

ACCI Comments on National Vocational Education and Training Regulator Bills 2010 [2011]

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1. ABOUT ACCI

1.1 Who We Are

The Australian Chamber of Commerce and Industry (ACCI) speaks on behalf of Australian business at a national and international level.

Australia's largest and most representative business advocate, ACCI develops and advocates policies that are in the best interests of Australian business, economy and community.

We achieve this through the collaborative action of our national member network which comprises:

- All state and territory chambers of commerce
- 27 national industry associations
- Bilateral and multilateral business organisations

In this way, ACCI provides leadership for more than 350,000 businesses which:

- Operate in all industry sectors
- Includes small, medium and large businesses
- Are located throughout metropolitan and regional Australia

1.2 What We Do

ACCI takes a leading role in advocating the views of Australian business to public policy decision makers and influencers including:

- Federal Government Ministers & Shadow Ministers
- Federal Parliamentarians
- Policy Advisors
- Commonwealth Public Servants
- Regulatory Authorities
- Federal Government Agencies

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally;
- Business representation on a range of statutory and business boards and committees;
- Representing business in national forums including Fair Work Australia, Safe Work Australia and many other bodies associated with economics, taxation, sustainability, small business, superannuation, employment, education and training, migration, trade, workplace relations and occupational health and safety;
- Representing business in international and global forums including the International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, Confederation of Asia-Pacific Chambers of Commerce and Industry and Confederation of Asia-Pacific Employers;
- Research and policy development on issues concerning Australian business;
- The publication of leading business surveys and other information products; and
- Providing forums for collective discussion amongst businesses on matters of law and policy.

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2. INTRODUCTORY COMMENTS

Ensuring quality outcomes of students' skill development provides the motivation and interest for the business community in the regulatory and governance arrangements in the VET sector. In addition, most Registered Training Organisations (RTOs) are businesses in their own right and as such the regulatory burden imposed on businesses is an area of policy interest to the Australian Chamber of Commerce and Industry (ACCI).

ACCI believes that the strengthened Australian Quality Training Framework (AQTF) provides a comprehensive set of standards for the operation of RTOs in the VET sector, although the detail of some conditions such as the proof of financial viability are yet to be worked out and may prove to be impractical to administer, especially for smaller business operations. The regulatory framework currently proposed in the three Bills before Parliament will pick up these standards or those that will be decided at a future point by the proposed National Standards Council (NSC).

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.

As well as difficulties experienced within jurisdictions in dealing with non-compliance, a lack of national consistency in the application of the AQTF has been another reason why the introduction of the NVR was needed and has been supported by the business community.

3. DISPROPORTIONATE REGULATORY RESPONSE TO RISK

There has been a clear need to rectify this situation, which has been recognised by the Council of Australian Governments (COAG). ACCI agrees with governments in their attempt to use the tools at their disposal in the regulatory arena to address the problems that arose and salvage Australia's international reputation.

While ACCI agrees there has been a problem and that the problem needs to be addressed and supports the introduction of the NVR, we question whether the regulatory approach proposed in the Bills is fair and balanced and whether or not some of the provisions will act to control the market too strongly potentially resulting in the loss of good as well as poor providers.

In relation to a hierarchy of legislation, ACCI supports certain aspects of the Bills, such as the continued use of a risk management framework for ascertaining the extent of compliance/non-compliance. The introduction of civil offences, while introducing an additional regulatory layer, can act to deter poor operators as a financial penalty will be incurred for recalcitrant offenders. However, this is dependent on the regulator acting in a fair and reasonable manner, which is not an explicit obligation on the NVR in the Bills.

At the next level of regulatory intervention, criminal offences and penalties have been introduced. ACCI considers these aspects of the Bills to be heavy handed and disproportionate to the identified problems. ACCI recommends the removal of criminal penalties from the Bills.

As well, there are excessive powers of authorised officers with the ability to tap phones, seize materials and enter premises. Compared to provisions under the Fair Work Act, the strongest level of regulatory intervention has been used and provides the NVR with unprecedented powers. Under the Fair Work Act the powers of the Fair Work Ombudsman and inspectors¹ are comparatively more circumscribed

¹ http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s682.html

and ACCI questions the need for the excessive powers being given to NVR authorised officers.

In Clause 68 the Senate Standing Committee for the Scrutiny of Bills states, "An authorised officer, executing an enforcement warrant, to seize evidential material which has not been 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'. It appears to the Committee that there is potential for the power to seize material which is not the kind of evidential material specified in the warrant to be abused." They also refer to other powers of authorised officers which do not appear to be justified. These powers are excessive and inconsistent with the powers of authorised officers in other arenas.

ACCI is also concerned by issues raised by the Senate Standing Committee for the Scrutiny of Bills² around the abrogation of the important privilege against self-incrimination in Clause 65 and questions why a more moderate regulatory response has not been used in the Bills.

In all arenas where the Senate Committee has raised questions with the Minister about potential trespass on personal rights and liberties, consideration needs to be given to moderating the powers and making them more consistent with the powers provided in comparative legislation such as the Fair Work Act. This will provide the necessary balance between the genuine need to provide the NVR with sufficient powers to execute its role but balance them with the basic legal rights and entitlements.

Issues around insufficiently defined administrative powers and broad delegation also need to be addressed.

² <http://www.aph.gov.au/SEnate/committee/scrutiny/alerts/2011/d01.pdf>

4. A FAIR AND EQUITABLE MARKET

Suggestions have been made in some quarters for the Bills to specify that RTOs have education and training as a primary or significant purpose – something now required of all colleges with international students, under changes made 11 months ago to the Education Services for Overseas Students (ESOS) Act.

ACCI does not support this proposal as it would result in all Enterprise RTOs being ineligible to register. 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. The full extent of the contribution towards training on the part of Enterprise RTOs is not known as this data is not currently captured but it is considered to be significant. 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.

There have also been issues raised about the possible linkages between the NVR and Tertiary Education Quality and Standards Agency (TEQSA)³. The statement in the TEQSA Fact Sheet “TEQSA will build its capacity over the medium term with the aim of expanding to cover the entire tertiary sector from 2013⁴” is ambiguous in terms of the future regulatory relationship between TEQSA and the NVR. Some stakeholders have suggested that the NVR Bills should align with the TEQSA Bills in order to prepare for a future merger.

While ACCI would normally support this sort of approach, on this occasion it might result in some providers using the TEQSA legislation to build a case for self-accreditation, thus creating classes of providers subject to the NVR with some “opting” for coverage under TEQSA where they deliver degree courses. This would create market inequality and detract from a competitive environment. ACCI would not support such a move.

In addition, the Prime Minister in her former role as Minister for Education has recognised the distinctive nature of the VET and higher

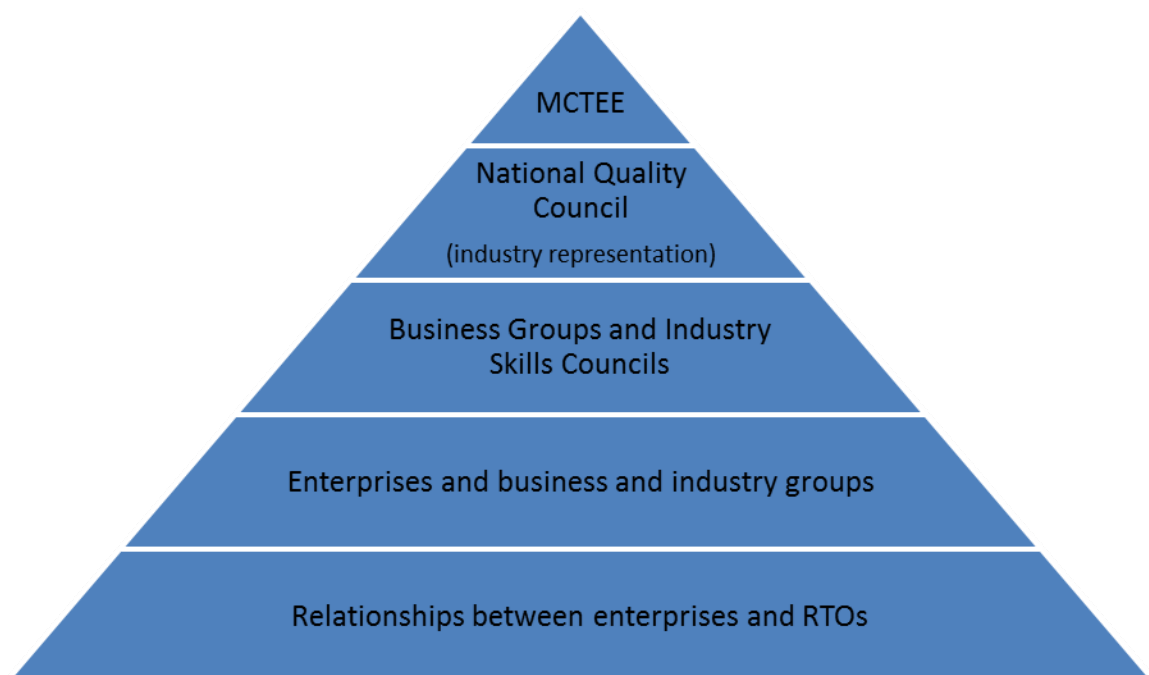
³ TAFE union, bosses fear VET regulator will be ‘TEQSA lite’, *Campus Review*, 28 February 2011

⁴ www.deewr.gov.au/HigherEducation/Documents/RTF/09_FactSheet_A%20national%20quality%20

education sectors and that the NVR would occupy a discrete and separate regulatory place under the broad banner of TEQSA in the future. These matters need to be resolved through stakeholder engagement to ensure fair and equitable conditions apply to the VET market.

5. INDUSTRY LEADERSHIP

The diagram below provides a basic outline of the relationship between industry and regulation of the VET sector in the current environment.



While not entirely operating to the complete satisfaction of industry, there is a formal role in the current VET arrangements that broadly support demand responsiveness in the provision of training. Many exceptions to this remain in pockets of training providers which is a constant source of frustration and vexation to industry although there is a high level of satisfaction with providers that work closely with industry.

However, it could be generally asserted that industry leads the VET sector rather than TAFE and private providers. This is achieved through a number of formal mechanisms to support industry engagement. These include:

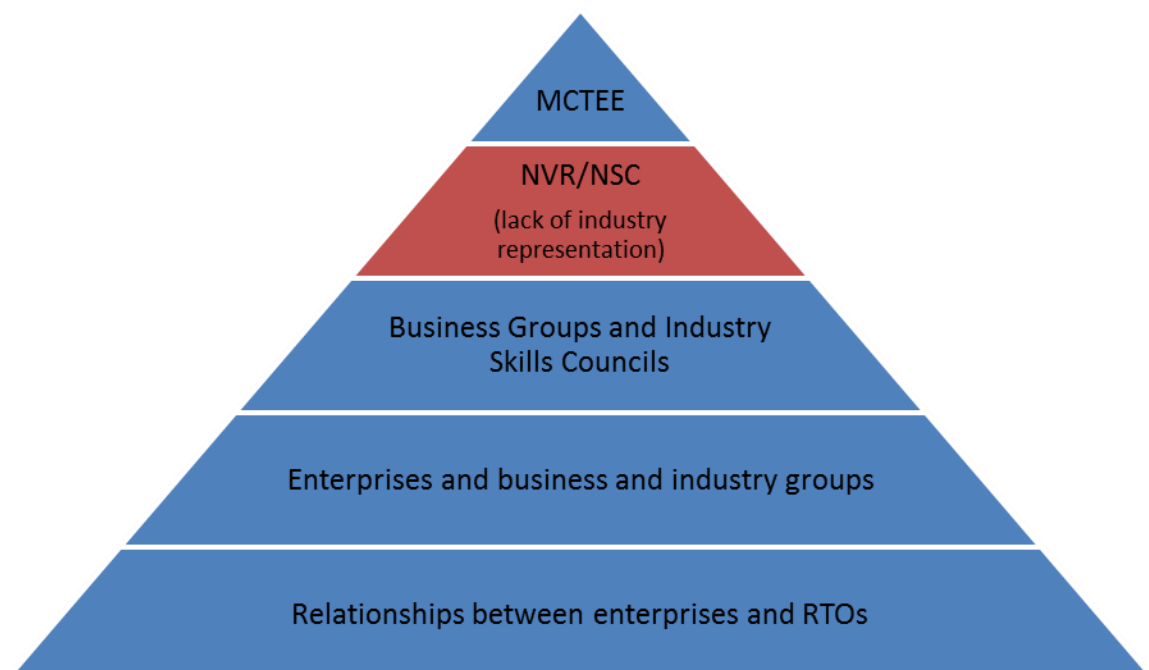
- the identification and endorsement of industry standards to develop Training Packages, which are used for the delivery of training;

- the provision of industry intelligence for planning purposes to Industry Skills Councils and State and Territory Industry Training Advisory Boards; and
- limited quality assurance powers through stakeholder involvement in the National Quality Council.

An industry led system in the vocational sector involves relationships between individuals and enterprises, enterprises and their representative groups, representative groups and stakeholders- there is a formal role for the collective voice of industry in the sector.

There is no parallel structure for industry engagement in the tertiary sector and although individual businesses and some business groups are involved, the involvement is ad hoc and informal at a systems level.

It is essential that an industry led system be retained in the VET sector and that this role is potentially expanded to the higher education sector to cover identification of standards, labour market intelligence and quality assurance.



6. QUALITY OF ASSESSMENT

The quality of assessment of students remains a contentious issue for employers especially where learning and assessment take place in institutions rather than the workplace.

Some suggestions have been made around the establishment of a system of moderation that would be overseen or administered by the NVR. ACCI does not support a role for the NVR in this arena.

Rather, the NVR might establish a Panel of Expert Assessors, based on the advice of industry and working in conjunction with them. Where RTOs are not compliant with assessment requirements under the AQTF, they could purchase the expertise from the Panel of Expert Assessors. This would add to business costs so there would be a driver for RTOs to avoid this cost and better comply with assessment requirements in the first place. It would also identify and make transparent what quality assessment involves.

If after a robust policy discussion amongst stakeholders and if there was agreement to establish a system of moderation, the Panel of Expert Assessors could provide a stepping stone towards this objective. However, the VET system would not be locked in to an idea that has not yet been fully discussed, debated or agreed to rather than if moderation is adopted in the first instance without such debate and consensus.

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