



**SENATE STANDING COMMITTEE**  
**FOR THE**  
**SCRUTINY OF BILLS**

**SECOND REPORT**  
**OF**  
**2011**

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# **SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS**

## **MEMBERS OF THE COMMITTEE**

Senator the Hon H Coonan (Chair)  
Senator M Bishop (Deputy Chair)  
Senator G Marshall  
Senator L Pratt  
Senator R Siewert  
Senator the Hon J Troeth

## **TERMS OF REFERENCE**

### **Extract from *Standing Order 24***

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
  - (i) trespass unduly on personal rights and liberties;
  - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
  - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
  - (iv) inappropriately delegate legislative powers; or
  - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.



# **SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS**

## **SECOND REPORT OF 2011**

The Committee presents its Second Report of 2011 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

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# Foreign Acquisitions Amendment (Agricultural Land) Bill 2010

Introduced into the Senate on 24 November 2010

By: Senator Xenophon

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 1 of 2011*. The Senator responded to the Committee's comments in a letter dated on 2 February 2011. A copy of the letter is attached to this report.

## **Background**

This bill seeks to make three key changes to the current *Foreign Acquisitions and Takeovers Act 1975*. These changes include:

- provides for a national interest test which requires any interest in Australian agricultural land greater than 5 hectares to be subject to application to the Treasurer;
- lowers the threshold from \$231 to 5 hectares for the acquisition of Australian agricultural land; and
- requires online publication of applications of interest in Australian agricultural land;

### *Alert Digest No. 1 of 2011 - extract*

## **Possible severe penalty**

### **Item 11**

This bill requires private foreign investors to seek approval prior to acquiring any interest in Australian agricultural land greater than 5 hectares.

Item 11 of Schedule 1 would insert subsection 26B(2) into the legislation. This subsection specifies the penalty for breach of the obligation to not acquire agricultural land without approval is a fine not exceeding 500 penalty units or imprisonment for a period not exceeding 2 years, or both. These are heavy penalties and it is possible that these penalties unduly encroach upon personal rights and liberties. The Committee requests that if this bill proceeds to further stages of debate it would be helpful if the explanatory memorandum justified these penalties by reference to comparable penalties in Commonwealth legislation.

*Pending the Senator's reply, the Committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*

### ***Senator's response - extract***

The first concern raised in your letter is around Item 11 of the Bill and the Committee's concern that it is possibly too a severe penalty.

Please be advised that the penalty that has been applied is consistent with the current legislation as relevant to 'Australian urban land'.

Section 26A of the Foreign Acquisitions and Takeovers Act 1975 states:

*2) Where a person to whom this section applies:*

*(a) enters into an agreement by virtue of which he or she acquires an interest in Australian urban land and did not, before entering into the agreement, furnish to the Treasurer a notice stating his or her intention to enter into that agreement; or*

*(b) having furnished a notice to the Treasurer slating his or her intention to enter into an agreement by virtue of which he or she is to acquire an interest in Australian urban land, enters into that agreement before:*

*(i) the end of 40 days after the day on which the notice was received by the Treasurer; or*

*(ii) the day on which advice is given that the Commonwealth Government does not object to the person entering into that agreement (whether or not the advice is subject to conditions imposed under subsection 25(1A));*

*whichever first occurs;*

*the person is guilty of an offence and is punishable, on conviction, by a fine not exceeding 500 penalty units or imprisonment for a period not exceeding 2 years, or both.*

### ***Committee Response***

The Committee thanks the Senator for this response.

## ***Alert Digest No. 1 of 2011 - extract***

### **Insufficiently defined administrative powers**

#### **Item 5**

Item 5 of Schedule 1 would insert subsection 21B(2) into the legislation. This provision gives the Treasurer a discretionary power to make an order prohibiting a proposed acquisition where he or she is satisfied that foreign person seeks to acquire an interest in Australian agricultural land which is greater than 5 hectares and that the proposed acquisition would be contrary to the public interest. This is a very broad discretionary power which may be thought to make rights unduly dependent upon insufficiently defined administrative powers.

However, proposed section 21C (also inserted by item 5 of Schedule 1) specifies in considerable detail a number of considerations to which the Treasurer must have regard in determining whether an acquisition would be contrary to the national interest. This requirement works to structure the exercise of the broad discretionary power.

Given the purpose of the bill is to enable the Treasurer to make policy decisions about whether or not to approve an application and the requirements (also inserted by item 5) to publish information about applications under consideration by the Treasurer, in the circumstances if the bill proceeds to further stages of debate the Committee leaves the question of whether this approach is appropriate to **the consideration of the Senate as a whole**.

*In the circumstances, the Committee makes no further comment on this provision.*

## ***Senator's response - extract***

With regard to the Committee's second concern, that the Bill includes insufficiently defined administrative powers, again the provisions in the Bill are consistent with the current Act as applied to 'Australian urban land'.

Section 21A of the Foreign Acquisitions and Takeovers Act 1975 states:

*(1) In this section:*

*"foreign person" means:*



*(a) a foreign corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or*

*(b) a foreign corporation in which 2 or more persons, each of whom is a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.*

*(2) Where the Treasurer is satisfied that:*

*(a) a foreign person proposes to acquire an interest in Australian urban land; and*

*(b) the proposed acquisition would be contrary to the national interest;*

*the Treasurer may make an order prohibiting the proposed acquisition.*

*(3) Where the Treasurer makes such an order in relation to an interest in Australian urban land, he or she may also make an order in relation to:*

*(a) a specified foreign person; or*

*(b) a specified foreign person and specified associates, or the persons included in a specified class of associates, of that person;*

*directing that that person shall not, or none of those persons shall, whether alone or together with any other or others of them, acquire:*

*(a) any interest in the land or other thing concerned; or*

*(b) any such interest except to a specified extent.*

*(4) Where a foreign person has acquired an interest in Australian urban land and the Treasurer is satisfied that the acquisition is contrary to the national interest, the Treasurer may make an order directing the foreign person to dispose of that interest within a specified period to any person or persons approved in writing by the Treasurer.*

*(5) Before the end of the period specified in the order or of that period as extended under this subsection, the Treasurer may, by writing signed by the Treasurer, extend or further extend that period or that period as so extended, and in that event the order has effect as if the period as so extended or further extended had been specified in the order.*

*(6) For the purposes of subsection (4), but without limiting the generality of that subsection:*

*(a) a foreign person shall be taken to have acquired an interest in Australian urban land if the person becomes, with or without the knowledge of the person, a beneficiary in a trust estate (other than a deceased estate) that consists of or includes an interest in Australian urban land; and*

*(b) where paragraph (a) applies and the trust estate is a discretionary trust estate-a reference to the disposal of the interest of the foreign person is a reference to the disposal of such assignable benefits in relation to that trust estate as may ultimately vest in that foreign person.*

*(7) The Treasurer shall not refuse to approve a person for the purposes of subsection (4) unless the Treasurer is satisfied that the person is a foreign person and that it would be contrary to the national interest for that person to acquire the interest concerned.*

I hope this information assists the Committee.

***Committee Response***

The Committee thanks the Senator for this response.

# National Vocational Education and Training Regulator Bill 2010

Introduced into the Senate on 26 November 2010

Portfolio: Education, Employment and Workplace Relations

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 1 of 2011*. The Minister responded to the Committee's comments in a letter dated on 28 February 2011. A copy of the letter is attached to this report.

The Committee intends to forward this information and its response (detailed below) to the Senate Education, Employment and Workplace Relations Legislation Committee.

## **Background**

This bill provides for the establishment of a national regulator for the vocational education and training sector. It also sets out the regulatory framework within which the National Vocational Education and Training Regulator will operate.

### *Minister's response – General comments*

I note the Committee has asked for advice about:

1. whether the power to charge a fee under subclause 17(4) for considering an application for registration is insufficiently defined
2. whether natural justice issues are appropriately dealt with by clauses 36 and 37
3. whether administrative powers under clauses 51 and 89 have been defined appropriately
4. the justification for the penalties in clauses 60,61
5. the justification for the possible trespass on personal rights and liberties found in clauses 62, 68, 70, 71, 85 and Division 2 of Part 5
6. the justification for the scope of the delegation of legislative powers found in clauses 224, 225 and 226
7. the justification for the retrospective application of Clause 30 of the Transitional Provisions Bill.

I have noted the Committee's concern in relation to the possible need for further information in the explanatory memoranda for the Bills about some of the above matters. It is the intention of the Australian Government to review and amend the explanatory memoranda taking these concerns into account as detailed below.

Before specifically addressing the Committee's comments below, I make the following general comments about the Bills.

### **Intergovernmental Agreement**

Following a Council of Australian Governments' decision in December 2009 it was agreed that there would be a national system of regulation in the vocational education and training (VET) sector to enable reform and ensure consistency across Australia.

There is an Intergovernmental Agreement (IGA) between the Government and the state and territory governments setting out the terms for agreement to establish the national regulation of VET, including the establishment of the National VET Regulator (NVR). The IGA contains detailed provisions of the agreed roles of the NVR, the Government, and the Ministerial Council for Tertiary Education and Employment (the Ministerial Council). These roles were the subject of ongoing negotiation and discussion prior to the agreement to refer powers to the Commonwealth, and are reflected in the drafting of the main Bill. This IGA was agreed in principle by the Ministerial Council in June 2010 and by the Council of Australian Governments (COAG) on 13 February 2011 and is expected to be signed prior to the passage of the legislation.

### **Consultation with States and Territories for the NVR Bills**

The main Bill and Transitional Bill were drafted following extensive consultation with state and territory representatives that took place throughout 2010. These consultations included broad open consultations with training providers, as well as discussions with Industry Skills Councils, peak provider bodies, peak employer bodies and the Australian Council of Trade Unions (ACTU). State governments and existing regulators were closely involved to ensure that best practice is reflected in the new legislation and that current issues and weaknesses of regulatory regimes have been avoided. In addition to this consultation process prior to and during the development of the legislation, stakeholders were given an opportunity to review and provide comment on a final draft of the Bill through an exposure draft process held in Melbourne on 29 October 2010.

The Bills contain similar regulatory powers to the state and territory regimes, with some additional provisions to address the difficulties the jurisdictions have encountered under current state regulatory arrangements.

## **Text based referral of power**

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.

## **Appointment and engagement of Commissioners and staff of the National VET Regulator (NVR)**

The NVR will consist of three Commissioners approved by the Minister as having appropriate qualifications, knowledge or experience, including the ability to recruit suitable staff to undertake the functions of the Regulator, and the ability to appoint authorised officers. The Commissioners will then recruit appropriately qualified staff to undertake its functions. Under clause 182 of the main Bill the staff will be engaged under the *Public Service Act 1999* and will be appointed based on merit and suitability for the role.

## **Reporting**

Under clause 215 the NVR will be responsible for reporting annually to the Parliament and the Ministerial Council on its performance, including the performance of delegates.

## **General comments on investigative and enforcement provisions**

Many of the investigative and enforcement powers found in the main Bill are in line with the *Education Services for Overseas Students Act 2000* (ESOS Act). They are also comparable to powers found in the *Tax Agent Services Act 2009*, and *Anti-Money Laundering and Counter- Terrorism Financing Act 2006*. The maximum levels for civil penalties are high because deterrence is considered necessary to improve the quality of the VET sector. As there is no corporate multiplier for civil penalties, and the size of providers range from single person entities to large corporations, it is necessary that the Bill allows for a range of penalties. These penalties are important to ensure the improved regulation of this sector.

***Alert Digest No. 1 of 2011 - extract***

## **Scope of legislative instrument to set fees Clauses 17 and 232**

Subclause 17(3) of the bill gives the National VET Regulator ('Regulator') power conduct an audit of any matter relating to an application prior to deciding whether to grant an application for registration. Subclause 17(4) provides that the Regulator may charge a

registration assessment fee for considering the registration Although subclause 16(3), which allows an application fee, provides that such fees must be determined by the Minister by legislative instrument under clause 232 of the bill, subclause 17(4) does not indicate how the assessment fee is to be determined.

Clause 232 empowers the Minister to, by legislative instrument, determine ‘amounts of fees the National VET Regulator may charge for goods or services it provides’. This provision is drafted in terms broad enough to enable the determination of fees applicable under subsection 17(4). It is currently unclear whether the Regulator can determine the level of fees appropriate for the purposes of subclause 17(4) in the absence of a legislative instrument dealing with this issue.

In addition, there is no limit or formula included in the legislation and the explanatory memorandum does not provide any guidance about the intended scope of any fees.

As this may be thought to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, the Committee **seeks the Minister’s clarification** as to whether the fees applicable under subclause 17(4) must be made by legislative instrument pursuant to clause 232 and as to whether the primary legislation can be amended to include a limit on the amount of any fee or to prescribe a formula for calculating each fee.

*Pending the Minister’s reply, the Committee draws Senators’ attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee’s terms of reference.*

### ***Minister’s response - extract***

#### **Subclause 17(4)**

The Committee has raised a concern about the ability of the NVR to set fees (for considering an application to be registered as an NVR registered training organisation) under subclause 17(4) of the Bill. The reason for the concern is that this subclause does not provide that the fee will be set by the Minister by legislative instrument under clause 232.

Paragraph 6.4 of the IGA is clear that the Ministerial Council will be responsible for approving the fee structure for the NVR. This is reflected in the requirement of subclause 232(2) that before making a legislative instrument determining fees for, among other things, goods or services in respect of registration as a registered training organisation, the Minister must get the Ministerial Council’s agreement to the amount of the fee.

As the Committee has noted, clause 232 would enable the Minister to determine the fees payable under subclause 17(4). All fees payable to the NVR under this Bill, including those payable under subclause 17(4) of the Bill will be determined under clause 232.

The explanatory memorandum for clauses 17 and 232 will be amended to reflect this intention.

Additionally, fees charged under the Bill must not amount to taxation and can only be imposed on a cost recovery basis in accordance with the *Australian Government Cost Recovery Guidelines* (Cost Recovery Guidelines). Among other things, the Cost Recovery Guidelines state that:

- Australian Government agencies should set charges to recover the costs of products and services when it is efficient to do so.
- Agencies that undertake regulatory activities (such as the NVR) should generally include administration costs when determining appropriate charges.
- Cost recovery arrangements are to be considered 'significant cost recovery arrangements' where, amongst other things, the agency's total cost recovery receipts will equal \$5 million or more per annum-this is likely to be the case with the NVR.
- Agencies with significant cost recovery arrangements should undertake appropriate stakeholder consultations on their fees (including with other agencies), as well as Cost Recovery Impact Statements—which the agency's chief executive, secretary or board must certify complies with the Cost Recovery Guidelines.
- Agencies must include a summary of the Cost Recovery Impact Statements in their portfolio budget submissions and statements.
- Agencies must review their significant cost recovery arrangements at least every 5 years.

The NVR will implement the above safeguards to ensure that the fees to be imposed by the NVR are appropriate.

### ***Committee Response***

The Committee thanks the Minister for this response and notes that the Ministerial Council will be responsible for approving the fee structure, which will be determined in accordance with the *Australian Government Cost Recovery Guidelines*.

## *Alert Digest No. 1 of 2011 - extract*

### **Trespass on personal rights and liberties – excluding natural justice Clauses 36 and 37**

Division 3 of the bill deals with ensuring compliance with the VET Quality Framework and allows for the imposition (Subdivision B) of administrative sanctions, including the suspension and cancellation of registration. Subclause 36(a) provides that subdivision B only applies, inter alia, if ‘natural justice requirements’ have been satisfied and clause 37 details these ‘natural justice requirements’. However, subclause 36(b) provides that the Regulator may impose administrative sanctions ‘without satisfying natural justice requirements’ in ‘exceptional circumstances’. These circumstances are not defined in the bill, but the explanatory memorandum at page 23 gives the following examples: major occupational health and safety breaches; evidence of significant and high levels of fraud or malpractice; further issuing of qualifications that would undermine health and safety in other industries.

Although in theory Parliament may exclude common law natural justice requirements, the courts are extremely reluctant to accept that legislation has this affect. Natural justice is a fundamental common law principle. Such principles will not be abrogated by legislation unless the intention to do so is manifested by unmistakable and unambiguous language. Although subclause 36(b) is unlikely to exclude all aspects of the common law of natural justice, it is important to note that natural justice obligations are applied flexibly and the need for urgent action is one reason why the courts may accept that the content of obligations to give a fair hearing may be diminished or modified. In this regard it is noteworthy that paragraph 37((b)(i) allows the Regulator to require an organisation to give its response to a notice indicating that administrative sanctions may be imposed within 24hours.

The Committee is concerned to understand whether the proposed approach adequately balances the serious health and safety issues envisaged with the fundamental principles of natural justice. The Committee therefore **seeks the Minister’s further explanation** as to whether paragraph 37(b)(i) is sufficient to deal with the problem of exceptional circumstances and also if a prior hearing is to be excluded in ‘exceptional circumstances’ whether consideration has been given to providing for the making of a provisional decision which might be followed promptly by a hearing to an affected organisation.

*Pending the Minister’s reply, the Committee draws Senators’ attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.*



## ***Minister's response - extract***

### **Subclause 36(1)(b) and clause 37**

The Committee was concerned that it may be unclear from subclause 36(1)(b) whether it excluded all natural justice requirements in exceptional circumstances, or only those referred to in clause 37 of the main Bill.

It is not intended for paragraph 36(1)(b) to exclude common law natural justice requirements, but only the specific notice requirements found at clause 37. The explanatory memorandum will be amended to clarify this.

It is appropriate for the NVR to be able to impose the sanctions in question without providing the notice mentioned in clause 37 in exceptional circumstances. This is because there are some industries where the level of risk to an individual or to the public posed by non-compliant training organisations can be very significant. There are some industries in VET where the level of risk to an individual can be so high that on balance the requirement to give a registered training organisation advance notice of a sanction to be imposed is unable to be met. An example of this includes where the supervision of student's use of dangerous machinery does not meet safety standards and immediate action is required to avoid serious personal injury to students. A further example is where a training organisation is fraudulently issuing qualifications that are then relied upon by a licensing body to grant a license, (e.g. electrician's licence), putting the public at risk of danger.

Clause 37 is drafted in similar terms to section 93 ESOS Act and sections 501 and 501A of the *Migration Act* 1958. The notice period of 24 hours is intended to be a minimum and decisions made by the NVR under clause 37 will be made by reference to what is fair in the circumstances.

Under clause 41, NVR registered training organisations may request the NVR to reassess its position in relation to the issues specified in subclauses 41(1) and 41(2). In addition, if a sanction is imposed under subclause 36(2), the Bill provides for an opportunity for the affected person to challenge the decision - see clause 199 (Reviewable decisions) of the Bill. In addition, training organisations could pursue review of a decision to impose a sanction under the *Administrative Decisions (Judicial Review) Act* 1977. The Commonwealth Ombudsman could investigate if a complaint was made to it about the NVR.

The provisions therefore achieve an appropriate balance between protecting the public and providing fairness to training organisations.

### ***Committee Response***

The Committee thanks the Minister for this response and notes that the explanatory memorandum will be amended to clarify that it is intended that common law natural justice requirements will apply with the limited exception of specific notice requirements in exceptional circumstances.

### ***Alert Digest No. 1 of 2011 - extract***

#### **Insufficiently defined administrative power Clause 51**

Subclause 51(1) enables the Regulator to amend an accredited course if ‘the Regulator considers it necessary to do so’. It may do so on receiving an application or on its own initiative (subclause 51(2)). On its face, this is a very broad discretionary power which may have significant ramifications for affected organisations. The explanatory memorandum states at page 30 that it is ‘not envisaged that the NVR would be involved in the substantial re-writing or amendment of courses’ and explains that the power is likely to be used to correct specific errors that have been identified or in response to changes in applicable standards or legislation to which the course refers. The Committee is concerned about the seemingly unnecessary breadth of this discretionary power and **seeks the Minister’s advice** as to whether consideration has been given to the possibility of drafting a more narrowly defined power to better reflect the intended use of this power.

*Pending the Minister’s advice, the Committee draws Senators’ attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee’s terms of reference.*

### ***Minister’s response - extract***

#### **Clause 51 - amending accredited courses**

The Committee was concerned that subclause 51(1) enables the NVR to amend an accredited course if ‘the Regulator considers it necessary to do so’ and that this power is insufficiently defined, and sought advice as to whether consideration has been given to the possibility of drafting a more narrowly defined power.

It is proper that a course can be amended by the NVR when it is satisfied that it is appropriate to do so, so the NVR can ensure the consistency and quality of courses for which the NVR is responsible.

As the explanatory memorandum notes, it is not envisaged that the NVR would be involved in the substantial re-writing or amendment of courses. A more narrowly defined power, however, might mean that the NVR is unable to respond to issues which arise in connection with VET accredited courses. It is not possible to predict in advance all the situations in which the NVR may need to amend VET accredited courses.

### ***Committee Response***

The Committee thanks the Minister for this response, but retains its concern about the potential for this broad power to be used inappropriately. The Committee remains of the view that it should be possible to draft this provision more narrowly or to include legislative safeguards such as listing factors to be taken into account when considering the exercise of the power. The Committee leaves the question of whether the proposed power is appropriate **to the consideration of the Senate as a whole**.

### ***Alert Digest No. 1 of 2011 - extract***

#### **Insufficiently defined administrative powers**

##### **Clause 89**

Clause 89 allows for the appointment of authorised officers—who may execute monitoring and enforcement powers under the bill—and subclause 89(2) states that the Chief Commissioner must not appoint a person as an authorised officer unless satisfied that the person has suitable qualifications and experience to properly exercise the powers of an authorised officer. Given the significance of the proposed powers of authorised officers the Committee **seeks the Minister's advice** as to whether consideration has been given to the inclusion of a legislative provision specifying the qualification and training procedures for authorised officers and guidelines for the execution of the coercive powers exercised by authorised officers (see for example the requirements of the Defence Legislation Amendment (Security of Defence Premises) Bill 2010).

*Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.*

## *Minister's response - extract*

### **Clause 89**

The Committee sought advice on whether consideration has been given to the inclusion of a provision specifying the qualification and training procedures for authorised officers and guidelines for powers exercised by them.

Clause 89 allows for the appointment of authorised officers. The NVR will be an independent statutory authority consisting of three Commissioners approved by the Minister as having appropriate qualifications, knowledge or experience, including the ability to recruit suitable staff to undertake the functions of the Regulator, and the ability to appoint authorised officers. The Commissioners will then recruit appropriately qualified staff to undertake its functions. Under clause 182 of the Bill the staff will be engaged under the *Public Service Act 1999* and will be appointed based on merit and suitability for the role.

The IGA provides at paragraph 6.5, that where appropriate, the NVR will draw on the existing workforce of the state and territory VET Regulators, giving the Regulator ready access to a workforce with suitable qualifications and experience.

VET Regulators currently comply with the *AQTF Standards for Registering Bodies*, which is a document agreed by the Ministerial Council. Under clause 189 of the Bill the Minister can make Standards for VET Regulators with the agreement of the Ministerial Council. The Committee's concerns in relation to ensuring that suitably qualified authorised officers are appointed and adequate training is provided will be taken into account when drafting the new Standards for VET Regulators. The explanatory memorandum will also be amended to include explanation that it is envisaged that guidance may be provided by the Standards for VET Regulators in appointing authorised officers.

### ***Committee Response***

The Committee thanks the Minister for this response and notes the existing framework for appointments and the Minister's commitment to consider the Committee's concerns when the new Standards for VET Regulators are drafted. However, the Committee remains concerned to ensure that authorised officers are appropriately qualified and trained and suggests the inclusion of a legislative provision specifying the qualification and training procedures for authorised officers and guidelines for the execution of the coercive powers exercised by authorised officers (see for example the requirements of the Defence Legislation Amendment (Security of Defence Premises) Bill 2010). The Committee leaves the question of whether the proposed approach is appropriate **to the consideration of the Senate as a whole.**

## ***Alert Digest No. 1 of 2011 - extract***

### **Possible severe penalties Clauses 60 and 61**

Clauses 60 and 61 impose civil penalties for failure to return VET qualifications which have been cancelled in certain circumstances and for purporting to hold a qualification that has been cancelled. The penalties are, respectively, \$11000 and \$26400. The explanatory memorandum does not in any way seek to justify the level of penalty to be imposed. To ensure that there is no undue trespass on rights, it is desirable that civil penalties be consistently imposed across Commonwealth legislation. The Committee therefore **seeks the Minister's clarification** as to why the level of penalties imposed by these provisions are appropriate.

*Pending the Minister's advice the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*

## ***Minister's response - extract***

### **The civil penalties in clauses 60 and 61**

#### **Clause 60**

The Committee was concerned about the maximum penalty which could be imposed (100 penalty units (\$11 000)) under clause 60 for failure to return an cancelled qualification or VET statement of attainment.

The maximum penalty will not always be imposed. The level of maximum penalty, however, is appropriate because where a person holds themselves out as possessing a VET qualification or statement of attainment which has been cancelled, this may have serious implications for the public. For example, many licensed occupations rely heavily on the presentation of documentation of qualifications. These include occupations in the health industries, security, construction and trades. The *December 2009* report by the Independent Commission Against Corruption, '*Report on the Corruption in the Provision and Certification of Security Industry Training*', highlighted the scope for potential corruption in areas where fraudulent or sub-standard qualifications are relied upon by licensing bodies.

Depending on the circumstances, the provisions can be contravened with both serious and less serious effect on others.

Under subparagraph 57(1)(b)(i) the NVR must attempt to serve the affected person with a notice of the intention to cancel their qualification, and the reasons for such an intention. The notice must invite the person to give the NVR a written response to the notice, within certain timeframes. Under clause 58 the NVR must consider the response and, if cancellation occurs, give the person written notice of the decision.

Decisions to cancel a VET qualification or statement of attainment are reviewable decisions for the purpose of the main Bill (clause 199). There will be no offence under clause 60 unless the person affected was aware that the VET qualification or statement of attainment had been cancelled.

### **Clause 61**

The Committee was concerned about the maximum penalty which could be imposed (240 penalty units (\$26400)) under clause 61.

The maximum level will not always be imposed, but is appropriate for the reasons given in relation to clause 60 above.

The contravention referred to in clause 61 (use of a cancelled VET qualification) is similar to the criminal offence of corruption. The penalty benchmark for this type of offence, as outlined at section 5.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), recommends 5 years imprisonment or 300 penalty units.

Section 145.1 of the *Criminal Code Act 1995* (use of a false document with the intention of inducing another person in the other person's capacity as a public official to accept it as genuine) attracts a criminal penalty of 10 years imprisonment.

A comparable civil penalty is found at section 50-5 of the *Tax Agent Services Act 2009* (providing tax agent services if unregistered or representing as registered). The penalty for an individual specified in section 50-5(1) of that Act is 250 penalty units.

The explanatory memorandum will be amended to provide further explanation about clause 61, i.e. about the similar provisions noted above.

### ***Committee Response***

The Committee thanks the Minister for this response and notes that the explanatory memorandum will be amended to include additional information. The Committee leaves the question of whether the proposed approach is appropriate **to the consideration of the Senate as a whole.**

## ***Alert Digest No. 1 of 2011 - extract***

### **Privilege against self-incrimination**

#### **Clause 65**

Clause 65 of the bill abrogates the privilege against self incrimination in relation to the giving of information or production of a document or thing pursuant to clause 62 in relation to the so-called 'penalty privilege'. Although subclause 65(2) provides for a use and derivative use immunity in relation to the privilege against self-incrimination, paragraph 65(2)(f) makes it clear that these immunities do not apply in relation to civil proceedings for a civil penalty provision. Given that in the modern regulatory state civil and administrative penalties are often just as significant (in practical terms) as criminal punishment, it is not clear why a different approach should be taken on the availability of these immunities in relation to the 'penalty privilege'.

The explanatory memorandum argues at page 40 that the approach is appropriate given that the regulator 'will necessarily rely on the information provided by persons who are, or were, connected with current or former nationally registered training organisations in undertaking its regulatory and quality assurance functions, one of the aims of which is to protect the students in these organisations'. Although it is not made explicit, the underlying rationale for this approach may be to be that those persons (who lose their ability to rely on the privilege) are connected to a regulatory scheme, in which they participate voluntarily, and so may be taken to submit to being compelled to provide necessary information. This interpretation of the explanatory memorandum is supported by the further comment at page 40 of the explanatory memorandum that 'the civil penalties and offences provisions are an important way for the [Regulator] to enforce quality standards and maintain integrity in vocational education and training'. The explanatory memorandum also makes the point that information gathered under clause 62 'would otherwise not have been able to be gathered'.

The Committee has accepted that the privilege against self-incrimination is not absolute, but has indicated that the public benefit from its negation should decisively outweigh the resultant harm to individual rights. It is suggested that the mere fact the abrogation of the privilege is most serious in relation to its operation in the context of civil penalties should not be significant in weighing the relevant public interests. Nevertheless, some of the points made in the explanatory memorandum are relevant: that the abrogation only applies in relation to persons 'connected with' a registered training organisation and that the information could not otherwise be gathered. Unfortunately, however, these arguments are brief and the Committee expects that they would be developed further if they are to justify the abrogation of the important privilege against self-incrimination.

To assist in determining whether the public interest in abrogating the privilege decisively outweighs that in the preservation of an important individual right, the Committee **seeks**

**the Minister's further explanation** of the rationale for the approach. In particular, clarification is sought as to the nature and seriousness of harm which may be suffered and the extent to which information gained is can reasonably be expected to serve this public interest. Also, given the extensive search powers set out in Division 2 of the bill, the comment in the explanatory memorandum that relevant information 'would not otherwise be gathered' might be helpfully elaborated.

*Pending the Minister's advice the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*

### ***Minister's response - extract***

#### **Privilege against Self-Incrimination in clause 65**

The Committee stated in part 'although subclause 65(2) provides for a use and derivative use immunity in relation to the privilege against self-incrimination, paragraph 65(2)(1) makes it clear that these immunities do not apply in relation to civil proceedings for a civil penalty provision.' Given that in the modern regulatory state civil and administrative penalties are often just as significant (in practical terms) as criminal punishment, it is not clear why a different approach should be taken on the availability of these immunities in relation to the 'penalty privilege'.

There is not a substantial difference in approach - see subclauses 65(2)(e) and (I). Please let me know if I can be of further assistance in relation to clause 65, in which case I would be grateful for clarification of the Committee's concerns.

#### ***Committee Response***

The Committee thanks the Minister for the explanation, which addresses the Committee's concern.



## ***Alert Digest No. 1 of 2011 - extract***

### **Possible undue trespass on personal rights and liberties**

#### **Clause 62**

Clause 62 of the bill enables the Regulator to request the provision of information and production of documents or things directed to persons who are or were connected with a registered training organisation or former registered training organisation. Although subclause 62(4) states that at least 14 days must be given to comply with a request, a shorter time (not less than 24 hours) may be specified if the Regulator considers this 'reasonably necessary'.

The *Guide* at page 98 states that especially where non-compliance with such a request is an offence (as it is in this case, clause 64) 14 days is considered 'the minimum time in which a response can reasonably be expected.' The explanatory memorandum gives the examples of where a person is likely to leave Australia and where training is being provided in a manner which would result in a health or safety risk as circumstances where a shorter period would be justified. However, given that the legislation allows a shorter period where the Regulator considers this reasonably necessary (ie it is the Regulator's opinion which matters), the circumstances justifying a shorter period would not be subjected to searching review by courts.

The Committee is concerned that this provision may make rights unduly dependent on insufficiently defined administrative powers and **seeks the Minister's advice** as to whether consideration has been given to specifying in the legislation the circumstances in which the Regulator could impose a shorter period rather than leaving this to the opinion of the Regulator.

*Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.*

## ***Minister's response - extract***

### **Issues concerning person rights and liberties**

#### **Clause 62**

The Committee was concerned about possible trespass on personal rights and liberties.

Subclause 62(3) of the NVR Bill allows for a shorter notice period for the production of documents/information (at least 24 hours) in circumstances where the NVR considers it reasonably necessary. Although the Regulator's belief in these circumstances is subjective, it is qualified by subclause 62(1), which requires the Regulator to have reason to believe that a person is capable of producing the documents/information.

The 24 hour timeframe is consistent with existing Commonwealth legislation. For example, subsection 114(2)(b) of the ESOS Act provides that at least 24 hours notice must be provided for production of certain types of documents.

As outlined in the explanatory memorandum, a shorter notice period for production can be a necessity in exceptional circumstances. To specify the circumstances in which the Regulator could impose the shorter notice period would not allow the Regulator sufficient flexibility to tailor the notice requirement to individual situation.

For example, subclause 62(3) requires at least 24 hours notice to be provided, however the Regulator can provide 72 hours notice or one week's notice depending on the circumstances and risk involved. It is not intended that the shorter notice period would be used routinely, but rather in response to specific circumstances.

### ***Committee Response***

The Committee thanks the Minister for this response but remains concerned to ensure that there are safeguards for the proper use of this power, for example limiting its use to certain types of documents (as per the ESOS Act example) or listing factors to be taken into account when considering the exercise of the power. The Committee leaves the question of whether the proposed power is appropriate **to the consideration of the Senate as a whole**.

### ***Alert Digest No. 1 of 2011 - extract***

#### **Possible trespass on personal rights and liberties**

##### **Division 2, clause 68**

Division 2 of the bill allows for searches of premises and the seizure of material through the exercise, by 'authorised officers', of monitoring and enforcement warrants. For the most part these provisions appear to comply with the principles set out in the *Guide*. The following comments can, however, be made. Subclause 68(6) enables an authorised officer, executing an enforcement warrant, to seize evidential material which has not been specified in the warrant where the officer 'believes on reasonable grounds that it is necessary to seize the thing in order to prevent its concealment, loss or destruction'. It appears to the Committee that there is potential for the power to seize material which is not

the kind of evidential material specified in the warrant to be abused. Unfortunately the explanatory memorandum merely repeats the effect of the legislation and does not explain why these powers are necessary and proportionate, including examples of circumstances in which they may be needed, whether they are comparable to powers in other legislation and what safeguards are in place to ensure that they are used appropriately. The Committee therefore **seeks the Minister's advice** about the justification for clause 68(2).

*Pending the Minister's advice the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*

### ***Minister's response - extract***

#### **Subclause 68(6) - Enforcement powers of authorised officers**

The Committee noted that the explanatory memorandum does not explain why the power to seize evidential material of a kind which is not specified in a warrant is necessary, does not provide examples of similar provisions in other legislation, and does not indicate safeguards are in place to ensure they are used appropriately. Subclause 68(6) of the main Bill enables an authorised officer, executing an enforcement warrant, to seize 'other' evidential material not specified in the warrant where the officer believes on reasonable grounds that it is necessary to prevent its concealment, loss or destruction.

This clause is qualified by the objective requirement of belief on reasonable grounds. Furthermore, 'evidential material' as defined in clause 5 of the main Bill means a thing that there are reasonable grounds for suspecting will afford evidence as to the commission or suspected commission of an offence against the Bill, or a thing that there are reasonable grounds for suspecting it is intended to be used for the purpose of committing any such offence. This limits the kind of 'other' evidential material which can be lawfully seized pursuant to this provision.

In comparison, existing Commonwealth legislation allows for broader seizure powers than this, including section 142(7) of the ESOS Act, which allows for the seizure of anything that an officer reasonably believes may be evidence of the commission of any criminal offence. There are other examples of Commonwealth provisions similar to subclause 68(6), for example section 70A(6) of the *National Health Security Act 2007*.

The explanatory memorandum will be amended to include this additional explanation.

### ***Committee Response***

The Committee thanks the Minister for this response, but remains concerned about whether adequate safeguards are in place and leaves the question of whether the proposed power is appropriate **to the consideration of the Senate as a whole**.

### ***Alert Digest No. 1 of 2011 - extract***

#### **Possible trespass on personal rights and liberties Clause 70**

Clause 70 provides that in executing a warrant authorised officers may use such force against things as is necessary and reasonable in the circumstances. The explanatory memorandum restates the provision and gives the example of the moving of furniture or other objects to allow access to documents and other material. Given this limited example of the use of force, this provision is arguably drafted in terms which are too broad. Alternatively, it might be thought that the exercise of this power should be subject to explicit accountability requirements, such as a requirement that any use of force be recorded by video or that the provision does not authorise damage to any property, except in limited circumstances (see, for example subsection 3U(d) of the *Crimes Act*). The Committee **seeks the Minister's advice** as to whether this provision may be more narrowly drafted and whether its exercise may be made more accountable.

*Pending the Minister's advice the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*

### ***Minister's response - extract***

#### **Clause 70 - Use of force in executing a warrant**

The Committee sought advice on whether this provision could be more narrowly drafted and whether its exercise could be made more accountable.

Clause 70 allows an authorised officer to use force against things in exercising a search warrant which is reasonable and necessary in the circumstances. The actions of the

authorised officer are made accountable by the requirements for reasonableness and necessity.

The actions and decisions of the NVR would be subject to a number of review mechanisms such as investigation by the Commonwealth Ombudsman, and decisions of an administrative character made under the Bills would be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.

Clause 70 is relatively narrow in that the force it refers to may only be both reasonable and necessary, i.e. force which is both reasonable and cannot be dispensed with. It would be difficult to draft this provision more narrowly without rendering the provision inflexible.

Clause 70 is similar to existing Commonwealth legislative provisions, for example section 147 of the ESOS Act and Section 38J of the *Mutual Assistance in Criminal Matters Act 1987*.

At least some of the state/territory VET Acts contain provisions which are similar to clause 70, for example the *Vocational Education, Training and Employment Act 2000* (Qld) (section 265), and the *Vocational Education and Training Act 1996* (WA) (section 61C).

The explanatory memorandum will be amended to reflect the additional explanation of clause 70.

### ***Committee Response***

The Committee thanks the Minister for this response, but remains concerned about the breadth of the power and **leaves to the Senate as a whole** the question of whether additional accountability measures - such as a requirement that any use of force be recorded by video or that the provision does not authorise damage to any property, except in limited circumstances (see, for example subsection 3U(d) of the *Crimes Act*) - are appropriate.

### ***Alert Digest No. 1 of 2011 - extract***

#### **Possible trespass on personal rights and liberties** **Division 2, clause 71**

Subclause 71(2) provides that if an officer is authorised to enter premises under a warrant that any person on the premises may be required to answer specified questions and produce specified documents. Failure to comply with such a request is an offence punishable by 30

penalty units. Clause 62 of the bill empowers the Regulator to request the provision of information and production of documents or things. However, the exercise of that power is (in general) subject to the person having at least 14 days to comply with the request. The explanatory memorandum neither explains why clause 71(2) is necessary given the power of the Regulator in clause 62, nor does it address the question of what a reasonable time for compliance with a request under subclause 71(2) might be. The Committee **seeks the Minister's advice** about these issues and the justification for the proposed approach.

*Pending the Minister's advice the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*

### ***Minister's response - extract***

#### **Subclause 71(2) - Authorised officer may ask questions/seek production of documents**

The Committee noted that the explanatory memorandum does not explain why subclause 71(2) is necessary given the power in clause 62, nor address the question of what might be a reasonable time for compliance with subclause 71 (2).

Subclause 71 (2) of the NVR Bill is required to prevent the immediate destruction or loss of evidence, in circumstances where a search is being conducted under warrant. Clause 62 is not relevant to that situation.

When considering whether an offence under subclause 71(3) had been committed or the level of the penalty a court could consider the nature of the request made by the authorised officer and the circumstances.

Similar provisions to subclause 71 (2) are found in existing Commonwealth Acts, including the ESOS Act (s. 133) and the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (s.150(2)).

***Committee Response*** The Committee thanks the Minister for this response and leaves the question of whether the proposed power is appropriate **to the consideration of the Senate as a whole.**

## ***Alert Digest No. 1 of 2011 - extract***

### **Possible trespass on personal rights and liberties**

#### **Division 2, paragraph 85(4)(f)**

Paragraph 85(4)(f) provides that a monitoring warrant must specify the day, not more than 6 months after the issue of the warrant, on which the warrant ceases to be in force. The explanatory memorandum neither explains why such a lengthy period is justified nor indicates whether this is consistent with similar regulatory regimes which authorise the grant of monitoring warrants. The Committee **seeks the Minister's advice** about these issues.

*Pending the Minister's advice the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*

## ***Minister's response - extract***

### **Subclause 85(4)(f) - Content of a monitoring warrant**

The Committee noted that the explanatory memorandum does not explain why the warrant may be in force for up to 6 months and whether this is consistent with similar regulatory regimes.

Subclause 85(4)(f) requires a magistrate issuing a monitoring warrant to specify a timeframe within which the search can occur. Provision for a six month period in which a monitoring warrant can remain active allows the magistrate flexibility to determine an appropriate and reasonable timeframe according to individual circumstances, which could include a need for multiple searched to be made.

The six month timeframe is consistent with existing Commonwealth legislation, including *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (s. 159(4)) and the *Building Energy Efficiency Disclosure Act 2010* (s. 47(4)(1)).

The explanatory memorandum will be amended to include this additional explanation.

### ***Committee Response***

The Committee thanks the Minister for this response.

### ***Alert Digest No. 1 of 2011 - extract***

#### **Possible trespass on personal rights and liberties**

##### **Division 2**

The Committee notes that there is no requirement in the bill that, as a general rule, searches should be conducted during reasonable hours and on reasonable notice. The Committee is aware that there may be reasons for this approach, but in the absence of an explanation in the explanatory memorandum, the Committee **seeks the Minister's advice** as to whether consideration has been given to including a provision dealing with this matter.

*Pending the Minister's advice the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*

### ***Minister's response - extract***

#### **Part 5 Division 2 - Requirement for searches to be conducted during reasonable hours and on reasonable notice**

The Committee noted that there is no requirement in the main Bill that, as a general rule, searches should be conducted during reasonable hours and on reasonable notice.

Where an authorised officer is authorised to enter premises because the occupier of the premises consented to the entry, then the search will not occur at times or with notice other than that which is consented to by the occupier.

Warrants under clauses 85 and 86 must state whether the entry is authorised to be made at any time or within specified hours. The warrant could therefore not enable searches at times other than those which the magistrate issuing the warrant has determined.

This provision is similar to those in existing Commonwealth Acts, including the ESOS Act and the *Anti-Money Laundering and Counter- Terrorism Financing Act 2006*.



The provision allows for flexibility to determine the specific time at which a search may take place in lieu of a more general provision stipulating that searches must be conducted during reasonable hours and on reasonable notice. Some searches may need to be conducted as soon as possible, for example in the situation of a provider who is acting to destroy evidence on site, or where health, safety or security issues are involved, and this provision caters for those circumstances. It should also be noted that training providers themselves can operate at unusual hours depending on the industry they are servicing.

The explanatory memorandum will be amended to include further explanation about this.

### ***Committee Response***

The Committee thanks the Minister for this response.

### ***Alert Digest No. 1 of 2011 - extract***

#### **Broad delegation**

#### **Clauses 224, 225 and 226**

Clause 224 of the bill enables the Regulator to delegate all or any of the Regulator's powers and functions to a member of the staff of the Regulatory; a consultant; a Commonwealth authority; or a person who holds any office or appointment under a law of the Commonwealth. Unfortunately, the explanatory memorandum makes no effort to explain the breadth of the categories of persons whom may hold such a delegation. Of particular concern is the power to delegate important regulatory functions to persons outside the Commonwealth public service, including persons engaged as consultants under clause 84 of the bill.

A similar issue arises in relation to clause 225, which enables the delegation of powers to an occupational licensing body or other industrial body that 'deals with, or has an interest in, matters relating to vocational education and training'. The explanatory memorandum does not explain the justification for this approach. Nor does the explanatory memorandum seek to justify the necessity of the Regulator's capacity to delegate to a registered training organisation under clause 226 the Regulator's function of amending the organisation's scope of registration or accrediting a course.

The Committee **seeks the Minister's advice** about the appropriateness of these delegations.

*Pending the Minister's reply, The Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference and they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.*

### ***Minister's response - extract***

#### **The scope of the delegation of legislative powers found in clauses 224, 225 and 226**

The Committee was concerned in relation to the scope for delegation of power in clauses 224, 225 and 226.

The explanatory memorandum will be amended to explain the purpose of delegation by the NVR in relation to each of these clauses.

Delegation will allow for a transition of regulatory responsibilities to the NVR. The Regulator will be taking on functions currently carried out in eight different jurisdictions and during its first few years of operation will require the ability to delegate to enable a smooth transition.

The IGA includes a provision that the NVR will 'provide delegations of functions on a risk basis to RTOs or other bodies where appropriate'. The IGA further contains a provision that the Regulator will 'enter into agreements with other relevant regulatory and licensing agencies as appropriate'

The NVR will consist of three Commissioners approved by the Minister as having appropriate qualifications, knowledge or experience. Under clause 215 the Regulator will be responsible for reporting annually to the Ministerial Council on its performance, including the performance of delegates. This framework will ensure consistency of regulation nationally.

#### **Clause 224**

The broad scope for delegation to government authorities is consistent with current arrangements. For example in Queensland, the Queensland Studies Authority currently has delegation to regulate delivery of VET in schools from the Queensland Training and Employment Recognition Council.

Part of the current reform of the regulation of education includes the implementation of the Tertiary Education Quality and Standards Agency (TEQSA) which will regulate tertiary

education providers. For dual sector providers the NVR's ability to delegate to TEQSA will reduce the regulatory burden for them.

Delegates under clause 224 are required to comply with any direction made by the Regulator.

#### **Clause 225**

Clause 225 allows for delegation to occupational licensing bodies or other occupational licensing bodies. There are industries which have additional licensing requirements, for example electrical workers and gas fitters, and to ensure compliance with both licensing and regulatory requirements, registered training providers will continue to be regulated by more than one body. An additional aim of the current reform in the VET sector is to reduce the regulatory burden on stakeholders. By allowing for delegation to and from other bodies such as licensing authorities, this reduces the number of regulatory bodies with whom the provider deals with directly, reducing the regulatory burden.

In accordance with the principles of delegation the NVR will retain responsibility for decisions made under delegation. Delegates under clause 225 are required to comply with any direction made by the Regulator.

#### **Clause 226**

Clause 226 allows for the NVR to delegate to a registered training organisation the function of amending the organisation's scope of registration or accrediting a course. This arrangement currently takes place in respect of state funded registered training organisations such as TAFEs. In the interests of competitive neutrality, clause 226 has been drafted to allow for private registered training organisations that meet the same high level of quality standards to have the same opportunity as currently given to state funded TAFEs.

#### ***Committee Response***

The Committee thanks the Minister for this response and **leaves to the Senate as a whole** the question of whether these delegations of power are appropriate.

# National Vocational Education and Training Regulator (Transitional Provisions) Bill 2010

Introduced into the Senate on 26 November 2010

Portfolio: Education, Employment and Workplace Relations

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 1 of 2011*. The Minister responded to the Committee's comments in a letter dated on 28 February 2011. A copy of the letter is attached to this report.

### *Alert Digest No. 1 of 2011 - extract*

## **Background**

This bill provides for the transfer of existing registrations, applications and other matters from state regulators to the National VET Regulator with minimal disruption to existing registered training organisations.

### **Henry VII clause**

#### **Retrospective effect**

#### **Clause 30**

Subclause 30(2) provides that transitional regulations which may be made under subclause 30(1) of the bill 'have effect despite anything else in this Act'. Technically this is a Henry VIII clause at its effect is to enable regulations to override primary legislation. The Committee has long drawn attention such clauses as they may inappropriately delegate legislative power. In this case it is difficult to assess the appropriateness of the delegation of legislative power as the explanatory memorandum is silent on the issue.

In addition, subclause 30(4) provides that despite subsection 12(2) of the *LIA*, regulations may be expressed to take effect from a day before they are registered under that Act. Pursuant to this provision regulations may be lawful despite having a retrospective effect. Again the explanatory memorandum is silent as to the appropriateness of this approach. The Committee is aware that there may be legitimate reasons for the approach adopted in subclauses 30(2) and 30(4), but expects that they would be outlined in the explanatory memorandum. The Committee therefore **seeks the Minister's advice** as to the reasons why these provisions are required.

*Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference and they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.*

### ***Minister's response - extract***

#### Clause 30 of the Transitional Provisions Bill

The Committee inquired whether there is sufficient reason for the approach taken by subclause 30(2) and 30(4).

These provisions are very similar to those in section 6 of the recent *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*. As noted above, the main Bill and Transitional Bill rely on a referral of power from NSW, and are to enable the Commonwealth to undertake functions which have previously been performed by the states and territories. While the Commonwealth has worked closely with the states and territories to identify all transitional issues, it is possible that, given the number of jurisdictions concerned, an unforeseen issue may arise.

There is therefore a need to ensure that the regulations can provide for things which were not foreseen at the time the legislation was drafted, to avoid the need to pass further legislation to address things which were not foreseen. It may be that those things will need to be addressed on an urgent basis, and these provisions provide the necessary flexibility to do so.

These provisions therefore provide greater certainty for training organisations and consumers of their services.

The explanatory memorandum for clause 30 of the Transitional Bill will be amended to include this additional explanation.

I trust this information enables the Committee to finalise its consideration of the Bill.

***Committee Response***

The Committee thanks the Minister for this response and **leaves to the Senate as a whole the question of whether the approach is appropriate.**

Senator the Hon Helen Coonan  
Chair



**NICK XENOPHON**  
Independent Senator for South Australia  
**AUSTRALIAN SENATE**

**RECEIVED**

22 FEB 2011

Senate Standing C'ttee  
for the Scrutiny  
of Bills

Our ref: DAWES-M/EE

Toni Dawes  
Committee Secretary  
Standing Committee for the Scrutiny of Bills  
Parliament House  
Canberra ACT 2600

Dear Ms Dawes,

**Re: Foreign Acquisitions Amendment (Agricultural Land) Bill 2010**

I write in response to your letter dated 09 February outlining the Scrutiny of Bills' Committee's concerns about the Foreign Acquisitions Amendment (Agricultural Land) Bill 2010.

The first concern raised in your letter is around Item 11 of the Bill and the Committee's concern that it is possibly too a severe penalty.

Please be advised that the penalty that has been applied is consistent with the current legislation as relevant to 'Australian urban land'.

Section 26A of the Foreign Acquisitions and Takeovers Act 1975 states:

*2) Where a person to whom this section applies:*

*(a) enters into an agreement by virtue of which he or she acquires an interest in Australian urban land and did not, before entering into the agreement, furnish to the Treasurer a notice stating his or her intention to enter into that agreement; or*

*(b) having furnished a notice to the Treasurer stating his or her intention to enter into an agreement by virtue of which he or she is to acquire an interest in Australian urban land, enters into that agreement before:*

*(i) the end of 40 days after the day on which the notice was received by the Treasurer; or*

*(ii) the day on which advice is given that the Commonwealth Government does not object to the person entering into that agreement (whether or not the advice is subject to conditions imposed under subsection 25(1A));*

*whichever first occurs;*

*the person is guilty of an offence and is punishable, on conviction, by a fine not exceeding 500 penalty units or imprisonment for a period not exceeding 2 years, or both.*

With regard to the Committee's second concern, that the Bill includes insufficiently defined administrative powers, again the provisions in the Bill are consistent with the current Act as applied to 'Australian urban land'.

Section 21A of the Foreign Acquisitions and Takeovers Act 1975 states:

*(1) In this section:*

*"foreign person" means:*

*(a) a foreign corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or*

*(b) a foreign corporation in which 2 or more persons, each of whom is a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.*

*(2) Where the Treasurer is satisfied that:*

*(a) a foreign person proposes to acquire an interest in Australian urban land; and*

*(b) the proposed acquisition would be contrary to the national interest;*

*the Treasurer may make an order prohibiting the proposed acquisition.*

*(3) Where the Treasurer makes such an order in relation to an interest in Australian urban land, he or she may also make an order in relation to:*

*(a) a specified foreign person; or*

*(b) a specified foreign person and specified associates, or the persons included in a specified class of associates, of that person;*

*directing that that person shall not, or none of those persons shall, whether alone or together with any other or others of them, acquire:*

*(a) any interest in the land or other thing concerned; or*

*(b) any such interest except to a specified extent.*



*(4) Where a foreign person has acquired an interest in Australian urban land and the Treasurer is satisfied that the acquisition is contrary to the national interest, the Treasurer may make an order directing the foreign person to dispose of that interest within a specified period to any person or persons approved in writing by the Treasurer.*

*(5) Before the end of the period specified in the order or of that period as extended under this subsection, the Treasurer may, by writing signed by the Treasurer, extend or further extend that period or that period as so extended, and in that event the order has effect as if the period as so extended or further extended had been specified in the order.*

*(6) For the purposes of subsection (4), but without limiting the generality of that subsection:*

*(a) a foreign person shall be taken to have acquired an interest in Australian urban land if the person becomes, with or without the knowledge of the person, a beneficiary in a trust estate (other than a deceased estate) that consists of or includes an interest in Australian urban land; and*

*(b) where paragraph (a) applies and the trust estate is a discretionary trust estate—a reference to the disposal of the interest of the foreign person is a reference to the disposal of such assignable benefits in relation to that trust estate as may ultimately vest in that foreign person.*

*(7) The Treasurer shall not refuse to approve a person for the purposes of subsection (4) unless the Treasurer is satisfied that the person is a foreign person and that it would be contrary to the national interest for that person to acquire the interest concerned.*

I hope this information assists the Committee.

Further, please be advised that this Bill has been referred to the Senate Economics Committee for inquiry and so any concerns will be addressed as part of that inquiry.

Please feel free to contact me directly if you would like to discuss this matter further.

Yours Sincerely,



NICK XENOPHON

2/12/2011



**Senator Chris Evans**

Leader of the Government in the Senate

Minister for Tertiary Education, Skills, Jobs and Workplace Relations

**RECEIVED**

- 1 MAR 2011

Senate Standing C'ttee  
for the Scrutiny  
of Bills

Senator the Hon Helen Coonan  
Chair  
Standing Committee for the Scrutiny of Bills  
Parliament House  
CANBERRA ACT 2600

Dear Senator *Helen*

Thank you for your letter of 10 February 2011 on behalf of the Standing Committee for the Scrutiny of Bills regarding the Committee's comments in *Alert Digest No. 1 of 2011*, concerning the National Vocational Education and Training Regulator Bill 2010 ('the main Bill') and the National Vocational Education and Training Regulator (Transitional Provisions) Bill 2010 ('the Transitional Bill').

Unless otherwise indicated, all references to clauses are to clauses in the main Bill.

I note the Committee has asked for advice about:

1. whether the power to charge a fee under subclause 17(4) for considering an application for registration is insufficiently defined
2. whether natural justice issues are appropriately dealt with by clauses 36 and 37
3. whether administrative powers under clauses 51 and 89 have been defined appropriately
4. the justification for the penalties in clauses 60, 61
5. the justification for the possible trespass on personal rights and liberties found in clauses 62, 68, 70, 71, 85 and Division 2 of Part 5
6. the justification for the scope of the delegation of legislative powers found in clauses 224, 225 and 226
7. the justification for the retrospective application of Clause 30 of the Transitional Provisions Bill.

I have noted the Committee's concern in relation to the possible need for further information in the explanatory memoranda for the Bills about some of the above matters. It is the intention of the Australian Government to review and amend the explanatory memoranda taking these concerns into account as detailed below.



Before specifically addressing the Committee's comments below, I make the following general comments about the Bills.

### **Intergovernmental Agreement**

Following a Council of Australian Governments' decision in December 2009 it was agreed that there would be a national system of regulation in the vocational education and training (VET) sector to enable reform and ensure consistency across Australia.

There is an Intergovernmental Agreement (IGA) between the Government and the state and territory governments setting out the terms for agreement to establish the national regulation of VET, including the establishment of the National VET Regulator (NVR). The IGA contains detailed provisions of the agreed roles of the NVR, the Government, and the Ministerial Council for Tertiary Education and Employment (the Ministerial Council). These roles were the subject of ongoing negotiation and discussion prior to the agreement to refer powers to the Commonwealth, and are reflected in the drafting of the main Bill. This IGA was agreed in principle by the Ministerial Council in June 2010 and by the Council of Australian Governments (COAG) on 13 February 2011 and is expected to be signed prior to the passage of the legislation.

### **Consultation with States and Territories for the NVR Bills**

The main Bill and Transitional Bill were drafted following extensive consultation with state and territory representatives that took place throughout 2010. These consultations included broad open consultations with training providers, as well as discussions with Industry Skills Councils, peak provider bodies, peak employer bodies and the Australian Council of Trade Unions (ACTU). State governments and existing regulators were closely involved to ensure that best practice is reflected in the new legislation and that current issues and weaknesses of regulatory regimes have been avoided. In addition to this consultation process prior to and during the development of the legislation, stakeholders were given an opportunity to review and provide comment on a final draft of the Bill through an exposure draft process held in Melbourne on 29 October 2010.

The Bills contain similar regulatory powers to the state and territory regimes, with some additional provisions to address the difficulties the jurisdictions have encountered under current state regulatory arrangements.

### **Text based referral of power**

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.



## **Appointment and engagement of Commissioners and staff of the National VET Regulator (NVR)**

The NVR will consist of three Commissioners approved by the Minister as having appropriate qualifications, knowledge or experience, including the ability to recruit suitable staff to undertake the functions of the Regulator, and the ability to appoint authorised officers. The Commissioners will then recruit appropriately qualified staff to undertake its functions. Under clause 182 of the main Bill the staff will be engaged under the *Public Service Act 1999* and will be appointed based on merit and suitability for the role.

## **Reporting**

Under clause 215 the NVR will be responsible for reporting annually to the Parliament and the Ministerial Council on its performance, including the performance of delegates.

## **General comments on investigative and enforcement provisions**

Many of the investigative and enforcement powers found in the main Bill are in line with the *Education Services for Overseas Students Act 2000* (ESOS Act). They are also comparable to powers found in the *Tax Agent Services Act 2009*, and *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

The maximum levels for civil penalties are high because deterrence is considered necessary to improve the quality of the VET sector. As there is no corporate multiplier for civil penalties, and the size of providers range from single person entities to large corporations, it is necessary that the Bill allows for a range of penalties. These penalties are important to ensure the improved regulation of this sector.

## **Subclause 17(4)**

The Committee has raised a concern about the ability of the NVR to set fees (for considering an application to be registered as an NVR registered training organisation) under subclause 17(4) of the Bill. The reason for the concern is that this subclause does not provide that the fee will be set by the Minister by legislative instrument under clause 232.

Paragraph 6.4 of the IGA is clear that the Ministerial Council will be responsible for approving the fee structure for the NVR. This is reflected in the requirement of subclause 232(2) that before making a legislative instrument determining fees for, among other things, goods or services in respect of registration as a registered training organisation, the Minister must get the Ministerial Council's agreement to the amount of the fee

As the Committee has noted, clause 232 would enable the Minister to determine the fees payable under subclause 17(4). All fees payable to the NVR under this Bill, including those payable under subclause 17(4) of the Bill will be determined under clause 232.

The explanatory memorandum for clauses 17 and 232 will be amended to reflect this intention.

Additionally, fees charged under the Bill must not amount to taxation and can only be imposed on a cost recovery basis in accordance with the *Australian Government Cost Recovery Guidelines* (Cost Recovery Guidelines). Among other things, the Cost Recovery Guidelines state that:

- Australian Government agencies should set charges to recover the costs of products and services when it is efficient to do so.
- Agencies that undertake regulatory activities (such as the NVR) should generally include administration costs when determining appropriate charges.
- Cost recovery arrangements are to be considered 'significant cost recovery arrangements' where, amongst other things, the agency's total cost recovery receipts will equal \$5 million or more per annum—this is likely to be the case with the NVR.
- Agencies with significant cost recovery arrangements should undertake appropriate stakeholder consultations on their fees (including with other agencies), as well as Cost Recovery Impact Statements—which the agency's chief executive, secretary or board must certify complies with the Cost Recovery Guidelines.
- Agencies must include a summary of the Cost Recovery Impact Statements in their portfolio budget submissions and statements.
- Agencies must review their significant cost recovery arrangements at least every 5 years.

The NVR will implement the above safeguards to ensure that the fees to be imposed by the NVR are appropriate.

#### **Subclause 36(1)(b) and clause 37**

The Committee was concerned that it may be unclear from subclause 36(1)(b) whether it excluded all natural justice requirements in exceptional circumstances, or only those referred to in clause 37 of the main Bill.

It is not intended for paragraph 36(1)(b) to exclude common law natural justice requirements, but only the specific notice requirements found at clause 37. The explanatory memorandum will be amended to clarify this.

It is appropriate for the NVR to be able to impose the sanctions in question without providing the notice mentioned in clause 37 in exceptional circumstances. This is because there are some industries where the level of risk to an individual or to the public posed by non-compliant training organisations can be very significant. There are some industries in VET where the level of risk to an individual can be so high that on balance the requirement to give a registered training organisation advance notice of a sanction to be imposed is unable to be met. An example of this includes where



the supervision of student's use of dangerous machinery does not meet safety standards and immediate action is required to avoid serious personal injury to students. A further example is where a training organisation is fraudulently issuing qualifications that are then relied upon by a licensing body to grant a license, (e.g. electrician's licence), putting the public at risk of danger.

Clause 37 is drafted in similar terms to section 93 ESOS Act and sections 501 and 501A of the *Migration Act 1958*. The notice period of 24 hours is intended to be a minimum and decisions made by the NVR under clause 37 will be made by reference to what is fair in the circumstances.

Under clause 41, NVR registered training organisations may request the NVR to reassess its position in relation to the issues specified in subclauses 41(1) and 41(2). In addition, if a sanction is imposed under subclause 36(2), the Bill provides for an opportunity for the affected person to challenge the decision — see clause 199 (Reviewable decisions) of the Bill. In addition, training organisations could pursue review of a decision to impose a sanction under the *Administrative Decisions (Judicial Review) Act 1977*. The Commonwealth Ombudsman could investigate if a complaint was made to it about the NVR.

The provisions therefore achieve an appropriate balance between protecting the public and providing fairness to training organisations.

### **Clause 51 – amending accredited courses**

The Committee was concerned that subclause 51(1) enables the NVR to amend an accredited course if 'the Regulator considers it necessary to do so' and that this power is insufficiently defined, and sought advice as to whether consideration has been given to the possibility of drafting a more narrowly defined power.

It is proper that a course can be amended by the NVR when it is satisfied that it is appropriate to do so, so the NVR can ensure the consistency and quality of courses for which the NVR is responsible.

As the explanatory memorandum notes, it is not envisaged that the NVR would be involved in the substantial re-writing or amendment of courses. A more narrowly defined power, however, might mean that the NVR is unable to respond to issues which arise in connection with VET accredited courses. It is not possible to predict in advance all the situations in which the NVR may need to amend VET accredited courses.

### **Clause 89**

The Committee sought advice on whether consideration has been given to the inclusion of a provision specifying the qualification and training procedures for authorised officers and guidelines for powers exercised by them.



Clause 89 allows for the appointment of authorised officers. The NVR will be an independent statutory authority consisting of three Commissioners approved by the Minister as having appropriate qualifications, knowledge or experience, including the ability to recruit suitable staff to undertake the functions of the Regulator, and the ability to appoint authorised officers. The Commissioners will then recruit appropriately qualified staff to undertake its functions. Under clause 182 of the Bill the staff will be engaged under the *Public Service Act 1999* and will be appointed based on merit and suitability for the role.

The IGA provides at paragraph 6.5, that where appropriate, the NVR will draw on the existing workforce of the state and territory VET Regulators, giving the Regulator ready access to a workforce with suitable qualifications and experience.

VET Regulators currently comply with the *AQTF Standards for Registering Bodies*, which is a document agreed by the Ministerial Council. Under clause 189 of the Bill the Minister can make Standards for VET Regulators with the agreement of the Ministerial Council. The Committee's concerns in relation to ensuring that suitably qualified authorised officers are appointed and adequate training is provided will be taken into account when drafting the new Standards for VET Regulators. The explanatory memorandum will also be amended to include explanation that it is envisaged that guidance may be provided by the Standards for VET Regulators in appointing authorised officers.

## **The civil penalties in clauses 60 and 61**

### **Clause 60**

The Committee was concerned about the maximum penalty which could be imposed (100 penalty units (\$11 000)) under clause 60 for failure to return an cancelled qualification or VET statement of attainment.

The maximum penalty will not always be imposed. The level of maximum penalty, however, is appropriate because where a person holds themselves out as possessing a VET qualification or statement of attainment which has been cancelled, this may have serious implications for the public. For example, many licensed occupations rely heavily on the presentation of documentation of qualifications. These include occupations in the health industries, security, construction and trades.

The December 2009 report by the Independent Commission Against Corruption, '*Report on the Corruption in the Provision and Certification of Security Industry Training*', highlighted the scope for potential corruption in areas where fraudulent or sub-standard qualifications are relied upon by licensing bodies.

Depending on the circumstances, the provisions can be contravened with both serious and less serious effect on others.

Under subparagraph 57(1)(b)(i) the NVR must attempt to serve the affected person with a notice of the intention to cancel their qualification, and the reasons for such an intention. The notice must invite the person to give the NVR a written response to the notice, within certain timeframes. Under clause 58 the NVR must consider the response and, if cancellation occurs, give the person written notice of the decision.



Decisions to cancel a VET qualification or statement of attainment are reviewable decisions for the purpose of the main Bill (clause 199). There will be no offence under clause 60 unless the person affected was aware that the VET qualification or statement of attainment had been cancelled.

### **Clause 61**

The Committee was concerned about the maximum penalty which could be imposed (240 penalty units (\$26 400)) under clause 61.

The maximum level will not always be imposed, but is appropriate for the reasons given in relation to clause 60 above.

The contravention referred to in clause 61 (use of a cancelled VET qualification) is similar to the criminal offence of corruption. The penalty benchmark for this type of offence, as outlined at section 5.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), recommends 5 years imprisonment or 300 penalty units.

Section 145.1 of the *Criminal Code Act 1995* (use of a false document with the intention of inducing another person in the other person's capacity as a public official to accept it as genuine) attracts a criminal penalty of 10 years imprisonment.

A comparable civil penalty is found at section 50-5 of the *Tax Agent Services Act 2009* (providing tax agent services if unregistered or representing as registered). The penalty for an individual specified in section 50-5(1) of that Act is 250 penalty units.

The explanatory memorandum will be amended to provide further explanation about clause 61, i.e. about the similar provisions noted above.

### **Privilege against Self-Incrimination in clause 65**

The Committee stated in part 'although subclause 65(2) provides for a use and derivative use immunity in relation to the privilege against self-incrimination, paragraph 65(2)(f) makes it clear that these immunities do not apply in relation to civil proceedings for a civil penalty provision.' Given that in the modern regulatory state civil and administrative penalties are often just as significant (in practical terms) as criminal punishment, it is not clear why a different approach should be taken on the availability of these immunities in relation to the 'penalty privilege'.

There is not a substantial difference in approach - see subclauses 65(2)(e) and (f). Please let me know if I can be of further assistance in relation to clause 65, in which case I would be grateful for clarification of the Committee's concerns.

### **Issues concerning person rights and liberties**

#### **Clause 62**

The Committee was concerned about possible trespass on personal rights and liberties.



Subclause 62(3) of the NVR Bill allows for a shorter notice period for the production of documents/information (at least 24 hours) in circumstances where the NVR considers it reasonably necessary. Although the Regulator's belief in these circumstances is subjective, it is qualified by subclause 62(1), which requires the Regulator to have reason to believe that a person is capable of producing the documents/information.

The 24 hour timeframe is consistent with existing Commonwealth legislation. For example, subsection 114(2)(b) of the ESOS Act provides that at least 24 hours notice must be provided for production of certain types of documents.

As outlined in the explanatory memorandum, a shorter notice period for production can be a necessity in exceptional circumstances. To specify the circumstances in which the Regulator could impose the shorter notice period would not allow the Regulator sufficient flexibility to tailor the notice requirement to individual situation.

For example, subclause 62(3) requires at least 24 hours notice to be provided, however the Regulator can provide 72 hours notice or one week's notice depending on the circumstances and risk involved. It is not intended that the shorter notice period would be used routinely, but rather in response to specific circumstances.

#### **Subclause 68(6) — Enforcement powers of authorised officers**

The Committee noted that the explanatory memorandum does not explain why the power to seize evidential material of a kind which is not specified in a warrant is necessary, does not provide examples of similar provisions in other legislation, and does not indicate safeguards are in place to ensure they are used appropriately

Subclause 68(6) of the main Bill enables an authorised officer, executing an enforcement warrant, to seize 'other' evidential material not specified in the warrant where the officer believes on reasonable grounds that it is necessary to prevent its concealment, loss or destruction.

This clause is qualified by the objective requirement of belief on reasonable grounds. Furthermore, 'evidential material' as defined in clause 5 of the main Bill means a thing that there are reasonable grounds for suspecting will afford evidence as to the commission or suspected commission of an offence against the Bill, or a thing that there are reasonable grounds for suspecting is intended to be used for the purpose of committing any such offence. This limits the kind of 'other' evidential material which can be lawfully seized pursuant to this provision.

In comparison, existing Commonwealth legislation allows for broader seizure powers than this, including section 142(7) of the ESOS Act, which allows for the seizure of anything that an officer reasonably believes may be evidence of the commission of any criminal offence.

There are other examples of Commonwealth provisions similar to subclause 68(6), for example section 70A(6) of the *National Health Security Act 2007*.

The explanatory memorandum will be amended to include this additional explanation.



### **Clause 70 — Use of force in executing a warrant**

The Committee sought advice on whether this provision could be more narrowly drafted and whether its exercise could be made more accountable.

Clause 70 allows an authorised officer to use force against things in exercising a search warrant which is reasonable and necessary in the circumstances. The actions of the authorised officer are made accountable by the requirements for reasonableness and necessity.

The actions and decisions of the NVR would be subject to a number of review mechanisms such as investigation by the Commonwealth Ombudsman, and decisions of an administrative character made under the Bills would be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.

Clause 70 is relatively narrow in that the force it refers to may only be both reasonable and necessary, i.e. force which is both reasonable and cannot be dispensed with. It would be difficult to draft this provision more narrowly without rendering the provision inflexible.

Clause 70 is similar to existing Commonwealth legislative provisions, for example section 147 of the ESOS Act and Section 38J of the *Mutual Assistance in Criminal Matters Act 1987*.

At least some of the state/territory VET Acts contain provisions which are similar to clause 70, for example the *Vocational Education, Training and Employment Act 2000* (Qld) (section 265), and the *Vocational Education and Training Act 1996* (WA) (section 61C).

The explanatory memorandum will be amended to reflect the additional explanation of clause 70.

### **Subclause 71(2) — Authorised officer may ask questions/seek production of documents**

The Committee noted that the explanatory memorandum does not explain why subclause 71(2) is necessary given the power in clause 62, nor address the question of what might be a reasonable time for compliance with subclause 71(2).

Subclause 71(2) of the NVR Bill is required to prevent the immediate destruction or loss of evidence, in circumstances where a search is being conducted under warrant. Clause 62 is not relevant to that situation.

When considering whether an offence under subclause 71(3) had been committed or the level of the penalty a court could consider the nature of the request made by the authorised officer and the circumstances.

Similar provisions to subclause 71(2) are found in existing Commonwealth Acts, including the ESOS Act (s. 133) and the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (s. 150(2)).

### **Subclause 85(4)(f) — Content of a monitoring warrant**

The Committee noted that the explanatory memorandum does not explain why the warrant may be in force for up to 6 months and whether this is consistent with similar regulatory regimes.

Subclause 85(4)(f) requires a magistrate issuing a monitoring warrant to specify a timeframe within which the search can occur. Provision for a six month period in which a monitoring warrant can remain active allows the magistrate flexibility to determine an appropriate and reasonable timeframe according to individual circumstances, which could include a need for multiple searches to be made.

The six month timeframe is consistent with existing Commonwealth legislation, including *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (s. 159(4)) and the *Building Energy Efficiency Disclosure Act 2010* (s. 47(4)(f)).

The explanatory memorandum will be amended to include this additional explanation.

### **Part 5 Division 2 — Requirement for searches to be conducted during reasonable hours and on reasonable notice**

The Committee noted that there is no requirement in the main Bill that, as a general rule, searches should be conducted during reasonable hours and on reasonable notice.

Where an authorised officer is authorised to enter premises because the occupier of the premises consented to the entry, then the search will not occur at times or with notice other than that which is consented to by the occupier.

Warrants under clauses 85 and 86 must state whether the entry is authorised to be made at any time or within specified hours. The warrant could therefore not enable searches at times other than those which the magistrate issuing the warrant has determined.

This provision is similar to those in existing Commonwealth Acts, including the ESOS Act and the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

The provision allows for flexibility to determine the specific time at which a search may take place in lieu of a more general provision stipulating that searches must be conducted during reasonable hours and on reasonable notice. Some searches may need to be conducted as soon as possible, for example in the situation of a provider who is acting to destroy evidence on site, or where health, safety or security issues are involved, and this provision caters for those circumstances. It should also be noted that training providers themselves can operate at unusual hours depending on the industry they are servicing.

The explanatory memorandum will be amended to include further explanation about this.



### **The scope of the delegation of legislative powers found in clauses 224, 225 and 226**

The Committee was concerned in relation to the scope for delegation of power in clauses 224, 225 and 226.

The explanatory memorandum will be amended to explain the purpose of delegation by the NVR in relation to each of these clauses.

Delegation will allow for a transition of regulatory responsibilities to the NVR. The Regulator will be taking on functions currently carried out in eight different jurisdictions and during its first few years of operation will require the ability to delegate to enable a smooth transition.

The IGA includes a provision that the NVR will 'provide delegations of functions on a risk basis to RTOs or other bodies where appropriate'. The IGA further contains a provision that the Regulator will 'enter into agreements with other relevant regulatory and licensing agencies as appropriate'

The NVR will consist of three Commissioners approved by the Minister as having appropriate qualifications, knowledge or experience. Under clause 215 the Regulator will be responsible for reporting annually to the Ministerial Council on its performance, including the performance of delegates. This framework will ensure consistency of regulation nationally.

#### **Clause 224**

The broad scope for delegation to government authorities is consistent with current arrangements. For example in Queensland, the Queensland Studies Authority currently has delegation to regulate delivery of VET in schools from the Queensland Training and Employment Recognition Council.

Part of the current reform of the regulation of education includes the implementation of the Tertiary Education Quality and Standards Agency (TEQSA) which will regulate tertiary education providers. For dual sector providers the NVR's ability to delegate to TEQSA will reduce the regulatory burden for them.

Delegates under clause 224 are required to comply with any direction made by the Regulator.

#### **Clause 225**

Clause 225 allows for delegation to occupational licensing bodies or other occupational licensing bodies. There are industries which have additional licensing requirements, for example electrical workers and gas fitters, and to ensure compliance with both licensing and regulatory requirements, registered training providers will continue to be regulated by more than one body. An additional aim of the current reform in the VET sector is to reduce the regulatory burden on stakeholders. By allowing for delegation to and from other bodies such as licensing authorities, this reduces the number of regulatory bodies with whom the provider deals with directly, reducing the regulatory burden.

In accordance with the principles of delegation the NVR will retain responsibility for decisions made under delegation. Delegates under clause 225 are required to comply with any direction made by the Regulator.

#### **Clause 226**

Clause 226 allows for the NVR to delegate to a registered training organisation the function of amending the organisation's scope of registration or accrediting a course. This arrangement currently takes place in respect of state funded registered training organisations such as TAFEs. In the interests of competitive neutrality, clause 226 has been drafted to allow for private registered training organisations that meet the same high level of quality standards to have the same opportunity as currently given to state funded TAFEs.

#### **Clause 30 of the Transitional Provisions Bill.**

The Committee inquired whether there is sufficient reason for the approach taken by subclause 30(2) and 30(4).

These provisions are very similar to those in section 6 of the recent *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*.

As noted above, the main Bill and Transitional Bill rely on a referral of power from NSW, and are to enable the Commonwealth to undertake functions which have previously been performed by the states and territories. While the Commonwealth has worked closely with the states and territories to identify all transitional issues, it is possible that, given the number of jurisdictions concerned, an unforeseen issue may arise.

There is therefore a need to ensure that the regulations can provide for things which were not foreseen at the time the legislation was drafted, to avoid the need to pass further legislation to address things which were not foreseen. It may be that those things will need to be addressed on an urgent basis, and these provisions provide the necessary flexibility to do so.

These provisions therefore provide greater certainty for training organisations and consumers of their services.

The explanatory memorandum for clause 30 of the Transitional Bill will be amended to include this additional explanation.

I trust this information enables the Committee to finalise its consideration of the Bill.

Yours sincerely



CHRIS EVANS

28/2/11

