

**Australian Skills Quality Authority's submission to
the Review of the *National Vocational Education and
Training Regulator Act 2011***

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1. Executive Summary

- 1.1 The Australian Skills Quality Authority (ASQA) commenced operations on 1 July 2011 as the national vocational education and training (VET) regulator formed under the *National Vocational Education and Training Regulator Act 2011* (NVETR Act).
- 1.2 The Review provides ASQA an opportunity to reflect upon the NVETR Act and its supporting legislative instruments in light of ASQA's experience of regulating the majority of Australia's registered training organisations (RTOs) against a VET market which has evolved considerably in recent years.
- 1.3 This submission is structured to provide a basic context of the VET market, and ASQA's approach to regulation to frame a series of proposed reforms. The contextual and background components of the submission are contained in Part Two to Five and canvass the following:
- 1.3.1 An overview of VET in Australia – this includes governance arrangements, industry liaison, nationally recognised training products, VET regulators, and third-party arrangements with RTOs;
- 1.3.2 An explanation of regulation in the VET system – this includes the establishment, objects, and functions of ASQA, and an overview of the NVETR and its supportive legislative instruments;
- 1.3.3 ASQA's profile – this includes ASQA's organisational structure, resourcing and staffing profile, resourcing history and regulatory activity; and
- 1.3.4 ASQA's regulatory approach – this includes the legislative and policy context for ASQA's regulatory approach, ASQA's Regulatory Risk Framework, the management of systemic and provider risk, and engagement with industry and other stakeholders.
- 1.4 The proposed reforms in Part Six of this submission go to proposed changes to ASQA's regulatory approach and suggestions about the operation of VET system more broadly, which in some respects require or would be enhanced through changes to the NVETR Act and supporting instruments. The proposed reforms are grouped into four categories:
- 1.4.1 Entry to market and initial period of registration: A large part of ASQA's regulatory effort and resources are committed to market entry testing of initial applicants for registration and verification of the actual performance of newly registered RTOs (initial and compliance audits). These proposed reforms seek to raise the bar for

entry into the VET market and ensure that training organisations that are newly registered do not move into new training courses until quality VET delivery has been demonstrated. Key reforms in this category are:

- (a) Applicants for initial registration or renewal of registration should be required to demonstrate a genuine commitment to providing high quality VET and the capability to do so;
- (b) Financial viability requirements should be reformed and made fit for purpose;
- (c) Tribunal reviews of decisions to reject applications for initial registration should have regard only to the circumstances at the time the reviewable decision is made (i.e. not allow the introduction of new material);
- (d) Applications to add training products to scope of registration should only be allowable after the new training organisation has been delivering training and assessment for 12 months;
- (e) Strengthened evidence requirements should be imposed for providers seeking to change its scope of registration after 12 months of delivery (but prior to the finalisation of any compliance audit);
- (f) *Fit and Proper Person Requirements 2011* (Fit and Proper Person Requirements) should be amended – including by clarifying that the requirements apply to officers and high managerial agents; and
- (g) Amendments to the course accreditation requirements should be explored to enhance transparency and validate the efficacy of VET accredited courses.

1.4.2 Quality – not only compliance: ASQA has reformed its regulatory approach to focus more strongly on the actual performance and behaviours of RTOs in delivering VET and not simply an RTO's compliance with standards. This commitment to examine quality and not only compliance is the basis of the introduction in 2016 of the student-centred audit approach, but it is recognised more needs to be done. These reforms proposed seek to build upon market entry reforms and endeavour to foster regulatory partnerships between various government and industry stakeholders to further quality VET provision. Key reforms in this category are:

- (a) The NVETR Act be amended so that RTOs that do not commence providing VET within 12 months of being registered (or during registration cease to provide training for a 12 month period) have their registration lapse automatically;

- (b) The NVETR Act and *Standards for Registered Training Organisations 2015* (RTO Standards) be aligned so that third-party services in the provision of training and assessment can only be done by an RTO;
- (c) Consideration be given to initiatives that promote industry bodies to offer quality assurance and endorsement services to a broad range of RTOs;
- (d) The RTO Standards be amended to provide minimum specifications for participation in professional development; and
- (e) Amendments to the *Data Provision Requirements 2012* (Data Provision Requirements) and *National VET Provider Collection Data Requirements Policy* (Data Policy) be explored, which would improve ASQA's ability to regulate quality outcomes, as well as the inclusion of a new condition of registration to outline the requirements of RTOs in relation to performance against quality indicators and completion/attrition rates.

1.4.3 Consumer protection: Consumer protection for VET students and the end users of VET skills is fragmented and difficult to navigate given the differing regimes between states and different avenues to pursue disputes with an RTO open to students depending upon whether government assistance has been accessed. The proposed reforms go to enhancing consumer information to make informed choices and improving External Dispute Resolution (EDR) mechanisms for consumers. The proposals do not seek to move ASQA into a consumer protection role, but seek a better alignment between strengthened consumer protection mechanisms and the quality VET mandate of ASQA. Key reforms in this category are:

- (a) Consider making membership of an approved EDR scheme a condition of registration akin to the requirement in the financial services, energy, and telecommunication sectors;
- (b) Action to improve information to students and other consumers, including through the requirement for a formal statement of disclosure to prospective students;
- (c) Define the term 'amount of training' (which is currently used in the RTO Standards) and better incorporate the requirement into nationally recognised training requirements and documentation; and
- (d) Consider removal of the requirement that ASQA direct an RTO to cancel qualifications and statements of attainment prior to ASQA taking action to cancel qualifications, the addition of powers for ASQA to direct RTOs to undertake remedial action for affected students, and the treatment of

qualification holders as a class rather than on an individual by individual basis.

1.4.4 Provider closures: The closure of RTOs, either involuntarily (through cancellation by ASQA or insolvency) or for voluntary reasons has nearly doubled over the last two years. When closing providers are particularly large or close rapidly, the level of activity necessary to effectively support students is causing stress on all elements of the VET system, including ASQA. Reforms proposed in this section seek to clarify the role of the regulator, tuition assurance providers, and the RTO on closure, improve the management of student records, and stop re-entry into the market of the people responsible for the poor behaviour leading to the closures. Key reforms in this category are:

- (a) Amendments to the definition of 'student records' to limit the provision of paper-based records, and specify AVETMISS compliant software for the storage of electronic student records;
- (b) Providing ASQA with the power to issue banning orders to RTO executive officers and high managerial agents for a specified period of time; and
- (c) Increasing the time within which prosecution for offences under the NVETR Act must be commenced to 6 years (i.e. the same as the time allowed for civil penalty proceedings to commence).

1.5 A summary of recommended amendments to the NVETR Act and supporting instruments which are more operational in nature than the public policy orientated proposed reforms contained in Part 6 of this submission is at Attachment 2, and has been provided separately to the reviewer.

2. The Review

2.1 The Review has been commissioned by the Australian Government to assess the suitability of the NVETR legislative framework and its capacity to support responsive, effective, and efficient regulation which ensures the quality of the VET sector into the future.

2.2 The Review is being conducted by Professor Valerie Braithwaite from the Australian National University's School of Regulation and Global Governance. Professor Braithwaite is supported by an Expert Advisory Panel comprising:

2.2.1 Dr Subho Banerjee, Australian Government Department of Education and Training;

2.2.2 Mr John Pollaers, Australian Industry and Skills Committee (AISC);

2.2.3 Mr Simon Walker, TAFE International Western Australia;

- 2.2.4 Professor Nicholas Saunders, Tertiary Education Quality and Standards Agency (TEQSA);
 - 2.2.5 Ms Patricia Neden, Innovation and Business Skills Australia;
 - 2.2.6 Mr Rod Camm, Australian Council for Private Education and Training (ACPET);
 - 2.2.7 Mr Craig Robertson, TAFE Directors Australia (TDA);
 - 2.2.8 Ms Jodi Schmidt, TAFE Queensland; and
 - 2.2.9 Professor Peter Noonan, Tertiary Education Policy (Mitchell Institute).
- 2.3 The objectives of the Review include:
- 2.3.1 Shifting the regulatory framework towards outcomes-based regulation;
 - 2.3.2 Identifying any legislative changes needed to support a more efficient, risk-based approach to compliance;
 - 2.3.3 Enabling swift enforcement of sanctions when poor quality training is detected;
 - 2.3.4 Ensuring adequate information is available to support VET consumers' choices regarding training; and
 - 2.3.5 Administrative improvements to the NVETR Act.
- 2.4 The terms of reference for the Review are set out in Attachment 1.

3. Glossary of Terms

AAT	Administrative Appeals Tribunal
ACPET	Australian Council for Private Education and Training
AISC	Australian Industry and Skills Committee
ASL	Average Staffing Level
ASQA	Australian Skills Quality Authority
ATO	Australian Taxation Office
AQF	Australian Qualifications Framework
CISC	COAG Industry and Skills Council
COAG	Council of Australian Governments

CRICOS	Commonwealth Register of Institutions and Courses for Overseas Students
Data Policy	<i>National VET Provider Collection Data Requirements Policy</i>
Data Provision Requirements	<i>Data Provision Requirements 2012</i>
EDR	external dispute resolution
ELICOS	English Language Intensive Courses for Overseas Students
ELT	English Language Training
ESOS	Education Services for Overseas Students
ESOS Act	<i>Education Services for Overseas Students Act 2000 (Cth)</i>
Financial Viability Risk Assessment Requirements	<i>Financial Viability Risk Assessment Requirements 2011 (Cth)</i>
Fit and Proper Person Requirements	<i>Fit and Proper Person Requirements 2011 (Cth)</i>
HESA	<i>Higher Education Support Act 2003 (Cth)</i>
IBSA	Innovation and Business Skills Australia
IDR	internal dispute resolution
IRC	Industry Reference Committee
NCVER	National Centre for Vocational Education Research
NEAS	National ELT Accreditation Scheme
NVETR Act	<i>National Vocational Education and Training Regulator Act 2011 (Cth)</i>
NVETR Regulations	<i>National Vocational Education and Training Regulator Regulations 2011 (Cth)</i>
Regulator Standards	<i>Standards for VET Regulators 2015</i>
RTO	registered training organisation

RTO Standards	<i>Standards for Registered Training Organisations 2015</i>
SSO	Skills Service Organisation
Standards for Training Packages	<i>Standards for Training Packages 2012</i>
Standards for VET Accredited Courses	<i>Standards for VET Accredited Courses 2012</i>
TAE	Training and Education (TAE) Training Package
TAFE	Technical and Further Education
TDA	TAFE Directors Australia
TEQSA	Tertiary Education Quality and Standards Agency
USI	Unique Student Identifier
VET	vocational education and training
VSL	VET Student Loans
VSL Act	<i>VET Student Loans Act 2016 (Cth)</i>
VSL Rules	<i>VET Student Loans Rules 2016 (Cth)</i>
VRQA	Victorian Registration and Qualifications Authority
WA TAC	Western Australia Training Accreditation Council

4. Overview of the VET sector

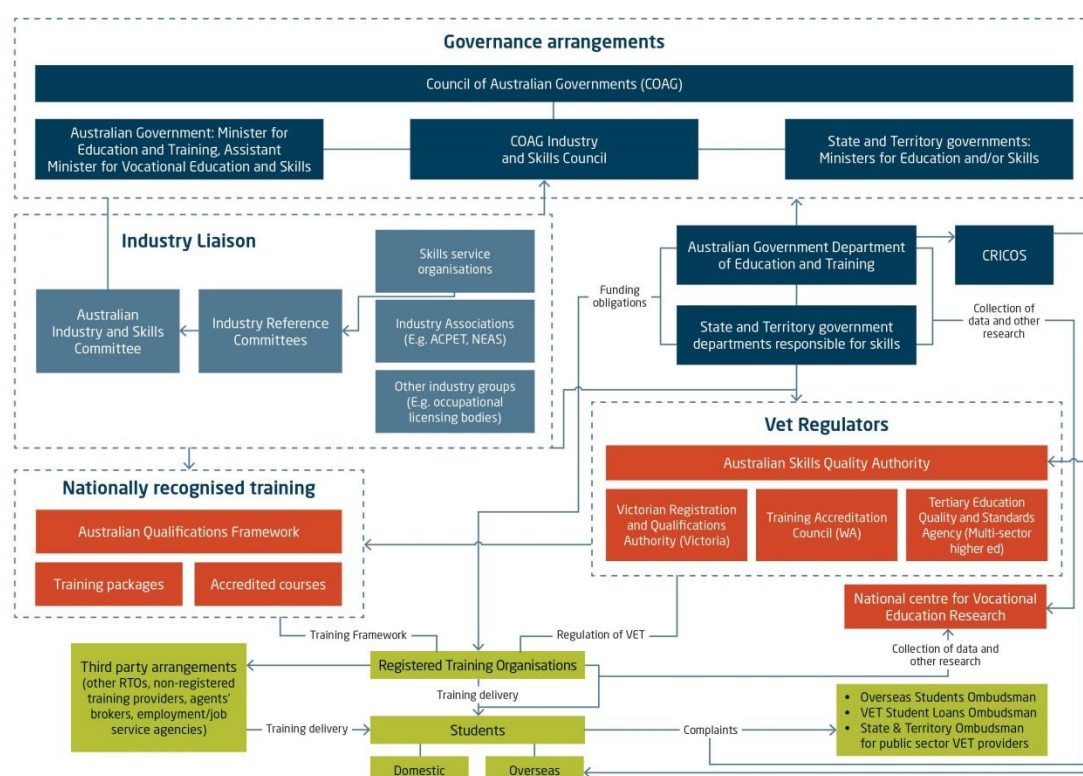
- 4.1 The provision of training and assessment leading to nationally recognised qualifications and skill sets is a multifaceted and complex endeavour. In governance terms, VET is a shared responsibility between interlinked government, industry, and individual stakeholders.
- 4.2 VET programs on offer are diverse and include:
- 4.2.1 Nationally recognised portable qualifications endorsed within training packages which are developed by and for industry;
 - 4.2.2 VET accredited courses which are developed in response to a particular industry or niche need where no training package qualification exists. These courses are accredited by a VET regulator and are also nationally recognised;
 - 4.2.3 Skill sets which are groupings of nationally recognised units of competency combined to provide a clearly defined statement of the skills and knowledge required by an individual to meet industry needs, or a licensing or regulatory requirement;
 - 4.2.4 Non-accredited training developed to meet individual or enterprise needs; and
 - 4.2.5 Foundation skills in language, literacy and numeracy, and English language programs.¹
- 4.3 In 2016, there were an estimated 4.2 million students enrolled in VET, including 3.7 million program enrolments with 4,279 training providers.² These RTOs are broadly categorised as public, private, community, and enterprise RTOs. The vast majority of RTOs are privately owned and operated.
- 4.4 Program enrolments offered in the VET sector are primarily in training package qualifications, which account for over 77 per cent of program enrolments in 2015.³
- 4.5 The VET sector has a number of ‘stakeholders’ with various roles, responsibilities and interests. Figure 1 sets out a high-level overview of the structure of the VET sector. The components are discussed in further detail below.

¹ Non-accredited training and foundation skill programs are not within the scope of the AQF and are generally not within the preview of ASQA regulatory oversight. These forms of training are often, however, captured in the description of VET programs.

² This does not include data submitted by providers reporting late. Korbel, P & Misko, J 2017, *Total VET students and courses 2016*, NCVER, Adelaide.

³ Korbel, P & Misko, J 2016, *Uptake and utility of VET qualifications*, NCVER, Adelaide.

Figure 1: Overview of VET sector

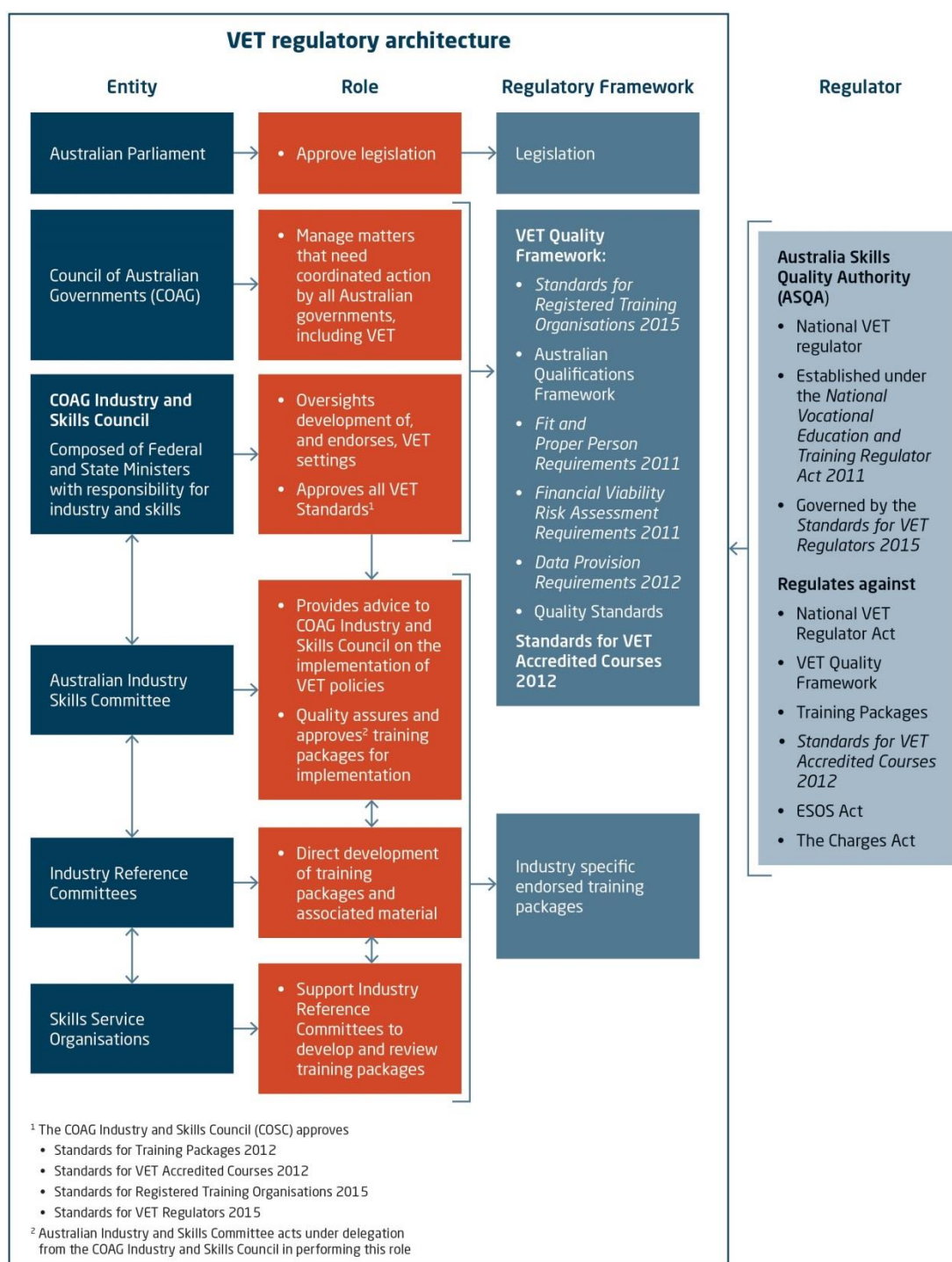


5. Governance Arrangements

- 5.1 At the national level, the Council of Australian Governments (COAG) Industry and Skills Council (CISC) made up of Commonwealth, state, and territory ministers, is responsible for industry and skills policy and programs, and provides leadership and direction for the VET sector.
- 5.2 Collectively, Australian governments have roles in the governance, regulation and support of the national VET sector, including funding responsibilities. Governments, through the CISC and on the advice of the AISC, set the regulatory framework for the provision of VET.

There are a number of components to the VET regulatory system with different parameters against which regulation occurs. Figure 2 sets out an overview of the VET regulatory architecture.

Figure 2: VET Regulatory Architecture



6. Industry liaison

- 6.1 A key principle underpinning the Australian VET system is the commitment to competency-based training. Competency-based training is centred on demonstrated competence against industry-defined standards of performance rather than the delivery of a mandated curriculum. Conceptually, competency-based training is focussed on learner outcomes rather than training provider inputs.
- 6.2 The governance framework embodies the concept of competency-based training through:
- 6.2.1 Providing industry with a formal role in determining the job skills and competencies required for industry specific jobs, which are detailed in industry specific training packages; and
 - 6.2.2 Allowing RTOs the flexibility to determine training and assessment strategies in response to industry and learner needs.
- 6.3 As a result, industry is given a formal role in the governance of the VET sector (Figure 1). The formal roles of the industry bodies are set out below:
- 6.3.1 The AISC comprises industry leaders nominated by Commonwealth, state, and territory ministers with responsibility for skills and training. It provides industry with a formal role in advising the CISC on policy directions and decision making in the VET sector. It also approves the content of industry specific training packages under a delegation from the CISC.
 - 6.3.2 Industry Reference Committees (IRCs) provide advice to the AISC. IRCs are made up of people with experience, skills, and knowledge of their particular industry sector and work to develop and review industry-specific training packages in accordance with the *Standards for Training Packages 2012* (Standards for Training Packages).
 - 6.3.3 IRCs are supported by Skills Service Organisations (SSOs), which are independent, professional service organisations.
- 6.4 In undertaking these roles, the AISC, IRCs and SSOs consult with a range of stakeholders including employers and their representatives; employees and their representatives; RTOs; and industry and occupational licensing bodies.
- 6.5 There are a range of other industry bodies representing the interests of training providers that engage with the sector, such as:
- 6.5.1 ACPET, representing the interests of private providers;

- 6.5.2 TDA, representing the interests of TAFEs;
- 6.5.3 Community Colleges Australia, representing community owned, not-for-profit education and training providers;
- 6.5.4 The Enterprise Registered Training Organisation Association Incorporated, representing RTOs and non-RTOs who deliver training primarily to their employees or volunteers, and individuals working actively as trainers, assessors or facilitators who deliver accredited training under the VET Quality Framework;
- 6.5.5 English Australia, representing member colleges that provide English language programs for international students and professionals; and
- 6.5.6 The National English language teaching (ELT) Accreditation Scheme (NEAS), providing accreditation and quality assurance services in ELT.

7. Nationally Recognised Training Products

Australian Qualifications Framework

- 7.1 The Australian Qualifications Framework (AQF) is the national policy for qualifications in the Australian education and training system.
- 7.2 An important purpose of the AQF is to describe the diverse range of qualifications offered in the three education sectors: schools, VET, and higher education. It incorporates the qualifications from each education and training sector into a single comprehensive national qualifications framework.
- 7.3 The AQF governs the development and accreditation of qualifications, and the policy requirements for issuing qualifications. As such, in relation to VET qualifications, its primary audiences are organisations:
 - 7.3.1 That develop qualifications, i.e. training package developers and VET accredited course developers;
 - 7.3.2 Authorised through legislation to accredit AQF qualifications, i.e. bodies that approve training packages and accredit VET courses; and
 - 7.3.3 Authorised through legislation to issue AQF qualifications; i.e. RTOs.
- 7.4 Developers of qualifications and accrediting bodies have to ensure qualifications meet the outcomes for a specific AQF qualification type.

Training Packages

- 7.5 The cornerstone of the Australian VET system is the key leadership role played by industry. This role includes the development of industry specific training packages. Training packages:
- 7.5.1 Are developed through consultation with industry to determine the industry-specific requirements for particular qualifications that are required to perform various job roles. These requirements are specified in competency standards, also known as units of competency; and
 - 7.5.2 Set out benchmarks to achieve a qualification, but do not dictate how they must be achieved, allowing RTOs the flexibility to determine how they will deliver training and assessment.
- 7.6 In other words, while training packages guide what skills and knowledge are to be demonstrated by a competent person, they do not dictate how the training should be conducted.
- 7.7 Under Standard 1 of the RTO Standards, ASQA regulates RTOs' compliance against the requirements of specific training packages by reviewing the training and assessment that RTOs plan and deliver for the relevant qualifications.
- 7.8 The development of training packages is governed by the Standards for Training Packages, which outline the required components for the design and development of training packages.
- 7.9 Training packages are:
- 7.9.1 Developed by SSOs under direction from IRCs;
 - 7.9.2 Submitted to the AISC for quality assurance and endorsement; and
 - 7.9.3 Overseen by the CISC.
- 7.10 Each training package contains both endorsed and non-endorsed components:
- 7.10.1 The requirements that industry specifies to be assessed are known as the 'endorsed' components. The endorsed components of a training package are units of competency; the assessment requirements associated with each unit of competency; qualifications; and credit arrangements. RTOs are required to comply with the endorsed components.
 - 7.10.2 The non-endorsed, quality assured components are called companion volumes. These volumes contain industry advice to RTOs on different aspects of implementation. A failure of an RTO to deliver against these non-endorsed

components of training packages will not of itself be a breach of any requirement, as they are advisory only.

VET accredited courses

- 7.11 In addition to training packages, the Australian VET system also uses VET accredited courses to meet industry requirements for training. VET accredited courses are also nationally recognised qualifications, and are required to be developed in consultation with industry. These courses are intended to address niche or new and emerging areas where no suitable training package qualification exists.
- 7.12 VET accredited courses are developed by course developers, which are often RTOs or private organisations with a particular interest and expertise in specific industry areas. Proposed VET accredited courses are submitted to a VET regulator for assessment and accreditation.
- 7.13 In order to be accredited, a VET course must be assessed by the regulator as compliant with the *Standards for VET Accredited Courses 2012* (Standards for VET Accredited Courses) and the AQF.
- 7.14 These standards specify that qualifications will be based on ‘an established industry, enterprise, education, legislative or community need’.⁴
- 7.15 VET accredited courses can only be delivered by an RTO approved to deliver the specific course or courses.

8. VET Regulators

- 8.1 Regulatory responsibility for RTOs and the accreditation of courses rests with ASQA and two non-referring state regulators.
- 8.2 ASQA is the regulatory body for RTOs in:
- 8.2.1 The Australian Capital Territory;
 - 8.2.2 New South Wales;
 - 8.2.3 The Northern Territory;
 - 8.2.4 South Australia;
 - 8.2.5 Queensland; and
 - 8.2.6 Tasmania.

⁴ Course standard 7 of the Standards for VET Accredited Courses.

- 8.3 ASQA is also the regulatory body for RTOs in Victoria and Western Australia that offer courses to:
- 8.3.1 International students, on or offshore; and/or
 - 8.3.2 Domestic students, including through offering courses online, in the Australian Capital Territory, New South Wales, the Northern Territory, South Australia, Queensland or Tasmania.
- 8.4 Separate regulators in Victoria and Western Australia continue to register and regulate RTOs which deliver training to domestic students residing in those states:
- 8.4.1 In Victoria, the Victorian Registration and Qualifications Authority (VRQA); and
 - 8.4.2 In Western Australia, the Training Accreditation Council (WA TAC).

9. RTOs and Third Parties

- 9.1 A training organisation can only provide a VET course and issue an AQF qualification if it is granted registration by a VET regulator. To secure and then maintain registration, the training organisation must operate consistently with a range of responsibilities sourced from legislation and supporting instruments which go to the standards the RTO is to satisfy in its operations, extending from marketing, the recruitment and enrolment of students, the provision of training, the assessment of skills and competencies, and the issuing qualifications. As of 30 June 2017, Australia had 4593 RTOs.
- 9.2 The regulatory system permits a range of services and activities of RTOs to be conducted by third parties. Third parties are akin to subcontractors commissioned by an RTO to perform services such as marketing, student recruitment, and training and assessment on behalf of an RTO.⁵
- 9.3 Third parties are not directly regulated by VET regulators. Rather, the regulated RTO is responsible for the performance of services provided by third parties and any failure by a third-party is a failure of the responsible RTO.
- 9.4 Additional requirements and limitations on the use of third parties are contained in state VET funding programs and have been introduced by the Commonwealth in relation to approved VET Student Loan (VSL) providers. RTOs are obliged under the provision of the RTO Standards to advise VET regulators of their third-party arrangements.⁶

⁵ Section 116 of the NVETR Act makes it an offence for a person to provide all or part of a VET course if the person is not an NVETR RTO. The interplay between this section and the RTO Standards is discussed in Part 6 of this submission.

⁶ Clause 8.3 of the RTO Standards.

10. Establishment of ASQA

- 10.1 In February 2011, COAG approved the Intergovernmental Agreement for Regulatory Reform of Vocational Education and Training. This agreement provided the framework to establish national VET regulation, including the establishment of the national VET regulator and the National Skills Standards Council. Section 51(xxxvii) of the Australian Constitution permits the Commonwealth to legislate on matters referred to the Commonwealth by any state. ASQA's establishment as the national VET regulator has involved the referral of powers to the Commonwealth from all states (excepting Victoria and Western Australia), as set out in this agreement.
- 10.2 The states did not grant the Commonwealth a plenary power to legislate on all matters related to VET. Rather, the power referred to the Commonwealth the specific power to:
- 10.2.1 Register and regulate RTOs;
 - 10.2.2 Accredit VET courses;
 - 10.2.3 Issue and cancel VET qualifications or statements of attainment;
 - 10.2.4 Make standards to be complied with by a VET regulator;
 - 10.2.5 Collect, publish, and share information about VET; and
 - 10.2.6 Investigate, sanction, and take enforcement action in relation to any of the above.
- 10.3 The exercise of the Commonwealth's constitutional power provides for ASQA's operation in the Australian Capital Territory and the Northern Territory.⁷
- 10.4 The introduction of national regulation sought to build on the quality and consistency in the VET sector and support the labour market and national productivity agendas by:
- 10.4.1 Building confidence in the quality and consistency of assessment and training outcomes of VET qualifications which in turn supports the confidence in the abilities of VET graduates;
 - 10.4.2 Maximising consistency in the application of national standards and regulatory activity in all jurisdictions;

⁷ Section 122 of the Constitution. The NVETR Act also applies in Australia's external territories such as Norfolk Island and the Indian Ocean territories.

- 10.4.3 Maximising consistency in the application of sanctions and the treatment of low quality RTOs;
- 10.4.4 Providing clear lines of accountability and responsibility for quality of VET; and
- 10.4.5 Ensuring a coordinated response to emerging quality issues in the sector.

11. Objects and functions of ASQA

- 11.1 ASQA is established under section 155 of the NVETR Act. The objects of the NVETR Act under section 2A are to:
 - 11.1.1 Provide for national consistency in the regulation of VET;
 - 11.1.2 Regulate VET using a standards-based quality framework and risk assessments where appropriate;
 - 11.1.3 Protect and enhance quality, flexibility, and innovation in VET, and Australia's reputation in VET nationally and internationally;
 - 11.1.4 Provide a regulatory framework that encourages and promotes a VET system that is appropriate to meet Australia's social and economic needs for a highly educated and skilled population;
 - 11.1.5 Protect students undertaking, or proposing to undertake, Australian VET by ensuring the provision of quality VET; and
 - 11.1.6 Facilitate access to accurate information relating to the quality of VET.
- 11.2 Under section 157 of the NVETR Act, ASQA has the following functions:
 - 11.2.1 To register organisations as RTOs;
 - 11.2.2 To accredit courses that may be offered and/or provided by RTOs;
 - 11.2.3 To carry out compliance audits of RTOs;
 - 11.2.4 To promote, and encourage the continuous improvement of, an RTO's capacity to provide a VET course or part of a VET course;
 - 11.2.5 To advise and make recommendations to the Minister on matters relating to VET;
 - 11.2.6 To advise and make recommendations to the state or territory Education Minister on specific matters relating to VET in the state or territory;

- 11.2.7 To advise and make recommendations to the Ministerial Council on general matters relating to VET in all jurisdictions;
 - 11.2.8 To collect, analyse, interpret, and disseminate information about VET;
 - 11.2.9 To publish performance information, of a kind prescribed by the *National Vocational Education and Training Regulator Regulations 2011* (NVETR Regulations), relating to RTOs;
 - 11.2.10 To conduct training programs relating to the regulation of RTOs and/or the accreditation of courses;
 - 11.2.11 To enter into arrangements with occupational licensing bodies, other industry bodies, or both, for the purpose of ensuring compliance by RTOs with the NVETR Act;
 - 11.2.12 To cooperate with a regulatory authority of another country that has responsibility relating to the quality or regulation of VET for all, or part, of the country;
 - 11.2.13 To develop relationships with its counterparts in other countries;
 - 11.2.14 To develop key performance indicators, to be agreed by the Minister, against which ASQA's performance can be assessed each financial year;
 - 11.2.15 To develop service standards that ASQA must meet in performing its functions;
 - 11.2.16 Any other function relating to VET that is set out in a legislative instrument made by the Minister; and
 - 11.2.17 Such other functions as are conferred on ASQA by or under the NVETR Act, the *Education Services for Overseas Students Act 2000* (ESOS Act) or any other law of the Commonwealth.
- 11.3 The functions of ASQA are expanded upon below.

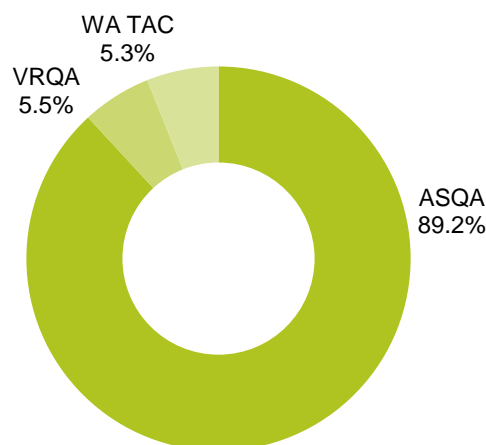
12. ASQA's functions

RTO Regulation

- 12.1 The NVETR Act specifies the conditions of registration for an RTO and creates the legislative framework for the regulation of RTOs and the registration process. Part 2, Division 1, Subdivision B of the NVETR Act provides for the conditions of registration which are:
- 12.1.1 Compliance with the VET Quality Framework, including the:

- 12.1.2 RTO Standards;
 - 12.1.3 Quality Standards;
 - 12.1.4 AQF;
 - 12.1.5 Data Provision Requirements;
 - 12.1.6 Fit and Proper Person Requirements (which, as of 2015, are part of the RTO Standards); and
 - 12.1.7 *Financial Viability Risk Assessment Requirements 2011* (Financial Viability Risk Assessment Requirements);
 - 12.1.8 Material change notification obligations;
 - 12.1.9 Compliance with student assistance laws;
 - 12.1.10 Compliance with regulator information requests;
 - 12.1.11 Cooperation with the regulator:
 - 12.1.12 Compliance with regulator general directions; and
 - 12.1.13 Other conditions the regulator may impose.
- 12.2 As at 30 June 2017, ASQA was responsible for the regulation of 4098 of the 4593 RTOs nationally. This represents 89.2 per cent of the total national provider market. The VRQA and WA TAC regulate 5.5 per cent and 5.3 per cent of the national training provider market respectively (Figure 3).

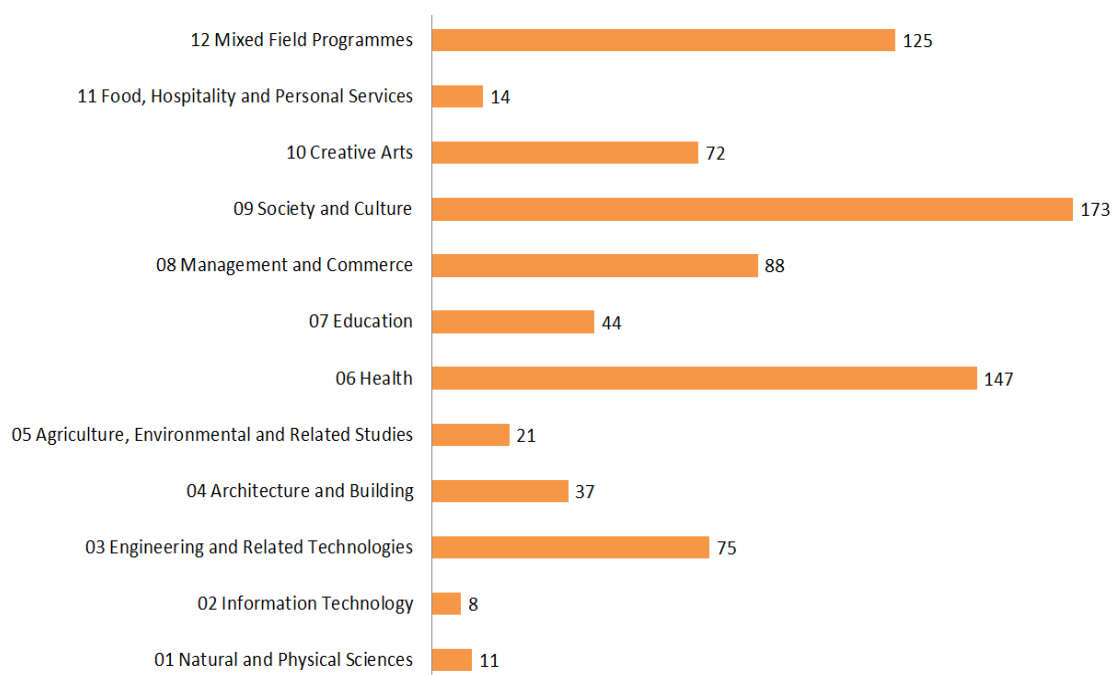
Figure 3: Regulators' market share of RTOs as at 30 June 2017



VET Course Accreditation

- 12.3 ASQA also has related responsibilities including the accreditation and regulation of VET accredited courses. In addition to training packages, the Australian VET system also uses accredited VET courses, which are nationally recognised qualifications, to meet industry requirements for training. Accredited courses have long been part of the VET system and can meet niche or emerging training needs not covered by training packages. Powers to accredit courses were referred to ASQA when it was established as the national regulator. Non-referring states, Victoria and Western Australia, retain the power to accredit courses. Regardless of whether VET accredited courses are approved by ASQA, VRQA or WA TAC, they are able to be delivered by an RTO with approval to do so.
- 12.4 VET accredited courses are developed by course developers, often RTOs or private organisations with a particular interest and expertise in specific industry areas.
- 12.5 The Standards for VET Accredited Courses apply to the course design for VET accredited courses. In deciding whether to accredit a course, ASQA must ensure that the course meets the requirements in these standards and the AQF.
- 12.6 There are a total of 811 accredited courses, 570 regulated by ASQA covering many industry areas and owned by individuals, businesses, associations, RTOs, or enterprises. In comparison, there are 67 training packages containing 1472 qualifications. The number of accredited courses per industry field is depicted in Figure 4. Accredited courses are listed on training.gov.au, although with limited detail.

Figure 4: Number of accredited courses per industry field as at 31 July 2017



- 12.7 Training packages, by contrast, are broader and high level and developed through the AISC and IRCs (supported by SSOs). RTOs are responsible for developing their own training and assessment materials for training packages so they can tailor the selection of units to suit industry need and local conditions. The contextualisation of training packages is part of its flexibility and ability to respond to industry need.

Education Services for Overseas Students

- 12.8 Under the ESOS Act, ASQA functions as an Education Services for Overseas Students (ESOS) agency.
- 12.9 The ESOS Act and associated legislative framework provides the legal framework for the provision of education services to overseas students, and sets out the registration requirements and the ongoing standards for education providers that offer courses to overseas students. ASQA, as the ESOS agency for registered VET providers, monitors providers registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) against the ESOS Act and the *National Code of Practice for Providers of Education and Training to Overseas Students 2017*, which sets out standards for the conduct of a registered provider.
- 12.10 This submission focusses on ASQA's role as the national VET regulator and does not deal in depth with ASQA's role as an ESOS agency.

13. Overview of the NVETR Act

- 13.1 Under the NVETR Act, the focus is on the regulation of RTOs, using a regulatory model based on a registration system, which governs entry into the market, provider scope of registration, and a registration renewal process to remain operating in the market.
- 13.2 Regulation based on a registration system is essentially permission based in that regulatory activity is triggered by an applicant seeking registration to be an RTO. The core provisions of the NVETR Act in Part 2 are focussed on the treatment of applications:
- 13.2.1 Division 1, Subdivision A details the process for applying to ASQA for registration as an RTO. This includes the application for registration or renewal of registration, what ASQA needs to consider, notification of a decision, issuing of a registration certificate, and stipulation of the commencement and duration of the registration;
- 13.2.2 Division 1, Subdivision B provides for the conditions of registration including, among others, compliance with the VET Quality Framework, satisfying Fit and Proper Person Requirements and Financial Viability Risk Assessment Requirements;
- 13.2.3 Division 1, Subdivision C provides for the renewal of registration; and

- 13.2.4 Division 2 provides for applications for change of scope of registration, what ASQA needs to consider, and notification of a decision.
- 13.3 The NVETR Act then sets out, at Part 2, Division 3, provisions focussed on ensuring compliance with the VET Quality Framework:
 - 13.3.1 Subdivision A allows ASQA to conduct compliance audits and reviews of an RTO's operations;
 - 13.3.2 Subdivision AA allows ASQA to give written directions to rectify breaches of conditions; and
 - 13.3.3 Subdivision B provides for a range of administrative sanctions and the conditions which may be imposed on the registration of an RTO, including natural justice requirements. The sanctions include written directions, shortening registration periods, amending the scope of registration, and suspension and cancellation of registration.
- 13.4 Under Part 4 of the NVETR Act, ASQA can cancel VET qualifications and VET statements of attainment if it is satisfied on reasonable grounds that students have not been provided with the assessment necessary to achieve the learning outcomes or competencies required.
- 13.5 Part 6 of the NVETR Act provides for a number of offences and civil penalties that include conduct:
 - 13.5.1 Outside the scope of an RTO's registration relating to providing all or part of a VET course, issuing VET qualifications or statements of attainments, or advertising all or part of a VET course;
 - 13.5.2 That is prohibited while scope of registration is suspended;
 - 13.5.3 Relating to issuing VET qualifications or statements of attainment without providing adequate assessment or ensuring that a student has satisfied requirements;
 - 13.5.4 That breaches a condition of registration;
 - 13.5.5 Relating to a failure to return a certificate of registration;
 - 13.5.6 That is prohibited if the organisation is not an NVETR registered RTO;
 - 13.5.7 That is false or misleading relating to advertising, VET courses, VET qualifications, or VET statements of attainment;
 - 13.5.8 Relating to advertising or offering VET courses without identifying the issuer of VET qualifications or statements of attainment;

- 13.5.9 Relating to a breach of a condition of accreditation; and
- 13.5.10 Relating to purportedly issuing or using VET qualifications or statements of attainment.
- 13.6 The NVETR Act also provides for investigative powers, the personal liability of an executive officer of an RTO, enforceable undertakings, infringement notices, and injunctions.
- 13.7 While the NVETR Act provides for a range of permissible actions, in practice, administrative sanctions are used more often given their more immediate impact, and relevance to deciding applications and the status of registration.
- 13.8 The NVETR Act also sets out administrative law matters in Part 9.

14. Legislative instruments

- 14.1 In performing its functions, ASQA is supported by a range of legislative instruments. Some of these are discussed below.

RTO Standards

- 14.2 Under the NVETR Act, the national training standards are established as legislative instruments, setting mandatory standards which are binding in their application. It is a condition of registration under the NVETR Act that providers are compliant with the RTO Standards at all times in order to be registered as a training provider in Australia.
- 14.3 The RTO Standards are the main instrument for assessing and monitoring RTOs to ensure quality training and assessment. They establish the requirements each RTO needs to meet, including the training and assessment requirements, and are designed to meet industry needs as set out in the training package or VET accredited course.
- 14.4 The RTO Standards do not, however, prescribe the methods by which RTOs must meet these requirements. This non-prescriptive approach:
 - 14.4.1 Allows RTOs to be flexible and innovative in its VET delivery; and
 - 14.4.2 Acknowledges that each RTO needs to operate in a way that meets the needs of its different clients and learners.
- 14.5 The Standards cover requirements an RTO must meet to ensure that:
 - 14.5.1 Standard 1: The RTO's training and assessment strategies and practices, including the amount of training, are responsive to industry and learner needs, and meet the requirements of training packages and VET accredited courses;

- 14.5.2 Standard 2: The operations of the RTO are quality assured;
- 14.5.3 Standard 3: The RTO issues, maintains and accepts AQF certification documentation in accordance with the RTO Standards and provides access to learner records;
- 14.5.4 Standard 4: Accurate and accessible information about an RTO, its services and performance is available to inform prospective and current learners and clients;
- 14.5.5 Standard 5: Each learner is properly informed about the services they are to receive, along with the rights and obligations of the learner and the RTO;
- 14.5.6 Standard 6: Complaints and appeals are recorded, acknowledged and dealt with fairly, efficiently and effectively;
- 14.5.7 Standard 7: The RTO has effective governance and administration arrangements in place; and
- 14.5.8 Standard 8: The RTO cooperates with the VET regulator and is legally compliant at all times.

Financial Viability Risk Assessment Requirements

- 14.6 This instrument sets out details of the financial viability risk of registered and applicant training organisations. The assessment of an organisation's financial viability risk is directed at evaluating the likelihood of its business continuity, and its capacity to achieve quality outcomes.

Data Provision Requirements

- 14.7 An instrument which sets out the requirements for providers in relation to the submission of data at stipulated timeframes or upon request.

Standards for VET Accredited Courses

- 14.8 The Standards for VET Accredited Courses state, inter alia, that:
 - 14.8.1 VET accredited courses are based on an established industry, enterprise, education, legislative, or community need;⁸
 - 14.8.2 The courses are not to duplicate training packages units;⁹ and
 - 14.8.3 Course owners also have obligations to monitor and evaluate the course.¹⁰

⁸ Course standard 7.1 of the Standards for VET Accredited Courses.

⁹ Course standard 7.2 of the Standards for VET Accredited Courses.

- 14.9 ASQA undertakes assessment of the course material, and ensures that consultation has occurred as required in the standards and they meet the AQF. Once registered, the training delivered under an accredited course may be audited in the same way as training delivered under a training package.
- 14.10 The content of the Standards for VET Accredited Courses have remained unchanged since approximately 1997. To maximise the alignment with training package qualifications, ASQA has adopted the content requirements from the Standards for Training Packages (specifically Standard 5) when assessing compliance of accredited courses.

Standards for VET Regulators 2015

- 14.11 The *Standards for VET Regulators 2015* (Regulator Standards) require VET regulators performing functions under the NVETR Act to:
- 14.11.1 Standard 1: Effectively and efficiently regulate RTOs which encapsulates the obligation to ensure processes and practices are fair, risk-based, transparent, responsive, consistent, and meet legislative requirements;
 - 14.11.2 Standard 2: Accredite courses in accordance with the Standards for VET Accredited Courses;
 - 14.11.3 Standard 3: Communicate effectively and implement a transparent complaints process to enhance regulatory practices and outcomes;
 - 14.11.4 Standard 4: Report to and respond to requests from the ISC or its delegate;
 - 14.11.5 Standard 5: Evaluate and improve its regulatory performance and ensure that its delegates comply with the Regulator Standards; and
 - 14.11.6 Standard 6: Be effectively and efficiently managed using robust management and administrative systems.

Australian Skills Quality Authority instrument fixing fees No. 1 of 2013

- 14.12 This is an instrument relating to the amount of fees ASQA charges for goods and services in performing its functions.
- 14.13 *The National Vocational Education and Training Regulator Amendment (Annual Registration Charge) Act 2017* clarifies that while ASQA may charge fees, as determined by the Minister, for goods and services it provides, certain registered providers are also liable to pay an 'annual registration charge' for each financial year of registration.

¹⁰ Course standard 8 of the Standards for VET Accredited Courses.

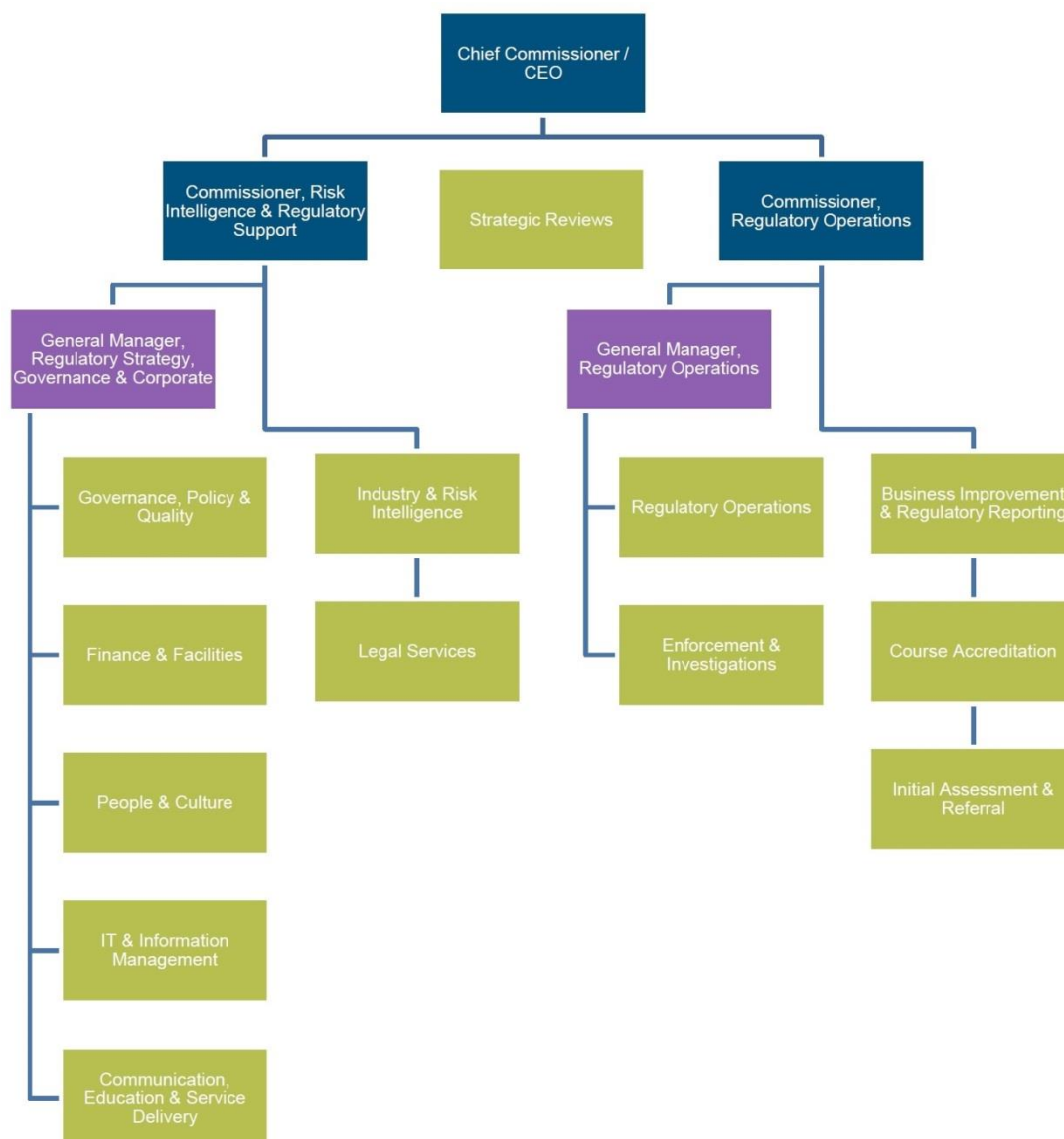
15. Interface between States, Territories and the Commonwealth

- 15.1 National, state, and territory governments have additional requirements that apply to publicly funded training and training accessed through government facilitated loans and, accordingly, providers approved to participate in such programs have additional regulatory and compliance obligations.
- 15.2 There are also non-regulatory measures to improve quality in the sector including workforce development activities, and the provision of consumer information such as through the My Skills website and other government sites, e.g. Victorian Skills Portal.
- 15.3 The regulation of training also interfaces with other regulatory regimes, such as: occupational licencing regimes; consumer protection laws regulated by the Australian Competition and Consumer Commission and state or territory Fair Trading regulators; and the corporate regulator the Australian Securities and Investments Commission.

16. ASQA's Organisational structure

- 16.1 As noted previously, ASQA was established on 1 July 2011 by the enactment of the NVETR Act and supplementary legislation. Before the establishment of ASQA, regulatory arrangements for VET were dispersed between eight states and territories.
- 16.2 Section 51(xxxvii) of the Australian Constitution permits the Commonwealth to legislate on matters referred to the Commonwealth by any state. ASQA's establishment as the national VET regulator involved the referral of powers to the Commonwealth from all states, except Victoria and Western Australia. ASQA assumed regulatory responsibility for RTOs from state and territory jurisdictions in phases throughout 2011–12.
- 16.3 ASQA's organisational structure is shown in Figure 5. Some of the functions shown below are undertaken in multiple ASQA offices across Australia as a direct result of the COAG intergovernmental agreement which requires ASQA to maintain an office in each state or territory. The structure reflects recommendations made by a review of ASQA's structure by KPMG in 2014. The structure came into effect from 1 July 2015 and reflects an organisational structure that seeks to enable ASQA's risk-based model of regulation. The allocation of resources within the structure has recently undergone further revisions to allow ASQA to achieve its budget and Average Staffing Level (ASL) requirements.

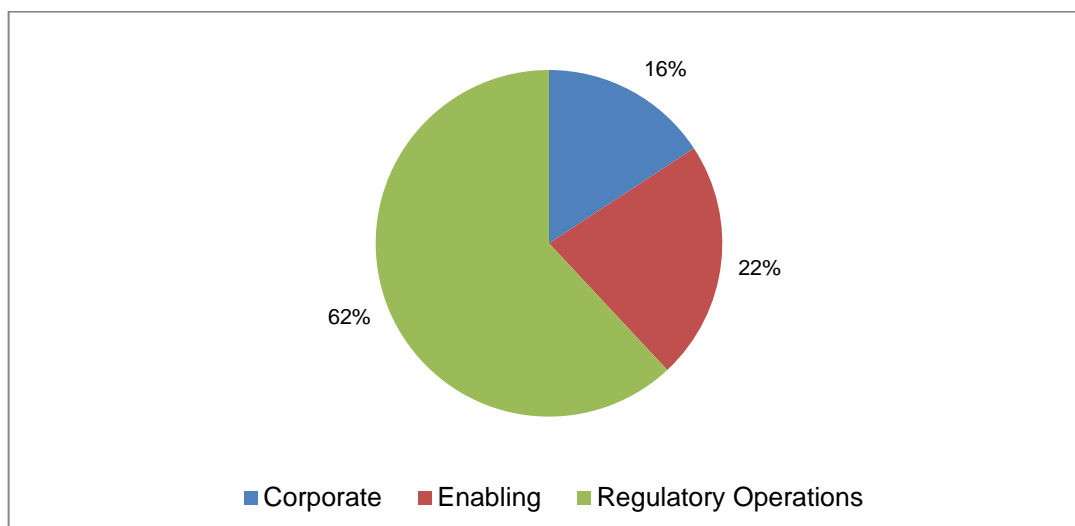
Figure 5: ASQA organisational structure as at 1 July 2017



17. ASQA's Resources and Staffing Profile

- 17.1 ASQA's budget appropriation for the 2017-2018 financial year is \$33,099,000 with an ASL of 184. Approximately 60 per cent of ASQA's budget goes to employee expenses.
- 17.2 This level of appropriation and staffing represents the final level in resourcing that was anticipated as an outcome of the VET regulatory reform package in 2014 (see below). As of 1 July 2017, ASQA fully implemented the organisational structure that was agreed in 2015, reflecting the shift from application based to risk-based regulation.
- 17.3 ASQA's current organisational profile was developed following the completion of a detailed benchmarking exercise where ASQA compared data relating to its regulatory, corporate and enabling functions with that of other Commonwealth regulatory agencies, and benchmarking data from the Department of Finance in relation to audit activities and ICT.
- 17.4 A key output of the adoption of the current organisational profile has been the optimising of ASQA staffing arrangements, the primary elements of which are provided in the pie charts below. An important element of the optimisation of the staffing profile is that staff hold the skills and capabilities in the locations where they are needed.
- 17.5 As shown in Figure 6, 86 per cent of ASQA's workforce is either exclusively (Regulatory Operations) or significantly (Enabling) involved in the ASQA's regulatory activities.

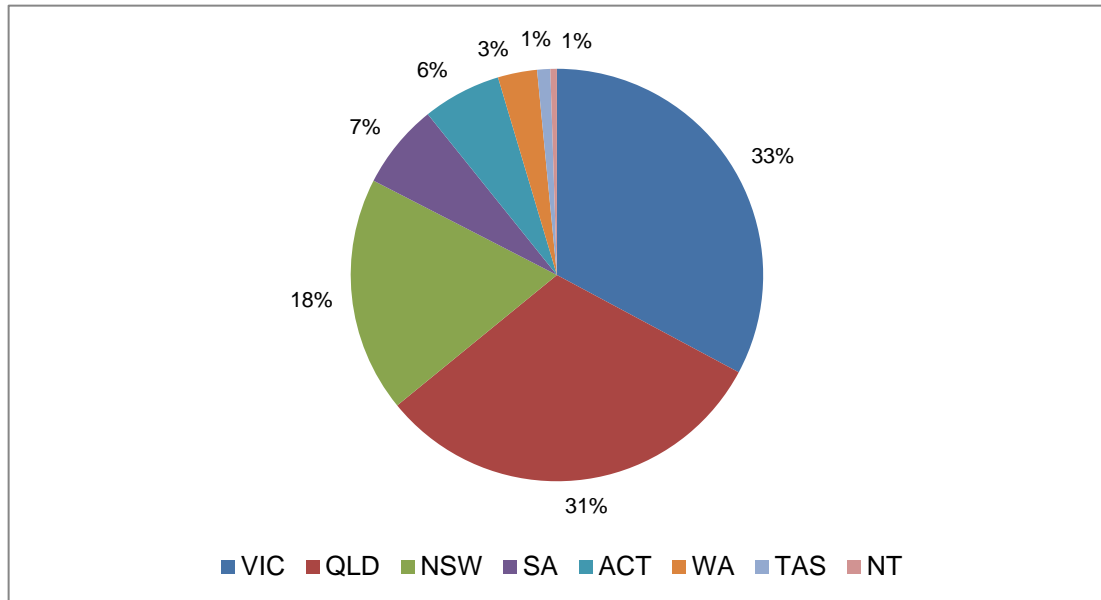
Figure 6: ASQA staffing numbers by high level functions in 2017-18



- **Corporate** = Finance & Facilities; IT & Information Management; and, People & Culture
- **Enabling** = Communications, Education & Service Delivery; Governance Policy & Quality; Industry & Risk Intelligence; and, Legal Services
- **Regulatory** = Regulatory Operations; Enforcement & Investigations; Business Improvement & Regulatory Reporting; Course Accreditation; Initial Assessment & Referral; and, Strategic Reviews.

- 17.6 As shown in Figure 7, most ASQA staff are based on the eastern seaboard, mirroring the provider community that ASQA regulates (the majority of providers are based in Victoria, New South Wales and Queensland). ASQA's Corporate and Enabling services are also based in Melbourne and Brisbane.

Figure 7: ASQA staffing by location in 2017-18



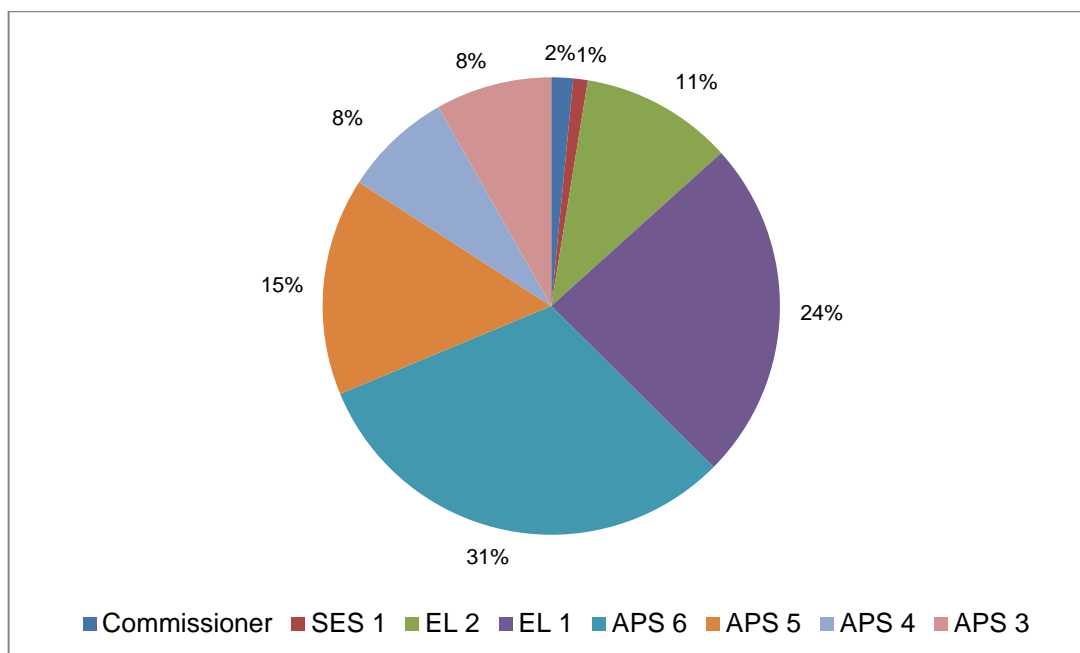
- 17.7 As shown in Figure 8, 55 per cent of ASQA staff are either at the EL1 (28 per cent) or APS6 (27 per cent) level. This is reflective of the fact that ASQA's auditors make up a large proportion of the ASQA workforce and are engaged at these levels due to the autonomous and complex decision making required. ASQA anticipates however that APS6 positions will make up the biggest of proportion of its workforce moving forward for two key reasons:

17.7.1 To bring ASQA into alignment with other Commonwealth agencies in terms of management's span of control; and

17.7.2 To ensure that ASQA has sufficient APS6 Lead Regulatory officers to undertake its work.

- 17.8 In addition to its own staff, ASQA has a panel arrangement in place where auditors, investigators, and course accreditors can be engaged, via a Deed of Standing Offer, when capacity issues arise.

Figure 8: ASQA by APS Level in 2017-18



18. Resourcing History

- 18.1 COAG agreed to ASQA's establishment as a cost-recovery agency in December 2009. 'Cost recovery' means that ASQA must recover the costs of performing regulatory activity through fees and charges.
- 18.2 ASQA receives budget appropriations from the Australian Government, with cost recovery revenue returned to the Australian Government's Consolidated Revenue Fund to offset this budget funding.
- 18.3 Shortly after ASQA's commencement, the Government recognised that the original budget initiative to fund the establishment ASQA was not sufficient to allow it to meet the Government's objective of effective regulation. In early 2012, additional core funding for ASQA was approved, with the expectation that the funding would be fully recovered from the sector over a three year period via increased fees and charges.
- 18.4 In 2014, the Government announced a VET reform package that altered the previous progression of ASQA towards full cost recovery. This decision gave ASQA the flexibility to move away from the provider application-led model of regulation towards a data and intelligence-led regulatory model. This was because ASQA was no longer bound by the cost recovery target to predominantly provide transactional style regulation via processing applications and gained freedom to undertake regulatory activity which was unrelated to considering applications. The reform package provided funding support as follows:

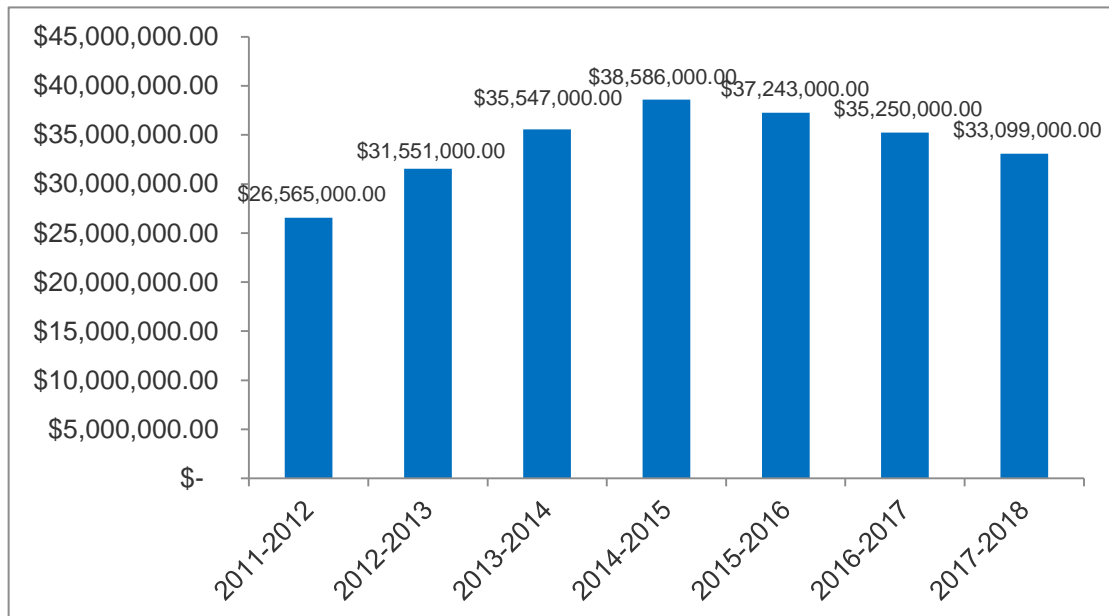
18.4.1 \$55.1m to replace ASQA's fee income, to maintain cost recovery at approximately 50 per cent of ASQA's operations, as opposed to the previous full cost recovery requirement. This meant that ASQA was not required to increase its fees and charges;

18.4.2 An additional \$8.6m for employee and supplier expenses to implement VET regulatory reform initiatives; and

18.4.3 \$5.1m to establish an agency capital budget and to supplement the cost of ASQA's ICT developments and assets replacement.

18.5 ASQA's budget resourcing from the Australian Government is provided in Figure 9.

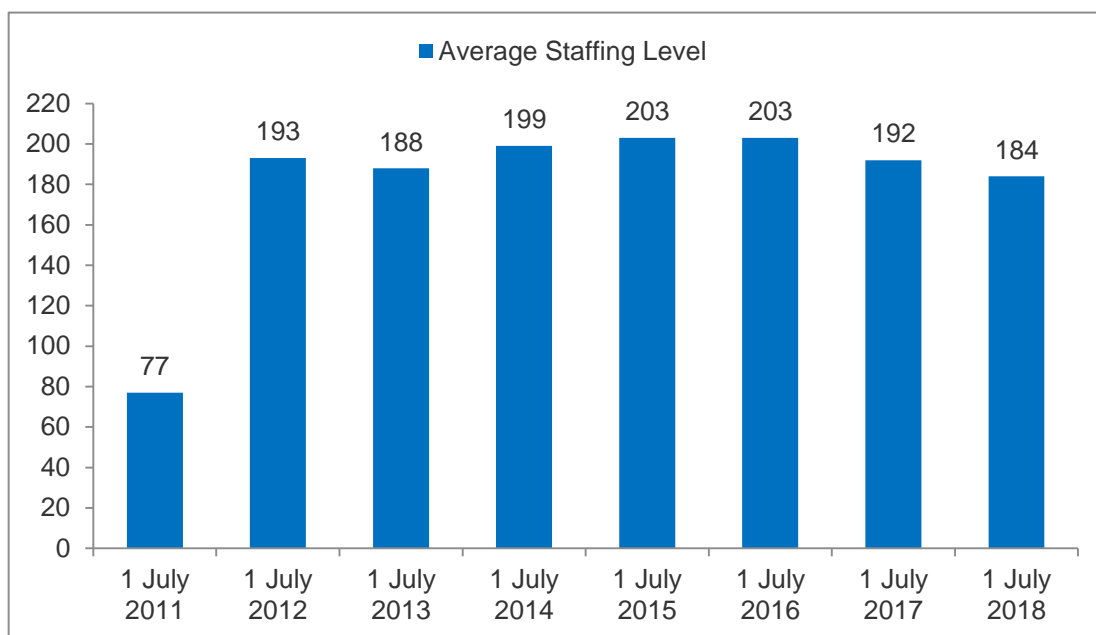
Figure 9: ASQA's budget resourcing from the Australian Government from 2011-12 to 2017-18



18.6 In relation to staffing, the VET regulatory reform package also increased ASQA's budgeted ASL in 2014-2015 from 197 to 205. However, to achieve its budget requirements (i.e. the ASL stipulated in the Portfolio Budget Statements for ASQA), ASQA was required to reduce its ASL to 197 in 2016-2017 and further to 184 in 2017-2018.

18.7 ASQA's Actual (as opposed to Budgeted) ASL since commencing operations is provided in Figure 10.

Figure 10: ASQA's Actual ASL from 1 July 2011-18



- 18.8 The work involved in implementing the VET reform package is now largely complete, although some system enhancements and data collection activities relating to ASQA's risk model and regulatory approach will continue until the end of the 2017-18 financial years.
- 18.9 An issue for ASQA moving forward, however, is that while capital funding was provided for ICT development and asset replacement as part of the reform package, the ongoing maintenance costs associated with this infrastructure was not part of the funding package.
- 18.10 Further, ASQA's activities in relation to reform initiatives, such as ASQA providing enhanced RTO guidance and information e.g. conducting national provider information sessions, have to be sustained in an overall more constrained funding and staffing environment.
- 18.11 In addition to these issues, the scope of ASQA regulatory task has recently expanded in relation to:
- 18.11.1 The monitoring of the now mandatory submission of Total VET Activity data and working with the National Centre for Vocational Education Research (NCVER) to ensure this meets relevant standards;
 - 18.11.2 The monitoring of the now mandatory annual Declaration on Compliance and ensuring this meets the requirements of the RTO Standards;
 - 18.11.3 The undertaking of additional regulatory analysis and providing information to the Australian Government Department of Education and Training to support their assessment of providers seeking VSL approval and oversight of providers already approved; and

- 18.11.4 Costs emanating from unforeseen issues, in particular the management of student records following the closures of large training providers.
- 18.12 In summary, ASQA is faced with a constrained budget outlook moving forward as it looks to meet significant unfunded ICT maintenance costs, continues to provide services initiated as part of the reform package for which funding is not ongoing, and absorbs the costs associated with additional regulatory functions, as well as those emanating from significant market developments such as major provider closures and the impact of public funding availability on the behaviour of some providers.
- 18.13 This constrained outlook is evidenced by the fact that in 2016-17, ASQA needed to seek budgetary relief, i.e. gaining approval for an Operating loss from the Minister for Finance, following unforeseen budgetary imposts relating to the significant demands placed on ASQA's legal resources as a direct result of its regulatory scrutiny of approved VET FEE-HELP providers.
- 18.14 Accordingly, any revision in ASQA's functions or regulatory approach will either need to be accommodated through a corresponding reduction in existing activity or an increased resource allocation to enable new functions to be undertaken.

19. Regulatory Activity

- 19.1 While levels of regulatory activity have fluctuated across ASQA's first 6 years of operation, activity has nevertheless increased, on a compound average growth basis, across all of ASQA's core regulatory activities.

Applications

- 19.2 Applications received and completed by ASQA between financial years 2011-12 and 2016-17 are provided in Figure 11 and 12 respectively. Completed course accreditation applications are provided in Figure 13.
- 19.3 ASQA has largely managed to meet its Performance Standards for the completion of applications. During 2016-17, 84.6 per cent of change of scope applications (not requiring audit) were completed within one month, and 96.0 per cent of registration renewal applications were completed within six months. ASQA is applying greater scrutiny to applications for initial registration which has resulted in a drop in the percentage of these applications finalised within the six month timeframe specified in ASQA's service standards, from 91.3 per cent in 2015-16 to 65.0 per cent in 2016-17. Similarly, due to the increased scrutiny in 2016-17 of applications to add the critical *TAE40116 Certificate IV in Training and Assessment* qualification to scope (all of which required audit), the percentage of change of scope applications that were finalised within the specified timeframe of six months fell from 83.5 per cent in 2015-16 to 42.7 per cent in 2016-17.

- 19.4 As part of the Government's 2014 reform package, equivalent changes to training packages resulted in the automatic updating of an RTO's scope of registration without the need of a provider application. This change in approach significantly reduced the number of applications required to be submitted after financial year 2012-13.

Figure 11: Number of applications received by ASQA from 2011-12 to 2016-17

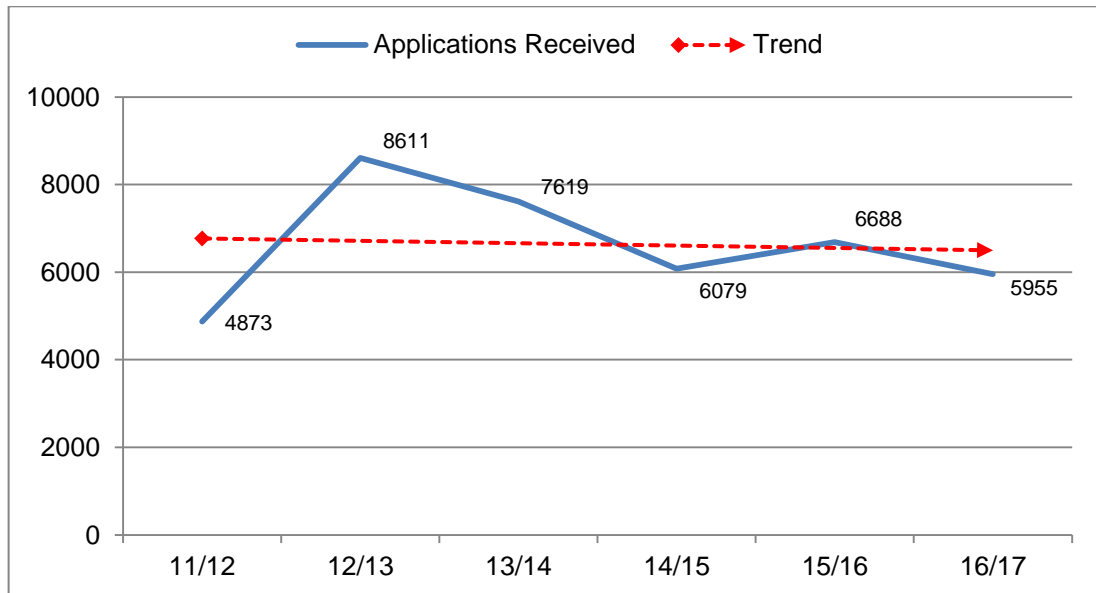


Figure 12: Number of applications completed by ASQA from 2011-12 to 2016-17

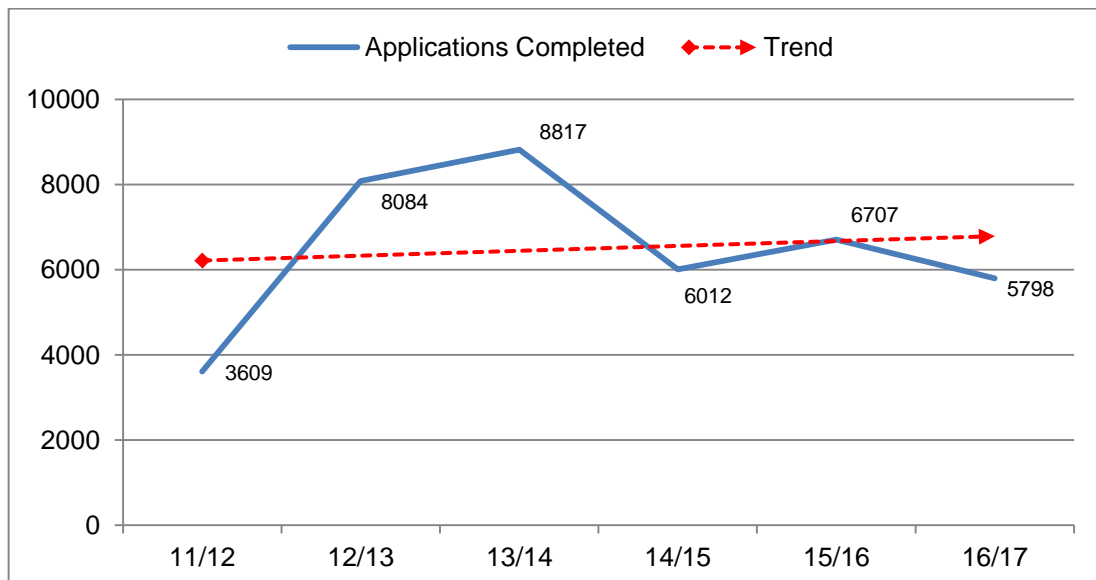
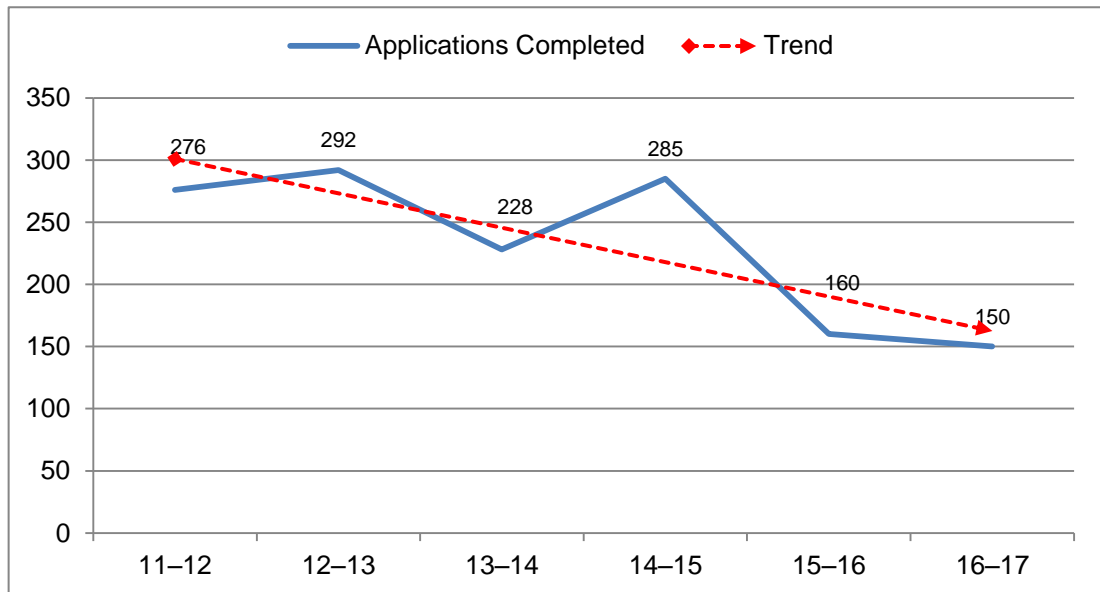


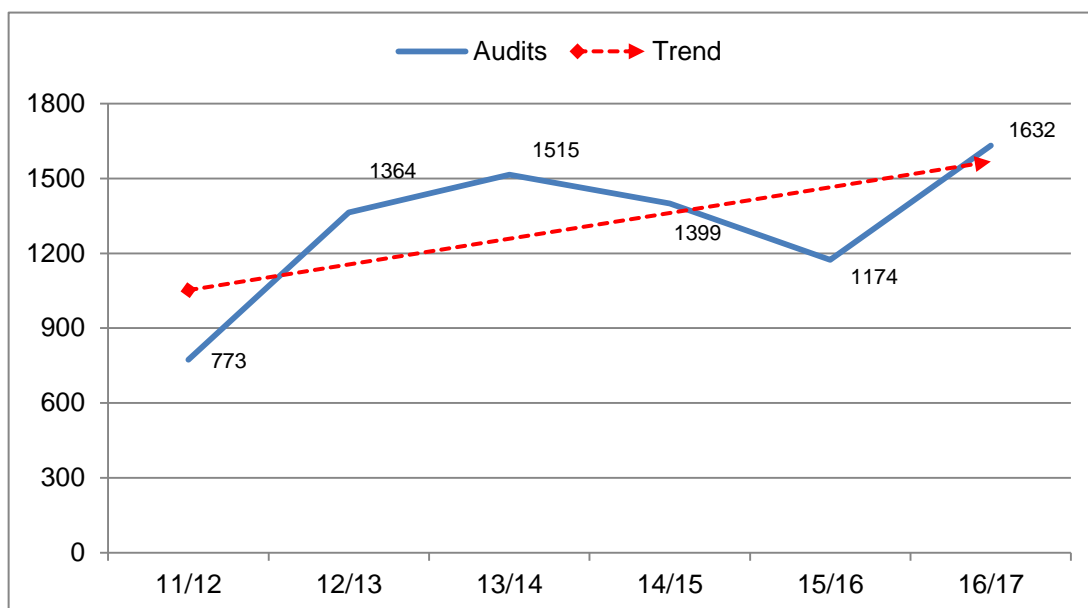
Figure 13: Number of course accreditation applications completed by ASQA from 2011-12 to 2016-17



Audit activity

- 19.5 Audit activities completed by ASQA between 2011-12 and 2016-17 are provided in Figure 14. It is important to recognise that the audit mix has changed significantly over time, with only 10 per cent of completed audits not being relating to an application in 2011-12, to more than 56 per cent of completed audits being non-application based in 2016-17. This change in audit mix is the result of ASQA working to move from a transactional to a risk-based regulatory approach. ASQA is focussing more of its audit resources toward those providers which pose the greatest risk to the quality of the VET sector, rather than providers which have simply submitted an application (noting that some applications are required, by legislation, to be audited).

Figure 14: Number of audits completed by ASQA from 2011-12 to 2016-17

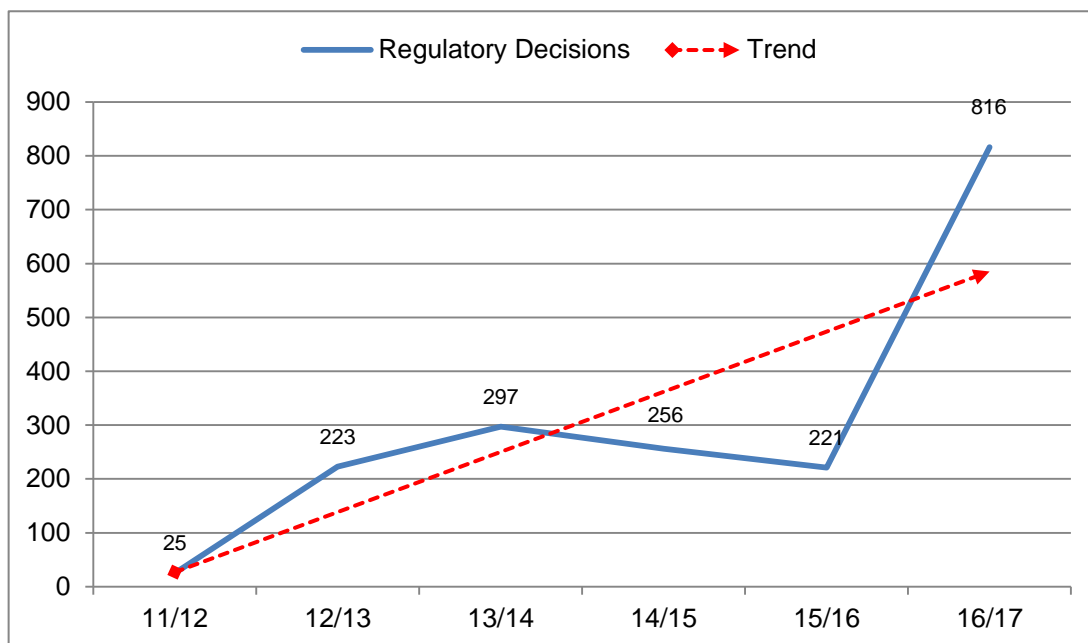


Adverse Regulatory Decisions

- 19.6 Adverse regulatory decisions made by ASQA between 2011-12 and 2016-2017 are provided in Figure 15. An adverse decision for these purposes means a decision to impose an administrative sanction or issue a notice of intention to impose an administrative sanction.
- 19.7 Growth in the number of adverse regulatory decisions being made by ASQA is attributable to the shift to nationally consistent regulation, as well as the maturing of ASQA's risk-based regulatory approach, which better focusses ASQA's regulatory resources toward those providers posing the greatest risk to the quality of the VET sector. The marked growth in the number of adverse regulatory decisions in 2016-17 is due to decisions related to providers which were non-compliant with data reporting obligations or did not pay fees.
- 19.8 Increases in the number of adverse regulatory decisions made by ASQA has resulted in increased workloads for ASQA in terms of the processing of reconsideration applications (a reconsideration process is available for certain types of decisions) and defending decisions at the Administrative Appeals Tribunal (AAT).

¹¹ The smaller number of audit activities in financial year 2015-16 reflects in part the introduction of the RTO Standards in 2015 and the re-allocation of audit resources into the major education program to explain the new standards to RTOs and VET stakeholders.

Figure 15: Number of adverse regulatory decisions made by ASQA from 2011-12 to 2016-17

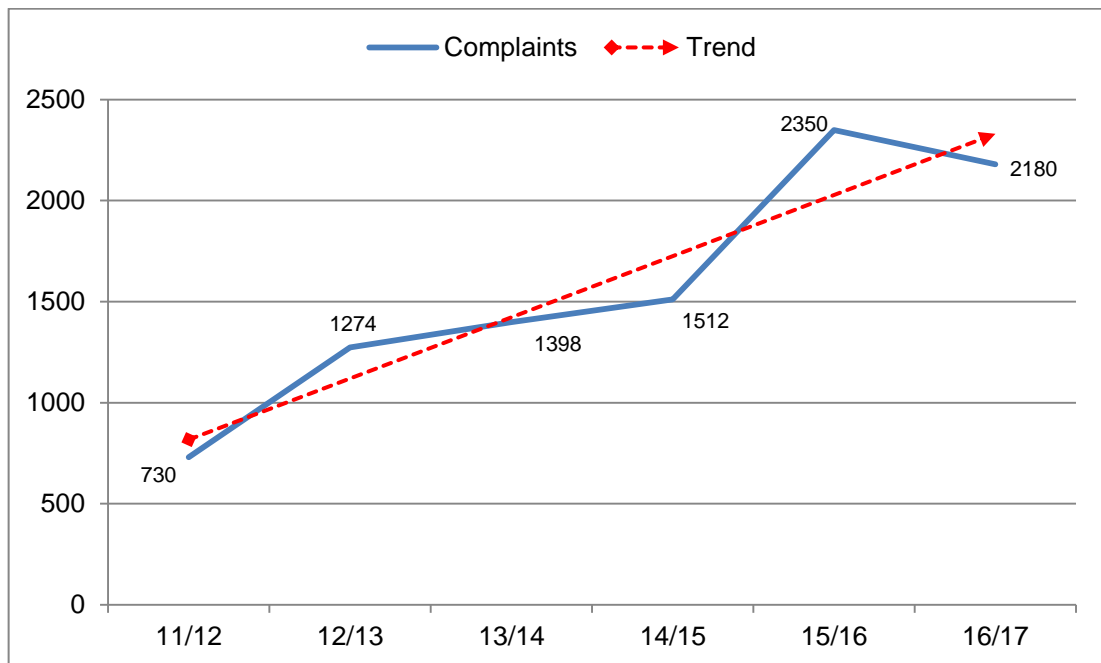


Complaints

- 19.9 Complaints about RTOs received by ASQA between 2011-12 and 2016-17 are provided in Figure 16.
- 19.10 Complaint inflows to ASQA are influenced by a number of factors, including sector-wide issues (such as problems associated with the now replaced VET FEE-HELP scheme) or a significant provider closure. An additional factor is likely to be increased public awareness of the Authority's existence and role. The establishment of the National Training Complaints Hotline in 2015 has also resulted in increased complaint inflows through referrals.

Despite significant increases in the number of complaints received, ASQA has actually managed to reduce the time taken to close complaints.

Figure 16: Number of complaints received by ASQA from 2011-12 to 2016-17



20. Legislative and policy context for ASQA's regulatory approach

- 20.1 The NVETR Act establishes ASQA, with the VRQA and the WA TAC continuing as state VET regulators. The Regulator Standards apply to the three VET Regulators and require that they implement a risk-based approach to regulation in order to reduce regulatory burden for higher performing RTOs and increase regulatory action for those providers considered higher risk.
- 20.2 Under section 190 of the NVETR Act, the Minister may make guidelines for ASQA to use when assessing risk. The guidelines are known as the Risk Assessment Framework.
- 20.3 ASQA is an ESOS Agency under section 6C of the ESOS Act. ASQA is the ESOS agency for all providers of VET courses and providers of English Language Intensive Courses for Overseas Students (ELICOS) that are not a direct pathway to either school or higher education course entry, or providers of selected aviation courses.
- 20.4 TEQSA is an ESOS agency under the ESOS Act with responsibility for providers of higher education courses. ASQA and TEQSA have direct regulatory responsibilities under the ESOS Act for providers of courses for overseas students for which they are the ESOS Agency. State and territory Boards of Study are ESOS designated state authorities for providers of school courses. Designated state authorities provide recommendations about providers of school courses to the Secretary of the Australian Government Department of Education and Training.
- 20.5 As ESOS agencies, ASQA and TEQSA assess the registration and renewal of registration of courses on CRICOS, and can approve or reject applications for registration and impose conditions at any time during a provider's registration. Both agencies also monitor providers against the ESOS Act and associated legislation which makes up the ESOS Framework – the *National Code of Practice for Providers of Education and Training to Overseas Students 2017*, and *ELICOS National Standards*. Under section 83 of the ESOS Act, both ASQA and TEQSA take enforcement action against a provider in breach of its obligations under the ESOS Framework including through the imposition of conditions, or suspension or cancellation of registration.
- 20.6 Consequential amendments to the NVETR Act in 2016 inserted section 24A which makes compliance with the *Higher Education Support Act 2003* (HESA) and the *VET Student Loans Act 2016* (VSL Act) a condition of registration as an RTO. Where ASQA finds non-compliance with the VSL Act in the course of its normal regulatory work, it can use this as evidence of non-compliance with the NVETR Act.

- 20.7 Section 45 of the VSL Act gives the Secretary of the Australian Government Department of Education and Training authority to require compliance audits of approved course providers to be conducted by ASQA or an auditor approved by the Secretary. ASQA can undertake regulatory work on behalf of the Department of Education and Training under the VSL Act should the need arise.
- 20.8 As outlined in Parts 2 and 3, ASQA regulates the conduct of providers and accredited course owners against the framework established by governments on the advice of industry. ASQA does not set this regulatory framework.
- 20.9 The regulatory framework enshrines the competency-based approach to training and provides flexibility to RTOs to tailor their training delivery to the needs of industry and individual learners.
- 20.10 ASQA applies the Commonwealth's Regulator Performance Framework which establishes key performance indicators against which ASQA measures its performance. These include minimising regulatory burden, effective stakeholder communication, applying a risk-based and proportionate approach, having streamlined and effective compliance and monitoring, being open and transparent, and having a commitment to continuous improvement.¹²

21. ASQA's Regulatory Risk Framework

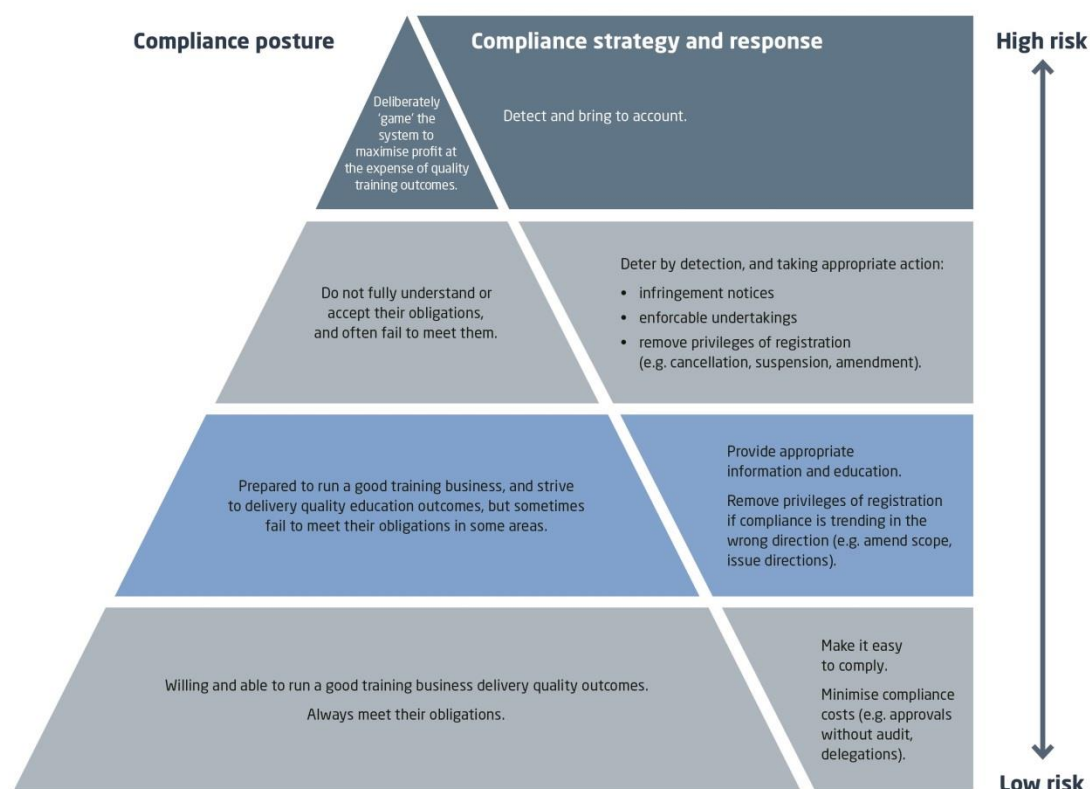
- 21.1 The legislative regime applying to VET creates a range of obligations on RTOs. In managing RTO compliance with these obligations, ASQA considers that the primary risk for ASQA to manage is an RTO certifying that a person has competencies that do not reflect their skills, knowledge, and attributes.
- 21.2 Established through a referral of powers from the states and the transfer of staff from former state regulators, ASQA's initial approach to regulation followed the legacy approach applied by the referring jurisdictions. This approach was transactional in nature and focussed regulatory effort towards assessing applications made by providers to ASQA. This could be when a provider initially applied for registration, applied to add new training products to its scope of registration, or applied to renew its registration. The approach relied on a provider risk rating of high, medium, or low to inform what action ASQA might take in response to applications received. Risk ratings were predominantly based on the limited internal regulatory data held by ASQA, which was initially received from the referring jurisdictions.

¹² Regulator Performance Framework: ASQA Measures
https://www.asqa.gov.au/sites/g/files/net2166/f/Regulator_Performance_Framework_-_ASQA_Measures.pdf
ASQA Self-Assessment Report against the Regulator Performance Framework
https://www.asqa.gov.au/sites/g/files/net2166/f/ASQA_Self_Assessment_Report_against_the_Regulator_Performance_Framework_2016.pdf

- 21.3 In addition to audits triggered by applications, ASQA developed a risk-based approach to managing complaints it received about providers. Complaints were managed separately to applications and while they may have resulted in an audit in the most serious of cases, these audits were often undertaken separate to application audits underway for a provider.
- 21.4 ASQA recognised that its application focussed regulatory approach was relatively predictable for providers who could often pre-empt and prepare for audit. Regulatory data showed that audits undertaken in response to complaints about providers were more likely to find quality concerns than audits triggered by applications. For example, in the second half of 2014, audits were finalised not compliant in 9 per cent of renewal or change to scope audits, whereas non-application triggered audits were finalised not compliant for 23 per cent of compliance monitoring and 40 per cent of complaint triggered audits.
- 21.5 ASQA also recognised that the transactional approach was resource intensive with audit being the most commonly used regulatory tool to assess a provider's compliance. Furthermore, audits followed highly prescribed business rules to ensure consistency in audits conducted by staff brought together from referring states and territories.
- 21.6 The first shift in ASQA's regulatory approach began in the initial years of operation, evidenced by the publication of an adapted compliance pyramid¹³ on its website communicating that ASQA applied a responsive approach to regulation (Figure 17).

¹³ Braithwaite, J. (1985), *To Punish or Persuade: Enforcement of Coal Mine Safety*. State University of New York Press, Albany.

Figure 17: ASQA's earlier responsive approach to regulation



21.7 The application of a responsive regulatory approach continues to be a key feature of ASQA's Regulatory Risk Framework,¹⁴ particularly in managing provider risk.

21.8 The evolution of ASQA's regulatory approach was also influenced by the work of Professor Malcolm Sparrow who suggests that controlling harms involves picking important problems and fixing them. ASQA first implemented this approach in 2013 when it undertook the first of a series of strategic reviews.¹⁵ Since then, ASQA has undertaken a further 7 strategic reviews.

21.9 The findings from the initial strategic reviews identified that harms in the various industry areas examined were driven by similar issues. These issues included:

21.9.1 Unduly short training;

21.9.2 Poor quality training and assessment, including work placements;

21.9.3 Insufficient training package specification; and

¹⁴ ASQA Regulatory Risk Framework

https://www.asqa.gov.au/sites/g/files/net2166/f/ASQA_Regulatory_Risk_Framework.pdf

¹⁵ See various strategic review reports published by ASQA <https://www.asqa.gov.au/news-publications/publications/strategic-review>

21.9.4 Questionable competency of trainers and assessors, including maintaining vocational competence.

- 21.10 In response to this learning, ASQA shifted the focus of strategic reviews away from 'industry-focussed' reviews to ones focussing on systemic issues across the sector. An example of this is the latest strategic review into 'unduly short training',¹⁶ which sought to understand factors contributing to delivery of VET courses in short timeframes. The report found that certain industry sectors are at greater risk from the impact of unduly short training than others. This led ASQA to make three recommendations that are aimed at clarifying the regulatory framework, allowing industry to specify training and assessment requirements in training packages, and improving the information available to consumers.
- 21.11 Reflecting on learnings about its regulatory approach in the context of the legislative and policy framework, ASQA developed its Regulatory Risk Framework¹⁷ published on the ASQA website dated April 2016. The development of this framework was informed by consultation with a range of other regulatory and intelligence agencies.¹⁸
- 21.12 ASQA's Regulatory Risk Framework seeks to treat risk on two levels: at a macro level (systemic risk) and micro level (provider risk). It relies on greater use of data and intelligence to determine where and to what extent ASQA should invest regulatory effort in managing risks on both levels. Important to the success of this renewed approach is ASQA's ability to gather and analyse timely information and data from other government agencies and stakeholders.

22. Managing Systemic Risk

- 22.1 In managing systemic risk, ASQA undertakes an annual environmental scan drawing on the views of key stakeholders, internal regulatory data, and other external data to understand risks in the VET sector, supplemented by a mid-year review to identify any emerging risks. The most significant of these risks are prioritised for treatment and communicated to the sector in ASQA's annual regulatory strategy.¹⁹
- 22.2 Often the systemic risks identified are issues that have been long-standing in the VET sector and contributed to by factors beyond ASQA's jurisdiction. Examples include the capability of the VET workforce; delivery of courses in short timeframes; and protecting learners as

¹⁶ See the strategic review report – *A review of issues relating to unduly short training* published by ASQA https://www.asqa.gov.au/sites/g/files/net2166/f/strategic_review_report_2017_course_duration.pdf

¹⁷ ASQA Regulatory Risk Framework https://www.asqa.gov.au/sites/g/files/net2166/f/ASQA_Regulatory_Risk_Framework.pdf

¹⁸ ATO; Department of Human Services; Civil Aviation Safety Authority; Therapeutic Goods Administration; Australian Communications and Media Authority; Australian Competition and Consumer Commission; Department of Agriculture; Other Vocational Regulators (VRQA & WA TAC), TEQSA; UK Police (National Intelligence Model); NZ Police (Crime Reduction Model).

¹⁹ ASQA's Regulatory Strategy 2016-17 https://www.asqa.gov.au/sites/g/files/net2166/f/ASQA_Regulatory_Strategy_2016-17.pdf

consumers in the VET market. ASQA's ability to effectively treat systemic risks often relies on willing participation by other regulatory or policy bodies in the treatment strategy.

- 22.3 ASQA manages work to address the risks in these priority areas using a project-based approach. Often these projects require engagement and collaboration with other stakeholders who share responsibility for policy or regulation in the area of focus. Projects can involve:
- 22.3.1 Undertaking a strategic review which involves research and consultation to fully understand the causes or drivers contributing to the risk. This activity often results in the publication of a report with recommendations;²⁰
 - 22.3.2 Establishing working groups to guide the implementation of recommendations from strategic reviews or other government reports; and
 - 22.3.3 Establishing multi-disciplinary, and sometimes cross agency, teams to apply a diversity of regulatory strategies ranging from advisory and persuasive measures (communication and education) through to hard regulation (targeted audits and investigations), the results of which may be published in reports.
- 22.4 ASQA's Regulatory Strategy 2016-17 outlined the priority areas (target areas) that ASQA sought to address through regulatory projects:
- 22.4.1 Learner protection – targeted regulatory scrutiny of a small number of VET FEE-HELP approved providers alleged to be involved in unscrupulous practice, including enrolling learners in courses when they did not have the prerequisite skills. The findings were shared with program administrators to inform changes to the funding scheme;
 - 22.4.2 Amount of training – a strategic review responding to the regulatory risk of unduly short training courses where courses are delivered in significantly shorter timeframes than reasonably required to ensure learners can demonstrate the competencies specified in the training; and
 - 22.4.3 Capability of trainers and assessors – increased scrutiny of providers applying to deliver the new VET training and assessment qualification in response to the high levels of non-compliance by RTOs with clause 1.8 of the RTO Standards, contributed to by the capacity of trainers and assessors to deliver quality VET.
- 22.5 ASQA's Regulatory Strategy 2017-18 identifies two target areas:

²⁰ See various strategic review reports published by ASQA <https://www.asqa.gov.au/news-publications/publications/strategic-review>

- 22.5.1 Australia's international education sector – a strategic review into the recent growth in the international education market, both on and off shore, and potential risks to be managed by the various policy and regulatory agencies with responsibilities in this market; and
 - 22.5.2 Capability of trainers and assessors – a continuation of the work in the previous regulatory strategy to ensure continued scrutiny of providers applying to deliver VET training and assessment qualifications as well as the monitoring of already approved providers. ASQA recognises that this scrutiny needs to be complemented by provider education and communication to build trainer and assessor capability in the sector.
- 22.6 ASQA's annual regulatory strategies also announce a range of initiatives each year that aim to ensure the recommendations from strategic reviews are implemented or to further mature ASQA's risk-based regulatory approach. The initiatives in the 2017-18 strategy are:
- 22.6.1 VSL implementation – working with the Australian Government Department of Education and Training to establish ASQA's agreed role in compliance monitoring of providers participating in the VSL program;
 - 22.6.2 Progressing recommendations regarding 'unduly short training' – working with key stakeholders to ensure the recommendations are considered in VET reform initiatives;
 - 22.6.3 Tightening scrutiny on new RTOs entering the VET market – placing greater scrutiny on new providers, particularly those seeking initial entry and those wishing to increase size or scope soon after registration, in response to stakeholder concerns about new provider practice;
 - 22.6.4 Embedding ASQA's 'student-centred audit approach' – integrating the renewed audit approach across all types of audits conducted after an initial period of testing and evaluation; and
 - 22.6.5 Recognising and supporting quality in the VET sector – providing support to the vast majority of providers striving to meet their compliance obligations to help them develop quality practice.
- 22.7 During ASQA's most recent environmental scan, stakeholders raised concerns about a range of RTO governance issues. There is increasing concern regarding complex business structures involving multiple providers and businesses; changes in ownership and management; operating on thin margins; and seeking registration for purposes other than the delivery of quality training (e.g. gaining registration for on-selling, migration or taxation

purposes). Some of the initiatives outlined in the Regulatory Strategy 2017-18 will aim to proactively address this emerging systemic risk.

- 22.8 In managing systemic risk and in supporting providers to meet their compliance obligations, ASQA implements an ongoing program of education and communication for its stakeholders. In 2016-17, ASQA delivered 24 face-to-face training provider briefings in 14 locations across Australia to educate providers about ASQA's regulatory activity and student-centred audit approach. The briefings also reinforced key messages about assessment practice and unduly short training courses. Three online webcasts of these briefings were also held with a total of 5,200 people attending across the 27 events. These briefings are supplemented by regular presentations at a wide range of VET sector events nationally.
- 22.9 During this period, ASQA also hosted two webcasts. The first to inform providers about the findings of its national strategic review into training for the early childhood education and care sector and recommendations made to enhance the quality of training in this sector. The second to inform providers of the requirements to have the new training and assessment qualification listed on their scope of registration.
- 22.10 During the 2016-17 year, ASQA invested considerable resources in its website and in digital media as a primary tool for communicating with and educating providers about their obligations under the RTO Standards and other regulatory requirements. This work included enhanced website content and frequently asked questions. The website also publishes recordings of all ASQA webcasts. ASQA also communicates regularly with providers through ASQA news and media announcements.

23. Managing Provider Risk

- 23.1 ASQA's Regulatory Risk Framework outlines how ASQA treats provider risk: through the assessment of credible and reliable provider reports (complaints and intelligence), and in response to unusual provider activity (including application activity).
- 23.2 In 2016-17, ASQA received 2180 complaints and 5955 provider applications. It is not possible, nor desirable, for ASQA to undertake scrutiny of each complaint or application received. ASQA takes a risk-based approach to assessing these when received.
- 23.3 ASQA uses a range of standardised tools to assess the risk a provider presents in these contexts and activities. Analytic dashboards and provider profiles are used with these tools to determine the proportionate response to be applied to a provider having regard to its compliance posture and the circumstances of the case. A suite of escalating responses is used to manage provider risk ranging from taking no immediate action and education letters through to audit or investigation in the more serious cases.

- 23.4 In 2016, ASQA developed a more responsive approach to auditing focussing on provider behaviour and practice, i.e. outcomes, and less on standards and outputs. The approach was heavily influenced by ASQA's experience in applying targeted scrutiny to VET FEE-HELP approved providers during 2015 and 2016 and a realisation that auditing led solely by the RTO Standards did not always produce the right type of evidence to support sound regulatory conclusions.
- 23.5 The student-centred audit approach continues to be integrated across ASQA's regulatory operations and focusses on testing provider behaviour and practice along the stages of the student experience:
- 23.5.1 Marketing and recruitment practices;
 - 23.5.2 Enrolment practices;
 - 23.5.3 Support and progression of the student during course delivery;
 - 23.5.4 Training and assessment; and
 - 23.5.5 Completion and qualification issuance.
- 23.6 The depth and scope of audits are informed by the provider's compliance history and detailed risk intelligence including complaints and intelligence reports; media reports; enrolment data; and student input from surveys and interviews conducted by ASQA.
- 23.7 Where the audit outcome finds that a provider has not complied with regulatory obligations, ASQA uses a standardised assessment tool to determine the proportionate response or sanction to be applied. The assessment considers the regulatory obligation not complied with and the circumstances of the cases, including the provider's compliance posture. In the less serious cases, this can be the issuance of a written direction to rectify the non-compliance. In the more serious cases, ASQA can notify the provider of its intention to cancel the provider's registration.
- 23.8 A key feature of the student-centred audit approach is the ability for ASQA to require the provider to rectify harms. If non-compliances are identified, ASQA may require a provider to:
- 23.8.1 Address the non-compliance so that future learners will not be negatively impacted, i.e. preventative; and
 - 23.8.2 Identify the impact the non-compliance has had on current and past learners and carry out remedial action to address this impact; i.e. corrective.
- 23.9 When requiring a provider to carry out remedial action to address the impact non-compliance has had on current and past learners, the intent is that the remedial action will benefit the

learner by remedying any impact that was caused by the non-compliance. It is not the intent that ASQA request mandatory remedial action that imposes a burden on the learner – for example, mandatory re-assessment of students who have already exited the RTO.

- 23.10 The student-centred audit approach was independently reviewed in early 2017.²¹ The review found widespread support for ASQA's new audit approach and concluded that the approach was more effective against poor quality training providers.

24. Engagement with industry and other stakeholders

- 24.1 Since its inception, ASQA has recognised the value of engaging with industry and other key stakeholders. ASQA's early engagement focussed on taking stock of existing key stakeholder arrangements that existed at state levels and actively sought to engage with key stakeholders at a national level, advocating for a more harmonised approach to industry regulation. Memorandums of Understanding (MOU) were initially used as a tool for confirming relationships or partnerships with stakeholders.
- 24.2 ASQA acknowledged the importance of engaging with industry stakeholders with the development in 2012 of a dedicated 'Industry Engagement Team'. This centrally coordinated the stakeholder engagement activities occurring from each of ASQA's state offices.
- 24.3 The diversity and potential scope of VET sector stakeholders who might have an expectation to engage with ASQA is demonstrated in four broad categories, with some examples listed below:
- (a) VET Students: Domestic and overseas students, consumer protection agencies, Australian consumer law regulators, ombudsmen, and tuition protection services;
 - (b) Industry (involving almost every industry in Australia): Peak business employer standards groups, national and state industry regulators, and industry associations;
 - (c) The VET workforce: RTOs, providers, RTO peak bodies, and third-party agencies; and
 - (d) VET Government agencies/authorities (e.g. policy, training package development, regulation, funding): State Training Authorities in each jurisdiction, the Australian Government Department of Education and Training, VRQA, WA TAC, Department of Immigration and Border Protection

²¹ ASQA's new audit approach - Evaluation report: Key Findings and Recommendations – Margo Couldry, February 2017 https://www.asqa.gov.au/sites/g/files/net2166/f/asqas_new_audit_approach_evaluation_report_-_key_findings_and_recommendations.pdf

(international education sector), TEQSA (dual VET and Higher Education providers), and SSOs.

24.4 Considering the diversity and scope of ASQA's potential stakeholders and to ensure a best practice approach that most efficiently utilised ASQA's finite resources, ASQA undertook a review of its industry engagement approach in 2016. The result was the development of a renewed approach for ASQA, based on a distributed model for engagement with industry. The new engagement strategy identifies ASQA's key industry stakeholder groups and uses a widely accepted model²² for prioritising stakeholder engagement that assesses each stakeholder according to interest in the organisations work, and power or influence over ASQA's strategy work. The result is ASQA's current "engagement with industry strategy" that:

24.4.1 Provides ASQA with a dynamic engagement style where engagement with industry is prioritised according to the systemic or training product industry areas identified as high risk, informed by our annual environmental scanning activities; and

24.4.2 Uses a range of engagement strategies such as gathering and sharing information, consultation, and collaboration.

24.5 Stakeholder engagement has been, and will continue to be, critical to 'ASQA's Regulatory risk framework' in identifying and addressing both systemic and provider risk. Engagement has been utilised by ASQA at every stage of its risk-based regulatory approach, for example in ASQA's approach to systemic risk:

24.5.1 Industry and other key stakeholder are consulted annually to provide input that informs ASQA's identification of systemic risk, as part of ASQA's annual environmental scan, which also informs ASQA's risk treatment strategies, and through regular provider and industry forums through the year;

24.5.2 Partnering with industry to identify issues and then co-design policy or other strategies as recommendations to address these issues has been pivotal to ASQA's strategic reviews in security, early childhood education and care, and amount of training;

24.5.3 Methods such as cross agency evidence, which has become accepted practice in the identification of providers of risk, was used when providers applied for VET FEE-HELP funding, a targeted area of systemic risk, with regular requests for sharing of 'provider profiles' with eligible authorities;

²² Ackermann, F., and Eden, C. (2011). Strategic management of stakeholders: theory and practice. *Long range planning*, 44(3), 179-196.

- 24.5.4 Regular engagement with industry and other key stakeholders occurs to gather complaints and intelligence as a key input to inform ASQA's identification of provider, sector, or systemic risk;
- 24.5.5 Another example of the significant role stakeholder engagement plays is ASQA's participation in the Education Regulators and Immigration Committee (ERIC). ERIC consists of a range of organisations that represent overseas students and/or the international sector. ASQA facilitated workshops to jointly identify potential risks in the international sector and to explore co-design of potential treatment strategies that might well involve coordinated agency responses;
- 24.5.6 ASQA's contemporary approach to engagement with industry and other stakeholders has only recently been implemented. This approach is one that is not static, and allows for proactive, responsive, and purposeful engagement with industry; and
- 24.5.7 Moving forward, ASQA continues to explore improved ways of engaging with stakeholders that will allow the identification of common goals and shared recognition of the constraints and challenges faced by stakeholders, and also harness the opportunities that partnerships and co-design approaches can bring with all parties ultimately benefiting from improved outcomes in the VET sector.

25. Introduction

25.1 Since its establishment, ASQA has been evolving its approach to regulation consistent with government policy settings, market behaviours, and available resources. In broad terms, the six years of ASQA's operation can be seen in four phases, namely:

25.1.1 Establishment – 1 July 2011 to 30 June 2013;

25.1.2 Reflection - 1 July 2013 to 30 June 2015;

25.1.3 Implementation - 1 July 2015 to 30 June 2017; and

25.1.4 Improvement - 1 July 2017 onwards.

25.2 The establishment phase covers the first period of ASQA's existence. The organisation's focus concerned the actions necessary to put into complete operation the new national regulator. Key activities during this period included:

25.2.1 Incorporation into the national regulator of the staff, caseload, data sets etc. of the former state and territory regulators as the referring states progressively passed legislation empowering the Commonwealth to regulate RTOs within their jurisdiction;

25.2.2 The creation of a single or 'one' ASQA approach to regulation where the variations to regulatory practice inherited from former state and territory regulators were eliminated and standard practices adopted;

25.2.3 Development and implementation of basic business processes, particularly those dealing with the assessment, and approval or rejection of provider applications;

25.2.4 Implementation of government policy to make ASQA a cost recovery agency, including the setting up of finance, invoicing, and charging mechanisms; and

25.2.5 The processing and finalisation of an inventory of unprocessed applications which were with the state and territory regulators at the time of referral. In addition, open complaints held by each of the former regulators were transferred to ASQA in this period.

25.3 The reflection phase describes the period after initial establishment, during which ASQA's experience of the VET market and provider behaviour as well as its own operations had settled sufficiently to permit thought as to how legacy regulatory systems and ASQA's regulatory approach could be improved. This period was characterised by an examination of

the approach to regulation adopted within the former state and territory regulators and an assessment as to what aspects of this approach were working well and which aspects should be reformed.

25.4 An important input into this process review was the 2013 report commissioned by the then Ministerial Council (Standing Council for Tertiary Education, Skills and Employment) into ASQA's operations. This report prepared by PwC was undertaken in advance of a proposed expansion of ASQA's cost recovery requirements and a consequent increase in fees and charges to be collected from market participants.

25.5 Important reforms developed in the reflection period include:

25.5.1 The development of ASQA's risk model and the conceptualisation that risk in the VET market should not only focus on individual provider risks, but also on systemic risks;

25.5.2 Piloting of an initial environmental scan to create a picture of VET systemic risks;

25.5.3 Refashioning of the handling of complaints about providers and the creation of risk tools to guide responses as to how complaints should be assessed and dealt with;

25.5.4 Complete mapping of all regulatory obligations imposed by legislation and subordinate instruments and the assessment of the relative importance of these obligations to the overall management of risks in the VET sector;

25.5.5 Development of ASQA's initial approach to support better performing providers through the delegation to providers of the entitlement to change scope without reference to ASQA approval;

25.5.6 Automated updating of RTOs' scopes of registration with 'equivalent' replacement items immediately upon their endorsement, removing the burden of having to formally apply for such changes as occurred previously;

25.5.7 An extensive education program about the commencement of the RTO Standards including the holding of 31 full-day information sessions in capital cities and major regional centres for RTO staff and VET stakeholders; and

25.5.8 Testing of the adequacy of tuition protection schemes operated by ACPET and the TDA so as to allow providers to take more than the prescribed maximum of fees in advance from students undertaking nationally recognised courses of study.

25.6 The implementation phase involved the rollout of the reforms conceptualised and decided during the reflection phase. Importantly during this period, ASQA:

- 25.6.1 Initiated an organisational restructure based upon a review of ASQA's structure by KPMG, which addressed silos in its operation identified in the earlier PwC report;
 - 25.6.2 Consistent with Commonwealth government policy decisions, moved away from the progression towards full cost recovery to become a 50 per cent cost recovery agency;
 - 25.6.3 Implemented a suite of policy and regulatory changes endorsed by the Commonwealth government and supported in part through new policy proposal funding;
 - 25.6.4 Developed and commenced initial implementation of the student-centred audit approach which improved the examination of provider practices and outcomes as well as tested inputs such as processes and documentation;
 - 25.6.5 Built a data analytics capacity and a stronger risk intelligence ability;
 - 25.6.6 Matured its approach to applying regulation under the ESOS Act as an ESOS agency, including greater coordination with TEQSA around regulating providers operating across both VET and higher education;
 - 25.6.7 Built and launched a new Electronic Data Records Management System, Customer Relationship Management System, and online web-based portal to improve client service, records management standards, and reporting capacity;
 - 25.6.8 Strengthened the organisation's ability to undertake investigations and developed an enforcement capacity beyond the legacy skills in auditing compliance and administrative decision making;
 - 25.6.9 Benefited from the gradual improvement in the provision of available data, notably through the rollout of Total VET Activity data reporting; and
 - 25.6.10 Developed and rolled out improved IT platforms to support core organisation functions as well as the analysis of available data.
- 25.7 The next phase of ASQA's development can be described as 'improvement'. The proposals outlined in the balance of this part of the submission go to proposed changes to ASQA's regulatory approach and suggestions about the VET system more broadly, which in some respects require or would be enhanced through changes to legislation and supporting instruments. The proposed reforms are grouped into four categories, namely:
- 25.7.1 Entry to market and initial period of registration;
 - 25.7.2 Quality, not only compliance;

25.7.3 Consumer protection; and

25.7.4 Provider closures.

25.8 ASQA has also included an addendum to the submission which provides proposed amendments to the NVETR Act and supporting instruments which are operationally focussed. The addendum reflects issues which have arisen in applying the legislative regime.

26. Entry to market and initial period of registration

26.1 Whilst the total number of RTOs has been reasonably stable in recent years, there is a considerable churn of provider registrations with around 350 applications for initial VET registration in 2016-17, mergers and acquisitions, and providers exiting the market. A large part of ASQA's regulatory effort is committed to market entry testing and verification (initial and compliance audits), and provider closure processes.

26.2 NCVER analysis concludes that, in 2014, there were three times as many VET students as students in higher education but 35 times more VET providers than higher education providers.²³ In 2014, the top 100 VET providers accounted for around 50 per cent of the total student population, while almost 2000 VET providers reported 100 or fewer students.²⁴ This data reflects the diversity of VET providers but also suggests that a considerable number of registered providers do not actively engage in the delivery of nationally recognised training. Data from the NCVER total VET students and courses publication indicates that 10% of providers reported no VET activity in 2016.²⁵

26.3 ASQA is obliged to regulate and expend its limited resources to this group of providers. While at one level a provider that is not delivering training and assessment poses no risk of poor VET outcomes, there are wider risks to be considered. For instance, advice from the Australian Taxation Office (ATO) is that education services are an area the ATO has concerns with. There are indications that RTOs not engaged in genuine training may be used as a vehicle to gain inappropriate tax advantages.

26.4 Another market behaviour which has emerged in initial applications is the practice of establishing 'shelf RTOs'. In this practice, a number of RTOs are sought to be registered by a single person or entity, often at the same time, with the apparent intent of on-selling shares in the RTOs rather than carrying out training and assessment. Typically, the applicant in these circumstances seeks a limited scope of registration based on materials which have been previously assessed to meet training package and RTO Standards requirements. In

²³ Korbelt, P & Misko, J 2016, *VET provider market structures: history, growth and change*, NCVER, Adelaide.

²⁴ Ibid.

²⁵ NCVER, 2017, *Australian vocational education and training statistics: total VET students and courses 2016*, NCVER, Adelaide.

some cases, the behaviour appears to be associated with schemes to support business migration pathways.

Initial registration – Genuine purpose

- 26.5 The requirements for registration as an RTO are set out in the NVETR Act by reference to the conditions which must be met in sections 22 to 28 of the Act. They include that the RTO must comply with:
- 26.5.1 The RTO Standards, the AQF and the Quality Standards;
 - 26.5.2 Fit and Proper Person Requirements;
 - 26.5.3 Financial Viability Risk Assessment Requirements;
 - 26.5.4 The HESA and the VSL Act;
 - 26.5.5 Material change notification requirements; and
 - 26.5.6 Requests for information from or directions made by ASQA.
- 26.6 Many of these conditions cannot be fully assessed at the time of an initial application for registration because the applicant has not commenced providing VET, and hence actual practice, as opposed to stated intentions, cannot be tested. Whilst ASQA can take into account the recorded history of an applicant if there is one, through the Fit and Proper Person Requirements, for the most part ASQA can only assess whether the applicant is aware of and seems likely to be able to comply with the conditions for registration. Financial ratios are checked and audits are conducted to ascertain the aspirations and apparent capacity of the applicant but ultimately the applicant's ability to meet the conditions of registration currently cannot be fully tested at the time of initial registration.

Shelf RTOs

- 26.7 ASQA believes that some organisations seek RTO registration without any genuine intention to provide VET.
- 26.8 Under the ESOS Act, in order to be registered, an applicant must satisfy the ESOS agency that the provider has the principal purpose of providing education.²⁶ The current ESOS Act Subdivision E Section 11 (d) and (e) states:

²⁶ Section 11(d) of the ESOS Act.

- 26.8.1 “A provider or registered provider meets the registration requirements if:
- (d) the ESOS agency for the provider is satisfied that the provider has the principal purpose of providing education; and
 - (e) the ESOS agency for the provider has no reason to believe that:
 - (i) the provider does not have the clearly demonstrated capacity to provide education of a satisfactory standard; or
 - (ii) the provider has not been providing, or will not provide, education of a satisfactory standard;”

26.9 ESOS Act Division 1 Subdivision A Section 83 Subsection (1c) states:

- 26.9.1 “The ESOS agency for a registered provider may also take one or more of those actions against the registered provider if the agency believes on reasonable grounds that the registered provider:
- (a) does not have the principal purpose of providing education; or
 - (b) does not have the clearly demonstrated capacity to provide education of a satisfactory standard; or
 - (c) has not been providing, or has not provided, education of a satisfactory standard.”

- 26.10 Under the VSL legislations, applicants for Commonwealth funding are required to be committed to the delivery of high quality VET and achieving the best outcomes for students.²⁷ This requirement is further strengthened by requiring that key personnel and advisers of the RTO have the experience and expertise necessary to perform their duties, including in the delivery of education, the management of the organisation, and administration.²⁸
- 26.11 The NVETR Act does not currently require an RTO to commence providing VET within any period of time after it has been registered. This allows for RTOs to obtain registration but not commence providing training. Instead they may sell the RTO resulting in the RTO being managed and controlled by people who did not submit the initial application and who were not assessed through that process.
- 26.12 In these circumstances, the RTO would be required to notify ASQA about changes to its executive officers or high managerial agents, however, this only allows ASQA to assess each person’s fitness and propriety. An assessment of the skills, experience and ability of natural persons is not mandated.
- 26.13 Introducing measures to ensure a genuine purpose to provide education and a commitment to, and expertise in, delivering high quality VET would:

²⁷ Rule 22 of the VSL Rules.

²⁸ Rule 27 of the VSL Rules.

- 26.13.1 Assist in restoring consumer confidence in the quality of education services provided across the VET sector;
- 26.13.2 Raise quality by ensuring only those organisations that have both a genuine purpose and demonstrated capacity to provide quality education are able to be registered;
- 26.13.3 Allow the regulator only to register a provider if the requirements are satisfied and there is no reason to believe the provider does not have a genuine purpose of providing education; and
- 26.13.4 Allow the regulator to take action against a registered provider where the regulator has reasonable grounds to believe the provider does not have a genuine purpose of providing education.
- 26.14 It is recognised that enterprise RTOs and some government agencies do not exist solely to provide education, but rather offer training as a critical part of labour force skilling. While the provision of nationally recognised training may not be the sole purpose of these organisations, they do have a genuine purpose to provide training.

Proposed reform 1

ASQA proposes that the NVETR Act be amended to provide that applicants for registration or renewal of registration be required to demonstrate a genuine purpose of a commitment to providing high quality VET and the capability to do so (similar to that required under the VSL Rules).

Initial registration – Financial viability and business planning

- 26.15 The Financial Viability Risk Assessment Requirements are detailed in a legislative instrument made pursuant to section 158(1) of the NVETR Act. The instrument in operation was developed in the period leading to ASQA's commencement and has not been varied since.
- 26.16 Applications for initial registration must be either accompanied with or preceded by the submission of a financial viability risk assessment pack. The pack requires the submission of information used by ASQA to assess financial viability risk and places the onus on the applicant to demonstrate that it has:
- 26.16.1 Access to accounting software, which can reconcile management reports and prepare monthly reports and annual financial statements;
- 26.16.2 A current business plan; and

- 26.16.3 A financial budgetary process to produce forecast outcomes for at least the following 12 months.
- 26.17 The applicant must satisfy a range of financial ratios going to its projected profitability and efficiency, liquidity and financial structure. The information provided must be certified as correct by the applicant's CEO or principal executive officer, and a nominated accountant.
- 26.18 ASQA adopted its current approach to assessing financial viability risk in October 2013. Prior to this time, ASQA utilised the services of an external financial analysis firm to review accounts submitted in conjunction with an application for renewal of registration and projected financial outcomes with initial applications. The experience of the earlier approach indicated that very few applicants were not able to meet their requirements or were able to do so once given a rectification opportunity. Given this experience, it was concluded that the regulatory burden being placed on all applicants was not justified by the regulatory benefit.
- 26.19 At a whole of sector level, financial viability assessment of training providers typically occurs as a requirement associated with state or territory VET funding programs and student loan programs. This means that viability testing is quite fragmented and, depending on its operation, an individual provider might be subject to financial requirements in multiple states and at the federal level if it is a VSL participant. Further the same provider, if a dual sector provider, would also be subject to the financial viability risk assessment processes of TEQSA.
- 26.20 The nature of financial viability testing means that it is a “point in time” assessment. The financial viability position of an entity can alter quickly and this means that, to be meaningful, financial viability assessment needs to be regular to enable a trend of performance data to be established.

Proposed reform 2

ASQA proposes that the Financial Viability Risk Assessment Requirements be reformed and made fit for purpose. This may entail requiring not simply financial ratio and solvency testing, but the establishment of a sustainable business model, with a focus on ensuring adequate resources are readily available for the proposed scope of registration. Sustainability and business model data provision should be linked to initial registration, change of scope of applications, and the submission of an annual compliance declaration.

Ideally, a whole of VET sector model for the gathering and analysis of financial information to service the needs of funding bodies, student loan schemes, tuition protection, and education quality regulators should be developed.

Review of a refusal decision of initial registration

- 26.21 Section 199 of the NVETR Act prescribes the decisions of ASQA which are reviewable decisions. A decision to grant or reject an application for initial registration pursuant to section 17 of the Act is a reviewable decision.
- 26.22 In ASQA's experience, a refusal to grant an initial application will almost always relate to the conclusion that the application does not meet legislative requirements, particularly the RTO Standards. It is also possible that the refusal may be because the applicant does not satisfy the Fit and Proper Person Requirements or the Financial Viability Risk Assessment Requirements, although refusals based solely on these grounds are more unusual.
- 26.23 If an application for initial registration is refused, the applicant is entitled to seek an external review of ASQA's decision to the AAT and in most, although not all, cases may seek an internal reconsideration of the decision by ASQA pursuant to sections 200 and 201 of the NVETR Act. Internal reconsideration of a reviewable decision is not available if the power to make the decision has not been delegated by the regulator, i.e. the decision has been made by all three ASQA Commissioners acting as the regulator, as opposed to a single Commissioner, or the decision having been delegated to another ASQA officer.
- 26.24 It is arguable that the review rights of an applicant seeking to join the VET market should not be as extensive as those available to an RTO or a person who holds an existing entitlement such as a current registration as an RTO. Certainly the exercise of executive power through the refusal of an application to be granted initial registration should be reviewable, but the nature of that review need not be of the same kind afforded to an entity or person with existing rights.
- 26.25 At present, the combination of section 203 of the NVETR Act, which provides for review of applications to the AAT, and the operation of the Tribunal, results in an applicant for initial registration being able to address non-compliances with the RTO Standards through the review process. ASQA's preferred position is that an applicant address shortcomings identified through an application process by the submission of a new and compliant application. A driver for the behaviour of an applicant to seek an external review process rather than the submission of a new application may in part be the relative cost advantage in lodging an AAT review application as opposed to the cost of a full application to ASQA for initial registration. Further, the use of the review process in some respects places ASQA as an unpaid consultant, as each further submission by the applicant of new materials to the Tribunal causes ASQA to examine the materials and provide a commentary as to whether the previous non-compliances have now been addressed.
- 26.26 Given the churn in the number of RTOs, the resource allocation by ASQA associated with applications for initial registration is considerable. Review processes in the AAT absorb the

time of ASQA's small legal team and are a significant call on the available resource in ASQA's regulatory teams.

26.27 It is proposed that the review avenues available to an applicant for initial registration should be modified. One alternative would be to not allow external review of an ASQA decision to refuse initial registration. If this alternative was adopted, internal review would be made available in all cases, with an applicant not addressing identified weaknesses in the application following internal review processes being obliged to lodge a fresh application for registration

26.28 A second alternative would be to allow external review to the AAT, but to limit the nature of that review to, in essence, an examination as to how or whether ASQA made a correct decision based on the materials and circumstances present at the time that ASQA's decision was made. In other words, the Tribunal would not make a fresh and preferable decision at the time it was reviewing the matter, which would allow the submission of further materials addressing non-compliances by the applicant, but rather would confine its consideration as to whether ASQA made a mistake in refusing the application in the first instance.

Proposed reform 3

ASQA proposes that section 203 of the NVETR Act be amended to add a new section 203(3) which provides that if an application under section (1) or (2) is made to review the rejection of an application for initial registration, the Tribunal must review the decision having regard only to the circumstances as at the time the reviewable decision is made.

Early life of an RTO

26.29 The regulatory model adopted by ASQA and required by the Regulator Standards provides that a newly registered RTO will be reviewed by way of a compliance audit within two years of registration. The conduct of a compliance audit of the RTO envisages a test of the actual performance of the provider. ASQA endeavours to conduct a compliance audit within 18 months of registration, although the timing of the audit is influenced by the RTO having actually commenced operations and the competing demands on ASQA's available resources at any given point in time.

26.30 From 1 July 2012 (when Queensland joined the national scheme) to 18 May 2017, a total of 1166 RTOs have obtained initial registration. Clause 1.5 of the Regulator Standards does not permit a VET regulator to grant an application to add an AQF qualification or assessor skill set from the Training and Education Training package to the scope of an RTO that has not held registration for at least two years. There is no limitation on a training organisation that is newly registered from otherwise applying to add training products to its scope from the time registration is obtained.

- 26.31 A small majority of all newly registered RTOs seek to add training products to their scope of registration in the first two years of the RTO's life. Of the 1166 RTOs registered from 1 July 2012 to 18 May 2017 (and excluding applications flowing from a non-equivalent change to a training package):
- 26.31.1 51 per cent of RTOs added training products within the first two years of registration;
 - 26.31.2 40 per cent of RTOs added training products within the first 12 months of registration; and
 - 26.31.3 24 per cent of RTOs added training products to their scope of registration within six months of registration.
- 26.32 Further analysis of the 171 RTOs registered since January 2015 that added training products to their scope of registration within their first 6 months of registration renewals has found that:
- 26.32.1 The most common items approved at initial registration were BSB50215 Diploma of Business, BSB51915 Diploma of Leadership and Management, and HLTAID003 Provide First Aid; and
 - 26.32.2 The most common items added thereafter are CHC30113 Certificate III and CHC50113 Diploma of Early Childhood Education and Care, HLTAID001 Provide CPR, BSB60215 Advanced Diploma of Business, and BSB61015 Advanced Diploma of Leadership and Management.
- 26.33 It is also notable that each of the most common training products added to a newly registered RTO's scope within the first 6 months have been identified in ASQA's 2016 Environment Scan as 'products of concern'. This means the training products have had concerning features of:
- 26.33.1 Significant number of complaints received about the products relative to enrolment numbers;
 - 26.33.2 The number of times non-compliances found at audit were associated with the product; and
 - 26.33.3 Stakeholder concerns about the product were raised in consultations in undertaking the environmental scan.
- 26.34 This pattern of RTOs moving quickly after initial registration to add new training products to their scope raises concerns as to whether the RTO has established that it is operating in compliance with the RTO Standards for its existing scope of registration.

- 26.35 In 2016-17, ASQA received 4773 change of scope applications, which amounts to slightly more than 80 per cent of all provider applications received. It is not possible, nor desirable, consistent with a data led model of risk-based regulation, for ASQA to undertake an in-depth examination of each provider application received. Equally, it is not consistent with a thoughtful and properly developed business plan and financial model that a newly registered RTO should seek to move into the delivery of additional training products within a short period of obtaining registration, particularly where those training products are in entirely different industry areas to those proposed for initial registration.
- 26.36 ASQA proposes that constraints be imposed on the unfettered entitlement of RTOs to seek to add training products to their scope of registration during the first two years of an RTO's registration. Such constraints need to balance the legitimate opportunity for an RTO to adapt its business model to take opportunities as they arise in the VET market with the wider public interest of enhancing the provision of quality VET. A graduated model might be employed which does not permit applications to add training products (other than applications required by a non-equivalent change related to a training product on the scope of the RTO at the time of initial registration) within the first 12 months of registration. Thereafter, applications to add training products would be permitted, but scrutiny of such applications should be enhanced by requiring the application to be accompanied with additional information to establish the RTO's actual practice consistent with legislative requirements, and with a revised business plan and financial viability information.

Proposed reform 4

ASQA proposes that section 32(1) of the NVETR Act be amended to provide that, absent exceptional circumstances, an application to add to scope may only be made after 12 months from the date delivery of training and assessment begins, unless the application is a transition to a training product superseded by a non-equivalent change to a VET course on the RTO's scope of registration at the grant of initial registration.

Proposed reform 5

ASQA proposes that, to the extent necessary, the RTO and Regulator Standards be amended to support a regulatory practice that applications to change the scope of registration of an RTO after 12 months from the time delivery of training and assessment begins, and before the finalisation of a compliance audit, be supported by evidence of actual delivery of training and assessment in compliance with the NVETR Act and the submission of a revised business plan and financial viability information.

Provider and person suitability requirements

- 26.37 Section 23 of the NVETR Act makes it a condition of registration for the RTO to satisfy the Fit and Proper Person Requirements. The requirements are then referenced in clause 7.1 of

the RTO Standards, which requires an RTO to ensure that its executive officers and high managerial agents are vested with sufficient authority to comply with the RTO Standards at all times and meet each of the criteria specified in the Fit and Proper Person Requirements in Schedule 3 of the RTO Standards.

26.38 The requirements in Schedule 3 of the RTO Standards then provide criteria which, in essence, provide a list of negative factors that, if present, will weigh against the suitability of a person to be an executive officer or high managerial agent of an RTO. The requirements do not positively require an executive officer or high managerial agent to possess attributes which would benefit the RTO such as appropriate qualifications, experience, or a proven track record in VET or successfully operating a business.

26.39 The Commonwealth's recent changes to the VET funding scheme introduced detailed requirements that providers and key personnel must meet to be approved, and to retain approval, for funding. These are set out in the VSL Act and *VET Student Loans Rules 2016* (VSL Rules).

26.40 To be an approved course provider under the VSL legislations, a provider must meet provider suitability requirements. These requirements deal with the following matters:

26.40.1 Financial performance;²⁹

26.40.2 Management and governance including:

- (a) Clearly defined decision-making processes;³⁰
- (b) Adequate resources to support employees and students;³¹
- (c) Maintaining the integrity of student records and data;³² and
- (d) Combining the experience and expertise of key personnel and advisers with experience in the delivery of education, management, and administration;³³

26.40.3 Experience in providing vocational education;³⁴

26.40.4 Student outcomes, including adequate completion rates and satisfactory levels of student satisfaction;³⁵ and

26.40.5 Industry links, including links with relevant and appropriate industry bodies.³⁶

²⁹ Rule 23 of the VSL Rules.

³⁰ Rule 26(1)(b) of the VSL Rules.

³¹ Rule 26(1)(c) of the VSL Rules.

³² Rule 26(2)(a) of the VSL Rules.

³³ Rule 27(2) of the VSL Rules.

³⁴ Rule 31-32 of the VSL Rules.

³⁵ Rules 33 and 34 of the VSL Rules.

³⁶ Rule 35 of the VSL Rules.

- 26.41 In addition to these provider requirements, applicants for VSL approval are required to meet Fit and Proper Person Requirements for the provider and its key personnel. The VSL legislations consider key personnel relating to:
- 26.41.1 Compliance with the law, including convictions;³⁷
 - 26.41.2 Financial record, including insolvency and bankruptcy;³⁸
 - 26.41.3 Management record, including disqualification from managing corporations under the *Corporations Act 2001* (Cth);³⁹
 - 26.41.4 Provision of false or misleading information;⁴⁰ and
 - 26.41.5 Previous conduct and involvement that suggests a deliberate pattern of unethical behaviour.⁴¹
- 26.42 The VSL legislations further strengthen the duties and requirements of executive officers of a provider by placing personal liability on these persons.⁴² Executive officers must take all reasonable steps to prevent the provider from committing an offence and will be held liable if found otherwise.
- 26.43 ASQA has identified three weaknesses with the current Fit and Proper Person Requirements. Firstly, Schedule 3(a) of the RTO Standards refers to a conviction for an offence. This should be extended to include an offence proven without proceeding to conviction.
- 26.44 Secondly, Schedule 3(b) refers to whether the person has ever been an executive officer of an RTO at a time that the RTO had its registration cancelled or suspended. This should be widened to capture regulatory decisions beyond cancellation or suspension to include a refusal of a renewal of registration application. Further, it is observed that RTOs occasionally change executive officers shortly before an adverse decision is taken and those behind the behaviours leading to the adverse decision should be held to account, even though they may not be in a high managerial agent position at the actual time the adverse decision is taken.
- 26.45 A final issue is that there is some doubt as to whether the RTO itself, as opposed to its executive officers and high managerial agents need to satisfy the Fit and Proper Person Requirements. This point should be clarified through an amendment to the requirements and the RTO Standards.

³⁷ Rule 15 of the VSL Rules.

³⁸ Rule 17 of the VSL Rules.

³⁹ Rule 18 of the VSL Rules.

⁴⁰ Rule 19 of the VSL Rules.

⁴¹ Rule 20 of the VSL Rules.

⁴² Section 65 of the VSL Act.

Proposed reform 6

ASQA proposes that the Fit and Proper Person Requirements be amended to:

- Refer to an 'offence proven without proceeding to conviction';
- Clarify that the requirements apply to the RTO as well as officers and high managerial agents of the RTO; and
- Capture adverse regulatory decisions that are not only cancellation or suspension of registration.

Transfers and changes of ownership

- 26.46 The NVETR Act provides for a 'person' to apply to ASQA for registration as an RTO and for ASQA to grant an application for registration.⁴³ A person includes a natural person and a body corporate. Once registration is obtained, there are a variety of possible avenues by which the actual business benefiting from the registration might be sought to be transferred to another entity or person. For instance:
- 26.46.1 The acquisition by a non-RTO of the legal entity holding registration as an RTO with the intent that the acquiring legal entity will gain the training business operated by the entity holding registration;
- 26.46.2 The merger of two or more RTOs to create a new legal entity or the absorption into one of the RTOs of the scope of registration and supporting business infrastructure, staff, etc. held by the other RTOs; and
- 26.46.3 The legal entity holding registration as an RTO changes ownership by means of the sale or transfer of the shares in the legal entity.
- 26.47 In the case of a new legal entity seeking to acquire the training business of a legal entity holding registration as an RTO, ASQA requires that the new legal entity make an application for initial registration as an RTO. In other words, registration is not transferable from one legal entity to another.⁴⁴
- 26.48 In other cases where there is no change to the legal entity holding registration, but the effective ownership of the legal entity has changed, the position is as follows:

⁴³ Section 16(1) and 17(1) of the NVETR Act.

⁴⁴ ASQA has on occasions facilitated the transfer of registration from one legal entity to another by way of a truncated and customised application process. This has typically occurred to facilitate changes in the organisation of the TAFE system within a state or territory.

- 26.48.1 An application for registration is not required, but the change in ownership of the RTO is a material change, which must be notified to ASQA pursuant to the condition of registration embodied in section 25 of the NVETR Act; and
- 26.48.2 Clause 8.1(e) of the RTO Standards specify that information about a significant change to an RTO's ownership must be provided within 90 days of the change occurring.
- 26.49 In addition to changes in ownership, an RTO is also required to notify the VET regulator of changes to the management of an RTO, such as a change in high managerial agents such as a CEO. Again, prior approval of such change is not required, but rather the regulator is to be informed of the change after it has occurred.
- 26.50 The Regulator Standards state that a VET regulator is to implement a risk-based approach to managing changes to RTO ownership or management.⁴⁵
- 26.51 Concerns about RTO governance and changes in ownership and key management personnel have been identified by VET stakeholders in ASQA's environmental scan of VET systemic risks. In the 2016-17 environmental scan, the issue was identified as one of six systemic concerns raised by multiple stakeholders, with matters raised including:
- 26.51.1 Concerns about complex business structures linked to multiple RTOs with different trading arms within a single company;
- 26.51.2 Lack of transparency of ownership of RTOs in complex business structures;
- 26.51.3 Changes in ownership of RTOs and concerns as to whether new owners are 'fit and proper' to run an RTO; and
- 26.51.4 Whether the new RTO owners and managers lack VET or education experience, or leadership competence.
- 26.52 ASQA has incorporated the assessment of material changes to RTO ownership and changes to high managerial agents within its risk model. In short, upon receiving notification of a material change, the identified individuals taking up ownership or management roles will be assessed against ASQA's persons of interest and associations database to check if any fit or proper person matters arise. In terms of ongoing regulatory action, ASQA takes into account the number of material change notifications and changes in ownership in the use of provider dashboards. The dashboard is one of the core tools utilised by ASQA in pre-audit research, as well as determining if regulatory scrutiny of an individual provider should occur. Equally, ASQA is in the process of incorporating within its Regulatory Operations Action Tool

⁴⁵ Clause 1.8 of the Regulator Standards.

(ROAT) changes to ownership and management as one of the risk factors to contribute to a decision about the triggering of regulatory scrutiny of a provider.

26.53 It is submitted that the issue of changes in RTO ownership or high managerial agents is worthy of consideration of potential reform. While ASQA does not propose a specific reform at this point, options could include:

26.53.1 Requiring that a change in ownership can only be achieved through a prior approval process as opposed to the current situation of a post facto assessment after the change had occurred; and/or

26.53.2 Not permitting an RTO with new ownership or changed key management personnel to change its scope of registration for a period until the impact of the change in ownership or management has been assessed in terms of the actual performance of the RTO.

26.54 If the regulatory framework was to be altered, the resourcing implications of implementing any new approach would need to be carefully weighed. For instance, in the period of 30 September 2016 to 24 July 2017, ASQA received 312 notifications of change of ownership, 498 changes of CEO, 75 changes of CRICOS principal executive officer, and 430 changes of executive officers and high managerial agents. In total, these comprise 1060 unique notifications from 733 different registered training providers. Given the dynamic nature of the VET market and the volume of changes in the ownership and leadership of RTOs which occur each year, the triggering of regulatory scrutiny based on the mere change itself without further indications of whether the change has been neutral, positive, or detrimental to the performance of the RTO is clearly unsustainable in resource terms for VET regulators, nor desirable in terms of the operation of the VET market. Accordingly, any change in regulatory requirements needs to be based upon data and intelligence that the change in RTO ownership or management has in fact led to adverse behaviours, rather than simply a concern of the potentiality of such behaviours.

Role of accredited courses and training packages

26.55 Accredited courses must not duplicate training package outcomes, but do fulfil a niche requirement or provide a relatively fast approach to meet new training needs. Not all training is accredited or needs to be accredited to be delivered. The demand for this regulation demonstrates that the credentialing of training is important to the organisation for their staff or for the business to support its marketing. Students gain confidence in the quality of the course from the regulation as the courses are managed by the course owner and delivery may be audited by ASQA.

26.56 However, there are a number of issues:

- 26.56.1 There is limited information published about the course regarding course content, or data on activity or outcomes, so students and others are not well informed;
- 26.56.2 The terms of the Standards for VET Accredited Courses refer broadly to industry, enterprise and community need. The courses are nationally accredited, so it is recognised nationally even if it is not delivered nationally. However, the testing for this is not clear and courses may be delivered locally or be associated with a particular organisation or individual for their objectives;
- 26.56.3 ASQA cannot fully check the technical claims of courses or be responsible for efficacy and safety implications. For example, technical advice on a course may be sought from a relevant professional body; however, the use of the skills is not regulated by ASQA or that body. In some cases courses cannot be checked by a technical body as the area is not regulated or there is no agreed industry self-regulation. Yet there is a risk that people expect that the outcomes of the process or service taught in an accredited training course are, because of ASQA involvement, effective and safe;
- 26.56.4 ASQA has concerns that some RTOs are developing courses for national recognition as a mechanism to enrol international students predominantly for the purpose of obtaining a student visa to enter Australia; and
- 26.56.5 ASQA also has concerns that some course developers are developing courses for national recognition for the primary purpose of enabling domestic students to access government subsidies.
- 26.57 Improving the transparency of accredited courses and the training undertaken would put them on the same footing as training package qualifications. Reforms to improve information for students and the quality indicators for training could be applied to accredited courses, which could then be used in monitoring the courses. Where courses are not widely used, or where outcomes are a concern, the accreditation could then be reviewed.
- 26.58 Managing the parameters of consumer protection that ASQA's course accreditation processes provide needs to be strengthened. The prescribed standards against which ASQA assesses course accreditation applications do not extend to ensuring safe or risk-free training delivery and assessment by training providers or a graduate's ongoing competency in the workplace following issuance of the qualification. Clarification of ASQA's role in accrediting courses and providing a power for ASQA to refuse to accredit a course would assist in situations such as where the proponent has not sufficiently demonstrated the safety or efficacy of a program.
- 26.59 Clarification of the role of these courses and how they sit alongside training packages (which are more akin to occupational standards), while not taking away from the potential flexibility

and benefit of accrediting training, may assist to better assess the need and validation of proposed accredited courses.

Proposed reform 7

ASQA proposes amendments to:

- Ensure that the same standards of quality indicator data for training packages apply to accredited courses and are used to inform students, assess RTO performance, and monitor courses through amendments to the relevant data and course accreditation requirements;
- Strengthen the threshold for establishing an economic or industry need for a proposed nationally accredited course, and the validation requirements, to ensure that the processes or services taught in a course demonstrate a sufficient level of safety and efficacy in the course accreditation requirements;
- The NVETR Act to provide for ASQA to refuse to accredit a course in certain circumstances (or remove accreditation) such as where the proponent has not sufficiently demonstrated the safety or efficacy of a program; and
- The Standards for VET Accredited Courses for a new standard to publish greater information on training.gov.au about the objectives and nature of each accredited course.

ASQA also proposes that the role of, and administration of, accredited courses and their relationship to training packages in the VET system be clarified and synergies explored.

27. Quality, not only compliance

- 27.1 In the past decade, the Australian VET sector has undergone substantial reform, focussing on creating an efficient, flexible and market-driven national VET system that is both engaged with, and responsive to, the needs of industry.
- 27.2 Over this period, successive governments have introduced significant regulatory reforms to the sector, including:
- 27.2.1 The establishment of ASQA as the national regulator;
 - 27.2.2 Substantial enhancements to the various standards for the regulation of VET; and
 - 27.2.3 A strengthening of the AQF to improve pathways between qualifications with the intention to promote lifetime learning.
- 27.3 The Australian Government's continuing VET reform agenda focusses on the four key themes of:
- 27.3.1 Industry responsiveness;
 - 27.3.2 Quality and regulation;
 - 27.3.3 Funding and governments; and
 - 27.3.4 Data and consumer information.
- 27.4 ASQA has been at the forefront in relation to 'quality and regulation', with reforms introducing a regulatory practice that adopts a risk-based approach and which seeks to target regulatory resources to the highest risk whilst minimising the administrative burden placed on providers.

Lapse of registration for a failure to deliver VET

- 27.5 As mentioned in paragraph 26.2, data from the NCVER total VET students and courses publication indicates that 10% of providers reported no VET activity in 2016.⁴⁶ Equally, a sizable minority of newly registered RTOs, when contacted to provide VET delivery data for the purposes of scheduling and scoping a compliance audit, advised that no delivery had commenced after 12 months of the RTO obtaining registration.
- 27.6 The sheer number of dormant RTOs imposes burdens not only on VET regulators, but on the NCVER which is obliged to collect nil delivery submissions from RTOs for data analysis purposes. There may be a range of reasons as to why an RTO obtains registration, but then does not commence actual delivery or becomes dormant for a prolonged period during its registration life. It is submitted however that there are a range of public policy reasons relating to the currency of the RTO's skills and capacity and its connection to industry, which are likely to justify a lapse of registration if no delivery actually is occurring.
- 27.7 In New Zealand the regulation of VET is encompassed within the scheme of the *Education Act (New Zealand) 1989*. The Act provides in part that the registration of a private training establishment (broadly equivalent to an RTO for the present discussion) will lapse in certain circumstances, namely:
- 27.7.1 On a date that is one year after registration if, within that period, the training provider does not provide an approved program to at least one enrolled student;⁴⁷
or
- 27.7.2 If 12 months have passed since the training provider has provided all or part of an approved program.⁴⁸
- 27.8 In other words, registration of a provider will lapse automatically unless some training and assessment is occurring each and every 12 months of the provider's registration. The New Zealand regime appears to go even further and will see individual qualifications and skills sets lapsing from a provider's scope of registration, even if the provider is delivering in other training products on its registration.
- 27.9 ASQA supports the adoption of the New Zealand approach, which the New Zealand regulator has advised has worked well to promote quality education outcomes by ensuring providers have a current capacity to provide registered courses.

⁴⁶ NCVER, 2017, *Australian vocational education and training statistics: total VET students and courses 2016*, NCVER, Adelaide.

⁴⁷ Section 234 of the *Education Act (New Zealand) 1989*.

⁴⁸ Section 250B of the *Education Act (New Zealand) 1989*.

- 27.10 It is proposed that the lapse of registration be automatic and not require the taking of a regulatory decision by a VET regulator. A provider whose registration lapses is obliged to reapply for initial registration. At this point ASQA does not advocate that the New Zealand approach in terms of the lapse of registration of individual qualifications or skills sets from a provider scope of registration be adopted. This approach, however, is worthy of further consideration.

Proposed reform 8

ASQA proposes that the NVETR Act be amended to provide that if an RTO does not commence providing VET within 12 months of being registered, or during its registration ceases to provide training for a 12 month period, then its registration will automatically lapse, meaning that it is no longer registered. If the entity later wants to provide VET, it should be required to re-apply for registration.

Regulation of third parties

- 27.11 It is common for RTOs to operate all or parts of their business through third parties that are not required to be registered with ASQA. This is envisaged in the RTO Standards. Third-party arrangements can include third parties that provide:
- 27.11.1 Marketing and recruitment services;
 - 27.11.2 Enrolment services;
 - 27.11.3 Study support services;
 - 27.11.4 Learning resources; or
 - 27.11.5 Delivery of training to students.
- 27.12 The RTO Standards require third-party arrangements to be in writing, notified to ASQA, and that the RTO monitor the services delivered on its behalf. The consequence of the use of third parties is that there are many participants in VET that are not registered with, nor directly regulated by, ASQA. This means that the third-party's suitability to operate is not easily scrutinised and if its behaviour is inappropriate it cannot be sanctioned directly.
- 27.13 Whilst the RTO that engages a third-party provider can be held accountable for the actions of its service providers, this does not prevent the third-party from offering services to another RTO.
- 27.14 The use of third parties for the recruitment of students under the VET FEE-HELP scheme was heavily criticised and believed to have led to many students signing up for VET courses without properly understanding the financial consequences or suitability of the course to the

learner's actual training needs. As a result of this experience, amendments were made to the HESA to prohibit third party recruitment for the VET FEE-HELP program. In the regime established for the replacement of VET FEE-HELP, namely the VSL program, participating RTOs are not permitted to utilise third party services at all. At the state and territory level, government VET assistance programs have adopted different approaches to the role of third parties, with some jurisdictions not permitting the use of third parties, while others may allow a third-party provider to be used in particular circumstances and with the prior approval of the funding body. In other states, there is no direct limitation on the use of third parties, although the terms of the funding contracts will generally go to the responsibilities of the RTO in regard to third parties to enable the funding body to fully monitor the performance of the RTO and the third-party.

- 27.15 For their part, the RTO Standards provide a number of references to the obligations that RTOs hold when third parties are engaged. In addition to the overarching requirement on an RTO to properly monitor and be responsible for the performance of its third parties, the Standards clearly envisage that third party services can occur across the range of a training provider's operations, including in the core area of training and assessment.⁴⁹
- 27.16 Given that the RTO Standards envisage that third-party services can be utilised by an RTO across the full array of a training provider's operations, there appears to be a tension between the behaviours envisaged by the Standards and sections 116 and 117 of the NVETR Act.
- 27.17 Section 116 of the NVETR Act provides that a person commits an offence if the person provides, or offers to provide, all or part of a VET course and the person is not an RTO. Section 117 renders a person liable to a civil penalty for this same behaviour.
- 27.18 On its face, it would seem that a third-party which is providing or offering to provide all or part of a VET course is acting contrary to sections 116 and 117, notwithstanding the implicit permission for such behaviour within the RTO Standards. While each case would turn on its own facts, such as the exact nature of the relationship between the RTO and a third-party, recent external legal advice obtained by ASQA has highlighted the apparent conflict between the NVETR Act and the RTO Standards on this point.
- 27.19 ASQA believes the unfettered ability of RTOs to effectively outsource all of its operations as a training provider to third parties under various licensing or contracting arrangements is highly problematic. The model of registration and regulation of RTOs assumes that the registered entity will in fact be responsible to undertake the services as a training provider. While there are a range of valid and practical reasons why particular services in particular circumstances may be contracted to third parties, the core functions in the actual delivery of

⁴⁹ For example, clauses 6.1(b), 6.2, 8.2, and 8.3 of the RTO Standards

training and assessment should primarily, if not entirely, be conducted by an RTO and not a third-party on behalf of an RTO.

- 27.20 ASQA contends that the apparent conflict between the RTO Standards and the NVETR Act should be resolved by adopting a policy position that training and assessment is so fundamental to the successful outcome of high-quality VET that these particular functions should only be delivered by an RTO directly and not through third-party arrangements. Such an outcome would be consistent with the position now reached in relation to the VSL scheme and with the position adopted in a number of the states in regard to VET funding programs. Further, regulation of the activities of RTOs would be more straightforward and the responsibilities more clear-cut if RTOs were not permitted to outsource training and assessment requirements.

Proposed reform 9

ASQA proposes that the apparent conflict between sections 116 and 117 of the NVETR Act and the RTO Standards be clarified by the amendment of the Standards so that third-party services in the provision of a VET course can only be provided by an RTO.

Recognising well performing providers

- 27.21 The NVETR Act and its supporting legislative instruments in effect provide the baseline of performance expected from an applicant to obtain registration of an RTO, and then for the RTO to maintain registration. While baseline performance is fundamental to the achievement of quality in the VET market, both governments and other users of VET services have adopted performance expectations which go beyond baseline regulatory requirements.
- 27.22 For instance, participation in government assistance programs, both at the state and territory level, and for the Commonwealth, generally require participating RTOs to satisfy a range of criteria in addition to mere registration as an RTO. For example, to be approved for the VSL program, an RTO must demonstrate:
- 27.22.1 A strong history of delivering high quality VET to genuine students for at least three years, evidenced through shortlisting for national awards or long-term delivery of state subsidised courses;
 - 27.22.2 A strong history of delivering diploma and advanced diploma qualifications, evidenced by outcomes such as course and completion rate data;
 - 27.22.3 A benefit to students recognised as exemplary by students and employers, and evidenced through references or media articles; and

- 27.22.4 Workplace relevance, evidenced by industry participation on RTO advisory boards, formal arrangements for relevant student placements, and involvement in industry organisations or presentations at conferences.
- 27.23 The predecessor to the current VET Quality Framework and the RTO Standards was the Australian Quality Training Framework (AQTF). The AQTF went through several manifestations with the *Standards for NVR RTOs 2012*, drawing heavily on the AQTF 2010. The forerunner of the AQTF 2010 was the AQTF 2007, which consisted of three components, namely:
- 27.23.1 Essential standards for registration, i.e. the standards necessary for a training organisation to be registered to deliver and assess nationally recognised training qualifications;
- 27.23.2 Standards for state and territory registering bodies, i.e. the standards for registering bodies to manage and quality assure the registration of training organisations in accordance with the AQTF 2007 and the relevant legislation within each jurisdiction; and
- 27.23.3 Excellence criteria, i.e. a set of criteria that RTOs may use voluntarily to continue improving the quality of their training and assessment and to gain formal recognition of their performance beyond the essential standards for registration.
- 27.24 The excellence criteria were developed and subject to trial, but were never fully implemented. This component of the AQTF did not carry over from the 2007 structure into its replacement in 2010. The excellence criteria were intended to be used in a voluntary manner by an RTO to demonstrate performance beyond the essential standards for registration and went to the areas of leadership, learning and assessment, people development, relationship management, and integrated information management.
- 27.25 The excellence model envisaged both self-evaluation and independent external evaluation. The benefit of self-evaluation was thought to include:
- 27.25.1 Further development of an organisation's business plan;
- 27.25.2 Increased staff commitment to the organisation's vision and goals;
- 27.25.3 The provision of opportunities for professional development and teambuilding;
- 27.25.4 Improved management of assets and resources; and
- 27.25.5 The embedding of continuous improvement processes to better meet client needs.

- 27.26 An RTO that went beyond self-evaluation and sought formal recognition as a quality committed or outstanding RTO was thought to benefit from:
- 27.26.1 Feedback from external evaluators to identify organisational strengths and opportunities for improvement;
 - 27.26.2 National and international recognition of their organisation's consistently high level performance, including as an employer of choice and a training provider of choice;
 - 27.26.3 Information exchange and benchmarking opportunities through a network of participating organisations.
- 27.27 An RTO which sought external valuation might be recognised as either quality committed or outstanding. The evaluation would be conducted at the provider's expense and carried out by an evaluator allocated from a panel maintained by state or territory regulator.
- 27.28 In contrast to the VET market, the provision of ELT education has a long history of a well-established industry-led quality assurance mechanism. NEAS operates a quality assurance process for ELT centres. This process relies upon a quality assurance framework which has been developed in consultation with the ELT profession, both in Australia and internationally, together with input from industry bodies and government. The framework concerns itself with the professional standards required by a range of occupations associated with ELT provision and aims to protect the interest of the students of ELT centres. The framework consists of six quality areas, namely:
- 27.28.1 Teaching, learning, and assessment;
 - 27.28.2 The student experience;
 - 27.28.3 Resources and facilities;
 - 27.28.4 Administration, management, and staffing;
 - 27.28.5 Promotion and student recruitment; and
 - 27.28.6 Welfare of students aged under eighteen.
- 27.29 The quality assurance process relies on stakeholder driven feedback informed by input from students, teachers, marketers, and administrative staff of an ELT centre. The use of online surveys and focus groups seeks to triangulate the information provided by an ELT centre with the actual experience of students. Further, the process endeavours to pinpoint any differences in approach and commitment to the ELT centres goal and mission between teaching, marketing, and administrative staff. NEAS' quality endorsement is taken into

account by ASQA in the operation of ASQA's risk model. In short, quality endorsement is taken as a positive risk factor in assessing the provider profile of an ELICOS provider.

27.30 It is submitted that the operation of the VET market and the achievement of quality VET outcomes would be enhanced by the emergence of quality assurance and endorsement mechanisms. The overall design and operation of such mechanisms requires detailed consideration. Basic features might include:

27.30.1 Leadership or at least strong engagement of industry, consistent with the industry-led character of the Australian VET system;

27.30.2 National standing so that quality endorsement is recognised by Commonwealth and state and territory VET funding bodies and might ideally replace the differential criteria applied across jurisdictions for RTOs to be approved as a participant in government assistance or student loan programs; and

27.30.3 Quality performance criteria which would demonstrate excellence in:

- (a) Industry engagement;
- (b) Learner outcomes in the acquisition of skills sets and in gaining employment or career advancement;
- (c) The learner experience inclusive of effective dispute resolution processes;
- (d) Teaching, learning and assessment, and innovation;
- (e) Resources and facilities; and
- (f) Qualifications and professional standing of trainers and learning support.

27.31 In risk terms, the award of quality endorsement would contribute to the provider's risk profile and be taken as a positive indicator. This in turn could be integrated into other regulatory decisions, such as the grant of delegated authority by the regulator to the provider to amend the provider's scope of registration without application.

Proposed reform 10

ASQA proposes initiatives that promote or encourage industry bodies to offer quality assurance and endorsement services to a broad range of RTOs. A formalised scheme could provide for a body, such as an industry council or a statutory board to consider applications from industry for authorisation to offer endorsements to RTOs. ASQA would be willing to recognise endorsements given by authorised industry bodies when undertaking its regulatory activities. This model would provide for the development of a scheme which offers quality assurance services to a broad range of RTOs by industry.

Bodies that could undertake the role of authorising industry bodies to endorse RTOs could be the AISC or the CISC. The NVETR Act could be amended to expressly provide for ASQA to have regard to endorsements held by RTOs that have been issued by industry bodies authorised by the statutory body. This could be provided for in the Ministers Guidelines on ASQA's Risk Assessment Framework.

Training and assessment and the professionalisation of VET

- 27.32 In its environmental scan in 2015, ASQA identified the systemic risk associated with RTO trainers and assessors. ASQA had concerns about the capability of VET trainers to understand training packages and comply with the RTO Standards and also about the absence of any requirement for VET trainers to undergo professional development. This is seen by ASQA as a critical issue for the VET sector.
- 27.33 In early 2016, ASQA prepared a submission in response to the Commonwealth's discussion paper, *Quality of assessment in vocational education and training – Discussion Paper*, in which it advanced the following points:
- 27.33.1 Through its strategic reviews and routine regulatory work, ASQA has consistently highlighted weaknesses in the capabilities of trainers and assessors, particularly in relation to conducting assessment. The necessary rigour of assessment is not currently adequately demonstrated across the VET sector and ASQA would welcome consideration of restricting the practice of recognising prior learning (particularly with regard to the RTO's own staff);
- 27.33.2 While ASQA believes that trainers and assessors should have a sound understanding of andragogy and the theory of how to train and assess in the VET sector, ASQA is not supportive of requiring trainers and assessors to undertake a university-level qualification. ASQA does believe, however, that consideration could be given to requiring RTOs to engage the services of a university trained VET teaching professional to oversee the RTO's training and assessment;

- 27.33.3 Of great concern to ASQA in relation to TAE training is that training is increasingly being delivered in a very short timeframe - where the number of hours the student studies is vastly inappropriate to fully develop the required skills. A further concern affecting the quality of this training is the growing focus on the hours students may be engaged in unsupervised or unstructured learning, rather than ensuring that sufficient knowledge and skills are imparted to learners by way of supervised learning delivered in a structured way by a provider;
- 27.33.4 Volume of learning that meets the minimum specification of the AQF, and includes sufficient supervised learning, is relevant to ensuring students graduate equipped with the necessary skills to work as a VET trainer and assessor; and
- 27.33.5 The appropriate amount of training represents a critical concern for ASQA, and is the subject of a strategic review, *A review of issues relating to unduly short training*, recently released by ASQA and discussed further at paragraphs 28.36 to 28.52.
- 27.34 Following on from the discussion paper, the Training and Assessment Working Group made a series of recommendations on improving the quality of assessment.⁵⁰ The Working Group's report was released following the CISC meeting of November 2015, with Ministers agreeing to progress the recommendations.⁵¹ The recommendations of the group were:
- 27.34.1 Workplace learning requirements to TAE Certificate IV and Diploma qualifications be strengthened to include a practicum;
- 27.34.2 Entry requirements for TAE Diploma qualifications be strengthened by requiring entrants to have the Certificate IV in Training and Assessment, and to be able to demonstrate a defined period of practice in training and assessment;
- 27.34.3 Consideration of establishing a mandatory national registration scheme for all VET practitioners;
- 27.34.4 The professional development requirements in the RTO Standards be reviewed to establish a definition for, and minimum standard for participation in, professional development;
- 27.34.5 Improvement of validation of assessment requirements considered by the AISC;
- 27.34.6 A review of the sanctions available to ASQA; and

⁵⁰ Training and Assessment Working Group, *Improving the Quality of Assessment in Vocational Education and Training*, May 2016.

⁵¹ COAG Industry and Skills Council Meeting, Skills Ministers, 18 November 2016.

27.34.7 Strengthening the provision of information to the VET sector through statements for employers and VET graduates outlining expected VET graduate capabilities.

Higher standards imposed for RTOs who provide TAE courses

27.35 ASQA's Regulatory Strategy 2016-17 identified RTO trainer and assessor capability as a critical concern for the VET sector. For this reason, ASQA has used the release of a new TAE training package as a vehicle to thoroughly test all RTOs seeking to offer the TAE. This work will continue in 2017-18 with the aim of improving the qualification standard of trainers and assessors as they enter the VET workforce.

Professional development or accreditation for VET trainers

27.36 Clause 1.16 of the RTO Standards provides that an RTO is to ensure that all trainers and assessors undertake professional development in the fields of the knowledge and practice of vocational training, and learning and assessment, including competency-based training and assessment. The standards do not specify how often professional development must occur, or whether the professional development is to be resourced by the RTO or by the individual trainer or assessor.

27.37 The Training and Assessment Working Group in its report noted that the RTO Standards currently lacked a definition of what might constitute professional development and what should be a minimum standard for participation in development activities. It was argued that addressing these points would be valuable in improving the professionalisation of the VET workforce. The Working Group further recommended that a mandatory national registration scheme for VET practitioners was worthy of further detailed consideration.

27.38 ASQA supports initiatives to professionalise the VET workforce. A starting point would be to provide minimum requirements for the conduct of professional development through the amendment of clause 1.16 of the RTO Standards. The other recommendations of the Working Group are also worthy of consideration.

Proposed reform 11

ASQA proposes that clause 1.16 of the RTO Standards be amended to provide minimum specifications for participation in professional development.

An informed market

- 27.39 ASQA considers that better quality indicators about training outcomes and greater consumer disclosure will improve both student protection and confidence in the VET market. In particular:
- 27.39.1 Improving the 'quality indicators' for RTOs currently required under the regulation, and strengthening ASQA's powers to use these to sanction poor performing RTOs, would improve incentives for RTOs to deliver training that delivers good outcomes;
 - 27.39.2 The data underpinning the student information and quality indicators should also be collected in a timelier manner and efficiently with minimum burden on RTOs. It could also be used for other reasons such as policy design and program administration;
 - 27.39.3 Improving information for students will improve their ability to choose between different training options and select one that best suits their needs; and
 - 27.39.4 As a student makes relatively infrequent decisions and knows less about the market than an RTO, it is appropriate to also strengthen the responsibilities of the RTO to the student through a more formal disclosure statement that includes performance information. The RTO would be liable for the claims and information in the statement and ASQA could also take regulatory action based on this information provided to students.
- 27.40 Data provision from RTOs is governed by the NVETR Act and Standards 4, 5 and 8 in the RTO Standards regarding information for students and for ASQA. Further detail is in the Data Provision Requirements and Data Policy agreed by Ministers.
- 27.41 The main data collections for the VET market are administered by the NCVER and comprise training activity (the annual Total VET Activity collection) and surveys of students and employers. The activity data is also used to populate the student transcripts of completed training that students can access using their Unique Student Identifier (USI) number.
- 27.42 RTOs also have data and performance requirements through contracts for government programs. Administrative data is collected through government programs run by the Australian Government (including VSL) and by state and territory governments, which may involve reporting as frequently as fortnightly. Data analytics are also evolving and providing new ways to link data sets and improve understanding of outcomes.
- 27.43 Survey data is used by RTOs and others for benchmarking performance and activity, and understanding trends in the market. RTOs also undertake their own student surveys as part of good management of their organisation, teachers, and courses.

- 27.44 RTOs must have, and use, a student records management system that enables reporting of AVETMISS compliant training activity data. Hence, it is not unreasonable nor overly burdensome for each RTO to report its activity data more regularly than currently mandated through annual reporting. ASQA advocates that RTOs should be required to, as a minimum, report qualification and statement of attainment issuance to a national collection in real time. This could result in a system-generated accountable document number being immediately sent to the RTO to be entered onto the student's certification and issued. This would require that the USI be established and/or verified by the RTO at, or close to, the commencement of training. Currently, this is not required until certification is issued. This has created significant problems in the case of provider closures and has hampered the full use of the USI Registry.
- 27.45 Benefits of this proposal are evident. For example, governments could have immediate access to all VET certification issued for planning, reporting, and regulatory activities. Graduate students could have immediate updates to their student identifier transcripts. Further, potential employers could have immediate access to an online system to validate the authenticity of certificates provided by potential employees.

RTO quality indicators

- 27.46 The VET 'quality indicators' set out at Part 4 of the Data Provision Requirements were established originally in 2007 under the Australian Quality Training Framework and continued under the NVETR framework in 2011. These indicators require data collection and reporting on training activity (commencements and completions), and student satisfaction and employer engagement feedback. The Total VET Activity collection now covers the first of these indicators. Options to improve the reliability of data about student satisfaction and employer engagement feedback for the whole VET market are being explored.⁵²
- 27.47 In the meantime, the requirement for RTOs to collect information on the quality indicators remains. The data is not collected in a standardised form so is not comparable, is not provided to ASQA in detail (only a statement that it is held by the RTO), and is not published. Updating the quality indicators through standardised feedback from students and employers across all RTOs is urgently needed.
- 27.48 Data on training activity such as enrolments, commencements, progression (where relevant), and completions by course by RTOs is important to monitor. With online technology, RTOs are now able to rapidly alter their delivery, and hence the opportunities and risks, for students. Governments can monitor subsidised programs closely and note any unusual changes in activity. While such information may be shared with ASQA as risk intelligence, ASQA does not have the same view of the remainder of the market.

⁵² For example, at communiqués for the CISC: <https://www.education.gov.au/council-australian-governments-industry-and-skills-council-cisc>

- 27.49 Feedback on the outcomes of the training – did a student gain a benefit from the training immediately or over time? Were employers satisfied? - is critical for VET. Surveys, or other data analytics work, need to be collected by course by RTO (subject to statistical validity). The data on outcomes is what defines the 'quality' of VET.
- 27.50 The updated quality indicators data should be provided to ASQA confidentially to be used in the regulation of quality. At a minimum, ASQA could use the data as part of the risk-based approach to targeting regulatory activity. The data, analysed alongside regulatory experience, would assist in identifying patterns of risk in RTO behaviour or in particular market segments.
- 27.51 ASQA could also use the data as a benchmark of quality and use the data as a basis to target RTOs that are poor performers. Poor performance could be defined in particular market segments in terms of outcome indicators such as progression, completion rates, employment outcomes, and student and employer satisfaction. More detailed work is needed to identify benchmarks and how to recognise special circumstances and cases such as enterprise RTOs. Lessons could also be learned from other government programs. A regime could be phased in with an initial focus on longer and more expensive courses or certain market segments at high risk.
- 27.52 The use of performance data in regulation would strengthen confidence in the VET sector by consumers and also RTOs. It would establish a fairer market in which RTOs could innovate and provide services as the products would have all met a valid and visible benchmark.
- 27.53 In the interests of informing the decisions of other VET partners, ASQA shares data and information with eligible legislative authorities under the current NVETR Act information sharing provisions. It usually occurs in response to requests for specific information for lists of providers which ASQA assesses on a case by case basis (a labour intensive task for ASQA).
- 27.54 There are opportunities for ASQA to adopt a more co-regulatory, partnering approach by sharing provider information more readily with other government agencies. For example, ASQA could provide access to information on all providers (e.g. analytic dashboards) to other government agencies so they can better understand the market within their jurisdiction and to inform decisions relevant to their area of responsibility (e.g. provide state and territory authorities with access to information for all providers to inform decisions about state level activity).

Improving student outcomes

- 27.55 The VET sector has an ongoing interest in student completion rates. As outlined in the *Redesigning VET FEE-HELP Discussion Paper*,⁵³ low levels of student completions characterise the sector, influencing the perceived and actual quality of VET training. While this paper specifically considered those students enrolled under the VET FEE-HELP scheme, the potential explanation that low course completions align to a provider having no incentives or penalties to improve completion rates, can be related to the whole of the VET sector.
- 27.56 The RTO Standards enable ASQA to take action against a provider for not meeting its quality outcomes. These actions, however, are reactive and occur after the student has been impacted. That is, it is only after it is identified that an RTO has very low completion rates that an RTO's enrolment practices and student support is scrutinised. By this time, a student's employability skills, foundation skills, and personal attributes have already been affected.
- 27.57 Changes made under the VSL legislation, however, now actively require a provider to meet 'adequate completion rates for each of its courses (or parts of courses)' in order to retain approval as a VSL provider.⁵⁴ This requirement allows for completion rate benchmarks to be determined which a provider must meet.
- 27.58 It is recognised that there is diversity in the VET sector. As noted by the NCVER in its report, *VET program completion rates: an evaluation of the current method*, program lengths vary and can span several years, students commence at different times, students can study full-time or part-time, and students may intend on only completing certain units of competency instead of a full qualification. Regardless, obtaining subject and program completion rates from an RTO – in a regular and timely manner – provides a valuable guide in regulation.

Proposed reform 12

ASQA proposes to:

- Amend the RTO Standards and the Data Provision Requirements (and Data Policy) to improve the quality indicators for RTO performance to reflect the Total VET Activity collection and introduce standard student and employer outcome surveys so as to improve the ability of ASQA to regulate for quality outcomes and facilitate informed choice by consumers;

⁵³ Department of Education and Training, *Redesigning VET FEE-HELP: Discussion Paper*, 19-21.

⁵⁴ Rule 33 of the VSL Rules.

- Collect performance indicators on a more timely basis and provide for information to be shared in a more timely and streamlined way; and
- Upon completion of government reform processes to the quality indicators, a new condition of registration be added to Part 2, Division 1, Subdivision B of the NVETR Act incorporating requirements which an RTO must satisfy in relation to quality indicators and completion/attrition rates.

28. Consumer protection

Introduction

- 28.1 Similar to other aspects of the VET system, the provision of consumer protection mechanisms is quite complex and involves obligations placed upon training providers and rights available to VET consumers sourced from a wide amalgam of Commonwealth, state, and territory laws. As a result, the position of an individual VET student and the available pathways for that student to raise a consumer complaint, and have the complaint examined and potentially resolved, depends on a number of variables, such as:
- 28.1.1 The state or territory in which the student is undertaking their course;
 - 28.1.2 Whether the student is domestic or studying in Australia on a student visa, or is an internal student with other than a student visa;
 - 28.1.3 If a domestic student, whether the student or the RTO providing the VET program to the student is in receipt of government assistance;
 - 28.1.4 Whether the RTO with whom the student is enrolled is a public or private entity;
 - 28.1.5 The nature of the concern being raised by the student; and
 - 28.1.6 The behaviours undertaken by the RTO.
- 28.2 Depending on the answer to these variables, the student might have access to the Commonwealth Ombudsman, a state or territory ombudsman, or a VET specific state-based government dispute resolution service. A domestic VET student enrolled in a private RTO and not in receipt of government assistance, i.e. a private fee-for-service paying student, will not have access to a government ombudsman service in most parts of Australia.
- 28.3 Overlaid upon the VET specific mechanisms is the Australian Consumer Law applied by the Australian Consumer and Competition Commission and state and territory Fair Trading bodies which provide a general framework of basic consumer protection to users of the VET system as it does for consumers of services across the economy. Further, depending on the

nature of the concern or issue being raised, the jurisdiction of a range of other dispute bodies might be enlivened. For instance, a complaint raising matters of sexual harassment or sexual discrimination in the provision of a VET service could enliven the jurisdiction of the Commonwealth Human Rights Commission or a state or territory anti-discrimination body. Equally, a concern about the adequacy or safety of the premises of a VET provider could see the jurisdiction of an Occupational Health and Safety Regulator brought into play.

28.4 In short, the regulation of training providers and the examination of complaints on a wide range of issues that might be canvassed by an individual VET consumer is a shared space between a number of regulatory, funding and dispute handling bodies at the Commonwealth, state, and territory level. The starting point therefore, in considering the adequacy of consumer protection in the VET system is a clear understanding of the different mandates of the bodies which can be involved in dealing with issues and complaints raised by a VET consumer.

28.5 The NVETR Act, the RTO Standards, and Regulator Standards taken as a whole make clear that ASQA is not established nor given powers to be a consumer protection body like a specific ombudsman service e.g. the VSL Ombudsman. This in turn reflects the scope of the constitutional power referred to the Commonwealth by the referring states which is limited to the regulation of RTOs. Rather, ASQA's mandate in terms of VET student protection is at the highest level summarised in the objectives of the NVETR Act section 2A(e) – to protect students undertaking, or proposing to undertake, Australian VET **by ensuring the provision of quality VET** (emphasis added).

28.6 This means that ASQA's focus is on the provision of quality VET and not the examination of issues of dissatisfaction that an individual student might have about their experience with an RTO. ASQA seeks to obtain student complaints and information as to a student's experience with an RTO, but this is for the purpose of informing the key data and intelligence available to ASQA in undertaking its regulatory operations of the VET sector rather than having the aim of resolving the individual concern raised by the student. In taking action triggered by a complaint, ASQA's examination of the issues of VET quality might result in a VET consumer obtaining an outcome which resolves their concern but the resolution of the consumer dispute is not the aim of the regulator's review of the RTO. That ASQA's role in the consideration of VET student and other complaints is not a consumer protection role is reinforced in the Regulator Standards. These Standards provide:

28.6.1 The Regulator is to implement a policy on reports of RTOs' non-compliance with the RTO Standards (complaints);⁵⁵

⁵⁵ Clause 3.5 of the Regulator Standards.

- 28.6.2 The policy is to explain how reports are used in supporting the compliance efforts of the VET Regulator;⁵⁶
- 28.6.3 Reports are to be processed in accordance with the principles of natural justice and procedural fairness;⁵⁷ and
- 28.6.4 The Regulator is to maintain records or reports about RTOs and provide regular reporting to the Minister.⁵⁸
- 28.7 In canvassing reforms to protection mechanisms available in the VET system, ASQA contends that its current legislative mandate should be retained. In short, ASQA should remain focused upon VET quality and not assume a consumer protection role.

Internal and external dispute resolution

- 28.8 The NVETR Act does not contain consumer protection style powers or functions as such. The RTO Standards do provide for RTOs to maintain basic consumer protections, notably Standard 6, which requires an RTO to manage complaints involving the conduct of the RTO, its trainers, assessors and other staff, as well as third parties providing services on the RTO's behalf.
- 28.9 The import of Standard 6 is that the RTO is to have both an internal dispute resolution process (IDR) and provide complainants with a review mechanism by an appropriate party independent of the RTO. Review by an independent person at the request of the complainant can be characterised as external dispute resolution (EDR).
- 28.10 IDR and EDR by service providers are well-established features within a number of key areas of the Australian economy, notably financial services, telecommunications, and the energy and utilities markets. While models vary, in broad terms, the relationship between IDR and EDR requires that the service provider be given the first opportunity and has the obligation to deal with and attempt to resolve the issue raised by a consumer of its services. Usually, access to an EDR service is only available if IDR has been attempted and either has not resolved the dispute or a specified time frame for the IDR process to be completed has passed.
- 28.11 The obligations for complaint handling on an RTO are contained in Standard 6 of the RTO Standards and require that:
- 28.11.1 The RTO has a complaints policy to manage and respond to allegations involving the conduct of the RTO, its trainers, assessors, and third-party service providers;

⁵⁶ Clause 3.5(c) of the Regulator Standards.

⁵⁷ Clause 3.5(e) of the Regulator Standards.

⁵⁸ Clause 3.5(f) and (g) of Regulator Standards.

- 28.11.2 The RTO has an appeals policy to manage the request for a review of decisions;
- 28.11.3 A review of an RTO's decision on a complaint must be undertaken by an appropriate party independent of the RTO and that the complainant has an entitlement to access this person if the internal process fails to resolve the complaint; and
- 28.11.4 The RTO has 60 calendar days to process and finalise a complaint or appeal and that appropriate records of all complaints and appeals, and their outcomes, are maintained.
- 28.12 In essence, Standard 6 requires an RTO to have an IDR process and provide for a complainant who was unhappy with the outcome of the internal process to access EDR. Standard 6 does not provide any framework for assessing the requirement for the EDR service, which the RTO must provide, other than that the external review is to be by an appropriate party independent of the RTO.
- 28.13 The Australian and New Zealand Ombudsman Association (ANZOA) advised that an EDR service should have six requirements, namely:
- 28.13.1 Independence from the organisation being complained about with the investigator/external decision-maker not being subject to direction;
- 28.13.2 A clearly defined jurisdiction going to the services of the organisation being reviewed;
- 28.13.3 The external decision body having adequate power to investigate whether the organisation being complained about has acted fairly and reasonably. The investigator/decision-maker needs a power to obtain information, inspect records, and the ability to choose a dispute resolution methodology such as mediation or conciliation;
- 28.13.4 The EDR process needs to be accessible with no charge for the complainant to raise a matter;
- 28.13.5 The process must operate consistently with the requirements of procedural fairness, including the organisation and complainant having the opportunity to be heard and respond to any adverse finding before an investigation and/or decision is concluded; and
- 28.13.6 The EDR scheme needs to be accountable with public reporting on its work.

- 28.14 The current EDR arrangements to the extent that they are provided by government ombudsman services would satisfy these requirements. In contrast, the avenues provided by RTOs pursuant to Standard 6 of the RTO Standards are of a variable quality and in many instances would not meet the ANZOA benchmark.
- 28.15 Given the fragmented nature of the external dispute processes in VET, there have been calls for reform. These calls have generally argued for the establishment of a comprehensive ombudsman style service applying to all VET consumers. While these calls have not been accepted by government at this point, the Commonwealth, state, and territory governments have acted to establish the National Complaints Hotline, which aims to provide a clearinghouse so that VET consumers are able to access one point of entry and have their complaint or concern assessed and streamed into the appropriate dispute service or regulator depending on the nature of the complaint or concern raised.
- 28.16 ASQA contends that an important improvement in the VET consumer framework could be gained by providing greater specificity as to what are acceptable features for EDR in VET. This could be achieved by making membership of an approved EDR scheme a condition of registration and the development of legislative instruments to outline the features of an acceptable scheme. A working model might be drawn from the financial services sector, where a license condition for financial services firms is that the firm has an appropriate dispute resolution mechanism.
- 28.17 The VET regulator in this model would not assume a consumer protection role, but like ASIC in relation to financial services licenses, the VET regulator would approve the EDR mechanism of an RTO. To be approved, the EDR mechanism would need to meet the benchmarks set out in the legislative instrument. The benchmarks would go to matters such as:
- 28.17.1 Equitable access to students irrespective of location and mode of study;
 - 28.17.2 The type of dispute capable of moving into EDR, inclusive of fees and refunds, and other basic consumer service issues;
 - 28.17.3 The EDR scheme must be capable of making a binding decision on the RTO if the dispute cannot be resolved through mediation;
 - 28.17.4 The EDR scheme must be independent of the RTO; and
 - 28.17.5 Dispute resolution processes are to accord with the principles of natural justice and be fair to both the complainant and the RTO.

- 28.18 If an RTO failed to comply with the terms of a settled dispute or a binding decision, this failure would amount to a breach of the RTO's conditions of registration and could result in a regulatory sanction, including cancellation of registration. For this reason, information would need to be shared by the EDR scheme and the VET regulator.

Proposed reform 13

ASQA proposes that a new condition of registration be added to Part 2, Division 1, Subdivision B of the NVETR Act to require an RTO to be a member of an approved EDR scheme.

The basic features of the EDR scheme would include:

- Availability to all VET students irrespective of state or territory VET services where supplied and irrespective of if the RTO was public or private;
- A mandate on consumer issues with a power to make binding determinations on matters such as refunds; and
- Sharing of information on systemic issues and individual RTOs with VET regulators and Consumer Law regulators.

Improving information for students and employers

- 28.19 Improved data collections on activity and outcomes will also enable publication of more data to support informed choice by student and employers. Better information about outcomes by course and RTO (subject to statistical validity and student confidentiality) is particularly important. This will enable outcomes to be compared across RTOs from standardised collections, augmented with local information, and will enable students to choose the course that best suits their needs. ASQA supports the development of a clear dashboard of information, most importantly for students, with the flexibility to delve into more detail. Such information will continue the work undertaken with the My Skills website in recent years.
- 28.20 The My Skills website also includes regulatory decisions to inform the market. This function could be enhanced over time, as ASQA's assessment of risk profiles matures with updated performance indicators and a greater focus on outcomes in regulatory decision making.
- 28.21 Informed choice is an important part of improving the outcomes and confidence in the VET market. Greater transparency of outcomes will also increase scrutiny of RTO performance by students and employers and create positive incentives to deliver better quality education and training.

- 28.22 While the information will assist students and employers to differentiate between providers, a further step could be taken to strengthen the responsibilities of the RTO with the requirement for a more formal disclosure statement to students.
- 28.23 Currently, RTOs have obligations to learners and clients under the Standards 4 and 5 of the RTO Standards:
- 28.23.1 Standard 4 covers accurate and accessible information about an RTO, its services, and performance; and
- 28.23.2 Standard 5 covers advice to each learner to ensure they are properly informed and protected, including about the learning that is appropriate to the prospective learner's needs taking into account their existing skills and competencies.
- 28.24 However, as a student makes relatively infrequent decisions about training and knows less about the market than an RTO, it is appropriate to strengthen Standard 5. Education and training is often a significant investment of time and money by a student, particularly in the longer VET courses. RTOs also have expectations about student commitment and it may be very costly or difficult to fully assess current skills.
- 28.25 ASQA's strategic review into course duration, *A review of issues relating to unduly short training*, found significant inconsistencies in how RTOs advertise course duration, including different terminology, meanings of duration, and measures of time. This is likely to be confusing for industry and learners trying to choose the most appropriate course. In particular, this lack of consistency makes any direct comparison between courses challenging, as there can be significant variation in the advertised course duration of the same qualifications offered by different RTOs.
- 28.26 Clause 5.1 of the RTO Standards requires that "prior to enrolment or the commencement of training and assessment, whichever comes first, the RTO provides advice to the prospective learner".
- 28.27 Clause 5.2 of the RTO Standards provides details of the required content and prescribes that the advice "be in print or through referral to an electronic copy".
- 28.28 There is no guidance, however, to RTOs about how these matters should be described or expressed.
- 28.29 A key issue discussed in the strategic review is the confusion that results from the range of terminology used to describe course duration and the level of flexibility inherent in the training architecture. The strategic review also found significant variation in the advertised course duration of the same qualifications offered by different RTOs, making any direct

comparison between courses challenging for industry and learners. For instance, more than 40 per cent of Certificate III courses take less than 34 weeks, while over a quarter of them take 68 weeks or more.

- 28.30 The strategic review recommended that RTOs be required to publish Product Disclosure Statements that include the range of learning activities expected, such as the amount of training (see below for further discussion) for each training product on their scope of registration.
- 28.31 It also recommended that a template be developed for the Product Disclosure Statement to standardise how the requirements of clause 5.2 be expressed.
- 28.32 A more formal disclosure statement for a student about the training and RTO performance in a course should be developed. This could include expectations about student commitment and existing skills.
- 28.33 As recommended in the strategic review, a more formal disclosure statement would be a significant improvement on the current information expected to be provided by RTOs. Making RTOs more accountable for their services would improve incentives for RTOs to provide quality training.
- 28.34 The information within the disclosure statement should include the type of information already expected to be available as a result of clause 5.2 of the RTO Standards, as well as proposed improvements. For example:
 - 28.34.1 Quality indicators for the course and RTO, including relative performance;
 - 28.34.2 Course details, mode of learning, hours, and location of training;
 - 28.34.3 Financial costs and any credit arrangements; and
 - 28.34.4 Any regulatory requirements in the training, including government subsidies, scholarships, and credit or loan arrangements.
- 28.35 A more formal disclosure statement would also enhance ASQA's ability to regulate against Standard 5.

Proposed reform 14

ASQA proposes continued action to improve information to students and other consumers such as employers, to improve their ability to choose the course and RTO that best suits their needs.

ASQA also proposes amendments to the Standard 5 of the RTO Standards to require RTOs to issue Product Disclosure Statements in a standardised format for each training product on their scope of registration.

Course Duration – ‘amount of training’

- 28.36 RTOs determine both the total hours of student learning and the split between supervised and unsupervised learning activities that is to be provided to meet the requirements of the relevant training package qualification or accredited course.
- 28.37 ASQA is concerned that this flexibility may be confusing for some RTOs and is complex to regulate effectively. Clause 1.1 of the RTO Standards, which governs amount of training, is in the top four clauses against which RTOs are found to be non-compliant. Course duration attracted the highest number of complaints between 1 April 2015 and 31 March 2017.
- 28.38 The AQF, which sets the overarching framework for duration:
- 28.38.1 Is necessarily broad in order to serve all industry and education sectors and to recognise that learners can achieve competence in different timeframes;
 - 28.38.2 Expresses volume of learning as a range that applies across entire qualification levels;
 - 28.38.3 Includes both RTO-supervised and individual-directed learning activities without guidance about how much volume should be allocated to each type of activity; and
 - 28.38.4 Does not provide sufficient guidance to RTOs, learners, or regulators about the expected volume of learning for units of competency, in which there is a significant and growing number of enrolments.
- 28.39 The Standards for Training Packages do not allow training packages to specify the volume of learning that RTOs must deliver, nor any other delivery requirements. This is in contrast to the Standards for VET Accredited Courses, which require inclusion of nominal hours and nominal duration. The fact that two types of nationally recognised training products have different duration requirements compounds the complexity of the regulatory framework.

- 28.40 The RTO Standards require RTOs to provide an amount of training consistent with the requirements of the qualifications (training packages and VET accredited courses) they deliver, but do not define 'amount of training'. In the absence of an explicit definition of amount of training, it has been taken to be analogous to the AQF volume of learning.
- 28.41 The flexibility inherent in the AQF volume of learning requirements and the RTO Standards allow RTOs to deliver training that caters specifically to learners' individual needs. It therefore requires RTOs to exercise significant professional judgement in interpreting the requirements of the training package to determine an appropriate amount of training. ASQA is then responsible for ensuring the compliance of RTOs against these requirements by exercising its own professional judgement.
- 28.42 In the absence of any specific guidance to RTOs or the regulator about the amount of training required specific to the training package qualifications and units of competency, there can be differing professional judgements between RTOs and the regulator about the required amount of training.
- 28.43 At worst, this flexibility can open the door for RTOs to assert that the apparent short duration of their courses is due to the way they have allocated volume of learning across RTO supervised and learner directed activities. That is, they can assert that while the supervised activities may be of short duration, the bulk of the course is 'self-directed' and therefore the totality of the course duration is in line with the AQF requirements.
- 28.44 The inclusion of a definition of amount of training in the RTO Standards that specifies the supervised learning and assessment activities that are included would strengthen and clarify the current legislative framework. The amount of training, so defined, would form a component of volume of learning and enable greater guidance to be given to RTOs about the amount of supervised learning and assessment activities that should be delivered.
- 28.45 It is recommended that the amount of training include all formal teaching, learning, and assessment activities that a new learner would need to undertake to achieve the learning outcomes specified, expressed in hours. It is recognised that the definition requires further consideration to ensure it is workable and does not lead to unintended consequences.
- 28.46 As a starting point for this consultation, it is proposed that amount of training could include supervised or guided learning, such as:
- 28.46.1 Tuition and other trainer-directed workshops or activities;
 - 28.46.2 Structured self-paced study;
 - 28.46.3 Structured work placement;

- 28.46.4 Projects and prescribed set tasks; and
- 28.46.5 Assessment activities.
- 28.47 It would not include unsupervised learning, such as:
- 28.47.1 Private study or preparation, including prescribed reading; or
- 28.47.2 Self-initiated learning or research.
- 28.48 It is not intended that each of these activities must be included in the delivery of training. It would be left to training package and accredited course developers to determine the amount of training (using a consistent definition) that would be specified for each training product.
- 28.49 This proposed definition draws upon good practice identified in the regulatory models of other countries with competency-based training systems. The proposal aims to provide clarity for RTOs, learners, industry, and the regulator about the time a learner (who is new to the industry area) would be required to undertake in supervised learning and assessment activities.
- 28.50 As is currently the case, learners may be required to undertake further unsupervised learning activities in addition to the supervised learning and assessment activities to ensure their total training activities are in line with the AQF volume of learning requirements. ASQA notes that the Australian Government has announced a review of the AQF. ASQA will be recommending that this review give consideration to the matters raised in its strategic review of course duration report.
- 28.51 It is recommended that the definition of amount of training included in the RTO Standards be replicated in the Standards for VET Accredited Courses and the Standards for Training Packages (and the associated policies and procedures) to ensure a consistent definition is adopted across the three sets of standards.
- 28.52 ASQA recommends that the views of industry, government, and RTOs are considered in finalising the 'amount of training' definition. This will ensure that any definition takes account of the practical issues associated with the delivery of supervised training and assessment activities across a range of modes of delivery.

Proposed reform 15

ASQA proposes that a comprehensive definition of the term 'amount of training' be included in the RTO Standards, specifying the supervised learning and assessment activities that are included.

The definition of 'amount of training' should be agreed through a consultative process commissioned by the Department of Education and Training, led by the Chair of the AISC, and involve key stakeholders including industry, RTOs, and government representatives.

Once finalised, the term 'amount of training' should be adopted in the Standards for VET Accredited Courses and associated VET Accredited Course requirements and documentation, the Standards for Training Packages, and the associated Training Package Development and Endorsement Process Policy.

Cancellation of VET qualifications and statements of attainment

- 28.53 The scheme of the NVETR Act is predicated on the imposition of obligations on RTOs to secure and maintain registration, and hence the focus of ASQA's regulation is on the 4098 RTOs which hold registration as at 30 June 2017. As noted, in 2016, there were an estimated 4.2 million students enrolled in VET at some point during that year. As a matter of practicality, as well as design, the NVETR Act is based upon the regulation of RTOs and not individuals who are students or who acquire VET qualifications or statements of attainment.
- 28.54 Part 4, Division 2, of the NVETR Act does permit ASQA to instigate a process whereby the qualification held by an individual might be cancelled. The triggering of this process relies upon the regulator being satisfied on reasonable grounds that:
- 28.54.1 The RTO did not provide the assessment necessary for a person to achieve the required learning outcomes or competencies;
 - 28.54.2 The qualification or statement was issued outside the scope of registration of the RTO;
 - 28.54.3 The qualification or statement was issued by the organisation in error, or because of a document or representation that was false or misleading; or
 - 28.54.4 It is appropriate to cancel the qualification or statement of attainment because of action ASQA has taken in relation to the RTO or the course to which the qualification or statement of attainment applies.
- 28.55 ASQA can only exercise its power to cancel qualifications and statements of attainment after it gives the RTO a written direction to do so and the RTO fails to comply with that direction.

There is no offence or civil penalty applicable when an RTO does not comply with a direction under this section.

- 28.56 The process in sections 56 to 59 of the NVETR Act have resulted ASQA taking cancellation actions involving over 2600 individual qualifications or statements of attainment. These occasions have largely related to circumstances where ASQA contends that no training or assessment has occurred, or that the training or assessment has been so deficient that it amounts to a sham that a reasonable person should have been aware of. In these instances, collusion between the RTO and the student to have the qualification or statement of attainment issued without adequate training or assessment can reasonably be suspected.
- 28.57 The more problematic situation arises where the student is engaging with the RTO in good faith and the RTO is purporting to offer training and assessment services, but the quality of the services do not meet the requirements of the VET Quality Framework and the conditions for registration. In such cases, ASQA may impose a sanction upon the RTO, such as the removal of a course from the RTO's scope of registration, or the suspension or cancellation of the RTO's registration. In these instances, ASQA has not sought to cancel qualifications or statements of attainment issued to individual students of the RTO. This is because:
- 28.57.1 Invariably, the examination of the processes and practices of an RTO is drawn from an evidence base which is at a particular point of time and cannot easily or reasonably be extrapolated to earlier periods;
- 28.57.2 Even with the failure of an RTO to provide training or assessment consistent with the RTO Standards, an individual learner may nonetheless have achieved the learning outcomes or competencies to warrant the issue of a qualification or statement of attainment; and
- 28.57.3 An individual may have gained the competencies certified by holding the qualification or statement of attainment through workplace experience, even if the training and assessment provided by the RTO was inadequate.
- 28.58 This means that, while the circumstances specified in section 56(1) (a) to (d) might be present, a genuine student would be disadvantaged by the failure of an RTO if a cancellation of qualification or statement of attainment decision was taken. It is, of course, equally noted that a wider public interest exists in the integrity of the VET sector and a manifest failure in training and assessment can both put an individual at risk, as well as impact on the safety and interests of the wider community.
- 28.59 The steps required by the NVETR Act make cancellation of a qualification or statement of attainment complex, time-consuming, and resource intensive if applied to more than a small number of people. The steps can be summarised as:

- 28.59.1 The regulator being satisfied on reasonable grounds that one or more of the circumstances in section 56(1) (a) to (d) have occurred;
- 28.59.2 The provision of a written direction to the RTO to cancel the qualifications and statements of attainment and to notify persons concerned of the cancellation;
- 28.59.3 If an RTO is no longer registered or fails to comply with the written direction, the regulator can instigate the cancellation and, in doing so, must give each person concerned a written notice of the proposed cancellation;
- 28.59.4 The written notice provided to each person must provide reasons and invite a written response to the notice;
- 28.59.5 The regulator must consider the response to the notice; and
- 28.59.6 If the cancellation decision is taken, the persons concerned are to be notified of the cancellation and directed to return the qualification or statement of attainment to the regulator.
- 28.60 This process does not lend itself to a situation where a large number of qualifications have been issued by an RTO in circumstances of alleged sham training and assessment. Rather, it seems to assume an individual instance of a qualification or statement of attainment having been wrongly issued due say to the circumstances specified in section 56(1)(b) of an error, or because of the use of a false or misleading document, for instance, in conjunction with a recognition of prior learning process.
- 28.61 ASQA contends that Part 4, Division 2 should be reformed to make the process operate more effectively, particularly in cases of sham training involving the multiple issuing of qualifications to statements of attainment. This should enable the regulator to treat a cohort of students as a class.

Proposed reform 16

ASQA proposes that Part 4, Division 2 of the NVETR Act be recast to:

- Permit the regulator the option to initiate the cancellation of a qualification or statement of attainment without first having to direct an RTO to cancel the qualification or statement of attainment;
- Enable the order of remedial action by an RTO, such as reassessment of an affected student or a refund to the student if cancellation of a qualification or statement of attainment is required; and
- Enable the treatment of a group of qualification holders as a class rather than on an individual by individual basis, in circumstances where the regulator is satisfied that a sham arrangement for training or assessment has occurred impacting on multiple people.

29. Provider closures

Closures

- 29.1 Closure of RTOs, either due to cancellation by ASQA, liquidation, or other voluntary reasons, increased from 98 in 2015 to 180 in 2016. The circumstances of some cases have raised issues in the handling of records for current and former students of an RTO, as well as pressures for ASQA. These relate to the definition of records and systems, and when students can access their records.
- 29.2 Under the NVETR Act, when an RTO closes or has its registration cancelled, student records must be transferred to another RTO (who may have acquired some or all of an RTO's business) or provided to ASQA within 30 days.⁵⁹ This requirement is designed to ensure that current and former students can access their records when an RTO no longer exists.
- 29.3 The current definition of 'VET student records' is broad and includes any document (including in electronic form) that is, or has been, kept because of its connection with a current or former student of the RTO.
- 29.4 Recent changes to Commonwealth funding have resulted in a high number of closures through insolvency and some of the RTOs that have closed have had thousands of VET student records. Recent closures of two large providers resulted in 2,500 and 10,000 boxes

⁵⁹ Sections 211 and 213 of the NVETR Act.

of hard copy student records being delivered to ASQA. The costs to ASQA to record and store this volume of material will be several hundred thousand dollars initially, plus considerable on-going costs should these records be required to be retained long-term.

- 29.5 For the RTO or an administrator, this provides a convenient means of disposing of documents with no responsibility for providing electronic or hard copy records in an orderly manner. Further, section 545 of the *Corporations Act 2001* (Cth) provides that a liquidator is not liable to incur any expenses in relation to the winding up of a company unless there is sufficient property. This will not be known until several weeks or months after the winding up so the costs incurred by ASQA in managing student records are not able to be recovered. In fact, in a recent closure, ASQA expended \$120,000 to secure the electronic records, as there were insufficient funds available to the administrator to ensure this.
- 29.6 The consequence of the current requirements is that ASQA is applying substantial funds and diverting resources from core regulatory work to the management of student records and to responding to ongoing requests from students. In order to release information to students, identification checks are required and records must be recovered from ASQA's record keeping systems. These administrative tasks are time consuming and costly.
- 29.7 Records about a current student's course and completions to date are also required by students seeking to transfer to another RTO to continue their training or by students who have recently completed. In many cases, the closure of an RTO is known and the RTO issues statements of attainment to their students. In some cases, transfers of existing student may be supported by RTOs, industry bodies, or government agencies (eg tuition protection services) that are also interested in understanding the status of current students and hence seek access to student records. Records are required within 30 days but the length of this period of time does not provide sufficient support to current students. With electronic student management systems, RTOs should be able to provide statements of attainment to students readily and support transfers. Such systems would also support the transfer of data to ASQA in a matter of days.
- 29.8 ASQA notes that USI numbers have been created for VET students which allow them to access transcripts via data submitted to NCVER by RTOs. However, the current procedures for the submission of data mean that the data is only available some months after the annual data submission of Total VET Activity (excluding RTOs who have some exemption from data reporting or USI). Submission of data in the event of the closure of an RTO is not mandated, and furthermore the data may not have a USI if a qualification has not been issued. Timely submission of a last Total VET Activity report to the NCVER with the USI for each student enrolled would greatly improve the provision of records to students when an RTO closes. Over several years this may replace the ASQA records collection for closed RTOs. Further

development in systems to support more frequent data reporting would also support students.

Proposed reform 17

ASQA proposes amendments to the NVETR Act and RTO Standards to provide for:

- An obligation on RTOs whose registration is cancelled or effectively ceases to operate to provide statements of attainment to their current, or recently completed, students before this event occurs;
- Clarification that the information provided to ASQA under section 211 of the NVETR Act is limited to student records of completions of courses, units, and qualifications over the life of the RTO and that this data should be provided within 5 days rather than within 30 days in an electronic version;
- The USI to be provided on enrolment or at the completion of the first unit to ensure that the transcript service can be utilised;
- All RTOs to maintain up to date electronic records (for example monthly) about students electronically in a student records system listed in the AVETMISS Compliant Software Register approved by NCVER, so that it is compatible with ASQA's systems when data is transferred to ASQA following a closure and to ensure the RTO has the capacity to submit Total VET Activity data as required;
- Part 9, Division 2, Subdivision B of the NVETR Act to be amended to expressly permit the sharing of information with a tuition assurance provider or other body with responsibility for managing transfers of students; and
- Section 205 of the NVETR Act to be amended to include NCVER and remove the need to notify students in cases where student information is required to be released to NCVER.

The result would be that only electronic records of specified information about students would be available to students through ASQA after an RTO is closed (if its business has not been acquired by another RTO).

Alternatively, all RTOs could be required to submit required information in electronic form directly to NCVER on an ongoing basis so that there is no need to transfer records to ASQA on closure. Current processes which enable that information to be available to students using their USI number need to be developed to ensure timely access by students without the need for ASQA to collect this information.

Cancellation of registration

- 29.9 Section 39(3) of the NVETR Act provides that an organisation whose registration has been cancelled may not apply for registration for 2 years or such shorter period that ASQA considers appropriate.
- 29.10 In ASQA's experience, where cancellation of registration is warranted, the RTO ought not be entitled to seek re-registration for more than 2 years.

ASQA's ability to prevent natural persons of concern from being involved in the management of RTOs

- 29.11 Registration as an RTO is usually held by corporate entities. The NVETR Act provides for RTOs to identify all persons who are executive officers or high managerial agents and for the RTO to notify ASQA where the name or contact details of an executive officer or high managerial agent of the organisation changes.⁶⁰
- 29.12 ASQA is aware that natural persons that have been responsible for the management of RTOs that have had their registration cancelled continue to operate in the sector although they may not be identified as executive officers or high managerial agents of registered RTOs. It can be difficult to prove that the person of concern is involved in another RTO. It can also be difficult to attribute the conduct of the cancelled RTO to the person of concern.

Proposed reform 18

ASQA proposes amendments to the NVETR Act to provide for the conduct of an RTO that has had its registration cancelled, suspended, renewal refused, or convicted of an offence, to be attributed to its executive officers and high managerial agents, as at the time the RTO exhibited the behaviours that led to its cancellation, by providing ASQA with the power to issue banning orders for those natural persons which would prevent them from participating in the management of an RTO for a specified period of time (perhaps up to 5 years).

The amendment would also prohibit other RTOs from employing or engaging a person banned by ASQA or a body corporate, where a person banned is a director.

Time bar on prosecution for offences

- 29.13 Offences under the NVETR Act are summary offences, which means that prosecutions must be commenced within 12 months after the commission of an offence. This generally does not provide ASQA with sufficient time to detect and then investigate the offence to the level

⁶⁰ Section 25(1)(b) of the NVETR Act.

required by the Commonwealth Director of Public Prosecutions and refer the matter for prosecution.

- 29.14 ASQA can issue infringement notices for some offences, however, if this process is followed, there is even less time to prosecute the matter if the infringement penalty is not paid.

To date, there have been three prosecutions which have alleged offences under sections 64 and 128 of the NVETR Act. The sentencing outcome in both cases was disappointing. In one instance, the Court convicted the offender; however, the fine was only \$2,000. In the second instance, the natural person was placed on a 12 month good behaviour bond with no conviction and fined \$500. The corporate entity was convicted (it should be noted that ASQA also cancelled the registration of the RTO).

Proposed reform 19

The time within which prosecution for offences under the NVETR Act must be commenced following commission of the offence should be increased to 6 years (which is the same as the time allowed for civil penalty proceedings to commence). This would allow sufficient time to issue an infringement notice (if applicable and appropriate), investigate the matter, and refer the matter to the Commonwealth Director of Public Prosecutions.

Attachment 1 Terms of Reference for the Review

Background

In 2011, the *National Vocational Education and Training Regulator Act 2011* (NVETR Act) established the Australian Skills Quality Authority (ASQA) as Australia's national vocational education and training (VET) regulator.

Since this time the VET regulatory landscape has changed significantly with the introduction of new Standards for Registered Training Organisations (RTOs) in 2015, an evolving approach towards risk by the regulator, and the introduction of the new VET Student Loans program.

In this context, it is timely and appropriate to review the extent to which the NVETR Act supports a responsive, effective and efficient approach to regulation to ensure the quality of the national VET sector.

The reviewer will develop a deep understanding of how ASQA's operational environment has evolved in order to make necessary recommendations about further reforms to assist ASQA's operations.

Scope of the review

The reviewer will make recommendations regarding the NVETR Act and its subordinate legislation to ensure its capacity to:

- a. provide the regulator with functions and powers that are relevant and suitable to the current and future VET environment
- b. enable the regulator to use its existing powers in a timely, effective and transparent manner
- c. enable the regulator to apply a responsive, risk-based regulatory approach and effectively detect non-compliance
- d. enable the regulator to consider student outcomes in making regulatory decisions
- e. provide appropriate student protection mechanisms
- f. ensure only an appropriate level of regulatory burden is imposed on RTOs
- g. ensure VET consumers have access to appropriate information
- h. ensure regulators can effectively manage qualification types which may be delivered in both the higher education and VET sectors
- i. facilitate an outcomes based approach.

The reviewer will also advise on any other administrative improvements to the NVETR Act.

The reviewer will also advise on the implications of their findings and recommendations for the operations of ASQA.

Conduct and timing of review

The review will seek the views of major stakeholders, invite submissions from the public, and draw on available information and data about the VET sector. The reviewer will report to the Assistant Minister for Vocational Education and Skills by the end of 2017.

Attachment 2 Operational Legal Issues

Provided separately to the reviewer.