

Private Education Submission – Cutting Red Tape

1. The Red Tape Committee is inquiring in to the effect of red tape on the economy and community, and how it impacts on private education.
2. The Committee Resolution is to inquire into and report on the effect of restrictions and prohibitions on business, on the economy and on the community.
3. A key consideration to the resolution is *inquiring as to any specific areas of red tape that are particularly burdensome, complex, redundant or duplicated across jurisdictions*.
4. In the Private Education sector, particularly the Private Vocational Education and Training Sector, the national regulator is the Australian Skills Quality Authority (ASQA).
5. ASQA was established in 2011 as an Independent Statutory Agency and is enabled by the *National Vocational Education and Training Regulator Act 2011*.
6. ASQA is a Non-Corporate Commonwealth Entity (with the meaning given by the *Public Governance, Performance and Accountability Act 2013*) with an Accountable Authority and is bound by a duty to govern the commonwealth entity in a way that promotes the proper use and management of public resources, for which the authority is responsible.
7. As a non-corporate commonwealth entity, ASQA and its Accountable Authority are bound to comply with the requirements of the Australian Government Regulator Performance Framework.
8. The purpose of the Regulator Performance Framework (RPF) is *to encourage regulators to undertake their functions with the minimum impact necessary to achieve regulatory objectives, and to report objectively on the outcomes of their efforts to administer regulation fairly, effectively and efficiently*.
9. In meeting this purpose, the Regulator Performance Framework established 6 outcomes-based key performance indicators articulating the Government's overarching expectations of regulator performance, of which the Australian Skills Quality Authority is required to report and measure itself against, being:
 1. KPI 1: Regulators do not unnecessarily impede the efficient operation of regulated entities
 2. KPI 2: Communication with regulated entities is clear, targeted and effective
 3. KPI 3: Actions undertaken by regulators are proportionate to the regulatory risk being managed
 4. KPI 4: Compliance and monitoring approaches are streamlined and co-ordinated
 5. KPI 5: Regulators are open and transparent in their dealings with regulated entities
 6. KPI 6: Regulators actively contribute to the continuous improvement of regulatory frameworks
10. This submission outlines potential failures of the Australian Skills Quality Framework against these KPIs, and that these potential failures have resulted in burdensome and complex regulation, drastically impacting compliance costs and economic output of regulated entities with a negative impact on the community.
11. This submission contends that, while the current institutional structures (such as Regulation Impact Statements and the Office of Best Practice Regulation) appear enabled and empowered to achieve their purpose, there appears to be a gap in the identification and intervention of bad-practice regulation.

Regulator Practices

12. New regulatory standards were introduced in 2015, the *Standards for Registered Training Organisations 2015* (legislative instrument enabled by the *National Vocational Education and Training Regulator Act 2011*), which the Australian Skills Quality Authority (ASQA) conducts regulatory audits against.
13. Since the introduction of these standards, the audit practices of the regulator towards regulated entities has seen:
 - a. A substantial volume of Administrative Appeal Tribunal appeals undertaken by regulated entities, with:
 - i. 165 AAT matters opened from 2014-15 to 2016-17
 - ii. 144 AAT matters closed from 2014-15 to 2016-17
 - iii. ASQAs decision affirmed in only 11 of the 144 AAT matters closed from 2014-15 to 2016-17
 - b. A blowout of findings of non-compliance at completion of audit against regulated entities, from:
 - i. 13% of providers being found non-compliant in the 2014-15 annual reporting period (when the new standards were introduced); to
 - ii. 47% of providers being found non-compliant after final audit in the 2016-17 annual reporting period
 - c. A significant reduction in the number of audit reports provided within ASQAs target timeframe of 30 days, across all audit types, from:
 - i. **at worst** 77.1% of audit reports provided within target during the 2014-15 reporting period; to
 - ii. **at best** 50.9% of audit reports provided within target during the 2016-17 reporting period.
 - d. The total regulator workforce in 2016-17 was 162 staff, with a turnover of 109 staff since 2014/15 representing an 66% turnover.
 - e. A 45% rate of finding of non-compliance, at completion of audit, of training organisations who received initial approvals to become a Registered Training Organisation and then were audited as part of ASQA's post-initial registration audit, which occurs within two years of a provider's initial registration.
 - f. An increase in the rate of non-compliance, at completion of audit, of providers who initiate licence renewal applications, from:
 - i. 16% in 2014-15; to
 - ii. 39% in 2016-17

- g. Without publishing the details of complaints, an increase in the number of complaints received about and against the regulator from 38 in 2014-15, to 73 in 2016-17; with the regulator internally substantiating 42% of the 127 complaints with an outcome recorded, across the categories of
 - i. Slow processing of applications/ audits (31% of complaints)
 - ii. ASQA's processes for handling complaints about RTOs (9.8% of complaints)
 - iii. Auditors competence/ attitude (10.3% of complaints)
 - iv. ASQA's regulatory requirements (8.1% of complaints)
 - v. Poor communication / including infoline issues (9.8% of complaints)
 - vi. ASQA's staff (excluding auditors) (9.8% of complaints)
 - vii. ASQA's fees and charges (2.2% of complaints)
 - viii. Other (19% of complaints)
 - h. A substantial increase in the frequency and severity of adverse regulatory decisions, with
 - i. of 48 decisions in 2015 (calendar year), the decision to reject renewal or cancel 35 licences;
 - ii. of 275 decisions in 2017 (calendar year), the decision to reject renewal or cancel 153 licences;
 - iii. of 237 decision in calendar year 2018 (to July 30 2018), the decision to reject renewal or cancel 197 licences, accounting for 83% of all regulatory decisions;
 - iv. 89% of all of the regulators decisions to cancel an organisations training licence, since the establishment of the regulator in 2011, having occurred since the implementation of the new standards in 2015.
14. ASQA published on 24 May 2018 that RTOs remain satisfied with ASQA's audit processes, stating under the title of *Transparency of the audit process* that "90% of respondents reported their organisation was 'Very Satisfied' or 'Satisfied' with the fairness and transparency of the audit process", however:
- a. The feedback survey results were for RTO's who had a site audit between 1 July and 31 December 2017, two quarters before the publication of the results.
 - b. ASQA identified the survey was "sent to organisations following the end of the relevant quarter in which their site audit was conducted" with organisations given two weeks to complete the survey.
 - c. ASQA Performance Standards indicate a target that providers will receive their initial audit report within 30 days of the site-visit yet this target was only met, at best 51% of the time during 2016-17
 - d. ASQA Performance Standards indicate that registration applications, renewal applications, and change of scope applications which trigger an audit, will be finalised within 6 months.
 - e. The information appears to indicate that providers who had received a site audit and were still waiting for the final audit decision were asked by ASQA to complete audit-feedback surveys, which were unlikely have been anonymous and which providers may have been concerned may have influenced a final audit decision.

15. In February 2014 ASQA updated its policy with regards to the publication of regulatory decisions made, deciding that *"It would be fairer practice to defer publication of its regulatory decisions until an RTO's rights for reconsideration or appeal have been exhausted"*. In June 2016 ASQA reverted this policy deciding that *"information about decisions will be published shortly after they are made"*.
16. On 20 July 2018 ASQA announced that it had received new regulatory powers to seek civil penalties for non-compliances by regulated entities against the Standards for Registered Training Organisations 2015. ASQA indicated that the purpose of these powers were to *"effectively support the quality of the VET sector by providing an additional mechanism to protect students for poor-quality providers"*. These powers allow ASQA to issue infringement notices for breaches of the standards, even in cases where a provider has rectified that breach. With 80% of providers being found non-compliant at first audit and 47% non-compliant after final audit, this will impose a significant compliance cost and burden on the industry.

Summary

17. The information contained under findings in items numbered 13-16 provide indications that the regulator is failing to perform its duties as required against the government Regulator Performance Framework and deregulation agenda.
18. The severity of regulatory decisions being made by the regulator, the high number of expensive and timely challenges of these decisions, and the limited number of instances where the actions undertaken by the regulator have been upheld in an independent court or tribunal, indicate that these actions are not proportionate to the regulatory risk being managed
19. The findings in relation to complaints indicate that communication by the regulator to regulated entities is not clear, targeted or effective
20. The processes the regulator employs with regards to their surveys to regulated entities, the regulators lack of publishing of findings in relation to substantiated complaints, and the changing of policy to publish findings against regulated entities, before those entities have been able to exhaust their review rights, do not indicate that the regulator is being open and transparent in its dealings with regulated entities
21. The regulators inability to meet critical timeframes in Performance Standards for regulatory activity is substantially impeding on business confidence and the capacity for regulated entities to operate efficiently.
22. The regulator is not undertaking its functions in a way which has the minimum impact necessary to achieve its regulatory objectives
23. The regulator does not appear to be reporting objectively on the outcomes of their efforts
24. The regulator does not appear to be administering regulation fairly, effectively or efficiently
25. The committee should consider an inquiry in to the actions and performance of the Australian Skills Quality Authority in meeting its legislated duties as a regulator and as Australian Public Servants.