



COMMONWEALTH OF AUSTRALIA

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SENATE

EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS
LEGISLATION COMMITTEE

Reference: National Vocational Education and Training Regulator (Consequential Amendments) Bill 2011; National Vocational Education and Training Regulator (Transitional Provisions) Bill 2010 [2011]; National Vocational Education and Training Regulator Bill 2010 [2011]

WEDNESDAY, 9 MARCH 2011

WEST PERTH

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**SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS
LEGISLATION COMMITTEE**

Wednesday, 9 March 2011

Members: Senator Marshall (Chair), Senator Back (Deputy Chair) and Senators Bilyk, Cash, Hanson-Young and Wortley

Substitute members: (As per most recent Senate Notice Paper)

Participating members: Senators Abetz, Adams, Barnett, Bernardi, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Colbeck, Coonan, Cormann, Crossin, Eggleston, Faulkner, Ferguson, Fierravanti-Wells, Fielding, Fifield, Fisher, Forshaw, Furner, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Ian Macdonald, McEwen, McGauran, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Trood, Williams and Xenophon

Senators in attendance: (Insert, in alphabetical order, the names of senators provided by committee secretary)

Terms of reference for the inquiry:

To inquire into and report on:

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

WITNESSES

BROWN, Mr Mark, Director, Education and Training Regulation, Department of Education Services, Western Australian Government 2

TRESTRAIL, Ms Stephanie, Assistant Director, Education and Training Regulation, Department of Education Services, Western Australian Government 2

Committee met at 8.57 am

CHAIR (Senator Marshall)—I formally open this hearing into the National Vocational Education and Training Regulator Bill. The National Vocational Education and Training Regulator Bill will establish the NVR and provide the NVR 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 alternatives to criminal offences and civil penalties.

This bill was referred to the committee by the Senate. We will be reporting on 21 March. The committee already had a public hearing on 7 March. Today we are hearing from officials from the Western Australian government. Witnesses appearing before the committee are protected by parliamentary privilege but officers of government departments are not to be asked to give evidence in respect of opinions on government policy but simply to reflect factual matters regarding the bill.

[8.59 am]

BROWN, Mr Mark, Director, Education and Training Regulation, Department of Education Services, Western Australian Government

TRESTRAIL, Ms Stephanie, Assistant Director, Education and Training Regulation, Department of Education Services, Western Australian Government

CHAIR—I welcome representatives of the Western Australian government. For the record, I am in Melbourne on teleconference but in Perth with the witnesses is Senator Chris Back. I invite the witnesses to make some opening remarks, which will be followed by questions.

Mr Brown—We are here to provide a statement reflecting the position of our minister, Mr Peter Collier, and our Premier, Colin Barnett. 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. During the latter half of 2010 various options to meet the commitments made were explored in good faith, but they still fall short of the key condition under which our Premier entered into the agreement to achieve national consistency in VET regulation.

At this time WA is of the view that neither explicitly excludes its state owned training providers—that is, its TAFE colleges—from regulation by the national regulator, as was agreed between the Premier and the then Prime Minister at COAG.

The bill only offers the possibility of a delegation back to the state regulator for low-risk providers but there is no guarantee that this will occur now or at any time in the future or, if such a delegation occurred, that it would not be rescinded at any time.

WA state owned providers, by virtue of their state ownership, are obviously low-risk providers by any definition. Their ongoing governance is assured through legislation. Their ongoing financial viability is backed by the state government and the state is ultimately accountable for their performance. These state owned providers are integral to the state system for the provision of training and workforce development and they are a pivotal element in this system, especially in the regional areas of WA, where significant industrial and economic outcomes are achieved for this nation.

As the prime funder of this state training system—over \$¼ billion annually—it is essential that the state is able to manage this system effectively. Having a state regulator is essential not just to audit that the standards are achieved by the state training providers. It does more than that. Being local, it can provide close monitoring of the system. A state regulator can undertake intensive stakeholder liaison. A state regulator can provide assurance where quality is evident and investigate thoroughly where it is not. It can provide the state with the level of quality assurance it requires in managing its state's provision and pointing out those areas where it needs to respond. A national regulator focused on the national system cannot provide this level of monitoring and quality assurance that the state requires for the training it provides in WA.

WA entered into the COAG agreement to support national consistency in VET and is strongly committed to doing so. It will rigorously apply the national standards, will enter into MOUs require 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. For quality training outcomes to be achieved in WA, it is essential that WA state owned training providers are regulated by the state regulator so that effective management of the system for training that operates in WA can be maintained.

Ms Trestrail—The Western Australian Attorney-General's office also feels that there is an issue with the constitutional powers that the Commonwealth has provided under proposed section 4 of the legislation. Under part 8 of the legislation, where it talks about the act coming into effect for non-referring states, it provides for the total delivery of organisations who take international students and multijurisdictional delivery to come under the power of the Commonwealth. We dispute that the Commonwealth has the constitutional powers to regulate the domestic delivery for those providers in Western Australia.

CHAIR—Thankfully, this committee will not have to determine whether that is right or wrong. Mr Brown, is there disagreement about what the agreement was at COAG?

Mr Brown—It is very clear in the Premier's mind what the agreement was. It is my understanding—and I was not present at the time—that, from the discussion that occurred at COAG, there was a clear understanding from officials who were attending and the Premier that that undertaking had been made: that the WA TAFE providers would not be party to the national VET regulation arrangements. It was on that basis then that the Premier agreed to the recommendations made at that meeting.

CHAIR—Sometimes people can still disagree about what was agreed in good faith, given that they both believe that what they agreed to could be slightly different. I am wonder what the Commonwealth actually say about the agreement. Do they also say that the bill reflects the agreement or do they concede that they are not meeting what was agreed?

Mr Brown—The Premier wrote twice to the office of the Prime Minister seeking confirmation of his understanding. There was one letter when the previous Prime Minister was in place and a follow-up one after the election. On both occasions we did not get an official response to confirm the understanding that our Premier has. The situation is that in the negotiations that occurred in the latter half of last year there was never any endorsement of that commitment that had been made; there was merely an exploration by officers of the various ways in which an agreement along those lines might be translated into the legislation.

CHAIR—I make no judgment about what was or was not agreed. It is clear that the Western Australian government have a view of the agreement and obviously in their view it has not been met and, therefore, they are not going to join with the national regulation until that is met. I think you have made that quite clear. I certainly understand that.

Senator BACK—I want to come back to the point of consistency. My understanding from Peter Collier's letter and your evidence to us is that the Western Australian government is quite willing to move towards nationally consistent legislation but in the Western Australian parliament—

Mr Brown—Correct.

Senator BACK—And that legislation would mirror the federal legislation?

Mr Brown—Correct, when it is in a form—

Senator BACK—Exactly—when it is in a form that is acceptable to all parties. What is your understanding of the state's position with regard to the regulation of training for overseas students?

Ms Trestrail—The state does not have constitutional powers to regulate the provision of delivery to overseas students. That is covered under the ESOS Act, which is Commonwealth legislation. Whilst that authority is currently delegated to the Western Australian government, it is actually a Commonwealth power.

Senator BACK—Do international students receive any training at all from TAFEs in WA?

Ms Trestrail—Yes, they do.

Senator BACK—So, whatever the outcome of the negotiations is, everybody is of the understanding that the regulation and auditing of the training of international students, whether undertaken in the private sector RTOs or TAFEs, does come under the remit of the federal legislation, under ESOS?

Ms Trestrail—Yes.

Senator BACK—So there is no dispute or disagreement about that?

Mr Brown—No.

Senator BACK—I want to go to the next level—that is, training that is federally funded. Can you explain to me what the Western Australian government's position is in terms of the regulation, the oversight and the auditing of programs funded by the federal government within TAFEs or within private sector RTOs?

Ms Trestrail—It is difficult, given the funding arrangements, to split the training per se that may be funded by the federal government. It is more likely that the distribution of federal funding is across all of the state programs. There is an approximate 70/30 split in funding arrangements—

Senator BACK—That is 70 per cent state and 30 per cent federal, is it?

Ms Trestrail—Yes.

Mr Brown—Last year the figure for state funding was \$269 million and the Commonwealth was \$147 million.

Senator BACK—And that is about two-thirds/one-third—70/30?

Mr Brown—Yes.

Ms Trestrail—The funding arrangements are such that you would not be able to clearly define the specific training that was funded from the Commonwealth, because the money is pooled and then distributed to meet the requirements of the state.

Senator BACK—Does that 70/30 funding mix you speak of apply for training in both the TAFE system and training through the private sector or enterprise based RTOs?

Ms Trestrail—If I could just clarify, the Department of Education Services, which undertakes the regulatory function for the training sector in WA, is not responsible for the funding of the VET system in Western Australia. Therefore, I think it would be inappropriate for me to give information in relation to those issues.

Senator BACK—When you say ‘not responsible for funding in the VET system’, can you explain that further? Do you mean the non-TAFE sector?

Ms Trestrail—The Department of Training and Workforce Development is responsible for the distribution of the state and federal funding in relation to training provision in Western Australia. It is not a function undertaken by the department that we are from.

Senator BACK—So, in relation to the 70/30 figure, are you telling me that those funds are allocated and distributed by an agency separate from yours?

Ms Trestrail—Yes.

Senator BACK—Is your responsibility for regulation, oversight et cetera confined to training in the TAFE sector or is it across the board?

Mr Brown—The department is the regulator in Western Australia for the VET sector, for higher education and for non-government schools as well.

Senator BACK—So you do have a regulatory role.

Mr Brown—If you like, we are a separate regulatory body in the state.

Senator BACK—Okay. Let me then ask you this question: in the event that Western Australia does not sign up, as a result of being dissatisfied with what Premier Barnett understands to have been the COAG agreement that he reached with then Prime Minister Rudd, would that 30 per cent of funding coming from the federal government be at risk in Western Australia? I am not asking for your opinion; I am just asking what the machinery, the mechanism, is.

Mr Brown—I would concur with my colleague’s comments that it is probably information that we do not have available to us because we are in a different area of government in Western Australia. It is probably a question for officials from the Department of Training and Workforce Development, who make those allocations.

Senator BACK—Sure. You obviously cannot take it on notice, then, because you cannot act for them, but I think it is information that we do need to have. Perhaps it needs to go back to Minister Collier.

Mr Brown—Yes, we can take that back to Minister Collier.

Senator BACK—Because I think it is important, as a Western Australian senator, that I have some understanding as to whether or not those funds are likely to be placed at risk.

I will move to the next area I would like to explore. Obviously, those enterprise based and private sector—and community service, probably—RTOs who provide training across state boundaries, and whose students and graduates are likely to move across state boundaries, have a high degree of enthusiasm that a nationally consistent process does result from these discussions. In the event that Western Australia—and indeed Victoria, for that matter, since they are also a non-referring state—do not reach agreement on this particular question, do you have some guidance for the committee as to how those objectives can still be met?

Ms Trestrail—Western Australia agreed consistently while negotiations were occurring for the development of this legislation that it is happy to, where appropriate, use the same processes as the National VET Regulator to the extent that the processes being applied are not substandard to the existing processes that Western Australia currently uses. 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.

Senator BACK—A lowering of standards? Yet from evidence given to us the other day in Melbourne by the department, I think—perhaps the chair can correct me—my understanding was that they set out with the objective of moving to the highest denominator. There is always the fear that you end up driving downwards to the lowest denominator. I cannot recall the name of the officer who appeared before us but I am sure she said to us that the objective was to cherry-pick the best of every jurisdiction, if you like, and try to make the best benchmark or yardstick. You have a concern that the process is not in place, has not happened or is not likely to be the outcome?

Ms Trestrail—We have not been consulted in relation to the processes that will be put in place by the National VET Regulator.

Senator BACK—But you have a concern that the Western Australian standards might in fact be eroded? You are satisfied that the Western Australian standards are meeting our objectives?

Ms Trestrail—The Western Australian standards are meeting our objectives. It is difficult to comment, not being privy to the information on how the National VET Regulator might operate from a process perspective.

Senator BACK—Again, it was put to us in Melbourne because we asked what some of the drivers are for moving to this national regulation and audit process. The view that has been put to us, not by the department but by others who appeared, is that there are too many anomalies. One example was given to us, for example, from a South Australian witness—and correct me if I am wrong, Chair or Dr Holland—where a young lady participated in a certificate III course in baking. She completed the course in two weeks and then, presumably, was given her certification, and quite clearly she was no more able to bake a loaf of bread than I could. A subsequent witness who was actually an RTO deliverer of services was telling us that, in his particular instance, it would be a nine-month program before a student could get the certificate III. Are you aware of inconsistencies from Western Australia's perspective? We were somewhat bemused as to how that two-week graduate could ever have got through the system. Do you have any comment in relation to your concern about the possibility of WA standards coming down rather than going up?

Ms Trestrail—Obviously in relation to the issues you have just mentioned we certainly would have concerns too. We would have concerns, potentially, in relation to the nine-month apprenticeship period as well.

Senator BACK—It was not an apprenticeship; it was just an achievement of the certificate level III.

Ms Trestrail—Western Australia does have other provisions within its VET legislation which would mean that that qualification could only be undertaken through an apprenticeship pathway, so you would not run into the same sort of thing. However, we are talking about competency based training and there are no nominal powers allocated to any course within the VET sector. If a person can demonstrate within a short period of time that they are actually competent, they are allowed to progress freely through the system. However, our role would be to ensure that the assessment was appropriately undertaken so that we could be confident in the decision of competence attributed to the student.

Senator BACK—Would that assessment be undertaken independent of the registered training organisation? When you say competency based, is that in an independent assessment process?

Ms Trestrail—No. The deeming of competency is a role undertaken by the RTO itself.

Senator BACK—In that scenario, who would audit the RTO to satisfy yourselves that the RTO was not corrupting the process?

Ms Trestrail—It would be the responsibility of the registering body, being the Training Accreditation Council, in Western Australia, to audit the RTO to ensure that the assessment processes undertaken were appropriate. The registering body does not undertake assessment of individuals.

Senator BACK—Within your assessment or audit processes, have you moved to an outcomes based assessment? Is there a process in place in Western Australia where, a period of time after they have completed their studies and a period of time after the employer has taken them on, the graduates from programs, let us call them, and the employers have some degree of outcomes based assessment?

Ms Trestrail—There is an outcomes based component of the auditing regime in Western Australia. Through our audit process auditors contact employers of graduates of an RTO to question the quality of the students they have received from the RTO. The auditor also undertakes discussions with students from the registered training organisation. Both of those consultations contribute to the auditing process.

Mr Brown—The state system, run through the Department of Training and Workforce Development in Western Australia, also undertakes similar sorts of surveys. In its most recent annual report, figures of around

86 to 87 per cent satisfaction were reported in terms of employer satisfaction and student satisfaction, from the surveys it undertook.

Senator BACK—Was that over a range of trades skills?

Mr Brown—Yes, as I understand it. It would have been a random sampling.

Senator BACK—Going to the constitutional aspects from the viewpoint of the Attorney-General, which you commented on, Ms Trestrail, have you had an opportunity to read the Victorian government's submission?

Ms Trestrail—Not in detail.

Senator BACK—The chair's point is valid—that is, this committee is not going to be sorting out constitutional issues. Is there a degree of consistency in the Western Australian position with that expressed by the Victorian government? They went into a lot of detail where they questioned the constitutionality.

Ms Trestrail—To the degree that we have had the opportunity to view the Victorian submission, it appears to be consistent with the opinions that we have been provided with.

Senator BACK—Mr Brown, you made an observation, if I can remember what you said—something along the lines that options were explored but, in the view of Western Australia, they still fell short in terms of the delegation process in the sense that any agreement could be rescinded at any time, and I think the other comment was along the lines that the interests of Western Australia would end up being subservient. Is that a reasonable summation of what you said?

Mr Brown—In the latter half of last year, yes, officials from Western Australia, Victoria and the Commonwealth met on a number of occasions to explore different ways in which Western Australia's position could be met. It would be true to say, I think, that those options were explored in good faith and that there was good intention by all parties. The outcome, however, has been that, as the bill currently stands, as the intergovernmental agreement has been drafted, we have proceeded no further from the result of exploring those options. It would still appear that the matter is not enshrined sufficiently in the legislation for the state to have sufficient guarantee that its state training providers would remain under the control of the state regulator, which is the key position that the Premier has.

We explored options. We looked at the options of a risk assessment being undertaken by the National VET Regulator, with the notion that, as a result of that risk assessment, low-risk providers would be delegated back to the state regulator. Our view is that, by any definition, our TAFE's are low risk and it does not need another body to determine that they are low risk. Therefore, why cannot that exemption be enshrined in the legislation if it is going to occur anyway?

Senator BACK—So the essence of the WA position is exemption rather than delegation?

Mr Brown—Yes. Or, if there is a delegation, that that delegation is formalised as being an ongoing element within the bill. So, if there is a delegation, it says that there will be a delegation and it 'will occur', not that it 'may occur'. In the most recent version of the intergovernmental agreement it was along the lines that it may occur, subject to the consideration of the NVR when it is formed. That to us does not provide the surety that we require.

Senator BACK—The department listed in attachment A the parties with whom they had met and the dates when they had met. The department gave us evidence that they had consulted on 31 March 2010 in a bilateral state meeting in Perth, on 6 May last year in a state and territory working group, on 13 May in a bilateral state meeting again with Western Australia, on 14 May in another state and territory working group and on 23 July last year. You made the comment that you were not consulted on National VET Regulator standards. Were either of you participants in those many consultations I just read out?

Ms Trestrail—If I could just clarify. As you would be aware, the national standards for registered training organisations are set by a separate body; they are not set by the National VET Regulator. We have been consulted on all issues in relation to the national standards. It is the processes that will be used by the National VET Regulator that we have not been consulted on.

Senator BACK—The processes rather than the actual standards?

Mr Brown—Yes. Those meetings did occur but, essentially, as I recall, some of those early meetings were really about the stating of the two positions that we have outlined in the hearing today.

Senator BACK—As result of your evidence and Minister Collier's submission to the committee, you are satisfied that the Western Australian position is well understood.

Mr Brown—Absolutely.

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.

CHAIR—Thanks for that. The other issue I want to finish off with is that of the TAFEs being low risk. I agree with you: I think that across the country the TAFE systems are low risk and in some cases probably verging on no risk. But can you understand the position of the rest of the industry, which says: 'Hang on a minute. Yes, they are big organisations and they have lots of governance issues, but we are also a large, reputable private RTO. We consider ourselves no risk.'? Why should two standards be applied?

Mr Brown—I can see the argument there. I suppose the thrust of my comments was along the lines that it is a low-risk provision but the essential point was that it is the state ownership and state management of its system in WA that is driving our position here. Under the legislation those private bodies, if they were low risk, may be delegated back to the state regulator. It may be that they will retain the national VET regulator. Essentially, the position has been driven by that need to maintain the effective provision of training in WA through a system that is operated in WA to meet the WA context, and I do not need to go into that—obviously for geographical, industrial and economic reasons. It is important that our minister and our state government have close control over that system, not only for the state's benefit but for the nation's benefit.

CHAIR—But it is accepted that a national regulator can in no way impinge upon the management of the TAFE system or the funding of the TAFE system or what they offer or deliver or where and how.

Mr Brown—That is true, but what I was trying to say in my statement about having a national regulator overseeing the state provision in this state is that, in our view, the state regulator would provide a greater level of quality assurance to our state government than what a national regulator would be able to provide. Even if it did have a local office, it would still be dealing within the context of a national system of auditing and registration of providers. I suppose what I am arguing here is that the state regulator has a value-added component that the state requires in order to maintain effective management of its system.

CHAIR—I will put one last thing to you. Given that the state is the owner of these bodies, can't it achieve the highest standard in delivery of services, or the standards that it requires, simply through its ownership and therefore control of those bodies in the first place? Again, an owner supplied regulator really does not regulate as effectively as the owner could directly within the management control of such a body.

Mr Brown—If I understand what you are putting to me, I think what you are going to is the notion of regulator separation.

CHAIR—Yes.

Mr Brown—As Stephanie Trestrail indicated, the responsibility for those particular functions falls quite separately in Western Australia within two separate departments. In fact, the Department of Education Services, which we are from, provides secretariat services to the Training Accreditation Council in Western Australia, which is a statutory body set up to oversee the regulation of training in Western Australia. It has a degree of independence itself. We feel that that arrangement provides sufficient provider/regulator separation but, at the same time, because it is operating within the state and meeting state needs and being able to inform the response that the state provides to its training requirements, that gives us the mix that we require to operate the system effectively.

CHAIR—If the exemption that you seek for the state TAFEs was indeed given, what assurance is then given to the Commonwealth that your regulator will at least deliver on the minimum standard required by the federal regulator?

Ms Trestrail—There is a provision within the Commonwealth legislation that WA intends to mirror that the yet-to-be-created National Standards Council will undertake third-party audits of all regulators and through that mechanism the Commonwealth will be given the assurance that WA is acting effectively in this area.

Senator BACK—I have only one other question following yours, Chair, and the responses. Mr Brown, can you tell me from your knowledge if the other states and/or territories also have that separation in their jurisdictions of the provider-regulator model that you just explained to us?

Mr Brown—Victoria certainly does: Skills Victoria, and then there is the RQA—the Victorian Registration and Qualifications Agency. I am not 100 per cent sure of the other states but I am aware that certainly in Victoria that separation is provided.

Senator BACK—Just to bring me back to the non government-related RTOs, the Training Accreditation Council also audits the performance of those other RTOs.

Mr Brown—The Training Accreditation Council is the regulator for all training provided in Western Australia.

Senator BACK—For all training, okay. So you know that WA and Victoria have that provider-regulator separation. You are not sure of other states and I think it would be worth our while for the secretariat to find out what the circumstances are in the others. Then, Ms Trestrail, just to recap your evidence in response to the chairman's question, under the legislation the National Standards Council would still have a third-party audit oversight of the accreditation council to ensure that national standards are actually met.

Ms Trestrail—Yes.

Senator BACK—I also have no further questions, Chairman. Thank you.

CHAIR—I thank our witnesses and again apologise to you on the record for our technical difficulties on Monday. I know this significantly inconvenienced you but I do thank you sincerely for making yourselves available today to enable us to complete our inquiry. Thank you for that.

Mr Brown—Thank you and we appreciate the opportunity to provide our statement to the hearing.

Committee adjourned at 9.37 am