

South Australia

# Training and Skills Development (Miscellaneous) Amendment Act 2011

An Act to amend the *Training and Skills Development Act 2008*.

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## Contents

### Part 1—Preliminary

- 1 Short title
- 2 Commencement
- 3 Amendment provisions

### Part 2—Amendment of *Training and Skills Development Act 2008*

- 4 Amendment of section 4—Interpretation
- 5 Amendment of section 5—Declarations relating to universities and higher education
- 6 Amendment of section 27—Conditions of registration
- 7 Amendment of section 28—Variation or cancellation of registration
- 8 Amendment of section 29—Criteria for registration
- 9 Amendment of section 31—Conditions of accreditation
- 10 Amendment of section 32—Variation or cancellation of accreditation
- 11 Amendment of section 34—Duration of registration/accreditation
- 12 Amendment of section 35—Grievances
- 13 Amendment of section 36—Inquiries and interventions
- 14 Insertion of section 36A
  - 36A Appointment of administrator
- 15 Substitution of section 37
  - 37 Commission may cancel, suspend or vary registration or accreditation
- 16 Amendment of section 39—Cancellation of qualification or statement of attainment
- 17 Substitution of section 41
  - 41 Public warning statements
- 18 Amendment of section 42—Appeal to District Court
- 19 Amendment of section 43—Offences relating to registration and issuing of qualifications
- 20 Amendment of section 44—Offences relating to universities, degrees etc
- 21 Insertion of section 44A and Part 3 Division 7
  - 44A Offence to make false or misleading statements
  - Division 7—Orders for compensation
    - 44B Orders for compensation
- 22 Amendment of section 57—Criteria for registration
- 23 Insertion of section 72A
  - 72A Confidentiality of information
- 24 Amendment of section 73—Other powers of Commission, Training Advocate etc
- 25 Amendment of section 75—False or misleading information
- 26 Insertion of sections 75A and 75B

75A	Imputation of conduct or state of mind of officer etc
75B	Offences by bodies corporate and employees

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## The Parliament of South Australia enacts as follows:

### Part 1—Preliminary

#### 1—Short title

This Act may be cited as the *Training and Skills Development (Miscellaneous) Amendment Act 2011*.

#### 2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

#### 3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

### Part 2—Amendment of *Training and Skills Development Act 2008*

#### 4—Amendment of section 4—Interpretation

- (1) Section 4(1)—after the definition of *AQTF* insert:

*authorised operations* of a registered training provider means the operations of the provider that are within the scope of the provider's registration;

- (2) Section 4—after subsection (4) insert:

(4a) For the purposes of this Act, a person is an *associate* of another person if—

- (a) they are partners; or
- (b) they are both trustees or beneficiaries of the same trust, or 1 is a trustee and the other is a beneficiary of the same trust; or
- (c) 1 is a body corporate and the other is a director or a member of the governing body of the body corporate; or
- (d) 1 is a body corporate and the other is a person who has a legal or equitable interest in 5% or more of the share capital of the body corporate; or
- (e) 1 is an employer or employee of the other; or
- (f) 1 is the spouse, domestic partner, parent or child of the other; or
- (g) a chain of relationships can be traced between them under any 1 or more of the preceding paragraphs.

### **5—Amendment of section 5—Declarations relating to universities and higher education**

Section 5(4), penalty provision—delete the penalty provision and substitute:

Maximum penalty: \$10 000.

Expiation fee: \$500.

### **6—Amendment of section 27—Conditions of registration**

(1) Section 27(2)—delete "by the Commission" and substitute:

under this Act

(2) Section 27(2), penalty provision—delete the penalty provision and substitute:

Maximum penalty: \$10 000.

Expiation fee: \$500.

### **7—Amendment of section 28—Variation or cancellation of registration**

Section 28(1)—after "on application" insert:

or of its own motion

### **8—Amendment of section 29—Criteria for registration**

(1) Section 29(2)(a)—delete paragraph (a) and substitute:

(a) the prior conduct of the person or an associate of the person (whether in this State or elsewhere), including (for example) such of the following matters as may be relevant:

- (i) whether the person or an associate of the person has been convicted of a criminal offence;
- (ii) whether the person or an associate of the person has been refused registration as a training provider;
- (iii) whether registration held by the person or an associate of the person has been suspended or cancelled;
- (iv) whether a condition of registration of the person or an associate of the person has been imposed or varied as a result of contravention of this Act or a corresponding law or a condition of the registration;
- (v) whether—
  - (A) in the case of a natural person—the person or an associate of the person has become bankrupt or has applied to take the benefit of a law for the relief of insolvent debtors;
  - (B) in the case of a body corporate—a winding-up order has been made in respect of the person or an associate of the person;

- (vi) whether the person or an associate of the person has ever been disqualified from managing corporations under Chapter 2D Part 2D.6 of the *Corporations Act 2001* of the Commonwealth; and

(2) Section 29(4)—delete subsection (4)

### **9—Amendment of section 31—Conditions of accreditation**

(1) Section 31(2)—delete "by the Commission" and substitute:

under this Act

(2) Section 31(2), penalty provision—delete the penalty provision and substitute:

Maximum penalty: \$10 000.

Expiation fee: \$500.

### **10—Amendment of section 32—Variation or cancellation of accreditation**

Section 32(1)—after "on application" insert:

or of its own motion

### **11—Amendment of section 34—Duration of registration/accreditation**

(1) Section 34(1)—after "remains in force" insert:

(except for any period for which it is suspended)

(2) Section 34(2), penalty provision—delete the penalty provision and substitute:

Maximum penalty: \$10 000.

Expiation fee: \$500.

### **12—Amendment of section 35—Grievances**

Section 35—after subsection (2) insert:

(3) The Commission must inquire into a matter referred to it under this section and take such action (if any) the Commission thinks fit in the circumstances, including—

(a) discontinuing the inquiry if, in the Commission's opinion—

(i) the matter is trivial; or

(ii) the grievance is frivolous or vexatious or not made in good faith; or

(iii) having regard to all the circumstances of the case, the inquiry into the matter is unnecessary or unjustifiable; or

(iv) for reasons of resources or otherwise, it is not viable to conduct or continue an inquiry; or

(b) referring the matter and relevant information to the Training Advocate, another registering body or some other person or body, specified by the Commission, for consideration and action; or

- (c) issuing proceedings for an alleged contravention of this Act or a corresponding law.

### **13—Amendment of section 36—Inquiries and interventions**

Section 36—after subsection (3) insert:

- (4) After conducting an inquiry into a training provider under this section, the Commission may do 1 or more of the following:
  - (a) require (whether by varying the conditions of, or imposing further conditions on, the provider's registration, or otherwise)—
    - (i) the provider to take specified action to ensure compliance with this Act;
    - (ii) the provider to correct specified irregularities or to reverse specified action;
    - (iii) the provider to apply specified management practices;
    - (iv) a financial, quality or other audit of the affairs of the provider to be conducted by an auditor approved by the Commission at the expense of the provider;
  - (b) recommend to the Minister that an administrator be appointed to conduct the authorised operations of the provider;
  - (c) if satisfied that there are grounds to do so—take such action under section 37 in relation to the provider as the Commission thinks appropriate in the circumstances;
  - (d) take such other action as may be prescribed by regulation.
- (5) The Commission must not make a recommendation to the Minister under subsection (4)(b) unless satisfied—
  - (a) that serious irregularities or difficulties have occurred or arisen in relation to the conduct of the provider's authorised operations; or
  - (b) that the provider has contravened or failed to comply with a condition imposed on the provider's registration under this Act; or
  - (c) that the provider has committed a breach of this Act and has, after notice by the Commission of the breach, failed, within the time referred to in the notice, to remedy the breach; or
  - (d) as to such other grounds as may be prescribed by regulation.

## **14—Insertion of section 36A**

After section 36 insert:

### **36A—Appointment of administrator**

- (1) On the recommendation of the Commission under section 36(4)(b) to appoint an administrator to conduct the authorised operations of a training provider, the Minister may, with the agreement of the provider, appoint, by notice in writing, such an administrator.
- (2) An administrator appointed under this section—
  - (a) must not be a member of the staff of the administrative unit of the Public Service that is, under the Minister, responsible for the administration of this Act; and
  - (b) has all the powers, functions and duties of the training provider, and may act in the name of and on behalf of the provider in relation to the conduct of the provider's authorised operations; and
  - (c) for the purpose of conducting the provider's authorised operations—may consult with the Commission, the Training Advocate and any other person or body as the administrator thinks fit; and
  - (d) is entitled to such remuneration as is approved by the Minister; and
  - (e) must report regularly to the Minister on the administration; and
  - (f) must, on the termination of his or her appointment, fully account to the Minister for the administration of the authorised operations of the provider.
- (3) The remuneration of an administrator and all other costs and expenses arising out of the administration of the authorised operations of a training provider are payable out of the funds of the provider.
- (4) The administrator of the authorised operations of a training provider appointed under this section may, by notice in writing, require an officer or employee or former officer or employee of the provider to provide a written report on such matters relating to the operations of the provider as the administrator may specify in the notice.
- (5) A person required to provide a report under subsection (4) may be reimbursed out of the funds of the training provider for such costs and expenses as the administrator considers have been reasonably incurred in making the report.
- (6) A person who fails to comply with a requirement made under subsection (4) is guilty of an offence.

Maximum penalty: \$5 000.

## 15—Substitution of section 37

Section 37—delete the section and substitute:

### **37—Commission may cancel, suspend or vary registration or accreditation**

- (1) If the holder of registration or accreditation—
  - (a) contravenes—
    - (i) this Act or a corresponding law; or
    - (ii) a condition of the registration or accreditation, (whether the contravention occurs in this State or elsewhere); or
  - (b) fails to pay a fee as required under this Part,  
the Commission may do either or both of the following:
    - (c) impose or vary a condition of the registration or accreditation;
    - (d) cancel or suspend the registration or accreditation.
- (2) In addition, the Commission may—
  - (a) cancel or suspend the registration of a training provider if the Commission is satisfied that the provider is no longer a fit and proper person to be so registered, taking into account—
    - (i) the conduct of the provider or an associate of the provider (whether in this State or elsewhere), including (for example) such of the following matters as may be relevant:
      - (A) whether the provider or an associate of the provider has been convicted of a criminal offence;
      - (B) whether registration held by an associate of the provider has been suspended or cancelled;
      - (C) whether a condition of registration of an associate of the provider has been imposed or varied as a result of contravention of this Act or a corresponding law or a condition of the registration;
      - (D) whether the provider or an associate of the provider has ever been disqualified from managing corporations under Chapter 2D Part 2D.6 of the *Corporations Act 2001* of the Commonwealth; and

- (ii) any other matter that the Commission considers relevant; or
- (b) cancel the registration of a training provider—
  - (i) subject to the regulations (if any), if the Commission determines (according to such criteria as the Commission thinks fit) that this State is no longer the provider's principal place of business as a training provider; or
  - (ii) if—
    - (A) in the case of a provider who is a natural person—the provider becomes bankrupt or has applied to take the benefit of a law for the relief of insolvent debtors; or
    - (B) in the case of a provider that is a body corporate—a winding-up order is made in respect of the provider.
- (3) Suspension of registration of a training provider under this section—
  - (a) may be for a specified period or until the fulfilment of stipulated conditions or until further notice by the Commission; and
  - (b) may allow for the provider to conduct, during the period of suspension, such restricted operations as are specified by the Commission in conditions.
- (4) It is an offence for a training provider whose registration has been suspended under this section—
  - (a) if conditions have been imposed on the suspension—to contravene any such condition; or
  - (b) in any other case—to continue to operate as a provider.

Maximum penalty:

  - (a) in the case of a body corporate—\$100 000;
  - (b) in the case of a natural person—\$20 000.
- (5) It is an offence for a training provider whose registration has been cancelled under this section to continue to operate as a provider.

Maximum penalty:

  - (a) in the case of a body corporate—\$100 000;
  - (b) in the case of a natural person—\$20 000.
- (6) Before taking action under this section, the Commission must—
  - (a) if of the opinion that urgent action is necessary—
    - (i) give the holder of the registration or accreditation 24 hours notice of the nature of the action the Commission intends to take against it; and



- (ii) take into account any representations made by the holder of the registration or accreditation within that period; and
    - (iii) if the intended action is to cancel the registration of a training provider—consult the registering body in each State and Territory where the provider operates; and
    - (iv) if the intended action is to cancel the accreditation of a course—consult the course accrediting body in each State and Territory where the course is offered; and
  - (b) in the case where the Commission decides to cancel the registration of a training provider under subsection (2)(b)(ii) (other than in urgent circumstances)—
    - (i) give the holder of the registration 7 days written notice of the intention to cancel the provider's registration; and
    - (ii) take into account any representations made by the holder of the registration within that period; and
    - (iii) consult the registering body in each State and Territory where the provider operates; and
  - (c) in any other case—
    - (i) give the holder of the registration or accreditation 14 days written notice of the nature of the action the Commission intends to take against it; and
    - (ii) take into account any representations made by the holder of the registration or accreditation within that period; and
    - (iii) if the intended action is to cancel the registration of a training provider—consult the registering body in each State and Territory where the provider operates; and
    - (iv) if the intended action is to cancel the accreditation of a course—consult the course accrediting body in each State and Territory where the course is offered.
- (7) The Commission may not take action under this section—
- (a) in relation to a training provider the registration of which was determined by some other registering body, except to impose conditions preventing the provider from operating in this State or restricting the provider's operations in this State; or

- (b) in relation to a course the accreditation of which was determined by some other course accrediting body, except to impose conditions preventing the holder of the accreditation from offering the course in this State or restricting the circumstances in which the holder of the accreditation may offer the course in this State.
- (8) Action to be taken under this section—
  - (a) must be imposed by written notice to the holder of the registration or accreditation; and
  - (b) may have effect at a future time or for a period specified in the notice.

### **16—Amendment of section 39—Cancellation of qualification or statement of attainment**

- (1) Section 39(1)—delete subsection (1) and substitute:
  - (1) The Commission may cancel a qualification or statement of attainment under the AQF in relation to specified higher education or vocational education and training issued to a person by a registered training provider (the *issuing training provider*) if the Commission is satisfied that—
    - (a) the qualification or statement of attainment was issued—
      - (i) by mistake; or
      - (ii) on the basis of false or misleading information; or
    - (b) the issuing training provider contravened or failed to comply with the standards for registered training providers.
- (2) Section 39(3)—delete subsection (3) and substitute:
  - (3) Before taking action under this section, the Commission must—
    - (a) if of the opinion that urgent action is necessary—
      - (i) take all reasonable steps to give the holder of the qualification or statement of attainment and the issuing training provider 24 hours written notice of its intention to cancel the qualification or statement of attainment; and
      - (ii) take into account any representations made by the holder of the qualification or statement of attainment and the issuing training provider within that period; and
    - (b) in any other case—
      - (i) take all reasonable steps to give the holder of the qualification or statement of attainment and the issuing training provider 14 days written notice of its intention to cancel the qualification or statement of attainment; and

- (ii) take into account any representations made by the holder of the registration or accreditation and the issuing training provider within that period.
- (4) The holder of a qualification or statement of attainment who has had the qualification or statement of attainment cancelled under this section may apply to a court of competent jurisdiction for an order that the issuing training provider pay to the person such amount by way of compensation as the court thinks just.
- (5) A person must not hold out that he or she is the holder of a qualification or statement of attainment if the qualification or statement of attainment has been cancelled under this section.  
Maximum penalty: \$2 500.
- (6) It is a defence to a charge of an offence against subsection (5) if the defendant proves that he or she did not know that the qualification or statement of attainment had been cancelled under this section.

### **17—Substitution of section 41**

Section 41—delete the section and substitute:

#### **41—Public warning statements**

- (1) The Minister or the Commission may, if satisfied that it is in the public interest to do so, make a public statement identifying and giving warnings or information about either or both of the following:
  - (a) the delivery or provision of education and training or other services in an unsatisfactory manner and training providers who deliver or provide those services;
  - (b) any other matter that adversely affects or may adversely affect the interests of persons in connection with their interaction with training providers.
- (2) The Training Advocate may, if satisfied that it is in the public interest to do so, make a public statement identifying and giving warnings or information about a matter that adversely affects or may adversely affect the interests of persons in connection with their interaction with training providers.
- (3) A statement under subsection (1) or (2) may identify particular services and training providers.
- (4) The Crown incurs no liability for a statement made by the Minister, the Commission or the Training Advocate in good faith in the exercise or purported exercise of powers under this section.
- (5) No liability is incurred by a person for publishing in good faith—
  - (a) a statement referred to in subsection (4); or
  - (b) a fair report or summary of such a statement.

## **18—Amendment of section 42—Appeal to District Court**

Section 42(1)(c)—after "accreditation" insert:

(other than cancelling registration under section 37(2)(b)(ii))

## **19—Amendment of section 43—Offences relating to registration and issuing of qualifications**

- (1) Section 43(1), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) in the case of a body corporate—\$100 000;
- (b) in the case of a natural person—\$20 000.

- (2) Section 43(2), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) in the case of a body corporate—\$100 000;
- (b) in the case of a natural person—\$20 000.

- (3) Section 43(3), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) in the case of a body corporate—\$100 000;
- (b) in the case of a natural person—\$20 000.

- (4) Section 43(4), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) in the case of a body corporate—\$100 000;
- (b) in the case of a natural person—\$20 000.

- (5) Section 43(5), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) in the case of a body corporate—\$100 000;
- (b) in the case of a natural person—\$20 000.

## **20—Amendment of section 44—Offences relating to universities, degrees etc**

- (1) Section 44(1), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) in the case of a body corporate—\$100 000;
- (b) in the case of a natural person—\$20 000.

- (2) Section 44(2), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) in the case of a body corporate—\$100 000;
- (b) in the case of a natural person—\$20 000.

- (3) Section 44(3), penalty provision—delete the penalty provision and substitute:  
Maximum penalty:
  - (a) in the case of a body corporate—\$100 000;
  - (b) in the case of a natural person—\$20 000.
- (4) Section 44(4), penalty provision—delete the penalty provision and substitute:  
Maximum penalty:
  - (a) in the case of a body corporate—\$100 000;
  - (b) in the case of a natural person—\$20 000.
- (5) Section 44(6), penalty provision—delete the penalty provision and substitute:  
Maximum penalty:
  - (a) in the case of a body corporate—\$100 000;
  - (b) in the case of a natural person—\$20 000.
- (6) Section 44(7), penalty provision—delete the penalty provision and substitute:  
Maximum penalty:
  - (a) in the case of a body corporate—\$100 000;
  - (b) in the case of a natural person—\$20 000.

## **21—Insertion of section 44A and Part 3 Division 7**

After section 44 insert:

### **44A—Offence to make false or misleading statements**

A person (whether registered as a training provider under this Part or not) must not make a statement that is false or misleading in a material particular (whether by reason of the inclusion or omission of any particular) in any information provided to a client or prospective client of the provider about the delivery or provision of education and training or other services regulated under this Part or a corresponding law.

Maximum penalty:

- (a) in the case of a body corporate—\$100 000;
- (b) in the case of a natural person—\$20 000.

### **Division 7—Orders for compensation**

#### **44B—Orders for compensation**

- (1) On application by a person to a court of competent jurisdiction, if satisfied that the person has suffered, or is likely to suffer, loss or damage by reason of a contravention of this Act, the court may, for the purpose of compensating that person or preventing or reducing the extent of the loss or damage, make orders under this section against the person who committed the contravention or a person involved in the contravention.

- (2) The orders that may be made under this section are of the following kinds:
- (a) an order for payment of the amount of the loss or damage;
  - (b) an order avoiding, in whole or in part, a contract;
  - (c) an order for the variation of a contract;
  - (d) an order directing the refund of money or the return of property;
  - (e) an order directing the delivery or provision of specified education and training or other specified services.

## **22—Amendment of section 57—Criteria for registration**

Section 57(3)—delete subsection (3)

## **23—Insertion of section 72A**

After section 72 insert:

### **72A—Confidentiality of information**

A person must not divulge or communicate information acquired by reason of being, or having been, employed or engaged in, or in connection with, the administration of this Act, except—

- (a) with the consent of the person to whom the information relates; or
- (b) in connection with the administration of this Act; or
- (c) to a member of the police force of this State or of the Commonwealth or another State or a Territory; or
- (d) to a person concerned in the administration of a corresponding law; or
- (e) for the purposes of legal proceedings.

Maximum penalty: \$20 000.

## **24—Amendment of section 73—Other powers of Commission, Training Advocate etc**

- (1) Section 73(1)(b)—delete "inspect, examine or copy it" and substitute:

—

- (i) examine, copy and take extracts from any record or document; and
  - (ii) take any record or document; and
  - (iii) seize and remove anything that may constitute evidence of an offence against this Act; and
  - (iv) take photographs, films or video recordings;
- (2) Section 73(3), penalty provision—delete the penalty provision and substitute:

Maximum penalty: \$10 000.

## **25—Amendment of section 75—False or misleading information**

Section 75, penalty provision—delete the penalty provision and substitute:

Maximum penalty: \$10 000.

## **26—Insertion of sections 75A and 75B**

After section 75 insert:

### **75A—Imputation of conduct or state of mind of officer etc**

- (1) For the purposes of proceedings for an offence against this Act—
  - (a) the conduct and state of mind of an officer, employee or agent of a body corporate acting within the scope of his or her actual, usual or ostensible authority will be imputed to the body corporate;
  - (b) the conduct and state of mind of an employee or agent of a natural person acting within the scope of his or her actual, usual or ostensible authority will be imputed to that person, (but not so as to affect any personal liability of the officer, employee or agent).
- (2) It will be a defence in any criminal proceedings under the Act against a body corporate or a natural person where conduct or a state of mind is imputed to the body or person under subsection (1) if it is proved that the alleged contravention did not result from any failure on the defendant's part to take all reasonable and practicable measures to prevent the contravention or contraventions of the same or a similar nature.
- (3) For the purposes of this section, a reference to *conduct* or *acting* includes a reference to failure to act.

### **75B—Offences by bodies corporate and employees**

- (1) If a body corporate is guilty of an offence against this Act, each director of the body corporate, and each person concerned in the management of the body corporate, is guilty of an offence and liable to the same penalty as is prescribed for the principal offence where the offender is a natural person.
- (2) It is a defence to a charge of an offence arising under subsection (1) if the defendant establishes that the defendant took reasonable precautions and exercised due diligence to prevent the commission of an offence by the body corporate.
- (3) If an employee is guilty of an offence against this Act, the employer is liable to the same penalty as is prescribed for the principal offence.
- (4) It is a defence to a charge of an offence arising under subsection (3) if the defendant establishes that—
  - (a) the defendant had no knowledge of the actual offence; or

- (b) the defendant took reasonable precautions and exercised due diligence to prevent the commission of an offence by the employee.