

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

²⁰20 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.

