Refunds for VET-FEE HELP Payments

Advice

Summary of Advice

1. In substance I have been asked to advise whether payments made by the Commonwealth to vocational education providers under the *Higher Education Support Act 2003* (Cth) ("the Act") would constitute property for the purposes of subsection 51(xxxi) of the Constitution. In my opinion, given the current form of the Act, such payments may possibly, but not necessarily, constitute property for the purposes of that subsection of the Constitution. Even if the payments do not constitute property for the purposes of that subsection, the Act needs to be amended to ensure that offending VET providers are required to refund the payments received in respect of their unacceptable conduct.

Instructions

2. The Consumer Action Law Centre has asked me to advise whether payments made by the Commonwealth to vocational education providers under the *Higher Education Support Act 2003* (Cth) ("the Act") would constitute property for the purposes of subsection 51(xxxi) of the Constitution. That subsection of the Constitution empowers the Commonwealth Parliament to make laws with respect to *"[t]he acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws."*
3. The funding of Australian higher education institutions is governed by the Act. In simple terms the Act provides for the Commonwealth to make loans ("VET FEE-HELP"[1]) to students to enable the students to pay for vocational education and training ("VET") courses provided by vocational education providers ("VET providers"). Under the Act the Commonwealth is required to pay the funds directly to the VET providers. This results in a debt owed by a student to the Commonwealth.
4. I am instructed that the Consumer Action Law Centre has identified a number of systemic problems existing within the private education industry. Indeed, as I have been preparing this Advice, the media have been reporting further abuses of the system by VET providers. A number of these problems have been with VET providers approved under the Act.
5. Generally, I am instructed, that the problems have involved various breaches of Australian consumer law such as:

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[1] S.43 of Schedule 1A to the Act sets out the circumstances in which a student is entitled to VET FEE-HELP.

(a) sales tactics employed by VET providers which constituted unconscionable, as well as misleading and deceptive conduct;

(b) poor quality, ill-suited courses, or courses that never went ahead in breach of the guarantee provisions of the Australian Consumer Law; and

(c) unfair contract terms and service contracts used by VET providers.

6. In the main, Consumer Action Law Centre has been able to negotiate with relevant VET providers on half of individual students to get fees re-credited to the student's VET FEE-HELP loan account with the Commonwealth. However, Consumer Action Law Centre is aware it is unable to assist every individual who has been impacted by the misconduct of certain VET providers. Given the significant growth in the industry over recent years, it is likely that thousands of students across Australia have suffered financial loss as a result of such misconduct.[2] Accordingly, Consumer Action Law Centre has been campaigning for the reform of the Act.

7. Recent court action by the Australian Competition and Consumer Commission and New South Wales Fair Trading has led to some redress for affected consumers by the cancelling of VET FEE-HELP and orders for the repayment of course fees that had been paid by the Commonwealth to VET providers. The Consumer Action Law Centre is concerned that a number of VET providers will have profited from breaching the law and many students will be left with a debt to the Commonwealth in circumstances where the VET providers have benefited from unconscionable or unlawful conduct.

8. To remedy these concerns, the Consumer Action Law Centre has proposed that a Commonwealth Remediation Scheme be set up to facilitate a scheme of remediation for all affected students provided with VET FEE-HELP loans during recent years. It would operate retrospectively as well as prospectively. It would not rely on individual complaints by students, but involve a review of all the loans advanced to determine if there was misconduct. My instructors envisage a scheme similar to that set out in the ASIC Consultation Paper 247.[3]

9. The Commonwealth is of the view that given the structure of the Act, the payment of VET FEE-HELP fees to VET providers results in the VET provider obtaining property within the meaning of subsection 51(xxxi) of the Constitution. If the position of the

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[2] Examples of the relevant "misconduct" consists of the conduct identified under sub-paragraphs (a) to (c) of this paragraph and which has resulted in the student incurring a debt to the Commonwealth pursuant to the VET-FEE HELP scheme.

[3] December 2015.

Commonwealth is correct, then the Commonwealth would need to pay just compensation to the VET provider to obtain re-credits on behalf of affected students. Accordingly, the Commonwealth is of the view that the remediation proposal is prohibitively expensive.

10. In particular I am asked to advise on the following specific questions:

    (a) Is the Commonwealth correct that a remediation scheme would constitute the acquisition of property for the purposes of subsection 51(xxxi) of the Constitution?

    (b) Does the answer to (a) depend on the remediation model adopted?

    (c) If the Commonwealth is correct, could the Act be amended so that in the future the Commonwealth could establish a remediation scheme without it constituting acquisition of property?

    (d) Given that the government is increasingly either outsourcing or finding private bodies to deliver what have traditionally been government services, how should future statutory regimes governing such funding be established to avoid the operation of subsection 51(xxxxi) of the Constitution?

    (e) Could the scheme been established in a way that would ensure remedies are available retrospectively?

General comment about the problem

11. The real problem concerning the issue upon which I am asked to advise, and which I believe becomes more apparent from the views I express in this Advice, is the current form of the legislation. Experience informs that despite the best intentions of a legislature, there will always be people (individuals, entities or companies) who are prepared to take advantage of the financial largesse of a government if that is at all possible. Whilst criminal or civil penalty sanctions may provide some deterrence, the use of such sanctions will requires a curial proceeding to establish an alleged breach. A problem of the current scheme is that whilst a debt is incurred between the student and the Commonwealth, the money has been paid to the VET provider in circumstances where it is almost certain that it should not have been so paid. And, as a result of that payment, the student has a debt – for that amount – owing to the Commonwealth. It is this problem that needs a simple answer, and one which does not cause any financial detriment to either the student concerned or the Commonwealth.

12. My instructors are simply trying to ensure that "unscrupulous" VET providers do not take advantage of the system and financially benefit themselves whilst "increasing" the VET FEE-HELP balance of a student.

Constitutional basis for the Act

13. The Commonwealth does not have power to make laws with respect to education[4] but subsection 51 (xxiiiA) of the Constitution permits it to make laws with respect to the "*...provision of...benefits to students...*"

14. I note that section 97A of the schedule was inserted by the *Higher Education Support Amendment (VET-FEE HELP Reform) Act 2015* (Cth) ("the Amending Act"). I have not been able to ascertain any reason for the insertion of this section.[5]

15. It also should be noted that the Amending Act introduced an additional two circumstances in which a VET Provider was required to re-credit a student's FEE-HELP account.

16. Importantly, the Explanatory Memorandum to the Amending Act echoes the concerns of my instructors. Inter alia it states as follows:

> "*The VET FEE-HELP loan scheme has experienced significant growth since its inception, some of which can be attributed to the strong early growth of a demand-driven scheme implemented in an area previously unassisted by Government loan assistance. Some of the growth however, derives from the unscrupulous or opportunistic behaviour of some providers and their agents. The characteristics of this pattern of unscrupulous behaviour are aggressive marketing, inappropriate targeting of vulnerable people, and widespread use of inducements. This Bill enacts a series of measures to strengthen the administration of the VET FEE-HELP loan scheme and improve the quality of outcomes for students while protecting students, public monies and the reputation of the broader VET sector.*"

The scheme of the Act

17. Section 3-1 of the Act states that the Act "*primarily provides for the Commonwealth to give financial support for...certain vocational education and training...(b) through financial assistance to students (usually in the form of loans).*" Such assistance is then provided by way of the VET FEE-HELP Assistance Scheme set out in Schedule 1A ("the Schedule") to the Act.[6]

18. The Schedule provides for VET FEE-HELP loans to be made to students enrolled in certain VET courses.[7] Part 1 Division 3 of the Schedule deals with how a body becomes, or ceases to be, a VET provider.

19. Part 1 Division 4 of the Schedule is concerned with the quality and accountability requirements of VET providers. This Part specifically provides that the Minister may

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[4] Although by the use of section 96 of the Constitution it can in effect fund education: see *Attorney-General for the State of Victoria v The Commonwealth* (1981) 146 CLR 559.

[5] It is simply referred to in a second Supplementary Explanatory Memorandum that is concerned with some proposed amendments to the original Bill.

[6] Section 3-30 of the Act

[7] Schedule 1A, s.1.

require a VET provider to be audited about compliance with a number of matters, including "*the approaches used to recruit or enrol students (or potential students)... who receive (or could receive) VET FEE-HELP assistance*"[8], "*the level...or quality of...*[teaching] *resources*"[9] and the "*completion rates for any of those courses of students who receive VET FEE-HELP*"[10]

20. Section 26A of the Schedule permits the Minister to give a VET provider a written compliance notice detailing any non-compliance or possible non-compliance with the Act, regulations, guidelines or any condition imposed on a VET provider. However, failure to rectify the matter or matters identified in the compliance notice only seems to result in the suspension or revocation of the provider's approval as a VET provider[11]. Suspension does not lead to the automatic refund of VET FEE-HELP that a VET provider has received where the VET provider's "unscrupulous behaviour"[12] has led to revocation or suspension of the provider's approval as a VET provider.
21. Part 1 Division 5 of the Schedule is concerned with, inter alia, the revocation of the approval of a VET provider. The sections concerning revocation do not provide for a VET provider to refund any VET FEE-HELP it has received from the Commonwealth for any of the students the VET provider was training.
22. Part 1 Division 5A of the Schedule creates a series of civil penalty provisions, inter alia, concerning the conduct of VET providers: presumably this is intended to encompass "unscrupulous behaviour". The conduct of concern to the Consumer Law Action Centre would, it appears, if proved breach at least some of these civil penalty provisions. However, the civil penalty provisions do not provide for the refund to the Commonwealth of any VET FEE-HELP payments received by a VET provider by reason of a breach of these civil penalty provisions.
23. Part 2 Division 7 Subdivision 7-A of the Schedule is concerned with entitlement to VET FEE-HELP.
24. Part 2 division 7 Subdivision 7-B of the Schedule concerns "FEE-HELP balances". The main provisions (as amended by the Amending Act) concerning the re-crediting of VET FEE-HELP payments are as follows [with my emphasis in all instances, although I have retained section headings in bold]:

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[8] Ibid s.26(1)(b)(i).
[9] Ibid s,26(1)(b)(iii)
[10] Ibid s.26(1)(b)(v).
[11] Ibid s.26A(3)(f).
[12] To use the words of the Explanatory Memorandum of the Amending Act

*"46 **Main case of re-crediting a person's FEE-HELP balance***

*(1) If clause 46A or 51 applies to re-credit a person's * FEE-HELP balance with an amount equal to the amounts of * VET FEE-HELP assistance that the person has received for a * VET unit of study, then this clause does not apply in relation to that unit.*

Note: For FEE-HELP balance , see section 104- 15, and for FEE-HELP limit , see section 104-20.

*(2) A * VET provider must, on the * Secretary's behalf, re-credit a person's * FEE-HELP balance with an amount equal to the amounts of * VET FEE-HELP assistance that the person received for a * VET unit of study if:*

(a) the person has been enrolled in the unit with the provider; and

(b) the person has not completed the requirements for the unit during the period during which the person undertook, or was to undertake, the unit; and

(c) the provider is satisfied that special circumstances apply to the person (see clause 48); and

(d) the person applies in writing to the provider for re-crediting of the FEE-HELP balance; and

(e) either:

(i) the application is made before the end of the application period under clause 49; or

(ii) the provider waives the requirement that the application be made before the end of that period, on the ground that it would not be, or was not, possible for the application to be made before the end of that period.

Note: A VET FEE-HELP debt relating to a VET unit of study will be remitted if the FEE-HELP balance in relation to the unit is re-credited: see section 137-18.

*(3) If the provider is unable to act for one or more of the purposes of subclause (2), or clause 48, 49 or 50, the * Secretary may act as if one or more of the references in those provisions to the provider were a reference to the Secretary.*

"46A Re-crediting a person's FEE-HELP balance--unacceptable conduct by provider or provider's agent

Decision to re-credit due to unacceptable conduct

*(1) The * Secretary must re-credit a person's * FEE-HELP balance with an amount equal to the amounts of * VET FEE-HELP assistance that the person received for a * VET unit of study if the Secretary is satisfied that:*

*(a) the person has been enrolled in the unit with a * VET provider; and*

(b) the person has not completed the requirements for the unit during the period the person undertook, or was to undertake, the unit; and

*(c) circumstances exist, of a kind specified in the * VET Guidelines for the purposes of this paragraph, involving* ***unacceptable conduct by the VET provider (or an agent of the VET provider) relating to the person's * request for Commonwealth assistance*** *relating to:*

(i) the unit; or

*(ii) the * VET course of study of which the unit forms a part; and*

(d) ***the person has applied in writing to the Secretary for re-crediting*** *of the FEE-HELP balance under this subclause; and*

(e) the application is in the form approved by the Secretary, and is accompanied by such information as the Secretary requests; and

(f) either:

(i) the application was made during the first 3 years after the period during which the person undertook, or was to undertake, the unit; or

(ii) it would not be, or was not, possible for the application to be made during those 3 years.

Note: A VET FEE-HELP debt relating to a VET unit of study will be remitted if the FEE-HELP balance in relation to the unit is re-credited: see section 137-18.

(2) If:

*(a) the person received the * VET FEE-HELP assistance as a result of giving an * appropriate officer of the * VET provider a form; and*

*(b) the form would have been a * request for Commonwealth assistance relating to the unit if it had been signed by a * responsible parent of the person;*

paragraph (1)(c) applies as if the form were the person's request for Commonwealth assistance relating to the unit.

Note: To be a request for Commonwealth assistance, a responsible parent must sign the form if the student is under 18 years old and subclause 88(3A) applies (see paragraph 88(3)(aa)).

Inviting submissions before making a decision

*(3) Before making a decision under subclause (1), the * Secretary must give the applicant and the * VET provider a notice in writing:*

(a) stating that the Secretary is considering making the decision; and

(b) describing the decision and stating the reasons why the Secretary is considering making it; and

(c) inviting the applicant and the VET provider to each make written submissions to the Secretary within 28 days on either or both of the following matters:

(i) why that decision should not be made;

*(ii) if that decision would re-credit the applicant's * FEE-HELP balance with a particular amount--why that amount should be changed; and*

(d) informing the applicant and the VET provider that, if no submissions are received within the 28 day period, the Secretary may proceed to make the decision.

*(4) In deciding whether to make the decision under subclause (1), the * Secretary must consider any submissions received from the applicant, and from the * VET provider, within the 28 day period.*

Notice of a decision

*(5) The * Secretary must give written notice of a decision under subclause (1) to the applicant and the * VET provider. The notice must be given within 28 days after the day the decision was made.*

46B Re-crediting a person's FEE-HELP balance--VET FEE-HELP account in deficit at the end of a calendar year

Main case

*(1) A * VET provider must, on the * Secretary's behalf, re-credit a student's * FEE-HELP balance with an amount if:*

*(a) the student receives * VET FEE-HELP assistance in a calendar year for a * VET unit of study undertaken with the VET provider; and*

*(b) under subclause 45E(1), the Secretary notifies the VET provider that the VET provider's * VET FEE-HELP account was in deficit at the end of the calendar year; and*

(c) the VET provider reasonably believes that some or all of that assistance caused or contributed to the deficit.

*(2) The amount to be re-credited is equal to so much of that assistance as the * VET provider reasonably believes caused or contributed to the deficit.*

Note: A corresponding amount of the student's VET FEE-HELP debt relating to the unit will be remitted (see section 137-18).

*(3) The * Secretary may re-credit the student's * FEE-HELP balance under this subclause if:*

*(a) the * VET provider is unable to do so under subclauses (1) and (2); and*

(b) the Secretary knows how much of that assistance that the VET provider reasonably believes caused or contributed to the deficit.

If not all of the deficit can be re-credited under subclauses (1) and (3)

*(4) If the deficit exceeds the total amount able to be re-credited under subclauses (1) and (3) for all of the * VET provider's students who received * VET FEE-HELP assistance in the calendar year for * VET units of study undertaken with the VET provider, the * Secretary may re-credit the * FEE-HELP balance of each of those students with the amount equal to:*

That excess × Student's percentage of the total assistance

where:

*"student's percentage of the total assistance " means the percentage equal to the percentage that the student's * VET FEE-HELP assistance referred to in paragraph (1)(a) is of the total VET FEE-HELP assistance received by students of the * VET provider in the calendar year for * VET units of study undertaken with the VET provider.*

47 Re-crediting a person's FEE-HELP balance--no tax file number

*(1) A * VET provider must, on the * Secretary's behalf, re-credit a person's * FEE-HELP balance with an amount equal to the amounts of * VET FEE-HELP assistance that the person received for a * VET unit of study if:*

(a) the person has been enrolled in the unit with the provider; and

(b) subclause 89(1) applies to the person in relation to the unit.

Note: A VET FEE-HELP debt relating to a VET unit of study will be remitted if the FEE-HELP balance in relation to the unit is re-credited: see section 137-18.

*(2) The * Secretary may re-credit the person's * FEE-HELP balance under subclause (1) if the provider is unable to do so.*

48 Special circumstances

*For the purposes of paragraph 46(2)(c), special circumstances apply to the person if and only if the * VET provider receiving the application is satisfied that circumstances apply to the person that:*

(a) are beyond the person's control; and

*(b) do not make their full impact on the person until on or after the * census date for the * VET unit of study in question; and*

(c) make it impracticable for the person to complete the requirements for the unit in the period during which the person undertook, or was to undertake, the unit.

49 Application period

(1) If:

*(a) the person applying under paragraph 46(2)(d) for the re-crediting of the person's * FEE-HELP balance in relation to a * VET unit of study has withdrawn his or her enrolment in the unit; and*

*(b) the * VET provider gives notice to the person that the withdrawal has taken effect;*

the application period for the application is the period of 12 months after the day specified in the notice as the day the withdrawal takes effect.

(2) If subclause (1) does not apply, the application period for the application is the period of 12 months after the period during which the person undertook, or was to undertake, the unit.

50 Dealing with applications

(1) If:

(a) the application is made under paragraph 46(2)(d) before the end of the relevant application period; or

*(b) the * VET provider waives the requirement that the application be made before the end of that period, on the ground that it would not*

be, or was not, possible for the application to be made before the end of that period;

the provider must, as soon as practicable, consider the matter to which the application relates and notify the applicant of the decision on the application.

(2) The notice must include a statement of the reasons for the decision.

Note: Refusals of applications are reviewable under Division 16.

51 Re-crediting a person's FEE-HELP balance if provider ceases to provide course of which unit forms part

*(1) A * VET provider must, on the * Secretary's behalf, re-credit a person's * FEE-HELP balance with an amount equal to the amounts of * VET FEE-HELP assistance that the person received for a * VET unit of study if:*

(a) the person has been enrolled in the unit with the provider; and

(b) the person has not completed the requirements for the unit during the period during which the person undertook, or was to undertake, the unit because the provider ceased to provide the unit as a result of ceasing to provide the course of which the unit formed part; and

*(c) the * VET tuition assurance requirements applied to the provider at the time the provider ceased to provide the unit; and*

(d) the person chose the option designated under the VET tuition assurance requirements as VET tuition fee repayment in relation to the unit.

Note: A VET FEE-HELP debt relating to a VET unit of study will be remitted if the FEE-HELP balance in relation to the unit is re-credited: see subsection 137-18(4).

*(2) The * Secretary may re-credit the person's * FEE-HELP balance under subclause (1) if the provider is unable to do so.*

51A Implications for the student's liability to the VET provider for the VET tuition fee

*If a student's * FEE-HELP balance is re-credited in accordance with this Subdivision with an amount for a * VET unit of study, the student is discharged from all liability to pay or account for so much of the student's * VET tuition fee for the unit as is equal to that amount.*

25. As can be seen there are a number of circumstances which may result in the re-crediting of a student's VET-HELP balance.

26. Section 46 of the Schedule does not apply to an application under either section 46A (unacceptable conduct by a VET provider) or section 51 (a VET provider ceases to provide the course. Section 46 will apply to cases where there is a deficit in a student's VET-HELP balance at the end of a calendar year (section 46B), cases of no tax file number (section 47) and cases of special circumstances (section 48).
27. If section 46 applies, a VET provider must re-credit a person FEE-HELP balance with the required amount. However, if a VET provider is unable to make the re-credit the Secretary may re-credit the amount[13].
28. One of the problems concerning the re-crediting of an amount to a student's FEE-HELP balance pursuant to section 46 of the Schedule is the requirement that the student has applied in writing for a re-crediting: subsection 46(2)(d). Generally that period is 12 months, unless the VET provider waives the time limit pursuant to subsection 46(2)(e)(ii). Given the relevant conduct that has given rise to the concerns expressed by my instructors, it is not difficult to contemplate that a VET provider would not waive this time limit. Section 46 also contemplates that a student is both aware of his or her right to seek a re-crediting and that there is a time limit in which to make that application.
29. Section 46A provides for the refunding of VET-FEE HELP where there has been "unacceptable conduct" by the VET provider. Whether there has been "unacceptable conduct" is to be determined by reference to the VET Guidelines[14]. [My instructions demonstrate that many of the concerns held by my instructors arise from what would appear to fall within the term unacceptable conduct as set out in the VET Guidelines.[15] However, it is not clear on my instructions that all the conduct of concern, whilst breaching Australian consumer laws, would necessarily constitute unacceptable conduct under the Act] The time limit contained in section 46A is generally three years: subsection 46A(1)(f). Similar concerns to those expressed in the preceding paragraph can properly be held about this time limit, although in this instance an application out of time is not dependent upon the VET provider waiving the time limitation period. However, the refund contemplated does not necessarily consist of any repayment by a VET provider: see sub-section 46A(1) of the Schedule: "*[t]he Secretary* ***must*** *re-credit a person's FEE-HELP balance...*" [my emphasis].

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[13] Subsections 46B(3) and 47(2)
[14] Subsection 46A(1)(c).
[15] As to which, see paragraph 5 above.

Subsection 51(xxxi) of the Constitution

30. As I have already noted[16], the Schedule now contains section 97A, which makes specific reference to subsection 51(xxxi) of the Constitution.

31. Subsection 51(xxxi) of the Constitution will only be relevant in the current circumstances if the law in question involves an acquisition of property from a person – here a VET provider. An acquisition may occur by way of a combination of acts[17], but I do not believe that is a likely problem here.

32. The High Court has held that the concept of "property" in subsection 51(xxxi) of the Constitution is to be interpreted in an expansive sense. In *Minister of State for the Army v Dalziel*[18] the court considered a wartime regulation which enabled the Commonwealth to take possession of any land for defence purposes. Pursuant to this regulation, the Minister took possession of certain land to enable the United States armed forces in Australia to occupy it. The land, when "acquired" was rented to Mr Dalziel under a weekly tenancy. Mr Dalziel had, for about 13 years prior to its 'acquisition", operated a carpark on the land. The Commonwealth argued that Mr Dalziel's weekly tenancy was not acquired but that the Commonwealth had merely entered into possession of the land and, accordingly, the Commonwealth had not acquired his property.[19]

33. The argument of the Commonwealth in this regard only found favour with Latham CJ. The other justices were all of the view that, despite the interference to the right of Mr Dalziel to continue to use the land as a car park being only temporary, there had been an acquisition of property. This was because, although the ownership of the land and the tenancy of Mr Dalziel had not been terminated, the rights of the owner and the tenant only continued to exist subject to the right of the Commonwealth to use it for the purpose authorised by the regulation.

34. The authorities make it clear that not all "apparent" acquisitions of property will contravene the subsection. Thus, for example, the vesting of a bankrupt's property in the Official Receiver[20], laws providing for the forfeiture of prohibited imports[21] or as a consequence of

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[16] Paragraph 13 above.

[17] For example, see *P. J. Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR382, which concerned the effect of "mutuall" Commonwealth and State legislation in an apparent attempt to circumvent subsection 51(xxxi) of the Constitution.

[18] (1944) 68 CLR 261.

[19] Ibid at p. 265

[20] *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361, at 372.

[21] *Burton v Honan* (1952) 86 CLR 169, at180-181.

a criminal conviction[22] or laws imposing taxation[23] have all been held to be valid laws of the Parliament and not to be struck down by reason of the subsection. In *Theophanous v The Commonwealth*[24] ("*Theophanous*") the High Court upheld Commonwealth legislation that disentitled a member of parliament, who had been convicted of corruption, to employer superannuation contributions and his or her parliamentary superannuation entitlements.

35. The High Court has justified this position on a number of bases. Thus an apparent acquisition of property may be an incident of another specific legislative power conferred on the Commonwealth[25]. Alternatively, it has been said that subsection 51(xxxi) "*applies only to acquisitions of a kind that permit on just terms. It is not concerned with laws in connection with which 'just terms' is an inconsistent or incongruous notion.*"[26]

36. As the plurality said in *Theophanous,* "*[t]o require the provision of 'just terms' in such circumstances would indeed, in the sense of the authorities be incongruous.*"[27] Gleeson CJ, agreeing as to the result, stated that subsection 51(xxxi) of the Constitution was irrelevant to the validity of the legislation in question because it all formed part of the Parliament's power to legislate for payment of allowances, including retirement allowances, to member of the Parliament.[28]

37. In *Health Insurance Commission v Peverill*[29], Peverill was a medical practitioner whose patients assigned to him their right to benefits under the *Health Insurance Act 1973* (Cth). Peverill submitted claims under a particular item of the Schedule to the *Health Insurance Act 1973*. The Commission decided to meet the claim under a different item which attracted a lower fee. The Federal Court determined the appropriate fee was the higher fee and Peverill then sued the Commission for the difference between the two items. Whilst the action was on foot the Commonwealth amended the *Health Insurance Act* by reducing, with retrospective effect, the amount payable under the item relied upon by Peverill. Peverill amended his defence to allege there had been an acquisition of property by the Commonwealth other than on just terms. The High Court rejected this defence.

38. In *Peverill* the justices of the High Court came to their conclusion for a number of reasons. Mason CJ, Deane and Gaudron JJ, on the basis that the adjustment, inter alia, was an

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[22] *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361, at 372.
[23] *Federal Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 263.
[24] (2006) 225 CLR 101
[25] For example, see *Re Director of Public prosecutions; Ex parte Lawler* (1994) 179 CLR 270, cited with approval by the plurality in *Theophanous v The Commonwealth* (2006) 225 CLR 101 at [58].
[26] *Re Director of Public prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285, cited with approval by the plurality in *Theophanous v The Commonwealth* (2006) 225 CLR 101 at [56]. See too *Attorney-General for the Northern Territory v Emmerson* (2014) 253 CLR 393 at 77.
[27] *Theophanous v The Commonwealth* (2006) 225 CLR 101 at [63].
[28] Ibid, at [6], [7] and [14].
[29] (1994) 179 CLR 226.

element of a regulatory scheme for the provision of welfare benefits from the public funds. Brennan J, was of the view that the right to claim the benefit was not property for the purposes of subsection 51(xxxi) of the Constitution. Dawson J, concluded that whist the value of the assigned service from the patient had been reduced the Commonwealth did not acquire any property. Toohey J could not identify any property that had been acquired by the Commonwealth and that the amending legislation lay outside the scope of subsection 51(xxxi) but was within the scope of subsection 51(xxiiiA) as a medical benefit. McHugh J, was of the view that Peverill's entitlement to payment was subject to the condition that it could be altered or revoked at any time.

39. Perhaps of most importance are the observations of Mason CJ, Deane and Gaudron JJ, that "*the rights that have been terminated are statutory entitlements to receive payments from the consolidated revenue which were not based on antecedent proprietary rights recognized by general law. That is particularly so in the case of both the nature and quantum of welfare benefits... Whether a particular medicare benefit should be provided and, if so, in what amount, calls for carefully considered assessment of... what is reasonable remuneration for the service provided... having regard to the community's need for assistance, the capacity of the government to pay and the future of health services in Australia. All... are susceptible of change... Where such change is effected by a law which operates retrospectively to... overcome distortion, anomaly or unintended consequences in the working of the scheme, variations in outstanding entitlements to receive payments under the scheme may result. In such a case, what is involved is a variation of a right which is inherently susceptible of variation and the mere fact that a particular variation involves a reduction in entitlement and is retrospective does not convert it into an acquisition of property.*"[30]

40. Whilst what occurred in Peverill is different to the Commonwealth seeking the re-crediting of VET FEE-HELP payments to a student's balance, the sentiments expressed in the preceding paragraph should *mutatis mutandis* be of relevance.

41. In *Attorney-General for the Northern Territory v Emmerson*[31], the High Court considered legislation permitting the Director of Public Prosecutions to apply for a declaration that a person was a drug trafficker and which could then result in an order forfeiting the person's property. The question arose as to whether a forfeiture order involved an acquisition of

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[30] Ibid at 237.
[31] (2014) 253 CLR 393.

property within the contemplation of subsection 51(xxxi) of the Constitution. The majority (with Gageler J, in dissent on other grounds, not deciding) rejected the argument "*...because the forfeiture worked by the Forfeiture Act is imposed as punishment for crime, the impugned provisions do not amount to an acquisition of property other than on just terms.*"[32] Later they commented that "*[t]he question is whether the statutory scheme can be properly characterised as a law with respect to forfeiture, that is a law which prescribes or imposes a penalty or sanction for breach of provisions which describe a rule of conduct.*"[33]

The proposal based on the ASIC Consultation Paper 247

42. A number of specific matters need to be identified with respect to this suggested proposal. Firstly, as I understand it, the remediation program contained in Consultation Paper 247 ("the Paper") is simply that: namely, a proposal and not in fact a program which is in effect[34]. Secondly, the *Corporations Act 2001* (Cth) ("the Corporations Act") specifically provides for Australian financial services licensees to have arrangements for compensating retail clients for losses suffered as a result of a breach by the licensees or its representative of their obligations under Chapter 7 of the Corporations Act.[35] As I read the Act there is no similar requirement with respect to VET providers. Thirdly, a legislative or regulatory requirement to require compensation for losses suffered by retail clients for losses suffered as a result of a breach by a licensees or its representative of their obligations under the Corporations Act is not a scheme whereby the Commonwealth is seeking to recover money from the licensee: i.e, it is not an acquisition of property by the Commonwealth. Rather, albeit one that the Commonwealth may impose as a condition of the grant of the appropriate licence, it is a scheme imposing legal obligations on a licensee to compensate a client for losses suffered by the conduct of the licensee.
43. There can be no doubt that a formal scheme for VET providers to compensate students by being required to refund VET FEE-HELP in appropriate circumstances is a commendable proposal. However, given the current legislative framework created by the Act – and in particular that it creates a debt owed by the student to the Commonwealth - any

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[32] Ibid at [75].
[33] Ibid at [80].
[34] The Paper itself states, at the "About this paper", on the frontispiece, that it "*...sets out ASIC's proposed guidance on review and remediation programs conducted by Australian Financial services...licensees who provide personal advice to retail clients.*"
[35] Section 912B of the Corporations Act

compensation would need to be paid to the Commonwealth, and not the student, to insure the FEE-HELP balance for the student was actually reduced. That the re-crediting would be to the student's VET FEE-HELP account, thereby reducing the student's indebtedness to the Commonwealth, is not determinative of the constitutionality of the proposal.

44. A scheme of the type envisaged could be a voluntary scheme entered into by VET providers. Such a voluntary scheme would not involve the Commonwealth making a law and thus subsection 51(xxxi) of the Constitution would have no possible application. Similarly, a voluntary scheme would not involve the Commonwealth in "acquiring" any property. However, given the conduct in question, it must be recognised that "offending" VET providers may be unlikely to become involved in such a scheme.

45. Any attempt by the Commonwealth to simply amend the Act in its current form and legislatively impose such a scheme compulsorily on VET providers would, in my opinion, undoubtedly lead to a challenge on the basis it was an acquisition of property other than on just terms. Whether such a challenge would succeed is not, in my opinion, clear. Were it to succeed the property acquired would be the VET FEE-HELP payment received by the VET provider and the just terms would require the Commonwealth to pay VET provider that same amount. In other words, in effect the Commonwealth would be re-crediting the VET FEE-HELP balance of a student because of the unscrupulous conduct of a VET provider. Arguably, to overcome this absurdity the proper repayment by a VET provider of VET FEE-HELP amounts received by reason of the unscrupulous conduct of the VET provider would not constitute an acquisition of property. I certainly have a problem that the application of subsection 51(xxxi) of the Constitution could lead to such an anomalous result.

The specific questions asked of me

Is the Commonwealth correct that a remediation scheme would constitute the acquisition of property for the purposes of subsection 51(xxxi) of the Constitution?

46. In my opinion, given the current form of the Act, the position of the Commonwealth may (at best) be possibly be correct, although I am doubtful about that position. Undoubtedly the payments received by the VET providers could constitute "property" within the meaning of that word, as determined by the decisions of the High Court[36], as used in subsection 51(xxxi) of the Constitution. However, that that is so is not

[36] See paragraph 21 above.

determinative that the payments are in fact "property" for the purposes of the subsection. If they were, one is confronted with the apparent paradoxical result that for the Commonwealth to recover VET FEE-HELP payments, which have been made "improperly" in the circumstances under consideration, the Commonwealth must pay that same sum to the VET provider so that the Commonwealth may recover the initial payment. In my opinion such a result is a nonsense. To use the one of the justifications for the non-application of subsection 51(xxxi) of the Constitution, such a result would be incongruous[37].

Does the answer to (a) depend on the remediation model adopted?

47. Possibly. A voluntary scheme of the type envisaged would almost certainly not be likely to be struck down by subsection 51(xxxi) of the Constitution. A compulsory scheme could, in my opinion, be introduced by appropriate amendments to the Act to make it clear that VET FEE-HELP payments received by a VET provider as a result of "unscrupulous behaviour" are to be forfeited as a sanction or punishment for failure by the VET provider to act appropriately.

If the Commonwealth is correct, could the Act be amended so that in the future the Commonwealth could establish a remediation scheme without it constituting acquisition of property?

48. Yes, as I have already indicated in the previous paragraph.

49. In my opinion, the Act needs to be amended whether or not the position taken by the Commonwealth is correct. Primarily the Act needs to make it clear that conduct of the type in question is contrary to the Act or the Schedule and that those who engage in such conduct will be penalised or sanctioned – at least in part – by being required to re-credit the VET FEE-HELP amounts to the credit of the VET FEE-HELP balance of the affected student. Such legislation should not be contrary to subsection 51(xxxi) of the Constitution but would be justified as a necessary incident of the provision of student benefits pursuant to subsection 51(xxiiiA) of the Constitution. Further, to use the words of the High Court in *Emmerson*, that it will be "*a law which prescribes or imposes a penalty or sanction for breach of provisions which describe a rule of conduct.*"[38]

50. I immediately acknowledge that such a proposal assumes that a recalcitrant VET provider will still be in existence or in a position to be able to re-credit the amount. In part this may

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[37] See paragraph 26 above.
[38] See paragraph 33 above.

be overcome by requiring a VET provider to provide a deposit or some form of guarantee before permitting its registration under the Act. It may also be necessary, as is the case with tax liabilities (to impose liability for unpaid taxes on the directors of corporations) to require the directors of VET providers to be liable for unpaid re-credits due to a student's VET FEE-HELP balance.

51. Section 97A should also be removed as it will be unnecessary

Given that the government is increasingly either outsourcing or finding private bodies to deliver what have traditionally been government services, how should future statutory regimes governing such funding be established to avoid the operation of subsection 51(xxxxi) of the Constitution?

52. I refer to and repeat my answer to the previous two question.

Could the scheme been established in a way that would ensure remedies are available retrospectively?

53. There is no doubt that the Parliament may enact legislation that is retrospective and that can apply even to remedies[39]. However, the area is one fraught with policy and politics. That being noted, there are compelling reasons for retrospective legislation in this case: namely, as best as can be achieved, to remove the financial gains made by unethical or unscrupulous VET providers and to reduce the burden of the VET-FEE HELP balances of the affected students. Similarly, given its voluntary nature, a voluntary scheme could apply retrospectively.

Finale

54. I would be happy to discuss any of the matters raised in this Advice with those instructing me.

W. Brind Zichy-Woinarski

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Aickin Chambers
1st September 2016

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[39] There is a natural repugnance in common law jurisdictions to retrospective legislation. However, it is clear that if the Parliament expresses a clear intention that a statute is to have retrospective effect then the courts, absent any valid reason to the contrary, will give effect to that intention: see generally s.8 of the *Acts Interpretation Act 1901* (Cth); "Statutory Interpretation Australia", D.C. Pearce and R. S. Geddes (6th Ed), Butterworths, Ch 10; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501. Consider to *Health Insurance Commission v Peverill* (1994) 179 CLR 226, dreferred to in paragraphs 37 and 38 above.