National Vocational Education and Training Regulator Amendment Bill 2019

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Date introduced: 4 December 2019
House: Senate
Portfolio: Employment, Skills, Small and Family Business
Commencement: Schedule 1 contains the main amendments, and commences 1 July 2020. Schedules 2 and 3 commence the day after the Act receives Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, 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 January 2020.
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Purpose of the Bill

The main purpose of the National Vocational Education and Training Regulator Amendment Bill 2019 (the Bill) is to amend the National Vocational Education and Training Regulator Act 2011 (the NVETR Act), under which the national vocational education and training (VET) regulator, the Australian Skills Quality Authority (ASQA), operates. In part, the amendments give effect to the Australian Government’s response to two recent reviews: All Eyes On Quality: Review of the National Vocational Education and Training Regulator Act 2011 Report (the Braithwaite Review) and Strengthening Skills: Expert Review of Australia’s Vocational Education and Training System (the Joyce Review). 1 Specifically, the Bill proposes changes to the NVETR Act in relation to arrangements for:

• provider registration
• course accreditation
• cancellation of VET qualifications and VET statements of attainment and
• a number of administrative matters, including information disclosure, VET student records, the National Register (the Register), and the appointment of Acting Commissioners.

The Bill also includes a number of minor technical amendments, including to the National Vocational Education and Training Regulator (Transitional Provisions) Act 2011, which are not discussed in this Bills Digest.

Background

The Australian Skills Quality Authority

ASQA is the national regulator for Australia’s VET sector, with responsibility for:

• registration of training providers
• accreditation of VET accredited courses and
• registration of VET and English language course providers who wish to offer courses to overseas students studying in Australia (CRICOS). 2

ASQA was created in 2011 under the NVETR Act, to give effect to a Council of Australian Governments (COAG) decision of December 2009. 3 All states except Victoria and Western Australia have referred powers for VET regulation to the Commonwealth, so providers based or offering training in those states, or to overseas students, must register with ASQA. 4 At January 2020, 3,683 registered training organisations (RTOs) were listed on the Register as being registered with ASQA, representing the majority of the 4,070 RTOs with current registration. 5

The Standards for VET Regulators 2015, made under section 189 of the NVETR Act, mandates a:

4. National Vocational Education and Training Regulator Act 2011 (the NVETR Act), Division 3; ASQA, ‘How does an RTO in Western Australia or Victoria become registered with ASQA?’, ASQA website. Providers only offering courses in Victoria or Western Australia, and not intending to enrol overseas students, do not need to register with ASQA. They can register with their relevant state regulator instead (the Victorian Registration and Qualifications Authority and the Western Australian Training Accreditation Council).
... risk-based approach to the regulation of RTOs that is informed by assessments of RTO compliance with the Standards for RTOs on an ongoing basis. This risk management approach enables VET Regulators to more actively and regularly apply strategies to reduce the regulatory burden for high-performing RTOs with a history of strong compliance and to increase regulatory action for those RTOs considered as higher risk.\(^6\)

In line with these requirements, in 2016 ASQA moved from a process-based, to a student-centred, audit approach, with ‘a greater focus on the student experience and the practices of RTOs’.\(^7\) This approach follows the key phases of student experience, from marketing and recruitment, through enrolment, support and progression, training and assessment, to completion.\(^8\)

While this shift has been supported by key stakeholders, ASQA’s role continues to attract considerable scrutiny.\(^9\) In part this is explained by the inherent challenges of being the regulator for a sector of over 4,000 diverse providers. However, recurrent quality issues, particularly linked to the misuse of the former VET FEE-HELP scheme by unscrupulous providers, have raised questions about whether ASQA is equipped for its role.\(^10\) Two key recent reviews of the Australian VET system have addressed this issue, as detailed below.

**The Braithwaite Review**

The Braithwaite Review was commissioned in June 2017 to specifically examine the NVETR Act and its associated legislative framework.\(^11\) *All Eyes On Quality: Review of the National Vocational Education and Training Regulator Act 2011 Report* was delivered in January 2018.\(^12\) Importantly, it found:

> There was general agreement that ASQA had sufficient legislative powers but that it needed to utilise a broader range of interventions and compliance processes to encourage continuous quality improvement to address shortcomings in training and assessment and student outcomes.\(^13\)

However, some significant problems were identified in the relationship between ASQA and RTOs:

> There were concerns about the compliance burden on RTOs, the inconsistency of audits and auditors, the difficulty in making sense of ASQA’s regulatory approach, and a disconnect from what RTOs considered important for regulation of the sector. In short, ASQA’s regulatory task is made more difficult and the sector’s anxieties are increased by a lack of supportive regulatory conversations. A new path for restoring some balance in this regard has been opened through a general appreciation of ASQA’s move to its new audit model that recognises the need to prioritise the student experience and outcomes.\(^14\)

The Braithwaite Review put forward 23 recommendations, addressing ASQA’s engagement with the sector, registration requirements, teaching quality, collection and sharing of data, and

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8. Ibid.
13. Ibid., p. 48.
The Joyce Review

The Joyce Review was commissioned on November 2018 to examine Australia’s VET sector as a whole. Strengthening Skills: Expert Review of Australia’s Vocational Education and Training System was delivered in March 2019. The Joyce Review draws on the Braithwaite Review and its own consultations, and in relation to ASQA was:

… concerned about the quite surprising high levels of disquiet in the provider community about the way ASQA currently conducts its regulatory activity. There is always some tension to be expected between the regulator and the regulated, but it is apparent the issues expressed in this case go beyond that sort of healthy tension …

Many providers worry whether ASQA will treat them fairly and reasonably during the audit process. They have little understanding of the approach ASQA will take when it comes time for their next audit.

The Joyce Review recommendations were wide ranging, and included:

- ASQA be required to release publicly all concluded audit reports
- in the longer term, ASQA expand its auditing role to ranking providers on the quality of their offerings
- ASQA be given new powers to better control the registration of RTO, as recommended in the Braithwaite Review
- the relevant Commonwealth department manage annual independent surveys of RTOs about ASQA’s performance
- the Skills Council mandate an agenda to reduce duplication and minimise reporting burdens for RTOs by negotiating common audit standards between Commonwealth and state and territory regulators.

The Government’s response to the Joyce Review, announced in the 2019–20 Budget, included ‘18.1 million to ensure ASQA is a modern and effective regulator focused on fostering excellence across the sector’, in response to the Braithwaite and Joyce reviews.

Government response

At its first meeting on 20 September 2019, the Skills Council agreed that ASQA ‘should improve its engagement with the VET sector and expand its educative role’. The Australian Government later confirmed this would involve regulatory reforms in response to the Braithwaite Review and the
Joyce Review, but little additional detail was provided.\textsuperscript{23} The Bill appears to give effect to the aspects of these announcements requiring legislation.

However, importantly, it is not the only work currently being undertaken on ASQA’s role. As the Braithwaite Review identifies:

Regulatory philosophy and culture contextualise legislative provisions and give them meaning in practice. Different meanings will lead to different enactments of the same legislative provision. Changing legislation without addressing the culture driving its interpretation will not necessarily produce the outcomes expected.\textsuperscript{24}

In October 2019, a further review was announced, this time focusing on ASQA’s ‘governance, policies and culture’ to ‘inform a 12 to 18 month program of improvements that will ensure regulation by ASQA is transparent and effective’.\textsuperscript{25}

At its 20 September 2019 meeting, the Skills Council also agreed to progress work on another quality issue, unduly short courses (in which the volume of learning provided by the RTO is insufficient for students to meet the outcomes of the course).\textsuperscript{26}

**Committee consideration**

**Senate Education and Employment Legislation Committee**

At its meeting of 4 December 2019, the Senate Selection of Bills Committee deferred consideration of the Bill to its next meeting.\textsuperscript{27}

**Senate Standing Committee for the Scrutiny of Bills**

At the time of writing, the Senate Standing Committee for the Scrutiny of Bills had not considered the Bill.\textsuperscript{28}

**Policy position of non-government parties/independents**

At the time of writing, non-government parties/independents have not commented on the details of the Bill.

**Position of major interest groups**

At the time of writing, major interest groups have not commented on the details of the Bill.

**Financial implications**

The [Explanatory Memorandum](#) to the Bill states that it has no financial impact on the Commonwealth or ASQA-registered RTOs.\textsuperscript{29}

\begin{itemize}
\item \textsuperscript{23} M Cash (Minister for Employment, Skills, Small and Family Business) and S Irons (Assistant Minister for Vocational Education, Training and Apprenticeships), *Ministers announce changes to the Australian Skills Quality Authority*, media release, 27 September 2019.
\item \textsuperscript{24} Braithwaite, *All eyes on quality*, op. cit., p. 48.
\item \textsuperscript{25} M Cash (Minister for Employment, Skills, Small and Family Business), *National vocational education regulator to focus on training excellence*, media release, 30 October 2019.
\item \textsuperscript{26} COAG, *Communique*, COAG Meeting, Brisbane, 7 December 2009, p. 1.
\item \textsuperscript{27} Senate Standing Committee for Selection of Bills, *Report*, 10, 2019, The Senate, Canberra, 5 December 2019.
\item \textsuperscript{28} Senate Standing Committee for the Scrutiny of Bills, *Index of Bills Considered by the Committee*, 2019, The Senate, 5 December 2019.
\item \textsuperscript{29} Explanatory Memorandum, National Vocational Education and Training Regulator Amendment Bill 2019, p. 5.
\end{itemize}
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 Bill’s 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 Bill is compatible.  

Parliamentary Joint Committee on Human Rights

At the time of writing, the Parliamentary Joint Committee on Human Rights had not considered the Bill.

Key issues and provisions

Provider registration

Conditions of registration

In order for an application for registration to be approved by ASQA, a VET provider must demonstrate compliance with:

- the VET Quality Framework, which comprises the:
  - Standards for ASQA-registered Registered Training Organisations, currently the Standards for Registered Training Organisations (RTOs) 2015
  - Data Provision Requirements 2012
  - Australian Qualifications Framework
  - Fit and Proper Person Requirements, currently the Fit and Proper Person Requirements 2011
  - Financial Viability Risk Assessment Requirements, currently the Financial Viability Risk Assessment Requirements
- the Higher Education Support Act 2003, if the RTO is a VET provider under that Act, and the VET Student Loans Act 2016, if the RTO is an approved course provider under that Act
- requirements to notify ASQA of any material changes to the organisation or its operations
- information requests from ASQA, providing notice is given in writing and the information is to be used for the purposes of the NVETR Act
- any other requests for cooperation from ASQA, to the extent that the request is necessary for ASQA to perform its functions, or would facilitate ASQA’s performance of its functions
- any general directions given by ASQA and published on its website, in relation to how the VET Quality Framework and other conditions of registration are to be complied with

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30. The Statement of Compatibility with Human Rights can be found at page 5 of the Explanatory Memorandum to the Bill.
31. Parliamentary Joint Committee on Human Rights, Index of Bills and instruments considered by the committee, 19 September 2019.
32. DET, Australian Qualifications Framework (AQF) website.
33. NVETR Act, sections 17 and 22. VET Quality Framework is defined in section 3 as the Standards for NVR Registered Training Organisations; the Quality Standards; the Australian Qualifications Framework; the Fit and Proper Person Requirements; the Financial Viability Risk Assessment Requirements; and the Data Provision Requirements. See also ASQA, 'VET quality framework', ASQA website.
34. NVETR Act, section 24A.
35. NVETR Act, section 25.
37. NVETR Act, section 27.
38. NVETR Act, section 28.
• any other conditions imposed on the organisation’s registration, either at the time of registration or later. 39

**Item 7** inserts **proposed section 22A**, with the effect of adding an additional registration condition for applicants to demonstrate commitment and capability to deliver quality VET. This requirement is consistent with the VET Quality Framework currently in place, where, for example, standard 5.1(c) of the [Standards for Registered Training Organisations (RTOs) 2015](https://www.gov.au) made under subsection 185(1) and subsection 186(1) of the *NVETR Act*, requires that:

Prior to enrolment or the commencement of training and assessment, whichever comes first, the RTO provides, in print or through referral to an electronic copy, current and accurate information that enables the learner to make informed decisions about undertaking training with the RTO and at a minimum includes …

... the RTO’s obligations to the learner, including that the RTO is responsible for the quality of the training and assessment in compliance with these Standards, and for the issuance of the AQF certification documentation.

However, there is currently no requirement in the primary legislation that applicants demonstrate such a commitment.

**Item 14** inserts additional requirements for applicants to comply with information requests at **proposed subsection 26(3)**. Currently, as outlined above, an ASQA-registered RTO must comply with information requests from ASQA providing notice is given in writing and the information is to be used for the purposes of the *NVETR Act*. Under **proposed subsection 26(3)**, ASQA-registered RTOs will also be required to produce any documents ASQA requests, providing the same notice and use conditions are met. **Proposed subsection 26(4)** specifies that the notice requiring access to documents under **proposed subsection 26(3)** must specify the period within which, and the manner in which, the documents are to be produced.

**Item 15** inserts **proposed sections 26A and 26B**, which specify further conditions for accessing documents under **proposed subsection 26(3)**:

• **proposed section 26A** allows ASQA to inspect a document obtained under **proposed subsection 26(3)**, and make and retain copies of, or take and retain extracts from, the document and

• **proposed section 26B** allows ASQA to take and retain possession of a document obtained under **proposed subsection 26(3)** for as long as is necessary, but:
  – requires ASQA to provide the person otherwise entitled to the document with a certified copy as soon as practicable
  – specifies that the certified copy must be received in all courts and tribunals as evidence as if it were the original and
  – specifies that until the certified copy is provided, ASQA must allow the person otherwise entitled to its possession, or a person authorised by that person, to inspect and make copies of, or take extracts from, the document.

**Item 17** makes changes to the section 29 provisions for ASQA to impose other conditions on an RTO, either at the time of application, or later, by inserting the words ‘or remove’, with the effect that ASQA can remove a condition—the provision currently only allows ASQA to vary a condition.

**Item 19** makes changes to the section 30 provisions for ASQA to notify an RTO of a change in conditions of registration. Currently, ASQA must notify the RTO in writing, within 30 days, of its

decision to impose or vary a condition, and the advice must include the decision, reasons for the decision, and period for which the condition is imposed. Proposed subsection 30(2) allows that the period for which the condition is imposed may either be specified in the notice, or ‘ascertained in accordance with the notice’. The Explanatory Memorandum to the Bill provides the example of a period which ceases when the RTO advises ASQA that a particular action has been taken. Proposed subsection 30(3) imposes the same notice requirements currently in place for imposing or varying a condition, to the removal of a condition.

Application audits

Subsection 17(3) allows ASQA to ensure an applicant’s compliance with the application requirements by conducting an audit of any matter relating to the application. Currently, a registration audit is conducted if an application is complete and passes an initial risk assessment, which examines if the provider is likely to meet the Fit and Proper Person Requirements and Financial Viability Risk Assessment Requirements. As such, all successfully ASQA-registered RTOs would be subject to such an audit. The audit begins with a desk analysis of application materials, and may involve requests for additional information or a site visit if necessary, to confirm the accuracy of application evidence and suitability of facilities and resources for training and assessment. The outcomes of the audit are documented in a report, a copy of which is provided to the applicant.

Item 3 inserts proposed section 17A, which requires ASQA to prepare a report if a registration audit is conducted. It also provides that the report must be in a form (if any) approved by the Minister, comply with the requirements of any audit rules made for the purposes of the paragraph, and must not include personal information, unless the personal information is the name of the applicant or an ASQA-registered RTO.

If an application is approved, the applicant is provided with:

- written notice of approval, including a certificate of registration
- information about the qualifications and/or units of competency the provider is registered to deliver
- details about the commencement date and period of time the registration covers and
- any conditions of registration.

Item 84 inserts proposed Division 3B—Audit Report rules. Proposed section 231B provides that the Minister may, by legislative instrument, make audit report rules prescribing matters required or permitted by the NVETR Act to be prescribed by the rules.

Registration renewal

Currently, under subsection 31(3), if an ASQA-registered RTO has applied for a renewal of registration, its existing registration continues until the outcome of the application is decided. Item 20 repeals this subsection, and substitutes:

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40. Explanatory Memorandum, National Vocational Education and Training Regulator Amendment Bill 2019, p. 22.
42. Ibid.
43. Ibid.
44. NVETR Act, sections 18 to 20.
• **proposed subsection 31(3)**, which provides that if an RTOs registration is due to expire before an application for renewal is decided, then the registration is taken to continue until either ASQA’s decision to refuse renewal takes effect, or the day after the application for renewal is approved

• **proposed subsection 31(3A)**, which provides that in the case of an application for renewal being refused, ASQA must notify the organisation of the refusal, which will take effect either at the start of the day the notice is given, or at a later date if specified

• **proposed subsection 31(3B)**, which provides that in the case of an application for renewal being approved, ASQA must determine how long the RTO’s new registration period will be—the renewal commences the day after the previous registration expired, or would have expired

• **proposed subsection 31(3C)**, which restricts the registration period to a maximum of seven years.

**Items 4, and 6** make consequential amendments to section 20, which deals with applications. Subparagraph 20(1)(a)(i) currently states that if an application is for a renewal of registration, then the commencement date for an approved application will be the day the previous registration expires. Item 4 repeals the subparagraph, and replaces it with a reference to the provisions in **proposed subsection 31(3B)**. Item 6 repeals the note to subsection 20(1), to reflect **proposed subsection 31(3)**.

**Compliance audits**

Subsection 35(1) of the *NVETR Act* allows ASQA to conduct an audit at any time to check if an ASQA-registered RTO is compliant with the VET Quality Framework. 45 **Item 21** inserts a heading, ‘compliance audits’ above the subsection.

**Item 22** inserts a number of requirements relating to such audits, at **proposed subsections 35(1A) to 35(1D)**:

• ASQA must prepare a report of a compliance audit
• the report must be in a form (if any) approved by the Minister, and comply with the requirements (if any) prescribed by the audit report rules made for the purpose
• the report must not include personal information, unless the personal information is the name of the RTO to which the report relates and
• ASQA must comply with the requirements (if any) prescribed by the audit report rules relating to the publication of the report.

It also inserts a heading ‘reviewing or examining an NVR registered training organisation’s operations’ below the proposed subsections, to clarify the different scope of the following subsection, 35(2), which allows ASQA to examine any aspect of an RTO’s operations for the purposes of addressing systematic issues in relation to the quality of the VET sector.

As outlined above, **item 84** inserts **proposed Division 3B—Audit Report rules. Proposed section 231B** provides that the Minister may, by legislative instrument, make **audit report rules** prescribing matters required or permitted by the *NVETR Act* to be prescribed by the rules.

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45. The *NVETR Act*, subsection 35(1).
Course accreditation

In addition to registering and quality assuring training providers, ASQA has responsibility for assuring VET accredited courses, which are a form of nationally recognised VET that operates as an alternative to the more commonly used training packages.46

Training packages are ‘occupational skills standards against which training delivery and assessment of competency can take place.’47 Organised around particular occupational groupings, such as health or aged care, training packages are made up of units of competency. Each unit specifies competencies students must demonstrate, including performance criteria, and evidence, required knowledge, and assessment conditions.48 Under section 3 of the NVETR Act the authority to endorse training packages sits with the Skills Council, and a process of detailed consultation informs this endorsement process.49

As an alternative to training packages, VET accredited courses can be developed where a skill need is not covered by a training package, often in the case of a rapidly emerging need, or highly specialised area.50 Copyright on accredited courses is held by the organisation that develops them.

Conditions of course accreditation

Under section 44 of the NVETR Act, ASQA may grant an application for the accreditation of a VET accredited course.51 The conditions for course accreditation by ASQA are not currently specified in detail in the NVETR Act. Under section 44, ASQA may grant an application for the accreditation of a course, with reference to whether the course meets the Standards for VET Accredited Courses 2012, and the AQF. Section 47 of the NVETR Act further requires that a person comply with any conditions imposed on the accreditation of a VET accredited course under subsection 48(1). Subsection 48(1) allows ASQA to impose conditions on the accreditation of a VET accredited course, but does not specify further general conditions.

Item 28 repeals section 47, and inserts sections specifying conditions for course accreditation, in similar terms to the requirements for RTO registration:

- proposed section 47 requires a person who has a VET course accredited to comply with conditions set out in sections 47A, 47B, and 47C, as well as any conditions imposed under subsection 48(1)
- proposed section 47A requires the person to comply with the Standards for VET Accredited Courses, currently the Standards for VET Accredited Courses 2012
- proposed section 47B requires the person to ensure the course meets the AQF and
- proposed section 47C requires compliance with general directions given by ASQA, providing such directions are given in writing and published on the ASQA website.

46. Training packages made up 84.5 per cent of enrolments in nationally recognised programs in 2018. See National Centre for Vocational Education Research (NCVER), Total VET students and courses 2018, Australian vocational education and training statistics, NCVER, Adelaide, August 2019, p. 10.
48. A full list of training packages can be viewed on the National Register at training.gov.au. See DESSFB, ‘Nationally recognised training search’, training.gov.au.
49. This process is complex and includes a number of government and non-government bodies. More information is available from the Australian Industry and Skills Committee (AISC) website. In summary, the AISC is responsible to the Skills Council for approving training packages for implementation, with advice from Industry Reference Committees (IRCs).
50. Australian Skills Quality Authority (ASQA), ‘When to consider course accreditation’, ASQA website. As with training packages, a full list of accredited courses can be viewed on the National Register at training.gov.au. See DESSFB, ‘Nationally recognised training search’, training.gov.au website.
51. NVETR Act, section 44.
Item 29 inserts ‘or remove’ into subsection 48(2), with the effect that ASQA can remove a condition of course accreditation—the provision currently only allows ASQA to vary a condition.

Item 31 amends section 49, which mandates a 30 day notice period for ASQA to impose or vary a condition of accreditation on a VET accredited course. Consistent with the amendments related to notice periods for varying conditions associated with RTO registration, this change allows the notice period to be specified in the notice (proposed paragraph 49(2)(a)) or ascertained in accordance with the notice (proposed paragraph 49(2)(b)). Likewise, proposed subsection 31(3) is inserted to deal with ASQA’s powers to remove a condition of course accreditation. The subsection would require ASQA to notify the relevant person of its decision to remove a condition on the course accreditation, within 30 days, and provide the decision, and reason for the decision, in writing.

**Course accreditation renewal**

Like RTO registration, course accreditation is for a limited time, and the relevant person must make an application for renewal under section 44 of the NVETR Act if they wish to continue offering the course after the accreditation expiry date. Under subsection 50(3), accreditation for the course is taken to continue until the person’s application is decided. Item 32 repeals the subsection, and replaces it with provisions in similar terms to the requirements for RTO registration renewal at item 20. That is:

• proposed subsection 50(3) provides that if course accreditation is due to expire before an application for renewal is decided, then the accreditation is taken to continue until either ASQA’s decision to refuse takes effect, or the day after the application for renewal is approved

• proposed subsection 50(3A) provides that in the case of an application for renewal being refused, ASQA must notify the relevant person of the refusal, which will take effect either at the start of the day the notice is given, or at a later date if specified

• proposed subsection 50(3B) provides that in the case of an application for renewal being approved, ASQA must determine how long the course’s new accreditation period will be—the renewal commences the day after the previous accreditation expired, or would have expired and

• proposed subsection 50(3C) restricts the accreditation period to a maximum of five years.

**Cancellation of VET qualifications and VET statements of attainment**

Nationally recognised VET study can be a full qualification, made up of a series of units, as listed in the Australian Qualifications Framework (AQF), such as a Certificate III or Diploma, but is frequently taken as fewer units, including as ‘skill sets’ where a smaller number of associated units or modules are grouped together for the purposes of achieving capability in a specific area of practice.\(^52\) When a student completes, they are provided with a qualification, or if they have completed some accredited units of study but not a full qualification, a statement of attainment is provided.\(^53\)

Currently, subsection 56(1) of the NVETR Act allows ASQA to cancel a VET qualification or VET statement of attainment issued to a person by an ASQA-registered RTO if ASQA is satisfied on reasonable grounds that the qualification or statement of attainment is not valid—for example paragraph 56(1)(c) allows cancellation if the qualification or statement was outside the scope of

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52. NCVER, *Total VET students and courses 2018*, op. cit., p. 25.
the RTO’s registration (such as an RTO issuing a Health qualification when they are only registered to provide training in the field of Business Services). However, subsection 56(2) provides that ASQA may only take action under subsection 56(1) if ASQA gives the organisation a written direction requiring the organisation to cancel the VET qualification or statement of attainment and notify the person concerned, in writing, of the cancellation, within a specified period of time, and the organisation fails to comply with the direction within the period specified in the direction. In the alternative, under subsection 56(4), ASQA may take action under subsection 56(1) at any time if the organisation is no longer a RTO.

**Item 34** inserts **proposed subsection 56(3A)**, which would allow ASQA to cancel the qualification or statement of attainment if it believes on reasonable grounds that a direction to the organisation under subsection 56(2) would not be complied with.

**Item 35** inserts **proposed subsection 56(5)**, which avoids doubt by specifying that ASQA must not take action under subsection 56(1) unless it is covered by subsections 56(2), 56(3A) or 56(4).

**Item 36** adds a civil penalty provision at proposed section 61A, which specifies that if an organisation is given a direction under subsection 56(2) and fails to comply within the time specified in the direction, they will be liable to a civil penalty of 100 penalty units ($21,000).  

**ASQA’s functions**

Subsection 157(1) of the *NVETR Act* states that the National VET Regulator’s functions are:

(a) to register an organisation as an NVR registered training organisation;

(b) to accredit courses that may be offered and/or provided by registered training organisations;

(c) to carry out compliance audits of NVR registered training organisations;

(d) to promote, and encourage the continuous improvement of, a registered training organisation’s capacity to provide a VET course or part of a VET course;

(e) if requested to do so by the Minister, or on the Regulator’s own initiative, to advise and make recommendations to the Minister on matters relating to vocational education and training;

(f) if requested to do so, in writing, by the Education Minister for a State or Territory, or on the Regulator’s own initiative, to advise and make recommendations to the Education Minister for the State or Territory on specific matters relating to vocational education and training in the State or Territory;

(g) if requested to do so, in writing, by the Chair of the Ministerial Council, or on the Regulator’s own initiative, to advise and make recommendations to the Ministerial Council on general matters relating to vocational education and training in all jurisdictions;

(h) to collect, analyse, interpret and disseminate information about vocational education and training;

(i) to publish performance information, of a kind prescribed by the regulations, relating to NVR registered training organisations;

(j) to conduct training programs relating to the regulation of registered training organisations and/or the accreditation of courses;

54. One penalty unit is currently $210, as per section 4AA of the *Crimes Act 1914*. 

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National Vocational Education and Training Regulator Amendment Bill 2019

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(k) to enter into arrangements with occupational licensing bodies, other industry bodies, or both, for the purpose of ensuring compliance by NVR registered training organisations with this Act;

(l) to cooperate with a regulatory authority of another country that has responsibility relating to the quality or regulation of vocational education and training for all, or part, of the country;

(m) to develop relationships with its counterparts in other countries;

(n) to develop key performance indicators, to be agreed by the Minister, against which the Regulator’s performance can be assessed each financial year;

(o) to develop service standards that the Regulator must meet in performing its functions;

(p) any other function relating to vocational education and training that is set out in a legislative instrument made by the Minister;

(q) such other functions as are conferred on the Regulator by or under:

(i) this Act; or

(ii) the Education Services for Overseas Students Act 2000 or any other law of the Commonwealth;

(r) to do anything incidental to, or conducive to, the performance of any of the above functions.

There are currently several sections in the NVETR Act that mean the Australian Parliament is not able to amend the NVETR Act to expand the scope of ASQA’s powers at the expense of state powers without state agreement:

- subsection 5(4) allows a state to stop being a referring state
- section 10 allows a referring state to make a law declaring a matter to be excluded (meaning the NVETR Act would not apply for the purposes of that matter)
- section 11 allows that if there is a conflict between state law and the NVETR Act, the state law will prevail and
- subsection 157(3) provides that the Minister must not set out a function in a legislative instrument under paragraph 157(1)(p) (discussed above, this gives ASQA the ability to undertake ‘any other function relating to vocational education and training that is set out in a legislative instrument made by the Minister’) unless the Ministerial Council has agreed to the function. That is, the Minister cannot make regulations giving ASQA additional functions without the agreement of the Ministerial Council.

The NVETR Act gives the Minister the power under subsection 160(1) to give ASQA direction, by legislative instrument, if they consider the direction is necessary to protect the integrity of the VET sector. Under subsection 160(2), the direction must not cover provider registration, course accreditation, a particular ASQA-registered RTO, or a particular person to whom a particular VET accredited course is accredited. That is, the Minister may provide general direction, but may not interfere with ASQA’s decision-making regarding applications for provider registration or course accreditation.

Item 49 revises the wording of subsection 160(1), so that it reads: ‘The Minister may, by legislative instrument, give directions to the National VET Regulator in relation to the performance of its

55. NVETR Act, subsection 160(2).
functions and the exercise of its powers.’ This omits the requirement that such directions be ‘necessary to protect the integrity of the VET sector’. However, as no change to subsection 160(2) is proposed, ASQA would still exercise independent judgment regarding applications for provider registration or course accreditation.

Other provisions

Information disclosure

There are a number of information sharing provisions in Part 9 of the NVETR Act, under Division 2. Under subsection 205(1), ASQA may disclose information, for the purpose of administering laws relating to vocational education and training, to:

- the Secretary
- a Commonwealth authority
- a state or territory authority
- a person who holds any office or appointment under a law of the Commonwealth, a state or territory
- another VET Regulator
- the National Centre for Vocational Education Research (NCVER) (or any successor of that body).

Item 63 amends section 205 to omit ‘or any successor of that body’ after the NCVER.

Item 64 adds a tuition assurance scheme operator to the list of bodies ASQA may disclose information to. 56

Item 65 adds proposed subsection 205(1A), which provides that ASQA may disclose information under subsection 205(1) electronically.

Currently, under subsection 205(2), if personal information is disclosed under subsection 205(1), this must be disclosed to the individual the information relates to, unless the disclosure is to the Secretary, a Commonwealth authority, a state or territory authority, or another VET Regulator. 57

Item 66 amends the paragraph references in this section with the effect that only disclosure to a person who holds any office or appointment under a law of the Commonwealth, a state or territory would need to be disclosed to the individual. This means disclosure of personal information to the NCVER under section 205(1) would no longer be notifiable, and disclosure to a tuition assurance scheme operator would not be notifiable.

Section 205A deals with disclosure of VET information.58 It allows ASQA to disclose VET information to a Commonwealth authority or a state or territory authority, if ASQA is satisfied that the disclosure is necessary to enable or assist the authority to perform or exercise any of the authority’s functions or powers, or a Royal Commission. If VET information disclosed to a Royal

56. Tuition assurance scheme operator is defined at item 1, which amends the definitions at section 3 of the NVETR Act, as a person or body who operates a scheme approved by ASQA for the purposes of requirements that are set out in the Standards for NVR Registered Training Organisations, and relate to the protection of fees for courses that an NVR registered training organisation is unable to provide. In short, such services ensure VET students can receive a refund or replacement course in the event their RTO does not provide their course as planned.

57. Under section 3, personal information has the same meaning as in the Privacy Act 1988.

58. VET information is defined in section 3 as information that is held by the National VET Regulator and relates to the performance of the Regulator’s functions, including information and documents collected by the Regulator in the course of the exercise of a power, or the performance of a function, under the NVETR Act or the administration of the NVETR Act.
Commission is personal information, ASQA must advise the person of the details of the disclosure in writing. **Item 67** adds proposed subsection 205A(1A), which provides that ASQA may disclose information under subsection 205(1) electronically.

Subsection 209(1) allows ASQA to release information to the public, if ASQA is satisfied that the release would reasonably inform a person’s choice to enrol as a VET student with a RTO, would encourage improvement in the quality of VET services, or would encourage compliance with the VET Quality Framework. Under subsection 209(2), this information may be released by ASQA authorising release by a Commonwealth authority, a state or territory authority, or a person who holds any office or appointment under a law of the Commonwealth, a state or territory. **Item 69** amends the subsection to add a tuition assurance scheme operator to the list of bodies ASQA may authorise to release information.

**Item 70** inserts proposed section 209, which includes provisions for the department with responsibility for VET policy and programs to release to the public information about VET provided by a RTO, and experiences, for students and employers with an RTO. **Proposed subsection 209A(2)** provides that the Secretary may provide for this information to be released by the NCVER. However, **proposed subsection 209A(3)** clarifies that this section does not authorise the release of personal information, unless the personal information is the name or a registered training organisation. The NCVER currently provides a range of research products, including the National Student Outcomes Survey, an annual survey of students who completed VET study in Australia during the previous year.

**VET student records**

Under subsection 211(1), if an RTO has its registration cancelled, or ceases to operate, a person who was an executive officer or high managerial agent of the RTO must provide ASQA with the RTO’s VET student records, if they possess or control them. Subsection 211(2), the records must be provided within 30 days of the registration being cancelled or, in cases where a provider has effectively ceased to operate, when operations ceased (even if their registration remains current at that time).

**Item 72** inserts proposed subsection 211(2A), which requires the person to provide a copy of the VET student records to ASQA in electronic form in accordance with information technology requirements specified in an instrument, if the instrument has been made.

**Proposed subsection 211(2B)** allows ASQA to make the legislative instrument specifying information technology requirements for the purposes of proposed subsection 211(2A). **Proposed subsection 211(2D)** provides that the instrument will be disallowable, and proposed subsection 211(2E) provides that it will be subject to sunsetting.

**Proposed subsection 211(2C)** allows ASQA to waive compliance with the requirements of subsection 211(2A) in a particular case.

Currently, failure to provide the VET student records in accordance with the required timeframes as set out in subsection 211(2), is subject to a penalty of 150 penalty units, or in the alternative, a civil penalty of 300 penalty units. **Item 73** proposes to add reference to subsection 211(2A) to

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59. NCVER, ‘Student outcomes’, NCVER website.
60. NVETR Act. subsection 211(3).
61. NVETR Act, subsection 211(4).
these provisions, so that failure to provide the records in the prescribed electronic form is also subject to the penalty provisions.

Section 212 also allows ASQA to request, in writing, that a person provide a copy of VET student records, if they believe that any other person (not covered by subsection 211(1)) holds VET student records relating to a RTO or former RTO. Item 74 adds provisions to section 212 in similar terms to those added to section 211, with the effect that ASQA may specify, by legislative instrument subject to disallowance and sunsetting, information technology requirements for the purposes of providing VET student records, and if such an instrument is in force the notice from ASQA may specify that these requirements are to be followed by the person providing the records. No offence provisions are proposed for this section.

The National Register

Currently, ASQA has a range of responsibilities for maintaining the information about VET contained on the Register at training.gov.au. These are set out in section 216. The Bill proposes a number of amendments to these arrangements:

- **item 75** repeals the current requirement for ASQA to ensure an ASQA-registered RTO’s business name and business address is on the Register, replacing this with requirements for the Register to contain the organisation’s name and business name, physical address and postal address of the head office, physical address of the RTO’s principal place of business, and physical address of the sites or campuses from which the organisation delivers VET on a permanent basis.

- **item 77** inserts requirements for ASQA to ensure that the Register includes information about any application to renew course accreditation by an ASQA-accredited RTO, and information about ASQA’s refusal to renew the accreditation (including the date of the effect of the refusal to renew), if either apply.

- **item 78** inserts requirements in similar terms to those at **item 77**, applied to VET accredited courses—that is, requirements for ASQA to ensure that the Register includes information about any application to renew a course’s accreditation, and information about ASQA’s refusal to renew (including the date of the effect of the refusal to renew), if either apply.

Appointment of Acting Commissioners

ASQA has three Commissioners: a Chief Commissioner, Deputy Chief Commissioner, and Commissioner. Under section 162 of the **NVETR Act**, Commissioners are appointed by the Governor-General by written instrument. Section 172 allows for the appointment of Acting Commissioners, also appointed by the Governor-General. **Items 2 to 4 of Schedule 2** amend section 172 to give the Minister the power to appoint Acting Commissioners, in place of the Governor-General. No changes are proposed to the appointment arrangements for Commissioners.

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62. Proposed subsections 212(3) to 212(6).
63. Proposed paragraphs 216(1)(i), 216(1)(ia), and 216(1)(ib).
64. Proposed paragraphs 216(1)(aa) and 216(1)(ab).
65. Proposed paragraphs 216(1)(da) and 216(1)(db).
66. ASQA, ‘Commissioners’, ASQA website.
Concluding comments

The Bill proposes a range of changes to the NVETR Act to give effect to the Government’s response to elements of the Braithwaite Review and Joyce Review requiring legislation, as agreed by the COAG Skills Council. Importantly, while for the most part these changes focus on tightening requirements around provider registration and course accreditation, perhaps the most important work on ASQA’s role is non-legislative.

As the Braithwaite Review argued:

Specification and letting the measurable drive out what is important is the weakness of overly technocratic regulation backed only by a philosophy of legal formalism. The answer lies in ASQA developing its regulatory culture to provide a better explanation of how its powers are used to achieve the overarching principles that drive enhanced student outcomes, and engaging in clearer regulatory conversations. 67

The Skills Council’s agreement that ASQA will shift to providing broad education and guidance to the VET sector, along with the review focusing on ASQA’s governance, policies and culture, are therefore likely to be integral to the possible effectiveness of the changes proposed in the Bill. 68

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67. Braithwaite, All eyes on quality, op. cit., p. 50.