

EXPLANATORY STATEMENT

Higher Education Support (VET) Amendment (VET FEE-HELP Student Protection) Guidelines 2020

PURPOSE AND OPERATION

The purpose of the *Higher Education Support (VET) Amendment (VET FEE-HELP Student Protection) Guidelines 2020 (Amendment Guidelines)* is to amend the *Higher Education Support (VET) Guideline 2015 (VET Guidelines)* to prescribe various matters for the purposes of clause 46AA of Schedule 1A to the *Higher Education Support Act 2003 (HESA)*.

Under clause 46AA of Schedule 1A to HESA, the Secretary may re-credit a person's HELP balance where the person incurred a VET FEE-HELP debt as a result of the inappropriate conduct of a VET provider (or an agent of the provider). Where an amount is re-credited under clause 46AA, the corresponding VET FEE-HELP debt is remitted.

The Secretary may re-credit a person's HELP balance on application by a person or on the Secretary's own initiative.

A person's application for a re-credit must meet the requirements in subclause 46AA(3). Relevantly, these include any requirements prescribed by the VET Guidelines (paragraph 46AA(3)(c)).

Currently, under subclauses 46AA(9)-(10), the Secretary must not re-credit a person's HELP balance:

- on the Secretary's own initiative, after 31 December 2020;
- on application made by a person, if the application is made after 31 December 2020.

However, subclauses 46AA(9)-(10) enable a later day to be prescribed by the VET Guidelines (paragraphs 46AA(9)(b) and 46AA(10)(b)).

The Amendment Guidelines amend the VET Guidelines to:

- specify a later day for the purposes of subclauses 46AA(9)-(10) – as a result, 31 December 2022 will be: (a) the final date for the Secretary to re-credit under subclause 46AA(1) on the Secretary's own initiative; and (b) the final date for making an application under subclause 46AA(3) for a re-credit under subclause 46AA(1);
- for the purposes of paragraph 46AA(3)(c), prescribe a requirement for applications made under subclause 46AA(3) for a re-credit under subclause 46AA(1) – that is, if an application is made after 31 December 2020 (that is the current final date for making applications), the application must demonstrate that the person did not make an application before that date due to exceptional circumstances.

These amendments extend the period of time by which persons affected by the inappropriate conduct of VET providers (or their agents) may apply to have their HELP balances re-credited. Similarly, they enable the Secretary to continue to re-credit the HELP balances of affected persons on the Secretary's own initiative for a further two-year period.

AUTHORITY

The Minister for Employment, Skills, Small and Family Business makes this instrument under clause 99 of Schedule 1A to HESA.

Clause 99 of Schedule 1A provides that the Minister may, by legislative instrument, make guidelines (the VET Guidelines), providing for matters: (a) required or permitted by Schedule 1A to be provided; or (b) necessary or convenient to be provided in order to carry out or give effect to Schedule 1A.

Clause 46AA of Schedule 1A to HESA provides for various matters to be prescribed by the VET Guidelines.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, 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.

REGULATORY IMPACT

The Office of Best Practice Regulation has advised no RIS is needed to describe the regulatory impact assessment process and outcomes. The OBPR reference number is RIS ID 42960.

CONSULTATION

Consultation was undertaken with the VET Student Loans Ombudsman (**VSLO**). The VSLO receives complaints about VET providers and makes recommendations to the Secretary about re-crediting under clause 46AA of Schedule 1A to HESA, in accordance with its functions under the *Ombudsman Act 1976*. The VSLO supports the extension of the deadlines for applications for re-credits under clause 46AA of Schedule 1A and for the Secretary's ability to re-credit on the Secretary's initiative. This feedback was taken into account in developing the Amendment Guidelines.

HIGHER EDUCATION SUPPORT (VET) AMENDMENT (VET FEE-HELP STUDENT PROTECTION) GUIDELINES 2020

EXPLANATION OF PROVISIONS

Section 1: Name

1. This is a formal provision specifying the name of the instrument to be the *Higher Education Support (VET) Amendment (VET FEE-HELP Student Protection) Guidelines 2020*.

Section 2: Commencement

2. Subsection 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.
3. The table provides that the whole of the instrument commences on 1 January 2021. This commencement date ensures clause 46AA of Schedule 1A to the *Higher Education Support Act 2003 (HESA)* continues to operate beyond 31 December 2020 (refer to the explanation for item 2 of Schedule 1 below).

Section 3: Authority

4. Section 3 provides that the instrument is made under clause 99 of Schedule 1A to HESA.

Section 4: Schedules

5. 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

6. Item 1 inserts a new definition of ‘exceptional circumstances’ in section 5 of the *Higher Education Support (VET) Guideline 2015 (VET Guidelines)*. This term is used in new section 58AD and is relevant to the new requirement for applications made under subclause 46AA(3) of Schedule 1A to HESA after 31 December 2020 for re-credits under subclause 46AA(1) of Schedule 1A.

Item 2 – After clause 58AB

7. Item 2 inserts two new sections in Division 3 of Part 6 of the VET Guidelines, which deals with the re-crediting of HELP balances for inappropriate conduct by VET providers (or their agents) and is relevant to the operation of clause 46AA of Schedule 1A to HESA. In accordance with clause 99 of Schedule 1A, the VET Guidelines can provide for matters: (a) required or permitted by Schedule 1A to be provided; or (b) necessary or convenient to be provided in order to carry out or give effect to Schedule 1A.
8. Subclause 46AA(1) empowers the Secretary to re-credit a person's HELP balance where the person incurred a VET FEE-HELP debt as a result of the inappropriate conduct of a VET provider (or an agent of the provider). The Secretary may do so on application by a person or on the Secretary's own initiative.
9. Subclause 46AA(3) provides that a person may apply to the Secretary for the person's HELP balance to be re-credited under subclause 46AA(1) and sets out the requirements for such an application. Relevantly, an application must meet any requirements prescribed by the VET Guidelines for the purposes of paragraph 46AA(3)(c). No requirements are currently prescribed.
10. Under subclauses 46AA(9), the Secretary must not re-credit a person's HELP balance under subclause 46AA(1) on the Secretary's own initiative after 31 December 2020 or a later day prescribed by the VET Guidelines. Similarly, under subclause 46AA(10), the Secretary must not re-credit a person's HELP balance on application made by a person if the application is made after 31 December 2020 or a later date prescribed by the VET Guidelines.
11. New section 58AC prescribes a later day (ie. 31 December 2022) for the purposes of both paragraphs 46AA(9)(b) and 46AA(10)(b). The effect of new section 58AC is that the Secretary will be able to make decisions to re-credit under subclause 46AA(1) on the Secretary's own initiative until 31 December 2022. Similarly, the new final date for making applications for re-credits under subclause 46AA(1) is 31 December 2022. The extension to these redress measures is in part due to the potential impacts of changes to employment and students' circumstances as a result of the COVID-19 pandemic, which may have led to some students not being aware of their debt or being able to come forward to lodge an application.
12. New section 58AD is made for the purpose of paragraph 46AA(3)(c) and sets out a requirement that must be met by applications made under subclause 46AA(3) for re-credits under subclause 46AA(1).

Specifically, under new subsection 58AD(1), if an application is made after 31 December 2020 (that is, the current final date for making applications), the application must demonstrate that the person did not make an application before that date due to exceptional circumstances. This new requirement reflects that the redress measures were intended to only operate for a finite period of time and the extension to the redress measures is to accommodate those persons who, due to exceptional circumstances, did not apply before the original cut-off date of 31 December 2020.

13. Subsection 58AD(2) provides that exceptional circumstances include the following circumstances:

- the person was not aware prior to 31 December 2020 of their VET FEE-HELP debt – for example, due to the impacts of the COVID-19 pandemic, the person did not reach the income threshold for compulsory repayments through the taxation system; and
- the person was not aware they could apply for a re-credit of the person’s HELP balance under subclause 46AA(1) of Schedule 1A to the Act;
- the person was a vulnerable person during the period 1 January 2019 to 31 December 2020. The term ‘vulnerable person’ is defined in section 5 of the VET Guidelines and includes: (a) a person with a physical or intellectual disability or a physical or mental illness; (b) a person who suffers social or financial hardship; (c) a person who cannot communicate, or has difficulty communicating, in English; and (d) a person who is otherwise disadvantaged.

14. To avoid doubt, new subsection 58AD(3) makes it clear that subsection 58AD(2) does not limit the circumstances which may be considered exceptional circumstances.

15. In practice, a person may apply for a re-credit through the complaints process managed by the VET Student Loans Ombudsman (**VSLO**) under Part IIE of the *Ombudsman Act 1976*. The VSLO’s functions include the ability to make recommendations to the Secretary about re-crediting the HELP balances of particular persons under clause 46AA of Schedule 1A. Therefore, consistent with the VET Student Loans Ombudsman’s current role under the redress measures (as explained in more detail in the Explanatory Memorandum to the *Higher Education Support Amendment (VET FEE-HELP Student Protection) Act 2018*), the VSLO may consider whether a person’s application meets the requirement under new section 58AD and make recommendations to the Secretary accordingly.

16. New section 58AD is not relevant to, and will not affect, the Secretary’s ability under subclause 46AA(1) of Schedule 1A to re-credit a person’s HELP balance on the Secretary’s own initiative.

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 2020

The *Higher Education Support (VET) Amendment (VET FEE-HELP Student Protection) Guidelines 2020 (Amendment Guidelines)* are 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 Instrument

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Human rights implications

The Amendment Guidelines engage the following 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 on 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

Article 13 of the ICESCR 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.

Clause 46AA of Schedule 1A to HESA provides a remedy for persons who incurred VET FEE-HELP debts as a result of the inappropriate conduct of VET providers (or agents of those providers) but were left with little to no training outcomes.

Due to the inappropriate conduct of these providers and their agents, affected individuals may have lost confidence in the ability to seek an education.

The Amendment Guidelines ensure that, where appropriate, affected individuals can continue to access a remedy under clause 46AA. They also seek to restore affected individuals' confidence and trust in the quality of the education and training system in Australia and its accessibility to them.

Rights of the child

Article 3 of the CRC 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 Amendment Guidelines protect vulnerable children who may have experienced unscrupulous behaviour by training providers approved under the VET FEE-HELP scheme (or agents of those providers) by ensuring that, where appropriate, debts incurred as a result of this behaviour can continue to be remitted through clause 46AA of Schedule 1A to HESA.

Rights of people with disability

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 Amendment Guidelines ensure that, where appropriate, vulnerable people 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 can continue to have their debts remitted through clause 46AA of Schedule 1A to HESA.

Conclusion

The Amendment Guidelines are compatible with human rights because they promote the protection of human rights.

**Minister for Employment, Skills, Small and Family Business,
Senator the Hon Michaelia Cash**