

Can you register an RTO just to sell it?

In small business, the establishment phase is the most challenging. This crucial period can make or break a business and will shape the essence of the organisation for years to come. Some entrepreneurs thrive in such conditions, whereas some people struggle to keep afloat. It is common practice for one person to establish a business and, once it is established, sell it to another.

So, can you register a Registered Training Organisation (RTO) just to sell it? We unpack this question by examining the Australian Skills Quality Authority's (ASQA) current policy and discussing the finer legal issues.

The answers might surprise you.

ASQA's current position

ASQA reports that much of its limited resources are allocated to regulating small, newly established RTOs. In an attempt to plug this drain on its resources, ASQA has been increasing scrutiny on new entrants to the vocational education and training (VET) sector.

ASQA has a new strategy for assessing initial applications for RTO registration under the *National Vocational Education and Training Regulator Act 2011* (Cth) (NVR Act). In an official ASQA webcast about the changes, ASQA announced that it would no longer tolerate the practice of "harvesting" or "shelf" RTOs. According to ASQA, a shelf RTO is where a person establishes and registers one or more RTOs for the purpose of selling it.

ASQA disapproves of shelf RTOs. Why? It appears their reasoning is as follows.

During the initial registration process and when an RTO changes hands, ASQA is required to scrutinise the owners. Doing these investigations twice (once for the initial registration application and again when the RTO is sold) increases ASQA's workload. ASQA also claim the investigations prescribed by the NVR Act after an RTO is sold are less stringent than the initial registration stage.

During the webcast ASQA warned that it would reject registration applications it considered were for shelf RTOs. The reason for the refusal being that "the applicant did not have any genuine intention to provide vocational education and training."

It appears that ASQA has remained true to its word. In the last few months, we have been made aware of a number of initial applications for registration that ASQA rejected on the basis that "the applicant did not have any genuine intention to provide vocational education and training."

ASQA has rejected these applications because persons involved with the applicant organisation (including, its shareholders, directors, chief executive officer etc.) have established RTOs in the past and sold them shortly after registration. This extends to both applications for RTO registration under the NVR Act and applications for registration on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) under the Education Services for Overseas Students Act 2000 (Cth) (ESOS Act).

Can ASQA reject applications because it believes "the applicant does not have any genuine intention to provide vocational education and training"? Let's see...

Initial registration requirements

The NVR Act sets out the requirements an RTO must meet in order to be registered. These are:

- *Standards for Registered Training Organisations (RTOs) 2015*
- Fit and Proper Person Requirements
- Financial Viability Risk Assessment Requirements
- Data Provision Requirements
- Australian Qualifications Framework
- Student assistance laws
- Material change notification requirements
- Relevant requests for information by ASQA
- Relevant directions made by ASQA

There is nothing in the initial registration requirements preventing a person from establishing an RTO for the sole purpose of selling it. There is also nothing that requires persons involved with the applicant organisation to have a genuine intent of providing VET.

Seemingly, ASQA agrees with this too. In an official submission regarding the review of the NVR Act, ASQA discussed the issue of shelf RTOs and essentially admitted the absence of any legislative basis for refusing applications for this reason. In fact, ASQA proposes law reform on this very issue, stating:

*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...*

This confirms the absence of a legislative requirement in the current laws. It appears that ASQA is merely exercising discretion, rather than applying the letter of the law, when it refuses a registration application because it considers there is no genuine commitment to provide VET.

Who is the “applicant”?

As discussed above, ASQA rejects applications if it believes that the applicant has no genuine intention to provide training and assessment. Let’s assume for a minute that ASQA has the power to reject applications on this basis. If this is the case, then we must understand the definition of the “applicant”.

The NVR Act states that “a person” may apply to ASQA for registration as a RTO. However, in most cases, the applicant is not an individual, it is a private company that has been established for the sole purpose of delivering VET. Under Australian law, any company is classified as a legal person. This means that a company is separate from its shareholders, directors, management and employees. In other words, the law generally considers a company to have a separate legal identity to its owners and others who may control it.

Now, turning back to the question at hand. According to the law, the applicant for the initial registration is the company itself, and not its owner/shareholders etc. Therefore, if the company intends to provide VET to students, which presumably it does because it has been established exactly for that purpose, the company owner, director and staff may change, but the intention of the company remains unchanged.

Therefore, so long as the new owners intend to continue operating the company as an RTO, the applicant arguably has a genuine and continuing intention to provide vocational education and training.

Where does that leave us?

It is arguable that ASQA's current policy to refuse applications for shelf RTOs on the basis that "the applicant does not have any genuine intention to provide vocational education and training" is legally flawed.

Our vindication for this position is two-fold. Firstly, the NVR Act's list of initial registration requirements does not require a "genuine intention" to provide VET. Secondly, ASQA's interpretation of "applicant" is sketchy.

As far as we have been able to determine, this issue has not come before the Administrative Appeals Tribunal. However, it is only a matter of time. In determining such a case, the Tribunal would consider whether ASQA has erred in applying the NVR Act. We anticipate clarification and guidance from the Tribunal on this topical issue.

For advice on your rights and assistance, speak with your lawyer.

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Disclaimer: This article has been based on Australian law and practices current as at the date of publication. Information contained in this article constitutes legal information and should not be viewed as legal advice. You should consult with a lawyer before you rely on this information.



rto.legal – legal and compliance services, *only* for RTOs

rto.legal is a commercial law and compliance firm operating out of Brisbane, Queensland, and focuses on exclusively supporting the legal and compliance needs of Registered Training Organisations (RTOs) and those seeking to become RTOs throughout Australia.

The firm provides support to RTOs through the delivery of high-quality and cost-effective legal and compliance services based on a deep understanding of the RTO business, and a flexible and highly competitive fee structure.

Why rto.legal

Because we've been there, and we understand.

We understand: (a) what you went through to establish your RTO; (b) how much time, money and hard work you invested to make it a success; and (c) in the current environment, what you need to do to keep your investment safe.

The investment required start and operate an RTO is significant.

This risk of potentially losing everything because of regulatory non-compliance is ever present.

ASQA is growing increasingly intolerant of non-compliant operators and is more inclined to impose sanctions including cancelling existing registrations or rejecting initial applications for registration.

Many people, despite having strong cases, cannot afford to pay the legal fees needed to challenge ASQA decisions.

Consequently, they accept decisions that they may feel were baseless or unfair.

There is no doubt that adherence to the VET Quality Framework is a must for all RTOs and those seeking to become RTOs.

However, no-one should have to accept a baseless or unfair decision because of the potentially high legal fees associated with challenging such a decision.

We are here to help by supporting you with high-quality legal and compliance services and a flexible and highly competitive fee structure.

Services and capabilities

We offer a full commercial law and compliance services including in relation to the following.

- Contesting ASQA decisions – internally with ASQA, through the Administrative Appeals Tribunal or the courts.
- Applying for initial registration, meeting the requirements of ongoing registration, making changes to a registration and renewing or withdrawing registration.

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- Continuing compliance with the VET Quality Framework.
- Representation on ASQA audits.
- Training partnerships, sub-contracting and training delivery.
- Business disposals and acquisitions.

Our Principal

The firm is led by its principal, Zmarak Zhouand.

- Zmarak is a lawyer qualified in Australia and New York with almost 20 years experience.
- He focuses exclusively on the vocational education and training (VET) sector.
- Zmarak has worked in-house and in private practice in Australia and abroad – with leading law firms and major businesses.
- He has owned and been the CEO of CRICOS and domestic RTOs.
- Zmarak understands RTOs and the complex legal and compliance environment in which they operate.
- He is technically strong, commercial and provides high-quality, practical and cost-effective services.
- Zmarak’s services are based on a deep understanding of his clients’ requirements in the context of their business objectives.
- He works with his clients to build strong relationships and is generally available 24/7.

Admissions/Memberships	Qualifications (University/HE)	Qualifications (VET)
Legal Practitioner, New South Wales, Australia, 2011	(Post-Grad) Bachelor of Laws, University of New England, 2000	Diploma of Training Design & Development
Member New York Bar Association, 2014	Bachelor of Laws, Southern Cross University, 1998	Diploma of Quality Audit
Member, Queensland Law Society, 2019	Graduate Diploma in Legal Practice, College of Law, 2001	Graduate Diploma in Strategic Leadership
Fellow, Chartered Institute of Arbitrators, 2017	Diploma in International Commercial Arbitration, Chartered Institute of Arbitrators, 2016	Graduate Diploma of Portfolio Management
		Advanced Diploma of Leadership & Management
		Diploma of Leadership & Management

Fees

- Our fees are very competitive and we are generally flexible regarding fee arrangements.
- We understand that clients may have different levels of ability to pay costs.
- We provide full costs disclosure on every matter, both initially and on an ongoing disclosure basis.
- We are open to both fixed-fee and time-based costing (with or without a fee cap).
- In dispute matters involving ASQA, we are also happy to look at contingency fee arrangements – where you only pay if we succeed in your case against ASQA – subject to conditions. We will consider contingency fee arrangements on a case by case basis.
- Overall, we believe that fees for my services should be fair and reasonable, having regard to all the circumstances of the instructions. The circumstances which may affect the level of fees include the following.

- Time spent on the matter
- Monetary amount involved
- Specialist legal knowledge required
- Number and length of documents
- Place and time of day at which the work was carried out
- Importance and urgency of the matter to you
- Complexity of the matter.
- Time spent on a matter will be one, but not the only factor considered in assessing the level of fees to be charged.

We will always be willing to discuss the basis for charging a matter at the outset.

Our values

- It is an honour to serve our clients in their moments of need.
- We serve our clients with a dedication to excellence, responsiveness, and caring and always with a sense of humble appreciation for the trust placed upon us.
- Our lifeblood has always been and always will be the recommendations of clients.
- Our success depends the satisfaction of our clients.
- The best marketing we can do is good work.
- We aim to exceed expectations.
- We focus on results, not activities.
- We view every client's problem as if it were our own.
- We believe that every client should receive not only a high level of legal representation but also a feeling of service and caring.
- No result is positive and no victory is absolute if a client has felt that their needs were not understood and addressed or that they did not receive our very best.

Contact

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