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**THE PARLIAMENT OF THE COMMONWEALTH OF  
AUSTRALIA**

**HOUSE OF REPRESENTATIVES**

**NATIONAL VOCATIONAL EDUCATION AND TRAINING  
REGULATOR AMENDMENT (ANNUAL REGISTRATION  
CHARGE) BILL 2017**

**EXPLANATORY MEMORANDUM**

**(Circulated by authority of the Assistant Minister for Vocational  
Education and Skills, the Honourable Karen Andrews MP)**

# NATIONAL VOCATIONAL EDUCATION AND TRAINING REGULATOR AMENDMENT (ANNUAL REGISTRATION CHARGE) BILL 2017

## OUTLINE

The purpose of the National Vocation Educational and Training Regulator Amendment (Annual Registration Charge) Bill 2017 (Bill) is to ensure that annual registration fees collected by the National VET Regulator (NVR) (the Australian Skills Quality Authority (ASQA)), from NVR registered training organisations (RTOs) and certain providers registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS providers), are underpinned by appropriate legislative authority and are constitutionally supported. Consistent with the evolving regulatory functions of ASQA, these measures will align the way in which ASQA's cost recovery charging framework is applied to its broad ranging and emergent regulatory and compliance monitoring activities in a manner that complies with the Australian Government Charging Framework (the Charging Framework), which incorporates the Cost Recovery Guidelines. More broadly, the measures are being progressed as part of a range of other changes to streamline ASQA's fees and charges and align them with the Charging Framework.

The Bill will amend the *National Vocational Education and Training Regulator Act 2011* (NVETR Act) to clarify that while ASQA may charge fees, as determined by the Minister, for goods and services it provides, certain registered providers are also liable to pay the 'National VET Regulator annual registration charge' for each financial year of registration. The National VET Regulator annual registration charge replaces current annual registration fees collected from RTOs and certain CRICOS providers. To the extent the National VET Regulator annual registration charge is in the nature of a tax, the companion National Vocational Education and Training Regulator (Charges) Amendment (Annual Registration Charge) Bill 2017 (Companion Bill) will amend the *National Vocational Education and Training Regulator (Charges) Act 2012* (NVETR Charges Act) to ensure the National VET Regulator annual registration charge is imposed under an Act which deals with a subject of taxation. This will ensure that the National VET Regulator annual registration charges are collected and administered in a manner consistent with section 55 of the Australian Constitution.

Since its establishment in 2011, ASQA has developed and shifted its regulatory approach to include activities, such as intelligence collection and data analysis, to inform targeted monitoring, compliance and enforcement activities. These activities have become core elements of ASQA's risk-based regulatory approach, protecting and enhancing quality in the vocational education and training (VET) sector. ASQA's ability to operate as a high performing regulator is based on it being sufficiently resourced to undertake these broad ranging compliance monitoring activities.

For consistency with the Charging Framework, ASQA has reviewed its fees and charges regime to ensure it collects payments for activities related to its regulatory functions in the form of cost recovery charges, and to ensure it charges for activities related to performing a service in the form of fees-for-service. To the extent that

such activities for which current annual registration fee amounts that are collected under the NVETR Act have broadened, there is a risk that these annual registration fees may now be characterised as a tax and need to be collected under separate tax legislation. To mitigate any constitutional risk that annual registration fees currently collected may be regarded as in the nature of a tax, the Bill will amend the NVETR Act to clarify that certain registered providers are liable to pay a National VET Regulator annual registration charge, and the Companion Bill will amend the NVETR Charges Act to ensure the National VET Regulator annual registration charge is imposed under an Act dealing with the subject of taxation.

The Bill is largely mechanical and enabling in character in that it effectively transfers current annual registration fees set out in an instrument under the NVETR Act into the NVETR Charges Act and re-characterises them as a charge. The NVETR Charges Act has been identified as an appropriate tax act under which charges of this nature may be validly collected. The Companion Bill does not set the amount of the charges. Consistent with the current fee arrangements under the NVETR Act, the amount and calculation of the charges will be determined by the Minister, agreed by the Ministerial Council and set out in a legislative instrument.

The Bill also makes a number of consequential amendments to the NVETR Act to clarify that annual registration charges are recoverable as debts to the Commonwealth and ensure the fees and charges regime imposed under the NVETR Act reflects ASQA's charging processes.

## **FINANCIAL IMPACT STATEMENT**

The Bill has no financial impact on the Commonwealth or registered providers.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

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This Bill 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 Bill**

This Bill will amend the *National Vocational Education and Training Regulator Act 2011* (NVETR Act) to ensure the National VET Regulator's (the Australian Skills Quality Authority (ASQA)) fees and charges are underpinned by appropriate legislative authority and are constitutionally supported. It achieves this by repealing and replacing existing annual registration fees presently determined in an instrument made under the NVETR Act with National VET Regulator (NVR) annual registration charges (analogous in nature and form) to be included in, and separately imposed under, the *National Vocational Education and Training Regulator Charges Act 2012* (NVETR Charges Act). These measures mitigate any legal risk that, due to the evolving nature of ASQA's compliance monitoring and cost recovery activities, the current annual registration fees could potentially be construed as being in the nature of taxation and thereby unable to be validly collected by ASQA as currently provided for under the NVETR Act. Repealing and replacing the annual registration fees under the NVETR Act, with a National VET Regulator annual registration charge under the NVETR Charges Act, is necessary as section 55 of the Australian Constitution requires that laws imposing taxation deal with one subject of taxation only. Given the more confined subject matter of the NVETR Charges Act, it is an appropriate legislative vehicle for collecting fees and charges of this nature.

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

##### Right to education

The Bill engages the right to education contained in Article 13 of the *International Convention on Economic, Social and Cultural Rights* (ICESCR) by ensuring that fee and charge collection mechanisms applied by ASQA are fully supported at law and are consistent with the Australian Constitution. The measures promote the right to education by, in turn, protecting the integrity of the vocational education and training (VET) sector through mitigation of the legal risk of any challenge to the constitutional basis for the imposition of annual registration fees on certain registered providers. This has been achieved by replacing the current annual registration fees with annual registration charges imposed under the NVETR Charges Act, and validating annual registration fees already collected from certain

registered providers. Strengthening the legal basis for the regulatory activities of ASQA in this respect reinforces the broader quality assurance, transparency and accountability objectives underpinning VET sector operations as a whole.

The measures are integral to ASQA's continuing operational integrity and accountability as the National VET Regulator because they serve to ensure that annual registration fees previously collected from certain registered providers are validated, and those fees and charges which will be prospectively collected, are legally and constitutionally supported. In this way, the measures protect the rights of registered providers by ensuring the registration process is rigorous, adaptive to the changing regulatory ambit of ASQA and consistent without altering the nature or form of their registration obligations.

The Bill is enabling and largely mechanical in character and does not impose limitations on the rights of, or affect the status quo arrangements which apply to, registered providers or VET sector participants more broadly. The Bill will not impose any financial impact on NVR registered training organisations or certain providers registered on the Commonwealth Register of Institutions and Courses for Overseas Students, nor will the measures expand or alter ASQA's regulatory powers. Rather, the measures ensure that ASQA's functions are underpinned by proper legislative authority and have the necessary constitutional support to enable ASQA to continue to recover the costs of critical compliance monitoring and intelligence analysis work it needs to undertake to protect and enhance quality in VET.

Notably, the measures do not affect the composition of the fees collected (except by way of a technical conversion of annual registration fees to a charge and transferring it to a separate piece of legislation) nor change the amount of the fees or impose any financial impacts. Replacing existing annual registration fees with National VET regulator annual registration charges is intended only to ensure compliance with the Australian Government Charging Framework and also address the constitutional risk that existing annual registration fees may have the characteristics of taxes. The measures contained in the Bill do not impact on ASQA's regulatory activities or operational remit, nor change the annual registration fee amounts that will be collected from NVR registered training organisations and other registered providers.

By extension, the measures in the Bill have a positive effect on the provision of education services to students by registered providers. Articles 13(3) and (4) of ICESCR state that State Parties are obliged to establish "minimum educational standards" to which all education institutions established are required to conform. They must also maintain a transparent and effective system to monitor such standards. This Bill promotes these rights through the various measures designed to mitigate legal and operational risk and which will, by implication, improve the regulation of the VET sector, enhance institutional quality and ensure that compliance monitoring and cost recovery processes are underpinned by appropriate statutory authority.

The Bill protects the rights and interests of registered providers by ensuring the charging framework applied to them has legal and constitutional efficacy and supports ASQA's operational capabilities by enabling it to recover costs associated with its regulatory and compliance monitoring activities in a manner consistent with

the Australian Government Charging Framework.

## **Conclusion**

The Bill is compatible with human rights as the measures contained in the Bill promote the right to education by ensuring that there is proper constitutional authority for ASQA's fee and charges imposition regime. These measures collectively promote transparency and accountability in the administration of the VET sector and support the continuing operational integrity of the National VET Regulator.

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## NOTES ON CLAUSES

### Clause 1 - Short title

Clause 1 provides for the Bill, when it is enacted, to be cited as the *National Vocational Education and Training Regulator Amendment (Annual Registration Charge) Act 2017*.

### Clause 2 - Commencement

Subclause 2(1) inserts a three column table setting out commencement information for various provisions in the Bill. Each provision of the Bill specified in column 1 of the table commences (or is taken to have commenced) in accordance with column 2 of the table and any other statement in column 2 has effect according to its terms.

The table has the effect of providing for the following commencement times:

Matters to commence on the day the Act receives the Royal Assent:

- sections 1 to 3 and anything else in the Act not otherwise covered by the table.

Matters to commence on 1 July 2017:

- Schedule 1.

### Clause 3 - Schedules

Clause 3 provides that any legislation that is specified in a schedule is amended or repealed as set out in the applicable items in the schedule and that any other item in a schedule has effect according to its terms.

### List of abbreviations

ASQA	Australian Skills Quality Authority
ESOS Act	<i>Education Services for Overseas Students Act 2000</i>
NVETR Act	<i>National Vocational Education and Training Regulator Act 2011</i>
NVETR Charges Act	<i>National Vocational Education and Training Regulator (Charges) Act 2012</i>
NVETR Transitional Provisions Act	<i>National Vocational Education and Training Regulator (Transitional Provisions) Act 2011</i>



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# **Schedule 1** *Amendments*

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## **Summary**

The Bill is largely mechanical and enabling in character in that it effectively transfers current annual registration fees collected by the National VET Regulator (ASQA) under the NVETR Act into the NVETR Charges Act and re-characterises them as a charge (the 'National VET Regulator annual registration charge'). The Bill also makes a number of consequential amendments to the NVETR Act to secure the validity of annual registration fees collected by ASQA before 1 July 2017, clarify that the National VET Regulator annual registration charge is recoverable as debts to the Commonwealth and ensure the fees and charges regime imposed under the NVETR Act reflects ASQA's charging processes.

## **Background**

ASQA commenced from 1 July 2011 with responsibility for registration and compliance monitoring of registered training organisations and the accreditation of courses. Since its establishment, ASQA has shifted its regulatory focus to a risk-based approach designed to improve the quality and integrity of the vocational education and training (VET) sector. As ASQA's regulatory focus has shifted, a review of its fees and charges regime has identified that there is a risk that certain annual registration fees may now be characterised as a tax and need to be collected under separate tax legislation.

## **Detailed explanation**

### ***National Vocational Education and Training Regulator Act 2011***

#### **Item 1 – Subparagraph 18(c)(iv)**

Subparagraph 18(c)(iv) of the NVETR Act requires the National VET Regulator, within 30 days of deciding an application for registration as an NVR registered training organisation, to notify the applicant in writing about the registration fee payable (including information about payment of the registration fee by instalments).

This item repeals subparagraph 18(c)(iv) and substitutes new subparagraphs 18(c)(iv) and (v). These new subparagraphs require the National VET Regulator, within 30 days of deciding an application for registration as an NVR registered training organisation, to notify the applicant in writing about the amount of the National VET Regulator annual registration charge payable by the applicant in relation to registration under new section 232A of the NVETR Act (see item 3) for the current financial year (or remainder of the current financial year); including, if applicable, information about payment of the charge amount by instalments.

The purpose of the amendment is to ensure paragraph 18(c) reflects ASQA's charging regime applied to NVR registered training organisations over the period of registration; which consists of annual charges being payable for each financial year

of registration. The amendment also clarifies that the notice provided under section 18 of the NVETR Act does not specify the annual National VET Regulator registration charge payable by an applicant for the registration period, rather it specifies the National VET Regulator annual registration charge payable for the financial year (or remainder of) in which the application for registration is granted. The National VET Regulator annual charge is payable for subsequent financial years occurring during the registration period as set out in new section 232A (see item 3).

### **Item 2 – Subsection 39(1)**

Subsection 39(1) of the NVETR Act provides that the National VET Regulator may, by written notice, cancel an NVR registered training organisation's registration as the National VET Regulator considers appropriate, including for failure to pay 'a registration fee'.

This item makes a consequential amendment to omit the reference to 'a registration fee' and substitute the description 'a National VET Regulator annual registration charge by the date on which it is payable (see section 232A).' This is consistent with the characterisation of the annual registration fee as an annual charge to be imposed under the NVETR Charges Act.

### **Item 3 – After section 232**

This item adds new sections 232A and 232B after section 232 of the NVETR Act.

Subsection 232A(1) provides that section 232A applies to a 'person' in either of the following circumstances:

- the person is registered, or continues to be registered, during a financial year as an NVR registered training organisation that is registered under the NVETR Act; or
- the person is registered, or continues to be registered, during a financial year as a registered provider that is registered under the ESOS Act and the National VET Regulator is the 'ESOS agency' for the registered provider for the purposes of that Act.

An 'ESOS agency' has a range of functions and powers to regulate higher education and vocational education and training providers under the ESOS Act.

Subsection 232A(2) provides that a person (to whom section 232A applies) is liable to pay the annual National VET Regulator registration charge imposed by Part 1A of the NVETR Charges Act for each financial year in which the person is registered as mentioned in subparagraphs 232A(1)(a) or (b) or both.

Item 2 in the companion National Vocational Education and Training Regulator (Charges) Amendment (Annual Registration Charge) Bill 2017 amends the NVETR Charges Act to insert a new Part 1A into that Act consisting of new sections 6A, 6B and 6C. For the purposes of new section 232A of the NVETR Act, subsection 6A(1) of the NVETR Charges Act will enable the Minister, by legislative instrument, to determine an annual National VET Regulator registration charge (or charges) payable by persons to whom section 20A of the NVETR Act applies.

The notes accompanying subsection 232A(2) explain that the ministerial determinations under Part 1A of the NVETR Charges Act may provide for the amount of registration charge to vary depending on the circumstances and that the person is liable to pay the charge for both of the types of registration mentioned in subsection 232A(1) (and these amounts may be different for each of the types of registration).

The purpose of subsections 232A(1) and (2) is to create a liability for a person to pay the National VET Regulator annual registration charge if the person is registered as described in subparagraphs 232A(1)(a) or (b) or both.

Subsection 232A(3) provides for the timing of payments of the annual National VET Regulator registration charge as follows:

- it is due and payable on the date notified to the person by the National VET Regulator (this date must be at least 30 days after the date of notification)
- if it is payable by instalments, it is due and payable on the dates notified to the person by the National VET Regulator (and the date of payment of the first instalment must be at least 30 days after the date of the first notification).

The charge is stated to be 'due and payable' for consistency with standard provisions creating debt liability in order to support debt recovery actions.

The purpose of subsection 232A(3) is to specify when payment of the annual National VET Regulator registration charge is due and payable.

Subsection 232A(4) provides that if a person's registration (see subsection 20A(1) of the NVETR Act) ends during the course of a financial year, a proportion of the registration charge payable for that year needs to be refunded to the person. This is to be calculated by dividing the number of whole months remaining in the financial year after the registration ceases by 12. The resultant sum is the proportion repayable.

The purpose of subsection 232A(4) is to specify how a proportion of an annual National VET Regulator registration charge paid by a person is to be refunded.

Subsection 232A(5) provides that section 232A also applies to a charge that has been imposed on a person under section 6C of the NVETR Charges Act. The purpose of this amendment is to ensure the deemed validation charge under section 6C of the NVETR Charges Act is treated in the same way as a National VET Regulator annual registration charge.

Subsection 232B provides that a charge imposed by the NVETR Charges Act is recoverable as a debt due to the Commonwealth in courts enumerated in subparagraphs (a) to (c). The purpose of this amendment is to confer a power on the Commonwealth to undertake debt recovery proceedings in relation to a National VET Regulator annual registration charge (or an unpaid deemed validation charge under section 6C of the NVETR Charges Act).

## ***National Vocational Education and Training Regulator (Transitional Provisions) Act 2011***

### **Item 4 – At the end of the Act**

The NVETR Transitional Provisions Act deals with transitional matters arising from the enactment of the NVETR Act.

This item adds a new Schedule 3 to the NVETR Transitional Provisions Act titled '*Transitional provision relating to the National Vocational Education and Training Regulator Amendment (Annual Registration Charge) Act 2017.*'

Item 1 of new Schedule 3 is titled 'Cancellation of registration – saving.'

Subitem 1(1) provides that the item applies to the amendment of subsection 39(1) of the NVETR Act as made by Schedule 1 to the Amending Act (i.e. this Bill once enacted).

Subitem 1(2) provides that, notwithstanding that amendment:

- subsection 39(1) of the NVETR Act as in force immediately before the commencement of the amendments to subsection 39(1) to be made by this Bill – continues to apply in relation to any failure by a person to pay an annual registration fee
- to the extent that the annual registration fee could not be validly determined under an ASQA determination – subsection 39(1) as then in force is taken to have applied and to continue to apply in relation to the failure to pay the fee (or part thereof).

These provisions are included to deal with the possibility that annual registration fees have been invalidly determined and collected. Subparagraph 1(2)(b) secures the validity of any cancellations of registration by ASQA of any person before commencement of this Bill for failure to pay an annual registration fee.

A note explains that the commencement date of Schedule 1 to the Amending Act is 1 July 2017.

Subitem 1(3) provides that an ***annual registration fee*** is a fee in relation to a financial year payable by a person for the purposes of the NVETR Act for registration:

- as a NVR registered training organisation under the NVETR Act; or
- as a registered provider that is registered under the ESOS Act.

Subitem 1(4) provides that an ***ASQA determination*** is one made under subsection 232(1) of the NVETR Act as in force before the commencement of this item. A note makes reference to the Australian Skills Quality Authority instrument fixing fees No. 1 of 2011 (F2011L01398) and the Australian Skills Quality Authority instrument fixing fees No. 1 of 2013 (F2013L01469) being the relevant ASQA determinations for the purposes of subitem 1(4).

The purpose of these consequential amendments is to preserve, after 1 July 2017, the validity of any action to cancel an NVR training organisations registration in relation to failure to pay a registration fee before 1 July 2017.