

Chapter 2

General issues

2.1 Australia will benefit from a single national approach to vocational education and training. This message was clearly sent by major stakeholders in the field. The committee is aware that some governments – Victoria and Western Australia – have reservations about the implementation of an intergovernmental agreement and national laws, but no-one disputes the benefit of a national approach for reducing complexity for businesses, and acting as a key quality assurance mechanism, thus improving confidence in Australia's VET system.

2.2 The New South Wales government, which has passed legislation to allow the referral of powers to the Commonwealth, said that it 'strongly supports a single, national VET regulatory system'.¹ The Minerals Council of Australia considered that:

The National VET Regulator Bills provide a single, standard national regulatory framework for the VET sector, which is essential to promote consistency and remove barriers and confusion for individuals and enterprises who are or who wish to work across more than one jurisdiction.²

2.3 The Australian Council of Trade Unions (ACTU) indicated it supported the change, saying it was something that has been needed for some time:

[O]ur main interest or focus has been to reaffirm our broad support for the establishment of the National VET Regulator. It is something the ACTU and others have called for for some time and we are glad to see now that we are almost there. It is a significant reform and we commend the government for taking it on. In terms of the bills themselves, we are pleased to see the broad powers enabling the National VET Regulator to monitor and enforce compliance with quality standards and also take appropriate action against those providers who do not meet those standards.³

2.4 The Australian Council for Private Education and Training (ACPET) was particularly strong in its support for the reforms. It expressed its concern:

That this critical initiative not be further delayed as a result of this inquiry... ACPET has been consulted on both the draft legislation and periodically on progress towards the establishment of the new regulator... ACPET considers that the proposed legislation significantly strengthens the ability of the regulator to take action against seriously non-

1 NSW Government, *Submission 19*, p. 2.

2 Minerals Council of Australia, *Submission 7*, p. 2.

3 ACTU, *Proof Committee Hansard*, 7 March 2011, p. 8.

compliant providers. The legislation will therefore serve to improve the quality of vocational education and training being delivered in Australia...⁴

2.5 The Minerals Council of Australia welcomed the 'reduction in the complexity of the regulatory framework'.⁵ Submitters were supportive of removing inconsistencies in areas such as training and assessment between jurisdictions.⁶

2.6 It is important to ensure high standards of training delivery across the VET sector, and the bills are an important measure in achieving this objective.⁷ The Master Builders Association supported a national regulator, arguing it would deliver 'consistent robust national regulation of training providers and courses'.⁸ The Australian Chamber of Commerce and Industry (ACCI) explained the need for a new regulatory approach in terms of dealing with low quality training:

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.⁹

2.7 Within the framework of strong support for the bills, a range of issues were identified by stakeholders.

Consultation processes

2.8 As noted above, ACPET was satisfied with the consultation process. This did not however seem to be a view that was necessarily widely shared. The ACTU, on behalf of itself and other relevant players, observed:

we are concerned with the lack of meaningful consultation around the details of these major reforms. The ACTU and other industry stakeholders were part of a 'limited consultation' process in late 2010 which provided the opportunity to view a draft Bill for a half day. Given the significance of this legislation, this did not prove sufficient time for proper consideration before the Bill was introduced.¹⁰

4 ACPET, *Submission 5*, p. 1.

5 Minerals Council of Australia, *Submission 7*, p. 2.

6 For example, EE-Oz Training Standards, *Submission 15*, p. 1.

7 ACTU, *Submission 10*, p. 3.

8 Master Builders Association, *Submission 2*, p. 1.

9 ACCI, *Submission 14*, p. 1.

10 ACTU, *Submission 10*, p. 4.

2.9 This theme – of broad support but limited input on the legislation – was a recurring one:

DEEWR, right from the outset of establishing the NVR, has involved industry stakeholders, first of all, in briefings and, secondly, in the consultation process at the end of last year. However, that consultation process, while appreciated, really did not provide us with a lot of scope for providing feedback. Certainly the government's approach has been to be very consultative in a lot of other forums, and probably there has not been as extensive consultation on this particular piece of legislation as occurs in other arenas. Also, even though we were consulted, basically nothing happened with the feedback that we provided. We are just one of a range of stakeholders; we understand that, but I think there has been some frustration about consultation on this particular bill.¹¹

2.10 The committee discussed the negotiations between jurisdictions with representatives of the Western Australian government. They implied Western Australia was not part of continuing discussions:

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.¹²

2.11 The Australian Education Union (AEU) and the TAFE Directors Association wanted more time spent on the legislation:

The organisations wish it further noted that they view the 11 day time period allowed for the Committee to undertake and complete its inquiry as wholly inadequate for the purpose of ensuring appropriate consultation on what is after all such a significant change in the VET sector regulatory environment. The Committee is urged to consider recommending further delay in passage of the Bills to enable full consultation to occur, including consideration of legislative amendment, to take account of stakeholder concerns.¹³

2.12 These organisations reiterated similar concerns at the hearing:

11 ACCI, *Proof Committee Hansard*, 7 March 2011, p. 22.

12 Mr Brown, Director, Education and Training Regulation, Western Australian Department of Education Services, *Proof Committee Hansard*, 9 March 2011, p. 7.

13 AEU and TAFE Directors Association, *Submission 11*, p. 1.

Compared with TEQSA, consultation on the National VET Regulator has been limited and there is no forum in which to have a holistic dialogue or single line of communication about the parallel and critical set of changes between the two bodies.¹⁴

However, in terms of any processes of consultation around the legislation—which is so critical as an underpinning for the national VET regulator—there have been no consultations with the union at all. As far as I am aware, I believe there was a restricted forum organised in late October where an invitation was extended to the ACTU to attend a closed session where participants would have access to a draft of the legislation for a limited period of time. During that session they would be able to provide feedback, then the draft legislation was to be left there. Unfortunately, because the notice for that session was so short the AEU was unable to attend that limited briefing and, as far as I am aware, that was the only point at which there was any consultation—certainly potentially with the AEU.¹⁵

2.13 The Department of Education, Employment and Workplace Relations (DEEWR) advised the committee of its schedule of stakeholder consultations. Excluding the meetings of the State and Territory Working Group, the Ministerial Committee and bilateral meetings with jurisdiction governments, the consultations included 16 meetings and open sessions, with at least one occurring in every jurisdiction, between 10 March and 5 May 2010.¹⁶ However, the committee understands that stakeholder consultation on the exposure draft of the bills was confined to a single session on 29 October 2010.¹⁷ A representative of the AEU said that 'the draft legislation was to be left there', suggesting it remained in confidence,¹⁸ however the department indicated that stakeholders were provided with a copy of the legislation,¹⁹ implying it was then public. The committee did not resolve the detail of whether the exposure draft was effectively public from 29 October 2010.

2.14 DEEWR advised the committee that the draft went through 18 draft iterations after the stakeholder consultation on 29 October, and gave examples of some of the changes that were included.²⁰

Committee view

2.15 As the committee notes elsewhere in this report, it also has concerns about a process where there is limited capacity to consider and comment on proposed

14 Ms Simmons, TAFE Directors Australia, *Proof Committee Hansard*, 7 March 2011, p. 23.

15 Ms Forward, AEU, *Proof Committee Hansard*, 7 March 2011, pp 24–25.

16 DEEWR, *Submission 7*, p. 7.

17 DEEWR, *Submission 7*, p. 7.

18 Ms Forward, AEU, *Proof Committee Hansard*, 7 March 2011, p. 25.

19 Ms Quagliata, DEEWR, *Proof Committee Hansard*, 7 March 2011, p. 43.

20 DEEWR, Answers to Questions on Notice, 7 March 2011 (received 17 March 2011), p. 1.

legislation, particularly when it is establishing a regulator, which involves creating and defining regulatory conditions, including offences. The committee believes the draft bills required more careful consideration at an early stage.

Lack of objects

2.16 Several major players in the sector noted the lack of an objects clause in the bill.²¹ This was one of the main points raised by the AEU and TAFE Directors Australia. It was also noted by the ACTU, which pointed out that similar clauses are in place in other legislation, such as the *Fair Work Act 2009*.²² The exposure draft of similar legislation, the Exposure Draft of the Tertiary Education Quality and Standards Agency Bill 2010 contains an objects clause:

The objects in that exposure draft bill are:

- (a) to provide for national consistency in the regulation of higher education; and
- (b) to regulate higher education using:
 - (i) a standards-based quality framework; and
 - (ii) principles relating to regulatory necessity, risk and proportionality; and
- (c) to protect and enhance:
 - (i) Australia's reputation for quality higher education and training services; and
 - (ii) Australia's international competitiveness in the higher education sector; and
 - (iii) excellence, diversity and innovation in higher education in Australia; and
- (d) to encourage and promote a higher education system that is appropriate to meet Australia's social and economic needs for a highly educated and skilled population; and
- (e) to protect students undertaking, or proposing to undertake, higher education in Australia by requiring the provision of quality higher education; and
- (f) to ensure students undertaking, or proposing to undertake, higher education, have access to information relating to higher education in Australia.²³

21 AMWU, *Submission 8*, p. 3; ACTU, *Submission 10*, p. 7; AEU and TAFE Directors Association, *Submission 11*, p. 1

22 ACTU, *Submission 10*, p. 7.

23 Exposure Draft of the Tertiary Education Quality and Standards Agency Bill 2010, clause 3, <http://www.deewr.gov.au/HigherEducation/Policy/teqsa/Documents/TEQSABill2011.pdf>, accessed 17 March 2011.

2.17 The AEU and TAFE Directors suggested that:

Objects provide a clear expression of legislative intention and provide authoritative guidance to the administrators and users of the statute. Without Objects, it is therefore unclear what the Bill is attempting to achieve.²⁴

2.18 They considered that objects modelled on those contained in the TEQSA bill exposure draft could be appropriate.

2.19 The Department responded saying that there were differences between the processes leading to the establishment of TEQSA and the National VET Regulator, in particular that the latter is relying on a referral of state powers and therefore is negotiated with the states:

As a result there is an intergovernmental agreement with the states and territories, and in that intergovernmental agreement a set of objectives is set out... In the case of this piece of legislation, it was thought unnecessary to do that when the objects would be set out in the intergovernmental agreement.²⁵

Committee view

2.20 As noted elsewhere in this report, however, the intergovernmental agreement is neither public, nor even signed as of the Senate considering the bill. The committee accepts that legislation may be prepared in different ways, and that an objects clause is not always necessary. However the lack of such objects being in the public domain, through either the bill or the intergovernmental agreement, seems unfortunate.

The development of national standards

2.21 National standards are critical to underpinning the national framework for vocational education and training. The Minister, in the second reading speech, stated

A key mechanism for regulation in VET is the national standards against which RTOs are regulated, currently called the Australian Quality Training Framework. The content of the standards will not be significantly changed, but this Bill strengthens their legal status by making them a legislative instrument.

The standards will continue to be endorsed by the Ministerial Council and will be developed in the future by the new Standards Council which will be established in 2011.²⁶

2.22 The Minerals Council of Australia indicated that industry participation in the development of standards was critical, and that current AQTF standards should not be

24 AEU and TAFE Directors Association, *Submission 11*, p. 1.

25 Ms Quagliata, DEEWR, *Proof Committee Hansard*, 7 March 2011, p. 41.

26 *Senate Hansard*, 26 November 2010, p. 2380.

directly adopted in their current form.²⁷ ACCI also expressed concern about the use (or abuse) of elements of the existing AQTF.²⁸

2.23 The Australian Manufacturing Workers' Union (AMWU) also expressed concern about how standards would be developed and adopted, but did not appear to share doubts about the adequacy of the existing AQTF:

There appears to be no mention in the Main Bill of the Australian Quality Training Framework (AQTF) which provides the current regulatory framework for Registered Training Organisations. Whilst this might be because the AQTF will be incorporated into the Standards for NVR registered training organisations, the AMWU submits that the relationship between the existing and new regulatory VET framework should be made explicit and that the legislation should expressly provide for a strong role for industry in decisions relating to the Standards underpinning the quality of the system.²⁹

2.24 A similar view was expressed by the ACTU, Manufacturing Skills Australia and EE-Oz Training Standards.³⁰

2.25 The Victorian government doubted that the AQTF was suitable to become a statutory framework for standards in the sector:

In essence, the national standards set out in the Australian Quality Training Framework (AQTF) are a set of policy statements and objectives. Whilst adequate as statements of policy, they are not crafted to serve as the basis for a robust regulatory system in the modern administrative law context.

It is understood that the Commonwealth proposes to resolve this problem by giving the AQTF the status of a legislative instrument. In Victoria's view, this does not solve the fundamental problem. Making a vaguely expressed document into a legislative instrument will not make it any easier to administer. For this reason, Victoria's approach has been to develop Acts and regulations that give effect to the policies set down in the AQTF in enforceable statutory form.

More work needs to be done to articulate the standards with greater clarity and precision to give providers and regulators better guidance on what they require.³¹

2.26 DEEWR indicated that there is the capacity to address these debates independently of the bill's provisions. DEEWR representatives noted that '[t]he

27 Minerals Council of Australia, *Submission 7*, p. 2.

28 ACCI, *Submission 14*, p. 1.

29 AMWU, *Submission 8*, p. 4.

30 ACTU, *Submission 10*, p. 5; Manufacturing Skills Australia, *Submission 9*, p. 3; EE-Oz Training Standards, *Submission 15*, p. 2.

31 Government of Victoria, *Submission 18*, p. 5.

standards that will be applied by the regulator are not set out in the legislation but are put in legislative instruments that are referred to in the legislation'.³² There is a deliberate separation of the standards themselves and the regulator's work in applying them:

[T]he introduction of a National VET Regulator is not intended to significantly alter the national standards as recently strengthened. The intention is to improve consistency and enforceability of the standards by having them regulated by a single body with robust powers.

There will be further opportunities in the future for stakeholders to contribute to the ongoing development and refinement of the standards. In addition to the establishment of a National VET Regulator, the Australian Government is consulting extensively with state and territory governments and other key stakeholders to form the National Standards Council.

The National Standards Council will continue to develop and refine the national standards, and will be required to consult extensively on these changes.³³

2.27 They also pointed out that the AQTF had itself been recently strengthened in a process separate to the current bills:

They were strengthened in a number of ways in a process in 2010 to include a requirement for fit and proper person standards to be met; for financial viability standards to be met; and for continuous improvement not to be seen as an alternative to meeting the standards but rather being in addition to meeting the standards. There was a separation of the standards for initial registration with the standards for continuing registration, as that resulted in some uncertainty as to how the standards applied in relation to initial registration, and there was a strengthening of the data requirements, in that there is now a requirement that registered providers keep [Australian Vocational Education and Training Management Information Statistical Standard] compliant student records.³⁴

2.28 It is important that the standards being enforced by the regulator are strong: strengthened enforcement powers are of little use unless they are supported by adequate laws. The committee was satisfied with DEEWR's observations on this issue.

The place of Enterprise RTOs

2.29 Enterprise RTOs are Australian companies that become RTOs in order to train their own employees, but their main business is not training. They include some of Australia's largest employers, such as Woolworths, Westpac and the Australian

32 Ms Quagliata, DEEWR, *Proof Committee Hansard*, 7 March 2011, p. 44.

33 DEEWR, *Answers to Questions on Notice*, 7 March 2011 (received 11 March 2011), p. 10.

34 Ms Quagliata, DEEWR, *Proof Committee Hansard*, 7 March 2011, p. 46.

Taxation Office. There are currently around 250 enterprise RTOs, issuing around 100 000 qualifications each year.³⁵

2.30 The AEU and TAFE Directors suggested that the VET framework should include a reference to the concept 'that VET providers have as a main or proper or primary or significant purpose the provision of VET'.³⁶ The AMWU supported the AEU and TAFE Directors, but expressed the proposal more narrowly, suggesting that RTOs should have, 'as a primary or significant purpose, the education and training of students'.³⁷

2.31 In contrast, ACCI was critical of any suggestion that definitions be inserted that could prevent Enterprise RTOs from remaining within the system:

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... 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.³⁸

Committee view

2.32 The committee understands the differing views of parties on this matter. It notes, however, that the AEU / TAFE Directors submission does suggest that VET providers may have as a 'proper...or significant purpose the provision of VET': 'proper' is significantly broader than 'main' or 'primary'. These words on their face seem clearly to have the scope to include enterprise RTOs. The committee is not sure there is a genuine conflict of views here. Nevertheless, the issue is a substantive policy question that goes beyond the provisions of the bill, and was not pursued further by the committee as part of this inquiry.

Conclusion

2.33 The committee wishes to reiterate that there is widespread support for a national approach to the VET sector. This is reflected in steps that have been taken in this direction over the last decade. The current reforms represent an important milestone in protecting and enhancing Australia's vocational education and training sector. The committee now turns to some specific issues with aspects of the bills, particularly in relation to offences, civil penalties and entry, search and seizure powers.

35 Enterprise RTO Association, *Submission 12*, p. 1.

36 AEU and TAFE Directors Association, *Submission 11*, p. 1.

37 AMWU, *Submission 8*, p. 5.

38 ACCI, *Submission 14*, p. 4.

