

EXPLANATORY STATEMENT

Issued by the authority of Minister O'Connor, Minister for Skills and Training

Standards for Registered Training Organisations Amendment (Fit and Proper Person) Instrument 2023

AUTHORITY

Section 186 of the *National Vocational Education and Training Regulator Act 2011* (**the Act**) empowers the Minister, by legislative instrument (with the agreement of the Ministerial Council), to make requirements for assessing whether a person is a Fit and Proper person. Subsection 186(2) of the Act provides that the agreed requirements are to be known as the Fit and Proper Person Requirements (**the Requirements**). Section 23 of the Act provides that an NVR registered training organisation must satisfy the Requirements as a condition of its registration.

Section 191 of the Act specifies that the Ministerial Council is to give its agreement by resolution of the Ministerial Council and passed in accordance with the procedures determined by the Ministerial Council. Currently the Ministerial Council is constituted by the Skills and Workforce Ministerial Council.

The *Standards for Registered Training Organisations Amendment (Fit and Proper Person) Instrument 2023* (**the Instrument**) is made under subsections 185(1) and 186(1) of the Act and amends the *Standards for Registered Training Organisations (RTOs) 2015* (**Standards for RTOs**) by repealing and replacing the existing Requirements in Schedule 3 of the Standards for RTOs.

Under subsection 33(3) of the *Acts Interpretation Act 1901* (Acts Interpretation Act), where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

PARLIAMENTARY SCRUINTY

Instruments made under subsections 185(1) and 186(1) of the Act are not subject to disallowance or sunseting because:

- any potential disallowance of legislative instruments made under subsection 185(1) and 186(1) of the Act may discourage state and territory support for the VET regulatory framework. A disallowance might be perceived as the Commonwealth Parliament unilaterally disallowing instruments that are part of a multilateral outcome.

- the enabling legislation for the instrument, the Act, facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States; and authorises the instrument to be made by the body or for the purposes of the body or scheme (see s 44(1) and s 54(1) of the *Legislation Act 2003*).
- it is an instrument that is prescribed by regulation for the purposes of paragraph 44(2)(b) and 54(2)(b) of the *Legislation Act 2003* (see item 23A, subsection (d) to the table in section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*, and item 44A, subsection (d) to the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*).

PURPOSE AND OPERATION

Under section 23 of the Act, an NVR registered training organisation must satisfy the Requirements as a condition of their registration. The term “VET Quality Framework” is defined in section 3 of the Act to include requirements set out in the Fit and Proper Person Requirements. As a result, requirements in the Act for the National VET Regulator to consider, and NVR registered training organisations to comply with the VET Quality Framework, include the requirements set out in the Fit and Proper Person Requirements.

The Instrument amends the Standards for RTOs by repealing and replacing the existing Requirements in Schedule 3 of the Standards and inserting a new Schedule 3 with new Requirements. The purpose of the provisions in new Schedule 3 is to strengthen the range of matters that may be considered by VET Regulators when assessing whether those persons who exercise a degree of control or influence over the management or operation of a training organisation are people in whom the public are likely to have confidence in their suitability to manage, or be involved with, an organisation that provides or assesses national VET qualifications.

The Instrument will amend the Standards to clearly set out and expand the extent of the National VET Regulator’s powers to scrutinise NVR registered training organisations and the propriety of those persons who exercise a degree of control or influence over the management or operation of the training organisation. This will allow for the National VET Regulator to make informed assessments and regulatory decisions, thus ensuring public confidence in the integrity of the people managing, providing and overseeing VET.

The Instrument directly implements recommendations from reviews of the Act and the VET sector in 2018 and 2019 - ‘*All eyes on quality: Review of the National Vocational Education and Training Regulator Act 2011 report*’ by Professor Valerie Braithwaite, and ‘*Strengthening Skills: Expert Review of Australia’s Vocational Education and Training System*’ by the Hon Steven Joyce. The reviews sought to strengthen the quality and integrity of the

VET sector by placing more rigorous legislative requirements on registered training organisations at the point of registration and throughout the registration period.

The Instrument will align requirements with similar FPPRs under the *Tertiary Education Quality and Standards Agency Act 2011* (TEQSA Act) to ensure consistency of regulation for multisector providers and providers registered under the *Education Services for Overseas Students Act 2000* (ESOS Act). The Instrument will:

- Clearly specify and broaden the range of matters which the National VET Regulator may consider when assessing whether persons who exercise a degree of control or influence over the management or operation of a training organisation are suitable persons to manage, or be involved with, an organisation that provides or assesses national VET qualifications. This will consequently broaden the National VET Regulator's scope of assessment under the Act, by allowing the Regulator to consider a greater range of matters when determining whether an NVR registered training organisation complies with the conditions of registration set out in the Act.
- Enable the National VET Regulator to apply increased scrutiny on NVR registered training organisations and make informed assessments and regulatory decisions, thus ensuring public confidence in the integrity of the people managing and overseeing VET.
- Enable the National VET Regulator to consider whether relevant persons have previously been found guilty an offence against, or ordered to pay a pecuniary penalty under, a law of the Commonwealth or a State or Territory, regardless of whether a conviction was recorded.
- Clarify that the National VET Regulator must have regard to, where it considers it to be relevant, all breaches of conditions of registration in Subdivision B Part 2 of the Act as well as conditions imposed under the Act when determining whether an organisation complies with the Requirements.
- Expand the false and misleading provisions to include consideration of information given to the tuition assurance administrator, the Department, the Minister, the Tertiary Education Quality and Standards Agency (TEQSA) and state and territory authorities that deal with subsidised funding arrangements. This also includes information given to the Tuition Protection Service Director, including in the Director's capacity as the VSL Tuition Protection Director and the Higher Education Tuition Protection Director.
- Expand scope of the Requirements to allow for the National VET Regulator to consider compliance with a list of specific and relevant laws, where non-compliance

with those laws may indicate that a relevant person does not meet the Requirements.

- Enable the National VET Regulator to have regard to conduct that suggests a deliberate pattern of unethical behaviour; is likely to undermine the public's confidence in a relevant person's suitability to be involved in an organisation that provides, assesses or issues nationally recognised qualifications.
- Maintain the general references in the Standards for RTOs to 'VET Regulator' and 'registered training organisations' (as opposed to 'NVR RTOs' and 'National VET Regulator'). This terminology is being maintained to allow for state regulators who are not bound by the Act, but who perform VET regulatory functions in their particular state, to easily adopt the Requirements for their own purposes. The Requirements, consistent with the note to Part 1 of the Standard for RTOs, do not purport to bind these particular state regulators, nor do they impose any additional powers, functions or obligations upon them.

REGULATORY IMPACT

The Office of Impact Analysis (OAI) has advised that an Impact Analysis is not required. OAI reference ID: OIA23-05152.

COMMENCEMENT

The Instrument commences the day after it is registered on the Federal Register of Legislation.

CONSULTATION

The National VET Regulator, Western Australia Training Accreditation Council, Victoria Registration and Qualification Authority, and the state and territory governments have been consulted regarding the making of the Instrument. Feedback was considered and incorporated into the Instrument where appropriate.

As required under subsections 185(1) and 186(1) of the Act, the Ministerial Council was consulted on the Instrument and gave its agreement in the form specified under section 191 of the Act.

STANDARDS FOR REGISTERED TRAINING ORGANISATIONS AMENDMENT (FIT AND PROPER PERSON) INSTRUMENT 2023

EXPLANATION OF PROVISIONS

Clause 1: Name of legislative instrument

1. This clause provides that the name of the Instrument is the *Standards for Registered Training Organisations Amendment (Fit and Proper Person) Instrument 2023 (the Instrument)*.

Clause 2: Commencement

2. This clause provides that the whole of the Instrument commences on the day after the Instrument is registered on the Federal Register of Legislation.

Clause 3: Authority

3. This clause provides that the Instrument is made under subsections 185(1) and 186(1) of the Act.

Clause 4: Schedule

4. This clause provides that any instruments specified in a Schedule to the Instrument are amended or repealed according to the Schedule. The Instrument consists of one schedule which amends the *Standards for Registered Training Organisations (RTOs) 2015 (the Standards for RTOs)*.

Schedule 1 – Amendments

Item 1: Part 1, Glossary

This item inserts a new definition of ‘government training contract’ into the Glossary of the Standards for RTOs. This definition informs the meaning of proposed paragraph 3(4)(b) in Schedule 1 of the Instrument, which relates to the breach of a government training contract. For the purposes of this paragraph, ‘government training contract’ is broadly defined to mean a funding contract between a registered training organisation and the Commonwealth or a state or territory which concerns the provision vocational education and training by the registered training organisation.

Item 2: Schedule 3

This item repeals the existing Fit and Proper Person Requirements as set out in schedule 3 to the Standards for RTOs and substitutes replacement Fit and Proper Person Requirements – titled ‘Schedule 3 - Fit and Proper Person Requirements’. The sections in proposed new Schedule 3 are discussed below.

Section 1: Application of Fit and Proper Person Requirements

This section provides that the VET Regulator must have regard to all the matters it considers relevant, which are specified in the replacement Schedule (i.e. Schedule 3 - Fit and Proper Person Requirements) when determining whether a person is a fit and proper person for the purposes of registration, renewing registration or maintaining registration as a registered training organisation. These purposes are determined according to the requirements imposed on NVR registered training organisations by the Act.

Subsection 1(2) provides that, where the VET Regulator has had regard to all the matters it considers relevant in the Schedule and concluded that an executive officer, high managerial agent (defined in section 3 of the Act) or person which exercises a degree of control or influence over the management or direction of the RTO are not a fit and proper person, then the RTO will not be assessed as a fit and proper person.

While section 23 of the Act says that an 'NVR registered training organisation must satisfy the Fit and Proper Person Requirements', subsection 186(1) of the Act extends to the assessment of 'persons'. A note to the provision clarifies that, consistent with section 2C of the *Acts Interpretation Act 1901*, a person includes an individual. As consequence, the provision provides that the Fit and Proper Person Requirements (**the Requirements**) apply to executive officers, high managerial agents and any person who exercises a degree of control or influence over the management or direction of the registered training organisation.

It is envisaged that this provision will extend to influential persons within a particular registered training organisation, including managers and directors of the organisation. These persons will be assessed according to the Requirements to assess whether the organisation, as a whole, satisfies the Requirements.

Item 2: Compliance with law

This section provides that the VET Regulator may have regard to instances where an offence under a law of the Commonwealth or a State or Territory is proven (or a person is ordered to pay a pecuniary penalty) but no conviction is recorded. Subsection 2(2) clarifies that in addition to the seriousness of the offence, or the nature of the pecuniary penalty, the VET Regulator may also have regard to time elapsed since the offence occurred, whether the person is currently involved in proceedings before a court or tribunal, and whether the person has been found guilty of a foreign offence.

A note to subsection 2(1) makes it clear that the VET Regulator's ability to consider non-recorded convictions does not affect the operation of Part VIIC of the *Crimes Act 1914*, which relates to the non-disclosure of spent convictions. This means that, consistent with Part VIIC, a VET Regulator does not have the power to compel a person to disclose a spent conviction.

Item 3: Management history

This section provides that the VET Regulator may have regard to whether the person has had:

- their registration;
- application for registration or renewal;
- approval as a course provider or VET provider; or
- funding arrangements with a State or Territory for the provision of education, cancelled, revoked, suspended or rejected.

Additionally, the VET Regulator may have regard to whether a person has breached; a condition of registration; a condition imposed on their registration; their approval as a course provider.

Subsection 3(3) provides that the VET Regulator may also have regard to whether a person has breached conditions under other Commonwealth legislation, specifically the *Education Services for Overseas Students Act 2000*; or the *Tertiary Education Quality and Standards Agency Act 2011* (TEQSA Act)). These Acts are included because they are relevant and relate to the services provided by registered training organisations – i.e. the provision of education services and tertiary education in Australia.

Subsection 3(4) allows for the VET Regulator to consider a person's past involvement: in the business of delivering courses or other services on behalf of persons who have been the subject of regulatory action mentioned in section 3 or entities who have previously breached a government training contract. The term 'government training contract' is defined in the Instrument (item 1) and will be inserted into the Glossary of the Standards for RTOs.

Finally, subsection 3(5) permits the VET Regulator to consider whether a person has been disqualified from managing corporations under Part 2D.6 of the *Corporations Act 2001*.

The purpose of these provisions is to give the VET Regulator broad remit (including by facilitating consideration of relevant ancillary Commonwealth legislative schemes) to determine whether those persons who exercise a degree of control or influence over the management or operation of a training organisation are suitable persons to manage, or be involved with, an organisation that provides or assesses national VET qualifications.

Item 4: Financial record

This section provides that the VET Regulator may have regard to the financial record of the registered training organisation or person and is expanded from the previous version of the Requirements to include instances where the person has outstanding debts to the Commonwealth, or has been placed under external administration as defined in the *Corporations Act 2001*.

The purpose of this section is to ensure that the VET Regulator can give consideration to the financial viability of registered training organisations and those persons responsible for operating and managing the organisations.

Item 5: Provision of information

This section provides that the VET Regulator may have regard to whether the person has provided false or misleading information to a VET Regulator in addition to other entities including the Tuition Protection Services Director (including in their capacity as the VSL Tuition Protection Director under the *VET Student Loans Act 2016* and the Higher Education Tuition Protection Director under the *Higher Education Support Act 2003*), the Department, the Minister, the Tertiary Education Quality and Standards Agency, or an authority of a state or territory that deals with subsidy funding arrangements for education.

These listed entities share intelligence about registered training organisations to the extent permitted by law. This section will therefore allow the VET Regulator to be made aware of false or misleading statements and information provided to these entities by relevant persons. It is envisaged that the VET Regulator will then be able to use this information to make an informed decision in accordance with the Requirements.

Item 6: Previous conduct and involvements

This section provides that the VET Regulator may have regard to whether the person has previously been found not to be a fit and proper person under the Acts listed under subsection 6(1). This list of Acts aligns closely with similar provisions in the TEQSA Act and additionally these Acts concern subject matter (i.e. tertiary education, and non-tertiary education) that closely relates to the provision and regulation of VET. The purpose of this provision is therefore to permit the VET Regulator to consider findings relating to a relevant person in respect of any circumstances in which they have previously provided educational services under similar Commonwealth legislative frameworks.

Subsections 6(2) and 6(3) have broad application and permit the VET Regulator to consider whether the person has engaged in conduct that reasonably suggests a deliberate pattern of unethical behaviour, and any other matter the VET Regulator considers relevant. The purpose of these provisions is to make it clear that where a matter which is reasonably relevant to whether a person is fit and proper, and is not otherwise referable to a specific provision in the Requirements, then that matter can still be considered by the VET Regulator for the purposes of the Requirements.

Item 7: Additional considerations

Section 7 also had broad application and permits the VET Regulator to consider whether the public is unlikely to have confidence in the person's suitability to be involved in an organisation that provides, assesses or issues nationally recognised qualifications.

The purpose of this provision is to make it clear that public confidence in an organisation's provision and assessment of nationally recognised qualifications is something that the VET

Regulator may reasonably consider for the purposes of determining whether the relevant person is a fit and proper person in accordance with the Requirements.