THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

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

REVISED EXPLANATORY MEMORANDUM

(Circulated by authority of the Assistant Minister for Vocational Education and Skills, the Honourable Karen Andrews MP)
The purpose of the National Vocational Education and Training Regulator (Charges) Amendment (Annual Registration Charge) Bill 2017 (Bill) is to amend the National Vocational Education and Training Regulator (Charges) Act 2012 (NVETR Charges Act) to impose a National VET Regulator (NVR) annual registration charge as a tax in an Act dealing with one subject of taxation for the purposes of section 55 of the Australian Constitution. The National VET Regulator annual registration charge replaces current annual registration fees collected from NVR registered training organisations (RTOs) and certain providers registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS providers), by the National VET Regulator (the Australian Skills Quality Authority (ASQA)) under the National Vocational Education and Training Regulator Act 2011 (NVETR Act). This Bill operates in conjunction with the measures contained in the companion National Vocational Education and Training Regulator Amendment (Annual Registration Charge) Bill 2017 (Companion Bill) which amends the NVETR Act to make RTOs and certain CRICOS providers liable to pay the National VET Regulator annual registration charge.

Since its establishment in 2011, ASQA has developed and shifted its regulatory approach to include activities, such as intelligence collection and data analysis, which 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 dependent on it being sufficiently resourced to undertake these broad ranging compliance monitoring activities.

For consistency with the Australian Government 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 by ASQA 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 being in the nature of a taxation, the Bill will amend the NVETR Charges Act to impose the National VET Regulator annual registration charge as a tax under an Act dealing with the subject of taxation, and validate any annual registration fees collected by ASQA prior to the commencement of the Bill. The Companion Bill will amend the NVETR Act to clarify that RTOs and certain CRICOS providers are liable to pay the National VET Regulator annual registration charge.
The Bill is largely mechanical and enabling in character in that it (in conjunction with the Companion Bill) 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 determined by way of a disallowable legislative instrument.

The Bill also makes a number of consequential amendments to the NVETR Charges Act to secure the validity of fees collected by ASQA before 1 July 2017 and ensure the NVETR Charges Act reflects ASQA’s charging processes associated with its evolving regulatory and compliance monitoring activities. This objective is achieved through the inclusion of validation provisions which impose a tax equivalent to the fees collected under the former annual registration fee regime. The Bill ensures the charge is cost recovery in nature by limiting the amount to no more than the likely costs of ASQA performing its functions. Further the Bill expressly provides that the Ministerial Council’s agreement must be obtained as to the amount of a National VET Regulator annual registration charge. This is consistent with current requirements for fees under the NVETR Act.
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

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

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 (Charges) Act 2012 (NVETR Charges Act) to ensure the National VET Regulator’s (NVR) (the Australian Skills and Quality Authority (ASQA)) fees and charges are underpinned by appropriate legislative authority and are constitutionally supported. It achieves this by imposing a National VET Regulator annual registration charge as a tax and validating annual registration fees collected by ASQA from NVR registered training organisations and certain providers registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS providers) under the NVETR Act prior to the commencement of the Bill. The NVETR Charges Act has been identified as an appropriate tax Act under which charges of this nature may be validly collected in accordance with section 55 of the Australian Constitution. The Bill also inserts provisions for the Minister to obtain agreement from the Ministerial Council before determining the amount of the National VET Regulator annual registration charge.

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 the mechanisms for collecting fees and charges applied by ASQA are fully supported at law and are consistent with the Australian Constitution. The measures promote this right by ensuring the legal efficacy of the fees and charges regime and thereby mitigating the risk of legal challenge to the constitutional validity of the fees and charges.

In this way, the Bill supports and enhances the transparency and accountability of the administrative framework necessary for the proper and effective regulation of the VET sector.

The measures in the Bill will have a positive effect on the provision of education services to students by registered providers. Articles 13(3) and (4) of the 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 and enhance institutional quality and ensure compliance monitoring and cost recovery is underpinned by appropriate statutory authority.

Further, 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 it will support ASQA’s regulatory function by ensuring the legal accountability and constitutional veracity of the registration charge framework on an ongoing basis as well as support the operational integrity of registered providers by securing legal validity of annual registration fees previously collected from them under the NVETR Act.
NOTES ON CLAUSES

Clause 1 - Short title

Clause 1 provides for the Bill, when enacted, to be cited as the National Vocational Education and Training Regulator (Charges) 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 at the same time as Schedule 1 to the National Vocational Education and Training Regulator Amendment (Annual Registration Charge) Act 2017 only if that Schedule commences:
  • Schedule 1.

Clause 3 - Schedules

Subclause 3(1) 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

<table>
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<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>ASQA</td>
<td>Australian Skills Quality Authority</td>
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<tr>
<td>NVETR Act</td>
<td>National Vocational Education and Training Regulator Act 2011</td>
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<tr>
<td>NVETR (Charges) Act</td>
<td>National Vocational Education and Training Regulator (Charges) Act 2012</td>
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The Bill is largely mechanical and enabling in character in that it (in conjunction with the companion National Vocational Education and Training Regulator Amendment (Annual Registration Charge) Bill 2017) 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 in accordance with section 55 of the Australian Constitution.

The Bill also makes a number of consequential amendments to the NVETR Charges Act to secure the validity of fees collected by National VET Regulator (ASQA) before 1 July 2017 and ensure the NVETR Charges Act reflects ASQA’s charging processes associated with its evolving regulatory and compliance monitoring activities.

**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 (Charges) Act 2012*

**Item 1 - Title**

The long title of the NVETR (Charges) Act currently reads as follows:

> An Act to impose charges in relation to certain matters under the National Vocational Education and Training Regulator Act 2011, and for related purposes.

This item repeals and substitutes the long title of the NVETR (Charges) Act so that it reads as follows:

> An Act to impose charges in relation to certain functions of the National VET Regulator, and for related purposes.
The reason for the change is to make it clear that the single subject of taxation for
the NVETR (Charges) Act is charges relating to the functions of the National VET
Regulator and is capable of applying registration charges to NVR registered training
organisations and certain providers registered on the Commonwealth Register of
Institutions and Courses for Overseas Students (CRICOS providers) as well as
existing compliance and investigation charges.

**Item 2 – After Part 1**

This item inserts a new Part 1A into the NVETR (Charges) Act titled *National VET
Regulator annual registration charge* consisting of the new sections as set out
below. This clarifies that the provisions relate to annual charges variously imposed
by ASQA as part of its regulatory and compliance monitoring activities.

**Part 1A – National VET Regulator annual registration charge**

**Section 6A – Imposition of charge**

Section 6A imposes the National VET Regulator annual registration charge as a
tax.

The purpose of this amendment is to clarify that the National VET Regulator annual
registration charge is a tax and is imposed as a tax.

**Section 6B – Determination of charge**

For the purposes of section 232A of the NVETR Act, subsection 6B(1) will enable
the Minister, by legislative instrument, to determine a National VET Regulator
annual registration charge (or charges) payable by persons to whom section 232A
of the NVETR Act applies, or a method for working out such an amount.

The companion National Vocational Education and Training Regulator Amendment
(Annual Registration Charge) Bill 2017 will insert a new section 232A into the
NVETR Act to make provision for the payment of the National VET Regulator
annual registration charge. The National VET regulator annual registration charge
may be collected by ASQA to recover costs for regulatory activities that are not
attributable to fees for services. For example, stakeholder management, complaint
investigation, complaint evidence review and purely regulatory activities such as
investigation and enforcement action. Calculation may also include the
subsidisation of other functions of ASQA and securing ASQA’s revenue against
future cost increases.

The amount of the National VET Regulator annual registration charge will be
determined by the Minister in a legislative instrument, after obtaining Ministerial
Council agreement to the amount. As the NVETR legislative framework is based on
a constitutional referral of power from the states and territories to the
Commonwealth, the amount of the National VET Regulator annual registration
charge must be agreed by the states and territories in accordance with Ministerial
Council processes. For this reason, the method of calculating the amount of the
National VET Regulator annual registration charge is not specified in the NVETR
(Charges) Act as this would restrict the ability of the states and territories to provide
agreement to the amount of the charge at a particular time. This approach provides
the necessary flexibility for states and territories to have the authority to provide genuine and considered agreement which takes into account ASQA’s regulatory priorities and what may be appropriate for ASQA to perform its functions and enhance the transparency and accountability of the VET sector.

Notes to subsection 6B(1) explain that:

- section 232A of the NVETR Act will apply to an NVR registered training organisation that is registered under the NVETR Act and to a registered provider that is registered under the ESOS Act (where the National VET Regulator is the ‘ESOS agency’ for the registered provider for the purposes of that Act)
- in instances where section 232A applies to a person for both of those registrations, the person is liable under section 232A to pay a charge for each of those registrations
- a subsection 6B(1) legislative instrument may specify different amounts of the charge determined in different circumstances (and sets out some examples), and notes subsection 33(3A) of the Acts Interpretation Act 1901 which allows a legislative instrument to make different provision with respect to different matters or classes of matters.

The examples to subsection 6B(1) seek to illustrate the intention that different amounts of National VET Regulator annual registration charge may be levied for various types of registration but that this does not preclude the same amount (or calculation) of charge for each form of registration and serves to clarify that a charge may be collected in respect of each form of registration. These examples are indicative only and do not preclude a different way of calculating the National VET Regulator annual registration charge.

Before making a determination about the amount of a National VET Regulator annual registration charge, or the method for working out such an amount, subsection 6B(2) requires the Minister to:

- be satisfied the determination will recover no more than the Commonwealth’s likely costs incurred by the National VET Regulator in performing its functions
- obtain the Ministerial Council’s agreement to the amount of a National VET Regulator annual registration charge, or the method for working out such an amount.

A note to subsection 6B(2) explains that Ministerial Council agreement is to be obtained in the same manner (see section 191 of the NVETR Act) as is required for certain fees determined under section 232 of the NVETR Act.

Subsection 44(1) of the Legislation Act 2003 provides that the Parliamentary disallowance process does not apply with respect to legislative instruments that facilitate the operation of an intergovernmental body or scheme involving the Commonwealth and one or more States.

Subsection 6B(3) ensures that subsection 6B(1) determinations are disallowable by Parliament. This ensures parliamentary oversight of the exercise of the taxation power. The amendment achieves this by providing that section 42 of the Legislation
Act (disallowance) applies to subsection 6B(1) determinations, notwithstanding subsection 44(1) of the Legislation Act.

Section 6C – Validation of annual registration fees charged for the purposes of the National Vocational Education and Training Regulator Act 2011

Subsection 6C(1) explains that section 6C applies to all amounts of annual registration fees that have purportedly been required to have been paid for the purposes of the NVETR Act, before the commencement of section 6C, to the extent that such fees could not validly have been determined by way of a determination made by ASQA.

Subsection 6C(2) provides that all amounts so paid are taken to be charges that were imposed as a tax.

Subsection 6C(3) provides that the amount of a charge a person is liable to pay is reduced or increased in certain circumstances.

Subsection 6C(4) 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 an NVR registered training organisation under the NVETR Act; or
- for registration as a registered provider under the ESOS Act.

Subsection 6C(5) provides that an ASQA determination is a determination made under subsection 232(1) of the NVETR Act (as in force at any time before section 6C commences). Subsection 232(1) authorises the Minister, by legislative instrument, to determine the amount of fees the NVETR Regulator may charge for goods or services that it provides when performing its functions.

The purpose of section 6C is to validate any annual registration fees collected by ASQA before commencement of the Bill (once enacted). This is a proactive legislative measure to mitigate legal and constitutional risk and validate annual registration fees already levied against registered providers by imposing an amount equivalent to the annual registration fees collected as a tax.

Items 3 and 4 – Paragraphs 13(a) and 13(b)

Section 13 of the NVETR (Charges) Act allows the Minister, by legislative instrument, to determine when the National VET Regulator may allow a charge to be paid in instalments or to be waived.

These items make minor technical amendments to section 13 to delete reference to ‘payable’ and ‘that otherwise would be payable’ from paragraphs 13(a) and (b).