Explanatory Statement

National Vocational Education and Training Regulator (Charges) Determination 2013 (No. 1) made under the National Vocational Education and Training Regulator (Charges) Act 2012

Issued by the authority of the Minister for Skills and Training

Subject: National Vocational Education and Training Regulator (Charges) Act 2012

National Vocational Education and Training Regulator (Charges) Determination 2013 (No. 1)

Authority

Subsections 9(2) and 12(2) of the National Vocational Education and Training Regulator (Charges) Act 2012 (the Charges Act) provide that the Minister must, by legislative instrument, determine the formula for calculating a charge payable under Part 2 and Part 3 of the Charges Act.

Section 13 of the Charges Act provides that the Minister may, by legislative instrument, determine the circumstances in which a charge payable under the Charges Act may be paid in instalments, or waived, in whole or in part.

Purpose and Operation

The purpose of the National Vocational Education and Training Regulator (Charges) Determination 2013 (No. 1) (the Determination) is to identify the formula for calculating a charge payable under Part 2 and Part 3 of the Charges Act, and to formally identify the circumstances in which a charge payable under the Charges Act may be paid in instalments, or waived, in whole or in part.

Charges are payable by a NVR Registered Training Organisation (NVR RTO) under the Charges Act for the costs and expenses incurred by the Australian Skills Quality Authority (ASQA) when undertaking compliance audits (Part 2) and in circumstances where ASQA has investigated a complaint about an NVR RTO and finds the complaint substantiated (Part 3). The charges determined by this instrument were based on a cost recovery impact statement which can be found at www.asqa.gov.au/about-asqa/consultation/consultation.html.

Consultation

Consultation concerning the formulas contained in the instrument occurred with stakeholders (individual NVR RTOs, peak RTO organisations, peak employee associations and industry representatives) in April and May 2013 as part of the consultation for ASQA’s approved cost recovery impact statement.
ASQA was also consulted on the content of the instrument.

Description of the provisions of the National Vocational Education and Training Regulator (Charges) Determination 2013 (No. 1)

Part 1—Preliminary

Division 1—Arrangements on commencement

1: Name of Instrument
Item 1 names the instrument as the *National Vocational Education and Training Regulator (Charges) Determination 2013 (No.1).*

2: Commencement
Item 2 identifies that the legislative instrument will commence on the day after it is registered on the Federal Register of Legislative Instruments.

3: Revocation
Item 3 revokes the National Vocational Education and Training Regulator (Charges) Determination 2012 (No. 1) (old determination) (F2012L02582).

4: Savings
Subitem 4(1) provides that the charges for any ongoing compliance audits or investigations that are current at the time of the commencement of the Determination, or charges for an investigation as a result of a complaint given to ASQA prior to the commencement of the Determination, will be determined in line with the charge formulas under the old determination. This will ensure that any ongoing compliance audits or investigations will not be subject to the changes to the charges under the Determination.

Subitem 4(2) provides that any ongoing compliance audits and investigations into substantiated complaints that are current at the time of the commencement of the Determination may be waived in accordance Item 9 of the Determination (which is explained below).

5: Authority
Item 5 provides that the Determination is made under subsection 9(2), 12(2) and 13 of the Charges Act.

6: Purpose
Item 6 identifies the purpose of the legislative instrument.
7: Definitions
Item 7 defines terms used throughout the legislative instrument.

ASQA official travel costs are defined as ‘reasonably incurred airfares and such other travel expenses which may be reasonably incurred, including but not limited to accommodation, car rental and meals.’

When determining what is ‘reasonable’ for the purposes of the definition of ASQA official travel costs, ASQA must comply with the requirements of the Financial Management and Accountability Act 1997 and Commonwealth Procurement Rules- 1 July 2012, to achieve value for money when purchasing goods and services, including official travel. In relation to official air travel ASQA must comply with the requirements of the Commonwealth’s policy on domestic and international travel. The current policies of the Commonwealth at the time of commencement of this instrument are Finance Circular 2012/05 - Use of the Best Fare of the Day for Official International Air Travel and Finance Circular 2012/04 - Use of the Lowest Practical Fare for Official Domestic Air Travel.

As provided by the note to Item 7, unless contrary intention appears, an expression has the same meaning in the legislative instrument as in the Charges Act.

Part 2 – Calculation Formulas

8: Calculation Formulas
Subitem 8(1) identifies the formula to calculate the charges payable by a NVR RTO subject to a compliance audit undertaken by ASQA. The formula provides that the charge is $1,000 plus ASQA official travel costs. In the event that the compliance audit exceeds four hours in length, the NVR RTO must pay an additional $250 per hour. Please note that Item 10 provides for the rules of rounding hours (as explained below).

For any part of a compliance audit conducted outside Australia that commences on or after 1 January 2014, the NVR RTO must pay the costs and expenses specified in paragraph 8(1)(a) plus any reasonable expenses incurred by ASQA relating to that part of the audit. This will vary according to the location of the off-shore activity. Please note that for audits that are conducted outside Australia after the commencement of the Determination and before 1 January 2014, there will be no additional charge other than what is provided for in paragraph 8(1)(a).

Subitem 8(2) identifies the formula to calculate the charge payable by an NVR RTO which is the subject of a complaint investigation and a resulting compliance audit where the complaint is substantiated. The formula provides that for an investigation into a complaint about a NVR RTO, the NVR RTO must pay a rate of $250 per hour plus ASQA official travel costs.

For a compliance audit as a result of an investigation into a complaint about a NVR RTO, the NVR RTO must pay the same charge as determined for a compliance audit as formulated by paragraph 8(1)(a) of the Determination.
For any part of a complaint investigation or compliance audit conducted outside Australia that commences on or after 1 January 2014, the NVR RTO must pay the costs and expenses in paragraph 8(2)(a) plus any reasonable expenses incurred by ASQA relating to that part of the investigation or audit. This will vary according to the location of the off-shore activity. Please note that for investigations and compliance audits that are conducted outside Australia after the commencement of the Determination and before 1 January 2014, there will no additional charge other than what is provided for in paragraph 8(2)(a).

Part 3 – Waivers

9: Circumstances in which a charge may be waived in part or in full

Subitem 9(1) identifies the circumstances in which a charge payable under the Charges Act may be waived, in whole or in part. It provides that a charge payable under the Charges Act may be waived, in whole or in part where, in the Chief Commissioner’s opinion, special or unusual circumstances exist which cause the charge to be unreasonable or inequitable.

Subitem 9(1) further provides that the balance of a charge that would otherwise be payable under the Charges Act may be waived where special or unusual circumstances exist which would cause the charge to be unreasonable or inequitable or it would not be economical to recover the balance. It is expected that this clause would be applied in circumstances where the balance of the charge owing is negligible in the context of the whole charge payable.

Examples of where a charge may be waived, in whole or in part, under Item 9 include:

- where ASQA miscalculated a charge, which has subsequently been paid by the provider; or
- where the NVR RTO has, in good faith, attempted to pay the charge, but their financial institution has, without notice, levied a bank charge, causing the payment to be underpaid by a negligible amount.

Paragraphs 9(2)(a) and 9(2)(b) clarify that the fact that an NVR RTO (which will include an individual, body politic or corporate, as defined by section 2C of the Acts Interpretation Act 1901) did not consent to, or agree to the outcome of a compliance audit or complaints investigation does not constitute special or unusual circumstances.

Paragraph 9(2)(c) clarifies that the fact that an NVR RTO ceases to exist, or to be an NVR RTO, or to carry out business as a RTO does not constitute grounds for a waiver.
Part 4 – Other

10: Rounding of hours

Item 10 clarifies the charges of investigation and compliance audits with respect to the hourly charge component of the formulas. Item 10 provides that where that the length of an investigation or compliance audit is less than 30 minutes, then the total amount payable will be zero dollars. This will mean that the NVR RTO will not be additionally charged the hourly rate for an audit if the audit does not go for longer than 29 minutes of the additional hour. Item 10 further provides that if the audit continues for a period greater or equal to 30 minutes beyond an hour, but less than the full hour, then the total amount payable will be $125.

By way of example, if a compliance audit takes 4 hours and 29 minutes, sections 8 and 10 will apply so that the person to which the charge applies will be charged $1,000 for the initial 4 hours of the audit but will not be charged for the additional 29 minutes of the audit.

If a compliance audit takes 4 hours and 30 minutes sections 8 and 10 will apply so that the person to which the charge applies will be charged $1,000 for the initial 4 hours of the audit and, because the audit has continued for a further half hour but less than a full further hour, person to which the charge applies will be charged a further $125.

If a compliance audit takes 5 hours and 30 minutes, sections 8 and 10 will apply so that the person to which the charge applies will be charged $1,000 for the initial 4 hours of the audit, $250 for the fifth hour of the audit and, because the audit has continued for a further half hour (but less than another full hour), a further $125.
Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

National Vocational Education and Training Regulator (Charges) Determination 2013 (No. 1)
(the Determination)

This Determination is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Determination

The Determination is made by the Minister under subclauses 9(2) and 12(2) and section 13 of the National Vocational Education and Training Regulator (Charges) Act 2012 (the Charges Act).

The purpose of the Determination is to set the formula that will enable ASQA to charge for compliance audits and the investigation of substantiated complaints which are conducted by ASQA of NVR Registered Training Organisations (NVR RTOs). These charges will support ASQA’s regulatory functions by allowing it to recover costs for the regulatory functions it undertakes and fulfil its budgetary obligations.

The Determination also identifies circumstances in which a charge payable under the Charges Act may be waived, in whole or in part.

Human rights implications

Right to education

The Determination engages the right to education contained in Article 13 of the International Covenant on Economic, Social and Cultural Rights.

In particular, paragraph 13(2)(b) states that secondary education, in all its different forms, including technical and vocational secondary education shall be made generally available and accessible to all by every appropriate means and in particular by the progressive introduction of free education.

The objectives of the Determination is to enable ASQA to charge NVR RTOs for complaints investigations, where substantiated, and to charge for compliance audits. Charging for audits and substantiated complaints will provide ASQA with the appropriate amount of funding to ensure that ASQA can undertake its regulatory functions in the vocational education and training (VET) sector, ensuring improved quality and greater integrity in the VET system. This will in turn protect students’ rights to education.

While charges are made for the purposes of allowing ASQA to undertake its functions and thereby ensuring improved quality and greater integrity in the VET system, it is important to note that the Determination will allow the waiver, in whole or in part, of these charges in special or unusual
circumstances which would otherwise cause the charge to be unreasonable or inequitable. This will ensure that the charges will not be imposed if they are considered to be severe.

It is therefore reasonable, necessary and proportionate for the Determination to prescribe a formula for the cost recovery of providing this protection.

Right to fair trial and fair hearing

To avoid doubt, this Determination is consistent with the right to fair trial contained in Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

Article 14 sets out specific guarantees that apply to proceedings involving criminal charges and to persons who have been convicted of a criminal offence, and provide protection against the imposition of retrospective criminal liability.

The charges imposed by the Determination, and in particular to the extent that the charges applied for substantiated complaints act as a disciplinary mechanism on NVR RTOs breaching the provisions of the National Vocational Education and Training Regulator Act 2011 (the NVETR Act), may be considered penalties. For the purposes of the ICCPR, a penalty may be considered to be ‘criminal’ even though it is considered ‘civil’ under Australian domestic law. For the following reasons, however, the charges under the determination will be considered civil rather than criminal.

Firstly, these charges are determined to be civil within Australian domestic law. More conclusively, however, these charges are regulatory in nature as they are applied only with regards to carrying out an audit, which determines compliance with the NVETR Act regulatory framework, or in the event that a complaint is substantiated against an NVR RTO which will also determine compliance with the regulatory framework.

Furthermore, the charges are not considered to be severe as the rate of charges for an investigation or compliance audit it set at a level that reflects the cost of such an investigation or an audit. In addition, the charges may be waived, in whole or in part, where AQSA’s Chief Commissioner is of the opinion that special or unusual circumstances exist which would otherwise cause the charge to be unreasonable or inequitable. This will ensure that the charges will not be imposed if they are considered to be severe.

For these reasons, the charges are considered to be civil penalties and will therefore be consistent with the right to a fair trial.

Conclusion

This Determination is compatible with human rights because it protects the right to education.

The Hon Brendan O’Connor, Minister for Skills and Training