National Vocational Education and Training Regulator Amendment (Annual Registration Charge) Bill 2017 [and] National Vocational Education and Training Regulator (Charges) Amendment (Annual Registration Charge) Bill 2017

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House: House of Representatives
Portfolio: Education and Training
Commencement: 1 July 2017

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page for the National Vocational Education and Training Regulator Amendment (Annual Registration Charge) Bill 2017 and for the National Vocational Education and Training Regulator (Charges) Amendment (Annual Registration Charge) Bill 2017, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at May 2017.
Purpose of the Bills

The purpose of the National Vocational Education and Training Regulator Amendment (Annual Registration Charge) Bill 2017 (the main Bill) is to amend the National Vocational Education and Training Regulator Act 2011 (the Act) and the National Vocational Education and Training Regulator (Transitional Provisions) Act 2011 to ensure that the annual registration charges collected by the National Vocational Education and Training (VET) Regulator are underpinned by appropriate legislative authority.

The National Vocational Education and Training Regulator (Charges) Amendment (Annual Registration Charge) Bill 2017 (the Charge Bill) contains consequential amendments to the National Vocational Education and Training Regulator (Charges) Act 2012 (the Charges Act).

Background

The National VET Regulator, the Australian Skills Quality Authority (ASQA), was established in 2011. It is responsible for the regulation of:

- vocational education and training providers
- accredited vocational education and training courses and
- the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) providers including those delivering English Language Intensive Courses to Overseas Students (ELICOS).

ASQA was established on the basis of moving to a full cost recovery operation and it therefore charges fees for its services. The Act currently allows the Minister, by legislative instrument, to determine the quantum of the fees that ASQA may charge for goods or services it provides in performing its functions (section 232). These fees include a fee on applying to become a registered training organisation (RTO) (section 16), a registration assessment fee (section 17) and a registration fee (section 18). As the Act is founded on a referral of power by the states to the Commonwealth (section 5), the Minister is required to obtain the approval of the Council of Australian Governments (COAG) Industry and Skills Council (subsection 232(2)) before making a determination. The Council is comprised of Commonwealth, state and territory ministers with responsibility for the vocational education and training (VET) sector.

The Explanatory Memorandum to the main Bill states that ASQA has recently reviewed its cost recovery arrangements to ensure consistency with the Australian Government Charging Framework (AGCF). The AGCF distinguishes between two broad types of cost recovery arrangement—cost recovery fees and cost recovery levies. Cost recovery fees are a charge for a good or service provided to a specific individual or organisation (for example, a fee that is payable when an organisation or individual applies for registration). In contrast, cost recovery levies:

... are a charge imposed when a good, service or regulation is provided to a group of individuals or organisations rather than to a specific individual or organisation. A cost recovery levy is a tax and is imposed via a separate taxation Act. It differs from general taxation as it is ‘earmarked’ to fund activities provided to the group that pays the levy.

As set out in the Explanatory Memorandum to the main Bill, since its establishment in 2011, ASQA ‘has shifted its regulatory approach to include activities, such as intelligence collection and data analysis, to inform targeted

3. ASQA, ‘Fees and charges’, ASQA website.
4. The relevant legislative instruments are Australian Skills Quality Authority instrument fixing fees No. 1 of 2011 and the Australian Skills Quality Authority Instrument Fixing Fees No. 1 of 2013.
8. Ibid., p. 12.
9. Ibid., p. 12.
monitored, compliance and enforcement activities’. These broader functions are not easily tied to the provision by ASQA of a good or service to a specific individual or organisation. Instead, they provide a benefit to the VET sector as a whole. As a result, questions have arisen as to the appropriateness of using cost recovery fees to fund these broader activities and a risk identified that ‘annual registration fees may now be characterised as a tax and need to be collected under separate tax legislation’. To address this risk, the main Bill changes one of the fees currently imposed by the Act—the registration fee referred to in section 18—into an ‘annual registration charge’. To comply with section 55 of the Constitution, which requires that any law dealing with taxation cannot include other matters and must deal with one subject of taxation only, the charge is imposed as a tax by the Charge Bill, through amendments to the Charges Act.

Committee consideration
At the time of writing the Bills had not been referred to any Committees for further consideration.

Policy position of non-government parties/independents
The measures in these Bills are essentially technical and have not attracted any comment from the non-government parties or the independents. Neither do there appear to be any comments from stakeholders.

Financial implications
There are no financial implications from these Bills.

Statement of Compatibility with Human Rights
As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bills’ compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bills are compatible. At the time of writing, the Parliamentary Joint Committee on Human Rights had not reported on the Bills.

Key issues and provisions
National Vocational Education and Training Regulator Amendment (Annual Registration Charge) Bill 2017
As explained above, the Act allows ASQA to charge fees for the provision of specified goods and services. The quantum of these fees is set by the Minister in a legislative instrument made under section 232 of the Act, after gaining the approval of the relevant COAG Ministerial Council. One of the fees specified in the Act is the registration fee under section 18, which is payable when ASQA decides to register an organisation as an RTO.

Item 1 of Schedule 1 of the main Bill amends section 18 of the Act so that rather than referring to ‘a registration fee’ it will refer to ‘a National VET Regulator annual registration charge’ payable under proposed section 232A for each financial year of registration.

Item 3 inserts new sections 232A and 232B. Proposed subsection 232A(1) describes who is liable to pay the annual registration charge. It provides that the charge is payable by RTOs and certain providers of education services to overseas students, registered under the Education Services for Overseas Students Act 2000. Proposed subsection 232A(2) specifies that the charge is imposed by Part 1A of the Charges Act, to be inserted by item 2 of the Charges Bill (see below). As is the case with the current registration fee, the annual registration charge may be payable by instalments (proposed subsection 232A(3)). The charge is payable on a pro-rata basis if an organisation is not registered for the entire financial year (proposed subsection 232A(4)).

15. The Statements of Compatibility with Human Rights can be found at pages 5–7 of the Explanatory Memorandum to the National Vocational Education and Training Regulator Amendment (Annual Registration Charge) Bill 2017 and at pages 5–6 of the Explanatory Memorandum to the National Vocational Education and Training Regulator (Charges) Amendment (Annual Registration Charge) Bill 2017.
Proposed subsection 232A(5) provides that the section also applies in relation to a charge taken to have been imposed under section 6C of the Charges Act, which is to be inserted by item 2 of the Charges Bill and is discussed below.

Proposed section 232B specifies that the annual registration charge is recoverable as a debt due to the Commonwealth.

Section 39 of the Act allows ASQA to cancel an RTO’s registration in any circumstances that it considers appropriate, including if the registration fee under section 18 has not been paid. Item 2 will amend section 39 to remove the reference to the registration fee and instead specify that appropriate circumstances for cancelling an RTO’s registration may include (but are not limited to) a failure to pay the annual registration charge by the due date.

Item 4 inserts a new Schedule at the end of the National Vocational Education and Training Regulator (Charges) Amendment (Annual Registration Charge) Bill 2017 to provide savings arrangements for registration cancellation based on failure to pay an existing registration fee once the Bill is enacted. As explained above, section 39 currently specifies that it may be appropriate for ASQA to cancel registration if an organisation has failed to pay a registration fee. Section 39 will be amended by item 2 of the Bill to replace the reference to registration fee with a reference to the new annual registration charge.

As set out in the ‘Background’ section of this Digest, questions have arisen as to the validity of the current registration fee, given that it has been used to provide services to the VET sector as a whole, rather than a specific individual or organisation. Item 4 ensures that section 39 as in force immediately before the amendments made by the Bill commence, continues to apply in relation to a failure to pay the registration fee, even if the fee was not capable of being validly determined by the Minister under section 232 of the Act. This ensures that any cancellation of registration by ASQA on the basis of failure to pay a registration fee will be valid, even if the determination of that fee may have been invalid. The Charges Bill includes provisions that retrospectively validate the imposition of the registration fee and is discussed in more detail below.

National Vocational Education and Training Regulator (Charges) Amendment (Annual Registration Charge) Bill 2017

Item 1 of the National Vocational Education and Training Regulator (Charges) Amendment (Annual Registration Charge) Bill 2017 (the Charges Bill) changes the long title of the National Vocational Education and Training Regulator (Charges) Act 2012 (the Charges Act) to remove the current reference to the imposition of charges under the National Vocational Education and Training Regulator Act 2011 and instead to refer to charges ‘in relation to certain functions of the National VET Regulator’. This is necessary as (as explained above) the annual registration charge will also apply to providers registered under the Education Services for Overseas Students Act 2000.

Item 2 inserts a new Part 1A into the Charges Act, which consists of proposed sections 6A to 6C. Proposed section 6A imposes the annual registration charge determined under proposed section 6B, as a tax. Proposed section 6B allows the Minister to determine a National VET Regulator annual registration charge for a financial year, by legislative instrument. As is the case with fees imposed under the Act, the Minister must have the COAG Ministerial Council’s approval to the amount of the charge.

As with item 4 of the main Bill, proposed section 6C responds to concerns that the current registration fee may not be valid. Proposed subsection 6C(1) specifies that the section applies to each amount of registration fee that a person was required to pay under the Act, before the commencement of the Bills, to the extent that the fee could not be validly determined under section 232 of that Act (for the reasons discussed in the Background section of this Digest). Proposed subsection 6C(2) imposes (as a tax) a charge equal to the invalid fee. Proposed subsection 6C(3) ensures that a person’s liability under subsection 6C(2) is reduced by any fees already paid and any amounts that ASQA has waived.

In effect, section 6C retrospectively validates registration fees that may not have been validly imposed. The Explanatory Memorandum describes section 6C as ‘a proactive legislative measure to mitigate legal and
constitutional risk’.

The Senate Standing Committee for the Scrutiny of Bills has previously commented on legislation that sought to retrospectively validate fees and charges:

> It is a fundamental principle that no pecuniary burden can be imposed upon individuals without clear and distinct legal authority. Retrospective validation of the imposition of fees and charges undermines this principle. In cases where this approach is proposed in a Bill the explanatory memorandum should provide a detailed explanation as to why it is considered necessary to retrospectively validate fees that may have been invalid at the time they were levied.

**Concluding comments**

These Bills are described as largely mechanical and are designed to ensure that the cost recovery arrangements for ASQA are consistent with the Australian Government Charging Framework, and that they are constitutionally supported. The Bills retrospectively validate registration fees that may not have been validly imposed, and registration cancellations made in reliance on non-payment of such fees.

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