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**By email: [VETRegulation@education.gov.au](mailto:VETRegulation@education.gov.au)**

Professor Valerie Braithwaite  
Department of Education and Training  
GPO Box 9880  
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Dear Professor Braithwaite

**Review of the National Vocational Education and Training Regulator Act 2011**

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Review of the National Vocational Education and Training Regulator Act 2011 (**NVETR Act**).

Consumer Action has played an active role in the vocational education and training (VET) debate over the last few years, particularly on the shortcomings of the VET FEE-HELP scheme. The rampant and inappropriate selling of VET courses, leading to large and inappropriate VET FEE-HELP debts with little or no outcomes for students, has disproportionately affected vulnerable and low-income Australians, and young job seekers.

Despite reforms to the Government loans program, Consumer Action continues to see significant consumer detriment in "fee-for-service" VET courses. It is arguable that the harm caused by these products is greater because of the debt burden that vulnerable students accrue when a dispute arises. In a Government loans scheme, such as the current VET Student Loans, there is an income threshold for repayments, which does not exist with "fee-for-service" courses.

For the purpose of this submission, we equate "fee-for-service" with VET courses that are not subject to a Government student loans, for instance the VET Student Loans scheme.

We will limit our comments to areas that relate to our area of expertise, namely consumer protection as it relates to VET.

Our comments are detailed more fully below.

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## About Consumer Action

Consumer Action Law Centre 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.

## Response to the questions

### **1. *In the interests of quality student outcomes, which aspects of vocational education and training (VET) should be under the closest scrutiny by the regulator, the Australian Skills Quality Authority (ASQA)?***

Empowering and protecting service users is a key criterion for any healthy and efficient market and this includes vocational education and training. While protection of students and potential students is included in the objects of the NVETR Act, our experience is that the regulator, the Australian Skills Quality Authority (ASQA), can be quite restricted in terms of the regulatory action it can take. This appears to be driven by an absence of substantive protections within the Act itself, for example, covering areas like marketing, contracts and dispute resolution. While the Standards for RTOs 2015, made under the NVETR Act, provide some protection, these has been insufficient to ensure good student outcomes.

The absence of robust protections can cause significant financial harm to low income and vulnerable students. As Justice Beach stated in a recent Federal Court case, “the education sector has been infected by the parasitic practices of operators preying upon the vulnerable and the unwary”<sup>1</sup>.

Consumer Action's specialist consumer law practice receives a significant number of complaints where a student has attempted to cancel or defer an enrolment without success and has sought legal advice. In these cases, the non-VSL VET provider has relied on a contract weighted heavily in favour of the provider to compel the student to pay the entire course fee, even if the student has not commenced the course.

In the cases brought to Consumer Action, the entire fee for the course is charged to the student upon enrolment and then repayments are arranged in fortnightly or monthly instalments.

This is extremely problematic and causes students, often in vulnerable situations, significant financial harm. One major provider, for instance, has a "seven (7) calendar day" refund (or cooling-off) period from the day of enrolment.<sup>2</sup> This date has no relationship to the start of the course, which means the cooling off period can (and often does) conclude prior to a student logging-on,

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<sup>1</sup> ACCC, Get Qualified Australia ordered to pay \$8 million penalty, 30 August 2017, <https://www.accc.gov.au/media-release/get-qualified-australia-ordered-to-pay-8-million-penalty>

<sup>2</sup> Open Colleges, *PO10 Cancellation and Refund Policy and Procedure*, viewed 17 August 2017, [https://s3-ap-southeast-2.amazonaws.com/key-student-docs/PO10+Cancellation+and+Refund+Policy+and+Procedure+\(1\).pdf](https://s3-ap-southeast-2.amazonaws.com/key-student-docs/PO10+Cancellation+and+Refund+Policy+and+Procedure+(1).pdf)

reading the course materials or trying lectures or subjects. If the student ends the enrolment, the provider then almost immediately seeks the entire unpaid course fees.

The case studies below illustrate the kinds of practices we commonly see with students attempting to withdraw from enrolment:

### **Case study one**

Rebecca\* is aged in her 50s and lives with severe epilepsy. Her sole income is from the Disability Support Pension. She has not worked since 2011, when she had to stop due to the effect of her epileptic seizures. In 2014, her epilepsy subsided to some extent, and she enrolled in an ABC College\* course as a way to return to the workforce.

After enrolling, but before the course commenced, her epileptic seizures had worsened, and she was concerned about her ability to complete the course. Acting on advice from her doctor and her own concerns, she withdrew from the course.

A debt collector is now pursuing her for \$5,487.50 despite having withdrawn before the course commencement date and having submitted an application for special consideration in writing in October 2016. She has not received a response to her application for special consideration from ABC College.

### **Case study two**

Cathy\* had not been in the workforce for a number of years. She was aged in her 40s when an opportunity with a family business led her to seek out an Early Childhood qualification in May 2017. When she called ABC College\*, she was already pregnant which she disclosed to the ABC College salesperson over the phone. When Cathy expressed concern at the amount of time ABC College expected students to commit to the course, the salesperson told her it was a "guideline".

The phone record of the conversation shows Cathy's confusion over the payment options. The salesperson goes on to say, "bear in mind that tomorrow is the last day for the \$500 discount, so keep that in mind if that makes sense."

The fees were being paid by Cathy's partner, but the relationship has broken down which has left Cathy without an income and incapable of continuing to pay the course instalments. As such, she is seeking to cancel her course enrolment. ABC College have rejected an initial request to waive the remaining fees despite the provision of evidence of her pregnancy and separation from her partner who was financially supporting her.

### Case study three

Heidi\* is a single mother of four, working full time. Heidi enrolled in a course with ABC College\* in April 2016. Prior to the course commencing, Heidi emailed the course advisor to postpone the course. She had recently come out of a long-term relationship with a history of family violence, and could no longer afford the course repayments. She also informed ABC College that she was “trying to stay hidden from an abusive ex-partner”.

Heidi sent this email to two separate ABC College staff seeking help and both times, according to Heidi, she was ignored. Not at any time did she ‘log-on’ to the ABC College’s portal or use any of the materials. ABC College initially refused to process termination request, and engaged a debt collector who sent Heidi a letter of demand for ten thousand dollars. It was only when Consumer Action became involved that the ten thousand dollar course cost was waived.

\* names changed to de-identify clients and trader.

If circumstances such as family violence, pregnancy and unemployment, serious illness or the significant change of financial situation is not sufficient to cancel or suspend a course without a fee waiver, it is hard to imagine a case that could be successful. The use of debt collectors and credit providers by RTOs is also very concerning and should be monitored.

Terms of standards form contracts which are onerous on students, such as the refund clauses mentioned above, may be unfair contract terms under the Australian Consumer Law (**ACL**). Section 23 of the ACL voids any term of a standard form consumer contract which is unfair. Under section 24, a contract term is unfair if

- a) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
- b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

We submit that a term which requires a student who cancels their course before beginning it, (or in the early stages), to pay out the whole course cost is unfair. The NSW Consumer, Trader and Tenancy Tribunal came to a similar conclusion in *Ncube v Open Colleges Pty Ltd*.<sup>3</sup>

However, it can be difficult for individuals to enforce this law, given that if the college insists on its contract, they will be required to obtain legal assistance to enforce their rights in a court or tribunal. There are commonly fees associated with making such applications. Students who have to cancel enrolments often do so at times of significant upheaval, for example, illness or mental health issues. They are not in a position to enforce their rights.

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<sup>3</sup> (General) [2012] NSWCTTT 79 (7 March 2012). See especially paragraph 6. Accessed from <http://www.austlii.edu.au/au/cases/nsw/NSWCTTT/2012/79.html>

It would be more effective if the NVETR Act, or the Standards made under it, clearly imposed minimum requirements around refund clauses. This should enable students to be only charged for training or other service actually provided. Such a Standard would align with the unfair contract terms legislation, giving that consumer protection specific meaning in the vocational training sector.

**Recommendation 1:**

That Standards be made under the NVETR Act to ensure that course cancellations, refunds and contractual terminations are fair and aligned with the principles of the unfair contract term regime. Further practical recommendations are provided below.

**2. What are the principles that should drive the business plan of a quality VET provider?**

Not applicable to our areas of expertise.

**3. Are regulatory and legislative changes required to support Registered Training Organisations to continuously improve across all areas of their operations and to go beyond meeting minimum quality standards?**

The current system is failing students of non-VSL VET courses. In order to strengthen consumer protection in the VET sector, we have identified several practical measures from our experience assisting students with disputes with their RTO. These measures will resolve much of the detriment currently experienced by students who have sought the assistance of Consumer Action.

Upon enrolment to a fee-for-service VET course, the student is charged for the entire cost of the course, which is then payable in fortnightly or monthly repayments. Further detail on this business model is discussed in Question 1. The price of these courses can total over ten thousand dollars. This is a significant amount, particularly if the student derives little or no benefit when cancelling enrollment, as described in the case studies.

Cancellations, and lack of access to fee waivers, can be tackled with some additional practical measures, some of which have been implemented to improve consumer protection for the VET Student Loans scheme.

A census date is a commonly known term in further education, and refers to the last day a student can withdraw from enrolment without incurring the fees or a government-funded loan debt.<sup>4</sup> The census date must be at least 20% of the way through the study for VET Student Loans. This is a reasonable model for the fee-for-service VET sector.

Reforms to the Government VET FEE-HELP (now known as VET Student Loans) also included created three census periods.<sup>5</sup> This created a type of unitary pricing where courses attached to a

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<sup>4</sup> Study Assist, *Deadlines and Withdrawals*, viewed 17 August 2017

<http://studyassist.gov.au/sites/studyassist/helpmypayingmyfees/pages/relevant-deadlines>

<sup>5</sup> Study Assist, Important Changes for Students Assessing VET FEE-HELP, December 2015,

<http://studyassist.gov.au/sites/StudyAssist/News/Documents/VET%20Student%20information%2020221222%20publication%20version.pdf>

VET Students Loan are broken into at least three periods, so that a student actively re-enrolls at least three times throughout the course. Previously, under VET FEE-HELP, students were liable for the entire course fees upfront, similar to the current situation with fee-for-service VET courses. While the student was not required to pay at this stage, the debt was applied, because the provider received payment from the Government scheme on the student's behalf.

An alternative to these options is a cancellation fee, which might be easier to adopt and could be fairer in cases of shorter courses of less than six months in duration. This could be applied by charging a nominal administration or cancellation fee, based on the total unpaid course fees when an enrolment is terminated. The cancellation fee would cover expenses incurred by the college in the enrolment process. We suggest that 5% of the course fee would be a reasonable figure.

**Recommendation 2:**

Students should not be penalised for the entire cost of a course if an enrolment is cancelled.

This could be achieved by:

- a. Introduction of a census date at least twenty percent of the way through a course
- b. Introduction of unitary pricing to charge students per unit of study
- c. Introduction of a "cancellation fee" payable when a student cancels an enrolment. This cancellation fee should total a maximum of 5% of unpaid course costs

The Victorian Government commissioned Deloitte Touche Tomatsu to review Victoria's VET system and found:

"Consumer complaint and redress mechanisms are fragmented and difficult to access, making them less effective in incentivising quality. There is a range of disparate complaint avenues available (including ASQA, VRQA, DET, general consumer protection regulators). Many stakeholders reported that these are complex and difficult to access and navigate."<sup>6</sup>

This report recommended the establishment of a VET Ombudsman, with a preference for a national scheme, for ensuring the rapid resolution of student complaints. In the absence of a national body, the report suggests a Victorian scheme where the obligation to respond to and co-operate with the independent body could be written into Victorian Training Guarantee (VTG) contracts.

As outlined by the Deloitte Touche Tomatsu report, ensuring compliance with an Ombudsman using a contractual (or regulatory) obligation is critical. As all Registered Training Organisations (RTOs) are registered with ASQA to provide VET services<sup>7</sup>, this industry lends itself to an industry Ombudsman scheme. It could simply be a condition of registration that a RTO must be a member of an industry Ombudsman scheme, similar to credit providers, transport operators, telcos or energy and water retailers.

The case studies presented above show clearly, along with the tendency for some VET providers to be obstructive and aggressive, that the VET sector has a significant access to justice problem.

<sup>6</sup> Deloitte Touche Tomatsu, *Review of Quality Assurance in Victoria's VET system*, May 2015

<sup>7</sup> ASQA, *About RTOs*, viewed 29 August 2017 <https://www.asqa.gov.au/about/australias-vet-sector/about-rtos>

The current barriers to pursuing an action through small claims forums such as VCAT mean that comparatively few people are likely to assert their rights, even when the trader is clearly in the wrong.

Consumer Action has significant experience in supporting and acting on behalf of consumers with disputes considered by industry ombudsman schemes, including the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) service, the Energy and Water Ombudsman Victoria (EWOV) and the Telecommunications Industry Ombudsman (TIO). In providing free, fast and fair access to justice for consumers, with the ability to make binding decisions, the establishment of these schemes has been one of the most significant advances in consumer protection of the past 30 years.

Without industry ombudsman schemes, hundreds of thousands of people would have been left with no avenue for redress other than courts, or more likely, because of cost and other access barriers, would have been left with nowhere to turn. There is a clear need for a free, accessible and efficient means for consumers to have their matters heard and resolved.

**Recommendation 3:**

Establish a national VET Student Ombudsman to resolve disputes between students and VET providers. This could build on the VET Student Loans Ombudsman, a body that only has jurisdiction over training providers that are part of the VET Student Loans program.

As outlined by the Senate Standing Committee on Education and Employment in 2015, *“few issues in the VET sector attracted as much community concern as the conduct of providers marketing their courses to potential students. The committee received a swathe of evidence from students, staff and advocates that high-pressure sales pitches aimed at securing students involved practices such as promises of equipment, downplaying the level of debt the students would incur and providing deceptive impressions of the qualifications to be earned or employment opportunities, which would follow.”*<sup>8</sup>

As evidenced by the experience of VET FEE-HELP, VET student protection needs to take into account the complexities and limitations of human behaviour in commercial activity. To base VET consumer policy on the notion that a consumer *“...should have a deep understanding of the market and its cost structures, and be somewhat aware of what a supplier’s competitors are offering”*<sup>9</sup> sets an unrealistically high bar which most people should not be expected to reach.

Often, consumer choices are made for emotional reasons and then rationalised after the fact. They are not arrived at through a careful and objective assessment of all available options, but are made on the basis of ‘gut instinct’, usually arrived at through one or a number of decision making short-cuts or biases, known as heuristics, which themselves may have little basis in rationality. Successful industries have understood the true decision making processes of consumers for

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<sup>8</sup> Senate Standing Committee on Education and Employment, *The operation, regulation and funding of private vocational education and training (VET) providers in Australia*, 15 October 2015

<sup>9</sup> Lee Worth, Brenton, *“Are we there yet? A return to the rational for Australian consumer protection”*, (2016) 24 AJCCL 33, p 38.

decades, and are increasingly sophisticated in their sales and marketing techniques to maximise that knowledge. This leaves some people vulnerable to sales and marketing with promises of false hope, or play on undue fears and concerns.

Cynically tapping into emotional triggers and cognitive limitations to make sales which are inappropriate for the needs of the consumer, and can have a disastrous impact on their financial health, is something that any good consumer protection legislation should guard against. Indeed, it is hard to see how such legislation can effectively protect and empower consumers if it fails to take these factors into account.

Education is one area where using emotional triggers, such as bettering oneself, getting a better job or providing for a family are extremely effective. As demonstrated in the earlier case studies, people who have been targeted include those who have experienced hardship, and are looking for a way out, which the RTO has in these cases appeared to offer, in these cases, irresponsibly.

We are further concerned that there is no general prohibition against misleading and deceptive conduct in the VET Standards, merely a requirement that the RTO *"accurately represents the services it provides and the training products on its scope of registration."*<sup>10</sup> We recommend including a general prohibition against misleading or deceptive conduct and representations in the VET Standards and VET Guidelines. We understand that private VET providers and brokers are already subject to the Australian Consumer Law (ACL), but inserting an explicit prohibition against this conduct would assist ASQA to take enforcement action in cases of misleading or deceptive conduct.

**Recommendation 4:**

We recommend that:

- a. Marketing standards be strengthened and clarified, including the introduction of a general prohibition against misleading or deceptive conduct which reflects the ACL requirements;
- b. ASQA makes the scrutinising of private VET providers marketing and advertising a high regulatory priority;
- c. ASQA be given jurisdiction to investigate misleading and deceptive conduct by private VET providers and brokers, without the need to first refer these matters to the ACCC;
- d. Providers be explicitly prohibited from guaranteeing:
  - i. an assessment outcome in their marketing such as '100% pass rates guarantee';
  - ii. the completion of a qualification or unit in unrealistically short time frames;
  - iii. employment or immigration outcomes from training; and
  - iv. minimum salaries
- e. Prohibit providers from paying commissions to their employees or contracted staff which is linked to VET enrolments.

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<sup>10</sup> *Standards for Registered Training Organisations (RTOs) 2015*, s 4.1(a)

**Recommendation 5:**

Students should be given independent course advice prior to enrolment, and students be independently assessed for suitability.

**4. How effective are the enforcement powers of ASQA for ensuring a quality VET sector and how might they be improved?**

Following the agreement by COAG, states and territories transitioned responsibility for accreditation, monitoring and enforcement of standards in higher education, including private VET providers, to the Commonwealth. This included the establishment ASQA to regulate the VET sector.

ASQA has jurisdiction over most VET providers, but Victoria and Western Australia also have their own regulators for VET providers that only deliver courses in these states. Certain conduct is also dealt with by the Australian Competition and Consumer Commission (**ACCC**). This complex regulatory regime makes it difficult for students to know where to turn if they have a problem.

We recommend a single national regulator for the VET sector and education brokers. This would provide clarity to both students and operators. It is also imperative that regulators and other relevant departments work closely together to improve compliance and enforcement outcomes. This co-operation should include, at a minimum, appropriate information sharing arrangements.

**Recommendation 6:**

We recommend that the Commonwealth and state and territory governments:

- a. establish a single national regulator for the VET sector; and
- b. introduce policies and procedures that encourage and enable regulators and government departments to work together more closely to improve compliance. This should include appropriate information sharing arrangements.

It is also not clear that ASQA has sufficient mechanisms to respond to non-compliance by private VET providers and education brokers. ASQA's enforcement powers may require amendment to ensure that ASQA can respond swiftly in the event of non-compliance. ASQA should be provided with enhanced enforcement powers, which include appropriate administrative powers that allow ASQA to impose penalties for non-compliance. Such powers are already found in other sectors, such as the suspension, banning and cancellation powers found in Part 7.6 of the *Corporations Act 2001*.

We also recommend that ASQA increase the frequency of audits of, and enforcement action against, private VET providers and education brokers. Currently, audits are occurring on average once every five years, allowing unscrupulous operators to fly under ASQA's radar.<sup>11</sup> ASQA should ensure that it is undertaking enforcement action in a strategic way, and increase actions across

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<sup>11</sup> Yu and Oliver (2015), p. 5.

the regulatory pyramid. There should be an emphasis on sufficient actions at the apex of the pyramid to have a real deterrent effect on businesses that may otherwise fail to comply.<sup>12</sup>

Ongoing compliance with relevant standards should be monitored and be a prerequisite to future accreditation.

**Recommendation 7:**

We recommend that ASQA:

- a. be given enhanced enforcement powers, including appropriate administrative powers to impose penalties for non-compliance with relevant standards;
- b. increase the frequency of compliance audits of private VET providers and education brokers; and
- c. increase enforcement action against VET providers and education brokers that contravene the relevant standards, based on a clear strategic compliance and enforcement policy.

As stated above, we would also like to see ASQA's jurisdiction extended in certain areas so that it is in a position to ensure that appropriate policies exist in relation to fair trading practices, such as refunds. ASQA's jurisdiction, and the relevant standards, requires amendment to ensure that appropriate policies exist in relation to selling techniques, unfair prices and quality. These factors should be taken into account when accrediting a provider, and determining whether their accreditation should continue.

ASQA's jurisdiction should also be extended to cover education brokers and unregistered sub-contracted providers. Although the VET Standards now require RTOs to ensure they comply with the VET Standards at all times, including where services are being delivered on its behalf,<sup>13</sup> ASQA does not have jurisdiction to regulate the unregulated sub-contractors themselves.

**Recommendation 8:**

We recommend that ASQA's jurisdiction be extended:

- a. to ensure that appropriate policies exist in relation to selling techniques, unfair prices and quality. These factors should be taken into account when accrediting a provider, and determining whether accreditation should continue;
- b. to regulate education brokers and unregistered subcontracted providers.

The effectiveness of the regulatory framework, including the regulator itself, needs to be regularly reviewed. In 2013, Consumer Action published *Regulator Watch*,<sup>14</sup> which was conceived in the absence of a public mechanism to determine how much enforcement work was undertaken by various regulators. This report noted some good practice frameworks that apply to regulators, including for the need for strong feedback loops between consumer organisations, consumer

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<sup>12</sup> Renouf, Balgi and Consumer Action Law Centre, 'Regulator Watch: The enhancement performance of Australian Consumer Protection Regulators', March 2013, pp.156-157, available at: <http://consumeraction.org.au/wp-content/uploads/2013/04/CALC-Regulator-Report-FINAL-eVersion.pdf>

<sup>13</sup> *Standards for Registered Training Organisations (RTOs) 2015*, Standard 2.1.

<sup>14</sup> Renouf (2013).

dispute resolution services, and regulators. We would encourage regular reviews of ASQA and the regulatory framework to ensure it is in fact ensuring compliance with regulatory obligations.

**Recommendation 7:**

That regulatory framework and ASQA's capacity to enforce compliance with regulatory requirements be regularly reviewed.

**5. How could quality be effectively measured and reported as part of an outcomes-based approach to regulation? What is the best way to measure student outcomes?**

Not applicable to our areas of expertise.

**6. What measures can be taken to give students, parents and communities a stronger voice in the regulation of VET?**

Not applicable to our areas of expertise.

**7. Are there areas of overlap, inconsistencies or gaps between the National Vocational Education and Training Regulator Act 2011 and other legislation that impedes the effective regulation of the VET sector?**

See response to Question 4.

**8. Other comments.**

Not applicable to our areas of expertise.

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

Yours sincerely

**CONSUMER ACTION LAW CENTRE**



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