



THE UNIVERSITY OF
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—
LH Martin Institute

The VET FEE-HELP Debacle:

Helping its victims and lessons
for administration

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Mark Warburton

Honorary Senior Fellow
LH Martin Institute
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The views expressed in the paper and any errors are my own.

Contents

Executive summary	4
Introduction	6
1. What is the issue?	7
2. How many people and how much money might be involved?	8
3. The three things DET says it is doing about the issue	10
4. Making sense of DET's answers	11
5. What is it to be enrolled in a course of study?	13
6. Can re-crediting of debt help adversely affected people?	14
7. Can ACCC actions resulting in 'redress' for students be an adequate response?	15
8. What should DET's 'investigations' be considering?	17
9. What is a 'Sham'?	18
10. Did the VET FEE-HELP debacle involve 'shams'?	19
11. Decision-making about VET FEE-HELP entitlements	20
12. Has the problem been the 'entitlement' nature of student loans?	22
13. Does passivity rule?	23
Conclusion	25

Executive summary

The 2012 expansion of VET FEE-HELP is not the first large Government policy initiative which has gone wrong during implementation. It is one where it is possible to correct some of the adverse consequences which have resulted. There will be an inappropriate loss of Government revenue and unjust outcomes for individuals if adequate efforts are not made to correct what has occurred. To date, the response by DET appears inadequate, based on the evidence it has given to Senators who have inquired into the matter. This paper attempts to clarify the issues which are involved and to point a way forward which might result in a more acceptable outcome.

In 2012, the Australian Government accepted greater responsibility for funding VET diplomas and advanced diplomas through the VET FEE-HELP scheme in return for the States and Territories extending its subsidies to private VET providers and providing an entitlement to a first post school qualification to a minimum of the VET Certificate III level. By 2015, there were nearly 260 providers whose students could receive VET FEE-HELP. A small proportion of these providers developed aggressive expansion plans. From 2014 to 2015, 15 private providers doubled in size and increased their number of full time equivalent students by over 600 in each institution.

From mid-2014 signs of the abuse of VET FEE-HELP were emerging. Complaints started in 2014 and continued to escalate. By the end of the third quarter of 2016, the Department of Education and Training (DET) had received 3,659 complaints. Despite it being apparent by the beginning of 2015 that some providers were engaging in unacceptable practices to sign-up students, DET appears not to have fully used its powers to protect Government revenue, or the people being misled and signed up for debts to be repaid to the Commonwealth.

It is not possible to know precisely how many people were affected by the 'unacceptable conduct' of VET providers. A significant level of Government expenditure appears to be involved. DET has taken action in relation to around 1,500 debts, but evidence presented to the Senate indicates that a larger number of people have been involved. If about 20,000 students were affected in 2015, then around \$380 million in fees may have been involved for enrolments which were not bona fide. If it is 50,000 students, then the amount could approach \$1 billion in 2015. Most of these fees would have been paid through VET FEE-HELP.

DET should be held accountable for resolving the legacy issues from the abuse of VET FEE-HELP and steps should be taken to ensure this happens expeditiously. It is now two years since the problems associated with VET FEE-HELP became widely known. Knowledge of how they are being managed is only slowly emerging.

Senators have been questioning DET about what can be done to help people who have been adversely affected. DET has not clearly outlined the options which are available to it, instead providing piecemeal information on one of three different lines of activity:

- The potential for 're-crediting' of debts by providers: Re-crediting of debt is precisely defined in VET FEE-HELP legislation and cannot occur in relation to events whose impact occurs prior to a student's debt being incurred. It is unhelpful to imply that this mechanism can assist adversely affected people.
- The actions being taken by the ACCC: These actions are against providers who have allegedly breached the Australian Consumer Law. The ACCC directs its resources to matters that provide the greatest overall benefit for competition and consumers. It cannot pursue all complaints. Its actions will not assist many people who have been adversely affected by the unacceptable practices of VET providers.
- DET's own investigations into specific providers: DET has indicated that it is investigating 28 providers but has provided little information about the purpose of these investigations. DET has indicated that it does not comment on its investigations.

The ACCC's actions are not a substitute for the actions that need to be taken by DET. The ACCC is seeking to prove that some providers engaged in misleading representations or unconscionable conduct. This is not the same test as whether students were bona fide and entitled to VET FEE-HELP.

DET does not appear to have an active and coherent strategy to recover the large amount of taxpayer funds it has outlaid to VET providers for enrolments that were not bona fide or to assist people who have been misused or misled by VET providers seeking to obtain documentation supporting those alleged enrolments. This should be of major concern to Senators and the broader public.

In my view, DET should be doing the following on a case by case basis.

- It should be thoroughly investigating those VET providers which have been growing at high rates, particularly where this has been off a very low base, as well as those that have been the subject of multiple complaints. It should be actively investigating whether those providers were systematically putting in place 'sham' enrolments. There is an accepted legal definition of a sham arrangement and there are established precedents for disregarding sham arrangements in determining entitlement to Commonwealth benefits.
- It should be disregarding enrolment documentation where there is good evidence that enrolments were not bona fide. In those cases, it should decide that people were not entitled to VET FEE-HELP, remove the debts of affected people and raise debts against the relevant VET providers to recover Government revenue.
- It should be pursuing cases of apparent fraud, where there is sufficient evidence.

DET should not sit back and wait for ACCC action to be successful. The 'entitlement' nature of VET FEE-HELP puts Government officials in a strong position to make proper and principled decisions about student entitlements, based on evidence about the substance of relationships. It does not have to give primacy to a signed enrolment form in the light of substantive evidence that the enrolment was not bona fide.

Inadequate action by Government officials has been more responsible for the VET FEE-HELP debacle than inadequate legislative provisions for the regulation of VET providers. That should not continue in dealing with the VET FEE-HELP legacy issues. DET can and should be actively seeking the recovery of Government revenue associated with 'sham' enrolments and the debts of many adversely affected people may be removed in the process.

Introduction

In November 2016, the Senate Education and Employment Legislation Committee tabled the Report of its Inquiry into the VET Student Loans Bill 2016 and two related bills. While ostensibly about the provisions of those bills and whether their passage should be supported in the Senate, a substantial proportion of the time of the inquiry was spent considering what could be done to help people adversely affected by past abuses of the VET FEE-HELP scheme. VET FEE-HELP is to be replaced by the new VET Student Loans scheme.

The Additional Comments made in the Report by the Australian Greens included the following recommendation:

That students who were enrolled into sham courses on false pretences have their debts forgiven by the Commonwealth.

[Senate Education and Employment Legislation Committee (2016a), page 63.]

I have written elsewhere that the problems which occurred with VET FEE-HELP were not so much that there was a lack of regulatory power but that it was not used [Warburton, M. (2016)]. I fear a very similar fate awaits the people who have been exploited in the VET FEE-HELP debacle. There is little sign that the Government officials responsible for the VET FEE-HELP scheme are prepared to use the full extent of their powers to relieve people of debts they should not have.

Senators have been asking questions of Government agencies but the responses they get are confusing. These responses don't sufficiently clarify the operation of the VET FEE-HELP scheme and the associated options for assisting people enrolled into VET courses under 'false pretences'. They often do not clearly delineate the specific responsibilities of the three agencies that are involved:

- The Department of Education and Training (DET / the Department), which is responsible for the VET FEE-HELP scheme;
- The Australian Competition and Consumer Commission (ACCC) which is a generalist regulator. It focusses on taking deterrence action on major consumer issues. Its role is not to seek redress for particular consumers, though this may occur in cases where it decides to take action; and
- The Australian Skills Quality Authority (ASQA) which is the industry specific national regulator for vocational education and training (VET).

This paper is intended to help inform Senators and the broader public about the issue and how it might be handled.

1. What is the issue?

VET FEE-HELP is a loan scheme that helps eligible VET students pay their tuition fees for certain higher-level VET qualifications. It is a benefit for students who are seeking an education qualification. It is not industry assistance for VET providers.

Students generally can only receive VET FEE-HELP if they are enrolled in a course that leads to a diploma, advanced diploma, graduate certificate or graduate diploma. In addition, the course must be undertaken with an approved VET provider. The process of approving VET providers has been directed to ensuring two things. First, that the provider is reputable and of high quality. Second, that the provider is willing to undertake a considerable share of the administration of the VET FEE-HELP scheme.

We know that from mid-2014 signs of the abuse of VET FEE-HELP were emerging. Expenditure in that scheme grew from \$325 million in 2012 to \$2.9 billion in 2015. Student complaints started in 2014 and continued to escalate throughout 2015 and 2016. By the end of the third quarter of 2016, DET had received 3,659 complaints [Senate Education and Employment Legislation Committee (2016b)].

We have listened to and read stories about the dubious practices that occurred during 2014 and 2015. Brokers allegedly ‘selling courses’ to disadvantaged people, targeting non-English speakers, unemployed people, single parents, young people with intellectual disability and others dependent on social security. We know brokers visited indigenous communities. We know some people were told they were signing up for free courses and that some were shocked when they got debt notices. There have even been claims that people who didn’t sign up for any course got debt notices.

The Consumer Action Law Centre (CALC) in its opening statement at the public hearing of the Senate Inquiry into the VET Student Loans Bills stated:

“we surmise that tens of thousands of Australians, and maybe more, were enrolled in courses as a result of what the bill calls ‘unacceptable conduct’. . . . these Australians are now carrying large debts, with nothing to show for it. Tackling the legacy issues must be of the highest priority for government.”

“We think that the Government should be proactive and wipe those debts, particularly for the most vulnerable cohorts – potentially people who did not even know that they were being signed up for a debt, never began the course and were not actually students – the disabled or the elderly, who were signed up in atrocious practices.”

[Proof Committee Hansard (2016), pages 6 & 11.]

2. How many people and how much money might be involved?

In 2008, all Australian Governments signed an intergovernmental agreement to double the national number of diploma and advanced diploma qualification completions.

In 2012, they signed a further agreement, the National Partnership Agreement on Skills Reform, under which States and Territories would introduce an entitlement for people to access a government subsidised training place to a minimum of the first Certificate III qualification undertaken at any registered training organisation (RTO), public or private. In return, the Commonwealth would extend VET FEE-HELP to all diploma and advanced diploma courses, both subsidised and full fee paying, undertaken at an approved VET provider.

The purpose of the National Partnership Agreement on Skills Reform was to extend access to subsidised vocational training at the Certificate III level and above, and in particular at the diploma and advanced diploma levels. The objective was explicitly to:

contribute to reform of the Vocational Education and Training (VET) system to deliver a productive and highly skilled workforce which contributes to Australia's economic future, and to enable all working age Australians to develop the skills and qualifications needed to participate effectively in the labour market.

[Council of Australian Governments (2012), page 1]

There have been claims that the rapid growth in VET FEE-HELP was partly due to the States and Territories cost shifting to the Commonwealth. If it was cost shifting, it was invited cost shifting. It was the direct result of a deal in which the Commonwealth agreed to accept greater responsibility for funding diplomas and advanced diplomas, if States and Territories implemented the entitlement to training and gave the private sector access to their education subsidies. VET FEE-HELP would not be extended in any State or Territory until this condition had been met and the entitlement would require the States and Territories to fund more subsidised training places at the Certificate III and IV levels.

The Commonwealth knew that there would be substantial growth in utilisation of VET FEE-HELP. In the 2013-14 Budget, it estimated that usage would grow rapidly and until 2015, that growth in usage was always less than it had estimated. In 2015, usage exceeded what previously had been expected, but the nominal increase still wasn't as great as it had been in the preceding year.

Table 1: Estimated VET FEE-HELP usage as at the 2013-14 Budget and actual usage by year

Year	Estimated VET FEE-HELP usage (full time equivalent students)	Actual VET FEE-HELP usage (full time equivalent students)
2012	65,300	35,550
2013	87,700	64,564
2014	172,300	131,344
2015	186,800	196,108
2016	198,800	n.a.

Sources: Department of industry, Innovation, Climate Change, Science, Research and Tertiary Education (2013), page 92; Department of Education and Training, VET FEE-HELP Statistical Reports – various years.

Research undertaken for the National Centre for Vocational Education Research [Korbel, P & Misko, J (2016)] indicates that the number of providers in the VET sector was stable over the 15 years to 2015, with fewer providers entering and leaving the sector over the last five years than in the previous 10 years. There have been over 4,000 private providers since 2000 with about 40 per cent having 100 or less students. The research also found that 19 of the top 20 utilisers of VET FEE-HELP in 2014 were in the sector before the scheme commenced.

The number of providers receiving VET FEE-HELP payments from 2012 to 2015 is identified in the table below. The growth in providers would have been broadly consistent with the Commonwealth's expectations, as the scheme was extended to each of the various States and Territories according to the agreed timetable.

Table 2: Number of VET providers who received VET FEE-HELP payments by year

2012	2013	2014	2015
105	155	224	258

Source: Department of Education and Training, 2015 VET FEE-HELP Statistical Report, Table 3.13.

At the public hearing of the Senate Inquiry, DET told Senators in respect of the level of lending under the VET FEE-HELP scheme:

“there was expected to be a large increase and ... it is a matter of trying to estimate how much of the large increase is the expected increase and how much of it is beyond that, which is bad behaviour”

[Proof Committee Hansard (2016), page 59.]

An analysis for each provider of the growth in full time equivalent students in receipt of VET FEE-HELP from 2014 to 2015 appears to indicate that DET should have been aware that a significant problem may have been emerging.

In 2014, there were only 25 providers that had more than 1,000 full time equivalent students receiving VET FEE-HELP and only 10 with more than 2,000. By 2015, this had reached 41 and 17 respectively.

In total, there were 21 providers (including 2 TAFEs), who increased the number of their full time equivalent students receiving VET FEE-HELP by more than 600 from 2014 to 2015. For 16 of these providers (including one TAFE), this growth more than doubled their apparent size.

These 21 providers increased their number of full time equivalent students by just over 53,000 and this accounted for around 85 per cent (\$980 million) of the increase in VET FEE-HELP expenditure from 2014 to 2015.

The 19 private providers among this group of 21 increased their number of full time equivalent students by just over 46,600 and this accounted for around 80 per cent of the increase in VET FEE-HELP expenditure (\$925 million). These 19 providers had an average fee for a year of full time study of over \$19,400, compared to an average of \$17,100 for other private providers.

There are five providers against which the ACCC has commenced proceedings or obtained a court enforceable undertaking from the provider in relation to potential breaches of the Australian Consumer Law (ACL). The nearly 42,000 full time equivalent students of these five providers were charged just under \$800 million in tuition fees. Only four of these five providers are in the group of 19 private providers discussed in the previous paragraph.

The rates of growth of the 19 providers are very high and it would be a major challenge for any quality VET provider to increase the delivery of the educational services necessary for these students to undertake their courses of study. This does not mean that it couldn't be done. A high growth rate is not proof that a provider has engaged in 'unacceptable conduct. It is hard to imagine that a risk based algorithm would not have identified these providers for additional compliance activity and, as will be discussed later, some scrutiny from DET concerning the legitimacy of the claims for VET FEE-HELP.

At the public hearing of the Senate Inquiry, DET told Senators that it did not have a ballpark figure for the number of non-legitimate course enrolments [Proof Committee Hansard (2016), page 63]. It would be difficult to ascertain how many people were signed up for courses without knowing, or without fully understanding what they were signing up for, or how many signed because they received an inducement. In response to a Senate Estimates Question on Notice, DET advised that over 50 per cent of the complaints it had received were related to marketing or a debt dispute [Additional Estimates 2015-16, SQ16-000526].

While it is not possible to know precisely how many people have been involved in 'unacceptable conduct' by VET providers, it appears that a very significant level of Government expenditure may be involved. DET has indicated action has already been taken in relation to around 1,500 debts. But the evidence presented to Senators appears to indicate that a larger number of people have been involved in this debacle. If we are talking about 20,000 students in 2015, then it could involve around \$380 million. If it is 50,000 students, then the amount could approach \$1 billion in 2015. This makes the issue of considerable significance and the CALC should be supported in its efforts to have this legacy issue treated as a high priority.

3. The three things DET says it is doing about the issue

Senators have been questioning Government agencies about what will happen to people who incurred debts as a result of inappropriate provider behaviour. They have been getting a confusing array of answers from DET. It has not clearly outlined the options which are available to it and which might help people. Instead, it provides piecemeal information on one of three different lines of activity:

- The potential for ‘re-crediting’ of debts by providers – an action which has a precise legal meaning that will be explained in more detail below;
- The actions being taken by the ACCC against providers who have allegedly engaged in misleading and deceptive conduct and the potential for some students to obtain ‘redress’ in these cases; or
- Its own investigations into specific providers, though DET does not provide any information on what actions may arise out of these saying only that “the Department does not comment on investigations”.

Below I examine and attempt to clarify each of these three lines of activity. I attempt to identify the option which has the most prospect of helping the alleged ‘victims’ who now have unexpected debts to repay, in some cases large unexpected debts.

Before considering each of these activities, it is necessary to provide some background to enable the reader to understand how VET FEE-HELP is administered, how a student’s entitlement to it is established and to cast light on the answers DET is providing to Senator’s questions.

4. Making sense of DET's answers

Students have to claim VET FEE-HELP and, if they are entitled to it, the Commonwealth pays the tuition fee for the whole or part of the course they are studying. The student obtains a debt to the Commonwealth as a result.

Senators have asked DET the following written questions on notice:

- What is the total number of students who have incurred a VET FEE-HELP loan without their knowledge? What is the value of these loans?
- What is the total number of students whose enrolment in a course has been continued without their knowledge, leading to a VET FEE-HELP debt? What is the value of these loans?
- In cases the department suspects may be bogus student claims by private colleges, how many received course refunds?
- Is it possible some Australians have VET FEE-HELP debts and do not know about them? How many people are in this situation? Are there any estimates or extrapolations that would provide an indication of the numbers impacted?

'The Department does not have this information' was DET's written answer to each of these questions [Senate Education and Employment Legislation Committee (2016b)].

It is a little odd that DET could be paying a student's tuition fees without the student actually being aware it is occurring. You need to understand a bit about how student loans such as VET FEE-HELP originated and how they are administered to understand this.

The original HECS scheme was introduced as a way of requiring students to contribute to the cost of their university education. Universities were required to do the bulk of the scheme's administration. Universities effectively became 'Centrelink' for the scheme. DET's role was minimised as much as possible and over time it generally has continued to shift more of the burden of administration onto education providers.

The current student loan application forms ask students a series of questions relevant to their eligibility. As a student works through their answers to those questions, the form may tell them 'You are not eligible for ... assistance. **Do not complete this form.**' The form is designed so that no-one has to make a decision that a student is eligible. If a student is not eligible, they never get to the end of

the form. In effect the completed form is a signed declaration of eligibility received from the student.

The application for assistance applies for the duration of a student's course, enabling all of the student's tuition fees to be paid throughout the course without re-application. Education providers are required to store the completed form for the Commonwealth for seven years. In normal circumstances, the form doesn't go to DET.

In addition to completing a loan application form, there are further conditions to be met for a student's entitlement to a loan to be established, such as the form being received by the provider prior to the 'census date' and the student still being enrolled in the course on that date. Except for the provider indicating that these conditions are met, evidence demonstrating that the conditions are satisfied is not normally required by DET.

Education providers are required to send notices to students about each new debt of the student shortly after it accrues on the 'census date' for the course. Census dates do not occur until at least 20 per cent of the way through the course. The notices are for information only. DET doesn't get evidence that these notices are sent.

All DET gets are data files with information about the students and their study. It gets an encrypted tax file number in those files and uses it to send student debt information to the tax office. It uses those files to make sure it has paid providers the right amount of money for student's tuition fees.

The original scheme was built to require people who were at a university to make a modest contribution to the cost of their study. It was built so that if a person at a public university met the conditions for being required to contribute to the cost of their higher education, they had a debt owing to the Commonwealth. The idea that the scheme provided a benefit which paid the person's tuition fee was latent and only came to the fore with subsequent developments of the income contingent loan model, including its extension to private providers.

Legislative provisions enabling a person to appeal against the creation of a debt were never part of the scheme. No statutory right of appeal was introduced when the scheme was expanded, in this case to the VET sector. A student cannot appeal that they were not entitled to a loan and should not have a debt. The relevant

provisions are not written as the decision of a decision maker. They are written as an entitlement resulting directly from specified circumstances being satisfied.

The HECS model of administration wasn't designed with an eye to commercial education providers potentially deciding to 'organise' people into the circumstances required for them to be entitled - to find people eligible for loans, sign them up for a course they wouldn't otherwise do and in the process get a loan form signed so they could send a bill for 'tuition fees' to the Government. It was a scheme that was built for an environment in which a high degree of trust could be placed in universities to administer the scheme and in which the funds made available through that program remained within a framework of public accountability. A university is generally a statutory entity accountable to its State or Territory Parliament.

The absence of statutory provisions for merits review of a person's entitlement to a student loan has been a very significant difference between these income contingent loan schemes and other entitlements like social security benefits. In these other cases, it is standard practice for legislation to provide that a person can appeal a decision about their entitlement to the benefit. The VET FEE-HELP debacle casts real doubt on the appropriateness of the model of administration for income contingent loans that has been in place. The inclusion of statutory provisions for the merits review of a decision to approve or not approve a VET Student Loan is a welcome improvement.

The Government did include one protection for students in the original HECS scheme and included legislative provisions making a decision on that matter subject to merits review. This protection was about removing the requirement for a student to contribute if they couldn't finish their course because, for example, they got extremely ill or were in a bad accident. This protection has continued as income contingent loans have been extended to private providers.

This protection allows the debts of genuine students to be removed or 'remitted' in particular circumstances. These circumstances relate to events that have their impact after the date on which a debt occurs (i.e. on the census date which does

not occur until 20 per cent of the way through a course). Events that have their impact prior to that time are not a ground on which debts can be removed.

This protection, the remitting of certain debts, served to increase public support for the introduction of the HECS scheme as being fair and reasonable. It is the genesis of the current 're-crediting of a person's FEE-HELP balance' or what in DET's answers to Senators is simply referred to as 're-crediting'. Once again it is a feature of current income contingent loan schemes that drifted across from the original HECS scheme with little consideration of its ongoing appropriateness to the circumstances in which the new schemes would operate.

As with the majority of the administration of student loan schemes, the function would be performed by education providers. They would receive the claims and make the decisions on them on behalf of the Commonwealth. They also were required to undertake the internal review stage of administrative appeal if a student appealed the decision not to 'remit' the debt.

Farming out the remission of Commonwealth debt to education providers, particularly private education providers, is potentially problematic. It is risky to give education providers the power to remove a student's debt to the Commonwealth. What is to stop them 'willy-nilly' giving away the Commonwealth's money?

The way found to manage this risk was to make education providers give the Commonwealth back the same amount of money that it had paid in tuition fees for the student. This approach was to deter the provider from being too lax in its decision making about whether to 'remit' or 're-credit' debts. It would make the provider feel the financial pain of the decision through being required to refund the amount of tuition fees that the Commonwealth paid for the student.

The approach protected the Commonwealth's financial position at the expense of the education provider. It neatly ignored that the provider would have incurred costs because students seeking to have their debts removed are already more than 20 per cent of the way through the unit or subject before they suffer the 'special circumstances' that justify removing the debt.

5. What is it to be enrolled in a course of study?

The Higher Education Support Act 2003 (HESA) specifies many conditions which have to be met to establish a student's entitlement to a VET FEE-HELP loan to pay their tuition fees. These include the student meeting citizenship/residency requirements, course requirements, tax file number requirements and completing and submitting the application form on or before the 'census date'. But if these conditions are satisfied the student is entitled to the loan and the VET provider can be certain that the Commonwealth will ultimately pay the student's tuition fees.

One of the conditions of entitlement is particularly important to any discussion on how to potentially help people who have been adversely affected by the behaviour of some providers. Throughout 2014 and 2015, section 43(1) of Schedule 1A provided the student must have:

- i. enrolled in the unit on or before the census date for the unit; and*
- ii. at the end of the census date, remained so enrolled*

A definition of 'enrolled' is provided in Schedule 1 of HESA. It tells us that "a person enrolled in a VET course of study includes a person undertaking the VET course of study".

This tells us that a person who is undertaking the VET course is enrolled. It doesn't tell us about a person who is not undertaking the VET course? The definition implies that there may be circumstances in which a person not undertaking the course could be considered to be enrolled in it. The legislation doesn't provide any further details on this matter.

The fact that 'enrolled' is not fully defined in HESA means that it is open to some interpretation. In the educational and social context in which the VET FEE-HELP scheme operates, it is normally the case that a person would not sign an enrolment form or put their name on a list to do a course, unless the person had a **bona fide** intention to undertake the course.

There are extensive regulatory arrangements in place to prevent qualifications being sold. The nature of the agreement between a person and an education provider is not the same as that of a standard contract that might be used by a door-to-door salesperson. Qualifications are awarded to people who demonstrate that they have acquired subject matter expertise, attained particular skills and demonstrated particular competencies. A person enrolls in a course to undertake the endeavour that will be required to result in a qualification being issued. The student may fail, but does not set out to do so.

There does not appear to be a compelling reason why DET could not interpret HESA to require more than a person simply signing an enrolment form or putting their name on a list to do a course. In ordinary circumstances, such documents may be considered to provide adequate evidence that a person was enrolled in the course and hence entitled to VET FEE-HELP. This does not have to be the case where there is good evidence that circumstances were not ordinary and that the people who signed these forms or put their names on course lists did not have a bona fide intention to undertake the course. Interpreting HESA in this way provides DET with the scope to protect Government revenue and assist people adversely affected by the unacceptable practices of some VET providers.

Whether all of the enrolments of people in VET courses reported to DET by VET providers were bona fide will be discussed in Section 9 below. There will be a particular focus on whether these enrolments may actually have been 'sham' arrangements.

Presumably in cases where there are multiple claims that students did not sign up for a course with a particular VET provider, DET is seeking further evidence from that provider to substantiate the alleged enrolments. We do not know if this is the case because DET will not comment on its investigations.

6. Can re-crediting of debt help adversely affected people?

DET told the Senate Inquiry that since May 2016 it has had a complaints unit and been able to get the remission of 1,500 student debts involving \$13.2 million. In response to written questions about this it said:

“80 providers have re-credited debts after being contacted by the department’s VET FEE HELP Complaints Handling Unit. However it should be noted that many providers regularly re-credit student’s HELP debts as part of a special circumstances claim or simply after consideration of a student’s complaint and or grievance.

[Senate Education and Employment Legislation Committee (2016b)]

The relevant legislative provisions governing the ‘re-crediting of FEE-HELP balance’ are contained in Section 46 of Schedule 1A, HESA. ‘Re-crediting’ can only occur in the ‘special circumstances’ specified in Section 48 of Schedule 1A, HESA. The circumstances have to:

- a) be beyond the student’s control;
- b) not make their full impact on the student until on or after the census day for the course, or the part of the course; and
- c) make it impracticable for the student to complete the requirements for the course, or the part of the course, during the student’s enrolment in the course, or the part of the course.

‘Re-crediting of FEE-HELP balance’ results in the removal of the same amount of the student’s debt. The conditions which need to be met for ‘re-crediting’ are strict and do not make it easy for students to get rid of their debts. They are about circumstances that do not make their full impact until after the census date and make it impractical for the student to complete the course. They are not about rogue provider behaviour directed at increasing the number of people enrolled in courses with the provider.

For the VET FEE-HELP entitlements paid in 2014 and 2015, it is only VET providers that can make decisions about ‘re-crediting’ and they can only do so if the VET provider is satisfied that all of the above conditions are met.

None of this has anything to do with getting ‘redress’ for students who have been subject to misleading representations or unconscionable conduct by providers ‘selling’ courses. There have been no amendments to these provisions which enable the ‘re-crediting’ of debts that arose prior to 1 January 2016 due to provider misconduct. It would be misleading to claim otherwise.

DET should not be referring cases back to the VET provider for a decision on ‘re-crediting of the students FEE-HELP balance’ as a way of seeking redress for students who have been misled by VET providers or their brokers. It may do so if it believed that an error had occurred in relation to the student’s enrolment. If the student had not been enrolled, then the student could not be entitled to VET FEE-HELP. In those circumstances, it would be appropriate for the VET provider to correct its administrative records and any data files that it had provided to DET.

It is difficult to imagine that a VET provider which had been engaging in widespread ‘unacceptable conduct’ directed at maximising its revenue from VET FEE-HELP would have an interest providing relief to a student complaining about being misled or misunderstanding the implications of their dealings with the provider. It does appear that this may be happening in some particular cases. It seems that these actions may be occurring because it is an easy and inexpensive way of dealing with a single case and potentially because it may prevent the extent of the true situation being drawn to the full attention of Government agencies.

It certainly would not be appropriate for DET to be encouraging VET providers to use the ‘re-crediting’ provisions in any case in which ‘special circumstances’ may not apply.

7. Can ACCC actions resulting in ‘redress’ for students be an adequate response?

DET also told the Senate Inquiry in its written response to questions that:

the Department of Education and Training has joined the Australian Competition and Consumer Commission (ACCC) in Federal Court action against several VET FEE-HELP providers alleging breaches of the Australian Consumer Law (misleading, deceptive and unconscionable conduct). Subject to the decisions of the court, these actions may result in further debts being re-credited.

[Senate Education and Employment Legislation Committee (2016b)]

DET’s comment about debts being re-credited in this response is potentially confusing. It does not appear that ACCC action could technically result in a decision to ‘re-credit’ as provided for under HESA.

The Australian Consumer Law (ACL) is complex. Some breaches of its provisions attract civil penalties and remedies and some are offences subject to criminal penalties. In the VET FEE-HELP cases currently being pursued by the ACCC, it is seeking civil penalties and remedies. The standard of proof required will be ‘on the balance of probabilities’, rather than the more difficult ‘beyond reasonable doubt’ required to prove a criminal offence.

There are a range of penalties and remedies available for breaches of the ACL. These include:

- Compensation for loss or damage
- Financial penalties
- Having the contract declared void in whole or in part
- Having the contract or arrangement varied
- A refund or performance of specified services.

The ACCC advised the Senate Inquiry that it has commenced proceedings against four colleges who are contesting that they have breached the ACL. Each case involves specific dealings with identified students and broader allegations of a pattern of behaviour for marketing and enrolling students. Among the penalties and remedies being sought is return of money to the Commonwealth and facilitation of cancellation of student debts.

In addition to the four cases which are being contested, the ACCC has accepted a court enforceable undertaking from one provider. In its written response to the Senate Inquiry, it indicated that these undertakings were:

to automatically cancel the enrolments of students who have not completed a unit of study, and to repay the Commonwealth any amounts received as a result of those enrolments. Students who consider they were misled may also seek redress.

[Senate Education and Employment Legislation Committee (2016b)]

In a sixth case, the ACCC has instituted proceedings against an education services broker which marketed courses on behalf of various colleges. In this case it is seeking declarations and penalties.

So how are these actions benefiting students? The answer to this question may depend on which remedies are being sought by the ACCC and in some of these cases there appears to be potential for difficulties to arise.

It is most easy to understand how a remedy which has ‘the contract declared void in whole or in part’ might assist. The contract in this case would be the agreement between the student and the VET provider under which the student agreed to pay the course tuition fees and the provider agreed to supply education services associated with the course of study and issue a specific qualification if the student successfully completed that course.

If that agreement was void, then it would seem DET could treat the student(s) as though the student had not been ‘enrolled in the course of study at the end of the census date’. This would mean that the student did not have an entitlement to VET FEE-HELP. If that was the case, DET could raise a debt for any amount it had incorrectly paid to the provider and could remove any debt that had been attributed to the student. There simply never was any entitlement.

DET has indicated in a response to a Senate Estimates Question on Notice that this is a possibility. Referring to ACCC action it said:

... if the contract between the provider and the student ends up being rescinded due to the provider’s misleading or deceptive conduct, the student may not have been effectively enrolled and the debt may be cancelled as having never properly arisen.

[Additional Estimates 2015-16, SQ16-000755]

A very similar result would follow if a court decided that the application for VET FEE-HELP was void.

The implications of a remedy which is 'to repay the Commonwealth any amounts received as a result of those enrolments' are a little less clear. While the Commonwealth would get its money back, what would happen to the debt that the student obtained under HESA? The remedy does not initially seem to produce the result that there was no entitlement and there is no debt.

This difficulty may not be insurmountable. A person incurs a VET FEE-HELP debt if the Commonwealth 'makes the person a loan'. Perhaps in this case the Commonwealth will decide, given it has its money back, that it can act as though it never made the loan and hence there never was a debt. It is unlikely that anyone who received the benefit of such a decision would object and take legal action claiming that the Commonwealth could not legally make such a decision. Presumably if this is what the Commonwealth intends, it considers that it is able to take such an action.

The implications of remedies arising from a student seeking redress are also not clear and are likely to depend on the nature of the remedy.

Some students are likely to have paid their tuition fees up front without a loan. These students should be able to seek redress by having those tuition fees refunded.

It also seems possible that a person could seek compensation for the 'economic loss' they incurred in paying tuition fees, even though those fees were paid through VET FEE-HELP. Such a person might not use the resulting funds to repay the debt they acquired under VET FEE-HELP. Such a person may never have the level of income required to make a compulsory repayment of their HELP debt.

It is likely that the Commonwealth is seeking to guard against this possibility. It is not clear from any of DET's responses to Senators whether this is the case.

Similarly, it is not clear if DET considers that penalties and remedies arising from successful ACCC action is the only option for assisting people who have been adversely affected by VET providers behaving inappropriately. There are a number of significant problems if that is DET's position.

First, it doesn't appear that this option can be used to assist everyone who may have been adversely affected. As indicated above, there appear to be around 20 providers who grew at an extra-ordinary rate. So far, the ACCC has obtained a court enforceable undertaking from only one VET provider. Four other VET providers and one broker marketing for various colleges are contesting the allegations.

Second, this option relies on the ACCC proving 'on the balance of probabilities' that particular VET providers breached a provision of the ACL – through misleading representations or engaging in deceptive or unconscionable conduct and so forth. The matters that need to be demonstrated and the findings in relation to facts are quite different to those of which DET has to be satisfied in the administration of VET FEE-HELP.

It is quite possible for DET to decide it is not satisfied that certain people allegedly enrolled in a course with a VET provider are entitled to VET FEE-HELP, even though the ACCC may have been unsuccessful in demonstrating that the particular provider had breached the ACL. Quite simply the questions to be answered in each case are different, as outlined in the next section.

Third, this approach by DET is completely passive. It was in part passive administration that led to the problem in the first place. It is not the case that DET cannot do anything unless the ACCC successfully takes action.

If a VET provider has a signed piece of paper (or similar electronic indication) purporting to be an enrolment, does that put the matter beyond doubt? Does DET have to assume that there was a **bona fide** enrolment of a person in a course simply because a provider claims that there was? The answer to both of these questions, in my view, is no.

While the ACCC's actions are important, it is not clear they offer the best prospect of helping the alleged 'victims' of the VET FEE-HELP debacle.

8. What should DET's 'investigations' be considering?

In its written responses to Senator's questions, DET indicated that:

the department has commissioned several suppliers (Deloitte, McGrathNicol, Ernst & Young and KPMG) to audit student enrolments and entitlement to VET FEE-HELP and compliance with the Higher Education Support Act 2003 and the Higher Education Support (VET) Guideline 2015. This includes 19 payment and compliance audits, as well as another nine providers (five of which are in administration or liquidation) to assess their entitlement to VET FEE-HELP payments.

[Senate Education and Employment Legislation Committee (2016b)]

This statement implies that DET might decide providers were not entitled to VET FEE-HELP payments. This is another confusing statement from DET.

Providers do not have an entitlement to VET FEE-HELP. The critical question is whether the provider's students are entitled to VET FEE-HELP. Only if they are does the Commonwealth pay the amount to which the student is entitled 'to the provider in discharge of the student's liability to pay his or her VET tuition fee'.

In 2009, the Hon Justice Garry Downes AM delivered a paper to The Law Society of New South Wales Government Solicitors' - CLE Conference. It was entitled Decision-Making in the Public Sector: Getting it Right. The first section was entitled Answer the Question and in it he said:

"So we are rather lax in our day to day communication. We do not often directly address questions that are posed for us.

This approach sometimes carries over into our other activities ... Decision-making is generally question answering and it is one area where more attention should be given to identifying the precise question and then answering it.

... It is never appropriate for administrative decision-making to be guided by perception. The precise wording of the rule being applied must always govern.

... the majority of decisions of the Administrative Appeals Tribunal which are upset on appeal to the Federal Court are set aside on the ground that the AAT member did not correctly apply the governing legislation. ... the failure is associated with an omission to strictly observe the requirements of the legislation and to follow through the cumulative tests it contains."

[Downes, G. (2009)]

It is not clear that DET is focussing on the correct question. That question is whether these people actually were enrolled in a course of study. This is the question that needs to be answered – the test that needs to be applied. If a student is not 'enrolled', then there is no entitlement. There is no payment to be made to the provider and no debt for the student to repay.

The Consumer Action Law Centre (CALC) in its oral evidence to the Senate Committee reported on discussions it had with the Government about helping people who had been misled by providers. It indicated that the Government had advised:

"that it may be in breach of constitutional requirements around compensation when property is revoked by the Government. The Government must under the Constitution provide compensation on just terms."

[Proof Committee Hansard (2016), page 9.]

It is possible that this statement relates only to the CALC's proposal for a remediation scheme to assist 'people who did not even know that they were being signed up for a debt, never began the course and were not actually students' [Proof Committee Hansard (2016), page 11.]. It would be useful if at some stage DET actually advised CALC that a person in these circumstances could not be entitled to VET FEE-HELP and so could not acquire a debt.

If there is an appropriate focus on the correct question, a remediation scheme may not be necessary to assist people in these circumstances. If these people were not 'enrolled', then there is no entitlement and there certainly is no need for DET to acquire any property.

9. What is a ‘Sham’?

The reader should think about social security for a moment. What happens to a sole parent when they are found to be in a marriage-like relationship? What happens when it is discovered that a person has entered into a ‘sham’ arrangement that is designed to reduce a person’s income or assets and so increase their entitlement to social security entitlement?

Artificial arrangements are not countenanced in the administration of social security entitlements. The Government disregards arrangements which are a sham and it has had the courts support such action. It is prepared to raise overpayments for amounts that have previously been incorrectly paid. This does not always result in the Commonwealth pursuing charges of fraud, but if there is sufficient evidence and the case is serious enough it will take such action. Sole parents have gone to goal over such matters.

It is relatively easy to find cases where the Administrative Appeals Tribunal (AAT) has disregarded ‘sham’ arrangements in determining the level of people’s entitlement to a Government benefit. Two such cases are discussed in Attachment A.

- In the first case, the AAT supported a Commonwealth decision that an arrangement for which there was documentary evidence was a sham and so that evidence could be disregarded.
- In the second case, the AAT rejected a Commonwealth decision to take documentary evidence of financial arrangements at face value and found those documents did not reflect the true nature of relationships.

A well accepted definition of a ‘sham’ was referenced in the second case. It is:

“the parties . . . have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating”

[Lee-Warner and Repatriation Commission [2003], AATA 533 (6 June 2003)]

In his 2008 Annual Taxation Lecture to the Faculty of Law at The University of Melbourne, the Hon Justice Michael Kirby AC CMG devoted most of his time to a discussion of how Australian courts have treated arrangements claimed to be a ‘sham’ and a defence of the limited and cautious use of ‘sham’ in legal analysis and decision making:

“[W]here justified, it may rescue the decision-maker from being led by the nose into the artificial task of defining the legal rights and obligations of the parties by reference to their proved documents and related conduct alone, where extrinsic evidence demonstrates that they constitute a sham and were not intended to be effective or have their “apparent, or any, legal consequences”.

For a court to call a transaction a sham . . . represents a principled liberation of the court from constraints imposed by taking documents and conduct solely at face value. In this sense, it is yet another instance of the tendency of contemporary Australian law to favour substance over form.”

[Kirby, M (2008)]

10. Did the VET FEE-HELP debacle involve ‘shams’?

There appears to be evidence that much of the rorting of VET FEE-HELP was people ‘signing up for courses’ with no intention to give rise to the normal legal rights and obligations associated with enrolling in a course of study.

- Did low income people really accept the obligation to pay a tuition fee? Some people have indicated that they were advised they would not need to pay a tuition fee or that the course was free. In these and other cases, VET providers may have had no intention of seeking tuition fees from these people. These VET providers were seeking out people who were entitled to VET FEE-HELP to enable them to ‘bill’ the Commonwealth.
- Was the VET provider really accepting the obligation to deliver the usual educational services? There is evidence that VET providers were enrolling people beyond any realistic assessment of their capacity to deliver the educational services necessary for students to undertake their courses of study.
- Did people ever have a bona fide intention to undertake the course? There is evidence that people were signing forms simply to receive inducements, such as laptops.

If DET obtains good evidence that the answer to these questions is no, then it would seem that an alleged enrolment could be regarded as a ‘sham’. It is quite clear that the Commonwealth can disregard a ‘sham’ enrolment and that would mean there was no entitlement to VET FEE-HELP, no payment due to a provider and no debt for the student.

While not specifically referring to arrangements being a sham, DET has indicated in a response to a Senate Estimates Question on Notice that:

Student entitlement to VET FEE-HELP is conditional upon the student’s enrolment in a relevant course (amongst other things) and therefore, if the enrolment itself is found to be flawed or illusory, the Department of Education and Training may take the view that there was no student entitlement to VET FEE-HELP and effectively undo the debt as a matter of ordinary administration.

[Additional Estimates 2015-16, SQ16-000755]

There does not appear to be a question of acquisition of property from a VET provider in the making of such a decision. An administrative decision that a person is not entitled to VET FEE-HELP would not remove the legal obligation of that person to pay the tuition fee set by their VET provider, if that obligation exists. A VET provider could take legal action to seek to establish that right if they wished. They may also have standing to seek judicial review of the Commonwealth’s decision that a payment for the student’s tuition fees is not due to them.

DET should not sit back and wait for ACCC action to be successful. The ‘entitlement’ nature of VET FEE-HELP puts Government officials in a strong position to make proper and principled decisions about student entitlements, based on its understanding of the substance of relationships. It does not have to give primacy to a signed enrolment form in the light of substantive evidence to the contrary.

DET has not provided information to Senators about the focus of its investigations into VET providers. It would be strange if those investigations did not go to the question of whether the provider’s students were entitled to VET FEE-HELP and instead focussed only on other matters concerning compliance with VET provider requirements. It should be actively seeking to satisfy itself that people’s enrolments in courses of study were bona fide, particularly where there have been multiple complaints from people claiming they were not aware they were enrolled or do not understand why they have been advised they have a debt.

11. Decision-making about VET FEE-HELP entitlements

There has been a lack of clarity about the extent of the responsibilities of each of DET, ASQA and the ACCC for the initial prevention of the ‘unacceptable conduct’ engaged in by some VET providers. In my view, there needs to be greater clarity of responsibility for this matter.

There is no lack of clarity about which agency is responsible for administering student entitlement to loans under the VET FEE-HELP scheme. The Administrative Arrangements Orders make it quite clear that it is the responsibility of DET. DET is responsible for the recovery of any funds that have been expended under that scheme that were not authorised under HESA.

DET appears likely to have substantive evidence that some alleged enrolments in courses of study were not bona fide. It should be actively identifying those cases and it should be seeking to actively identify those cases where VET providers were systematically putting in place sham arrangements. It should not be disregarding any evidence relevant to these matters.

In 2007, the Administrative Review Council (ARC) published best practice guides to support good decision making in Commonwealth agencies. The Guides were for use ‘as a training resource and as a reference for primary decision makers in Commonwealth agencies’. Guide 3 on Decision Making: EVIDENCE, FACTS and FINDINGS is particularly useful in the sort of case being discussed in this paper.

It provides a range of useful reminders for administrators, such as evidence is not necessarily proof; administrative decision makers may have a duty to investigate a fact if their power depends on the existence or non-existence of the fact; and findings in relation to the facts in issue must be based on evidence that is relevant and logically capable of supporting the findings.

It is important to note that DET needs to be satisfied about facts relevant to whether a person is entitled to VET FEE-HELP. It is not deciding whether a VET provider should receive a payment. The latter is simply a consequence of the decision that a person is entitled.

As with the actions the ACCC is taking against some VET providers, it is the civil standard of proof (i.e. the balance of probabilities) that would apply to DET’s findings on facts relevant to a student’s entitlement. But there are some significant differences between the matters for which DET is responsible and the ACCC actions.

The ACCC is not seeking to demonstrate the same facts as those of which DET should be satisfied for a person to be entitled to VET FEE-HELP. The ACCC is seeking to establish facts relevant to whether representations were misleading or conduct was unconscionable. DET should be examining whether enrolments were bona fide. The evidence that DET should be examining to ascertain whether this was the case may differ from that which the ACCC presents to the courts.

It is quite possible, for example, that a person could accept an inducement, such as a laptop, to enrol in a course and not have been misled by a VET provider. The transaction could have been based on the person receiving the laptop, knowing that they would obtain a debt that they were unlikely ever to be required to repay and knowing that the provider would receive payment for a tuition fee from the Government. Such an arrangement could quite consciously be a sham and have involved no misleading representations.

The ACCC will need to comply with the rules of evidence to establish ‘on the balance of probabilities’ that a VET provider breached a provision of the ACL. DET is not bound by those rules, but its findings still need to be

based on ‘logically probative’ evidence—material that tends logically to prove the existence or non-existence of a fact. ... rumour or speculation is not logically probative evidence because it does not tend rationally to prove what it asserts.

[Administrative Review Council (2007), page 6]

On the basis of this logically probative evidence, DET needs to be reasonably satisfied that a particular fact is more likely than not to be true. In the cases being discussed in this paper, the relevant fact is whether people were enrolled in a course of study. That fact may not be proved by a signed enrolment form. This could occur in circumstances in which the parties to that form had no intention of establishing the usual relationships between a person seeking an educational qualification and their education provider.

The ARC guidance provided in respect of evenly balanced evidence is particularly noteworthy. If the decision maker is not reasonably satisfied that the applicant qualifies, they must refuse the application [Administrative Review Council (2007), page 8]. This is likely to contrast with the situation of the ACCC. If it only manages to demonstrate ‘evenly balanced evidence’ in the cases it is pursuing, I doubt that it will win those cases.

Administrators are bound to observe procedural fairness and the requirements of natural justice. When making decisions, DET should treat a person potentially entitled to VET FEE-HELP and the relevant VET provider as interested parties. Both should be appropriately notified about the decisions being taken and given an opportunity to respond to evidence and information.

DET should be cognisant that any decision it makes about a person's VET FEE-HELP entitlement presents a potential disadvantage to the person as it may result in the person obtaining a debt which they are required to repay. It is inappropriate for DET to deny a person who is objecting to a notification about a VET FEE-HELP debt, the opportunity to provide evidence and information relevant to that matter. It would also be inappropriate for DET not to properly take that information into account in making a decision.

Any evidence that DET uses must be logical and capable of supporting its findings. Its specific decisions must depend on the particulars of the evidence available to it and their relevance to the facts of which it needs to be satisfied. It does not have to accept a signed form, such as an enrolment form, if there is substantive evidence that it does not represent the true relationship between the parties to that document.

Prior to this year, standard practice for DET was to advise people to raise concerns with their VET provider. While nothing has prevented a person from writing to DET with a complaint, its general approach to responding to such letters has for a long time been consistent with its website information.

DET's StudyAssist website tells students that to make a formal complaint: 'You must lodge your complaint with your provider via its official form.' People are advised to seek both internal and external appeals through the standard processes which their provider should have in place. If still not satisfied, they are told to submit their complaint to the relevant VET regulator (ASQA, except in Victoria and Western Australia).

It is only since May 2016 that it has had a complaints unit. There is now a Student Loans Enquiry Form available on its website for complaints to be directed to that unit.

The standard practice that DET has adopted in the past to shift the majority of the administration of its student loan schemes onto education providers is not appropriate in light of what has been occurring. VET providers are clearly not well placed to consider complaints which query the probity of their own conduct and which dispute the status of their purported enrolled students.

12. Has the problem been the ‘entitlement’ nature of student loans?

The Government discussion paper on Redesigning VET FEE-HELP stated:

“the only relevant consideration for determining a provider’s payments was whether or not the provider’s students had an entitlement to VET FEE-HELP assistance. If a provider’s student was entitled to a loan, the provider had a right to payment with respect to that student.”

[Australian Government (2016), page12]

It is not clear if this is a criticism of VET FEE-HELP being an entitlement or of something else. Perhaps it is implying that a bona fide student might be denied their ‘entitlement’ if a provider misbehaves. This would be a strange approach to an ‘entitlement’. Legitimate students should not be disadvantaged by the behaviour of their education provider.

Commonwealth legislation is usually constructed to ensure that the Commonwealth is in a very powerful position to administer entitlements. The conditions of entitlement are laid out in great detail and if they are not met, there is no entitlement – end of story!

In the case of VET FEE-HELP, the whole scheme was enveloped in a set of arrangements that were intended to ensure that VET providers behaved reputably, treated their students fairly and were high quality educators. No student is entitled to a VET FEE-HELP loan unless they are enrolled in a course with a VET provider that meets these standards.

It is important that we fully understand what went wrong in the administration of VET FEE-HELP, given the continual effort over the past 25 years to uphold the international reputation of Australia’s tertiary education sector. These efforts have been directed to ensuring that providers are reputable and of high quality, and that people have the skills they are supposed to have, before being issued with a qualification. The reputation of the tertiary education sector is critical to our domestic economy and to protecting Australia’s third largest export and its largest non-commodity export.

The problems that arose with VET FEE-HELP go beyond deficiencies in the legislative provisions and have little to do with the ‘entitlement’ nature of student loans.

13. Does passivity rule?

To date, there has been no forensic examination of what went wrong. We may get more insight when the ANAO finally releases its audit report ‘on the effectiveness of the policy establishment, implementation, administration and performance measurement of the Vocational Education and Training (VET) FEE-HELP Program’. That is due to occur in December 2016.

The use of brokers and inducements have been identified as significant problems. Regulation to prohibit and/or restrict their use is desirable and should be supported. But legislative provisions and regulation do not always ensure that a regulatory regime is effective.

Over the period 2011 to 2013, the Government took multiple actions to strengthen the regulation of VET providers, preparatory to the reforms which led to the problems we are now discussing. Two separate sets of amendments to the HESA were passed by the Parliament, one coming into force in 2012 and the other in early 2013. Both claimed to strengthen protections for students and taxpayer funds, and to uphold the quality of VET qualifications. From 2012 to 2015, little of the regulatory power which existed was used. VET FEE-HELP first doubled in 2013 and then again in 2014. It was not until Feb 2015 that the Minister announced 23 ASQA audits. As at April 2016, only one VET provider had had its approval under HESA revoked, effectively removing its student’s access to VET FEE-HELP [Additional Estimates 2015-16, SQ16-000545].

In late October 2016 during the public hearings into the VET Student Loans Bills, ASQA told the Senate Education and Employment Committee:

“We had an assumption that the model of regulation was that the regulator sat there and waited for someone to come knocking at our door asking us for something.”

[Proof Committee Hansard (2016), page 55.]

None of the Senators asked “Why would ASQA have thought it should have such a passive role?” None of them pointed out that ASQA’s enabling legislation made it an offence for a person to make false and misleading representations relating to a VET course or

VET qualification or that the 2012 Standards for Registered Training Organisations required advertising to be ethical and accurate. None of them referred to the fact that ASQA was given strong investigative powers to enforce such provisions, including the ability to search premises under a warrant with the power to seize evidence and use reasonable force.

ASQA’s frank assessment of the past should be commended. There were also other factors that should be recognised as having a significant bearing on its ability to perform its functions. The organisation had only commenced operation in 2011. The transition from State and Territory based regulation was a significant task and the organisation’s resources were limited, especially given the large number of VET providers in the sector.

DET was similarly slow to respond to developments affecting VET FEE-HELP. Significant features of that scheme’s administration were not fit for purpose outside of public institutions subject to public sector financial accountability regimes and strong Parliamentary scrutiny. It remains to be seen whether the administration for the new scheme will be better suited to a sector in which private providers are integral. The proposal for some direct dealings between DET and students seeking loans should be the first step in DET taking more direct involvement in the administration of student loans.

DET should be held accountable for resolving the legacy issues of VET FEE-HELP and steps should be taken to ensure this happens expeditiously. It is now two years since the problems associated with VET FEE-HELP became widely known. Knowledge of how they are being managed is only slowly emerging.

Senators have asked too few incisive questions and received too little in response. Rather than probe our public officials about their lack of action on the legacy issues, many of our politicians appear content to agree that the problems were systemic and the policy was naïve. Both of the major parties are fearful that blame for the debacle will stick to them. Each side has mud that can be slung at the other and both sides know some of it might stick. Better to move on and not dwell on the past.

It will be unjust if that occurs, forgetting about the people who have been adversely affected by other people seeking to exploit Commonwealth programs. There is a real sense that it is considered to be too hard, as this exchange from the Hansard record of the public hearings seems to imply:

Mr Brody: We suggest that an important part of that definition should be whether there has been a contravention of the Australian Consumer Law — that is, if in fact there were a breach of the law in their enrolment process. ...

Senator MARSHALL: Doesn't that rely on a finding?

Mr Brody: It does rely on a finding.

Senator MARSHALL: So it will never happen, will it? That means all these people—and we are talking about thousands and thousands—have to go through and have a finding made before we then activate it. We need something different.

[Proof Committee Hansard (2016), page 12.]

I do not think the task should be shirked. If the Commonwealth is going to legislate to provide for student entitlements, then it has to administer them properly.

DET should have in place an active strategy to clean up the legacy issues associated with the abuse of VET FEE-HELP. It needs to deal with the complaints it has received and it should explore its ability to make decisions about 'classes of cases' where there is good evidence that businesses had in place a system for organising 'sham' enrolments. There are ways of managing workload issues.

Conclusion

The Consumer Action Law Centre needs to be supported in its efforts to help people adversely affected by past abuses of the VET FEE-HELP scheme. These have potentially involved tens of thousands of people and hundreds of millions of dollars. It is important for the people involved and it may be important for the Commonwealth's future understanding of the value of the outstanding income contingent loans it has made.

DET has not indicated that it has a coherent strategy to assist people who have been misused or misled, or to recover the large amount of taxpayer funds it has outlaid to VET providers more interested in milking the VET FEE-HELP program than education provision. It is misleading people by implying that the HESA provisions for re-crediting of debt can play a role in this. The work that the ACCC is doing is important, but it is not a complete solution and it is not an alternative to DET properly investigating what has been occurring.

DET has indicated that it is investigating 28 providers but has provided little information about the purpose of these investigations. It should be thoroughly investigating those VET providers which appear to have been growing at high rates, particularly where this has been off a very low base, as well as those that have been the subject of multiple complaints. It should be actively investigating whether those providers were systematically putting in place 'sham' arrangements.

DET should be prepared to disregard enrolment documentation where there is good evidence that enrolments were not bona fide. It should decide that there was no entitlement to VET FEE-HELP, raise debts against those providers to recover Commonwealth revenue and remove the debts of affected people. Where there is sufficient evidence, DET should be prepared to pursue cases of apparent fraud.

The author of this paper is not aware of any impediment to adopting this approach to seeking to recover some of the Government revenue which has been dispersed and assisting some of the individuals who have been adversely affected by unacceptable provider behaviour. DET does not need to be on the back foot or wait for successful ACCC action to pursue this option.

It is not being claimed that is the only option. There are other ways in which adversely affected people might be assisted, such as through ex gratia payments.

The Government has legislated to abolish VET FEE HELP and introduce a new VET Student Loans scheme. The legislation is to commence from the start of 2017. There is little doubt that the approach is likely to put a stop to what has been occurring. Regulation is being tightened. All private VET providers will be required to reapply for approval to offer student loans.

The most significant way in which the new scheme will fix the problem is by drastically reducing the amount that can be lent under the scheme, apparently to around one fifth of its 2015 value. Students will no longer have an entitlement to a loan, rather 'the Secretary may approve a loan'. DET is to be given responsibility for deciding which providers may offer student loans and how much their students may borrow. So far no guidance has been provided on how those funds are to be rationed between potential students.

This is a return to the Commonwealth attempting to decide what educational activity is worthy of its support. It is not an approach which has been particularly successful in the past. It is not an approach that I believe the Government will be able to sustain into the future and it is likely that an entitlement model for student loans will be gradually reintroduced over time.

The problems we have been witnessing won't be fixed just by changing the law and its regulations. DET needs to actively manage its student loan programs, rather than outsourcing them to education providers. DET appears to need more training in how to run entitlement programs, in administrative law and how to manage risk in its student loan programs. ASQA needs to become a more active regulator and there needs to be a concerted effort to build its regulatory experience, expertise and capability.

Both agencies need to be prepared to use their powers when it is justified. Australia's public servants are told to 'engage with risk'. There is no better way to engage with risk than to take reasonable action to protect Government revenue and vulnerable people.

Attachment A

Two AAT cases involving ‘shams’ being disregarded

In **Lee-Warner and Repatriation Commission [2003]**, AATA 533 (6 June 2003), the Administrative Appeals Tribunal (AAT) considered two issues affecting the level of Mr Lee-Warner’s assessable assets. The AAT found that:

- “the lease ... was a sham designed to allow the applicant to avoid his obligations under the Family Law Act 1975. The same sham is now being put forward as a device to allow the application to avoid the provisions of the Veterans’ Entitlements Act 1986” (para 17, p 6);
- “although the \$20,923 is shown in the books of Kite Bar Pty Ltd as a loan, it is not a loan and should be deleted from the assets” (para 24, p 7).

These findings are important for two reasons in the context of this paper. The first reason is that the existence of a signed document purporting to be a lease was not a definitive consideration in determining the method of assessing Mr Lee-Warner’s assets. The lease was found to be a sham and the value of his assets was assessed with no regard for the lease. The second reason is that in determining the facts to which the legislation should be applied the AAT sought to establish the actual state of affairs. While the books of the company might have a record of a loan that does not mean that there was a loan.

This result effectively supported the broad approach taken by the Repatriation Commission.

In **MacFarlane; Department of Family and Community Services [1999]**, AATA 623 (24 August 1999), the AAT considered how income should be assessed. It had to determine whether ‘income’ had been ordinary income received in the past and hence not relevant to the future level of Mr MacFarlane’s entitlement. The alternative was that there had been a distribution from a trust, the amount of which should be assessed as income spread evenly over the coming year.

Mr MacFarlane had been hired by Mr Dillon to work for D & B. At about the same time, he “consulted a public accountant who suggested that he form a trust and work for it instead of working directly for D & B and in that way, he was advised, he could split the income for income tax purposes. Neither Mr nor Mrs MacFarlane understood anything of this and simply accepted the advice.” (para 8, p4)

The accountant drew up a deed of trust and established a savings bank account in its name. He then got Mr MacFarlane to arrange

with Mr Dillon at D & B to draw up a contract and eventually the Trust received payments for the work of Mr MacFarlane. Income tax returns were prepared for the Trust and Mr MacFarlane’s Income tax returns showed his income as a distribution from the trust. Evidence was provided that Mr Dillon treated Mr MacFarlane as a sub-contractor because it was advantageous to him, but that the two parties behaved as though Mr MacFarlane was working for wages.

The Tribunal considered that the evidence raised two questions. “The first is as to whether in fact there was a proper business structure consisting of a trust estate for which Mr MacFarlane worked and which was contracted to provide services to D & B. The second is whether in any event Mr MacFarlane was in fact the employee or servant of D & B which was the employer or master.” (para 23, p 7)

The Departmental advocate “submitted that the intention of the parties should dictate their relationship and it was clear that by entering into the contract their intentions were to establish the contractual arrangement and not a master/servant or employer/employee arrangement.” (para 24, p 7). The AAT understood him to be arguing that it should have regard to the form of the arrangement and not necessarily its substance.

The AAT reached the opinion that the evidence did not support the Department’s assertion. It found that the facts “point to a relationship of ... employer/employee” (para 25, p7).

The AAT found that the case raised the question of whether the arrangement was a sham and at paragraph 26 referenced the following potential definition of a sham from a case involving bankruptcy:

“for acts or documents to be a ‘sham’, with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating”

Its conclusion was that “The facts raise the presumption that neither of the parties to the contract had any intention of carrying it out but conducted their relationship as if the contract did not exist” (para 27, p 8)

This result effectively overturned the approach taken by the Department of Family and Community Services.

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