e. 1 January 2019). This is necessary and appropriate to ensure that the new remedy can be fully effective from 1 January 2019.

Purpose and operation

The VFH Student Protection Act amends Schedule 1A to HESA to introduce a broad remedy for students who incurred a VET FEE-HELP debt as a result of the inappropriate conduct of VET providers or their agents at any time before the closure of the VET FEE-HELP scheme (including where that conduct occurred prior to 1 January 2016). The new remedy will commence on 1 January 2019 and takes the form of a discretionary power for the Secretary to re-credit a person's FEE-HELP balance.

Specifically, under new clause 46AA, in deciding whether to re-credit a person's FEE-HELP balance, the Secretary must be satisfied that:

- a person has not completed the requirements for the VET unit of study, or under 'VET Guidelines' prescribed for this purpose the person is taken not to have completed those requirements (subparagraphs 46AA(1)(a)(i) and (ii)); and
- it is reasonably likely that the VET provider (or its agent) engaged in inappropriate conduct towards the person in relation to the unit or the course of which the unit forms a part, having regard to matters prescribed by the 'VET Guidelines' for this purpose (paragraph 46AA(1)(b)).

The Amendment Guidelines amend the VET Guideline 2015 to prescribe matters for the purposes of subparagraph 46AA(1)(a)(ii) and paragraph 46AA(1)(b) and therefore support the exercise of the Secretary's power under clause 46AA.

Specifically, the Amendment Guidelines introduce new provisions in Part 6 of the VET Guideline 2015 prescribing:

- when a person is taken not to have completed the requirements for a VET unit of study; and
- the matters that the Secretary must have regard to in determining whether it is reasonably likely that a VET provider (or its agent) engaged in inappropriate conduct towards a person in relation to the VET unit of study or the course of which the unit forms a part.

Details of the Amendment Guidelines are set out at Attachment A.

Consultation

The Department of Education and Training (the department), in conjunction with the Office of the Commonwealth Ombudsman, conducted consultation on the Amendment Guidelines with the following parties in November 2018:

- Australian Competition Consumer Commission
- Australian Council for Private Education and Training
- Australian Skills Quality Authority
- Australian Taxation Office

- Consumer Action Law Centre
- CPA Australia
- Department of Finance
- Department of Human Services
- Department of the Prime Minister and Cabinet
- Department of Social Services
- Indigenous Consumer Assistance Network
- Legal Aid New South Wales
- Legal Aid Queensland
- Legal Aid Western Australia
- Queensland Training Ombudsman
- South Australia (SA) Training Advocate
- TAFE Directors Australia
- Department of the Treasury.

These stakeholders represent all Australian Government departments and entities with an interest in the implementation of the VET FEE-HELP student redress remedy introduced by the VFH Student Protection Act, as well as entities which have implemented similar measures.

Non-Commonwealth entities consulted included VET provider peak representative bodies, independent state government bodies responsible for monitoring the VET sector, consumer advocacy groups and entities it is expected that students with a VET FEE-HELP debt may approach for advice. It is noted that several other bodies were invited to engage in consultations but were unable to attend.

Regulation Impact Statement

The Office of Best Practice Regulation (OBPR) advised that a Regulation Impact Statement is not required for the Guidelines (OBPR Reference No. 23254).

Statement of Compatibility with Human Rights

The Statement of Compatibility with Human Rights is set out in Attachment B. It has been prepared in accordance with section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Detailed description of the *Higher Education Support (VET) Amendment (VET FEE-HELP Student Protection) Guidelines 2018*

Preliminary

Section 1 – Name

Section 1 provides that the name of the instrument is the *Higher Education Support (VET) Amendment (VET FEE-HELP Student Protection) Guidelines 2018*.

Section 2 – Commencement

Section 2(1) contains a table that sets out the commencement information for various provisions in the instrument. Each provision of the instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table and any other statement in column 2 has effect according to its terms.

The table has the effect of providing for the following commencement times:

- Sections 1 to 4 and anything else in the instrument not elsewhere covered by the table commence the day after the instrument is registered on the Federal Register of Legislation.
- Schedule 1 commences the later of:
 - (a) the start of the day after this instrument is registered; and
 - (b) immediately after the commencement of Schedule 1 to the *Higher Education Support Amendment (VET FEE-HELP Student Protection) Act 2018* (VFH Student Protection Act). Schedule 1 to the VFH Student Protection Act commences on 1 January 2019 and contains the enabling provisions for this instrument.

In the event that, in accordance with section 4 of the *Acts Interpretation Act 1901* (AIA), the instrument is made after the VFH Student Protection Act is enacted but before Schedule 1 to that Act commences, this commencement provision ensures that the instrument will only commence after it is registered (i.e. it will not have retrospective operation) or after the enabling provisions commence. Relying on section 4 of the AIA will allow the instrument to commence at the same time as the amendments in the VFH Student Protection Act and therefore allow all the elements of the new remedy in Schedule 1A to the *Higher Education Support Act 2003* (HESA) to be in place as soon as possible. In turn, this will ensure that the new remedy will be available to affected persons as soon as possible.

- Schedule 2 commences on 1 January 2020 immediately after the commencement of Schedule 3 to the *Higher Education Support Legislation Amendment (Student Loan Sustainability) Act 2018*. This is because Schedule 2 contains amendments that are consequential to amendments contained in Schedule 3 to the *Higher Education Support Legislation Amendment (Student Loan Sustainability) Act 2018*.

Section 3 – Authority

Section 3 provides that the instrument is made under the authority of HESA.

Section 4 – Schedules

Section 4 provides that each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the instrument has effect according to its terms.

Schedule 1 – Amendments

Higher Education Support (VET) Guideline 2015

Item 1 – Section 5 (Definitions)

Item 1 inserts two new definitions in section 5 of the *Higher Education Support (VET) Guideline 2015* (VET Guideline 2015), specifically definitions for the terms ‘Australian Consumer Law’ and ‘vulnerable person’. These terms are used in new section 58AB of the VET Guideline 2015 (see item 2 below).

Item 2 – At the end of Part 6

Item 2 inserts a new Division 3 at the end of Part 6 of the VET Guideline 2015. New Division 3, comprising two sections, deals with the re-crediting of FEE-HELP balances for inappropriate conduct by VET providers (or their agents).

Subclause 46AA(1) of Schedule 1A to HESA empowers the Secretary to re-credit a person’s FEE-HELP balance where the person incurred a VET-FEE HELP debt as a result of the inappropriate conduct by a VET provider or its agents at any time before the closure of the VET FEE-HELP scheme. In deciding whether to re-credit a person’s FEE-HELP balance, the Secretary must be satisfied that:

- a person has not completed the requirements for the VET unit of study, or under ‘VET Guidelines’ prescribed for this purpose, the person is taken not to have completed those requirements (subparagraphs 46AA(1)(a)(i) and (ii)); and
- it is reasonably likely that the VET provider (or its agent) engaged in inappropriate conduct towards the person in relation to the unit or the course of which the unit forms a part, having regard to matters prescribed by the ‘VET Guidelines’ for this purpose (paragraph 46AA(1)(b)).

‘VET Guidelines’ means the guidelines made by the Minister, by legislative instrument, under clause 99 of Schedule 1A (see the definition in clause 1 of Schedule 1 to HESA). The current ‘VET Guidelines’ are the VET Guideline 2015.

New section 58A sets out when a person is taken not to have completed the requirements for a VET unit of study for the purposes of subparagraph 46AA(1)(a)(ii) of Schedule 1A. Specifically, a person (referred to as ‘the student’) is taken not to have completed the requirements for a VET unit of study with a VET provider if it is reasonably likely that the student did not complete the requirements for the unit, regardless of whether the student is recorded as having completed the unit. That is, the fact that a student has been recorded (for example, in the Higher Education Information Management System maintained by the

department) as having completed the requirements for a VET unit of study is not determinative of whether the student actually completed such requirements. Rather, the central consideration is whether it is reasonably likely that the student did not actually complete the requirements for the unit. This would include, for example, situations where a student's attendance, participation and achievements were not correctly recorded, or the student was wrongly recorded as having completed the requirements for a unit.

New section 58AB is made for the purposes of paragraph 46AA(1)(b) of Schedule 1A. It sets out the matters that the Secretary must have regard to in determining whether it is reasonably likely that a VET provider (or an agent of the provider) engaged in inappropriate conduct towards a person (referred to as 'the student') in relation to a VET unit of study or VET course of study of which the unit forms part.

Some of the matters set out in new section 58AB relate to conduct that is captured by existing provisions relating to unacceptable conduct in Schedule 1A to HESA and the *VET Student Loans Act 2016* (VSL Act) and relevant legislative instruments (see clause 46A of Schedule 1A and Division 2 of Part 6 of the VET Guideline 2015, section 71 of the VSL Act and section 148 of the *VET Student Loan Rules 2016* (VSL Rules). Other matters reflect the experiences of students who have contacted the department and the VET Student Loans Ombudsman (VSLO) to date.

Specifically, in accordance with subsection 58AB(1), the Secretary must have regard to:

- whether the provider engaged in conduct towards the student that involved treating the student as being entitled to VET FEE-HELP assistance under clause 43 of Schedule 1A, when the student was not entitled to that assistance (paragraph 58AB(1)(a)). Under new clause 56(4) of Schedule 1A, where a person's FEE-HELP balance is re-credited under new subclause 46AA(1), this particular conduct triggers an obligation for the VET provider to pay the Commonwealth an amount equal to the VET FEE-HELP assistance to which the person was treated as being entitled for the unit;
- whether the provider or agent engaged in any of the following conduct (paragraph 58AB(1)(b)):
 - unconscionable conduct;
 - systemic conduct, or a pattern of behavior, that is unconscionable;
 - misleading or deceptive conduct;
 - making a representation about a future matter (for example, doing or refusing to do an act) where there was no reasonable grounds for making the representation;
 - advertising tuition fees for the course where there were reasonable grounds for believing that the provider would not be able to provide the course for the fees;
 - the use of physical force, harassment or coercion;
- whether any of the circumstances involving unacceptable conduct specified in Division 2 of Part 6 of the VET Guideline 2015 (other than sections 53, 57 and 58) exist (paragraph 58AB(1)(c));
- whether any of the circumstances involving unacceptable conduct specified in sections 53, 57 and 58 of the VET Guideline 2015 exist on or after 1 January 2016 (paragraph 58AB(1)(d)). Sections 53, 57 and 58 relate to requirements that applied to VET providers from 1 January 2016. Therefore, it is not appropriate for the Secretary to

- have regard to these in the context of conduct that took place before 1 January 2016;
- whether the provider or agent failed to comply with a requirement under Division 2 of Part 3-2 of Chapter 3 of the Australian Consumer Law (that is, a requirement about unsolicited consumer agreements) (paragraph 58AB(1)(e));
- whether the provider has financial, administrative or other barriers that prevented the student from fulfilling an expressed intention to withdraw from the VET unit of study before the census date (paragraph 58AB(1)(f)). This is consistent with the requirements in subsection 32(2) of the VET Guideline 2015 about a provider’s withdrawal procedures;
- whether the student was a vulnerable person (paragraph 58AB(1)(g));
- any recommendations made by the VET Student Loans Ombudsman (VSLO) under paragraph 20ZM(1)(ca) of the *Ombudsman Act 1976* (Ombudsman Act) regarding the student or any student of the provider (paragraph 58AB(1)(h)). Under paragraph 20ZM(1)(ca) of the Ombudsman Act, one of the functions of the VSLO is to make recommendations to the Secretary of the Department administered by the Minister administering HESA (currently, the Secretary of the Department of Education and Training) about re-crediting the FEE-HELP balances of particular persons or classes of persons under clauses 46A and 46AA of Schedule 1A to HESA;
- the provider’s (or the agent’s) history of compliance with (paragraph 58AB(1)(i)):
 - HESA and regulations made under HESA,
 - the VET Guideline 2015
 - any conditions imposed on the provider’s approval as a VET provider, and
 - the *National Vocational Education and Training Regulator Act 2011* in relation to the provider’s (or agent’s) conduct towards any student;
- any other matter that the Secretary considers relevant (paragraph 58AB(1)(j)).

Subsection 58AB(2) sets out the matters that the Secretary may have regard to in considering whether the conduct was unconscionable for the purposes of subparagraph 58AB(1)(b)(i).

It should be noted that none of the circumstances set out in paragraph 58AB(1)(b) are defined by reference to other laws using the same or similar language (e.g. the *Competition and Consumer Act 2010*). They are intended to have broad meaning. Although the Secretary may take guidance from the interpretation given to phrases such as “unconscionable conduct”, “systemic conduct, or a pattern of behavior that is unconscionable” and “misleading and deceptive conduct” in other statutory contexts, the Secretary is not bound to apply such interpretations.

Schedule 2 – Consequential amendments

Higher Education Support (VET) Guideline 2015

Items making consequential amendments to change references to FEE-HELP to HELP

The following items make consequential amendments to change reference to *FEE-HELP balance* to *HELP balance* (or to change *FEE-HELP balances* to *HELP balances*). These amendments are consequential to amendments contained in Schedule 3 to the *Higher Education Support Legislation Amendment (Student Loan Sustainability) Act 2018*. In particular, Schedule 3 to that Act replaces various references to *FEE-HELP balance* in HESA with references to *HELP balance*.

Item number	Provision of VET Guideline 2015
1	Section 7 (paragraph (c) of note 2)
2	Paragraph 10(5)(a)
3	Subsection 10(5) (note)
4	Subsection 10(7)
5	Subparagraph 16(2)(d)(ii)
6	Subsection 21(4)
7	Subsection 21(4) (note)
8	Section 43 (heading)
9	Paragraphs 43(2)(a) and (b)
10	Part 6 (heading)
11	Division 2 of Part 6 (heading)
12	Division 3 of Part 6 (heading)
13	Paragraph 79(4)(f)
14	Subsection 80(4)
15	Subsection 92(5) (heading)

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

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

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

The *Higher Education Support Amendment (VET FEE-HELP Student Protection) Act 2018* (VFH Student Protection Act) amends Schedule 1A to the *Higher Education Support Act 2003* (HESA) to introduce a broad remedy for students who incurred a VET FEE-HELP debt as a result of the inappropriate conduct of VET providers or their agents at any time before the closure of the VET FEE-HELP scheme (including where that conduct occurred prior to 1 January 2016). The new remedy will be available from 1 January 2019 and takes the form of a discretionary power for the Secretary to re-credit a person's FEE-HELP balance.

Specifically, under new clause 46AA, in deciding whether to re-credit a person's FEE-HELP balance, the Secretary must be satisfied that:

- a person has not completed the requirements for the VET unit of study, or under 'VET Guidelines' prescribed for this purpose the person is taken not to have completed those requirements (subparagraphs 46AA(1)(a)(i) and (ii)); and
- it is reasonably likely that the VET provider (or its agent) engaged in inappropriate conduct towards the person in relation to the unit or the course of which the unit forms a part, having regard to matters prescribed by the 'VET Guidelines' for this purpose (paragraph 46AA(1)(b)).

'VET Guidelines' means the guidelines made by the Minister, by legislative instrument, under clause 99 of Schedule 1A. The current 'VET Guidelines' are *Higher Education Support (VET) Guideline 2015* (VET Guideline 2015).

The *Higher Education Support (VET) Amendment (VET FEE-HELP Student Protection) Guidelines 2018* (Amendment Guidelines) amend the VET Guideline 2015 to provide matters for the purposes of new clause 46AA of Schedule 1A to HESA and therefore support the exercise of the Secretary's power under new clause 46AA.

Analysis of human rights implications

This legislative instrument has implications for the following human rights:

- the right to education – Article 13 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- the rights of the child – Article 3 of the *Convention of the Rights of the Child* (CRC)
- the rights of people with disabilities - Article 10 of the *Declaration on the Rights of Disabled Persons* (DRDP).

Right to education

This legislative instrument engages the right to education, which is set out in Article 13 of the ICESCR.

Article 13 recognises the important personal, societal, economic and intellectual benefits of education. Article 13 further sets out that secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means.

The intent of the VET FEE-HELP loan scheme was to make technical and vocational secondary education more accessible to students who may not otherwise have had access to it. The actions of a small number of unscrupulous training providers and their agents have left many students with large debts and little to no training outcomes.

The VFH Student Protection Act introduces a new remedy for students who sought out educational opportunities through the VET FEE-HELP loan scheme and incurred debts as a result of inappropriate conduct by VET providers or agents of those providers. Due to the inappropriate conduct of these providers and their agents, it is likely that affected students have lost confidence in the ability to seek an education. The VFH Student Protection Act seeks to provide a remedy to these students and to restore their confidence and trust in the quality of the education and training system in Australia and its accessibility to them.

The measures in this legislative instrument support the operation of the new remedy and are compatible with the right to education.

Rights of the Child

This legislative instrument engages the rights of the child, which are provided for in Article 3 of the CRC.

Article 3 provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The measures in the VFH Student Protection Act and this legislative instrument protect vulnerable children who may have experienced unscrupulous behaviour by training providers approved under the VET FEE-HELP loan scheme (or agents of those providers) by introducing and giving effect to a new remedy to ensure debts incurred as a result of this behaviour can be remitted.

Rights of Disabled Persons

Article 10 of the DRDP ensures that disabled persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature. Further, Article 6 of the DRDP provides, in relevant part, that disabled persons have the right to education and vocational training to develop their capabilities and skills to the maximum and hasten the processes of their social integration or reintegration.

The Commonwealth is aware that the VET FEE-HELP scheme was plagued by some unethical provider or agent practices that resulted in vulnerable, including disabled, persons being taken advantage of.

The measures in the VFH Student Protection Act and this legislative instrument seek to provide redress for those vulnerable students who were signed up to the VET FEE-HELP scheme and incurred a significant financial liability, without fully understanding the consequences of what they were signing up to. They will help ensure that debts incurred as a result of the inappropriate conduct of providers or their agents can be remitted.

Therefore, this legislative instrument is compatible with the rights of disabled persons.

Conclusion

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.