

RULE OF LAW

INSTITUTE OF AUSTRALIA

14 March 2011

Committee Secretary
Senate Education, Employment and Workplace Relations Committees
PO Box 6100
Parliament House
Canberra ACT 2600
By email: eewr.sen@aph.gov.au

Dear Committee Secretary

Supplementary Submission: National Vocational Education and Training Regulator Bill 2010 & ors inquiry

The Rule of Law Institute of Australia (RoLIA) is grateful for the opportunity to comment on the above Bill in particular. RoLIA has completed further analysis and would be pleased if you would accept a supplementary submission elaborating on the points made in our main submission about coercive powers and search powers of the proposed regulator.

Senator the Hon Christopher Evans' Second Reading speech on the above Bill describes how the search and information gathering powers as well as civil and criminal penalties are proposed which greatly exceed the current powers of state Vocation & Education Regulators. RoLIA encourages the Committee to consider the requirement and need for these increased powers.

Coercive powers – information gathering (Part 5, Division 1, ss 62-65)

RoLIA has determined several issues with the coercive powers which the Committee should note:

1. The proposed Vocational Education and Training Regulator (VET Regulator) is not required to report on these powers in its annual report. The Australian Competition and Consumer Commission (ACCC) has statutory mandatory reporting powers; and the ABCC reports in its annual report as well as in separate specialised reports. Transparency of federal regulators is a crucial issue for RoLIA and RoLIA calls for the Bills to be amended to include a reporting requirement along the lines of the most recent and comprehensive example, the ACCC's *Competition & Consumer Act 2010*, s 171.

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2. There is no provision for Legal Professional Privilege over documents. Legal Professional Privilege protects confidential communications between legal professionals and clients. Many other regulators, for example the Australian Securities & Investments Commission (ASIC), have a clear position on this area enshrined in their legislation. Legal Professional Privilege is a crucial doctrine for the rule of law in Australia and RoLIA calls for a clear provision to be installed in the Bill.
3. The Australian Building and Construction Commission (ABCC) decision-maker is required to believe on 'reasonable grounds' to require documents/information as is ASIC when it requires a person to attend an interview, while the proposed VET Regulator is only required to have 'reason to believe' a person is capable of giving information – RoLIA is concerned that this could apply differently in practice and constitute an easier threshold. The Committee should ensure there is a rigorous threshold. For example, ASIC is required to have alleged or suspected contravention of the corporations legislation or certain other laws to act to require information/documents, a much more appropriate standard which the VET Regulator could be required to meet.
4. The 'National VET Regulator' can request information/documents as opposed to the VET Commissioner; this is different from, for example, the ABCC whose Commissioner calls for the information. RoLIA calls on the Committee to ensure that this important and intrusive power can only be exercised by appropriately senior members of the VET Regulator and that there will be appropriate delegations and points of accountability.
5. 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 it 'reasonably necessary' they can reduce it to as low as 24 hours, which appears to be out of line with other notice periods.

Search warrants – entry of premises (Part 5, Division 2, ss 66-89)

1. 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.
2. Section 70 allows the 'authorised officer' and persons assisting to use 'necessary and reasonable' force in executing a warrant. Although the Explanatory Memorandum states that this is envisaged to mean moving of furniture, RoLIA proposes that for clarity of legislation it should be stated what the position is to be on force against persons and the

training that members of the VET Regulator will have on what 'necessary and reasonable' force is.

3. 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.

Finally, we thank the Committee for its scrutiny and examination of this matter. Should you need any further information please contact Ms Lydia O'Keeffe on (02) 9251 8000.

Yours sincerely

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