National Vocational Education and Training Regulator (Charges) Bill 2012

Carol Ey
Social Policy Section

Contents

Purpose ............................................................................................................................................. 2
Background ......................................................................................................................................... 2
Key issues and Provisions ................................................................................................................... 3
  Operation of the main Act and this Bill in relation to charges ....................................................... 3
  Ministerial Council’s agreement to the amount of a fee under the main Act ............................... 4
  The meaning of costs and expenses ............................................................................................... 5
  Where a complaint is partially substantiated ................................................................................. 5
Delegated legislation .......................................................................................................................... 6
  Delayed commencement ................................................................................................................. 6
  Potential Impact of Additional Costs – Position of major interest groups ................................. 7
Committee consideration .................................................................................................................. 7
  Senate Economics Legislation Committee ...................................................................................... 7
  Scrutiny of Bills Committee ........................................................................................................... 8
Financial implications ....................................................................................................................... 8
Concluding comments ...................................................................................................................... 8
National Vocational Education and Training Regulator (Charges) Bill 2012

Date introduced: 22 March 2012
House: House of Representatives
Portfolio: Tertiary Education, Skills, Science and Research

Commencement: Sections 1 and 2 will commence on the day the Act receives Royal Assent. Sections 3 to 14 will commence on 1 January 2013.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The Bill will enable the National Vocational Education and Training (VET) Regulator, the Australian Skills Quality Authority (ASQA), to charge registered training organisations (RTOs) for compliance audits and for the investigation of complaints which are substantiated.

In particular, these charges include the costs and expenses of conducting the audit or investigation, and any reasonable expenses incurred for any part of the audit or investigation conducted overseas.

Background

On 7 December 2009, COAG agreed to establish a national regulator for the VET sector to ensure consistent standards and improved regulation of training providers across jurisdictions.1 As a result legislation to establish a National VET Regulator was introduced into Parliament and passed by both houses in March 2011.2 ASQA was established on 1 July 2011 and has responsibility for the registration and audit of RTOs and the accreditation of courses.


Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
All states have passed or are in the process of passing referring legislation, except Victoria and Western Australia, which have elected to retain responsibility for regulating RTOs in their jurisdictions. However any providers that operate in other states or are registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) must be registered with ASQA.

Part of the COAG agreement was that the new regulator would operate on a cost recovery basis, with phased implementation of the various fees and charges. The proposed cost recovery arrangements for ASQA were subject to extensive consultation in 2011, with the Cost Recovery Impact Statement (CRIS), including the proposed structure of fees and charges, available on the AQSA website from April 2011. The cost recovery arrangements proposed are consistent with the Australian Government Cost Recovery Guidelines.

**Key issues and Provisions**

This Bill raises a number of issues which are outlined below. As some of these issues have also been raised in Committee reports and in stakeholder submissions they are also referred to under these subsequent headings.

**Operation of the main Act and this Bill in relation to charges**

Section 232 of the main Act establishing the National VET Regulator, the National Vocational Education and Training Regulator Act 2011 (the main Act), provides for the Minister to determine the fees that the Regulator (ASQA) can charge RTOs for goods and services it provides in performing its functions. However, the provision specifically excludes a review or examination of any systemic issues relating to the quality of vocational education and training, being a service mentioned in subsection 35(2) of the main Act.

The Explanatory Memorandum to the main Act does not explain why subsection 35(2) was expressly excluded under section 232(1) of the main Act.

Section 35(1) of the main Act allows the National VET Regulator to conduct a compliance audit of an NVR registered training organisation’s operations to assess whether the organisation continues to

---


**Warning:** All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
comply with the VET Quality Framework. One of the functions of the Regulator under paragraph 157(1)(a) of the main Act is to carry out compliance audits of NVR registered training organisations. Section 232 appears to allow for the determination of a fee for a compliance audit.

The Explanatory Memorandum to this Bill states that:

Application based fees are authorised by the main Act. Some fees applied from 1 July 2011, while others will progressively apply in line with the Regulator’s implementation path to full cost recovery by 2014-15. The purpose of this Bill is to authorise charges for services that are not application-based (additional monitoring activities).  

Both the main Act and this Bill refer to the conduct of compliance audits. While, as noted above, the payment of a fee for the conduct of an audit is provided for under section 232 of the main Act, the imposition of the charge to cover costs and expenses associated with the conduct of the compliance audit is addressed under this Bill.

As this Bill seeks to impose a charge for the conduct of a compliance audit or investigation of a complaint it arguably falls within the class of a taxation Bill. As such, it could be governed by section 55 of the Australian Constitution which provides that laws imposing taxation shall only deal with the imposition of taxation.  

The [High] Court held that section 55 of the Constitution required that both an amending Act imposing taxation and the amended principal Act deal only with the imposition of taxation and that it was not within the competence of Parliament to purport to insert by an amending Act a provision imposing taxation in an existing valid Act which contained provisions dealing with other matters.

This Constitutional restriction appears to have necessitated the introduction of the current legislation as a stand-alone Bill. However, this point is not canvassed in the explanatory material. It is also noted that a taxation Bill cannot originate in, or be amended by, the Senate.

Ministerial Council’s agreement to the amount of a fee under the main Act

The provisions relating to the determination of fees in the main Act require the Minister to obtain the Ministerial Council for Tertiary Education and Employment’s agreement to the amount of fees in

---


Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
relation to: registration of a provider; accreditation of a course; and for goods and services provided to an RTO. Although the joint Department of Industry, Innovation, Science, Research and Tertiary Education (DIISRTE)/ASQA submission to the Senate Economics Legislation Committee inquiry into the Bill states that any changes to fees and charges in the Bill need to be approved by the Ministerial Council, the requirement to obtain Ministerial Council agreement has not been included in the provisions of the Bill and subsection 232(2) of the main Act does not include compliance audits. Accordingly, it would appear that there is no legislative requirement to obtain Ministerial Council agreement to the amount of the charges.

The meaning of costs and expenses

There is also lack of clarity about what is included in ‘the costs and expenses incurred by the Regulator’ in subclauses 7(a) and 10(a) of the Bill, and in particular how this differs from the ‘reasonable expenses incurred by the Regulator’ specified in subclauses 7(b) and 10(b) for audits and investigations conducted outside Australia.

The draft schedule of fees and charges in the CRIS specifies a charge of $150 per hour up to a maximum of $5000 for audits and $3000 for investigation of substantiated complaints, with ‘Govt approved travel costs’ also included for off-shore monitoring. This would suggest that travel costs would not be charged for audits and investigations within Australia, but will be charged for overseas audits. However, this is not clear from the proposed legislation.

Where a complaint is partially substantiated

Clause 10 of the Bill states that if the National VET Regulator investigates a complaint and finds the complaint substantiated, the RTO will be required to pay for the costs and expenses of the investigation. It is presumed that where the complaint is not substantiated ASQA (the Regulator) will meet the costs of the investigation. However, it is unclear whether a charge would be payable by the RTO if the complaint is partially substantiated. This situation may be addressed by the operation of clause 13 of the Bill, which allows the Minister to determine the circumstances in which a charge may be waived either in whole or in part by way of legislative instrument.

---


**Warning:** All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Delegated legislation

Clause 9 of Part 2 and Clause 12 of Part 3 of the Bill require the Minister to make a legislative instrument determining the amount of the charges payable under clause 7 and clause 10 of the Bill, respectively. It is noteworthy that any legislative instrument made by the Minister to determine fees under section 232 of the main Act is not disallowable or subject to sunsetting under the Legislative Instruments Act 2003.14 The same does not apply to any legislative instrument made by the Minister to determine the amount of the charges payable under this Bill.15

The Senate Scrutiny of Bills Committee commented on the delegation of legislative power as follows:

The charges are premised on a cost recovery basis. The explanatory memorandum states that the charges payable under Part 2 have been subject to extensive consultation and the details of the charges payable and the consultation process have been made publicly available in a ‘Cost Recovery Impact Statement’.

The same issue arises in relation the charge payable under Part 3.

In light of the stated cost recovery approach, the use of a formula, and the detailed consultation the Committee makes no further comment on this delegation of legislative power.16

Delayed commencement

The Senate Scrutiny of Bills Committee also commented on the delayed commencement of the substantive provisions of the Bill, being 1 January 2013.17

Where there is a delay in commencement of legislation longer than six months (or a possible delay, depending on when passage of the bills occurs) it is appropriate for the explanatory memorandum to outline the reasons for the delay in accordance with paragraph 19 of Drafting Direction No 1.3. While the Committee is aware that there are circumstances in which the proposed approach may be appropriate, it expects that the justification will be addressed in the explanatory memorandum. In this instance the explanatory memorandum does not appear to outline the justification for the proposed commencement of the bill. The Committee therefore

15. A legislative instrument can be subject to disallowance if either a Senator or Member of the House of Representatives moves a motion of disallowance within 15 sitting days of the day that the legislative instrument is tabled. The motion to disallow must be resolved or withdrawn within a further 15 sitting days of the day that the notice of motion is given. However, it should be noted that if there is no notice of motion to disallow a legislative instrument, then there is no debate about its contents. Source: ‘Chapter 10: Legislation’, House of Representatives Practice, op. cit., p. 400.
17. Clause 2 of the Bill.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
seeks the Minister's advice as to the rationale for the proposed commencement of the bill, and any possible delay in commencement.

Pending the Minister's reply, the Committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference. 18

Potential Impact of Additional Costs – Position of major interest groups

The major concern raised by RTOs and industry groups about this Bill is the potential impact of additional costs on the viability of smaller RTOs and on the international education sector. 19

The full cost recovery model being adopted by ASQA has resulted in higher fees than many providers experienced previously, as most states and territories subsidised the costs of their regulatory agencies. 20 While increased application and registration fees can be built into course costs, and states and territories can subsidise RTOs directly if they wish, the lack of clarity about who might be subject to compliance audits and what these audits will cost has introduced a degree of uncertainty, and in particular is likely to have a larger impact on small providers. The inclusion of travel costs will also have a major impact on providers operating overseas and potentially on providers in regional and remote locations. For the international education sector this comes at a time of reducing demand from overseas students, largely in response to a high Australian dollar.

Committee consideration

Senate Economics Legislation Committee

The Bill was referred to the Senate Economics Legislation Committee for inquiry. The committee reported on 10 May 2012. 21

Twelve submissions were received by the committee, including a joint submission from DIISRTE and ASQA, which provides additional detail on the background to the Bill and the design of the charges. 22

---

18. Senate Scrutiny of Bills Committee, op. cit., p. 20. No response from the Minister is available as at the date of publication of this Bills Digest.
20. DIISRTE and ASQA, op. cit., p. 16.
22. DIISRTE and ASQA, op. cit.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Other submissions were from training and education providers and industry groups. These stakeholders raised concerns regarding the discretionary powers of the Minister to set charges, the cost of registration and the ambiguity of the details relating to the charges.

The Committee considered that there had been adequate consultation and explanation regarding the proposed fees and charges, and that RTOs had been given a reasonable time to adapt to the new pricing structure. However it did suggest that ASQA ‘remain cognisant of the financial circumstances of RTOs’ and ensure that costs are maintained at a reasonable level, particularly where travel is required.23 The Committee recommended that the Bill be passed in its current form, but there was a dissenting report by the Coalition Senators, which noted ‘grave concerns about the increased economic and regulatory burden this Bill will place on providers’.24

Scrubtny of Bills Committee

The Senate Scrutiny of Bills Committee commented on the Bill in Alert Digest No. 5 of 2012, as noted above under discussion of key issues and provisions.25 Although the Scrutiny of Bills Committee raised both the issue of delegation of legislative powers and the delayed commencement of the substantive provisions of the Bill, in the circumstances it made no further comment.

Financial implications

ASQA is financed by appropriations of $94.9m between 2011 and 2015 and funded on a progressively cost neutral basis.

Charges for additional monitoring activities as provided for in the Bill are part of ASQA’s cost recovery arrangements. It is estimated that these charges will amount to $2.1 million in 2012–13, rising to an ongoing level of $5.4 million in 2013–14.26

Concluding comments

Charges for the conduct of compliance audits and complaint investigations are being imposed through this Bill, which will create a stand-alone Act, rather than amend the main Act. This Bill appears to be financial legislation, which is not subject to amendment by the Senate. The detail of the charges that this Bill authorises will be contained in a separate legislative instrument. It is expected that this instrument will resolve areas of uncertainty in the Bill concerning what RTOs may be charged for, however the lack of clarity in the Bill is of concern. While the sponsoring department has stated that these charges will be subject to approval by the Ministerial Council, this does not appear to be required by the proposed legislation.


Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.