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Can I sue ASQA for damages?

In the current environment, an increasing number of people feel that they and their Registered Training Organisations (RTOs) have suffered loss and damage due to what they believe are wrongful acts or omissions on the part the Australian Skills Quality Authority (ASQA).

The question that these people want answered is: “*Can I sue ASQA?*”

Read on for more details.

(1) Reviewing a decision vs. suing ASQA

There is a difference between applying to have a decision reviewed and suing for damages.

If ASQA makes a decision that you disagree with (for example a decision to cancel your RTO registration), you can usually apply to review the decision internally with ASQA and/or with the Administrative Appeals Tribunal.

A review is an administrative process where the decision maker (either ASQA or the tribunal) will make a new decision. Reviewing an ASQA decision is different from suing ASQA.

You would sue ASQA to recover loss and damage that they have wrongfully caused.

If you have suffered a loss or damage because of an alleged wrongful act or omission on the part of ASQA, in theory, provided you can satisfy the elements of a cause of action (such as negligence), you may sue ASQA for damages.

So what’s stopping you?

(2) Crown immunity: ASQA protected from legal action

Under the National Vocational Regulator Act (NVR Act) ASQA has privileges and immunities of the Crown and cannot be sued where it acts on “good faith”.

This means ASQA is legally immune from being sued where the loss or damage is caused by something ASQA did (or did not do) in “good faith”.

ASQA would be deemed to be acting in good faith if it *honestly believes* that it is acting in furtherance of its statutory duties – even if it is negligent or makes a wrong decision.

Accordingly, even where ASQA is negligent, and such negligence causes you or your RTO loss and damages, provided ASQA acted in “good faith”, you can’t sue ASQA.

But, there are exceptions.

(3) Not acting in good faith

If ASQA, or one of its representatives (for example, an auditor), does not act in good faith and you or your RTO suffers loss or damage, you may be able to sue ASQA or its representative.

This is a complex area of law and beyond the scope of this short article. You should seek legal advice if you believe your case might fall under this exception.

(4) Discretionary avenues for recovery

In circumstances where it can be established that you suffered loss or damage due to ASQA's negligence, defective administration or other special circumstance, you can seek compensation in the following ways.

- Payment in settlement of a claim
- Compensation for Detriment caused by Defective Administration (CDDA) scheme
- Act of Grace payment

All these schemes are *discretionary* meaning that there is no obligation to pay compensation of any sort. They are based on the premise that there is a moral, rather than legal, obligation to make things right.

(a) Payment in settlement of a claim

Making a compensation claim and requesting settlement is usually the first step. You can make a claim directly to ASQA. The claim must be in writing (usually a letter) and include the details of the *alleged* negligence and the subsequent loss and damage suffered.

If ASQA agrees to pay you compensation, it will be an ex-gratia payment, meaning it is not an admission of liability ASQA. If ASQA does not compensate you, you can consider making a CDDA Scheme of act of grace application.

(b) CDDA Scheme

The CDDA Scheme aims to rectify defective administration. Defective administration is defined as:

- a specific and unreasonable lapse in complying with existing administrative procedures; or
- an unreasonable failure to institute appropriate administrative procedures; or
- an unreasonable failure to give to (or for) an applicant, the proper advice that was within the officer's power and knowledge to give (or reasonably capable of being obtained by the officer to give); or
- giving advice to (or for) an applicant that was, in all the circumstances, incorrect or ambiguous.

The aim of the CDDA scheme is to put you in the same position you would have been, had there been no error or negligence. So, if you can prove that defective administration took place, then the CDDA scheme may, but is not obligated to, compensate you for your loss or damage.

(c) Acts of grace payment

An act of grace payment is a special 'gift of money' by the Commonwealth government. Act of grace payments are very rare. According to the Commonwealth Department of Finance:

Act of grace payments are a last resort for providing compensation to persons who may have been unfairly disadvantaged by the Commonwealth but who have no legal claim against it.

Circumstances where an act of grace payment might be made include:

- where ASQA's involvement had an unintended outcome

- where the application of legislation or policy has resulted in an unintended, inequitable or anomalous effect
- where the paramount obligation is moral, rather than legal.

The Department of Finance handles act of grace payment applications.

(5) Way forward

Suing ASQA or one of its representatives, or making a claim under one or more of the discretionary schemes, can be very tricky and you want to get it right, the first time.

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

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.



About rto.legal

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

The firm provides commercial law and compliance support to RTOs through the delivery of expert legal and compliance services based on a deep understanding of the RTO business, and a flexible and highly competitive fee structure.

The services that we provide include the following.

- Contesting ASQA decisions – litigated and un-litigated.
- Applying for initial registration, meeting the requirements of ongoing registration, making changes to a registration and renewing or withdrawing registration.
- Continuing compliance with the VET Quality Framework.
- Representation on ASQA audits.
- Intellectual property within RTO course materials.
- Training partnerships, sub-contracting and training delivery.
- Business disposals and acquisitions.

The firm is led by its principal, Zmarak Zhouand.

- Zmarak is a lawyer qualified in Australia and New York with almost 19 years experience.
- He is a vocational education and training (VET) sector legal and compliance specialist.
- 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 our 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

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. We will determine contingency fee arrangements on a case by case basis.

Overall, we believe that fees for our 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.