

The Senate

Education, Employment
and Workplace Relations
Legislation Committee

National Vocational Education and Training Regulator Bill
2010 [2011]

National Vocational Education and Training Regulator
(Transitional Provisions) Bill 2010 [2011]

National Vocational Education and Training Regulator
(Consequential Amendments) Bill 2011

March 2011

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Senate Standing Committee on Education, Employment & Workplace Relations

LEGISLATION COMMITTEE

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Acronyms and Abbreviations

ACCI	Australian Chamber of Commerce and Industry
ACPET	Australian Council for Private Education and Training
ACTU	Australian Council of Trade Unions
AQTF	Australian Quality Training Framework
DEEWR	Department of Education, Employment and Workplace Relations
Enterprise RTO	Enterprise Registered Training Organisation
National VET Regulator	National Vocational Education and Training Regulator
RTO	Registered Training Organisation
TAFE	Technical and Further Education
TEQSA	Tertiary Education Quality and Standards Agency
VET	Vocational education and training

Recommendations

Recommendation 1

1.32 The committee recommends that the bills be passed in their current form.

Recommendation 2

1.34 That in future, exposure drafts of legislation be made available for examination by parliamentary committees prior to their adoption as text-based referrals of power by state legislatures, thereby assisting committees to recommend amendments to bills, if necessary, without threatening the viability of the referral of powers.

Recommendation 3

3.19 That the Department of Education, Employment and Workplace Relations amend the Explanatory Memorandum for the National Vocational Education and Training Regulator Bill 2010 [2011] to include the additional general information regarding the application of offences at pages 1 and 2 of the Answers to Questions on Notice dated 11 March 2011 and the answer to question one on pages 2 to 3 of the Answers to Questions on Notice dated 11 March 2011.

Recommendation 4

3.23 That the Department of Education, Employment and Workplace Relations amend the Explanatory Memorandum for the National Vocational Education and Training Regulator Bill 2010 [2011] to include the explanation for the proposed extraterritorial operation of the offences, as provided to the committee at page 6 of the Answers to Questions on Notice dated 11 March 2011.

Recommendation 5

3.33 That the Department of Education, Employment and Workplace Relations amend the Explanatory Memorandum for the National Vocational Education and Training Regulator Bill 2010 [2011] to include explanation for the proposed infringement notice scheme's departures from the principles in *A guide to framing Commonwealth offences, civil penalties and enforcement powers*.

Recommendation 6

3.34 That the National VET Regulator review the operation of the infringement notice scheme after 12 months operation.

Recommendation 7

3.44 That, once enacted, subclause 60(1) and subclause 60(2) be amended to include a requirement that the person know that the qualification or statement of attainment (whatever is applicable) has been cancelled.

Recommendation 8

4.28 The committee recommends that negotiations between jurisdictions continue with the aim of ensuring that all jurisdictions refer powers.

Chapter 1

Introduction

Referral of the National Vocational Education and Training Regulator Bills

1.1 On 10 February 2011, the Senate jointly referred the National Vocational Education and Training Regulator Bill 2010 [2011], the National Vocational Education and Training Regulator (Transitional Provisions) Bill 2010 [2011] and the National Vocational Education and Training Regulator (Consequential Amendments) Bill 2011 to the Senate Legislation Committee on Education, Employment and Workplace Relations for inquiry and report by 21 March 2011.

Conduct of inquiry

1.2 The committee advertised in *The Australian* on 16 February 2011. Details of the inquiry, the bills and associated documents were placed on the committee's website.

1.3 The committee wrote to 87 organisations and individuals inviting submissions by 1 March 2011. Submissions were received from 22 individuals and organisations, as listed in Appendix 1.

1.4 Public hearings were held on 7 March 2011 and 9 March 2011. The witness lists for the hearings are at Appendix 2.

Acknowledgement

1.5 The committee thanks those organisations and individuals who made submissions to the inquiry, and those who gave evidence at the public hearing.

1.6 The committee also thanks Dr Andrew Lynch, Director, Gilbert + Tobin Centre of Public Law, and the Commonwealth Parliamentary Library, for their assistance.

Notes on references

1.7 Submission references in this report are to the individual submissions as received by the committee, not to a bound volume. References to the *Committee Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcripts.

Background

1.8 In December 2008, the review of higher education, lead by Professor Denise Bradley AC, recommended the creation of a national regulatory

body responsible for accreditation and quality standards of all providers of higher education in Australia. The review also recommended the Australian Government explore with the States and Territories the option of expanding the regulator's role to include accreditation and quality standards for vocational education.¹

1.9 On 20 November 2009, the Ministerial Council for Tertiary Education and Employment (MCTEE) reached a majority agreement for referral of powers to the Commonwealth for the establishment of an independent national regulator for the vocational education and training (VET) sector. Victoria and Western Australia did not support the proposal, instead recommending 'consideration of other models to achieve national regulation and the retention of the principles of State accountability'.²

1.10 On 7 December 2009, the Council of Australian Governments (COAG) agreed to establish a national regulator for the VET sector to 'drive better quality standards and regulation and to strengthen Australia's international education sector'.³ The agreement envisages that the regulator will be established under Commonwealth legislation and will be responsible for registration and audit of registered training organisations (RTOs) and the accreditation of courses. With the exception of Victoria and Western Australia, on 13 February 2011 COAG reaffirmed its commitment to a national VET regulator agreeing in principle to the 'Intergovernmental Agreement for Regulatory Reform of Vocational Education and Training' (the IGA).⁴ While agreed in principle, the terms of the IGA are yet to be finalised. Accordingly, at the time of this report the IGA had not been publicly released.

1.11 Victoria and Western Australia elected to retain responsibility for regulating RTOs in their jurisdiction. While retaining this responsibility, the states have agreed to enact mirror legislation to ensure the same standards of operation and accountability across Australia's VET sector.⁵

1.12 The COAG agreement provides for the national regulator to operate in non-referring jurisdictions. As noted by Victoria and Western Australia, COAG determined that providers 'wishing to operate in more than one jurisdiction or enrol international students in post-secondary education institutions will be registered

1 Recommendations 20 and 43, Professor Denise Bradley AC, et al, *Review of Higher Education – Final Report*, December 2008.

2 Communiqué for the Ministerial Council for Tertiary Education and Employment Meeting, 20 November 2009, http://www.deewr.gov.au/Skills/Overview/Governance/Pages/Ministerial_Council.aspx.

3 Communiqué for the Council of Australia Governments' Meeting, 7 December 2009, p. 1, http://www.coag.gov.au/coag_meeting_outcomes/archive.cfm.

4 Communiqué for the Council of Australia Governments' Meeting, 13 February 2011, p. 4, http://www.coag.gov.au/coag_meeting_outcomes/2011-02-13/index.cfm?CFID=3805391&CFTOKEN=37051611.

5 Communiqué for the Council of Australia Governments' Meeting, 7 December 2009, p. 5, http://www.coag.gov.au/coag_meeting_outcomes/archive.cfm.

through the national regulator'.⁶ In its submission to the inquiry, the Government of Victoria advised that Victoria and Western Australia noted but did not agree to this decision.⁷

1.13 COAG also agreed to establish a Standards Council, to provide advice to the MCTEE for the development of national standards for VET regulation, including 'registration, quality assurance, performance monitoring, reporting, risk, audit, review and renewal of providers, and accreditation of VET qualifications'.⁸

1.14 The establishment of the National VET Regulator was included as a key initiative in the 'Skills for Sustainable Growth' package announced in the 2010-11 Federal Budget,⁹ with the budget providing \$105.5 million over four years for the new national VET system. The Government anticipates that the National VET Regulator will operate on a full cost recovery basis by 2014-15.¹⁰ The Explanatory Memorandum to the National Vocational Education and Training Regulator Bill 2010 [2011] (the NVR Bill) further advises that it is anticipated that cost recovery activities will recover \$39.9 million over January 2011 and June 2014.¹¹

1.15 On 6 July 2010, the then Minister for Education, the Hon Simon Crean MP, announced the appointment of Ms Kaye Schofield as interim Chair, and Mr John Smyth as interim Chief Executive Officer, of the National VET Regulator.¹²

1.16 The Senate Standing Committee for the Scrutiny of Bills has considered the National Vocational Education and Training Regulator Bill 2010.¹³ The Scrutiny committee raised concerns with the following matters.

- Setting fees by legislative instrument (clauses 17 and 232).

6 Communiqué for the Council of Australia Governments' Meeting, 7 December 2009, p. 5 http://www.coag.gov.au/coag_meeting_outcomes/archive.cfm.

7 Government of Victoria, *Submission 18*, p. 1.

8 Communiqué for the Council of Australia Governments' Meeting, 7 December 2009, p. 5, http://www.coag.gov.au/coag_meeting_outcomes/archive.cfm; Department of Education, Employment and Workplace Relations, *National VET Regulator – Overview*, <http://www.deewr.gov.au/skills/overview/policy/nationalvetregulator/pages/overview.aspx>, viewed 21 February 2011.

9 The Hon Simon Crean MP, Minister for Education, 'Improving the quality of higher education in the VET sector', Media release, 6 July 2010.

10 Australian Government, *Budget measures: budget paper no. 2: 2010-11*, 2010, p. 151.

11 Explanatory Memorandum, National Vocational Education and Training Regulator Bill 2010 [2011], p. 3.

12 The Hon Simon Crean MP, Minister for Education, 'Improving the quality of higher education in the VET sector', Media release, 6 July 2010.

13 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 1/11*, 9 February 2011, pp. 20-29.

- Removing natural justice considerations for the imposition of administrative sanctions (clauses 26 and 37).
- The broad discretionary administrative power to amend course accreditation (clause 51).
- The level of civil penalties (clauses 60 and 61).
- The regulator's investigative powers, including entry, search and seizure powers. In particular, the committee drew attention to the absence of a requirement that the powers be used during reasonable hours and on reasonable notice, and the lack of clarity about the qualifications for persons who may exercise the powers (clauses 62, 68, 70, 71, 89).
- The abrogation of the privilege against self-incrimination (clause 65).
- The use of monitoring warrants (clause 85).
- The broad delegation of the regulator's functions (clauses 224,225 and 226).

1.17 The Scrutiny committee also considered the National Vocational Education and Training Regulator (Transitional Provisions) Bill 2010.¹⁴ The Scrutiny committee raised concern with the head of power to enact regulations (clause 30), as it authorises the regulations to have retrospective effect and to take precedence over the Act.

1.18 The Scrutiny committee sought the Minister's advice regarding these matters. Senator Chris Evans, Minister for Tertiary Education, Skills, Jobs and Workplace Relations, responded to the committee's concerns, by letter dated 1 March 2011. Despite the Minister's response, the Scrutiny committee remains concerned with several aspects of the Bills.¹⁵ This committee understands that the Scrutiny committee continues to correspond with the Minister in relation to these matters.

Purpose of the Bills

1.19 Collectively, the bills provide for the establishment of a national regulator for the VET sector and a regulatory framework within which the National Vocational Education and Training Regulator (the National VET Regulator) will operate.

1.20 The NVR Bill will establish the National VET Regulator and provide the National VET Regulator with administrative and enforcement powers. The Bill also creates offences and civil penalties relating to the conduct of RTOs and others involved with the VET sector. The Bill also allows the use of infringement notices and enforceable undertakings as an alternative to criminal offences and civil penalties.

1.21 The National Vocation Educational and Training Regulator (Transitional Provisions) Bill 2010 [2011] (the Transitional Bill) aims to minimise disruption for

14 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 1/11*, 9 February 2011, p. 30.

15 Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2011*, pp. 59 - 86.

RTOs by providing for the transfer of existing regulations, applications and other matters from state regulators to the National VET Regulator.¹⁶

1.22 The National Vocational Education and Training Regulation (Consequential Amendments) Bill contains consequential amendments to the *Education Services for Overseas Students Act 2000*, *Higher Education Support Act 2003* and the *Indigenous Education (Targeted Assistance) Act 2000* to ensure that the National VET Regulator framework properly interacts with other regulatory frameworks and funding programs.¹⁷

1.23 The bills are intended to address inconsistencies in VET regulation across jurisdictions. As stated in the Explanatory Memorandum for the National VET Regulator Bill, national regulation has the following objective:

[to] build on the current quality and consistency in the VET sector and support the labour market and national productivity agendas by:

- building confidence in the quality and consistency of assessment and training outcomes of VET qualifications which in turn supports the confidence in the abilities of VET graduates
- maximising consistency in application of national standards and regulatory activity in all jurisdictions
- maximising consistency in the application of sanctions and the treatment of low quality registered training organisations
- providing clear lines of accountability and responsibility for quality of VET
- ensuring a coordinated response to emerging quality issues in the sector.¹⁸

Constitutional basis for the NVR Bills

1.24 The Department of Education, Employment and Workplace Relations (DEEWR) advised that the COAG agreement relies on a text based referral from the referring states.¹⁹

1.25 Two days prior to the introduction of the National VET Regulator Bill in the Commonwealth Parliament, on 24 November 2010 the Vocational Education and Training (Commonwealth Powers) Bill 2010 was introduced in the New South Wales

16 Senator the Hon. Joe Ludwig, Minister for Agriculture, Fisheries and Forestry, *Senate Hansard*, 26 November 2010, pp. 2379-2380.

17 Senator the Hon. Jan McLucas, Parliamentary Secretary for Disabilities and Carers, *Senate Proof Hansard*, pp. 33-34.

18 Explanatory Memorandum, National Vocational Education and Training Regulator Bill 2010, p. 2.

19 Department of Education, Employment and Workplace Relations, *Submission 7*, p. 2.

Legislative Assembly. The Bill was passed by the NSW Parliament on 30 November 2010. The *Vocational Education and Training (Commonwealth Powers) Act 2010* (the NSW Act) received Royal Assent on 7 December 2010, however the NSW Act had not commenced as at the date of this report.²⁰ No other jurisdiction has passed legislation referring the required power to the Commonwealth at this time.

1.26 The referral of power to the Commonwealth in the NSW Act is in two parts; an initial reference and a continuing reference.²¹ Section 6 states that ‘The initial VET matters are referred to the Parliament of the Commonwealth, but only to the extent of the making of laws with respect to those matters by enacting Acts in the terms, or substantially the terms, of the tabled text’. ‘Initial VET matters’ is defined in section 4 as ‘matters to which the provisions of the tabled text relate to the extent that those matters are included in the legislative powers of the Parliament of the State’. The ‘tabled text’ is defined in section 3 as ‘the text of the following proposed Bills for Commonwealth Acts: National VET Regulator Bill 2010, National VET Regulator (Transitional Provisions) Bill 2010 as tabled in the Legislative Assembly of New South Wales on 24 November 2010...’.

1.27 Constitutional lawyer Andrew Lynch has explained that text-based referral, such as that undertaken by New South Wales for the VET Regulator bills, is the commonest way in which powers are now referred to the Commonwealth. Examples of such text-based referral include the corporations law and anti-terrorism legislation. Such referrals generally include an initial referral of matters based on an agreed text of a bill, with a separate referral of the power to amend that text.²² This is the model that has been used for the current bills.

1.28 By letter dated 1 March 2011 to the Senate Standing Committee for the Scrutiny of Bills, Senator Chris Evans, advised that for the NSW referral to stand the NVR Bill and the Transitional Bill must be passed by the Commonwealth Parliament in substantially the same form as was introduced to the NSW Parliament on 24 November 2010:

The main Bill and Transitional Bill rely on a text based referral of powers from New South Wales. If there is amendment of the Commonwealth Bill, then the NSW referral will not support the enactment of that amended Bill. This will be the case even if only a small number of amendments are made. Any amendments to the text of the main Bill, other than purely editorial changes, will therefore delay or prevent the establishment of the NVR.²³

²⁰ Parliament of New South Wales, *Vocational Education and Training (Commonwealth Powers) Bill 2010*, <http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/131a07fa4b8a041cca256e610012de17/369f8ac5a0f6539eca2577e5003ac314?OpenDocument> (accessed 17 March 2011).

²¹ Section 6, *Vocational Education and Training (Commonwealth Powers) Act 2010*.

²² Andrew Lynch, ‘After a Referral: The Amendment and Termination of Commonwealth Laws relying on s 51(xxxvii)’, *Sydney Law Review*, vol. 32, p. 375.

²³ Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2011*, p. 61.

1.29 DEEWR provided the same advice to the Senate Legislation Committee on Education, Employment and Workplace Relations at a hearing for the committee's inquiry into the Commonwealth VET Bills on 7 March 2011.

1.30 The committee notes that a similar issue arose when Parliament considered the Corporations Bill 2001. The issue of amendment was addressed in the Parliamentary Library's Bills Digest, which concluded:

Despite this technical capacity to amend, the prudent course of action would be to enact the Bills in their existing form, given that the intent of the new scheme is to bring certainty to the corporate regulation. It would be unwise to open up another avenue of constitutional challenge about whether an amendment to the tabled text represented a 'substantial' change and therefore was not supported by section 51(xxxvii).²⁴

1.31 The committee accepts the conclusion reached by all the sources who have considered this issue. As the next chapter demonstrates, there is widespread and strong support for the creation of a National VET Regulator. Accordingly, the committee considers that the introduction of a national system of VET regulation should not be delayed or undermined through amendment of the bills at this stage.

Recommendation 1

1.32 The committee recommends that the bills be passed in their current form.

1.33 Nevertheless, as later chapters will demonstrate, there is capacity for improvement to the bills. It may have helped the drafting process, and the Parliament, had the bills been given earlier consideration by parliamentary committees, prior to their adoption by the New South Wales Parliament.

Recommendation 2

1.34 That in future, exposure drafts of legislation be made available for examination by parliamentary committees prior to their adoption as text-based referrals of power by state legislatures, thereby assisting committees to recommend amendments to bills, if necessary, without threatening the viability of the referral of powers.

24 Mark Tapley, *Corporations Bill 2001*, Bills Digest, no 140, 2000-01, Parliamentary Library, Canberra, 2001, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillsdgs%2FJ4746%22>, accessed 17 March 2011.

Chapter 2

General issues

2.1 Australia will benefit from a single national approach to vocational education and training. This message was clearly sent by major stakeholders in the field. The committee is aware that some governments – Victoria and Western Australia – have reservations about the implementation of an intergovernmental agreement and national laws, but no-one disputes the benefit of a national approach for reducing complexity for businesses, and acting as a key quality assurance mechanism, thus improving confidence in Australia's VET system.

2.2 The New South Wales government, which has passed legislation to allow the referral of powers to the Commonwealth, said that it 'strongly supports a single, national VET regulatory system'.¹ The Minerals Council of Australia considered that:

The National VET Regulator Bills provide a single, standard national regulatory framework for the VET sector, which is essential to promote consistency and remove barriers and confusion for individuals and enterprises who are or who wish to work across more than one jurisdiction.²

2.3 The Australian Council of Trade Unions (ACTU) indicated it supported the change, saying it was something that has been needed for some time:

[O]ur main interest or focus has been to reaffirm our broad support for the establishment of the National VET Regulator. It is something the ACTU and others have called for for some time and we are glad to see now that we are almost there. It is a significant reform and we commend the government for taking it on. In terms of the bills themselves, we are pleased to see the broad powers enabling the National VET Regulator to monitor and enforce compliance with quality standards and also take appropriate action against those providers who do not meet those standards.³

2.4 The Australian Council for Private Education and Training (ACPET) was particularly strong in its support for the reforms. It expressed its concern:

That this critical initiative not be further delayed as a result of this inquiry... ACPET has been consulted on both the draft legislation and periodically on progress towards the establishment of the new regulator... ACPET considers that the proposed legislation significantly strengthens the ability of the regulator to take action against seriously non-

1 NSW Government, *Submission 19*, p. 2.

2 Minerals Council of Australia, *Submission 7*, p. 2.

3 ACTU, *Proof Committee Hansard*, 7 March 2011, p. 8.

compliant providers. The legislation will therefore serve to improve the quality of vocational education and training being delivered in Australia...⁴

2.5 The Minerals Council of Australia welcomed the 'reduction in the complexity of the regulatory framework'.⁵ Submitters were supportive of removing inconsistencies in areas such as training and assessment between jurisdictions.⁶

2.6 It is important to ensure high standards of training delivery across the VET sector, and the bills are an important measure in achieving this objective.⁷ The Master Builders Association supported a national regulator, arguing it would deliver 'consistent robust national regulation of training providers and courses'.⁸ The Australian Chamber of Commerce and Industry (ACCI) explained the need for a new regulatory approach in terms of dealing with low quality training:

The Bills have been designed to overcome some of the specific problems experienced as a result of the activities of some poorer quality providers who used elements of the AQTF designed for continuous improvement under existing State and Territory legislation to defend their lack of compliance with critical quality requirements. It created problems and generated an unjustified but poor broader image for the whole VET sector and resulted in undesirable outcomes and publicity around international students. The establishment of the NVR will help to rectify these problems through enabling a stronger regulatory response to non-compliant RTOS.⁹

2.7 Within the framework of strong support for the bills, a range of issues were identified by stakeholders.

Consultation processes

2.8 As noted above, ACPET was satisfied with the consultation process. This did not however seem to be a view that was necessarily widely shared. The ACTU, on behalf of itself and other relevant players, observed:

we are concerned with the lack of meaningful consultation around the details of these major reforms. The ACTU and other industry stakeholders were part of a 'limited consultation' process in late 2010 which provided the opportunity to view a draft Bill for a half day. Given the significance of this legislation, this did not prove sufficient time for proper consideration before the Bill was introduced.¹⁰

4 ACPET, *Submission 5*, p. 1.

5 Minerals Council of Australia, *Submission 7*, p. 2.

6 For example, EE-Oz Training Standards, *Submission 15*, p. 1.

7 ACTU, *Submission 10*, p. 3.

8 Master Builders Association, *Submission 2*, p. 1.

9 ACCI, *Submission 14*, p. 1.

10 ACTU, *Submission 10*, p. 4.

2.9 This theme – of broad support but limited input on the legislation – was a recurring one:

DEEWR, right from the outset of establishing the NVR, has involved industry stakeholders, first of all, in briefings and, secondly, in the consultation process at the end of last year. However, that consultation process, while appreciated, really did not provide us with a lot of scope for providing feedback. Certainly the government's approach has been to be very consultative in a lot of other forums, and probably there has not been as extensive consultation on this particular piece of legislation as occurs in other arenas. Also, even though we were consulted, basically nothing happened with the feedback that we provided. We are just one of a range of stakeholders; we understand that, but I think there has been some frustration about consultation on this particular bill.¹¹

2.10 The committee discussed the negotiations between jurisdictions with representatives of the Western Australian government. They implied Western Australia was not part of continuing discussions:

CHAIR—Are there still some discussions going on? On one reading of what you have said there is not that much between the parties even though it is obviously a threshold issue. Are there still attempts to resolve the issue or, from your point of view, is the ball now in the Commonwealth's court, so to speak?

Mr Brown—As we understand it, the legislation and the intergovernmental agreement are the Commonwealth's final position and we have not had any further consultation on that matter. When we inquired whether there would be, we were basically given the sense that that was it, that was the position that was going to be presented.¹²

2.11 The Australian Education Union (AEU) and the TAFE Directors Association wanted more time spent on the legislation:

The organisations wish it further noted that they view the 11 day time period allowed for the Committee to undertake and complete its inquiry as wholly inadequate for the purpose of ensuring appropriate consultation on what is after all such a significant change in the VET sector regulatory environment. The Committee is urged to consider recommending further delay in passage of the Bills to enable full consultation to occur, including consideration of legislative amendment, to take account of stakeholder concerns.¹³

2.12 These organisations reiterated similar concerns at the hearing:

11 ACCI, *Proof Committee Hansard*, 7 March 2011, p. 22.

12 Mr Brown, Director, Education and Training Regulation, Western Australian Department of Education Services, *Proof Committee Hansard*, 9 March 2011, p. 7.

13 AEU and TAFE Directors Association, *Submission 11*, p. 1.

Compared with TEQSA, consultation on the National VET Regulator has been limited and there is no forum in which to have a holistic dialogue or single line of communication about the parallel and critical set of changes between the two bodies.¹⁴

However, in terms of any processes of consultation around the legislation—which is so critical as an underpinning for the national VET regulator—there have been no consultations with the union at all. As far as I am aware, I believe there was a restricted forum organised in late October where an invitation was extended to the ACTU to attend a closed session where participants would have access to a draft of the legislation for a limited period of time. During that session they would be able to provide feedback, then the draft legislation was to be left there. Unfortunately, because the notice for that session was so short the AEU was unable to attend that limited briefing and, as far as I am aware, that was the only point at which there was any consultation—certainly potentially with the AEU.¹⁵

2.13 The Department of Education, Employment and Workplace Relations (DEEWR) advised the committee of its schedule of stakeholder consultations. Excluding the meetings of the State and Territory Working Group, the Ministerial Committee and bilateral meetings with jurisdiction governments, the consultations included 16 meetings and open sessions, with at least one occurring in every jurisdiction, between 10 March and 5 May 2010.¹⁶ However, the committee understands that stakeholder consultation on the exposure draft of the bills was confined to a single session on 29 October 2010.¹⁷ A representative of the AEU said that 'the draft legislation was to be left there', suggesting it remained in confidence,¹⁸ however the department indicated that stakeholders were provided with a copy of the legislation,¹⁹ implying it was then public. The committee did not resolve the detail of whether the exposure draft was effectively public from 29 October 2010.

2.14 DEEWR advised the committee that the draft went through 18 draft iterations after the stakeholder consultation on 29 October, and gave examples of some of the changes that were included.²⁰

Committee view

2.15 As the committee notes elsewhere in this report, it also has concerns about a process where there is limited capacity to consider and comment on proposed

14 Ms Simmons, TAFE Directors Australia, *Proof Committee Hansard*, 7 March 2011, p. 23.

15 Ms Forward, AEU, *Proof Committee Hansard*, 7 March 2011, pp 24–25.

16 DEEWR, *Submission 7*, p. 7.

17 DEEWR, *Submission 7*, p. 7.

18 Ms Forward, AEU, *Proof Committee Hansard*, 7 March 2011, p. 25.

19 Ms Quagliata, DEEWR, *Proof Committee Hansard*, 7 March 2011, p. 43.

20 DEEWR, Answers to Questions on Notice, 7 March 2011 (received 17 March 2011), p. 1.

legislation, particularly when it is establishing a regulator, which involves creating and defining regulatory conditions, including offences. The committee believes the draft bills required more careful consideration at an early stage.

Lack of objects

2.16 Several major players in the sector noted the lack of an objects clause in the bill.²¹ This was one of the main points raised by the AEU and TAFE Directors Australia. It was also noted by the ACTU, which pointed out that similar clauses are in place in other legislation, such as the *Fair Work Act 2009*.²² The exposure draft of similar legislation, the Exposure Draft of the Tertiary Education Quality and Standards Agency Bill 2010 contains an objects clause:

The objects in that exposure draft bill are:

- (a) to provide for national consistency in the regulation of higher education; and
- (b) to regulate higher education using:
 - (i) a standards-based quality framework; and
 - (ii) principles relating to regulatory necessity, risk and proportionality; and
- (c) to protect and enhance:
 - (i) Australia's reputation for quality higher education and training services; and
 - (ii) Australia's international competitiveness in the higher education sector; and
 - (iii) excellence, diversity and innovation in higher education in Australia; and
- (d) to encourage and promote a higher education system that is appropriate to meet Australia's social and economic needs for a highly educated and skilled population; and
- (e) to protect students undertaking, or proposing to undertake, higher education in Australia by requiring the provision of quality higher education; and
- (f) to ensure students undertaking, or proposing to undertake, higher education, have access to information relating to higher education in Australia.²³

21 AMWU, *Submission 8*, p. 3; ACTU, *Submission 10*, p. 7; AEU and TAFE Directors Association, *Submission 11*, p. 1

22 ACTU, *Submission 10*, p. 7.

23 Exposure Draft of the Tertiary Education Quality and Standards Agency Bill 2010, clause 3, <http://www.deewr.gov.au/HigherEducation/Policy/teqsa/Documents/TEQSABill2011.pdf>, accessed 17 March 2011.

2.17 The AEU and TAFE Directors suggested that:

Objects provide a clear expression of legislative intention and provide authoritative guidance to the administrators and users of the statute. Without Objects, it is therefore unclear what the Bill is attempting to achieve.²⁴

2.18 They considered that objects modelled on those contained in the TEQSA bill exposure draft could be appropriate.

2.19 The Department responded saying that there were differences between the processes leading to the establishment of TEQSA and the National VET Regulator, in particular that the latter is relying on a referral of state powers and therefore is negotiated with the states:

As a result there is an intergovernmental agreement with the states and territories, and in that intergovernmental agreement a set of objectives is set out... In the case of this piece of legislation, it was thought unnecessary to do that when the objects would be set out in the intergovernmental agreement.²⁵

Committee view

2.20 As noted elsewhere in this report, however, the intergovernmental agreement is neither public, nor even signed as of the Senate considering the bill. The committee accepts that legislation may be prepared in different ways, and that an objects clause is not always necessary. However the lack of such objects being in the public domain, through either the bill or the intergovernmental agreement, seems unfortunate.

The development of national standards

2.21 National standards are critical to underpinning the national framework for vocational education and training. The Minister, in the second reading speech, stated

A key mechanism for regulation in VET is the national standards against which RTOs are regulated, currently called the Australian Quality Training Framework. The content of the standards will not be significantly changed, but this Bill strengthens their legal status by making them a legislative instrument.

The standards will continue to be endorsed by the Ministerial Council and will be developed in the future by the new Standards Council which will be established in 2011.²⁶

2.22 The Minerals Council of Australia indicated that industry participation in the development of standards was critical, and that current AQTF standards should not be

24 AEU and TAFE Directors Association, *Submission 11*, p. 1.

25 Ms Quagliata, DEEWR, *Proof Committee Hansard*, 7 March 2011, p. 41.

26 *Senate Hansard*, 26 November 2010, p. 2380.

directly adopted in their current form.²⁷ ACCI also expressed concern about the use (or abuse) of elements of the existing AQTF.²⁸

2.23 The Australian Manufacturing Workers' Union (AMWU) also expressed concern about how standards would be developed and adopted, but did not appear to share doubts about the adequacy of the existing AQTF:

There appears to be no mention in the Main Bill of the Australian Quality Training Framework (AQTF) which provides the current regulatory framework for Registered Training Organisations. Whilst this might be because the AQTF will be incorporated into the Standards for NVR registered training organisations, the AMWU submits that the relationship between the existing and new regulatory VET framework should be made explicit and that the legislation should expressly provide for a strong role for industry in decisions relating to the Standards underpinning the quality of the system.²⁹

2.24 A similar view was expressed by the ACTU, Manufacturing Skills Australia and EE-Oz Training Standards.³⁰

2.25 The Victorian government doubted that the AQTF was suitable to become a statutory framework for standards in the sector:

In essence, the national standards set out in the Australian Quality Training Framework (AQTF) are a set of policy statements and objectives. Whilst adequate as statements of policy, they are not crafted to serve as the basis for a robust regulatory system in the modern administrative law context.

It is understood that the Commonwealth proposes to resolve this problem by giving the AQTF the status of a legislative instrument. In Victoria's view, this does not solve the fundamental problem. Making a vaguely expressed document into a legislative instrument will not make it any easier to administer. For this reason, Victoria's approach has been to develop Acts and regulations that give effect to the policies set down in the AQTF in enforceable statutory form.

More work needs to be done to articulate the standards with greater clarity and precision to give providers and regulators better guidance on what they require.³¹

2.26 DEEWR indicated that there is the capacity to address these debates independently of the bill's provisions. DEEWR representatives noted that '[t]he

27 Minerals Council of Australia, *Submission 7*, p. 2.

28 ACCI, *Submission 14*, p. 1.

29 AMWU, *Submission 8*, p. 4.

30 ACTU, *Submission 10*, p. 5; Manufacturing Skills Australia, *Submission 9*, p. 3; EE-Oz Training Standards, *Submission 15*, p. 2.

31 Government of Victoria, *Submission 18*, p. 5.

standards that will be applied by the regulator are not set out in the legislation but are put in legislative instruments that are referred to in the legislation'.³² There is a deliberate separation of the standards themselves and the regulator's work in applying them:

[T]he introduction of a National VET Regulator is not intended to significantly alter the national standards as recently strengthened. The intention is to improve consistency and enforceability of the standards by having them regulated by a single body with robust powers.

There will be further opportunities in the future for stakeholders to contribute to the ongoing development and refinement of the standards. In addition to the establishment of a National VET Regulator, the Australian Government is consulting extensively with state and territory governments and other key stakeholders to form the National Standards Council.

The National Standards Council will continue to develop and refine the national standards, and will be required to consult extensively on these changes.³³

2.27 They also pointed out that the AQTF had itself been recently strengthened in a process separate to the current bills:

They were strengthened in a number of ways in a process in 2010 to include a requirement for fit and proper person standards to be met; for financial viability standards to be met; and for continuous improvement not to be seen as an alternative to meeting the standards but rather being in addition to meeting the standards. There was a separation of the standards for initial registration with the standards for continuing registration, as that resulted in some uncertainty as to how the standards applied in relation to initial registration, and there was a strengthening of the data requirements, in that there is now a requirement that registered providers keep [Australian Vocational Education and Training Management Information Statistical Standard] compliant student records.³⁴

2.28 It is important that the standards being enforced by the regulator are strong: strengthened enforcement powers are of little use unless they are supported by adequate laws. The committee was satisfied with DEEWR's observations on this issue.

The place of Enterprise RTOs

2.29 Enterprise RTOs are Australian companies that become RTOs in order to train their own employees, but their main business is not training. They include some of Australia's largest employers, such as Woolworths, Westpac and the Australian

32 Ms Quagliata, DEEWR, *Proof Committee Hansard*, 7 March 2011, p. 44.

33 DEEWR, *Answers to Questions on Notice*, 7 March 2011 (received 11 March 2011), p. 10.

34 Ms Quagliata, DEEWR, *Proof Committee Hansard*, 7 March 2011, p. 46.

Taxation Office. There are currently around 250 enterprise RTOs, issuing around 100 000 qualifications each year.³⁵

2.30 The AEU and TAFE Directors suggested that the VET framework should include a reference to the concept 'that VET providers have as a main or proper or primary or significant purpose the provision of VET'.³⁶ The AMWU supported the AEU and TAFE Directors, but expressed the proposal more narrowly, suggesting that RTOs should have, 'as a primary or significant purpose, the education and training of students'.³⁷

2.31 In contrast, ACCI was critical of any suggestion that definitions be inserted that could prevent Enterprise RTOs from remaining within the system:

It is highly desirable that businesses embrace the accredited training system and integrate training into their business processes as is the model in Enterprise RTOs... Inadvertent exclusion of this important sector would be a significant blow to formal training and may encourage enterprises to turn instead to non-formal and informal training to meet their skills needs. From a business and industry perspective, this would be highly undesirable.³⁸

Committee view

2.32 The committee understands the differing views of parties on this matter. It notes, however, that the AEU / TAFE Directors submission does suggest that VET providers may have as a 'proper...or significant purpose the provision of VET': 'proper' is significantly broader than 'main' or 'primary'. These words on their face seem clearly to have the scope to include enterprise RTOs. The committee is not sure there is a genuine conflict of views here. Nevertheless, the issue is a substantive policy question that goes beyond the provisions of the bill, and was not pursued further by the committee as part of this inquiry.

Conclusion

2.33 The committee wishes to reiterate that there is widespread support for a national approach to the VET sector. This is reflected in steps that have been taken in this direction over the last decade. The current reforms represent an important milestone in protecting and enhancing Australia's vocational education and training sector. The committee now turns to some specific issues with aspects of the bills, particularly in relation to offences, civil penalties and entry, search and seizure powers.

35 Enterprise RTO Association, *Submission 12*, p. 1.

36 AEU and TAFE Directors Association, *Submission 11*, p. 1.

37 AMWU, *Submission 8*, p. 5.

38 ACCI, *Submission 14*, p. 4.

Chapter 3

Offences, civil penalties and entry, search and seizure powers

3.1 The committee was advised that the NVR Bills are designed to establish a more 'robust regulatory framework' for the VET sector.¹ DEEWR explained that the National NVR Regulator would be given powers that exceed those of the state and territory regulators.² The Department has further stated that stronger regulation is a key objective behind implementing a national regulator.³

3.2 Several stakeholder submissions advocated that sanctions and enforcement powers are necessary to address non-compliance with VET standards.⁴ Views put forward to the committee are reflected in the statement made by the Minerals Council of Australia that 'the NVR must ... have the authority to sanction or deregister providers who do not meet the required standards'.⁵

3.3 There were, however, divergent views about the appropriateness of the proposed offences, civil penalties and enforcement powers. EE-Oz Training Standards argued that the punitive measures in the Bill should be strengthened.⁶ Conversely, several submissions raised concerns with aspects of the offences and civil penalties, and the National VET Regulator's coercive entry, search and seizure powers.

3.4 It was put to the committee that the severity of the offences, civil penalties and enforcement powers may deter RTOs from continuing in the VET sector. Surf Life Saving Australia stated that the enforcement powers are 'not only unrealistic and problematic for enterprise RTOs, but may make many of them question the value of their commitment to accredited training'.⁷ The ACCI questioned whether 'some of the provisions will act to control the market too strongly potentially resulting in the loss of good as well as poor providers'.⁸

1 Explanatory Memorandum, National Vocational Education and Training Regulator Bill 2010, p. 2.

2 DEEWR, *Submission 7*, p. 4.

3 DEEWR, Answers to Questions on Notice, 8 March 2011 (received 11 March 2011), p. 1.

4 ACCI, *Submission 14*, p. 2; ACTU, *Submission 10*, p. 3; EE-Oz training standards, *Submission 15*, p. 2; Minerals Council of Australia, *Submission 6*, p. 2.

5 Minerals Council of Australia, *Submission 6*, p. 2.

6 EE-Oz Training Standards, *Submission 15*, p. 2. Skills Australia also endorsed strong regulatory powers for the National VET Regulator (*Submission 17*, p. 1.)

7 Surf Life Saving Australia, *Submission 20*, p. 2.

8 ACCI, *Submission 14*, p. 2.

3.5 Master Builders Australia noted that a reduction in the number of providers could significantly undermine the viability of the VET system:

...Master Builders is concerned that elements of the Bill impose undefined and potentially burdensome requirements on training providers, which may result in some legitimate providers choosing to leave (or not enter) the VET market. A lack of competition in training provision arising from such an outcome would be as undesirable as a failure of standards from insufficient regulation.⁹

Committee views

3.6 The committee notes the concerns that harsh or inappropriate regulation may deter legitimate RTOs from continuing to provide VET services.

3.7 Mr John Smyth, Interim CEO, National VET Regulator, advised that the National VET Regulator has conducted 'a fairly intensive consultation process with all stakeholders'. Stakeholder discussions canvassed issues relating to the implementation of the NVR legislation and the proposed regulatory model, and the establishment and operation of the National VET Regulator.¹⁰ The committee believes that the national system would benefit from continued discussions between the National VET Regulator and RTOs about the effect of the new regulatory environment.

Use of criminal offences

3.8 A number of submissions queried whether criminal offences were an appropriate means of regulating the VET sector. The AMWU stated that 'non-compliance should result in suspension of registration'.¹¹

3.9 The ACCI advised against the use of criminal sanctions as part of regulating the VET sector, recommending the NVR Bill be amended to exclude those offences. The ACCI considers that, as a regulatory response to concerns with RTO conduct, offences are 'heavy handed and disproportionate'.¹²

ACCI does not believe, on balance, that the majority of contraventions in the Bill should be classified as criminal offences. They do not warrant the seriousness and social stigma of criminal responsibility, even if they are summary offences (as opposed to indictable offences).¹³

9 Master Builders Australia, *Submission 2*, p. 1.

10 Mr John Smyth, Interim CEO, National VET Regulator, Department of Education, Employment and Workplace Relations, *Proof Hansard*, 7 March 2011, pp. 43–44.

11 AMWU, *Submission 8*, p. 4.

12 ACCI, *Submission 14*, p. 2.

13 ACCI, Answer to Questions on Notice, 7 March 2011 (received 10 March 2011), p. 2.

3.10 In response to concerns raised about whether the use of criminal sanctions is appropriate, DEEWR advised that serious non-compliance, such as corrupt conduct, can materially damage the VET sector:

Serious non-compliance by only a few providers has the potential to undermine confidence in the entire sector. It also has the potential to pose health and safety risks to the public through the provision of qualifications to students, who have not completed the necessary requirements, who then participate in the building and construction or electrical industries.¹⁴

3.11 DEEWR submitted that regulating conduct through offences is, in part, intended to reduce the risk of corruption in the VET sector.¹⁵ The Department informed the committee that the 2010 report *Stronger, simpler smarter ESOS: supporting international students* highlighted concerns with sanctions for non-compliance with regulatory standards. The report noted that 'Too many international education providers have become comfortable with the idea that they will not get caught, and if they do get caught, the sanctions will be weak...'.¹⁶

3.12 DEEWR provided the committee the following illustration of corrupt conduct by RTOs.

An example of the type of behaviour that can occur is in the *Report on Corruption in the Provision and Certification of Security Industry Training* (ICAC, 2009). The Commission identified a level of corruption in security industry training where both RTOs and students were complicit in deceiving the registering authority. RTOs were falsely claiming the students had an adequate level of English, and had passed examinations where the students had poor or no English skills and had been given the answers to the exam in advance by the RTO.¹⁷

3.13 DEEWR further advised that 'offences have been part of the VET regulatory framework for a number of years', and that several of the offences are based on the Model Clauses for Training, National Registration and Accreditation.¹⁸ The committee was informed that a report into the South Australian VET sector also recommended the use of offences.¹⁹

14 DEEWR, Answers to Questions on Notice, 8 March 2011 (received 11 March 2011), p. 1.

15 DEEWR, Answers to Questions on Notice, 8 March 2011 (received 11 March 2011), p. 4.

16 The Hon Bruce Baird, *Stronger, simpler smarter ESOS: supporting international students*, February 2010, p. 22.

17 DEEWR, Answers to Questions on Notice, 8 March 2011 (received 11 March 2011), p. 1.

18 DEEWR, Answers to Questions on Notice, 8 March 2011 (received 11 March 2011), pp. 2–3.

19 DEEWR, Answers to Questions on Notice, 8 March 2011 (received 11 March 2011), p. 2.

Committee view

3.14 The committee considers that the use of offences is generally appropriate, though the justifications offered in the Explanatory Memorandum were sometimes inadequate. However, there are concerns with aspects of several of the proposed offences and some of these as discussed further below. The committee expects the government to closely monitor the application of the offences created by the new legislation.

Meaning of 'appropriate assessment'

3.15 The NVR Bill proposes that it will be an offence for an RTO to issue a VET qualification or a VET statement of attainment without providing, or arranging another person to provide, 'the assessment necessary for a VET student to satisfy the requirements [of the qualification or statement of attainment]'.²⁰

3.16 'Adequate assessment' or 'assessment' are not defined in Division 2 of the NVR Bill. Master Builders Australia questioned what is meant by adequate assessment, advising the committee that 'there is no settled understanding of what "adequate assessment" may constitute'.²¹ The Explanatory Memorandum provides no clarity on its meaning, which is of concern as the scope of an offence should be clear.²²

3.17 In response to the concerns, DEEWR provided the committee with additional information about the required nature of VET assessments. It indicated that the meaning would vary between VET qualifications and statements of attainment.

Assessment necessary for the purpose of clauses 103 and 105 will depend on the type of VET qualification or statement of attainment that is being awarded. Guidance is provided through training packages and accredited course documentation which provide the basis for the development of strategies for training and assessment by each RTO and describe essential course information including the packaging rules, outcomes to be achieved, standards for assessment and required resources.²³

Committee views

3.18 The additional information provided by DEEWR, and its ongoing dissemination through training packages and accredited course documentation, clarifies the requirements on RTOs to avoid committing the offences at clauses 103

20 Clause 103, clause 105, National Vocational Education and Training Regulator Bill 2010 [2011].

21 Master Builders Australia, *Submission 2*, p. 2.

22 Commonwealth Attorney-General's Department, *A guide to framing Commonwealth offences, civil penalties and enforcement powers*, December 2007, p. 15.

23 DEEWR, Answers to Questions on Notice, 8 March 2011 (received 11 March 2011), p. 2.

and 105 of the NVR Bill. The committee notes the importance of information about the kind of assessment required being clearly specified in the training packages and accredited course documentation. The committee considers that stakeholder concerns would have been addressed in the first instance had the additional information been contained in the Explanatory Memorandum.

Recommendation 3

3.19 That the Department of Education, Employment and Workplace Relations amend the Explanatory Memorandum for the National Vocational Education and Training Regulator Bill 2010 [2011] to include the additional general information regarding the application of offences at pages 1 and 2 of the Answers to Questions on Notice dated 11 March 2011 and the answer to question one on pages 2 to 3 of the Answers to Questions on Notice dated 11 March 2011.

Extended geographical jurisdiction

3.20 The offences in subdivisions A and C, Division 1, Part 6 of the NVR Bill will apply whether or not the conduct constituting the alleged offence, and its result, occurs in Australia. The Explanatory Memorandum explains the effect of the extended geographical jurisdiction but does not justify its use. The committee notes the advice in *A guide to framing Commonwealth offences, civil penalties and enforcement powers* (the Guide) that offences should have extraterritorial application only where appropriate.²⁴

3.21 DEEWR informed the committee of a growing number of offshore providers of Australian VET qualifications, with approximately 2 per cent of all registered Australian private providers and 61 per cent of all Australian TAFE institutes involved in the delivery of VET offshore in 2009. The Department advised that:

[i]t is therefore necessary to allow for the geographical jurisdiction to be extended to allow for confidence in Australian qualifications provided offshore by Australian RTOs and to deter overseas providers from falsely claiming to be registered in Australia and adversely affecting the reputation of AQF qualifications and Australian registration.²⁵

Committee views

3.22 Given the growing number of offshore providers of Australian VET qualifications, the committee considers that the extraterritorial operation of the offences is appropriate. It would be useful for information explaining the need for the extraterritorial operation to be included in the Explanatory Memorandum.

Recommendation 4

24 Attorney-General's Department, *A guide to framing Commonwealth offences, civil penalties and enforcement powers*, pp. 36–37.

25 DEEWR, Answers to Questions on Notice, 8 March 2011 (received 11 March 2011), p. 6.

3.23 That the Department of Education, Employment and Workplace Relations amend the Explanatory Memorandum for the National Vocational Education and Training Regulator Bill 2010 [2011] to include the explanation for the proposed extraterritorial operation of the offences, as provided to the committee at page 6 of the Answers to Questions on Notice dated 11 March 2011.

Infringement notices

3.24 Clause 148 of the NVR Bill would provide for regulations to establish an infringement notice scheme for all the offences under the proposed legislation, while clause 149 would provide for regulations to establish a similar scheme for the civil penalties. The Explanatory Memorandum advises the penalty attached to the infringement notice will be 1/5th the maximum penalty for an offence and 1/10th the maximum penalty for a civil penalty.²⁶

3.25 The committee notes the directions in the Guide that infringement notices should only be used for strict or absolute liability offences, or civil penalties that do not require proof of fault.

3.26 The committee also notes that the Guide stipulates that the penalty attached to an infringement notice should not exceed 12 penalty units for a natural person and 60 penalty units for a body corporate, and that exceeding this limit requires 'strong justification'.²⁷

3.27 The committee notes in this regard that the penalties provided for under the scheme exceed those stipulated in the Guide. In particular, the civil penalties at clause 115, 117, 119, 121, 127, 129 apply to natural persons and have a penalty of 600 penalty units. A penalty 1/10th the maximum of 600 penalty units would significantly exceed the infringement notice limit of 12 penalty units for a natural person.

3.28 Likewise, the offences at clause 114, 116, 118, 120, 126, 128 apply to natural persons and have a penalty of 300 penalty units. A penalty 1/5th the maximum of 300 penalty units would exceed the infringement notice limit of 12 penalty units for a natural person.

3.29 Furthermore, the civil penalty at clause 131 applies to natural persons and has a penalty of 240 penalty units. A penalty 1/10th the maximum of 240 penalty units would exceed the infringement notice limit of 12 penalty units for a natural person.

3.30 Therefore it appears that the infringement notice scheme will depart from the principles in the Guide in two respects. First, the offences in the NVR Bill are not

26 Explanatory Memorandum, National Vocational Education and Training Regulator Bill 2010 [2011], pp. 76–77.

27 Attorney-General's Department, *A guide to framing Commonwealth offences, civil penalties and enforcement powers*, Chapter 6, pp 50–61.

strict or absolute liability offences. Second, in some cases the penalties would exceed the limit of 12 penalty units for a natural person.

3.31 The Explanatory Memorandum does not provide justification for these departures from the general principles for framing infringement notice schemes. DEEWR advised the committee that the infringement notice scheme would be 'based on consideration of the Guide' but did not provide further explanation despite the committee specifically requesting this.²⁸

Committee views

3.32 The committee is concerned that, while there may be justification for departing from the guide, an adequate explanation has not been provided.

Recommendation 5

3.33 That the Department of Education, Employment and Workplace Relations amend the Explanatory Memorandum for the National Vocational Education and Training Regulator Bill 2010 [2011] to include explanation for the proposed infringement notice scheme's departures from the principles in *A guide to framing Commonwealth offences, civil penalties and enforcement powers*.

Recommendation 6

3.34 That the National VET Regulator review the operation of the infringement notice scheme after 12 months operation.

Civil penalties

3.35 Clause 60 of the NVR Bill contains four civil penalty provisions applicable to VET students who do not return cancelled VET qualifications or statements of attainment. Clause 61 creates a civil penalty of purporting to hold a VET qualification or statement of attainment in circumstances where the qualification or statement of attainment has been cancelled.

3.36 The Senate Standing Committee for the Scrutiny of Bills questioned whether the penalties attached to civil penalties in the NVR Bill, particularly at clauses 60 and 61, are excessive.²⁹ The Australian Council of Trade Unions (ACTU) also queried whether the penalty levels were appropriate.³⁰

3.37 The ACTU and Master Builders Australia further submitted that the civil penalties at clauses 60 and 61 are inappropriate as they do not require knowledge that

28 DEEWR, Answers to Questions on Notice, 8 March 2011 (received 11 March 2011), p. 8.

29 Senate Standing Committee for the Scrutiny of Bills, *Report 2 of 2011*, pp. 69–70.

30 ACTU, *Submission 10*, p. 6.

the VET qualification or statement of attainment has been cancelled for the civil penalty to be made out.³¹ On this point, the ACTU argued that:

...the concern with each of these provisions is that there seems to be undue burden on the individual or worker, including potentially heavy penalties, where they have enrolled in a course in good faith, finished the course, and unknown to them, and for reasons beyond their control, the qualification has been cancelled or is bogus in some way.³²

3.38 The committee notes the advice in the Guide that knowledge is required to make out a civil penalty only when expressly stated in the provisions.³³ The civil penalties at subclauses 60(1), and 60(2) do not contain any express statement about requiring the person to know of the cancellation of the VET statement of attainment or qualification. Therefore, it appears that a person could contravene the civil penalties where he or she does not know that the VET qualification or statement of attainment has been cancelled. This is of concern to the committee.

3.39 In contrast, it appears that subclause 60(3) and clause 61 would require knowledge of cancellation for the civil penalty to be made out. The civil penalty at subclause 60(3) requires 'the person to whom the notice relates to be aware of [the notice]'. The civil penalty at clause 61 applies where a person 'purports to hold' a VET qualification or statement of attainment that has been cancelled. DEEWR has advised that the civil penalty 'will be used where a person who purports to hold a VET qualification or VET statement of attainment has knowledge that the qualification or statement has been cancelled'.³⁴ In relation to the civil penalty at subclause 60(4), the committee notes DEEWR's advice that for the penalty to apply the person must have knowledge of the cancellation:

Subclause 60(4) requires a person to return their qualification or statement of attainment to the NVR in circumstances where the Administrative Appeals Tribunal (AAT) has reviewed the NVR's initial cancellation decision and confirmed it. This penalty is appropriate as a person who has applied to the AAT to review the NVR's cancellation decision must have knowledge of the decision.³⁵

3.40 The committee is satisfied that the civil penalty at subclause 60(4) will not apply where persons are unaware of the cancellation.

31 ACTU, *Submission 10*, pp. 6–7, Master Builders Australia, *Submission 2*, p. 2.

32 ACTU, *Submission 10*, p. 7.

33 Attorney-General's Department, *A guide to framing Commonwealth offences, civil penalties and enforcement powers*, p. 65.

34 DEEWR, Answers to Questions on Notice, 8 March 2011 (received 11 March 2011), p. 7.

35 DEEWR, Answers to Questions on Notice, 8 March 2011 (received 11 March 2011), p. 7.

3.41 While it is clear that at least subclause 60(3), subclause 60(4) and clause 61 would apply only where the person has received notice of the cancellation,³⁶ some submissions questioned whether the service arrangements are sufficient given the severity of the penalties under these clauses.³⁷ Clause 57 of the NVR Bill directs that where personal service is not feasible, the National VET Regulator may issue the notice 'in any other way it considers appropriate'. Subclause 57(2) provides examples of alternative methods of service, which include publishing the notice on the regulator's website or in a newspaper circulated in the State or Territory where the person is believed to reside.

3.42 The ACTU argued that the service requirements would create 'a significant risk that somebody will not be aware that a qualification has been cancelled'.³⁸ The ACTU further argued that this raises 'real issues of fairness and justice', as the civil penalties created by subclauses 60(1), 60(2) and 60(4) could be contravened regardless of whether the person knows about the cancellation.³⁹ Master Builders Australia recommended 'that for the serious step of a person's qualifications being cancelled, that person must in all cases be served notice individually'.

Committee view

3.43 The committee is concerned that sufficient explanation has not been provided as to why the civil penalties as subclauses 60(1), 60(2) and 60(4) may apply where the person may not know that the VET statement of attainment or qualification has been cancelled. To address this issue these subclauses could be amended to only apply where the person knows that the statement of attainment or qualification has been cancelled.

Recommendation 7

3.44 That, once enacted, subclause 60(1) and subclause 60(2) be amended to include a requirement that the person know that the qualification or statement of attainment (whatever is applicable) has been cancelled.

Entry, Search and Seizure Powers

3.45 Part 5 of the NVR Bill would provide the National VET Regulator with extensive entry, search and seizure powers. These include the power to request persons to provide the regulator information, documents or things,⁴⁰ to retain documents or things provided,⁴¹ to search premises and seize goods, either with

36 DEEWR, Answers to Questions on Notice, 8 March 2011 (received 11 March 2011), p. 7.

37 For example, ACTU, *Submission 10*, pp. 6–7.

38 Mr Joel Fetter, Policy and Industrial Officer, ACTU, *Proof Hansard*, 7 March 2011, p. 9.

39 Mr Joel Fetter, *Proof Hansard*, 7 March 2011, p. 9.

40 Clause 62, National Vocational Education and Training Regulator Bill 2010 [2011].

41 Clause 62, National Vocational Education and Training Regulator Bill 2010 [2011].

consent or under warrant,⁴² and to question any persons on the premises searched pursuant to a warrant.⁴³

3.46 Submissions expressed concerns with the powers under the part. While entry, search and seizure powers received in-principle support from submitters such as the ACTU, the powers were considered to be excessive and in need of safeguards to ensure their fair and transparent use. Mr Shipstone, representing the ACTU, submitted that:

We are fairly broadly supportive of the broad powers which have been given to the regulator in this case. We think the evidence is that there have been problems in the quality of regulation across the sector and the powers, as some of the explanatory materials say, have probably been strengthened in advance of what was the existing situation with the state regulatory authorities. In this case, given the importance of quality regulation of our VET system, we are broadly supportive of the powers which have been given to the NVR.⁴⁴

3.47 On the same matter, Mr Fetter from the ACTU took the view that:

There are, of course, aspects of these powers that to us, who usually deal in the workplace relations space, seem extraordinary, including, in clause 70, the permission for use of force in executing a warrant. That is something that we would never condone in terms of workplace inspections, but I suppose this is a different regime copied from different regulatory models whereby there are warrants issued and therefore inspectors will be enforcing the warrant. It is out of our area, so we will not say whether it is appropriate or not. But certainly in the civil jurisdiction the use of force in executing warrants is a bit problematic, it would seem to us.⁴⁵

3.48 Surf Life Saving Australia questioned the enforcement powers. In particular, the organisation stated that for enterprise RTOs, for whom VET matters are not core business, the powers to request former employees to produce documents or information, to search anywhere or anything on the premises and to question anyone on the premises are unreasonable and 'will threaten the viability' of enterprise RTOs.⁴⁶

3.49 The Rule of Law Institute of Australia drew attention to other concerns with the powers. These include the following:

The time period for federal regulators wishing to conduct an interview or require information is generally 14 days. The VET Regulator does have the 14 day requirement to require documents/information, but if they consider

42 Division 2, Part 5, National Vocational Education and Training Regulator Bill 2010 [2011].

43 Clause 71, National Vocational Education and Training Regulator Bill 2010 [2011].

44 Mr Tim Shipstone, Industrial Officer, ACTU, *Proof Hansard*, 7 March 2011, p. 9.

45 Mr Joel Fetter, *Proof Hansard*, 7 March 2011, p. 9.

46 Surf Life Saving Australia, *Submission 20*, p. 2.

it ‘reasonably necessary’ they can reduce it to as low as 24 hours, which appears to be out of line with other notice periods.

[...]

RoLIA is concerned that an ‘authorised officer’ may exercise a warrant or enter by consent. An ‘authorised officer’ is a person appointed by the Chief Commissioner from the staff of the VET Regulator under s 89. Therefore, unlike ASIC and other federal regulators, the Australian Federal Police do not conduct the search. RoLIA strongly disagrees with this, as there is no reason for the VET Regulator to not be required to operate in the same way as other regulators. Safety of authorised officers may become a problem and their training may be called into question.

[...]

Whilst executing a warrant, an authorised officer can question the occupier on, among other things, information regarding the operation of the Act or information provided under the Act. There is no mention of whether a lawyer can be present or whether the principle against self-incrimination is in operation (the provision on self-incrimination included in the Bill only applies to the section on information requests). This gives the impression of being a potential method of gathering evidence not subject to the controls over interviews applicable for regulators such as ASIC, ABCC, ACCC and the ATO. RoLIA is very concerned about this particular issue.⁴⁷

3.50 The Institute recommended that the NVR Bill be amended to require the regulator to include in its annual reports information about the use of the powers under Part 5, and for this report to be tabled in Parliament.⁴⁸

3.51 The ACCI commented that the powers are excessive and that sufficient justification has not been provided.

The powers available to authorised officers are akin to those exercised by law enforcement officers. Monitoring powers, warrants, and the abrogation of the privilege against self-incrimination appears unwarranted and excessive given the types of conduct which is proscribed, particularly where these are new offences and powers for regulating the industry.

There does not appear to be any cogent policy reasons provided in the Second reading speech or explanatory materials which explain in detail why these new powers are required.⁴⁹

3.52 The ACCI provided the committee with a helpful overview of differences between the National VET Regulator's proposed powers and the entry, search and seizure powers under the *Fair Work Act 2009*. The overview indicates that the

47 Rule of Law Institute of Australia, *Supplementary Submission*, pp. 2–3.

48 Rule of Law Institute of Australia, *Supplementary 22*, p. 2.

49 ACCI, Answer to Questions on Notice, 7 March 2011 (received 10 March 2011), p. 2.

National VET Regulator's powers do not include safeguards similar to those required under the Fair Work Act.⁵⁰

Committee views

3.53 The committee acknowledges the seriousness of the concerns raised about the framing of the entry, search and seizure powers in the NVR Bill.

3.54 The committee also notes that the Senate Standing Committee for the Scrutiny of Bills has raised several concerns with the entry, search and seizure powers.⁵¹ The committee notes that the Scrutiny committee continues to correspond with the Minister in relation to several outstanding matter of concern. This committee endorses the Scrutiny committee's reports on the NVR Bills.

Conclusion

3.55 As the committee stated in chapters 1 and 2, there is widespread support for these reforms. The legal situation is such that any substantive amendment to the bills at this time would endanger the process of referring state powers, and therefore the entire regulatory framework. Accordingly, the committee reiterates its view that the bills should be passed.

3.56 The committee is concerned that there are numerous areas in which improvement of the Explanatory Memorandum could have averted stakeholder concerns, as well as some of those raised by the Scrutiny committee. It appears that there were many occasions on which the government departed from the practices recommended in the *Guide to framing Commonwealth offences, civil penalties and enforcement powers*.

3.57 The committee believes closer adherence to these guides would have assisted the Senate's committees. It is possible that the *Legislation Handbook* could be revised to highlight that Explanatory Memoranda must contain explicit explanations and sufficient justification where the Bill departs from the accountability standards applied by the Senate Standing Committee for the Scrutiny of Bills and the principles in the *Guide*, or could include examples of Explanatory Memoranda that have received adverse comment from Parliament for not meeting the above requirements. However, the committee leaves further consideration of this to the Scrutiny of Bills committee.

50 ACCI, Answer to Questions on Notice, 7 March 2011 (received 10 March 2011), pp. 4–13.

51 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 1/11*, 9 February 2011, pp. 20–30; Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2011*, pp. 59–86.

Chapter 4

Concerns raised by Victoria and Western Australia

Position of the Victorian Government

4.1 From its submission to the committee, it is evident the Government of Victoria (Victoria) has two kinds of concerns with the proposal for national regulation of the VET sector. The first relates to the scope of the National VET Regulator's jurisdiction. The second concerns the implications of the NVR Bill for RTOs and students in Victoria.

4.2 Victoria submitted that it disputes the scope of the National VET Regulator's authority, arguing that the regulator should not manage any RTOs that operate in Victoria.¹ Victoria advised the committee that it did not endorse the COAG agreement under which the national regulator would oversee RTOs that operate in both referring and non-referring jurisdictions or that provide services to international students. Victoria also submitted that 'regulatory responsibility should sit alongside funding responsibility', saying that the state is responsible for approximately 70 per cent of government funding for VET providers in Victoria.²

4.3 Victoria also considered that the NVR Bill 'will have a significant impact on Victoria's VET sector and the State's policy autonomy and responsibility, and could also affect the State's finances.'³ The state identified the following issues with the operation the NVR Bill.

4.4 First, Victoria argued that in contrast to the position in referring states, the NVR Bill will restrict the regulation of TAFE providers and apprenticeships in non-referring states. Victoria noted that clause 9 of the NVR Bill states that the NVR will not interfere with the management of TAFE providers and apprenticeships. In contrast, the Bill does not provide this express guarantee for non-referring states.

4.5 Victoria considered that this will exempt TAFE providers in Victoria registered with the National VET Regulator from their obligations under Victorian law to comply with State Government directions on administrative and policy matters including program delivery.⁴ It was submitted that this potential interference with TAFE management in non-referring states is 'a fundamental flaw that must be corrected before the NVR Bill can become law'.⁵ In relation to the regulation of

1 Government of Victoria, *Submission 18*, p. 5.

2 Government of Victoria, *Submission 18*, p. 1.

3 Government of Victoria, *Submission 18*, p. 1.

4 Government of Victoria, *Submission 18*, p. 3.

5 Government of Victoria, *Submission 18*, p. 3.

apprenticeships, Victoria put forward that, as the exemption is not stated in relation to non-referring states, 'the clear implication of the Bill is that Victorian apprenticeship laws, at least to the extent that they may affect NVR providers, are to be overridden'.⁶ Victoria argued that this 'appears to create a substantial regulatory gap' in the management of apprenticeships.⁷

4.6 In response to this concern, DEEWR advised that it does not consider that the NVR Bill will interfere with the management of TAFE providers or apprenticeships in non-referring states:

The Commonwealth's view is ... that the NVR Bill does not show an intention to cover the field in relation to all matters relating to VET. Section 9(3) specifically confers immunity on NVR registered training organisations in non-referring States from complying with laws dealing with particular listed subject matters, and thereby strongly indicates that those organisations are *not* immune from complying with other laws of the State.⁸

4.7 Second, Victoria submitted that the NVR Bill will reduce consumer protection safeguards for VET students in Victoria. The jurisdiction notes that compared to the focus in the NVR Bill on regulatory and administrative frameworks, '[l]ess emphasis is given to the rights of students, and the obligations of providers in relation to students'.⁹

4.8 Victoria advised that it interprets subclause 9(3) of the NVR Bill as having the effect that Victorian laws regarding the following matters will not apply to RTOs operating in both Victoria and a referring jurisdiction:

- Handling of complaints by students against decisions, actions or omissions of registered training organisations;
- Regulations to set "fair contract terms" for student / provider contracts, and to set standards with which a registered training organisation must comply when dealing with students;
- Power of the Victorian Supreme Court to make, in certain circumstances, an order for judicial administration of a registered training organisation to protect the interests of students.¹⁰

4.9 Victoria submitted that preventing these laws from applying will undermine protections for VET students, as the NVR Bill 'does not contain provisions for

6 Government of Victoria, *Submission 18*, p. 4.

7 Government of Victoria, *Submission 18*, p. 5.

8 Department of Education, Employment and Workplace Relations, Answers to Questions on Notice, 7 March 2011 (received 11 March 2011), p. 9.

9 Government of Victoria, *Submission 18*, p. 5.

10 Government of Victoria, *Submission 18*, p. 4.

complaints systems, fair student contracts or judicial administration of failing providers of the kind found in the Victorian laws that are being displaced'.¹¹

4.10 Third, Victoria noted that it disagrees with the approach adopted in the NVR Bill of containing in the form of a legislative instrument national standards based on the AQTF. It argued that this approach would not promote efficient regulation of the VET sector for '[w]hilst adequate as statements of policy, [the AQTF] are not crafted to serve as the basis for a robust regulatory system in the modern administrative law context'. Victoria concluded that '[m]ore work needs to be done to articulate the standards with greater clarity and precision to give providers and regulators better guidance on what they require'.¹²

4.11 In response, DEEWR advised that '[t]he National Standards Council will continue to develop and refine the national standards'.¹³ The committee notes that the response does not address Victoria's concerns about the appropriateness of using the AQTF as the basis of national standards.

4.12 Victoria also noted its concerns with the Transitional Bill, arguing that the requirements to transfer records from state regulators to the Commonwealth is contrary to Victoria's privacy legislation. Victoria submitted that amendment of its privacy legislation is required before information may be transferred.¹⁴

4.13 Victoria recommended that the NVR only regulate RTOs in referring states.¹⁵

4.14 Victoria also recommended amendments to the NVR Bill to 'establish parity of treatment between referring and non-referring States'.¹⁶ Victoria submitted that clauses 9 and 10 should be amended to ensure that the laws of non-referring states regarding the management of TAFE providers and apprenticeships are not overridden, and to preserve consumer protection laws. As an alternative, Victoria recommended the Bill allow the Commonwealth Minister to exempt certain state laws from the operation of the NVR Bill, arguing that this model is provided for in clause 9(3) of the Tertiary Education Quality Standards Agency Bill (the TEQSA Bill).¹⁷

4.15 The committee notes DEEWR's advice that the NVR Bill is not intended to cover the field for all VET matters. The committee also notes that DEEWR informed

11 Government of Victoria, *Submission 18*, p. 4.

12 Government of Victoria, *Submission 18*, p. 5.

13 Department of Education, Employment and Workplace Relations, Answers to Questions on Notice, 7 March 2011 (received 11 March 2011), p. 10.

14 Government of Victoria, *Submission 18*, p. 5.

15 Government of Victoria, *Submission 18*, p. 5.

16 Government of Victoria, *Submission 18*, p. 6.

17 Government of Victoria, *Submission 18*, p. 6.

the committee that the TEQSA Bill does not operate as Victoria suggests but authorises the Minister to override additional laws.¹⁸

4.16 The committee recommends that Victoria and the Commonwealth discuss amending the NVR legislation to incorporate protections for students as consumers of VET services.

4.17 Victoria also submitted that a Memorandum of Understanding should be developed between the Commonwealth, Victoria and Western Australia to ensure a consistent national approach to VET regulation.¹⁹ In response, DEEWR advised the committee that the National VET Regulator and Victoria are negotiating an agreement regarding the implementation and operation of aspects of the NVR Bill.²⁰

Position of the Western Australian Government

4.18 The Government of Western Australian (Western Australia) has advised that it considers that the NVR legislation is not in line with the COAG agreement:

The Commonwealth Bill does not reflect the assurance given to our Premier from the then Prime Minister at the COAG meeting in December 2009 that these reforms would not result in the regulatory take-over of State owned public providers, including Western Australian TAFE Colleges.²¹

4.19 The committee notes that the COAG agreements of December 2009 and February 2011 do not refer to state-owned RTOs. However, Western Australia advised that:

...from the discussion that occurred at COAG, there was a clear understanding from officials who were attending and the Premier that the undertakings had been made: that the WA TAFE providers would not be party to the national VET regulation arrangements. It was on this basis that the Premier agreed to the recommendations made at the meeting.²²

4.20 Western Australia argued that the NVR Bill does not ensure that the state will retain responsibility for regulating state-owned RTOs. Western Australia further advised that the state had attempted to explore options with the Commonwealth, including that the National VET Regulator delegate authority over Western Australian

18 Department of Education, Employment and Workplace Relations, Answers to Questions on Notice, 7 March 2011 (received 11 March 2011), p. 10.

19 Government of Victoria, *Submission 18*, p. 5.

20 Department of Education, Employment and Workplace Relations, Answers to Questions on Notice, 7 March 2011 (received 11 March 2011), p. 10.

21 The Hon Peter Collier MLC, Minister for Energy; Training and Workforce Development; Indigenous Affairs, *Submission 16*, p. 1.

22 Mr Mark Brown, Director, Department of Education Services, Western Australian Government, *Proof Hansard*, 9 March 2011, p. 3.

state-owned RTOs to the Western Australian regulator, however the matter was not resolved.²³

4.21 At the hearing on 9 March 2011, Mr Mark Brown, from the Western Australia Department of Education Services, advised that Western Australia considers TAFE providers are low risk and authority for their regulation should rest with state regulators. Mr Brown explained that Western Australia is of the view that 'a state regulator would provide a greater level of quality assurance to our state government than what a national regulator would be able to provide'.²⁴

4.22 Concern about the regulation of state-owned RTOs is important to Western Australia's reluctance to participate in a national VET system. Western Australia advised that unless the matter is resolved, it is unlikely the state will apply the national VET regulation framework:

It will rigorously apply the national standards, will enter into MOUs require[d] for information sharing and so on, and will mirror the Commonwealth legislation in its state parliament but only when it has the surety it requires that WA state owned providers will continue to be regulated by the state regulator, as was agreed at COAG.²⁵

4.23 To this end, Western Australia proposed an amendment to the NVR Bill to ensure that the state retains responsibility for regulating state-owned RTOs:

Western Australia considers that the Commonwealth Bill must be amended to expressly exclude its State owned public providers from the Commonwealth legislation or provide that the regulation of these providers must be delegated back to the Western Australian Regulator.²⁶

4.24 In addition to this central matter, Western Australia is also concerned that national regulation will reduce standards for VET providers and students in Western Australia. Mr Brown reported that a survey conducted by the Western Australian Department of Training and Workforce Development suggests approximately 86 to 87 per cent employer and student satisfaction with the state's VET program.²⁷ The committee was further advised that 'Western Australia is a nationally recognised a leader in VET regulation and one of our key concerns is that there will be a lowering of the standards to meet the requirements in other states and territories'.²⁸

23 Mr Mark Brown, *Proof Hansard*, 9 March 2011, p. 6.

24 Mr Mark Brown, *Proof Hansard*, 9 March 2011, p. 6.

25 Mr Mark Brown, *Proof Hansard*, 9 March 2011, p. 2.

26 The Hon Peter Collier MLC, *Submission 18*, p. 1.

27 Mr Mark Brown, *Proof Hansard*, 9 March 2011, pp. 5-6.

28 Ms Stephanie Trestrail, Assistant Director, Department of Education Services, Western Australian Government, *Proof Hansard*, 9 March 2011, p. 4.

4.25 Western Australia also disputed that the Commonwealth has the constitutional authority to regulate providers in Western Australia who also operate in a referring state.²⁹

Conclusion

4.26 Like all stakeholders, the committee would like to see a national approach to which every jurisdiction could fully subscribe. All jurisdictions other than Victoria and Western Australia support the current proposal, and New South Wales has established a referral of powers that will allow implementation of these important VET reforms to take place.

4.27 It is important that the momentum for change not be lost, and that the National Vocational Education and Training Regulator be established, giving concrete form to a national VET system. The committee strongly supports continuing discussions with a view to ensuring the national system eventually includes all jurisdictions, but without compromising national consistency. It notes that Victoria and Western Australia, notwithstanding their concerns, have committed to passing mirror legislation. The committee hopes that, in time, every state will become part of a national system that promises greater consistency, greater quality, and reduced complexity for training providers.

Recommendation 8

4.28 The committee recommends that negotiations between jurisdictions continue with the aim of ensuring that all jurisdictions refer powers.

Senator Gavin Marshall

Chair

29 Ms Stephanie Trestrail, *Proof Hansard*, 9 March 2011, pp. 2 – 3.

Coalition Senators' Dissenting report

Position of Victoria and Western Australia

1.1 The Coalition is unable to support a recommendation that the NVR Bills proceed in their current form given the status of Victoria and Western Australia as non-referring states.

1.2 As outlined at paragraphs 2.2 to 2.6 of the main report, the evidence presented by RTOs and others strongly supports a national approach to regulation and auditing, having regard to the number of organisations that provide training across state and territory borders. Coalition senators are also satisfied that every State and Territory sees the merit of nationally consistent regulation and auditing of the VET sector.

1.3 However, the evidence presented to the committee is that the NVR Bills have the potential to undermine national regulation. While Victoria and Western Australia have indicated they are prepared to introduce mirror legislation in their state parliaments to give effect to this aspiration¹, Western Australia has advised that it is unable to do so on the basis the NVR Bill as currently drafted:

Our position on this bill is that the December 2009 agreement made by our Premier at COAG on the regulation of VET has as yet not been sufficiently reflected in the bill as it currently stands. The Commonwealth legislation being considered by this committee falls short of that agreement and the state is, therefore, not able to keep its side of the agreement until it is honoured in the legislation.²

1.4 The committee was informed that Western Australia was given assurances that the national system would not result in the transfer of regulatory responsibility for state-owned RTOs:

The Commonwealth Bill does not reflect the assurances given to our Premier from the then Prime Minister at the COAG meeting in December 2009 that these reforms would not result in the regulatory take-over of State owned public providers, including Western Australian TAFE Colleges.³

1.5 The committee was further advised that this assurance was central to Western Australia's commitment to a system of national regulation:

...from the discussion that occurred at COAG, there was a clear understanding from officials who were attending and the Premier that that undertakings had been made: that the WA TAFE providers would not be

¹ Communiqué for the Council of Australia Governments' Meeting, 7 December 2009, p. 5, http://www.coag.gov.au/coag_meeting_outcomes/archive.cfm.

² Mr Mark Brown, Director, Department of Education Services, Western Australian Government, *Proof Hansard*, 9 March 2011, p. 2.

³ The Hon Peter Collier MLC, Minister for Energy; Training and Workforce Development; Indigenous Affairs, *Submission 16*, p. 1.

party to the national VET regulation arrangements. It was on this basis that the Premier agreed to the recommendations made at the meeting.⁴

1.6 Western Australia has recommend that the Commonwealth attempt to address these concerns through amendments to the draft legislation to ensure the state retains responsibility for state-owned RTOs:

Western Australia considers that the Commonwealth Bill must be amended to expressly exclude its State owned public providers from the Commonwealth legislation or provide that the regulation of these providers must be delegated back to the Western Australian Regulator.⁵

1.7 As outlined at paragraphs 4.1 to 4.17 of the main report, Victoria also advised the committee of several concerns with the draft legislation. Among the matters that Victoria raised is the concern that the NVR Bills will undermine consumer protections for VET students in Victoria.⁶ The state also advised that it is concerned that the Bills will create uncertainty for the administration of TAFE Colleges in Victoria:

If Victorian TAFE Institutes have to become NVR registered training organisations (which appears to be the effect of the NVR Bill), then they may gain immunity, under clause 9(3)(a) of the NVR Bill, from the Victorian laws governing administration of State TAFE institutes outlined above.

Such an outcome would be fundamentally inconsistent with the status of TAFE Institutes as public authorities of the State. Whist this may not be an outcome intended by the drafters of the NVR Bill, it is nonetheless a fundamental flaw that must be corrected before the NVR Bill can become law.⁷

1.8 Victoria also noted its concerns regarding potential implications for the regulation of apprenticeships:

By exempting apprenticeship laws from override for some States but not Victoria, the clear implication of the Bill is that Victorian apprenticeship laws, at least to the extent that they may affect NVR registered providers, are to be overridden. Again, no equivalent arrangements will be established by the NVR Bill to replace the State laws it displaces. This appears to create a substantial regulatory gap.⁸

1.9 DEEWR argued that the bill would not interfere with the management of TAFE providers and apprenticeships, however it seems that Victoria is not satisfied on this point at present.

⁴ Mr Mark Brown, Western Australian Government, *Proof Hansard*, 9 March 2011, p. 3.

⁵ The Hon Peter Collier MLC, Minister for Energy; Training and Workforce Development; Indigenous Affairs, *Submission 16*, p. 1.

⁶ Government of Victoria, *Submission 18*, p. 3.

⁷ Government of Victoria, *Submission 18*, p. 3.

⁸ Government of Victoria, *Submission 18*, pp. 4-5.

1.10 Victoria's submission to the committee echoes the view expressed by Western Australia that the draft legislation does not reflect a best practice approach to national regulation:

Victoria seeks to limit the scope of the NVR through the NVR Bill to only those providers based in referring States. Non-referring States should retain responsibility for the regulation of all VET providers based in their jurisdiction, including providers that operate interstate and/or offer services to international students. Victoria has consistently supported a nationally consistent approach to the regulation of the VET sector. In place of a practical approach to national regulation agreed by all 6 jurisdictions, the Commonwealth's use of its powers to override States' constitutional responsibility for education, is inappropriate and undermines the Federation.⁹

1.11 Victoria has also recommended the Commonwealth seek to address the concerns through amending the NVR Bill to clarify that the legislation does not affect the authority of non-referring States to manage TAFE institutes and regulate apprenticeships, and to allow non-referring state to exempt certain laws from the operation of the NVR legislation.¹⁰ Victoria also submitted the following alternative to amending the legislation:

if the Commonwealth is not prepared to confer such a power on a non-referring state, the Bill could be amended to enable the Commonwealth Minister to exempt specified state laws from the override.¹¹

Conclusion

1.12 Coalition senators feel strongly that more work needs to be done by DEEWR to draft legislation which meets the requirements of the two non-referring states so that a truly nationally consistent VET regulator process can be presented to the Parliament. On the basis of the evidence heard, the Coalition will not support a recommendation that the Bill be approved for passage in its present form.

Recommendation 1

1.13 Coalition senators recommend the NVR Bill not be passed in its current form.

Recommendation 2

1.14 Coalition senators recommend that the NVR Bill be amended to address concerns regarding the regulation of state-owned RTOs and RTOs based in non-referring states, and concerns regarding consumer protection safeguards for students.

⁹ Government of Victoria, *Submission 18*, pp. 5 – 6.

¹⁰ Government of Victoria, *Submission 18*, p. 6.

¹¹ Government of Victoria, *Submission 18*, p. 6.

Recommendation 3

1.15 Coalition senators recommend that the Bill be amended to state that the legislation will not interfere with the management in non-referring states of TAFE providers and apprenticeships.

Intergovernmental agreements and parliamentary scrutiny

1.16 As outlined in paragraphs 1.9 to 1.12 of the committee's report, the creation of a national approach to VET is underpinned by intergovernmental negotiations and an agreement that there be a referral of powers to the Commonwealth by states and territories. As already noted, this agreement is far from unanimous: there appear to be significant sticking points with Victoria and Western Australia about exactly how the new system should work.

1.17 However, Coalition Senators are also concerned about the way in which the objective of national VET regulation is being pursued. The committee has outlined, at paragraphs 1.24 to 1.31 of its report, the constitutional and legal mechanism being used to create the National VET Regulator.

1.18 Coalition senators are concerned about three features of the process in particular:

- The attempt to tie the hands of the parliament, preventing it from improving legislation it has been asked to enact;
- The suggestion that legislation should be enacted on the basis of an intergovernmental agreement, when the agreement has not been signed and is not public; and
- A poor process for consulting on the exposure draft of legislation, including failure to present it to parliamentary committees for consideration.

Parliamentary scrutiny

1.19 We note the advice given by the Minister to the Scrutiny of Bills committee, and confirmed during this inquiry, that:

If there is amendment of the Commonwealth Bill, then the NSW referral will not support the enactment of that amended Bill. This will be the case even if only a small number of amendments are made. Any amendments to the text of the main Bill, other than purely editorial changes, will therefore delay or prevent the establishment of the [National VET Regulator].¹²

1.20 The government is saying to parliament that, even though the views of legislators were never sought, the bills cannot be revised without causing the initial referral of powers by New South Wales to fail. However, parliamentary consideration of legislation is a cornerstone of our democratic system.

¹² Senator Evans, quoted in Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2011*, p. 61.

1.21 The Scrutiny of Bills committee highlighted an unusually large number of problems with this bill, in what was one of its longer reports on legislation before the Senate. As of the time of this report, several of those concerns had not allayed by the government.

1.22 While it is clear that there is widespread support for a national approach to VET, documented in paragraphs 2.1 to 2.6 of the committee's report, it was equally clear that there is a host of difficulties with the legislation. The committee's report enumerates many of these, and we generally concur with the identification of those issues.

1.23 However, the committee found itself being given the same message as was given to Scrutiny of Bills committee:

A State text referral will not support a Commonwealth law that departs in substance from the terms of the text referred. This means that the Commonwealth and the State must agree on the terms of the text before it is referred to the Commonwealth by the State.¹³

1.24 Coalition Senators do not believe that this is an adequate argument to pass legislation when so many technical and policy issues have been identified.

1.25 The committee was not presented with any reason why New South Wales in particular needed to be the jurisdiction that made the initial referral. Since any state can do this, there should be ample opportunities in the sittings of the various state parliaments to give prompt effect to referral legislation once the bills have been revised. Accordingly, we do not believe that revising the current bills, even if such revision were to render the New South Wales referral invalid, will cause undue delay in implementing a national approach to VET.

An intergovernmental agreement?

1.26 As the committee's report notes, the creation of a National VET Regulator under the current bills is the result of a COAG agreement reached in December 2009. However, the situation at present is far from clear. There is now only 'in principle' support for an IGA on the National VET Regulator, and that agreement does not include two jurisdictions. The draft agreement is not public; the committee sought a copy, but it was not provided.

1.27 The problem was highlighted by the debate over the lack of an objects clause in the main bill. As the committee notes in its report at 2.16 to 2.20, a number of stakeholders thought the bill should have an objects clause, and contrasted it with the Exposure Draft of the Tertiary Education Quality and Standards Agency Bill, which has such a clause. Here is what the committee's report goes on to document about the government's response on this:

The Department responded saying that there were differences between the processes leading to the establishment of TEQSA and the National VET Regulator, in particular that the latter is relying on a referral of state powers and therefore is negotiated with the states:

¹³ DEEWR, Answers to Questions on Notice, 7 March 2011 (received 17 March 2011), p. 2.

As a result there is an intergovernmental agreement with the states and territories, and in that intergovernmental agreement a set of objectives is set out... In the case of this piece of legislation, it was thought unnecessary to do that when the objects would be set out in the intergovernmental agreement.¹⁴

1.28 But there is no agreed intergovernmental agreement. The Department's response is effectively referring to a confidential, draft document: a document the committee could not scrutinise. Likewise, the stakeholders concerned about the lack of an objects clause can also not see this draft agreement. Even if the draft was public, neither they, nor this committee, nor the Parliament itself can be sure that it won't change after the bill has been passed.

1.29 In our view, this puts Parliament in a ridiculous situation. It is told that it cannot revise the bills in any way without invalidating the New South Wales referral of powers. Yet it is being asked to support the scheme in the absence of a signed agreement between jurisdictions, and indeed in the absence of even a public *draft* of that agreement. It is being asked to endorse the creation of what appears to be a house of cards that could collapse at any point, leaving the Commonwealth supporting a National VET Regulator that only has full jurisdiction in one state.

A poor consultation process

1.30 Far from acting as an argument to pass the bill unaltered, the situation that has arisen with the New South Wales referral of powers highlights the need for reform of parliamentary consideration of legislation in the context of intergovernmental agreements.

1.31 We believe the process needs to be changed to give Commonwealth Parliamentary committees the opportunity to consider the exposure drafts of the bills prior to their passage through a state parliament, not afterwards. This could have been achieved in late 2010 by giving Scrutiny of Bills and the Senate Education, Employment and Workplace Relations Legislation committees an opportunity to consider the bills at the same time they were being provided to other stakeholders.

1.32 Furthermore, the government should have known that there would be problems, because of the significant number of points at which the bills and Explanatory Memorandum are not consistent with the *Guide to framing Commonwealth offences, civil penalties and enforcement powers*.¹⁵ Coalition Senators take up this point further below.

1.33 We also note that the process for stakeholder consideration of the exposure draft appeared to be very brief. It did not appear to involve stakeholders with a broader view of legal issues, but only those directly involved in the VET sector. Given the scope of the legislation and the unusual assemblage of powers it contains, consultation with a broader range of interests would have been desirable.

¹⁴ Ms Quagliata, DEEWR, *Proof Committee Hansard*, 7 March 2011, p. 41.

¹⁵ Attorney-General's Department, *A guide to framing Commonwealth offences, civil penalties and enforcement powers*.

Coalition Senators' view

1.34 Coalition Senators agree with the committee's Recommendation 2, that exposure drafts of legislation be made available for examination by parliamentary committees prior to their adoption as text-based referrals of power by state legislatures. However the problems that have emerged with the National VET Regulator legislation mean that we do not think the current bills should be exempted from such scrutiny. Accordingly, we cannot agree with the committee's Recommendation 1, which recommends that the bills be passed in their current form. The parliament currently has the opportunity to get the bills right. If that means the referral of powers needs to be re-done by a state jurisdiction, then a short delay is preferable to second-rate legislation.

Recommendation 4

1.35 Coalition senators recommend that intergovernmental schemes of referred powers be created after the signing of an intergovernmental agreement, not before, and that the agreement-making process be appropriately transparent.

Recommendation 5

1.36 Coalition Senators recommend that the bill be amended to address the concerns identified by both this committee, and by the Scrutiny of Bills committee, and that if necessary, this be followed by a new referral of powers by a state.

Entry, search and seizure powers

1.37 As outlined at paragraph 3.45 of the main report, the NVR Bill would equip the National VET Regulator with significant investigatory powers, including the powers to enter and search premises under warrant, question persons on the premises and to seize documents. The Senate Standing Committee for the Scrutiny of Bills has sought justification from the Minister for aspects of these powers, concerned that clauses 62, 70, 71 and 85 may trespass on personal rights and liberties.¹⁶

1.38 It is of significant concern that following the Minister's advice the Scrutiny Committee remains of the view that the provisions do not contain sufficient safeguards or accountability measures.¹⁷ As outlined at paragraphs 3.45 to 3.54 of the

¹⁶ Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2011*, p. 59. 1. Clause 62 permits authorised officers acting for the National VET Regulator to request a person who is or was connected with an RTO to provide the regulator documents or things. Under clause 64, failure to do so is an offence. Similarly, subclause 71(2) permits an authorised officer acting pursuant to a warrant to require persons on the premises to answer any questions and produce any documents. Under subclause 72(3) failure to do so is an offence. Clause 68 provides authorised officers enforcement powers, including the power to seize evidential material not specified in the warrant where the officer 'believes on reasonable grounds that it is necessary to seize the thing in order to prevent its concealment, loss or destruction'. Clause 70 permits an authorised officer to use reasonable and necessary force in executing the warrant. Clause 85 permits the use of monitoring warrants.

¹⁷ Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2011*, pp. 72 – 81.

committee's report, similar concerns are shared by several stakeholders in the VET sector.

1.39 The Scrutiny Committee has provided a number of options to bring the enforcement powers in line with best practice while still ensuring a robust regulatory response to RTO non-compliance with the regulatory framework. The options are:

- Amending clause 62 to limit the power to request documents to certain kind of documents or to list factors to be taken into account when considering the exercise of the power; and¹⁸
- Amending clause 70 to include additional accountability measures for the use of force, such as a requirement that any use of force be recorded by video or that the provision does not authorise damage to any property, except in limited circumstances.¹⁹

1.40 Additionally, stakeholders have also proposed measures to ensure the enforcement powers are appropriately exercised. For example, the ACCI recommended the powers be revised to reflect the powers in the *Fair Work Act 2009*.²⁰

Coalition Senators' view

1.41 It is accepted that the National VET Regulator requires investigatory powers to respond to concerns that an RTO is operating outside the regulatory framework. However, as the Scrutiny Committee and stakeholders have pointed out, such powers must be exercised within appropriate boundaries and with due regard for personal rights and liberties.

1.42 Coalition senators believe that the entry, search and seizure powers in Part 5 of the NVR Bill should be moderated to ensure they operate appropriately. The powers should be revised to respond to the concerns identified by the Scrutiny Committee. The Fair Work Act should be investigated further as a possible model for appropriate safeguards.

Recommendation 6

1.43 Coalition Senators recommend that the bill be amended to ensure that the National VET Regulator's powers are exercised appropriately and with due regard for personal rights and liberties, and that the Fair Work Act be investigated as a possible model for exercise of entry, search and seizure powers.

Enterprise RTOs

1.44 In its report at paragraph 2.32, the committee notes how the 'AEU and TAFE Directors suggested that the VET framework should include a reference to the concept "that VET providers have as a main or proper or primary or significant purpose the

¹⁸ Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2011*, p. 74.

¹⁹ Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2011*, p. 77.

²⁰ ACCI, Answers to Questions on Notice, 7 March 2011 (received 10 March 2011), pp. 4 – 13.

provision of VET".²¹ The committee also notes that the ACCI was critical of any proposal that might undermine the role of Enterprise RTOs.

1.45 As the committee notes in paragraph 2.29, Enterprise RTOs include some of Australia's largest and leading employers in both the public and private sector, including the Commonwealth's own leading agency on public sector training and development, the Australian Public Service Commission.

1.46 Enterprise RTOs not only provide valuable access to training for large numbers of Australian employees, but also act as models for all Australian employers, demonstrating the need to take training seriously and to commit to ensuring it is provided to high standards. Coalition Senators emphatically reject any proposals that would risk undermining the efforts of Enterprise RTOs to ensure high quality training for their own employees.

Senator Chris Back
Deputy Chair

Senator Michaelia Cash

²¹ AEU and TAFE Directors Association, *Submission 11*, p. 1.

Appendix 1

Submissions and additional information received

Submissions

- 1 Mr Gavin Moodie
- 2 Master Builders Australia
- 3 National Centre for Vocational Education Research LTD
- 4 Innovation and Business Industry Skills Council
- 5 Australian Council for Private Education and Training
- 6 Minerals Council of Australia
- 7 Australian Government, Department of Education, Employment and Workplace Relations
- 8 Australian Manufacturing Workers' Union
- 9 Manufacturing Skills Australia
- 10 Australian Council of Trade Unions
- 11 Australian Education Union and TAFE Directors Australia
- 12 Enterprise RTO Association
- 13 CPSU-SPSF Group
- 14 Australian Chamber of Commerce and Industry
- 15 EE-Oz Training Standards
- 16 Western Australian Government, Minister for Energy, Training and Indigenous Affairs
- 17 Skills Australia
- 18 Skills Victoria, Department of Education and Early Childhood Development
- 19 NSW Government, Director-General of Education and Training Managing Director of TAFE NSW
- 20 Surf Life Saving Australia

- 21 National ELT Accreditation Scheme
- 22 Rule of Law Institute of Australia
- 23 Service Skills Australia

Answers to Questions on Notice

- 1 Public Hearing 7 March 2011, Australian Chamber of Commerce and Industry.
- 2 Public Hearing 7 March 2011, Department of Education, Employment and Workplace Relations.
- 3 Public Hearing 7 March 2011, Department of Education, Employment and Workplace Relations (Additional Answers).
- 4 Western Australian Department of Education Services

Appendix 2

Witnesses who appeared before the Committee

Monday, 7 March 2011

St James Court conference Centre, Melbourne

Manufacturing Skills Australia

Mr Bob Paton, Chair

Australian Council of Trade Unions

Mr Joel Fetter, Policy and Industrial Officer

Mr Tim Shipstone, Industrial Officer

Australian Manufacturing Workers' Union

Mr Ian Curry, National Projects Officers

Australian Chamber of Commerce and Industry

Ms Mary Hicks, Director, Employment and Workplace Relations

TAFE Directors Australia

Mr Martin Riordan, CEO

Ms Virginia Simmons, Tertiary Consultant

Australian Education Union

Mr David Colley, Federal Industrial Officer

Ms Pat Forward, Federal TAFE Secretary

Australian Council of Private Education and Training

Ms Paula Johnson, General Manager

Mr Mel Koumides, Director

Mr Ben Vivekanadan, Manager, Policy and Research

Department of Education, Employment and Workplace Relations

Mr John Smyth, Interim CEO, National VET Regulator

Ms Maryann Quagliata, Branch Manager, Skills Quality Branch

Ms Margaret Tregurtha, Branch Manager, Education Legal Branch

Wednesday, 9 March 2011

Legislative Council Committee Room 1, Parliament House, Perth

Western Australian Government, Department of Education Services

Mr Mark Brown, Director, Education and Training Regulation

Ms Stephanie Trestrail, Assistant Director, Education and Training Regulation

