

# Explanatory Statement

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## ***National Vocational Education and Training Regulator (Charges) Amendment (COVID-19) Determination 2020***

### **Purpose and Authority**

The *National Vocational Education and Training Regulator (Charges) Amendment (COVID-19) Determination 2020* (Amendment Determination) is made under subsections 6B(1), 9(2), 12(2) and section 13 of the *National Vocational Education and Training Regulator (Charges) Act 2012* (NVETR Charges Act), as construed in accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (Acts Interpretation Act).

Among other things, subsection 33(3) of the Acts Interpretation Act provides that a power to make an instrument of a legislative character (such as under relevant sections of the NVETR Charges Act) includes a power to amend such an instrument.

The Amendment Determination amends the *National Vocational Education and Training Regulator (Charges) Determination 2013 (No. 1)* (Principal Determination).

In summary, the Amendment Determination implements Government policy with respect to the refunding and waiver of charges imposed on registered training organisations and registered providers by the Australian Skills Quality Authority (ASQA)<sup>1</sup>, by:

- ensuring that for any registered training organisations and registered providers that already held registration with ASQA prior to 1 January 2020, the annual registration charge is set at zero where that charge becomes payable between 1 January and 30 June 2020. This means that for those organisations and providers that have already paid the charge during that period, the amount is able to be fully refunded, and otherwise no charge becomes payable
- ensuring that the above outcome also applies to any compliance audit and complaint investigation charges
- ensuring that in other circumstances the existing discretionary capacity of ASQA to waive annual registration, compliance audit, and complaint investigation charges in special or unusual circumstances extends to the COVID-19 pandemic event.

These amendments are intended to ensure that Government policy with respect to the refunding and waiver of charges imposed on registered training organisations and registered providers can be implemented. In combination with other financial assistance measures announced by Government relating to the COVID-19 pandemic event, these measures help ensure the ongoing sustainability and viability of the vocational education and training sector, and help reduce the financial burden for that sector.

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<sup>1</sup> Note that ASQA is the National Vocational Education and Training Regulator under the *National Vocational Education and Training Regulator Act 2011* (see regulation 15 of the *National Vocational Education and Training Regulator Regulations 2011*).

## **Commencement**

The Amendment Determination commences from 1 January 2020, to ensure that it applies to applicable charges paid or payable from that date. The measures in the Amendment Determination are beneficial (enabling charge refund and waiver), impose no new liabilities, and are justified in response to the urgent and unforeseen circumstances of the COVID-19 pandemic event.

Accordingly, the retrospective application of the Amendment Determination does not disadvantage, or give rise to any liabilities of, any registered training organisations or registered providers. Given this, subsection 12(2) of the *Legislation Act 2003* (Legislation Act) does not apply to the Amendment Determination.

## **Consultation**

The Council of Australian Governments (COAG) Skills Council was consulted on the measures in the Amendment Determination on 17 April 2020, and Skills Ministers unanimously agreed to those measures.

ASQA and the Skills Senior Officials Network (consisting of senior officials from the skills policy portfolios of all States and Territories) were also consulted on the measures in the Amendment Determination.

The measures in the Amendment Determination are in response to stakeholder feedback in relation to the impacts of the COVID-19 pandemic on the vocational education and training sector.

## **Regulation Impact Statement**

The Office of Best Practice Regulation (OBPR) has confirmed that the Higher Education Relief Package<sup>2</sup>, which includes the measures in the Amendment Determination, does not require a Regulation Impact Statement (RIS). OBPR reference: 26451.

Further to this, the Prime Minister has granted an exemption from the need to complete regulatory impact analysis in the form of RISs for all urgent and unforeseen Government measures made in response to the COVID-19 pandemic event<sup>3</sup>. The measures in the Amendment Determination are considered unforeseen and have been made in response to the COVID-19 pandemic event.

## **Disallowance**

Subsection 44(1) of the Legislation Act provides that legislative instruments are not subject to disallowance where the enabling legislation for the instrument facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States and Territories, and authorises the instrument to be made by the body or for the purposes of the body or scheme.

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<sup>2</sup> <https://www.dese.gov.au/covid-19/higher-education/higher-education-faq>

<sup>3</sup> <https://ris.pmc.gov.au/2020/03/18/prime-ministers-exemption---covid-19-related-measures>

The *National Vocational Education and Training Regulator Act 2011* (NVETR Act) established the Australian Skills Quality Authority (ASQA) to facilitate an intergovernmental scheme for national vocational education and training regulation, giving effect to the Intergovernmental Agreement for Regulatory Reform in Vocational Education and Training. The NVETR Charges Act is a part of the national vocational education and training regulatory legislative framework, and enables ASQA to charge registered training organisations and registered providers for the performance of some of its functions.

Accordingly, with respect to **items 2, 4 and 5** of the Amendment Determination (see Detailed Explanation of Amendments below), the amendments made by these items are not subject to disallowance in accordance with the operation of subsection 44(1) of the Legislation Act.

However, subsection 6B(3) of the NVETR Charges Act provides that, notwithstanding the operation of section 44(1) of the Legislation Act, a legislative instrument made pursuant to subsection 6B(1) of that Act is subject to disallowance. Given this, **items 1 and 3** of the Amendment Determination (see Detailed Explanation of Amendments below), are subject to disallowance.

## Abbreviations used in this Explanatory Statement

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**Amendment Determination** means the *National Vocational Education and Training Regulator (Charges) Amendment (COVID-19) Determination 2020*.

**NVETR Charges Act** means the *National Vocational Education and Training Regulator (Charges) Act 2012*.

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

## Detailed Explanation of Amendments

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### Preliminary

Sections 1 to 4 of the Amendment Determination are formal provisions providing for the name, commencement, authority and effect of the instrument.

**Section 1** states the name of the instrument as the *National Vocational Education and Training Regulator (Charges) Amendment (COVID-19) Determination 2020*.

**Section 2** provides for the Amendment Determination to commence from 1 January 2020, to ensure that it applies to applicable charges paid or payable from that date. The retrospective application of the Amendment Determination does not disadvantage, or give rise to any liabilities of, any registered training organisations or registered providers. Given this, subsection 12(2) of the *Legislation Act 2003* does not apply to the Amendment Determination.

**Section 3** states that the Amendment Determination is made under various provisions of the NVETR Charges Act.

**Section 4** provides that the Principal Determination is amended as set out in the Schedule to the Amendment Determination.

### Schedule 1 – Amendments

**Item 3** inserts new section 7E into the Principal Determination. New subsection 7E(1) provides that the section applies to registered training organisations and registered providers that already held registration with ASQA prior to 1 January 2020. New subsection 7E(2) then provides that if an annual registration charge became payable between 1 January and 30 June 2020, the amount of that charge is zero. The effect of these amendments mean that for those applicable organisations and providers that have already paid the charge during that period, the amount is able to be fully refunded, and otherwise no charge becomes payable.

**Item 1** is a consequential amendment arising from item 3, and ensures that the operation of new section 7E is incorporated into the application of section 7A of the Principal Determination. That is, to ensure that any annual charges determined under the Principal Determination are subject to the operation of new section 7E.

**Items 2 and 4** insert new subsections 7D(3) and 9(3) respectively into the Principal Determination. These amendments ensure that the existing discretionary capacity of ASQA to waive annual registration, compliance charges, and complaint investigation charges in special or unusual circumstances extends to circumstances related to the COVID-19 pandemic event. Subsections 7D(3) and 9(3) are inserted for avoidance of doubt purposes, in order to provide certainty to the vocational education and training sector that the discretionary waiver capacity of ASQA includes circumstances related to the COVID-19 pandemic event.

**Item 5** inserts new section 11 into the Principal Determination. This amendment ensures that for any registered training organisations and registered providers that already held registration with ASQA prior to 1 January 2020, any compliance audit and complaint investigation charges are also set at zero where those charges become payable between 1 January and 30 June 2020.

This means that for those organisations and providers that have already paid such a charge during that period, the amount is able to be fully refunded, and otherwise no charge becomes payable.

# Statement of Compatibility with Human Rights

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*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 and at the request of the Parliamentary Joint Committee on Human Rights*

## Summary of instrument

The *National Vocational Education and Training Regulator (Charges) Amendment (COVID-19) Determination 2020* (Amendment Determination) is made under subsections 6B(1), 9(2), 12(2) and section 13 of the *National Vocational Education and Training Regulator (Charges) Act 2012* (NVETR Charges Act), as construed in accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (Acts Interpretation Act).

Among other things, subsection 33(3) of the Acts Interpretation Act provides that a power to make an instrument of a legislative character (such as under relevant sections of the NVETR Charges Act) includes a power to amend such an instrument.

The Amendment Determination amends the *National Vocational Education and Training Regulator (Charges) Determination 2013 (No. 1)* (Principal Determination).

In summary, the Amendment Determination implements Government policy with respect to the refunding and waiver of charges imposed on registered training organisations and registered providers by the Australian Skills Quality Authority (ASQA)<sup>4</sup>, by:

- a. ensuring that for any registered training organisations and registered providers that already held registration with ASQA prior to 1 January 2020, the annual registration charge is set at zero where that charge becomes payable between 1 January and 30 June 2020. This means that for those organisations and providers that have already paid the charge during that period, the amount is able to be fully refunded, and otherwise no charge becomes payable
- b. ensuring that for any registered training organisations and registered providers that already held registration with ASQA prior to 1 January 2020, any compliance audit and complaint investigation charges are also set at zero where those charges become payable between 1 January and 30 June 2020. This means that for those organisations and providers that have already paid such a charge during that period, the amount is able to be fully refunded, and otherwise no charge becomes payable
- c. ensuring that in other circumstances the existing discretionary capacity of ASQA to waive annual registration, compliance audit, and complaint investigation charges in special or unusual circumstances extends to the COVID-19 pandemic event.

These amendments are intended to ensure that Government policy with respect to the refunding and waiver of charges imposed on registered training organisations and registered providers can be implemented. In combination with other financial assistance measures announced by Government relating to the COVID-19 pandemic event, these measures help ensure the ongoing sustainability and viability of the vocational education and training sector, and help reduce the financial burden for that sector.

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<sup>4</sup> Note that ASQA is the National Vocational Education and Training Regulator under the *National Vocational Education and Training Regulator Act 2011* (see regulation 15 of the *National Vocational Education and Training Regulator Regulations 2011*).

## **Matters under the Amendment Determination that do not ordinarily require a Statement of Compatibility with Human Rights**

With respect to **items 2, 4 and 5** of the Amendment Determination (see summary in paragraphs b. and c. above), the amendments made by these items are not subject to disallowance in accordance with the operation of subsections 44(1) of the Legislation Act.

Accordingly and pursuant to subsection 15J(2) of the *Legislation Act 2003* (Legislation Act), as these aspects of the Amendment Determination are not disallowable, a statement of compatibility prepared under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* is not required.

However, on 15 April 2020 the Parliamentary Joint Committee on Human Rights wrote to the Secretary of the Department of Education, Skills and Employment stating that, given the potential impact on human rights of legislative instruments dealing with the COVID-19 response, the Committee would appreciate if all such instruments were accompanied by a statement of compatibility. Therefore, pursuant to that request, this statement of compatibility relates to the measures in the whole Amendment Determination, not simply that part of the Amendment Determination which is disallowable.

### **Analysis of human rights implications**

#### *Right to education*

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

Article 13 recognises that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.

In addition, paragraph 13(2)(b) recognises 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.

#### *Right to work*

The Amendment Determination engages the right to work contained in Article 6 of the *International Covenant on Economic, Social and Cultural Rights*.

Article 6 recognises that in order to fully achieve the realisation of the right to work, there should be available technical and vocational guidance and training programmes, policies and techniques.

The objective of the Amendment Determination is to ensure that for applicable registered training organisations and registered providers, the annual registration charge, compliance audit charge, and complaint investigation charge are set at zero where those charges become payable between 1 January and 30 June 2020. The Amendment Determination also ensures that the existing discretionary capacity of ASQA to waive annual registration, compliance audit, and



complaint investigation charges in special or unusual circumstances extends to the COVID-19 pandemic event.

Therefore, the Amendment Determination ensures that for those organisations and providers that have already paid the relevant charges during that period, the amount is able to be fully refunded, and otherwise no charge becomes payable. In conjunction with the clarification that ASQA's existing discretion to waive charges extends to the COVID-19 pandemic event, this will help ensure the ongoing sustainability and viability of the vocational education and training sector, and help reduce the financial burden for that sector during COVID-19.

This objective is aimed at supporting the vocational education and training sector, and therefore promotes both the right to education and the right to work.

### **Conclusion**

This instrument 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*.