



THE UNIVERSITY OF  
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LH Martin Institute

# The VET Student Loans Scheme:

Is it a good model for a student  
loan scheme?

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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.

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# A. Executive summary

This paper examines some aspects of the policy and implementation of the new VET Student Loans scheme. The VET Student Loans scheme was rushed through the Parliament on a wave of public outrage about the robbing of VET FEE-HELP. The old scheme was voted out with little understanding of what the new one might bring in.

The scheme's fundamental purpose is to provide a benefit to students. It seeks to make access to vocational education and training (VET) affordable by helping students to pay their tuition fees. In doing so, it contributes to the financial resources of VET providers and the provision and development of VET in Australia.

The aspects of policy and implementation that this paper examines are primarily those related to the payment of tuition fees. It considers whether these arrangements are simple, fair and efficient for students and providers. While the prime motivation for a new scheme was to ensure that it was not abused by disreputable providers, regulatory aspects of the scheme are examined only to the extent they are relevant to the paper's main purpose.

The VET Student Loans scheme gives the Secretary of the Department of Education and Training (DET) a very high level of discretion in administrative decision-making on the ground that this will ensure the integrity of the scheme. The priority afforded to Secretarial discretion has compromised other aspects of the scheme and resulted in it having features that are atypical for a national system of benefits for citizens. An assessment of the extent to which the current VET Students Loans scheme meets a range of desirable features for such a scheme is provided in the table on the following page.

It is not a scheme in which the benefits are closely defined and in which beneficiaries, in this case students, have rights. It doesn't ensure that any student has any part of their tuition fees paid for them through the scheme. Of course, the scheme will be used to pay the tuition fees of many students. This will occur as a discretionary act of executive government, rather than as an entitlement to assistance with vocational education and training.

The participation of private vocational education and training (VET) providers and, after 7 years, the participation

of public VET providers is discretionary and not subject to merits review or consideration by the Parliament. The Secretary has substantial power to control the operations of all VET providers, their approved courses and academic curriculum.

The scheme doesn't prevent upfront barriers to students undertaking study. This is not an objective of the VET Student Loans scheme. There are not upper limits on the tuition fees which a provider may charge, but there are maximum loan amounts

which are payable for a course under the scheme. There is already one provider offering a private loan to cover 'gap' fees.

Students are advised by their provider after they enrol of the amount of tuition fees for their course to be 'covered' by a VET Student Loan and how much of those tuition fees the student must pay themselves. This advice is provided in the VET Student Loan Statement of Covered Fees. The provider cannot require 'covered' fees to be paid by a student.

The arrangements may require VET providers to give a student their VET Student Loan Statement of Covered Fees before they know if the Secretary has approved a loan for the student or the amount of loan approved. Providers also must give a student their first VET Student Loan fee notice (their first **invoice**) detailing their covered fees for the first part of their course at least 14 days prior to the last day available to the student to apply for a VET Student Loan.

The process of approving loans and notifying students of the decision and their appeal rights is quite unclear, in part because there has been little time for DET to put the required processes in place or to modify and update its IT systems for the new scheme. Even if these matters were in order, under the scheme's legislative provisions, approval of a loan is no guarantee that a student will have any amount of tuition fees paid using the loan.

Desirable features of a student loan scheme	Rating					Relevant sections of paper
<b>For Students</b>						
Financial barriers for students to study are minimised						4, 5 & 6
Students fully informed about fees and when they must pay them						5 & 10
Loan approval process is clear with a right of appeal						6
Students readily able to meet requirements to access the scheme						6 & 10
Debts only arise from fees agreed to be paid under the scheme						4 & 10
Amount and date of student's debt is clear						7 & 8
Students receive accurate and timely information on their debts						9
<b>For VET Providers</b>						
Providers have timely information on a student's loan eligibility						6, 7 & 10
Providers know which fees are to be directly paid by the student						5, 6, & 10
Providers have reasonable certainty of the amount and timing of loan payments for student's tuition fees						7 & 8
Providers role in scheme's administration is reasonable and encourages integrity in dealing with students and Government 5, 9 & 11						5, 9 & 11
Conditions of provider's approval in the scheme are transparent						7 & 11
Provider approval process is clear, with reasonable accountability						11
<b>For VET Sector and Government</b>						
Arrangements assure that providers are reputable						11
Arrangements assure financial integrity of scheme						4, 7, 8 & 11
Scheme administration is fully consistent with the law						9 & 10
Scheme provides consistent level of financial support to VET sector						7 & 12

How much of a student's tuition fee may be paid depends on the amount the provider is prepared to advise can be 'covered' by the scheme and it can be less than the maximum loan amount payable for their course. It is not a decision that the student can appeal.

There is no guarantee that the Secretary will pay a student's covered fees, even if the student is eligible for a VET Student Loan and the loan has been approved. The Act does not include any right to appeal a decision not to pay a student's tuition fees. A student may not care about such a decision because the Act prevents their VET provider from requiring them to pay any 'covered' tuition fees, irrespective of whether the Secretary pays those fees. It is the VET provider that will be adversely affected by a decision not to pay the student's tuition fees.

There are new arrangements concerning Tax File Numbers (TFN). If a student who has been approved for a loan does not supply their TFN to DET by the census day, the VET provider will not be paid for that fee period. If students do not apply for a TFN in a timely manner, there is a delay in issuing the TFN by the ATO or a student simply does not supply their TFN by the census day, the provider will suffer a financial loss even though it is not their fault. There may be significant problems in the proposed implementation of these new TFN arrangements.

VET Student Loan debts are incurred on the day the Secretary pays the loan amount, not the census day as with previous loan schemes. There may be problems in the proposed implementation of this change, primarily because there has been little time for DET to put new processes in place or to modify and update its IT systems.

VET providers are being required to issue Commonwealth Assistance Notices to advise students about their debts and to report those debt amounts to DET as though they occurred on the census day. This occurs prior to the Secretary paying the loan and the student incurring the debt. Despite this, Chief Financial Officers of VET providers are being asked to certify the accuracy of reported data. This may be the information being passed to the ATO, making it difficult for the ATO to process these debts in a manner fully consistent with the law.

The Secretary's power to impose conditions on approved VET providers includes the power to impose a limit on the total loan amount that can be paid to a provider. These limits can be imposed in a variety of ways, for example they might apply for a particular period or apply to particular approved courses in a particular period. Providers have little choice but to accept any limit on the total amount of loans available to their students and to ration this amount among students.

The scheme's legislative provisions do not require the Secretary to make provider loan limits publicly available.

Nothing prevents a provider that has been approved to offer VET Student Loans from enrolling domestic students on the basis that none of their tuition fees are covered. The student has no right to appeal the provider's decision. Conversely, nothing explicitly prevents the Secretary from paying tuition fees which are not 'covered'.

The scheme's potential financial contribution to the VET sector is difficult to determine. The Rules allow up to \$2.1 billion to be spent each year. The Secretary is not required to allocate this amount. In December 2016, it was estimated that \$1.6 billion would be spent in 2016 under the previous VET FEE-HELP scheme, down from \$2.9 billion in 2015 following efforts to tighten the administration of that scheme. As less than half of the courses eligible for VET FEE-HELP have been approved for VET Student Loans, only around \$800 million may actually be lent under the new scheme.

In short, the VET Student Loans scheme is under-developed and its implementation has been rushed. Many individual provisions sound reasonable, but when put together they do not form a coherent scheme which is simple, fair and efficient for students and providers. There are errors in the Rules, such as the accidental abolition of all loan fees, and poor drafting of requirements about financial viability and the academic suitability of students. DET has not been given sufficient time to develop or implement the scheme. It has not had time to develop the required processes and IT systems in consultation with VET providers.

Whether the scheme produces consistent and certain outcomes for students and providers into the future will depend on decisions taken by Government, the Secretary of DET and VET providers. Some substantial changes to the scheme are likely to be required. Until this occurs, there will be problems administering the scheme and VET providers and students will be confused and have difficulties understanding and using it.

# B. Introduction

## 1. Purpose of this paper

This paper is a critical examination of some aspects of the policy and implementation of the VET Student Loans scheme.

The scheme's fundamental purpose is to provide a benefit to students. It seeks to make access to vocational education and training (VET) affordable by helping students to pay their tuition fees. In doing so, it contributes to the financial resources of VET providers and the provision and development of VET in Australia.

The aspects of policy and implementation that this paper examines are primarily those related to the payment of tuition fees. It considers whether these arrangements are simple, fair and efficient for students and providers.

While the prime motivation for a new scheme was to ensure that it was not abused by disreputable providers, regulatory aspects of the scheme are examined only to the extent they are relevant to the paper's main purpose.

It is effectively assumed that VET providers participating in the scheme are reputable, treat their student's fairly and manage their financial resources so they are able to deliver high quality education and training.

This paper seeks to:

- explain in detail what we know about aspects of the new scheme which are relevant to the payment of student's tuition fees; and
- highlight the issues and problems in policy and implementation which are likely to emerge.

VET providers are not in a strong position to publicly air concerns about these matters. Under the VET Student Loans scheme, they are too dependent on the good auspices of the Secretary and other officers of DET. This paper is therefore also an attempt to initiate public discussion of the scheme, some of its differences from previous schemes and problems in its proposed operation. There is no pretence that previous schemes were perfect.

I have advocated publicly that the multiplicity of student loan schemes should be unified into a coherent single program of income contingent loans supporting the tertiary education of domestic students and enabling better monitoring and management of the associated costs to Government. There should be a strong and informed public consensus on what the features of such a scheme should be. I hope this paper will contribute to that objective.

## 2. Designing a coherent student loans scheme

The VET Student Loans scheme commenced on 1 January 2017. It introduced a new operational framework including new concepts and requiring new administrative processes and new and modified IT systems. Some of these are quite different from the established arrangements for income contingent loan schemes which pay student's tuition fees and of which VET FEE-HELP was one example.

In my submission to the Senate Inquiry into the VET Student Loans Bill 2016, I noted that student loan schemes were already complicated and that the proposed changes to their administration would increase the burden and complexity across tertiary providers operating in both the VET and higher education sectors. I expressed concern that the arrangements might not be workable [Warburton, M (2016b), pp5-6]. My concern has not been allayed as the scheme has been further developed and more information materials released.

It is not easy to put together a workable framework for a student loan scheme. A whole range of factors need to work in harmony to ensure the scheme is practical, effective and fair to all parties. These factors include:

- the definition of the tuition fee which can be paid through the loan scheme and what other fees which must be paid by students themselves can be charged;
- what decisions are made by whom and when, in particular how do all of the various dates align and interact - enrolment dates, dates by which a student must pay fees, the dates on which loan debts arise, the dates on which student information is to be reported to the Government and the dates when

Government payments are to be made;

- what rights and responsibilities do the various involved parties have and can any disputes be satisfactorily resolved in a timeframe that does not cause substantial disadvantage to an aggrieved party;
- how does essential administrative information flow between Government, providers, students and the Australian Taxation Office (ATO) and what is the most efficient way to do this, including minimising the need for revisions; and
- how are arrangements affected when all the normal predictable things happen, such as students withdrawing from enrolment, students not having tax file numbers because they are straight out of school and both students and providers not doing things on time and making errors.

In my view, the best frameworks for loan and grant schemes must promote fair and efficient provider practices and not overly complicate those practices. They are simple, clear and fair for students and providers. They protect Government revenue but also provide consistent and relatively certain outcomes for all stakeholders.

Developing and drafting good legislation for a scheme and getting it passed by the Parliament takes around six months. The legislation usually provides only the broad framework. After

that, the public service has to work through a mass of detail to implement the scheme. It has to finalise subordinate legislation, develop administrative and procedural guidelines, draft and test application forms and communication products. It needs to deliver a communications strategy to inform consumers and stakeholders (such as education providers) about how it all works. Government IT systems need to be built and tested. Technical business specifications need to be produced for private and public providers who need to build/modify and test their own systems. Government and provider IT systems need to be able to ‘talk’ to one another.

None of this happens magically when a piece of legislation receives royal assent. Governments and Ministers under-estimate how difficult, time-consuming and in the end how important such activities can be. They are crucial to the successful implementation of any initiative. They are invariably improved through consultation with stakeholders. Initiatives fail when there is insufficient time to do these things, when they are not done properly or there is insufficient attention to risks.

### 3. Background to the scheme’s introduction

The VET FEE-HELP scheme provided income contingent loans to students in Australia’s VET system until the end of 2016 and it is now being phased out. There was widespread abuse of the scheme during 2014 and 2015.

In the second half of 2015, efforts were made to stop that abuse and as a result 2016 expenditure appears to have been just over half of that in 2015. In late 2016, the Government decided that the scheme was fatally flawed and proposed the introduction of a new scheme, VET Student Loans.

The problem was not that the whole VET FEE-HELP scheme was flawed. The case to condemn VET FEE-HELP, rather than fix aspects of it, was not adequately made. The available regulatory powers to prevent abuse of the VET FEE-HELP scheme, including those held directly by the Minister, were not used. By July 2015, the widespread reporting was public knowledge but there had not been a single VET provider whose approval to offer VET FEE-HELP had been suspended or revoked. [Warburton, M. (2016a), pages 67-71]

The Department of Education and Training (DET) did not fully use its powers to protect Government revenue, or the people being misled and signed up for debts to be repaid to the Commonwealth. DET did not have, and to my knowledge still does not have, an active and coherent strategy to recover the large amount of taxpayer funds it has outlaid to a relatively small number of VET providers for enrolments that were not bona fide. [Warburton, M. (2016c)]

The Australian National Audit Office’s (ANAO) report on *The Administration of the VET FEE-HELP Scheme* appeared to reach a similar conclusion. It found “*that elements of the VET operating environment were conducive to designing an effective compliance strategy*”. Its report made clear that DET could have readily identified the small number of providers at greater risk of non-compliance and done something about it. [The Auditor-General (2016), p 40]

The Senate Education and Employment Legislation Committee conducted an Inquiry into the VET Student Loans Bill 2016 and two related bills. The inquiry and its report did not spend a lot of time considering the proposed replacement scheme for VET FEE-HELP. The inquiry focussed primarily on the perceived inadequacies of VET FEE-HELP, what could be done to help people adversely affected by past abuses of that scheme and a few high level parameters of the new scheme. These parameters were principally the approved courses and the fee limits applying to those courses, third party training providers, brokers, agents and marketing. Some transitional issues were considered, along with preferential treatments that might be available to public providers and the introduction of a VET Student Loans Ombudsman [Senate Education and Employment Legislation Committee (2016); Proof Committee Hansard (2016)].

Lost in the collective moral outrage at the level of VET FEE-HELP abuse was proper consideration of the details of the proposed replacement scheme. It will be one of the most significant forms of assistance to Australian VET students, but few Parliamentarians had any real idea about the nature of the scheme they were being asked to support. It should have been judged on its potential to ensure students had affordable access to vocational education and training (VET) and for its contribution to the future provision and development of VET in Australia.

Legislation for the VET Student Loans scheme was passed in the final week of the Parliamentary sittings in 2016.

Many details of the scheme are not included in the VET Student Loans Act 2016 (the Act). They are included in a legislative instrument made under the Act, the VET Student Loans Rules 2016 (the Rules). It is unfortunate that these Rules were not publicly available before the legislation was passed, so that Parliamentarians had a better understanding of what they were being asked to support.

These Rules were registered as a legislative instrument on 23 December 2016. They now form part of the law and, unlike administrative guidelines, they are binding. The Rules may be disallowed by either House of Parliament, a process which requires a notice of a motion to disallow the instrument within 15 sitting days and the motion being agreed to, not resolved or withdrawn.

The Government also has published *VET Student Loans: Information for students applying for VET Student Loans - 2017* (the 2017 student information brochure) and a variety of short information materials for VET providers. These contain some further insights into the scheme, but it is still difficult to obtain a full understanding of how the scheme is to work in practice.

From personal experience, I know that a scheme such as this takes at least 18 months to develop and implement. I know that Ministers do not like to be told this. Too often Ministers think advice about these matters is just public servants trying to make their own lives easy. Very few senior public servants are prepared to stand up and persist in the provision of such advice to a Minister. I was once told by a Departmental Deputy Secretary that I would be crazy to provide this sort of advice to a Minister.

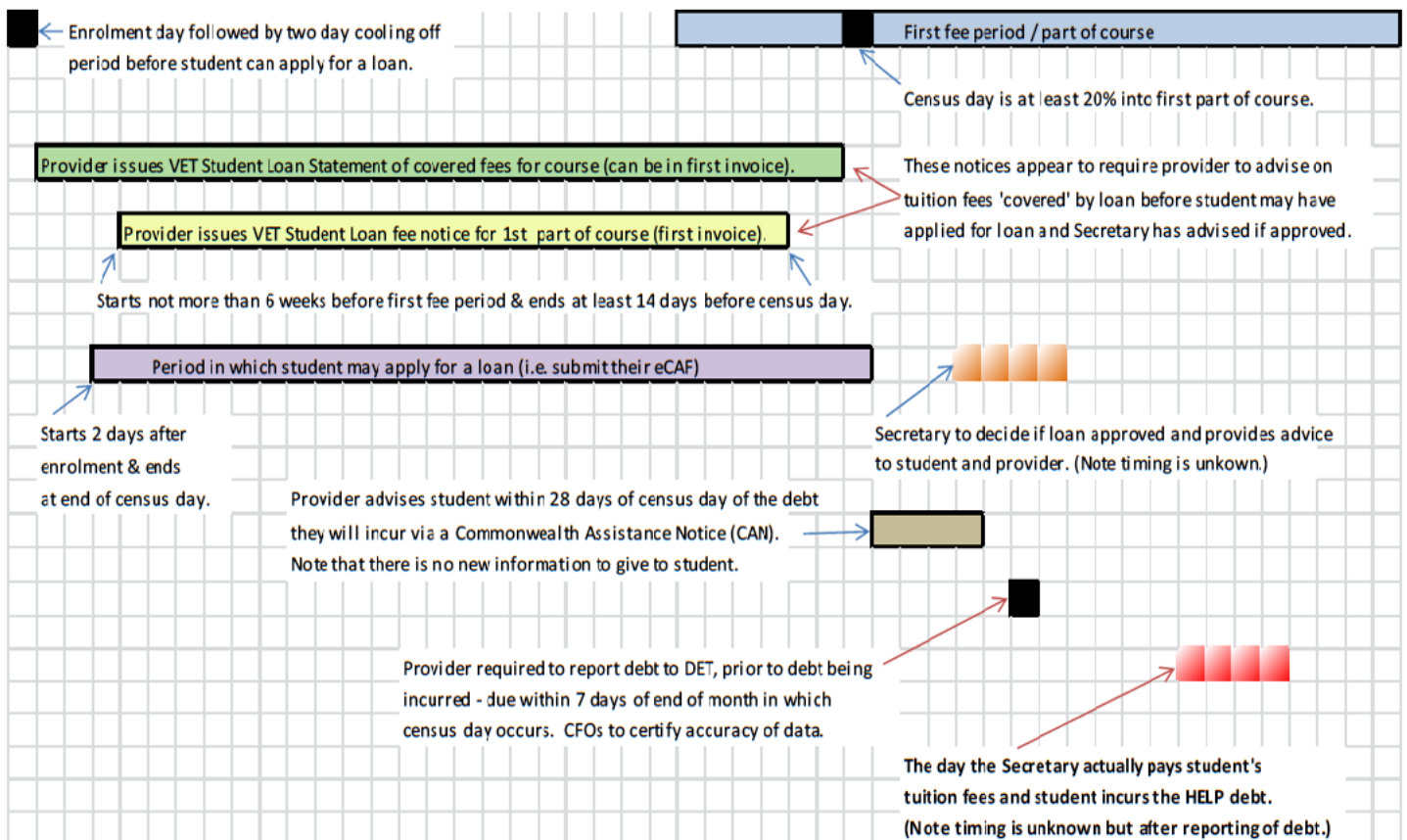
It is likely to become clear that the Government hasn’t allowed sufficient time for the development and implementation of the VET



Student Loans scheme. There has been less than six months from the 2016 election to the scheme's commencement. There has not been time to adequately consider the details of the scheme or to properly consult stakeholders and get the details right. DET has not been given sufficient time to develop necessary administrative processes and IT systems. The scheme has started.

Chart 1 on the following page provides a diagram intended to highlight what appear to be inconsistencies in the timeline of decision making in the VET Student Loans scheme. It is intended to aid understanding of the discussion which follows in Part C of this paper *A critical look at concepts and design features* of the VET Student Loans scheme, before specific comments on the Rules are provided in Part C. It is hard not to conclude the scheme is being adversely affected by being implemented on the run.

**Chart 1: Decision making for VET Student Loans**  
**Indicative timeline showing inconsistencies**



# C. A critical look at concepts and design features

## 4. Tuition fees and barriers to study

Previous student loan schemes included definitions of fees and tuition fees. They did this for a number of reasons. A major objective of past loans schemes was to ensure that students were not prevented from undertaking study by upfront costs. In general, any fee or charge that was essential for completion of a course had to be part of the tuition fee/s and an eligible student generally was able to have all of their tuition fee/s paid through the loan scheme.

Other fees had to be for items that were not essential to completing the course, such as for amenities or services not of an academic nature (e.g. for parking) or for something 'incidental'. Providers were allowed to have fines and penalties in place to help them properly manage their institutions. For example, you could be fined for not returning a library book on time because other students need access to the book. You could be charged a late enrolment fee if you hadn't bothered re-enrolling in the scheduled period.

There is no definition of fee or tuition fee in the VET Student Loans scheme, but the provisions prohibiting inducements appear to ensure that tuition fees can only be for the content and quality of the course. The Act requires a provider to determine the tuition fees for a course and publish those fees on its website before enrolling any student in that course. A provider must also give a list of the tuition and other fees for an approved course to the Secretary. This appears to effectively ensure there is clarity of the total amount of tuition fees payable for an approved course.

There was no regulation of the **amount** of tuition fee under VET FEE-HELP, but generally the whole tuition fee could be paid through the loan scheme. There is also no regulation of how much can be charged under VET Student Loans. There are maximum amounts for a course that can be paid through the loan scheme. Any amount above that (the gap fee) must be paid by the student. Nothing prevents upfront barriers to students undertaking study and the prevention of financial barriers to study or training is not an objective of the VET Student Loans scheme.

The Act does define 'covered fees' in section 56. If your provider tells you that your enrolment is accepted on the basis that a specified amount of the tuition fees for the course are covered by a VET Student Loan, that is the amount of 'covered fees'. A VET provider cannot require a student to pay the amount of covered fees. The provider contravenes the Act if the provider does so and a civil penalty of over \$20,000 may be imposed for such a breach.

The Rules specify that a provider must not require fees, other than the determined tuition fees, to be paid for any of the following:

- applying for enrolment in an approved course;
- enrolling in an approved course; and
- assessments to determine if the student is academically suited to undertake a course [Rules, S 93(2)].

By implication, the cost of the above three items must be met through the revenue derived from tuition fees.

The Act requires there to be no financial or other barrier to withdrawing from a course before the census day. If

the student does so, no tuition fees are payable and the provider is required to refund any tuition fees that already have been paid [Act, S 59]. The Rules require the census day for a part of a course to be at least 20 per cent of the way through the period beginning when that part of the course starts and ending at the expected completion date of that part [Rules, S 131]. This arrangement has always been generous to students and previously the cost to providers was recognised through the possible application of a withdrawal penalty. Such a penalty is no longer allowed under VET Student Loans.

Otherwise, there are no restrictions on the fees and charges which a student may have to pay in addition to the tuition fees which a provider specifies. The provider just has to ensure that the student understands:

- that these other fees and charges are not for tuition;
- the purpose of the fees;
- the student's total liability for the fees; and
- when and how the fees are to be paid [Rules, S 93(1)].

Providers can be highly innovative in the fees and charges they contemplate and will have great freedom to do so under the VET Student Loans scheme, as long as the fee has a purpose that is not tuition. What fees and charges may be levied in addition to the tuition fees paid through loan schemes has often been a point of contention between tertiary education providers and the Department. That won't be the case for VET Student Loans, as fees are not capped and there is less emphasis on ensuring that there are no upfront financial barriers to students undertaking study.

The extent to which the maximum loan amounts will contain future fee increases and the extent to which gap fees may develop remain to be seen. There are already providers who are arranging private loans for students to cover gap fees (see SAE's website at <https://sae.edu.au/admissions/fees-and-payments/> - on 19 January 2017, this provider was marketing an interest free loan for gap fees).

There may be competition between providers, but whether there is effective competition will depend on factors such as the number of providers in a student's location and how many providers offer the course or training the student wishes to undertake.

Whether, as a matter of practical reality, many students will face barriers to study will depend on decisions taken by the Government, the Secretary and a student's VET provider. It will depend on the total amount that may be lent under the scheme, the maximum loan amounts for a course, the fee limit specified for a provider by the Secretary and the amount of a student's tuition fees which their provider allows to be covered. To my knowledge, a student does not have a right to appeal any of these decisions, but a decision maker is able to reconsider their decision on these matters.

Desirable features of a student loan scheme affected by arrangements discussed in above section	Rating					Other relevant sections
	Green	Dark Green	Yellow	Red	Dark Red	
Financial barriers for students to study are minimised				Red		5 & 6
Debts only arise from fees agreed to be paid under the scheme	Green					10
Arrangements assure financial integrity of scheme	Green					7, 8 & 11

## 5. Informing students about fees

The Rules require a provider to give to a student:

- a package of information about their course, to be provided before the student enrolls [Rules, S 98];
- a **VET Student Loan Statement of Covered Fees** for the course, to be provided after the student enrolls and before the first census day for the course [Rules, S 129]; and
- a **VET Student Loan fee notice** (also referred to as an invoice) for each fee period, to be provided not more than six weeks prior to the relevant fee period and at least 14 days before the census day for that fee period [Rules S 99].

The information package appears to be the least important of these items. The Rules do not require this information to be tailored to a particular student, but it will need to be specific to each course. The 14 information items include the tuition fees and any other fees that may be payable for the course. These items include a lot of general information about VET student loans, including how to apply, but nothing that identifies what the student actually will receive. The information package is not required to include information on how much of the student's tuition fees may be 'covered' by a VET Student Loan.

The *VET Student Loan Statement of Covered Fees* may be issued with the first invoice (i.e. the first VET Student Loan fee notice). Its information is about the whole course, whereas the invoice relates just to the first fee period.

The *VET Student Loan Statement of Covered Fees* advises the student whether or not the enrolment is accepted on the basis that some or all of the tuition fees for the course will be covered by a VET Student Loan. It must contain 10 specified items of information, including how much of the total tuition fees for the course is to be covered by the student's VET Student Loan and how much is not covered.

This statement is important for students because it identifies the amount of covered fees and providers are not allowed to require a

student to pay a covered amount. There are no explicit provisions enabling a provider to change or amend the statement if it contains an error or something unintended, no matter how quickly this may

have been discovered. There are no provisions enabling it to be amended if at some stage during their course a student advises their provider that they do not want their tuition fees to be paid using a loan.

A *VET Student Loan fee notice* (i.e. invoice) is to be issued for each fee period. This must contain 14 specified items of information including how much of the tuition fees for the fee period are covered by the student's VET Student Loan, how much the student must pay themselves and by when that payment must be made.

Courses must have at least three fee periods equalling the duration of the course [Rules, S 123] and DET has advised that the first fee period is to start on the first day of the course. Both the tuition fees covered by a student loan and any remaining tuition fee must be 'reasonably apportioned' over the fee periods, taking into account how much of the course is in each period [Rules, S 122].

The Rules state that "none of the tuition fees for the course are to be payable outside a fee period for the course" [Rules, S 122]. Many providers will require payment of any tuition fees that are not 'covered' by the first day of the course. DET appears to be assuming that any tuition fees which are not covered will be paid by the census day, but nothing requires this to the case. A provider might for example wish to allow a student to pay the tuition fees that are not covered in fortnightly instalments over the course. It is not clear that the Department's administration and systems would accommodate such an approach.

It is extremely odd that 'covered fees' are barely mentioned in any material dealing with the approval of VET Student Loans or the payment of tuition fees by the Secretary.

There is no guarantee that the Secretary will pay a student's covered fees, even if the student is eligible for a VET Student Loan and the loan has been approved. Payments to providers for tuition fees are discussed further below.

Desirable features of a student loan scheme affected by arrangements discussed in above section	Rating					Other relevant sections
	Green	Yellow	Orange	Red	Dark Red	
Financial barriers for students to study are minimised				Red		4 & 6
Students fully informed about fees and when they must pay them		Green				10
Providers know which fees are to be directly paid by the student			Orange			6 & 10
Providers role in scheme's administration is reasonable and encourages integrity in dealing with students and Government				Red		9 & 11

There is no requirement for a provider to 'cover' any amount of a student's tuition fees. This is because the Secretary has the power to impose a limit on the total loan amount that can be paid to a provider. These limits can be imposed in a variety of ways, for example they might apply for a particular period or to particular approved courses in a particular period. If providers are not to suffer financial losses due to the discretion of the Secretary

to limit their total loan amount, they need to be able to ration their limited loan amount among their students. Providers appear to have complete discretion in how this is to be done.

There is no requirement on a provider to allocate any of their total loan limit to students. Nothing prevents a provider that has been approved to offer VET Student Loans from enrolling all of its domestic students on the basis that none of their tuition fees are covered.

The intention appears to be that the Secretary will only pay covered tuition fees, but nothing appears to prevent the Secretary from paying tuition fees that are not covered. However, providers may require any tuition fee which is not covered to be paid prior to the census date. There would potentially be no outstanding fees for the Secretary to pay to the provider on the student's behalf if this occurred.

## 6. Loan approval and uncertainties for students and providers

Under previous student loan schemes, a student was entitled to a loan if they met all of the specified conditions of entitlement. These conditions included completing and signing the application form, giving it to their provider before the census day and being enrolled in the course on the census day.

A student could be reasonably certain that they were eligible for a loan by completing the application form. An ineligible student couldn't successfully complete the form, as it would tell them part

way though 'You are not eligible ... Do not complete this form.' If a student did successfully complete the form, the student knew they were eligible and it was a relatively straight forward matter to meet the other conditions of entitlement. The application for assistance applied 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.

Under these arrangements, there was no administrative decision to approve a loan. If the conditions of entitlement were met, the amount of tuition fees which the student had not paid by the end of the census day was paid through the loan scheme.

The VET Student Loans scheme requires the Secretary to approve a loan. Section 18 of the Act requires the Secretary to decide whether or not to approve a VET Student Loan, subject to the student applying in the correct manner and providing all requested information. The Secretary also must give the student and the provider written notice of the decision and it must include reasons if the loan is not approved. The Act allows the Rules to provide for another person to give this notice on the Secretary's behalf, but the Rules do not appear to have done this.

The Secretary's decision can be appealed [Act, S 74]. No time limit for making the decision is placed on the Secretary. If the Secretary does not make a decision within two months of the application, then the application is taken to have been refused, opening up the option for the student to appeal [Act, S 75].

The Act appears ambiguous on the question of whether the approval includes the amount of loan or whether it is simply an approval that enables loans to be made as and when amounts of covered tuition fees are to be paid.

The Explanatory Memorandum for the VET Student Loans Bill 2016 appears to clarify this matter. Clause 8 places an upper limit on the amount of loan a student may receive for their course and the explanation of this clause states:

*"When the Secretary approves a VET Student Loan for a student for a course of study, the loan will be for the amount specified in the approval."*

The amount would seem to be whatever amount the Secretary decides.

Neither the Act, the Rules, nor the 2017 student information brochure provide much detail about the Secretary's approval of a loan. It is not clear how advice of the decision and notice of their appeal rights will be given to a student. It is not clear how the approval of a loan will relate to a VET provider's advice about the amount of fees which are covered. It is not clear that these processes and their timing will allow students and providers to make informed decisions. The reason for this situation is that there has been insufficient time for DET to put new processes in place and to modify and update its IT systems for the new scheme.

We know that at the time a student enrolls in a course, they will be unable to definitely know that they will be approved for a student loan. At this time, they may not know how much of their fees the provider will allow to be covered.

A student cannot apply for a loan for their course until at least two business days after they have enrolled in the course. The latest they can apply for a loan for the first part of their course is the census day for that part of the course [Rules, S 10]. As a result, the Secretary may not approve a loan until after the census day.

The student's provider is required to give the student the first VET Student Loan fee notice (their first invoice) not more than six weeks prior to the first fee period and at least 14 days before the census day for that fee period.

This means that the provider must advise the student about their covered fees for the first part of the course at least 14 days prior to the last day available to the student to apply for a VET Student Loan.

Providers are likely to want to know if a student has been approved for a VET Student Loan and the amount of the loan, prior to issuing the VET Student Loan fee notice. None of the available information materials deal with whether a provider can set a day by which they must know if a student has been approved for a loan, prior to issuing their advice on the amount of tuition fees to be covered.

The student's provider also has to give the student their VET Student Loan Statement of Covered Fees for the course before the first census day for the course. Once again, this means that the provider is potentially required to do so before the provider knows if the student is eligible for a loan and the amount of the loan. If the provider advises a student that a certain amount of tuition fees are covered before the provider knows that the Commonwealth will pay those fees, the provider is at risk of making a financial loss.

It is not clear if the provider can cancel the student's enrolment if the student does not voluntarily pay any amount of covered tuition fees that will not be paid through a VET Student Loan. The provider's only potential leverage is

cancelling the student's enrolment, as they are legally prevented from requiring payment of covered tuition fees.

Current information materials are inadequate and do not give providers or students a decent understanding about how these matters are to be handled under the VET Student Loans scheme.

The 2017 student information brochure tells students that, at the time of enrolment, they need to indicate to their provider that they wish to access a VET Student Loan. Their provider will then be expected to give the DET the student's enrolment information through a new Departmental IT system – the eCAF system. This is the system which will manage electronic applications for a VET Student Loan.

The brochure indicates that the provider's notification will trigger an email to the student who will have to sign into the eCAF system, verify provider course information and supply any required additional information. Once the student submits their application, the system will email the student a copy of the completed form [The Department of Education and Training (2017a), p 20].

Little further information is currently publicly available. The Rules and the 2017 student information brochure do not tell the student how they will be advised about the approval of a loan or that they can appeal an adverse decision, such as a decision to not approve a loan or to approve a loan of an amount less than the student is seeking.

It remains quite unclear how the process of approving loans relates to anything else in the scheme. The approval of a loan, a decision which is subject to appeal, is no guarantee that a student will have any amount of tuition fees paid using the loan. That depends on how much of the student's tuition fee their provider advises is covered and that is not a decision that can be appealed.

Desirable features of a student loan scheme affected by arrangements discussed in above section	Rating					Other relevant sections
	Green	Light Green	Yellow	Red	Dark Red	
Financial barriers for students to study are minimised				Red		4 & 5
Loan approval process is clear with a right of appeal				Red		–
Students readily able to meet requirements to access the scheme		Green				10
Providers have timely information on a student’s loan eligibility				Red		7 & 10
Providers know which fees are to be directly paid by the student			Yellow			5 & 10

## 7. Payment of fees and uncertainties for providers

Previous student loan schemes paid the amount of an entitled student’s tuition fee that was outstanding at the end of the census day. An entitled student could choose to pay some or all of their tuition fee prior to the census day. The Commonwealth became liable to pay to the provider the outstanding amount at the end of the census day and the student’s debt under the scheme arose at the same time.

The amount that the Commonwealth was liable to pay, the amount of debt which the student incurred and the date on which both of those things occurred were explicitly defined under previous schemes. They are not explicitly defined for the VET Student Loans scheme.

They are not defined in the interest of providing flexibility for the Secretary. Their omission allows the Secretary to “ensure the integrity of the VET student Loans program” and “drive appropriate behaviour by providers” (See Explanatory Memorandum to the VET Student Loans Bill 2016, Clause 19, page 28).

A student incurs a debt only when the Secretary pays their tuition fees [Higher Education Support Act 2003, S 137-19(3)]. There is no date on which the Commonwealth becomes liable to pay a student’s tuition fees and the Act does not explicitly identify the amount that the Commonwealth must pay.

I spent a lot of time puzzling about what all this meant. How do you reconcile what the Commonwealth owes a provider for a period when there is no date on which the Commonwealth incurs a liability? If the Commonwealth is adding up its liabilities across all students and then paying the total amount to the provider through instalments, how will anyone know when a particular student will incur the debt associated with payment of their tuition fees?

When does the Australian Taxation Office (ATO) get advised that there is a debt? The ATO needs to know the date the debt was incurred so that they know:

- when to start indexing that debt to maintain its real value; and
- when they can require a student to make a compulsory repayment against the debt.

These are potentially significant matters that may have a major impact on how the scheme works.

The VET Student Loans scheme distinguishes between the Secretary’s approval of a loan and the Secretary’s payment of a loan amount. The Secretary may approve a loan, but that does not mean that the Secretary always will pay a student’s covered tuition fees. Section 20 of the Act makes it clear that the Secretary is not required to pay a loan amount for a student if any one of the following seven conditions apply:

- the student has not given the Secretary the student’s tax file number;
- the student has not given the Secretary the student’s student identifier;
- the Secretary is satisfied that the student is not an eligible student or is not a genuine student;
- payment of the amount would breach a provider fee limit;
- the loan amount is greater than the student’s FEE-HELP balance;
- the Secretary suspects on reasonable grounds that the course provider is not complying with the Act; and
- the approval of the course provider has been revoked, suspended or has expired.

I wondered whether the legal construction of the Act was such that the Secretary is only allowed to deny payment in these conditions. I imagined further circumstances in which the Secretary may not want to pay an approved loan amount to a provider. These include that the student:

- paid the tuition fees themselves prior to the census day; or
- cancelled their enrolment before the census day and so does not incur any tuition fees (see section 58 of the Act).

Section 19 of the Act places a general requirement on the Secretary to use the approved loan to pay the student's tuition fees. This is what the Secretary should be expected to be doing, unless the Secretary makes a lawful decision not to do it.

In my two imagined circumstances, there either are:

- no tuition fees to be paid because the student cancelled their enrolment before the census date; or
- no outstanding tuition fees left to be paid because the student has paid them, even though the student may have been advised that those fees were 'covered'.

In these cases there are no tuition fees which can be paid and the Act makes clear that the loan can only be used to pay tuition fees. So my guess is the Act is mute in these cases because they involve a moot issue.

Section 20 is particularly broad. It is hard to imagine any other cases in which there may be outstanding tuition fees and in which that section could not be used as the basis on which not to pay a student's tuition fee, if the Secretary considered that action appropriate. Section 20 includes 'the Secretary suspects on reasonable grounds that the course provider is not complying with the Act'. The Act appears able to proscribe almost anything a VET provider could do through an appropriate condition with which they must comply under the Act.

Section 26 of the Act explicitly enables the Rules to specify '**provider suitability requirements**' to ensure that "loan amounts are paid to suitable course providers" [Act, S 26(1)]. The Rules include an extensive list of provider suitability requirements – general requirements and requirements concerning financial performance, management and governance, experience and course offerings, student outcomes and workplace relevance [Rules, Division 3, S 21-35].

Any 'significant' non-compliance with the Act and its Rules might result in non-payment. The 'threshold' at which non-compliance becomes sufficient to justify non-payment appears to be a judgment to be made by the Secretary. The Secretary has a very broad discretion to **not** pay a student's tuition fees and has this discretion for students at both public and private providers.

Universities, including some private universities, TAFEs and Commonwealth, State and Territory training organisations are taken to meet a small number of the provider suitability requirements (i.e. they are effectively exempt from satisfying the Secretary that they meet these requirements). These cover specific requirements concerning financial viability, dividend and related party transactions, and experience in providing vocational education and training. Otherwise, the Secretary is able to not pay these organisations in the same circumstances as any other provider.

The Act does not include any right to appeal a decision not to pay a student's tuition fees. A student may not care about such a decision because the Act prevents their VET provider from requiring them to pay any 'covered' tuition fees, irrespective of whether the Secretary pays those fees. It is the VET provider that will be adversely affected by a decision not to pay the student's tuition fees.

There is no merits review of the decision – no way of getting a tribunal to substitute a preferable decision. A concern about this matter was raised by the Senate Standing Committee for the Scrutiny of Bills, but to my knowledge the Senate didn't bother considering the issue.

Judicial review of such a decision could be sought by an aggrieved VET provider applying to a court to have the decision set aside. A complaint could be made to the Commonwealth Ombudsman. Unless there was some significant failure in administration, neither option would offer much hope to a provider that simply dislikes or disagrees with the decision.

Administrative law requires the Secretary to act lawfully, observe procedural fairness, base decisions on evidence and all the relevant facts and provide reasons. Provided the Secretary does this, a VET provider would probably fail if they sought judicial review, as a court would find the decision to be free from legal error [Administrative Review Council (2007c), p 8]. If the VET provider did succeed in having the original decision overturned, the Secretary would either have to pay the tuition fees or make a new decision not to do so – this time hopefully a lawful decision.

Lodging a complaint with the Commonwealth Ombudsman provides a cheaper and easier alternative to judicial review. The Ombudsman is able to investigate whether administrative action has been lawful, fair, reasonable, non-discriminatory and properly based on evidence and facts. They are able to recommend to the Secretary that a decision be changed and/or that there be change to policies, procedures and practices. The Ombudsman cannot change the decision [Administrative Review Council (2007a), p 3].

My view is that the extent of power given to the Secretary to withhold payment is excessive. The power is broad in scope and discretionary. Delegation of the power is not restricted to senior officers of the Department.

Affected parties have a very limited right to contest these decisions. There is little doubt that the Secretary has the upper hand in deciding whether to pay any student's tuition fees and this dominant position puts the Secretary in a strong position to guide provider behaviour and generally keep VET providers 'in line'.

Desirable features of a student loan scheme affected by arrangements discussed in above section	Rating					Other relevant sections
	Green	Light Green	Yellow	Light Red	Red	
Amount and date of student's debt is clear					Red	8
Providers have timely information on a student's loan eligibility				Light Red		6 & 10
Providers have reasonable certainty of the amount and timing of loan payments for student's tuition fees					Red	8
Conditions of provider's approval in the scheme are transparent					Red	11
Arrangements assure financial integrity of scheme	Green					4, 8 & 11
Scheme provides consistent level of financial support to VET sector				Light Red		12

## 8. Timing of payments and risk to provider's cash flows

The Commonwealth had a reasonably wide discretion about when to make required payments to a provider under previous schemes. Payments could be made in advance or in arrears, as periodic payments, in different amounts at different times or in a single lump sum. Nothing has ever prevented the Commonwealth from paying student loan amounts in arrears, other than the deleterious impact that such action may have on the operational cash flows of providers, particularly public providers that may have limited cash reserves.

Information about the approach to making payments was available to providers, in part because it was outlined in legal determinations concerning the manner of payments (e.g. in instalments, as a lump sum, etc) and their timing. The Secretary had discretion to make advance payments of amounts expected to become payable and advance payments for a period would be reconciled based on the Commonwealth liabilities that were incurred on the census days in those periods.

The VET Student Loans Act does not require determinations about the time and manner of payments. It does not deal with advance payments in the same manner. The Act is explicit that the Secretary can pay a student's tuition fees before or after the start of the course, after the student has completed their course or by instalments.

But then the Act makes it clear that these options do not limit how the Secretary must use the loan to pay tuition fees [Act, S 19].

Overall, the VET Student Loans scheme has broadened the Secretary's discretion in how to make payments.

Previous arrangements would not have allowed payment to be delayed until a student completed their course which may be

several years after a first census day. It also seems possible that the new model may enable the Secretary to pay the tuition fees through the student or to reimburse the student for their tuition fees. Such approaches were not previously possible. Of course the Secretary may do none of these things.

The Government has announced that the approach will be to pay VET providers in arrears. The VET Student Loans brochure on New compliance powers states: "Providers ... will be paid monthly in arrears based on Chief Financial Officer authorised and verified student data" [The Department of Education and Training (2016a), p 2].

This wouldn't mean much to people uninitiated in the minutia of student loan schemes, but in practice it will mean sometime after the census day.

The important thing to note is that at this stage 'in arrears' does not mean after a student has completed all or part of their study. It just means that the Commonwealth will not make advance payments based on a provider's estimate of the total amount of loans to which its student's may be entitled in a given year. It will only pay when a provider has submitted all of the required data on a student. This is the data that enables the student's debt to be transmitted to the ATO. I believe this type of approach was in place for some 'difficult' providers under the VET FEE-HELP scheme prior to 2014. It was certainly being considered at that time.

DET has advised providers that in March 2017 it will attempt to pay the tuition fees of students with census dates in January 2017. The VET Data Collection 2017 Reporting Schedule requires providers to report units of study with census days occurring in each month by the 7th day of the following month [The Department of Education and Training (2017b)]. This appears to give DET around 7 weeks to authorise the payments for these students.

These reporting processes are driven by data files specified by DET and which it requires providers to submit.



The files have extensive information on students and have many purposes, including the administration of student loan programs. The Commonwealth uses these files to calculate the amount of a student's tuition fees that it is liable to pay under student loan programs. Information on the debts of students is on-forwarded to the ATO which collects repayments of the debt, indexes the amount of outstanding debt each year and keeps a record of the total amount of a student's debt across all of the loan programs which pay student tuition fees.

These files are complicated. Making changes to them may require extensive consultation with providers and the ATO. The systems have to integrate with student administration systems and with ATO processing systems. All of the data items have to be tightly defined, to ensure that accurate data is feeding into the correct processes and that everything is being done in accordance with the law.

There simply hasn't been time to update these systems, since passage of the legislation. As far as I can ascertain, DET has only been able to make some minor changes to these systems and has not had time to accommodate the more significant changes that occurred with the introduction of the VET Student Loans scheme. I am not aware of any consultations with student administrators having taken place on how to modify these systems to take into account the introduction of the VET Student Loans scheme.

The cash flow requirements of VET providers will drive them to submit these data files as soon as possible, along with the required certification by the provider's Chief Financial Officer that the data is accurate.

Despite the statement of intention by DET that payments will be made monthly in arrears, there are some real uncertainties about the timing of the payments to be made under the VET Student Loans scheme. Providers may have difficulty getting all of the information they require to submit the files, in particular a student's Tax File Number (TFN), as discussed below. There is also no guarantee that the Commonwealth will make payments within the intended period. Any allegations about alleged inappropriate provider behaviours may see a provider's payments delayed for a considerable period of time.

Desirable features of a student loan scheme affected by arrangements discussed in above section	Rating					Other relevant sections
	5	4	3	2	1	
Amount and date of student's debt is clear						7
Providers have reasonable certainty of the amount and timing of loan payments for student's tuition fees						7
Arrangements assure financial integrity of scheme						4, 7 & 11

## 9. Treatment of student debts and its consistency with the law

The new VET Student Loan scheme required consequential amendments to the Higher Education Support Act 2003. This was to ensure that debts under the scheme were combined with debts from other student loan schemes, repaid in the same way and that the FEE-HELP limit applied.

These consequential amendments also made a significant departure from past practice. Rather than debts being incurred immediately after the census day as occurs with other student loan schemes which pay tuition fees, VET Student Loan debts are incurred on the day the Secretary pays the loan amount [Higher Education Support Act 2003, S 137-19(3)]. This appears to have been done to support the Secretary's power to withhold payments and to ensure the integrity of the scheme, but it has wide ranging consequences for the scheme's administration.

This is one of the significant changes that it appears DET has had insufficient time to accommodate.

The 2017 student information brochure advises students that they will incur their liability to pay tuition fees for each part of the course on the census day for that part of the course [The Department of Education and Training (2017a), p 4]. This is not consistent with the Rules which allow a provider to specify the day by when any amount of tuition fees not 'covered' by a VET Student Loan is to be paid, provided it is not outside of a fee period for the course [Rules, S 99(1)(m) and S 122(1)(b)]. The Act and the Rules say nothing about the 'date of liability' of an amount of tuition fees 'covered' by a VET Student Loan.

The VET Student Loans Rules require a provider to give to each student who has a VET student loan a Commonwealth Assistance Notice (CAN) for each part of their course. This is to be done after the census day but within 28 days of the census day [Rules, S 100]. This is the same arrangement as previously applied for VET FEE-HELP.

The CAN has always been an important piece of information for students. It has advised them, following the census day, of the debt that the student incurred on that census day. It allowed a student to check that the information was correct. If there was an error, it meant that there was a reasonable chance it could be corrected before data was submitted to DET and debt information reached the ATO.

Under VET Student Loans, the CAN cannot operate in the same way as it has for previous schemes for many reasons. The first is that on the census day a provider may not know that a student has been approved for a VET Student Loan. The student is able to lodge their application as late as the census day. How long the Secretary may take to make a decision whether to approve a loan is unclear.

The second reason is that the notice is to include the amount of the student's tuition fees for that part of the course which is covered by a VET student loan. This is the same information as was included in the VET Student Loan fee notice (i.e. the invoice) given to the student at least 14 days prior to the census day.

The third reason is that the notice is to include the amount of HELP debt the student will incur, inclusive of any loan fee. But unlike

previous schemes, the notice cannot inform the student about the debt that has been incurred, only about the debt that may be incurred, if the Secretary decides to pay any of the student's tuition fees. This also is the same information as was included in the VET Student Loan fee notice which was given to the student at least 14 days prior to the census day.

It is extremely unlikely that the Secretary will have paid any tuition fees for the student when the CAN is issued.

The CAN cannot confirm that the student has incurred any amount of debt. As noted above, DET is advising providers that it will attempt to make payments around two months after the census day, but there is no guarantee that will occur. The CAN must be issued within 28 days of the census day.

Under the Act, it is a strict liability offence for a provider not to issue the CAN or the VET Student Loan fee notice in accordance with the Rules and a penalty of over \$10,000 may be imposed for such a breach. [Act, S 50(3)].

The purpose for which a CAN was previously issued has been undermined by the new arrangements for VET Student Loans. The CAN no longer advises students of the actual debt that they have incurred. It no longer provides a mechanism for checking that there has not been an error or misunderstanding. It does not provide any information additional to the VET Student Loan fee notice.

This element of DET's administration ignores the fact that a student does not incur a VET Student Loan debt on the census day. DET is requiring providers to issue CANs in the same manner as it has done before because it has not had time to implement the changes, particularly the IT systems on which the operation of the scheme depends.

DET has only been able to make some minor changes to reporting systems and the data files do not appear to accommodate VET Student Loan debts being incurred on the day the Secretary pays the loan amount. These systems were developed when debts were incurred on the census day. Those files cannot be submitted if there are fatal validation errors and some validation rules may not be applicable to VET Student Loans. Providers do not know that a student has incurred a debt because at the time the file is submitted the student's tuition fees have not been paid. It cannot be paid until after the file has been submitted. Despite this, the files require the debt to be reported and the relevant Chief Financial Officer to certify the accuracy of data.

Under the Act, it is a strict liability offence for a provider not to comply with the Secretary's Notice under Subsection 53(1) requiring this data file to be submitted for each month by the 7th day of the following month [For notice details see The Department of Education and Training (2017c)]. A penalty of over \$10,000 may be imposed for such a breach. [Act, S 53(5)]

This data file is used in the transmission of information to the ATO on student's debts. Given that the files have not been modified to take account of all VET Student Loan changes, the ATO may have difficulty processing these debts in a manner that is completely consistent with the law. Some aspects of ATO processing, such as the indexation of debts, require the ATO to have the correct date on which the liability was incurred.

Desirable features of a student loan scheme affected by arrangements discussed in above section	Rating					Other relevant sections
	Green	Yellow	Orange	Red	Dark Red	
Students receive accurate and timely information on their debts						-
Providers role in scheme's administration is reasonable and encourages integrity in dealing with students and Government						5 & 11
Scheme administration is fully consistent with the law						10

## 10. The vexed issue of Tax File Numbers (TFNs)

Tax File Numbers (TFNs) are integral to the administration of income contingent loan schemes. Debts are collected through the ATO and students must have a TFN. Ensuring that debts are recorded against the correct TFN is a critical part of administration. It is vital to the scheme's overall integrity and ensuring that debts are recovered in accordance with the law.

One of the difficulties has always been that a high proportion of users of the schemes are young people straight out of school who often do not have a TFN. To deal with this issue, the conditions of entitlement have required people to provide either their TFN or a copy of a certificate from the Tax Commissioner stating that they have applied for a TFN.

The weakness in the scheme was that students were required to provide their TFN to their education provider once it had been issued to them by the Commissioner, but they did not lose entitlement if they did not do so. To overcome this difficulty, there were arrangements in place for the Tax Commissioner to provide the TFN directly to the education provider to ensure that the debts of these students were appropriately recorded. The arrangements also allowed the Tax Commissioner to deal with incorrect and duplicate TFNs [Higher Education Support Act 2003, Division 190].

Under VET FEE-HELP, it appears these arrangements may have facilitated the abuse of the scheme by some providers. The ANAO audit report on The Administration of the VET FEE-HELP Scheme made specific mention of the ATO practice of providing Tax File Numbers (TFNs) to VFH providers for students who had not done so themselves. The ANAO stated that the ATO estimated it "has responded to thousands of requests from VFH providers for student TFNs, with some requests listing up to 200 students". It then tells us that DET has advised that the practice has now been terminated [The Auditor-General (2016), p 43]. It was unfortunate that the ANAO did not provide a view on whether the practice materially contributed to people being inappropriately issued with a loan.

The 2017 student information brochure for VET Student Loans advises students to treat their TFN like a bank PIN [The Department

of Education and Training (2017a), p 16]. While DET has had insufficient time to modify all of its IT systems, it has given priority to developing the system which manages electronic applications for a VET Student Loan, the eCAF system, to ensure that TFNs are provided by students, not providers.

The 2017 student information brochure advises students that they must have a valid TFN by the census day or they will not be able to use the scheme for that study period [The Department of Education and Training (2017a), pp 20-21]. A student will still be able to lodge their application for a loan if they do not have a TFN. As was previously the case, an application for a loan can be submitted without a TFN, provided it is lodged with a certificate from the Tax Commissioner stating that the person has applied for a TFN.

The approach being adopted by DET appears to allow the approval of a loan for a student whose application includes such a certificate. The 2017 student information brochure is a statement of policy that the Secretary generally intends to not pay the student's tuition fees unless the student has input a valid TFN into the eCAF system prior to the census day.

The brochure advises students whose application has included a certificate from the Tax Commissioner to advise their provider once they have been given their TFN. The provider will re-open the eCAF system, enabling the TFN to be input. The provider only receives the TFN once it has been supplied to DET by the student.

It is likely that there will be a reasonable number of students who do not supply their TFN by the census day as required. A student not supplying the Secretary with their TFN by the census day is one of the explicit cases in which the Secretary is authorised by section 20 of the Act to not pay a provider.

While the 2017 student information brochure enunciates a statement of policy, the Secretary or the delegate of the Secretary still has to properly exercise this discretion. The Administrative Review Council in Decision Making: LAWFULNESS, Best-practice guide 1, has noted:

*"A policy can guide decision making, but it must not prevent a decision maker exercising discretion. It cannot constrain them to reach a particular decision; nor can it prevent them taking all relevant considerations into account. Policy must not be applied inflexibly. It would be unlawful, for example, to say, 'It is our policy*

*never to grant a pilot's licence to anybody with a conviction for speeding in a motor car'. The decision maker must be prepared to consider whether it is appropriate to depart from the policy in an individual case. Otherwise, the policy is effectively a rule, which is inconsistent with discretionary power."*

[Administrative Review Council (2007a), p 8]

This is a clear case in which the arrangements do not appear to be fair to VET providers, including public VET providers. In this case, non-payment would generally arise through no fault of the provider. It may be due to a student not applying for a TFN in a timely manner, a delay in issuing the TFN by the ATO or a student simply not supplying their TFN by the census day.

Another strange aspect of this arrangement is that there is little incentive for a student, who has been approved for a loan on the basis of a certificate from the Tax Commissioner, to provide their TFN once it is issued. The student's provider must give the student their *VET Student Loan Statement of Covered Fees* for the course before the first census day for the course. Once issued, it is the provider that bears the financial risk of the student's tuition fees not being paid by the Commonwealth under the loan scheme.

Once a student has their *VET Student Loan Statement of Covered Fees*, why would a student care if they cannot use the loan scheme? The provider is prevented from requiring payment of the amount of tuition fees which were specified as covered in that statement.

This raises questions to which there do not appear to be publicly available answers. Does the provider ask the student to voluntarily pay any amount of covered tuition fees that will not be paid through a VET Student Loan?

Can the provider threaten to cancel the student's enrolment if the student does not 'voluntarily' pay the covered tuition fees? Can the provider cancel the student's enrolment if the student does not 'voluntarily' pay the covered tuition fees?

It is worth noting that DET reporting systems do not appear to be able to handle cases where a student has been advised that some of their fees are 'covered', but has not supplied a TFN. A TFN must be provided for every student with a HELP debt, implying that the provider has to report these cases with the HELP debt as zero.

However the record would be rejected by the validation rules because the HELP debt plus the amount paid up front will not equal the total amount charged.

How DET will deal with these issues and how it will advise VET providers to handle those cases in which a student has been approved for a loan but has not provided their TFN will be interesting to see.

Desirable features of a student loan scheme affected by arrangements discussed in above section	Rating					Other relevant sections
	5	4	3	2	1	
Students fully informed about fees and when they must pay them					5	5
Students readily able to meet requirements to access the scheme				2		6
Debts only arise from fees agreed to be paid under the scheme					4	4
Providers have timely information on a student's loan eligibility					4	6 & 7
Providers know which fees are to be directly paid by the student	5					5 & 6
Scheme administration is fully consistent with the law				2		9

## 11. The approval of course providers

Under VET FEE-HELP, the Minister was responsible for the approval and revoking of approval of providers. There were a large number of conditions of approval but if the Minister was satisfied that those conditions were met, the Minister had the discretion to approve the body, enabling students of the provider to access VET FEE-HELP. The approval of a provider was a legislative instrument which meant that either House of Parliament could disallow the approval, provided this was done within the required time limits for disallowance.

Similarly the Minister could revoke a provider's approval. The Act outlined a process that the Minister was required to follow, but the Minister was in a strong position to revoke the approval of any provider engaged in dubious practices. The process simply ensured that the Minister observed the sort of due process required by administrative law and that, if not observed, might provide the basis of a successful challenge of the decision through judicial review. Provided that the process was observed, the Minister had a high level of discretion to revoke a provider's approval [Higher Education Support Act 2003 (as at 12 March 2014), Schedule 1A, S 33-36].

A decision to revoke approval was also a legislative instrument. Despite being subject to Parliamentary oversight and disallowance, there was little chance that a revocation decision would be overturned if the Minister's decision was to protect the integrity of the tertiary education sector, potential students or Commonwealth revenue.

These processes provided the Minister with the power to ensure that providers were reputable and they provided strong Parliamentary oversight of decisions to approve and revoke the approval of providers. This is not the case for VET Student Loans. These decisions are now taken by the Secretary with little oversight by the Parliament and minimal rights to seek review of a decision.

The Secretary's decision to approve or not approve a provider under section 25 of the VET Student Loans Act is not subject to merits review but could be the subject of judicial review. Approval is provided for a specified period of not more than seven years. As with a decision to withhold payment of a student's covered tuition fees (see section 7 above), provided the Secretary acts lawfully, observes procedural fairness, bases decisions on evidence and all the relevant facts and provides reasons, their decision would not be overturned by a court.

The Secretary has wide powers to impose conditions on the approval of a provider and to vary those conditions throughout the period of approval under section 34 of the Act. It is likely these conditions could deal with any matter, provided it had some connection to the provision of vocational education and training and the operations of the provider. It can cover any matter directly relevant to the VET Student Loans scheme and the delivery and content of approved courses. It can cover academic matters. Again there is only judicial review and no merits review.

The Secretary's power to impose conditions includes the power to impose a limit on the total loan amount that can be paid to a provider. These limits can be imposed in a variety of ways, for example they might apply for a particular period or to particular approved courses in a particular period. Providers have little choice but to accept any limit on the total amount of loans available to their students. As discussed previously, they currently appear to have complete discretion in how any limited amount of loans is rationed among their students, enabling them to attempt to avoid financial losses.

The lack of merits review of a decision to approve or not approve a provider and of decisions imposing or varying conditions of approval were concerns raised by the Senate Standing Committee for the Scrutiny of Bills, but to my knowledge the Senate didn't consider these issues.

Curiously, a decision by the Secretary to revoke a provider's approval is subject to merits review by the AAT [Act, S 74]. As with all of the decisions subject to merits review under the VET Student Loans scheme, except for the re-crediting of FEE-HELP balance, the right of review offers a quite minimal level of accountability. It ensures that, during the provider's specified period of approval, it has the right to appeal a decision to revoke that approval. Once that period has ended, the provider has no guarantee that they will be approved for a new period and this new decision is not subject to merits review.

Desirable features of a student loan scheme affected by arrangements discussed in above section	Rating					Other relevant sections
	Green	Dark Green	Yellow	Red	Dark Red	
Providers role in scheme's administration is reasonable and encourages integrity in dealing with students and Government				Red		5 & 9
Conditions of provider's approval in the scheme are transparent					Dark Red	7
Provider approval process is clear, with reasonable accountability					Dark Red	-
Arrangements assure that providers are reputable	Green					-
Arrangements assure financial integrity of scheme	Green					4, 7 & 8

# D. Some specific comments on the VET Student Loans Rules 2016

## 12. The scheme’s contribution to resourcing the VET sector

The Rules allow that a total amount of just under \$2.1 billion can be approved in loans for each of 2017, 2018 and 2019 [Rules, S 155]. This is potentially good news for the resource constrained VET sector, but it is unclear if this amount of loans will actually be made available. There is no requirement for the Secretary to publish the limit placed on the total loan amount that can be paid to a provider or the total amount of all VET provider loan limits. The Secretary decides how much is paid.

The Government advised the Parliament in the Explanatory Memorandum to the VET Student Loans Bill 2016 that the new scheme would save \$2.4 billion a year by 2019-20. The peak year for VET FEE-HELP loans was 2015, in which \$2.9 billion in loans was issued. After that year, the Government froze the total amount that could be lent. This made it appear that there may be only around \$500 million available for loans. This now appears an underestimate.

It seems implausible that the forward estimates of expenditure could have assumed that around \$4.5 billion in VET FEE-HELP loans would be issued by 2019-20 (i.e. the \$2.1 billion stated to be available in the Rules, plus the \$2.4 billion saving advised to the Senate). It cannot however be ruled out as a possibility.

We do not actually know how much of the \$2.1 billion available for VET Student Loans will be lent. There had already been a considerable improvement in VET FEE-HELP administration in 2016. Action was being taken to minimise VET provider abuse of the scheme and the student loan amounts for each VET provider were frozen.

In the ANAO audit report on VET FEE-HELP, issued in the last week before Christmas 2016, we were told that, as at December 2016, estimated lending under VET FEE-HELP for 2016 would only be around \$1.6 billion [The Auditor-General (2016), p 27].

The Government has indicated that VET Student Loans is to considerably tighten lending. There are caps on the amount that can be borrowed to put downward pressure on fees and less than half of all potential courses have been approved for VET Student Loans. According to the Minister’s press release of 10 October 2016, the draft list of eligible courses for consultation had 347 approved courses

and omitted 478 courses. The finalised list also has 347 approved courses, plus 23 courses approved at particular providers only and 8 aviation courses for which a \$75,000 borrowing limit is specified.

If the reduction in approved courses and fee limits results in a comparable reduction in the amount of loans, it appears that borrowing under VET Student Loans will drop to around \$800 million in 2017 (i.e half of the amount spent in 2016). It does not appear that the Government actually intends to spend the total amount that it has allegedly made available for loans in the Rules.

There will still be expenditure under VET FEE-HELP during 2017 due to the transitional arrangements. It will be interesting to see if DET is able to separately report on the amount of VET Student Loans and VET FEE-HELP loans in 2017.

The actual impact of the new VET Student Loans scheme is still very uncertain. We know very little about how it will be paired with State and Territory Government subsidies. We do not know if the Government will replace the National Partnership Agreement on Skills Reform 2012. If not, payments to the States and Territories for VET will decline by around \$500 million from 1 July 2017, reducing the resources available for student subsidies. We do not know how much students may have to pay upfront in gap fees. We do not know if the largest student loans will go to those most likely to repay their loans.

There is very little transparency of information about the Government’s loan schemes. This significantly inhibits public policy discussion about their role in financing tertiary education and the impact of proposed changes to those schemes.

Desirable features of a student loan scheme affected by arrangements discussed in above section	Rating					Other relevant sections
	5	4	3	2	1	
Scheme provides consistent level of financial support to VET sector						7

## 13. The Rules appear to accidentally abolish all loan fees

The 2017 student information brochure makes it clear the Government intends there to be a 20 per cent loan fee for students in non-subsidised courses under VET Student Loans [The Department of Education and Training (2017a), p 19]. This is a continuation of the policy that applied under VET FEE-HELP. Information on the Department's website also makes it clear that there has not been a change of policy.

Under the National Partnership Agreement on Skills Reform 2012, there are specific agreed arrangements for State and Territory Government subsidised courses. Only State and Territory Government subsidised diploma and advanced diploma courses were allowed to attract VET FEE-HELP and there was to be no loan fee for these courses. The arrangements did not allow a State and Territory Government subsidised graduate certificate or graduate diploma to attract VET FEE-HELP assistance.

Instead of the loan fee, the National Partnership Agreement on Skills Reform 2012 specified arrangements for sharing of the costs of "funding ICLs including costs of implementation, administration and sharing risk" [Council of Australian Governments (2012), p 9]. In particular, States and Territories agreed to:

*"... pay 50 per cent of the fair value of impaired assets relating to ICLs taken out in their state for diploma or advanced diploma courses to which a state subsidy applies; plus 50 per cent of public debt interest cost for these loans, arising from the concessional treatment that applies to ICLs under the VET FEE HELP Assistance Scheme."*

[Council of Australian Governments (2012), p 25].

Section 14(2) of the Act allows the Rules to specify additional requirements for a course to be approved for VET Student Loans. It provides the mechanism to exclude State and Territory Government subsidised graduate certificates and graduate diplomas. Section 7(1) of the Rules requires that: If the course provider receives funding from a State or Territory for enrolments in the course, the course must lead to a qualification of diploma or advanced diploma.

This prevents a student undertaking a State and Territory Government subsidised graduate certificate or graduate diploma from receiving a VET Student Loan to pay their tuition fees. Such a course does not satisfy this condition.

All courses that are not subsidised by a State or Territory Government meet the condition specified in section 7(1) of the Rules. A non-subsidised course, regardless of whether it is a diploma, advanced diploma, graduate certificate or graduate diploma, must meet this condition, otherwise a student undertaking one of these courses would not be able to receive a VET Student Loan to pay their tuition fees.

The problem is that any course that meets the requirement of this rule is defined as a 'State or Territory subsidised course'. So a

course that is not subsidised by a State or Territory Government is a 'State or Territory subsidised course' as defined in the Rules [Rules, S 7(2)]. The Rules then go on to specify that there is no loan fee for a 'State or Territory subsidised course' [Rules, S 12].

The Rules accidentally abolish the loan fee for all eligible VET Student Loan courses and will continue to do so until the definition of a 'State or Territory subsidised course' is amended. Until this occurs, no student can be charged a loan fee. The debt for which they are liable should not include a loan fee. This is quite simply a mistake that needs to be fixed.

There does not seem to be a good policy reason to exclude State and Territory Government subsidised graduate certificates and graduate diplomas from the VET Student Loans scheme, other than one related to the potential cost. These costs may be minimal and further research into this issue would be worthwhile. Currently the arrangement provides an incentive for State and Territory Governments not to provide any subsidy for such courses.

I have argued elsewhere for the development of a more coherent system of support for resourcing student places across the tertiary sector [see Warburton, M (2016a)]. This matter deserves further consideration in that context.

## 14. The financial viability requirements in the Rules are unclear

A provider must be financially viable in order to be approved as a course provider under the VET Student Loans scheme. Section 23 of the Rules states 'Each of the following is an indicator that a provider is financially viable:..' and then lists seven conditions (a) to (g). The construction implies that there can be no further question about the financial viability of a provider that meets any one of the listed seven conditions. So, for example, a provider that is not providing its assets as security other than under a commercial loan arrangement is financially viable.

Once again this does not appear to be what is intended. If the intention is that all of the conditions are to be met, it doesn't actually say this. If the intention is that the conditions are matters that the Secretary can consider in assessing financial viability, then a more general formulation such as 'The following are matters that can be considered in determining if a provider is financially viable' should be used. This section of the Rules appears to require clarification.

The financial viability requirement for VET providers has always been a difficult matter of judgement, open to interpretation as to the height of the hurdle to be jumped. Depending on the interpretation of the requirement a provider currently can be financially viable, but this might provide little solid assurance as to what will be the case in six months.

Previously, a VET provider with little educational or training experience, possibly little business history of any description, could apply to offer VET FEE-HELP to its students. Its proposed business model could be heavily dependent on student fees to be paid



through VET FEE-HELP loans. These factors were not inconsistent with a provider being found to be financially viable.

The financial viability requirements did not and could not be expected to prevent individuals prepared to engage in disreputable practices from 'getting into the system to make a quick buck'. Such people are hard to keep out because there is always the option of buying a long standing small reputable provider and using it as a starting vehicle for expansion.

It remains to be seen whether section 31 of the Rules requiring providers to have experience in providing vocational education and training and allowing the Secretary to have regard to the history of the provider and its key personnel in deciding whether the provider has such experience, will provide an effective safeguard against such individuals.

As was the case under VET FEE-HELP, it will require DET to monitor providers, maintain vigilance over time and act quickly to ensure that all approved providers in the VET sector remain reputable. This is easier said than done.

## 15. Academic suitability and regulatory responsibilities

Section 80 of the Rules is about making sure that VET providers do not enrol students who are not academically suited to undertake their course. The implication is that an enrolled student who applies themselves should have a high likelihood of being able to complete their course.

This requirement is complementary to a general requirement in section 33 of the Rules for a provider to meet completion rate benchmarks for courses or parts of courses. The completion rate benchmarks are to be published on the Department's website.

As with other sections of the Rules, the section 80 academic suitability requirement is not clearly drafted. It says an approved course provider's student entry procedure must specify that a student is academically suited to undertake a particular course if three conditions are met. What it doesn't say is that a provider cannot find that a student is academically suited in any other circumstance. Unfortunately, it is the latter that is the prime policy intention, but the Rules do not require it. This policy intention is clear in the information brochure for students [The Department of Education and Training (2017a), pp 17-18]. Again the Rules need to be fixed.

DET will be involved in matters of academic suitability, with the Secretary:

- ensuring that providers have appropriate standards concerning who they are prepared to enrol [Rules, S 80-82];
- responsible for approving tools to be used in assessing competence in reading and numeracy [Rules, S 82-83]; and
- enforcing completion rate benchmarks [Rules, S 33-34].

These requirements are additional to the general requirement to comply with a wide range of laws and standards [Rules, S 29-30], including the:

- National Vocational Education and Training Regulator Act 2011;
- The Standards for NVR Registered Training Organisations; and
- Educational Services for Overseas Students Act 2000.

The Rules clearly imply that there will be higher standards for VET providers who wish to offer VET Student Loans, than otherwise would apply. The implication is that providers who are outside of this framework may have lesser protections for their students. I do not think this is good policy and I do not think it supports the upholding of Australia's international reputation as a supplier of quality education and training services. Why should there be two tiers of providers and different levels of standards for similar courses?

I think this situation potentially adds to confusion over the respective roles of ASQA, DET and the ACCC. I have argued elsewhere that there should be greater clarity of responsibilities for the various aspects of regulation if the problems with VET FEE-HELP are not to recur. The official position appears to be that sharing of responsibilities is unavoidable.

# E. Concluding remarks

The new VET Student Loans scheme did not just tighten the regulation of providers. It did more than introduce powers of entry and inspection and the monitoring framework associated with Part 2 of the Regulatory Powers Act. It did more than introduce new offences, including strict liability offences, and new civil penalty provisions.

Despite the considerable increase in regulatory power, the new scheme gave the Secretary of the Department of Education and Training an incredible level of discretion about how the scheme is run, the benefits that may be available to individuals who use it and the required behaviours of providers, including in respect of the content and delivery of education and training courses.

It is not a scheme in which benefits are ultimately defined and in which beneficiaries, that is students, have rights.

It doesn't ensure that any student has any part of their tuition fees paid for them through the scheme. The scheme will be used to pay the tuition fees of many students, but this will occur as a discretionary act of executive government, rather than as an entitlement to assistance with vocational education and training.

The Act includes provisions specifically to reinforce the Secretary's extra-ordinary level of power. Section 111(2) provides that 'Neither approval, nor payment of any amount, of a VET Student Loan requires any other loan to be approved or any other loan amount to be paid'. Section 112 protects officers of the Department from any liability for damages arising from any good faith actions or omitted actions, though this does not prevent damages being sought from the Commonwealth Government.

Section 113 is of particular interest in respect of the Secretary's discretionary powers. It appears intended to facilitate resolution of cases that a court might find as having involved the acquisition of property on other than just terms. The provision appears intended to try and safeguard against the Act or parts of the Act from being ruled by a court to be unconstitutional. The provision suggests that the Government's legislative drafters considered there to be a real risk that the Secretary in exercising powers under the Act might acquire property on other than just terms.

The VET Student Loans scheme has been imposed on the sector with minimal consultation in an extremely truncated timeframe. The objective of ensuring that the Department has power to control providers has overridden almost every other consideration. It certainly overrode the development of a coherent scheme and any guarantee of fairness for students and consistency of outcomes for providers.

There is little doubt that some of the legislative provisions of the current scheme and aspects of the way it is being implemented will need to be fixed. The individual Rules may sound reasonable, but they do not make sense when put together. Until they are fixed, there will be problems administering the scheme and VET providers and students will be confused and have difficulties understanding and using the scheme.

Hopefully, this paper will play a constructive role in public debate about how the VET Student Loan scheme can be improved. Suffice it to say that the scheme is currently far from my ideal model for a coherent single program of income contingent loans supporting the tertiary education of Australian students.

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