

Explanatory Statement

Australian Skills Quality Authority Instrument Fixing Fees Amendment (Refund of Fees) Determination 2020

Purpose and Authority

The *Australian Skills Quality Authority Instrument Fixing Fees Amendment (Refund of Fees) Determination 2020* (Amendment Determination) is made under subsections 232(1) and 232(5) of the *National Vocational Education and Training Regulator Act 2011* (NVETR Act), as construed in accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (Acts Interpretation Act).

Among other things, subsection 33(3) of the Acts Interpretation Act provides that a power to make an instrument of a legislative character (such as under subsections 232(1) and 232(5) of the NVETR Act) includes a power to amend such an instrument.

The Amendment Determination amends the *Australian Skills Quality Authority Instrument Fixing Fees No. 1 of 2013* (Principal Determination).

In summary, the Amendment Determination implements Government policy with respect to the refunding and waiver of fees charged to registered training organisations and registered providers by the Australian Skills Quality Authority (ASQA)¹, by:

- ensuring that ASQA has capacity to refund fees paid under the NVETR Act and the *Education Services for Overseas Students Act 2000* in special or unusual circumstances that cause the fee to be unreasonable or inequitable, including in circumstances related to the COVID-19 pandemic event
- ensuring that the existing discretionary capacity of ASQA to waive fees payable under the NVETR Act and the *Education Services for Overseas Students Act 2000* in special or unusual circumstances extends to the COVID-19 pandemic event.

These amendments are intended to ensure that Government policy with respect to the refunding and waiver of fees charged to registered training organisations and registered providers can be implemented. In combination with other financial assistance measures announced by Government relating to the COVID-19 pandemic event, these measures help ensure the ongoing sustainability and viability of the vocational education and training sector, and help reduce the financial burden for that sector.

Commencement

The Amendment Determination commences from 20 April 2020. This ensures the additional clarity provided by the amendments regarding COVID-19 circumstances applies to the fees ASQA is currently waiving. The measures in the Amendment Determination are beneficial (enabling fee refund and waiver), impose no new liabilities, and are justified in response to the urgent and unforeseen circumstances of the COVID-19 pandemic event.

¹ Note that ASQA is the National Vocational Education and Training Regulator under the NVETR Act (see regulation 15 of the *National Vocational Education and Training Regulator Regulations 2011*).

Accordingly, the retrospective application of the Amendment Determination does not disadvantage, or give rise to any liabilities of, any registered training organisations or registered providers. Given this, subsection 12(2) of the *Legislation Act 2003* (Legislation Act) does not apply to the Amendment Determination.

Consultation

The Council of Australian Governments (COAG) Skills Council was consulted on the measures in the Amendment Determination on 17 April 2020, and Skills Ministers unanimously agreed to those measures.

ASQA and the Skills Senior Officials Network (consisting of senior officials from the skills policy portfolios of all States and Territories) were also consulted on the measures in the Amendment Determination.

The measures in the Amendment Determination are in response to stakeholder feedback in relation to the impacts of the COVID-19 pandemic on the vocational education and training sector.

Regulation Impact Statement

The Office of Best Practice Regulation (OBPR) has confirmed that the Higher Education Relief Package², which includes the measures in the Amendment Determination, does not require a Regulation Impact Statement (RIS). OBPR reference: 26451.

Further to this, the Prime Minister has granted an exemption from the need to complete regulatory impact analysis in the form of RISs for all urgent and unforeseen Government measures made in response to the COVID-19 pandemic event³. The measures in the Amendment Determination are considered unforeseen and have been made in response to the COVID-19 pandemic event.

Disallowance

Paragraph 44(2)(b) of the Legislation Act provides that a legislative instrument is not subject to disallowance where it is prescribed by regulation for the purposes of that paragraph. An instrument made under subsection 232(1) of the NVETR Act is prescribed for the purposes of paragraph 44(2)(b) of the Legislation Act (item 23A of the table in section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*).

Further, subsection 44(1) of the Legislation Act provides that a legislative instrument is not subject to disallowance where the enabling legislation for the instrument facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States and Territories, and authorises the instrument to be made by the body or for the purposes of the body or scheme.

² <https://www.dese.gov.au/covid-19/higher-education/higher-education-faq>

³ <https://ris.pmc.gov.au/2020/03/18/prime-ministers-exemption---covid-19-related-measures>

The NVETR Act established the Australian Skills Quality Authority (ASQA) to facilitate an intergovernmental scheme for national vocational education and training regulation, giving effect to the Intergovernmental Agreement for Regulatory Reform in Vocational Education and Training. The NVETR Act enables fees to be set, payable by registered training organisations and registered providers, in relation to the performance of ASQA's functions.

Consequently, the Amendment Determination is not subject to disallowance.

Abbreviations used in this Explanatory Statement

Amendment Determination means the *Australian Skills Quality Authority Instrument Fixing Fees Amendment (Refund of Fees) Determination 2020*.

NVETR Act means the *National Vocational Education and Training Regulator Act 2011*.

Principal Determination means the *Australian Skills Quality Authority Instrument Fixing Fees No. 1 of 2013*.

Detailed Explanation of Amendments

Preliminary

Sections 1 to 4 of the Amendment Determination are formal provisions providing for the name, commencement, authority and effect of the instrument.

Section 1 states the name of the instrument as the *Australian Skills Quality Authority Instrument Fixing Fees Amendment (Refund of Fees) Determination 2020*.

Section 2 provides for the Amendment Determination to commence from 20 April 2020. The retrospective application of the Amendment Determination does not disadvantage, or give rise to any liabilities of, any registered training organisations or registered providers. Given this, subsection 12(2) of the *Legislation Act 2003* does not apply to the Amendment Determination.

Section 3 states that the Amendment Determination is made under subsections 232(1) and 232(5) of the NVETR Act.

Section 4 provides that the Principal Determination is amended as set out in the Schedule to the Amendment Determination.

Schedule 1 – Amendments

Item 1 inserts new subsections 3(g) and 3(h) into section 3 of Schedule B of the Principal Determination.

New subsection 3(g) provides ASQA the discretionary capacity to refund fees paid under the NVETR Act and the *Education Services for Overseas Students Act 2000*, in special or unusual circumstances that cause the fee to be unreasonable or inequitable. This ensures that ASQA has discretion to refund fees in circumstances that warrant that refund, and aligns with the existing discretionary capacity of ASQA to waive applicable fees under the Principal Determination.

New subsection 3(h) ensures that the operation of new subsection 3(g) extends to circumstances related to the COVID-19 pandemic event. Subsection 3(h) is inserted for avoidance of doubt purposes, in order to provide certainty to the vocational education and training sector that the fee refund capacity of ASQA includes circumstances related to the COVID-19 pandemic event.

Item 2 inserts new subsection 5(ea) into section 5 of Schedule B of the Principal Determination.

New subsection 5(ea) ensures that the existing discretionary capacity of ASQA to waive fees payable under the NVETR Act and the *Education Services for Overseas Students Act 2000* in special or unusual circumstances, extends to the COVID-19 pandemic event. Subsection 5(ea) is inserted for avoidance of doubt purposes, in order to provide certainty to the vocational education and training sector that the discretionary waiver capacity of ASQA includes circumstances related to the COVID-19 pandemic event.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 and at the request of the Parliamentary Joint Committee on Human Rights

Summary of instrument

The *Australian Skills Quality Authority Instrument Fixing Fees Amendment (Refund of Fees) Determination 2020* (Amendment Determination) is made under subsections 232(1) and 232(5) of the *National Vocational Education and Training Regulator Act 2011* (NVETR Act), as construed in accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (Acts Interpretation Act).

Among other things, subsection 33(3) of the Acts Interpretation Act provides that a power to make an instrument of a legislative character (such as under subsections 232(1) and 232(5) of the NVETR Act) includes a power to amend such an instrument.

The Amendment Determination amends the *Australian Skills Quality Authority Instrument Fixing Fees No. 1 of 2013* (Principal Determination).

In summary, the Amendment Determination implements Government policy with respect to the refunding and waiver of fees charged to registered training organisations and registered providers by the Australian Skills Quality Authority (ASQA)⁴, by:

- ensuring that ASQA has capacity to refund fees paid under the NVETR Act and the *Education Services for Overseas Students Act 2000* in special or unusual circumstances that cause the fee to be unreasonable or inequitable, including in circumstances related to the COVID-19 pandemic event
- ensuring that the existing discretionary capacity of ASQA to waive fees payable under the NVETR Act and the *Education Services for Overseas Students Act 2000* in special or unusual circumstances extends to the COVID-19 pandemic event.

These amendments are intended to ensure that Government policy with respect to the refunding and waiver of fees charged to registered training organisations and registered providers can be implemented. In combination with other financial assistance measures announced by Government relating to the COVID-19 pandemic event, these measures help ensure the ongoing sustainability and viability of the vocational education and training sector, and help reduce the financial burden for that sector.

The Amendment Determination does not ordinarily require a Statement of Compatibility with Human Rights

In accordance with subsection 15J(2) of the *Legislation Act 2003* (Legislation Act), as the Amendment Determination is not a disallowable instrument, a statement of compatibility prepared under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* is not required.

⁴ Note that ASQA is the National Vocational Education and Training Regulator under the NVETR Act (see regulation 15 of the *National Vocational Education and Training Regulator Regulations 2011*).

However, on 15 April 2020 the Parliamentary Joint Committee on Human Rights wrote to the Secretary of the Department of Education, Skills and Employment stating that, given the potential impact on human rights of legislative instruments dealing with the COVID-19 response, the Committee would appreciate if all such instruments were accompanied by a statement of compatibility. Therefore, this statement of compatibility has been prepared pursuant to that request.

Analysis of human rights implications

Right to education

The Amendment Determination engages the right to education contained in Article 13 of the *International Covenant on Economic, Social and Cultural Rights*.

Article 13 recognises that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.

In addition, paragraph 13(2)(b) recognises that secondary education, in all its different forms, including technical and vocational secondary education shall be made generally available and accessible to all by every appropriate means and in particular by the progressive introduction of free education.

Right to work

The Amendment Determination engages the right to work contained in Article 6 of the *International Covenant on Economic, Social and Cultural Rights*.

Article 6 recognises that in order to fully achieve the realisation of the right to work, there should be available technical and vocational guidance and training programmes, policies and techniques.

The objective of the Amendment Determination is to ensure that ASQA has capacity to refund fees paid under the NVETR Act and the *Education Services for Overseas Students Act 2000* in special or unusual circumstances that cause the fee to be unreasonable or inequitable, including in circumstances related to the COVID-19 pandemic event. It also ensures that the existing discretionary capacity of ASQA to waive fees payable under the NVETR Act and the *Education Services for Overseas Students Act 2000* in special or unusual circumstances extends to the COVID-19 pandemic event.

Therefore, the Amendment Determination will help ensure the ongoing sustainability and viability of the vocational education and training sector, and help reduce the financial burden for that sector, during the COVID-19 pandemic event.

This objective is aimed at supporting the vocational education and training sector, and therefore promotes both the right to education and the right to work.

Conclusion

This instrument 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*.