



19 October 2016

By email: senator.marshall@aph.gov.au and eec.sen@aph.gov.au

Senator Gavin Marshall
Chair, Senate Standing Committee on Education and Employment
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Senator

Inquiry into the VET Student Loans Bill 2016, the VET Student Loans (Consequential Amendments and Transitional Provisions) Bill 2016 and the VET Student Loans (Charges) Bill 2016

Consumer Action Law Centre (**Consumer Action**) is pleased to make this submission to the Senate Standing Committee on Education and Employment in relation to the Inquiry into the VET Student Loans Bill 2016 (the **Student Loans Bill**), the VET Student Loans (Consequential Amendments and Transitional Provisions) Bill 2016 and the VET Student Loans (Charges) Bill 2016.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

Introduction

In recent years we have developed substantial legal and policy expertise in the Vocational Education and Training (**VET**) sector by providing legal assistance to Victorians who have been improperly or unlawfully enrolled courses that have led to the accrual of a VET FEE-HELP loan. As a result, we have identified gaps in consumer protection within the VET sector. We welcome the VET Student Loans Bill as a largely effective response to those gaps, and this submission outlines potential enhancements that could contribute to the achievement of the legislation's objectives.

We also identified significant gaps in accessibility of dispute resolution, best explained by the need for legal assistance being required to obtain a re-credit to a consumer's FEE-HELP balance in cases of unlawful conduct by a provider or broker. The announcement of a VET student loans ombudsman should improve access to effective dispute resolution.

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Broadly, we are very encouraged by the reforms announced by the Government that identify many of these gaps and present practical solutions. However, these changes will not help those Australians already impacted through the accrual of an unfair FEE-HELP debt. We are most concerned about legacy issues created by poor consumer protection during previous iterations of the VET FEE-HELP scheme.

Brokers and Marketing

It is well documented and generally accepted that vulnerable and low-income consumers and job seekers were specifically targeted by VET providers and third-party sales agents. Unsolicited sales were common, either through door-to-door sales in lower socio-economic areas, or cold calling “leads” generated through job search or competition websites. Much of this activity was unlawful under the Australian Consumer Law (**ACL**) due to practices involving misleading or unconscionable conduct. In response, the Australian Competition and Consumer Commission (**ACCC**) has taken enforcement action against individual providers or brokersⁱ.

These so-called education “brokers” and third-party sales agents wreaked havoc between 2012 and 2015 with enrolments surging from 55,000 to 272,000 during this timeⁱⁱ. Consumer Action’s legal practice saw a similar spike in complaints about the enrolment practices of VET FEE-HELP providers and brokers over the same period. Banning brokers and marketing agents is a welcome step forward.

Section 49 of the Student Loans Bill is a broad provision which should provide regulators with the ability to enforce the ban. However, without an associated ban on incentivised selling practices, Consumer Action remains concerned that VET Student Loans providers could move sales agents “in-house” with no real change to the way prospective students are identified, targeted and recruited. The sector has been very adept at circumventing reforms in the past to maintain their market position. For example, when the Government initially banned marketing inducements in 2015, some industry participants responded by advertising loaned items as an inducement. Further changes to the VET Guidelines were required to address this circumvention.

Commission-based incentives which drive salespeople to sign consumers up for expensive and inappropriate purchases have driven poor consumer outcomes across numerous industries, including energy retail, solar panels and educational software.

Staff on commission-based payment structures are often highly trained and motivated to sell. The very nature of the way they are paid means they are not concerned that the good or service is appropriate or affordable for the consumer, but simply that the sale be closed. Vocational education should be about education, not sales.

<p>Recommendation: Amend section 49 of the Student Loans Bill to include a prohibition of commissions, bonuses or incentives that can be paid for the enrolment of students into a courses with a VET Student Loan.</p>
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Another pleasing reform is section 63 which bans the use of third party contact lists, particularly relevant for students like Benjamin Mutchⁱⁱⁱ. Mr Mutch was a job-seeker who was enrolled into a course by Acquire Learning after the company harvested his details from a jobs web-site. He was subsequently enrolled into a course that was significantly more expensive than an equivalent TAFE course.

It is critical that this prohibition also covers situations where the company or person that receives the personal details is linked to or is the same as the person who contacts, markets or enrolls people into courses. In the case of Acquire Learning, this company markets courses through its website for VET providers that it wholly owns, such as Franklin Scholar^{iv}. Acquire also markets these courses through the online job search website CareerOne, a company that it partly owns^v.

Consumer Action has seen multiple cases of consumers who are contacted by traders because the consumer has provided their contact details in an online form. In one matter, the trader's website provided online tools that could only be accessed by the user if they provided their full contact details. The user subsequently received a sales call which in our view constitutes an unsolicited approach. In another case, a client received a phone call from a trader after they had simply clicked on an online ad place by that trader.

As previously mentioned, some in the sector have shown a willingness to circumvent regulations to their own ends. This suggests that regulation should reflect the potential for providers to alter business models where loopholes can be identified.

Recommendation: Strengthen the prohibitions in sections 62 and 63 of the VET Student Loans Bill by also banning an approved course provider from marketing or promoting a course to a person whose details they have obtained for another purpose, for example, as part of an application for a job.

Another concern relates to clever marketing ploys to get around requirements about the disclosure. We have seen terms used in marketing such as "Tuition Assistance" or "Funded Training"^{vi}, terms which are prominently featured on a marketing site for vocational education and training courses provided by a leading provider. These can leave the prospective student with the perception that the course costs are wholly or partly offset, without properly disclosing the full amount of the debt being accrued.

Recommendation: Expand section 60 of the VET Student Loans Bill to also prohibit representations that a VET Student Loan amounts to "government funding" or "tuition assistance" or analogous terms.

Section 64 of the VET Student Loans Bill allows for the creation of further rules relating to marketing of courses. If the above amendments cannot be made to the Bill, then we recommend that the rules that are developed respond to our recommendations.

Remediation

A significant and outstanding matter for the Committee is how to assist Australians carrying debts that were accrued due to the "unacceptable conduct" of a provider or broker. A scheme to remediate debt

would recover much needed funds for the Commonwealth and erase wrongly incurred VET FEE-HELP debts.

In her Second Reading speech for the Bill, the Assistant Minister for Vocational Education and Skills, Hon Karen Andrews MP said;

“Over the coming months the department will be contacting all existing students to advise them of the required arrangements by which they can opt in to be ‘grandfathered’.”^{vii}

This provides the Department with the perfect opportunity to interrogate whether the incomplete course was enrolled into appropriately and lawfully, or whether “unacceptable conduct” led to the student’s enrolment.

Recommendation: That the Department contact all students with incomplete courses to determine whether the enrolment was as a result of “unacceptable conduct” [see section 71]. Re-crediting of the student’s FEE-HELP balance should then immediately follow.

On the matter of remediation for legacy issues of “unacceptable conduct”, another opportunity for justice for VET FEE-HELP victims exists with the Minister for Education and Training, Senator the Hon Simon Birmingham announcing that:

“All private education institutions will be required to apply to be eligible for VET Student Loans”^{viii}

Consumer Action released legal advice from an eminent Queen’s Counsel this month^{ix} which outlined that the Government could compulsorily recover VET FEE-HELP money paid out to vocational education providers.

Consumer Action sought the advice following the passage of 2015 reforms which included a provision suggesting that the Federal Government may be liable to pay compensation to VET providers in certain circumstances.^x This provision raised concerns that the recovery of VET FEE-HELP payments would constitute the acquisition of property, requiring compensation on just terms pursuant to subsection 51(xxxi) of the Constitution.

As part of the application process to become a course provider under the VET Student Loans scheme, the Government could require providers that were previously VET FEE-HELP providers to investigate previous enrolments to determine if they were the result of “unacceptable conduct” or otherwise breached the ACL. This investigation should be undertaken by an independent third party appointed by the provider. Where that independent party finds that previous enrolments were inappropriate, the provider should be required to refund the VET FEE-HELP loan to the Commonwealth and students’ VET FEE-HELP debt should be cancelled.

Recommendation: Amend section 25(2) to include a requirement for an approved course provider to appoint an independent third party to assess all previous VET FEE-HELP enrolments by that provider, and refund/re-credit any loan deemed to be a result of “unacceptable conduct”.

Re-crediting a FEE-HELP balance will be largely dependent on the definition of “unacceptable conduct”, which in section 71(2) will have its meaning, “given by the rules”. It is therefore critical that the definition is rigorous. The definition should include conduct that contravenes ACL.

This is best demonstrated by a series of actions by the ACCC against the enrolment practices of providers and/or brokers. In the case against Careers Australia, which led to a court enforceable undertaking in May 2016^{xi}, the ACCC argued that Careers Australia made false or misleading representations and engaged in unconscionable conduct, in breach of the ACL. The undertaking led to the cancellation of 12, 130 student enrolments. It appears that the regulators responsible for the training sector and VET FEE-HELP would not have been able to obtain these outcomes, as they were not responsible for the ACL. Including a link to the ACL will strengthen the ability of all regulators to ensure effective consumer protection.

Recommendation: That the meaning of “unacceptable conduct” in section 71(2), which is to be defined by the rules, include conduct that contravenes the ACL.

Section 68 provides for circumstances where the course provider may re-credit the student’s FEE-HELP balance. Section 68(1)(b) states that the balance must be re-credited if;

“the application is made within 12 months after the census day for the course, or the part of the course”

Unlike much of the bill, this time limitation does not reflect the profile of those Australians targeted by inappropriate or unlawful enrolment. Many of those targeted do not earn the income threshold that requires the repayment of the FEE-HELP debt that in many cases was the factor driving their exploitation. That many of those victims have not come forward to complain is not surprising as there is currently no immediate financial penalty to them. There is a simply a debt, increasing with interest, but with no current or imminent repayment requirement.

Recommendation: Amend section 68 to remove the time limitation [12 months] for the re-crediting of a FEE-HELP balance

Remediation won’t solve all problems, particularly as some of the greatest excesses of the scandal were perpetrated by providers or brokers that have now gone into administration^{xii}, such as Australian Careers Network (ACN), trading as Phoenix Institute. The ACCC initiated proceedings in the Federal Court in November 2015 over alleged ACL breaches^{xiii}. Phoenix, according to the ACCC, enrolled more than 9,000 students in 17,000 courses (most enrolled in double Diplomas) and was paid in excess of \$100 million by the Commonwealth for those enrolments.

Media reports and our own experience^{xiv} confirm the appalling behaviour by this provider. As part of its enforcement action, the ACCC is seeking redress for affected consumers by cancellation of VET FEE-HELP debts. However, students of other providers that engaged in similar conduct (including those that have gone into administration) will continue to carry FEE-HELP debts as a result of “unacceptable conduct”. The Parliament should consider whether in cases of “unacceptable conduct”, and where there is no likelihood of debt recovery from the provider, that these debts be erased unilaterally from the victim’s FEE-HELP balance.

Dispute Resolution

The announcement by Assistant Minister Andrews during the Second Reading to establish an Ombudsman scheme is a significant step to resolve disputes involving the VET sector and students as they arise.

“To further strengthen student protections, the government intends to establish a VET student loans ombudsman, and will provide further information on this in due course.”^{xv}

An ombudsman will assist the sector to rebuild its reputation and the trust and confidence of students, parents and employers. The fact that the Government is acting quickly to establish this service is welcomed, as accessible and free dispute resolution is complimentary to a rigorous consumer protection environment. There are more details on how an Ombudsman could be designed in Consumer Action’s submission to the “Redesigning VET-FEE Help discussion paper”^{xvi}.

Recommendation: That the VET ombudsman be established to comply with the Australian Treasury’s “Benchmarks for Industry-based Customer Dispute Resolution”.^{xvii} Consideration should be given to how the ombudsman can deal with all VET-related complaints, not just those relating to the VET Student Loans scheme.

Please contact Mick Bellairs on 03 9670 5088 or at michaelb@consumeraction.org.au if you have any questions about this submission.

Yours sincerely,

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ⁱ Eg, Australian Competition and Consumer Commission, 16 May 2016, “Careers Australia undertakes to repay Commonwealth for VET FEE-HELP diploma courses”, Available from [ACCC](#) [Accessed 18 October 2016].

ⁱⁱ Australian Government, Redesigning VET FEE-HELP: discussion paper, 27 April 2016, retrieved from The [Department of Education](#)

ⁱⁱⁱ Bachelard, M & Cook, H, The Age, “Andrew Demetriou’s Acquire Learning takes job seekers and turns them into cash”, 14 October 2015, retrieved from [The Age](#)

^{iv} Franklin Scholar, 2016, Website Terms of Use, Available from [Franklin Scholar](#) [Accessed 19 October 2016]

^v CareerOne, Terms & Conditions, 2016, Available from [CareerOne](#) [Accessed 18 October 2016].

^{vi} Funded Training Australia, 2016,

^{vii} Ms Andrews, Second Reading speech: VET Student Loans Bill 2016, 13 October 2016, accessible in [Parlinfo Search](#)

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- ^{viii} The Department of Education and Training, 5 October 2016 “New VET Student Loans a win-win for students and taxpayers”, Available from the [Department of Education](#) [Accessed 18 October 2016].
- ^{ix} Consumer Action Law Centre, 5 October 2016, “New advice shows Government can claw back VET FEE-HELP money”, Available from [Consumer Action Law Centre](#) [Accessed 18 October 2016].
- ^x Section 97A of the Schedule to the *Higher Education Support Act 2003* (Cth), inserted by *Higher Education Support Amendment (VET-FEE HELP Reform) Act 2015* (Cth).
- ^{xi} Australian Competition and Consumer Commission, 16 May 2016, “Careers Australia undertakes to repay Commonwealth for VET FEE-HELP diploma courses”, Available from [ACCC](#) [Accessed 18 October 2016].
- ^{xii} Ferrier Hodgson, March 2016, Australian Careers Network, Available from [Ferrier Hodgson](#) [Accessed 18 October 2016]
- ^{xiii} Australian Competition and Consumer Commission, 24 November 2016, “ACCC takes action against Phoenix following joint investigation with NSW Fair Trading”, Available from [ACCC](#) [Accessed 18 October 2016]
- ^{xiv} Bachelard, M & Cook, H, “Disabled and living in public housing: the victims of a private training college”, 17 September 2015, retrieved from [The Age](#)
- ^{xv} Ms Andrews, Second Reading speech: VET Student Loans Bill 2016, 13 October 2016, accessible in [Parlinfo Search](#)
- ^{xvi} Consumer Action Law Centre, “Submission to the Redesigning VET FEE-HELP discussion paper”, 1 July 2016, retrieved from [Consumer Action Law Centre](#)
- ^{xvii} Australian Government, “Benchmarks for industry-based customer dispute resolution”, 2015, retrieved from http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2015/benchmarks_ind_cust_dispute_reso/Documents/PDF/benchmarks_ind_cust_dispute_reso.ashx