

vision for the future



MANAGEMENT

VET Reforms, COVID-19 and the Future of the RTO

Peter Doukas OAM



NATIONAL VET CONFERENCE
GOLD COAST 2021

#2021NVC

An aerial photograph of a dense forest covered in a thick layer of snow. The trees are mostly evergreens, their branches heavily laden with white snow. The ground is a uniform white, creating a high-contrast scene. The perspective is from directly above, looking down on the forest canopy.

The future of VET

Velg Training National VET Conference

September 2021

Strategy on the implementation of recent
reforms in the VET Sector.



Denison Toyer is a Sydney based law firm that specialises in RTO legal work, education, and governance services.

Our aim is to prioritise resolution of your dealings with the Regulator.

We have acted for over 100 RTOs.



About Denison Toyer

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The RTO Lifecycle

Changes to NVR Act

(with effect from 1 July 2020)

Examples of changes to the NVR Act that affect providers include:

- demonstrating a commitment and capability to delivering quality VET
- informing ASQA if an event is likely to occur that would significantly affect the RTO's ability to comply with the VET Quality Framework
- ensuring third party arrangements with non-RTOs are undertaken with a written agreement in place
- providing information or VET student records to ASQA when an RTO closes, or on ASQA's request, in a particular electronic or other specific format
- applying for internal review (reconsideration) where available, before seeking an external review (AAT).

Under section 41(2) of the *Administrative Appeals Tribunal Act 1975*, you also have the right to apply for a stay of the enforcement or implementation of ASQA's decision until such time as the AAT determines its review of the decision.

An application to the AAT for a review of the decision must be submitted within 28 days of receiving notification of ASQA's decision and will usually require the payment of an application fee. Your application to the AAT must be submitted in writing using the AAT forms available from the AAT Registry in your capital city, or from the AAT website www.aat.gov.au. Review applications may be lodged at the Administrative Appeals Tribunal, GPO Box 9955 in your capital city. You may contact the AAT directly by telephone at 1300 366 700.

Publication of decisions

ASQA will publish information about adverse regulatory decisions on its website (www.asqa.gov.au). This decision will be published in line with ASQA's policy of publishing decisions on the AAT as they are made. The information will be updated as and when required so as to reflect the outcome of any available review processes through to finalisation.

Access documents

Your organisation may also have the right of access to further documents under the *Freedom of Information Act 1982*. More information about Freedom of Information (FOI), including how to make an FOI application, is available via <https://www.asqa.gov.au/about/accountability/reporting/freedom-of-information>.

The Decision

Further information

If you require further information in relation to this decision, please contact ASQA on 1300 701 801 or email info@asqa.gov.au.

Smith's RTO

Also by email to:

RTO ID: 12345

Audit No: AUDREC0012345

Dear Mr Smith

Re: Smith's RTO: Notice of decision to cancel NVR Act registration

On 27 November 2018, the Australian Skills Quality Authority (ASQA) gave you notice under section 37(1)(a) of the *National Vocational Education and Training Regulator Act 2011* (the NVR Act) that it intended to make a decision to cancel your registration under section 39. That notice also, in accordance with section 37(1)(b), invited you to give ASQA a written response no later than 2 January 2019.

On 5 December 2018, ASQA received your request for an extension to provide a written response. An extension was approved until the 31 January 2019.

On 30 January 2019, ASQA received your response. ASQA has considered your response. In accordance with section 37(2) of the NVR Act, ASQA hereby gives you notice that it has made a decision to cancel your registration under section 39 with effect from 6 May 2019.

Reason for the Decision

Smith's RTO:

- has failed to provide advice to learners about training products appropriate to their needs, taking into account their existing skills and competencies (Clause 5.1) and failed to provide learners with current and accurate information to enable the learner to make an informed decision about undertaking training with the RTO (Clauses 5.2 and 5.3)
- has failed to establish the needs of learners or deliver services and support to meet those needs (Clause 1.7)
- does not have training and assessment practices, including the amount of training, consistent with training package requirements for the training products that enable each learner to meet the requirements for each unit of competency (Clauses 1.1 and 1.2)

Delegate Decisions

Delegate Decisions now
cannot be appealed
to the AAT until after
reconsideration

Smith's RTO

Also by email to:

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On 5 December 2018, ASQA received your request for an extension of time to give your response. An extension was approved until the 31 January 2019.

On 30 January 2019, ASQA received your response. ASQA has considered your response. In accordance with section 37(2) of the NVR Act, ASQA hereby gives you notice that it has made a decision to cancel your registration under section 39 with effect from 6 May 2019.

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Reviewable decision

The decision to cancel registration is a reviewable decision under section 199 of the NVR Act.

This decision was made by a delegate so reconsideration of the decision by ASQA is available. You must apply for and await the outcome of the reconsideration process before seeking review by the Administrative Appeals Tribunal.

If you are not satisfied with this decision

Request to ASQA for reconsideration of decision

If you are not satisfied with this decision you can lodge a request for reconsideration with ASQA in writing by completing an Application for ASQA to review a decision form. You may be required to pay an application fee. Your application must provide the reasons why you think our decision is wrong and should include any supporting documentation. To access the application form and for further information about reviewable decisions, please see the ASQA website www.asqa.gov.au.

You must lodge your request for reconsideration **within 30 days of receiving this notice**. If you do not submit your Application for ASQA to review a decision form within the required timeframe, you must apply to ASQA for an extension of time providing the reasons why you did not lodge in time.

ASQA will inform you of the result of its reconsideration of the decision within 90 days of receiving your application. If, upon the reconsideration, ASQA either affirms or varies its decision, you may seek a further review by the Administrative Appeals Tribunal (the AAT).

Publication of decisions

ASQA will publish information about adverse regulatory decisions on its website (www.asqa.gov.au). This decision will be published in line with ASQA's policy of publishing decisions on the ASQA website

Stage 1: The 'New Deal'

The Steps to deal with a Delegate Decision

Receive Delegate
Decision

Immediately Instruct
Consultants / Lawyers

Obtain confirmation that
a Stay (an extension to
the effective date) will
be granted

Submit Internal
Reconsideration
Application

Up to 90 days to obtain
decision



Remember: If an internal stay is not granted – the decision will come into effect. Then the only recourse is the Federal Court!

Stage 2 AAT Appeals

After an internal review of a Delegate Decision, or after a decision made by the Commissioner, normally the only viable recourse for an RTO is to

Apply for Review in the AAT

In many instances an RTO must obtain a Stay of the Decision before the decision comes into effect!

Education and Training Regulator has made a decision to cancel your registration under section 39. The Regulator, under section 37(1)(b), invited you to give ASQA a written response no later than 31 December 2018. ASQA received your request for an extension to provide a written response. An extension was approved until the 31 January 2019.

On 30 January 2019, ASQA received your response. ASQA has considered your response. In accordance with section 37(2) of the NVR Act, ASQA hereby gives you notice that it has made a decision to cancel your registration under section 39 with effect from 6 May 2019.

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Australian Skills
Quality Authority
ABN 72 581 678 655
GPO Box 592
Melbourne



The test for a Stay

1. The Tribunal has identified numerous factors which are often pertinent to deciding whether to grant a stay under s 41(2):
 - (a) **prospects of success (that is, that the application does not appear to be hopeless);**
 - (b) **the consequences for the applicant of the refusal of a stay;**
 - (c) **the public interest;**
 - (d) **the consequences for the respondent in carrying out its functions depending on whether the stay is granted;**
 - (e) **whether the application for review would be rendered nugatory if no stay is granted;**
 - (f) **any other matter, including the length of time the decision has been in place, the gap between the stay application and the hearing of the substantive application.**

Re Scott and Australian Securities and Investments Commission [2009] AATA 798, [4] (Downes J, President).

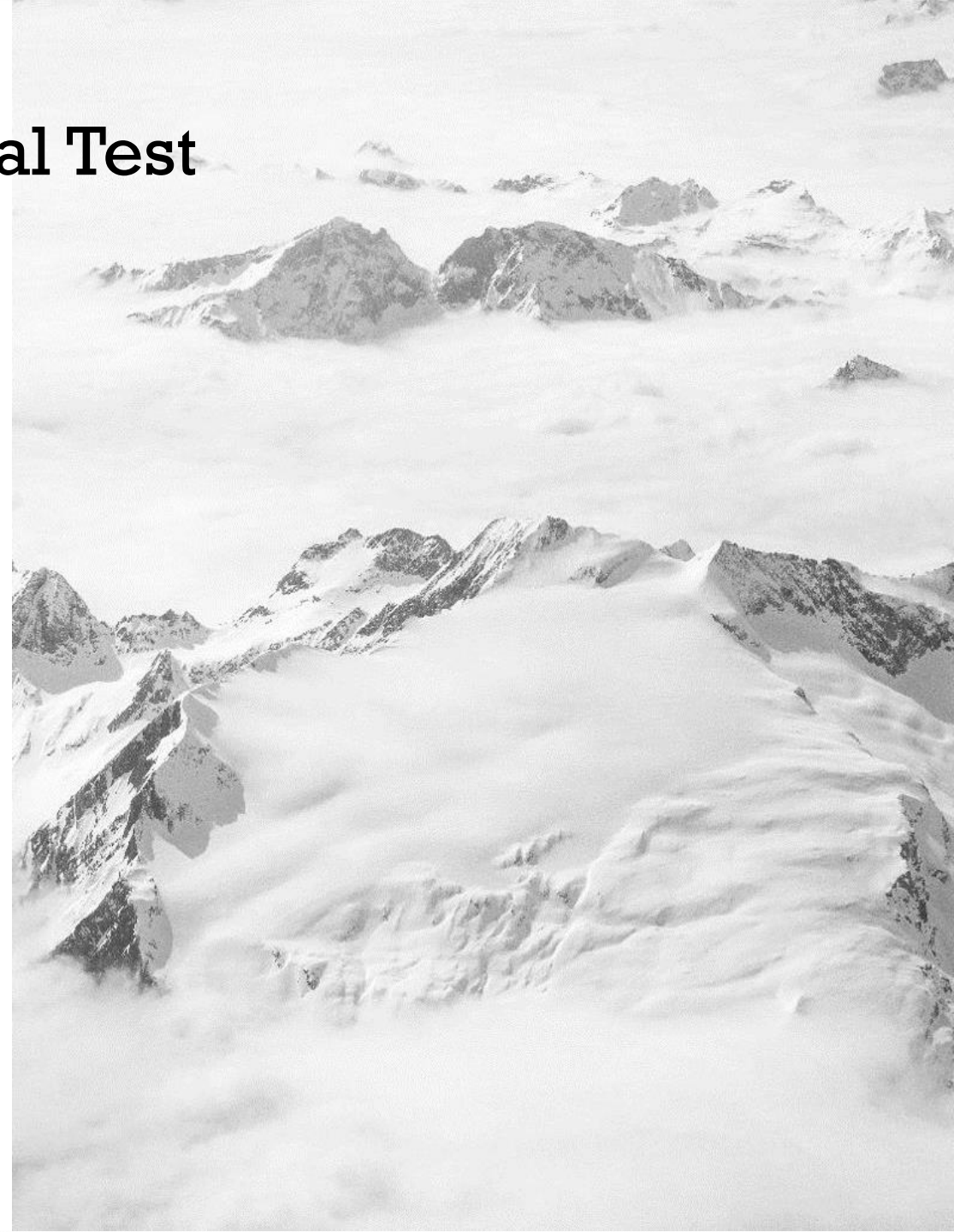
Being 'Rendered Nugatory': Financial Test

The Tribunal has set the bar higher for the financial position of an RTO:

"Given the unexplained failure to introduce into evidence before the Tribunal proper financial statements, accounts and/or tax returns, the Tribunal must consider what the consequences of that failure are and whether any, and if so what, inferences can be drawn from such failure."

"...the failure to produce a complete set of business records on the part of the Applicant reduces the value that the Tribunal can place upon the limited records produced in evidence...the Tribunal is unable to reach a conclusion concerning the capacity of the Applicant to meet its liabilities, whether such business is viable in the future and whether or not it may become insolvent prior to the final hearing and determination of the application."

**Technical Education Australia Pty Ltd and Australian Skills Quality Authority
[2018] AATA 3047**



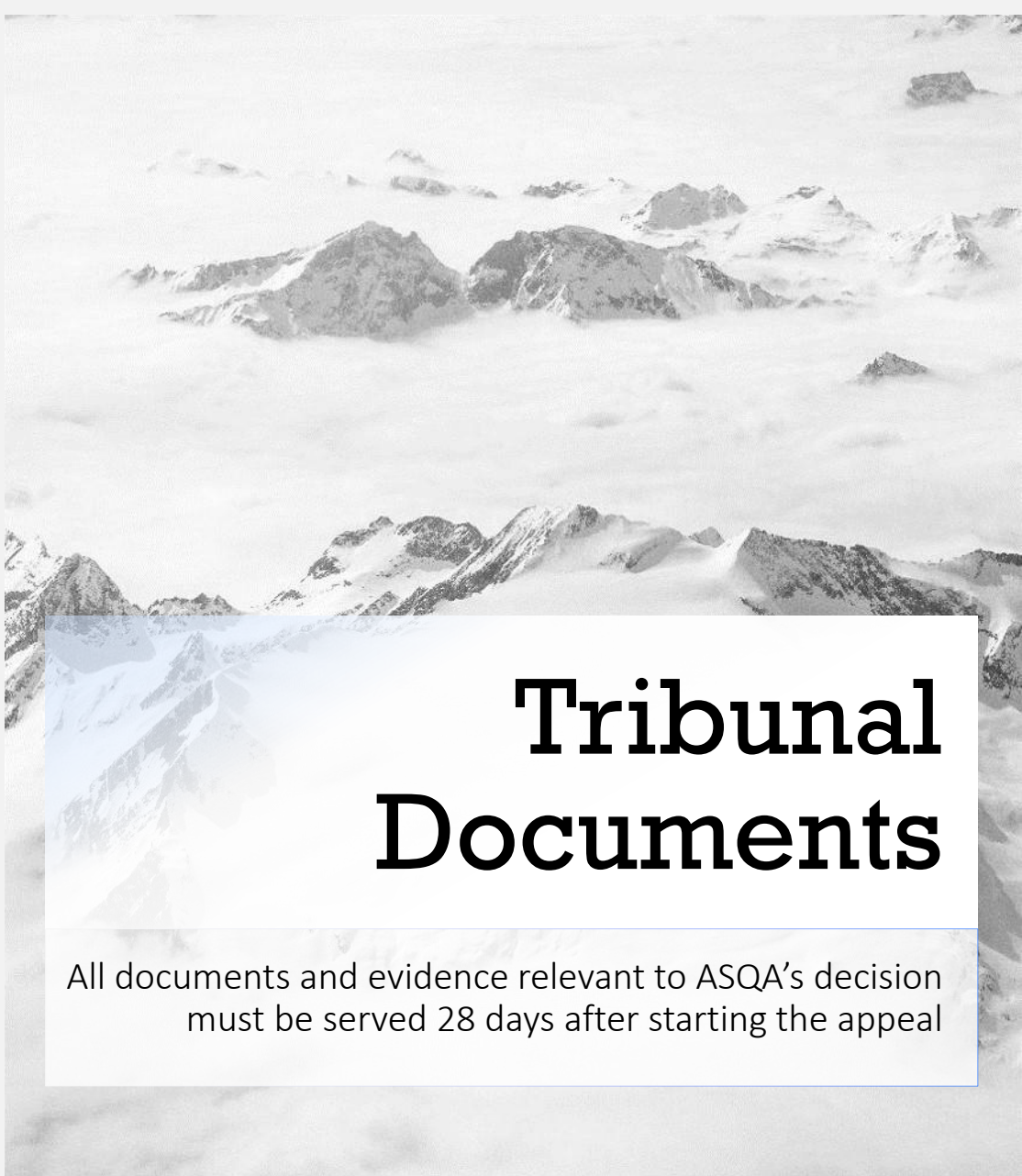
AAT ASQA Decision Review Process – The ‘New Deal’

Prior to Reforms



After Reforms – DELEGATE DECISIONS





Tribunal Documents

All documents and evidence relevant to ASQA's decision must be served 28 days after starting the appeal

s. 37 AAT Act states that the Decision-maker (ASQA) must lodge material documents

(1) Subject to this section, a person who has made a decision that is the subject of an application for review ...by the [Tribunal](#) must, within 28 days after receiving notice of the application (or within such further period as the [Tribunal](#) allows), lodge with the [Tribunal](#) a copy of:

- (a) a [statement](#) setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision; and
- (b) subject to any directions given under section 18B, ***every other document that is in the person's possession or under the person's control and is relevant to the review of the decision by the [Tribunal](#).***

Primary Evidence for an Applicant



Remediation

- Fixes to dynamic elements, often needing much more work:
 - Reassessment of students
 - Completing CPD for staff
 - Re-training of students

Rectification

- Fixes to static elements of evidence, such as:
 - TAS
 - Assessment Tools
 - Contracts
 - Leases

Essential Evidence for an Applicant



Expert Reports

Witness Statements / Affidavits

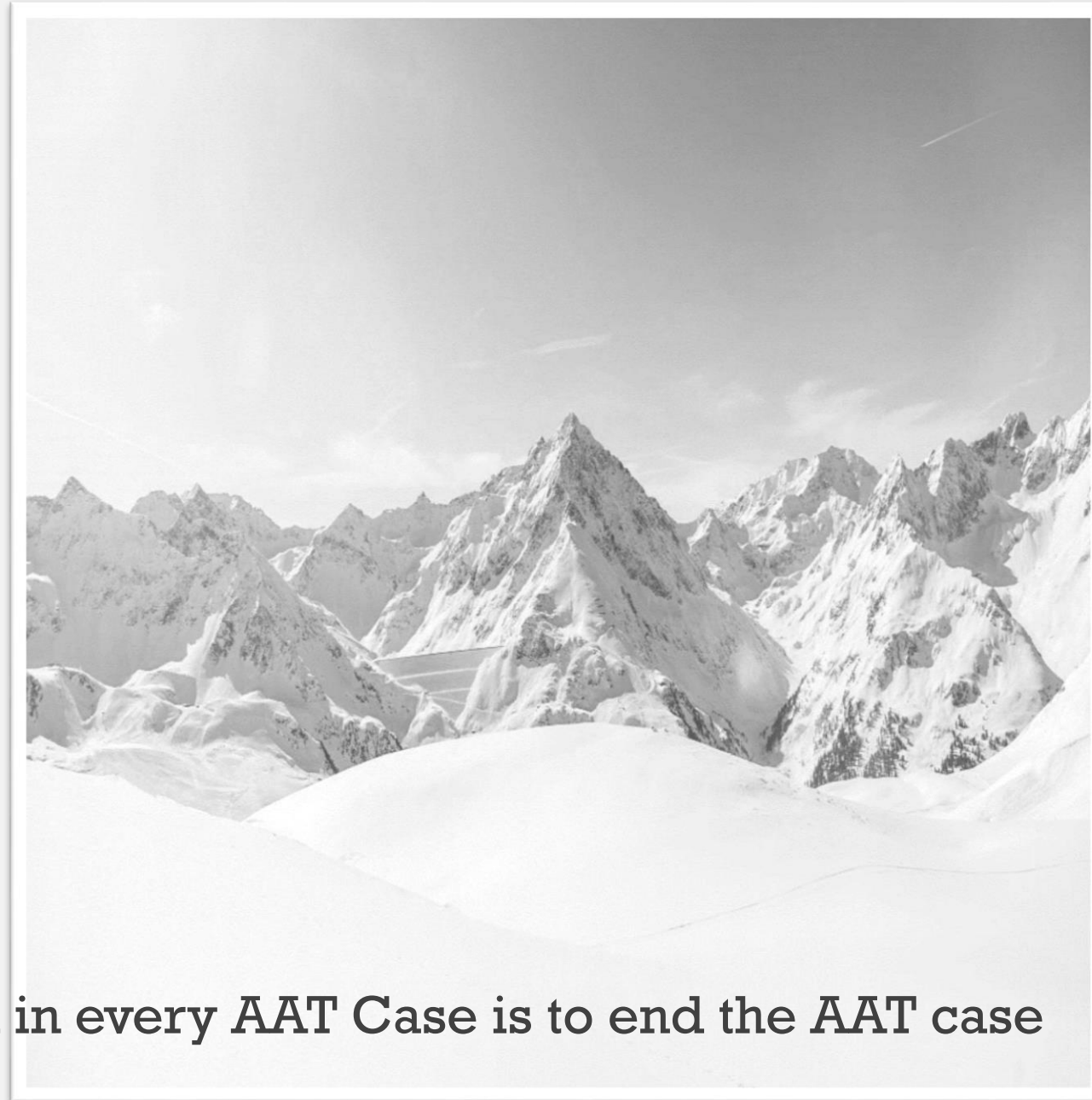
Rectifications / Remediation

Conciliation

Agreement under s. 42 (1) a, b or c of the AAT Act – parties are able to resolve a set of Orders and Conditions to resolve proceedings

- Orders could include:
 - To set aside ASQA's decision
 - To agree to withdraw all or part of an application
 - Could involve a Hybrid orders
- Issues Papers will likely need to be prepared to include:
 - The matters in issue
 - Any areas of agreement

The aim in every AAT Case is to end the AAT case





SOFIC

Statement of

Facts

Issues

Contentions

Facts

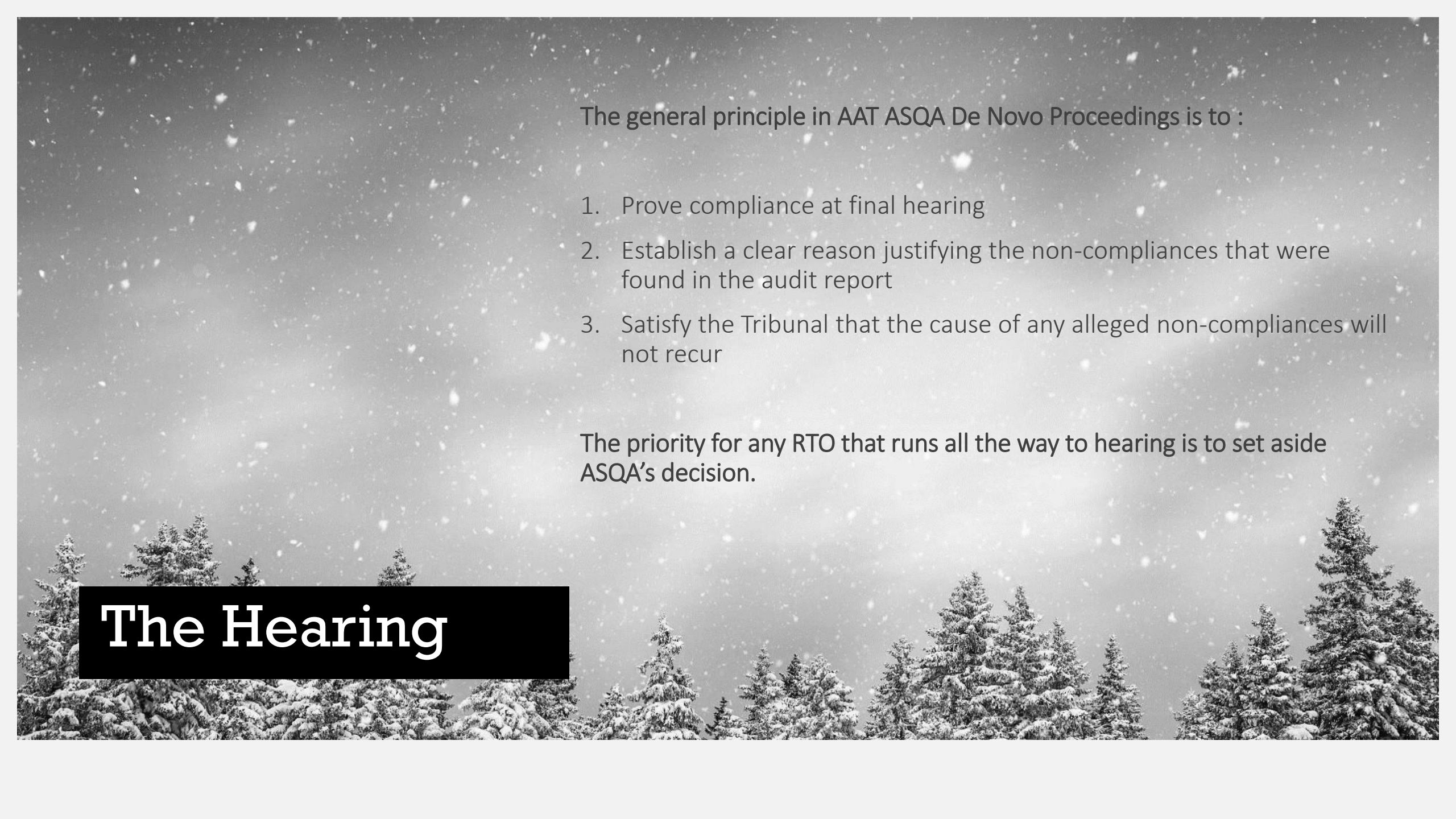
- Facts relevant to the audit report
- Any other facts that led to ASQA's decision
- The situation today (Rectification and remediation is complete)

Issues

- Set out the Tribunal's powers to review the decision
- Why this decision should be set aside
- The impact of the decision not being set aside (students, staff, business investment loss)

Contentions

- **What the Applicant 'says' about itself**
 - Compliant with the Standards
 - Has addressed the audit report
 - That the decision should be set aside



The general principle in AAT ASQA De Novo Proceedings is to :

1. Prove compliance at final hearing
2. Establish a clear reason justifying the non-compliances that were found in the audit report
3. Satisfy the Tribunal that the cause of any alleged non-compliances will not recur

The priority for any RTO that runs all the way to hearing is to set aside ASQA's decision.

The Hearing

A background image of a snowy forest. A path of snow leads through tall, thin trees covered in snow. The scene is bright and wintry.

Recommendations for the 'New Deal'

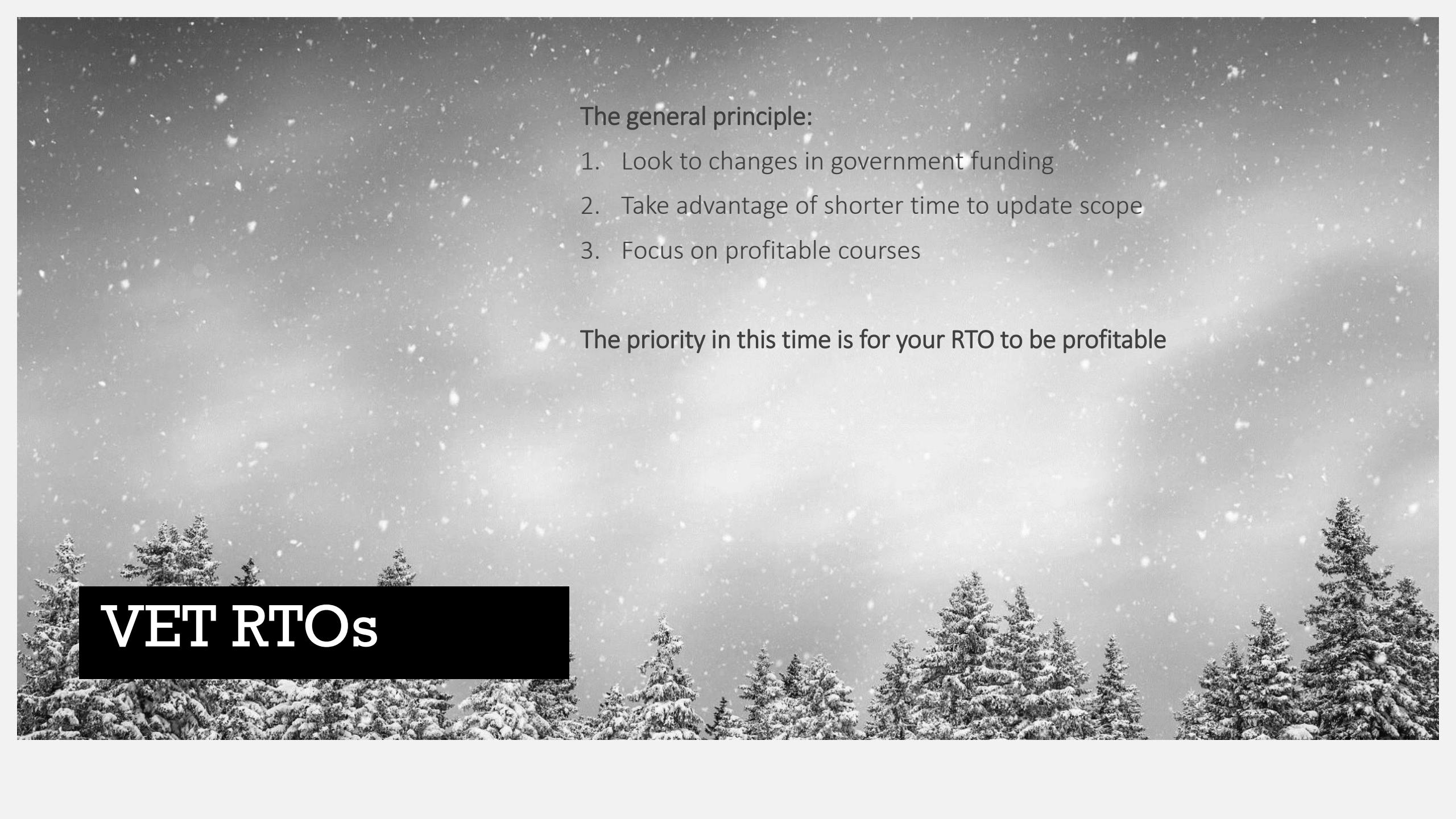
- Establish a clear Board of Directors / Management that meets monthly and minutes all decisions
- Always be ready for a protracted audit process. Keep funds set aside to be able to engage professionals to help you
- Engage or retain a lawyer on a full time basis to sit on this board
- Engage or retain a compliance professional to also sit on and advise this board
- Update your audit policies and have all staff trained in audit emergency situations
- Invest in compliance checks periodically

The RTO Business in 2021 – 22

CRICOS

- RTOs must incorporate Hotel Quarantine and a cap on student entries into Australia
- Local students will likely have more pressure to work stemming from Government policy than ever before
- Australia has an edge over the rest of the world however, and CRICOS RTOs should prepare for a higher cost of tuition for 2022





The general principle:

1. Look to changes in government funding
2. Take advantage of shorter time to update scope
3. Focus on profitable courses

The priority in this time is for your RTO to be profitable

VET RTOs

The Future of Compliance

Less AAT Cases

- Likely that there will be less cases in the AAT

More Internal Reviews

- Likely that most of ASQA's negative audit results will be determined internally. Ensure you engage a compliance and legal adviser in audits



Disclaimer:

This presentation and any associated speeches or materials do not constitute legal advice nor does it represent the views of the writer. We strongly recommend independent legal advice is obtained before taking any action.

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Thank You

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<https://www.linkedin.com/in/peter-doukas> 



Thank you for being a part of our

vision for the future
NATIONAL VET CONFERENCE
GOLD COAST / 9-10 SEPTEMBER 2021

We hope you found it to be a valuable experience and that attending has helped shape your "Vision for the Future".

We look forward to seeing you next year!