

RULE OF LAW

INSTITUTE OF AUSTRALIA

9 March 2011

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

Dear Committee Secretary

National Vocational Education and Training Regulator Bill 2010 [2011], National Vocational Education and Training Regulator (Transitional Provisions) Bill 2010 [2011] and National Vocational Education and Training Regulator (Consequential Amendments) Bill 2011.

The Rule of Law Institute of Australia (RoLIA) is grateful for the opportunity to comment on the above Bills. The other submissions have generally commented on the way the Bill will impact the education industry and its regulation. However, RoLIA would like to reinforce the findings of the Senate Standing Committee on the Scrutiny of Bills in its Digest No.1 for 2011 and Second Report for 2011 that there are substantial issues with the way the Bills are drafted. Issues identified and discussed were:

- Insufficient definition of powers;
- Natural justice problems;
- Inappropriate delegation of power;
- Unjustified penalties;
- Trespass on rights and liberties;
- Retrospectivity of provisions; and
- Henry VIII clauses.

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RoLIA is an independent non-profit association formed to uphold the rule of law in Australia. RoLIA was established in September 2009 with the following objectives:

- To foster the rule of law in Australia.
- To promote good governance in Australia by the rule of law.
- To encourage truth and transparency in Australian Federal and State governments, and government departments and agencies.
- To reduce the complexity, arbitrariness and uncertainty of Australian laws.
- To reduce the complexity, arbitrariness and uncertainty of the administrative application of Australian laws.

Parliament needs to be certain that when establishing a new regulatory agency it does not confer powers which offend the rule of law. It is RoLIA's view that the issues which have been identified by the Senate Scrutiny of Bills Committee undermine the rule of law in Australia and that they need to be addressed.

RoLIA especially notes that this Bill gives the VET regulator coercive powers including the right to of access to information and documents, search of premises with and without consent, electronic monitoring and the power to seize documents. Whilst there might be sound policy reasons for conferring such powers on a regulator, it is important that Parliament be informed of the circumstances and frequency of use of such powers, some of which are not even available to the police. RoLIA particularly notes that the Bill removes the right of silence of a person being interviewed by the regulator.

Accordingly, RoLIA alerts the Committee to a 2008 report of the Administrative Review Council which identified 20 best practice principles for regulatory agencies which have been conferred coercive powers. These include transparency and accountability best practice procedures. RoLIA research has found that in relation to transparency the ACCC and the ABCC appear to have achieved a higher standard than other regulators (see attachments 1 and 2). In the interests of ensuring that the VET regulator is accountable to Parliament on its policies and use of its extensive coercive powers, RoLIA recommends that a clause be incorporated in the Bill which requires the VET regulator to report on this aspect of operations via its Annual Report to Parliament.

For the preceding reasons, RoLIA recommends that the Bills not be passed as currently drafted. We would be happy to assist the Committee in preparing any amendments to enhance the rule of law standing of the proposed legislation.

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

Yours sincerely

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Publication of data in annual reports 2009-2010

| Reporting item | ACCC | ACC | APRA | ATO | ASIC | ABCC |
|--|------|-----|------|-----|------|------|
| Number of notices | x | x | | | | x |
| Notices by type (for interview or document production) | x | x | | | | x |
| Notices by area of compliance | | x | | | | |
| Challenges to the validity of notices | x | x | | | | x |
| Search warrants sought | x | | | | | |
| Warrants executed/granted | x | | | x* | | |
| Description of matters for which warrants sought | x | | | | | |
| Explanation of the powers and how they work | | x | | | | x |
| State by state breakdown | | | | | | x |
| Proceedings begun for failure to attend examination | | x | | | | x |
| Breakdown by type of examinee Eg management or employees | | | | | | x |
| Outcome of examinations (proceedings commenced, investigation closed etc). | | | | | | x |
| Legal representation at interview | | | | | | x |
| Explanation of why increase/decrease in number of notices | | x | | | | |
| Telecommunications warrants | | | | | | |

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*The ATO disclosed on its use of access-without-notice powers by stating they used the powers on 10 occasions. It is the only regulator with these powers; the other regulators must apply to Court for a warrant which is then executed by the AFP.

Information disclosed about coercive powers

| Regulator | Specific information/document on website | Coercive powers Policy available on website | Some information on website | No information on website | Disclosed information at Senate estimates hearings | General statistics in annual report on use of powers |
|-----------|--|---|-----------------------------|-------------------------------------|--|--|
| ACCC | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> | | | | <input checked="" type="checkbox"/> |
| APRA | | | | <input checked="" type="checkbox"/> | | |
| ATO | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> | | | <input checked="" type="checkbox"/> | Mention of access-without notice powers only |
| ASIC | | | | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> | |
| ABCC | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> | | | | <input checked="" type="checkbox"/> |

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