



National Vocational Education and Training Regulator Bill 2010

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

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Social Policy Section

Contents

Purpose	3
Background	4
Increased Commonwealth role in vocational education and training	4
Basis of policy commitment.....	5
The case for a national approach	7
The need for higher level skills	7
Regulating a larger and more diverse national and international market	8
Regulatory complexity	9
Financial implications.....	10
Main issues.....	10
Funding and costs	11
Coverage of WA and Victorian providers	11
Dual sector providers.....	12
Powers and penalties.....	12
Audit processes.....	13
Referral and delegation of powers	13
Consequential changes to the ESOS framework	14

Quality and standards.....	14
Key provisions	16
NVR Bill	16
Concluding comments	22

National Vocational Education and Training Regulator Bill 2010

Date introduced: 26 November 2010

House: Senate

Portfolio: Education, Employment and Workplace Relations

Commencement: Sections 1 and 2 and others not specified commence on the day of Royal Assent, sections 3 to 15 on a day to be fixed by Proclamation or the day after six months from the day of Royal Assent and parts 2 to 12 will be commensurate with sections 3 to 15.

Links: The links to the [Bill, its Explanatory Memoranda and second reading speech](#) can be found on the Bills home page, or through <http://www.aph.gov.au/bills/>. When bills have been passed they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

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Date introduced: 26 November 2010

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Commencement: Sections 1 to 3 and others not specified commence on the day of Royal Assent. Schedule 1 commences immediately after the commencement of section 3 of the *National Vocational Education and Training Regulator Act 2010*.

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Purpose

The National Vocational Education and Training Regulator Bill 2010 (the NVR Bill) would establish a National Vocational Education and Training Regulator (NVR), providing the constitutional basis for its operations, its powers for the registration of providers, the accreditation of courses, investigation and enforcement, and for its administrative arrangements.

The National Vocational Education and Training Regulator (Transitional Provisions) Bill 2010 (the NVR Transitional Bill) would provide transitional arrangements to enable a smooth transfer of regulatory responsibility from the states and territories to the new NVR.

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Background

Increased Commonwealth role in vocational education and training

In his second reading speech the Minister has stated that ‘the establishment of a National VET Regulator is one of the most significant reforms to the sector in years’ and that ‘it has been achieved through strong cooperation between the Commonwealth, states and territories’.¹ In many ways, it can be seen as the next stage in the co-operative policy framework that has incrementally enabled greater Commonwealth involvement in vocational education and training (VET). At this point in time it also marks another step towards the integration of the tertiary education sector, that is, VET and higher education.

The states and territories have the primary responsibility for the funding of VET (they account for approximately 70 per cent of public VET funding), and for the delivery of VET, within their jurisdictions. This responsibility has included administering the state and territory run Technical and Further Education (TAFE) institutes as well as developing, through competitive funding mechanisms, a market of VET providers. This has grown in scope and diversity as access to government funding has attracted a number of private businesses. There are currently an estimated 4500 registered training organisations (RTOs) operating in the VET market.² The state and territory authorities have been responsible for the registration of these RTOs and their courses, and for the regulation of their activities.

These responsibilities are undertaken within the framework of the national training system (NTS) that was set up in 1992, a collaborative arrangement that recognised the importance of VET to state economies by preserving their functions and responsibilities while paving the way for greater Commonwealth involvement in a sector that is as important to the national economy. With the setting up at that time of the Australian National Training Authority (ANTA), a Commonwealth statutory authority through which Commonwealth grants were allocated to the states under the terms of a funding agreement, the Commonwealth could have some control of its funding investment and a role in setting priorities. While this collaborative arrangement facilitated a joint investment in VET and enabled national funding and planning for the VET sector to occur, the Commonwealth’s influence was mediated and it did not have a direct relationship with providers.

With the abolition of ANTA by the Howard Government in 2005, the Commonwealth Government’s relationship with the states became more direct as ANTA’s functions were absorbed by the Department of Education, Employment and Workplace Relations (DEEWR) and the Commonwealth’s conditions for funding the states were prescribed in legislation.³ DEEWR retained these

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1. J Ludwig, ‘Second reading speech: National Vocational Education and Training Regulator Bill 2010’, Senate, *Debates*, 26 November 2010, p. 2379.
 2. See V Simmons, ‘From VET to tertiary: the future of VET in Australia’ in F Beddie and P Curtin, *The future of VET: a medley of views*, NCVET, 2010, p. 34, viewed 2 February 2011, <http://www.ncver.edu.au/publications/2284.html>
 3. *Skilling Australia’s Workforce Act 2005* (Cth)

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responsibilities under the Rudd Government but the policy reform agenda on skills and workforce development became a COAG responsibility and the Commonwealth introduced new intergovernmental financial arrangements for distributing grants to the states.⁴

Under their agreements with the states and territories both the Coalition and Labor governments have chosen to merely maintain the real value of Commonwealth grants funding to the states, preferring to increase VET expenditures on the Commonwealth's own programmes such as the Australian Skills Vouchers of the Howard Government and the Productivity Places Program of the Rudd Government.⁵ These programmes have given the Commonwealth some more direct relationship with providers and more influence over the number and nature of the training places created in the VET system. Through such mechanisms the Commonwealth has progressively strengthened its influence in VET planning, priority setting and systemic reform.

These current Commonwealth arrangements for VET funding remain unchanged with the creation of the NVR. Subclause 6(2) of the NVR Bill also ensures that state and territory government funding of VET or their establishment or management of their VET providers is unaffected by the establishment of the NVR.

The significance of the NVR is that through the referral of powers from the states and other constitutional mechanisms, the Commonwealth will acquire additional responsibilities that have previously been the domain of the states and territories. These new responsibilities which include registering and regulating providers will give the Commonwealth, albeit through a statutory agency, more direct control over VET providers, their registration and regulation, and over the courses they deliver.

Basis of policy commitment

The NVR Bill implements the Council of Australian Government (COAG) decision of December 2009 to:

... establish a national regulator for the VET sector. The regulator will be responsible for the registration and audit of registered training providers, and accreditation of courses, and will be established under Commonwealth legislation.

A national standards council will also be established to provide advice to the Ministerial Council for Tertiary Education and Employment on national standards for regulation, including registration, quality assurance, performance monitoring, reporting, risk, audit, review and renewal of providers, and accreditation of VET qualifications.

4. C Kempner, 'Vocational education and training' in *Budget review 2009–10*, Parliamentary Library, Canberra, 2009, viewed 4 February 2011, <http://www.aph.gov.au/library/pubs/RP/BudgetReview2009-10/index.htm>

5. C Kempner, 'Vocational education and training' in *Budget review 2008–09*, Research paper, no. 31, 2007–08, Parliamentary Library, Canberra, 2008, viewed 4 February 2011, <http://www.aph.gov.au/library/pubs/rp/BudgetReview/Contents.htm>

Victoria and Western Australia will continue to regulate providers operating in their States and will enact legislation to mirror the Commonwealth legislation. On a national basis, all providers wishing to operate in more than one jurisdiction or enrol international students in post-secondary educational institutions will be registered through the national regulator. This COAG decision is noted by Victoria and Western Australia.⁶

Therefore under the COAG agreement not all states have agreed to refer their powers to the Commonwealth. Victoria and Western Australia (WA) will instead 'enact legislation to mirror the Commonwealth legislation'. Issues around the interpretation of the agreement have arisen in the context of the NVR Bill. These are dealt with in the main issues section below.

Funding for the NVR has been provided in the 2010–11 Commonwealth Budget. More details are provided in the financial implications section below.

On 6 July 2010, the Minister for Education Simon Crean, announced the appointment of an interim Chair, Ms Kaye Schofield, and an interim Chief Executive Officer, Mr John Smyth, to help set up the NVR to ensure it is ready to begin regulatory action from the day of its commencement.⁷

New South Wales (NSW) also paved the way for the NVR Bill by agreeing to undertake the responsibility of drafting the legislation for the referral of state powers to the Commonwealth. NSW passed the *Vocational Education and Training (Commonwealth Powers) Act 2010* in December 2010.⁸

In a recent *National update* the NVR interim Chair has reported that 'it is anticipated that NVR will begin regulating RTOs in New South Wales, the Northern Territory and the Australian Capital Territory in April 2011. This date also applies to the regulation of all RTOs providing international and cross-jurisdiction training in Victoria and Western Australia'.⁹

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6. Council of Australian Governments (COAG), *Council of Australian Governments' Meeting 7 December 2009: Communiqué*, viewed 2 February 2011, http://www.coag.gov.au/coag_meeting_outcomes/2009-12-07/index.cfm#voc_ed_train
 7. S Crean (Minister for Education), *Improving the quality of higher education and VET sectors*, media release, 6 July 2010, viewed 3 February 2011, http://www.deewr.gov.au/Ministers/Crean/Media/Releases/Pages/Article_100706_154627.aspx
 8. *Vocational Education and Training (Commonwealth Powers) Act 2010* (NSW), viewed 3 February 2011, http://www.austlii.edu.au/au/legis/nsw/consol_act/veatpa2010526/
 9. National Vocational Education and Training Regulator, *National update*, December 2010, DEEWR, 2010, viewed 4 February 2011, <http://www.deewr.gov.au/Skills/Overview/Policy/NationalVETRegulator/Documents/NatUpdateDec2010.pdf>

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The case for a national approach

The need for higher level skills

Skills Australia, the Australian Government's advisory body, in its position paper *Foundations for the future: proposals for the governance, architecture and market design of a National Training System* heralds that 'Australia is at a pivotal point in history where a change is needed to address our skills challenges'.¹⁰

To address these challenges the Australian Government has set targets for higher level qualification attainment. It aims to have 40 per cent of 25 to 34 year olds with a degree by 2025, and 20 per cent of higher education enrolments from people of low socio-economic status (SES) backgrounds by 2020. COAG has also set targets to double the number of people with Diploma and Advanced Diploma qualifications by 2020 and to halve the proportion of 20–64 year olds without qualifications at Certificate III level by 2020.¹¹

Both the higher education and VET sectors have a role to play in meeting these targets. There is already a degree of overlap between the two sectors in the delivery of higher level qualifications—Diploma, Advanced Diploma, Graduate Diploma, and Graduate Certificate courses—and since 2003 the VET sector has also provided undergraduate education. Work is also being undertaken by the Australian Qualifications Framework Council to establish parity and greater national consistency between university and VET sector qualifications and to develop mechanisms for the competency-based system of VET, and the merit-based system of higher education, to more readily inter-relate.

Structural and funding reforms to meet these targets is also partially underway in the higher education sector through the Rudd Government's response to the major review of Australia's higher education system chaired by Professor Denise Bradley in 2008.¹²

Both Bradley and Skills Australia recommend a model for a single national regulator across the tertiary sector to meet these challenges.¹³ A single tertiary education regulator would enable 'a

10. Skills Australia, *Foundations for the future: proposals for the governance, architecture and market design of a National Training System*, p. 1, viewed 4 February 2011, p. 9,

http://www.skillsaustralia.gov.au/PDFs_RTFS/Foundationsforthefuture.pdf

11. Australian Government, *Transforming Australia's Higher Education System*, Commonwealth of Australia, Canberra, 2009, viewed 4 February 2011, pp. 12–13,

http://www.deewr.gov.au/HigherEducation/Documents/PDF/Additional%20Report%20-%20Transforming%20Aus%20Higher%20ED_webaw.pdf

12. Australian Government, *Review of Australian Higher Education: final report*, chaired by Professor Denise Bradley, 2008, Australian Government, Canberra viewed 4 February 2010,

<http://www.deewr.gov.au/HigherEducation/Review/Pages/ReviewofAustralianHigherEducationReport.aspx>

13. *Ibid.*, p. 12.

continuum of tertiary skills provision, with better connections across the sectors resulting in stronger and clearer pathways between the VET and higher education sectors in both directions'.¹⁴

Although a single regulator for the tertiary sector may be the ultimate goal, for practical reasons Skills Australia had advised that 'the single regulator model as suggested by Bradley may need to evolve over several stages' and that initially there should be two separate national regulatory bodies that would merge when 'this architecture is sufficiently robust'.¹⁵ Therefore, while the setting up of the NVR and the proposed Tertiary Education Quality Standards Agency (TEQSA) to regulate higher education may be seen as a step toward this coordinated national approach to tertiary sector regulation, there has been no decision, as yet, to take the next step.

In the meantime according to Skills Australia 'given the variety of people's needs, the two sectors should remain distinct in their educational offerings and roles' and VET's 'unique and distinctive features'—the delivery of practical and applied skills underpinned by standards set by industry and industry's strong engagement with VET—'should not be obscured in future governance arrangements'.¹⁶

Close collaboration between NVR and TEQSA is however already proceeding. They are sharing corporate services and 'the NVR and the TEQSA are committed to working together to identify opportunities to align their regulatory approaches and activities'.¹⁷

Regulating a larger and more diverse national and international market

In addition to moving to a more integrated national tertiary education sector to meet Australia's higher level skill needs, other imperatives for change in the VET arrangements in particular, include the regulatory challenge associated with the increasing numbers, and diversity of providers that have entered the VET market with the expansion of competitive funding from the mid 1990s. The risk of unethical providers entering the market has therefore increased, requiring 'more cohesive and rigorous national regulation as a fundamental and necessary safeguard in an expanding market'.¹⁸

There has also been significant growth in the number of VET providers operating in the international education sector to cater to the enormous growth in international VET student numbers. From only 53 933 enrolments in 2002, enrolments have grown to 230 799 in November 2010.¹⁹ The effectiveness of some state and territory regulators came under question in 2009 with the exposure

14. Ibid., p. 12.

15. Skills Australia, op. cit., p. 12.

16. Ibid., p. 8.

17. National Vocational Education and Training Regulator, *National update*, December 2010, op. cit.

18. Ibid., p. 45.

19. Australian Education International (AEI), 'International student data', AEI web page, viewed 4 February 2011, <http://aei.gov.au/AEI/Statistics/StudentEnrolmentAndVisaStatistics/Default.htm#data>

of unethical practices of some providers and the collapse of a number of private colleges operating in this sector.

For efficiency, and to reduce regulatory duplication, the regulatory framework for managing international education providers that also involved the Commonwealth, the *Education Services for Overseas Students Act 2000* (ESOS Act), leverages on the state and territory regulatory arrangements that apply to providers of domestic services. However, the complexity of the inter-governmental arrangements under the ESOS Act has often led to inconsistency and even poor enforcement in many jurisdictions.²⁰ The risk to Australia's international reputation as a provider of international education, a reputation that has been challenged by events in recent years, has therefore no doubt also contributed to the impetus for change. Skills Australia reported that one of the three overarching messages that emerged during its consultations was the need for 'a toughened and more consistent national framework for regulation to deliver the highest quality outcomes and enhanced performance by the system'.²¹

Regulatory complexity

While there is a view that the national training system functions well and it is highly regarded, it is complex. Much of this is on account of jurisdictional differences in regulation and quality enforcement creating problems, in particular, for providers operating across sectors and jurisdictions and those delivering services to both domestic and international students.

There is considerable complexity in the current governance of regulatory and quality apparatus with registration, accreditation, approval and auditing arrangements in place for the AQTF, international student provision and for user choice purchasing arrangements— as well as those running in parallel for higher education. This presents significant issues for provider responsiveness, especially those operating across the VET and higher education sectors, both domestically and internationally.²²

Skills Australia notes that even though there have been various reforms in each of the regulatory sectors 'the integration of these approaches in what is essentially a state-based and administered 'national system' has faltered'.²³ Establishing the NVR is therefore expected to respond to the need

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20. For more information on this see B Baird, *Stronger, simpler, smarter ESOS: supporting international students: Final report Review of the Education Services for Overseas Students (EOS) Act 2000*, Australian Government, Canberra, 2010, viewed 13 July 2010, http://www.aei.gov.au/AEI/GovernmentActivities/InternationalStudentsTaskforce/ESOS_REview_Final_Report_Feb_2010_pdf.pdf
 21. Skills Australia, *Foundations for the future: proposals for the governance, architecture and market design of a National Training System*, Skills Australia, Canberra, 2010, p. 1, viewed 4 February 2010, http://www.skillsaustralia.gov.au/PDFs_RTf/FoundationsfortheFuture.pdf
 22. *Ibid.*, p. 44.
 23. *Ibid.*, p. 47.

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to simplify the regulatory arrangements, to provide clearer accountability and rationalise the multiplicity of authorities involved in regulation and quality matters at both state and national levels.

Financial implications

Funding was provided in the 2010–11 Commonwealth Budget—\$105.5 million over four years to establish national regulatory arrangements for the VET system including, \$92.3 million over four years for the establishment of the NVR and \$10.6 million over four years for the establishment of the National Standards Council.²⁴ The Budget also notes that consistent with existing state and territory practice the NVR will ‘initially be funded by partial cost recovery’ and will move to full cost recovery by 2014–15. It estimates that expenses will be partially offset by \$50.4 million in revenue over the forward estimates to 2013–14. This would mean that the Government commitment for the NVR would have been \$41.9 million.

The Explanatory Memorandum however says that ‘the NVR will have appropriations of \$94.9m made available to it between commencement in 2011 and June 2014 and that it is expected that its cost recovery activities will return \$39.9m to the Budget during over the period January 2011 and June 2014.’²⁵

Consistent with the Explanatory Memorandum information provided on the DEEWR web site refers to a commitment of \$55 million over four years which will be in addition to fees received by the regulator for regulatory activities.²⁶

Main issues

There appears to be widespread stakeholder support and state and territory government support, albeit with the WA and Victorian caveats, for the establishment of the NVR. At the federal level there also appears to be bipartisan support.²⁷

However, not surprisingly, given the complexity of transitioning to the new arrangements and the ongoing task of working through the detail, there are reports of various concerns about its implementation.

24. Australian Government, *Budget measures: budget paper no. 2: 2010–11*, Commonwealth of Australia, Canberra, 2010, p. 151.

25. Explanatory Memorandum, National Vocational Education and Training Regulator Bill 2010, p. 3.

26. Department of Education, Employment and Workplace Relations, (DEEWR), ‘National VET Regulator: Frequently asked questions’, DEEWR web page, viewed 4 February 2011, <http://www.deewr.gov.au/Skills/Overview/Policy/NationalVETRegulator/Pages/FrequentlyAskedQuestions.aspx>

27. A Trounson, ‘Funding a challenge for new VET regulator’, *The Australian*, 17 November 2010, p. 26, viewed 4 February 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F365117%22>

Funding and costs

Though there are likely to be savings for the states from their referral of powers and functions to the NVR, the apparently revised federal budget figures (see financial implications section) and reported concerns by the NVR interim Chair, raise questions about the adequacy of the NVR's funding to meet its 'stronger investigative and analysis' functions.²⁸ With the expectation of full cost recovery by 2014 and a fee structure for services yet to be developed and approved by the Ministerial Council for Tertiary Education and Employment (MCTEE), there has been speculation that fees in some states are likely to rise.²⁹ There was early speculation that the reason Victoria may have refused to refer its powers was that it wanted to be confident that there was to be adequate funding.³⁰

Coverage of WA and Victorian providers

The effect of the NVR Bill is that all providers in states that have referred their powers, that is all except for WA and Victoria, will be registered by the NVR, and that the NVR will also register all providers operating across jurisdictions and all post-secondary education providers enrolling international students. This would mean that WA and Victoria who have not agreed to refer their powers but who have agreed to introduce mirror legislation 'will retain responsibility for regulating training providers which are operating only within that jurisdiction and do not cater to international students'.³¹ There have been recent reports that WA and Victoria have concerns about this interpretation of the COAG agreement and consequently about the provisions in the NVR Bill.³² Why the concern now is unclear as there had been early commentary on the implications of what they had agreed to:

The National Training Information System lists around 1260 RTOs in Victoria and 530 in WA. But around 340 education providers in Victoria and 120 in WA are listed on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS). And many RTOs operate in multiple jurisdictions, including private training groups, enterprise RTOs and colleges in border areas such as the Murray Valley.

The decision means all TAFEs will probably go to the national regulator, given that all but a handful of Victorian and WA institutes are available to international students. Many TAFEs also have interstate operations, not to mention their international ones. Victoria's four dual-sector

28. Ibid.

29. Ibid.

30. J Ross, 'National regulator to override states for international students', *Campus review*, 18 January 2010, viewed 4 February 2011, <http://www.campusreview.com.au/pages/section/article.php?idArticle=13812>

31. Department of Education, Employment and Workplace Relations (DEEWR), 'National VET Regulator: frequently asked questions', viewed 2 February 2011, <http://www.deewr.gov.au/Skills/Overview/Policy/NationalVetRegulator/Pages/FrequentlyAskedQuestions.aspx>

32. J Ross, 'Constitutional showdown looms over VET regulator', *Campus review*, 7 December 2010, p. 5, viewed 3 February 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query%3DId%3A%22library%2Fjrnart%2F424470%22>

institutions are likely to be particularly pleased, having long been required to report to the state regulator for VET matters and the federal government for higher education.³³

Given that the NVR interim Chair has recently said that the April 2011 start up date 'also applies to the regulation of all RTOs providing international and cross-jurisdiction training in Victoria and Western Australia' it seems that the Commonwealth is not wavering.³⁴ The possibility that a resolution to their concerns might mean double registration or triple registration for some providers has been canvassed.³⁵ If the provisions of the NVR Bill prevail, the value to those states of maintaining their separate but mirror regulatory systems would seem questionable. They would at best be residual to, and at worst duplicate the coverage of the NVR.

Dual sector providers

Streamlining for the benefit of dual-sector providers, that is those that operate in as both higher education and VET institutions so that they don't have to deal with more than one regulator has been raised as an issue.³⁶

Powers and penalties

The powers of investigation and enforcement that will be available to the NVR appear similar to those currently available to DEEWR for its dealings with international education providers under the ESOS Act. This would effectively extend application of these powers to a wider range of providers. Gavin Moodie a higher education commentator has noted:

For many providers tertiary education is a business and the investigative, monitoring and disciplinary powers needed to regulate any other business with vulnerable consumers have become necessary.³⁷

The Minister has also said that the power to apply both civil penalties and criminal offences are stronger than those available to existing state regulators.³⁸ In highlighting the cost of the penalties

33. J Ross, 'National regulator to override states for international students', op. cit.

34. National Vocational Education and Training Regulator, *National update*, December 2010, op. cit.

35. J Ross, 'Slow progress on national VET regulator, despite Opposition support', *Campus review*, 9 August 2010, <http://www.campusreview.com.au/pages/section/article.php?s=VET&idArticle=17608><http://www.campusreview.com.au/pages/section/article.php?s=VET&idArticle=17608>

36. Ibid.

37. G Moodie, 'Sweeping powers for VET regulator', *The Australian*, 12 January 2011, p. 22, viewed 4 February 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F480022%22>

38. J Ludwig, 'Second reading speech: National Vocational Education and Training Regulator Bill 2010', Senate, *Debates*, 26 November 2010, p. 2379.

\$26 400 for people who make use of cancelled VET qualifications and \$11 000 for failing to return hard copies of cancelled qualifications, some are questioning whether they are not excessive.³⁹

Audit processes

The states and territories have raised concerns about audit processes but the audit operational requirements have yet to be determined.⁴⁰ The interim Chair has however indicated plans to reduce the amount of 'process' auditing and replace it with 'quality' auditing by making use of 'an enhanced complaints function as a way of identifying high-risk providers' and focusing their efforts on them.⁴¹ In a recent *National update* the NVR interim Chair has stated that the new National Regulatory Model will have an increased emphasis on active monitoring and investigation of risk. This risk analysis will be informed by: Risk assessments of initial, renewal, and scope applications; Advice from auditors; Feedback from industry regulators and associations; Student complaints; State, Territory, and Australian government information; and Analysis of non-compliance data indicators.⁴²

Referral and delegation of powers

While the Commonwealth is having powers referred to it from the states, the Bill also empowers the NVR to delegate all or any of its functions and powers to a state or territory authority or to an occupational licensing body or other industry body. The NVR may also delegate to an NVR registered training organisation the NVR's functions of amending the organisation's scope of registration and/or accrediting a course. One commentator has noted that the power to delegate to an NVR registered training organisation, the authority to accredit its own programs, would effectively establish self-accreditation, a status that would presumably be highly sought after.⁴³ It is unclear, however, to what extent some of its functions will be delegated, and what the risks of such delegations might be for the consistency in administration and enforcement that it aims to achieve.

The NVR will also be able to be assisted by employees of Commonwealth agencies and officers or employees of state or territory authorities. It is unclear whether this would also be on a delegated basis or whether it is a provision to recruit from these authorities. In the recent *National update* the NVR interim Chair said that the NVR will have offices in each state and territory and that 'the NVR is negotiating transition arrangements with participating States and Territories for staff interested in working with the NVR'.⁴⁴

39. J Ross, 'Constitutional showdown looms over VET regulator', op. cit.

40. J Ross, 'Slow progress on national VET regulator, despite Opposition support', op. cit.

41. A Trounson, 'Funding a challenge for new VET regulator', op. cit.

42. National Vocational Education and Training Regulator, *National update*, December 2010, op. cit.

43. G Moodie, 'Sweeping powers for VET regulator', op. cit.

44. Ibid.

Consequential changes to the ESOS framework

As the ESOS legislative framework builds on the existing state and territory regulatory arrangements, and at the Commonwealth level DEEWR has carriage of various responsibilities, there are likely to be consequential changes to this framework.

Quality and standards

The Australian Education Union has said that there is a loophole in the NVR Bill in that it does not explicitly address the Australian Quality Training Framework (AQTF) and the process by which the AQTF will evolve into the standards that will be the responsibility of the new Standards Council.⁴⁵ In his second reading speech the Minister said:

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

The standards will continue to be endorsed by the Ministerial Council and will be developed in the future by the new Standards Council which will be established in 2011.⁴⁶

The AEU's criticism seems to be based on concerns that this arrangement may 'entrench existing problems' as in its view, standards endorsed by the Ministerial Council would not get the same level of public scrutiny as they would if considered by the Parliament.

The AQTF, is a national set of standards to ensure nationally consistent, high-quality VET and assessment services. They include standards for initial and continuing registration, for state and territory registering bodies, and quality indicators and excellence criteria. The initial and continuing registration standards were recently revised in response to the issues that arose in relation to international students in 2009, and were endorsed by the Ministerial Council for Tertiary Education and Employment (MCTEE) and by COAG.

Currently, the National Quality Council (NQC), a Committee of MCTEE which receives secretariat services from TVET Australia, a company owned by the members of the Ministerial Council, oversees quality assurance and ensures national consistency in the application of the AQTF standards for the audit and registration of training providers. In its advice to government on how these functions would be performed under a new regulatory framework Skills Australia had recommended that:

45. J Ross, 'Serious loopholes in VET Regulator plan: AEU', *Campus review*, 7 February 2011, viewed 8 February 2011, <http://www.campusreview.com.au/pages/section/article.php?s=News&idArticle=19800>

46. J Ludwig, 'Second reading speech: National Vocational Education and Training Regulator Bill 2010', Senate, *Debates*, 26 November 2010, p. 2379.

In terms of the existing regulatory and quality structures at the national level, including the functions of TVET Australia in relation to the National Quality Council (NQC) and National Audit and Registration Authority (NARA), Skills Australia sees these being largely absorbed into the new operations of the proposed national VET regulatory body. As noted above, the policy functions of the NQC related to development of quality and regulatory frameworks should be referenced in new legislation encompassing the agreed national model.⁴⁷

At this stage there appears to be little detail about how the new Standards Council is to be established and how it will operate. However, like the NQC, it too may have policies around stakeholder engagement in the development of its policies and standards.⁴⁸ DEEWR does however outline how the relationship between the Standards Council and the NVR will work:

The Standards Council will set the standards and provide advice and information to the Ministerial Council for Tertiary Education and Employment (MCTEE). The national regulator will implement the standards set by the Standards Council.⁴⁹

The AEU also suggests that the registration requirements specified in the NVR Bill may be inadequate in that while they require financial viability they do not address educational viability as is now required for international education colleges.⁵⁰

The NVR Bill however appears to be more about providing an overarching framework. Therefore while it does not detail the procedures for setting standards nor the standards themselves, it does however provide for compliance with the VET Quality Framework. This is defined in the NVR Bill as including the standards for RTOs, the AQF, Fit and Proper Person Requirements, Financial Viability Risk Assessment requirements and Data Provision Requirements. Given that much of this framework appears to be modelled on the ESOS framework, it would be surprising if the recently introduced 'principle purpose criteria' under the ESOS Act, that is a 'focus on determining that the principal purpose of the provider in setting up operations as an education provider is to deliver a quality education outcome for students', were not to be replicated in these standards.⁵¹

47. Skills Australia, *Foundations for the future: proposals for the governance, architecture and market design of a National Training System*, p. 53, op. cit.

48. See National Quality Council (NQC) web site, 'NQC Stakeholder and Communication Strategy', viewed 8 February 2011, <http://www.nqc.tvetaustralia.com.au/>

49. Department of Education, Employment and Workplace Relations (DEEWR), 'National VET Regulator: frequently asked questions', op. cit.

50. J Ross, 'Serious loopholes in VET Regulator plan: AEU', *Campus review*, 7 February 2011, op. cit.

51. Australian Education International (AEI), 'Information on the principal purpose criteria', AEI web page, viewed 8 February 2011, http://www.aei.gov.au/AEI/ESOS/Principal_Purpose_Criteria.htm

Key provisions

NVR Bill

The following is a summary of the structure of the NVR Bill highlighting the provisions that have been the focus of some commentary. The Explanatory Memorandum provides a more detailed description of other provisions.

The Bill has 12 parts:

Part 1—Introduction

Division 3 provides for the constitutional basis for the NVR Act and the NVR Transitional Act.

Clause 4 identifies the constitutional powers for its application in a referring state, a territory, a non-referring state and outside Australia. **Subclause 4(1)** dealing with its application in a referring state, is based on the legislative powers that the Commonwealth Parliament has under the Constitution including paragraph 51(xxxvii) which allows it to pass laws on matters referred to it by the Parliament of a referring state. **Subclause 4(3)** dealing with a non-referring state draws on various constitutional powers including paragraphs 51(xx) (corporations), 51(xix) (naturalization and aliens), 51(i) (trade and commerce), section 122 (to make laws for the government of a territory) and all other powers to legislate under the Constitution.

Clause 5 provides for the meaning of a referring state as essentially one that has referred certain matters to the Commonwealth. The reference of powers is in two parts, the first relating to the NVR Bill and the NVR Transitional Bill and the second relating to any amendments to these. **Subclause 5(4)** provides for the conditions when a state stops being a referring state as it relates to the NVR Act and the NVR Transitional Act. **Subclause 5(6)** provides for the conditions when a state stops being a referring state if it terminates the reference of powers relating to amendments to these Acts (the amendment reference) as provided by **subclause 5(5)**. However, the provisions of **subclause 5(7)** would only allow this to be achieved if it gives at least 6 months notice and every other state terminates its amendment reference on the same day.

Clause 6 provides for the meaning of the *referred VET matters*. These are the registration and regulation of VET organisations, the accreditation of VET courses and programs, the cancellation of VET qualifications, the standards for a VET regulator, VET information collection and dissemination and investigative powers, sanctions and enforcement. **Subclause 6(2)** makes clear that *referred VET matters* among other things do not include limiting the laws of a referring state or territory that make provision for school and higher education, apprenticeships or traineeships, state and territory government funding of VET or their establishment or management of their VET providers.

Clause 7 defines a state to be a non-referring state if it is not a referring state and for the Minister to make such a determination by legislative instrument. **Subclause 7(3)** allows for a determination to be made that a state is a non-referring state if there is a written agreement with that state that it

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will adopt the relevant version of the NVR Act and the NVR Transitional Act and it will refer the matters covered by **subclause 5(5)**. There is a note however referring to section 44 of the *Legislative Instruments Act 2003* that this is not covered under section 42 (disallowance) of that Act and can therefore not be disallowed. The Explanatory Memorandum provides an explanation of this.⁵²

Subclause 8(4) provides for the application of this Act in relation to a training organisation in a non-referring state if it is a registered provider (as defined in the *Education Services for Overseas Students Act 2000*), or it provides all or part of a VET course in both the non-referring state and a referring state or it provides all or part of a VET course in the non-referring state and offers it in a referring state to be provided in that state. **Subclause 8(5)** stipulates that subclause 8(4) would have the same effect if references to an organisation were confined to a trading corporation.

Clauses 9 and 10 provide for when the laws of states and territories do not apply to an NVR registered training organisation and **clause 11** provides for addressing inconsistency between Commonwealth and state laws.

Part 2—Registration

Division 1, subdivision A details the process for applying to the NVR for registration as an NVR registered training organisation. This includes the grant of an application, notification of a decision, issuing of a registration certificate and stipulation of the commencement and duration of the registration. **Subdivision B** provides for the conditions of registration including among others compliance with the VET Quality Framework, satisfying fit and proper person and financial viability risk assessment requirements. **Subdivision C** provides for registration renewal.

Division 2 provides for a process for changing the scope of the registration, what the NVR needs to consider and notification of a decision.

Division 3 provides for ensuring compliance with the VET Quality Framework. **Subdivision A** allows for the NVR to engage in compliance audits and reviews of an NVR registered training organisation's operations. **Subdivision B** provides for a wide range of administrative sanctions and the conditions under which they can be imposed including natural justice requirements. The sanctions include written directions to rectify a breach and to notify students of a matter set out in a direction, shortening a registration period, amending the scope of a registration, suspension and cancellation.

Division 4 provides NVR registered training organisations with a mechanism for requesting a reassessment by the NVR of its position in relation to issues identified by the NVR.

Division 5 enables NVR registered training organisations to withdraw their registrations.

Part 3—Accreditation of Courses

52. Explanatory Memorandum, National Vocational Education and Training Regulator Bill 2010, p. 11.

This part details the process for applying for course accreditation including the grant of an application, period of accreditation, conditions, notification of a decision, and stipulation of the commencement and duration of the accreditation. It also deals with accreditation renewal, amending accredited courses, and cancelling accreditation.

Part 4—NVR’s power to issue and cancel VET qualifications

Division 1 enables the NVR to issue a VET qualification and provides the circumstances under which it can do so.

Division 2, subdivision A enables it to cancel a qualification and the process it must follow in relation to a cancellation. **Division 2, subdivision B** provides for civil penalties for failure to return a VET qualification and also for use of a cancelled VET qualification of 100 penalty units and 240 respectively i.e. \$11 000 and \$26 400 respectively.

Part 5—Investigative powers

Division 1 empowers the NVR to require people connected with an NVR registered training organisation to provide information and produce documents, makes it an offence if they fail to comply and does not allow self-incrimination as an excuse for failing to comply. There is a brief justification for this in the Explanatory memorandum, and there are limits on the circumstances in which the information is admissible.⁵³ At the time of writing the Scrutiny of Bills Committee has not commented on this Bill.

Division 2 provides broad ranging powers to enter and search any premises with either the consent of the occupier or under warrant. **Subdivision A** includes monitoring powers to inspect, examine, measure, test, make images, take extracts or make copies of documents and use electronic equipment. It also includes the enforcement powers of authorised officers (the appointment of which is provided for in **subdivision F**) to search the premises for evidential material and inspect, examine, measure, test, make images, and take extracts or make copies of evidential materials and use electronic equipment. Authorised officers may be assisted by other persons and use of force as is necessary and reasonable is authorised. Detailed also are the powers of authorised officers to ask questions and for documents and the requirement to comply. The obligations of authorised officers (**subdivision B**) and the occupier’s rights and responsibilities (**subdivision C**) are also covered. The provisions include compensation for any damage to electronic equipment relating to monitoring or enforcement action and provisions relating to the seizure of materials (**subdivision D**). **Subdivision E** provides for monitoring and enforcement warrants. **Subdivision G** details the powers of Magistrates.

Part 6—Enforcement

Provisions for offences and civil penalties for registered training organisations that engage in specified forms of conduct, for example providing courses or issuing qualifications outside the scope

53. Explanatory Memorandum, National Vocational Education and Training Regulator Bill 2010, p. 40.

of a registration, are set out in this part. There are also provisions for enforceable undertakings, infringement notices and injunctions.

Part 7—National Vocational Education and Training Regulator (NVR)

Division 1 establishes the NVR and sets out its functions and powers. Its functions provided for in **clause 157** include registering organisations, accrediting courses, carrying out compliance audits, and promoting continuous improvement within registered organisations. On its own initiative or if requested to do so it may also provide advice to the Minister, State and Territory Education Ministers or the Chair of the Ministerial Council on matters relating to VET. It also has a role in collecting, analysing and disseminating VET information, publishing performance information about NVR registered organisations, training related to regulation and developing key performance indicators and service standards for itself. **Subclause 157(4)** requires that it apply the Risk Assessment Framework in performing its functions.

Clause 158 requires the NVR to make by legislative instrument requirements relating to the financial viability of NVR registered organisations.

Clause 159 provides for the independence of the NVR in relation to the performance of its functions and exercise of its powers. Under **clause 160** the Minister may however give the NVR a direction by legislative instrument if it is thought to be necessary to protect the integrity of the VET sector.

Subclause 160(2) however specifies that the direction may not be in relation to a registration of a person or body, the accreditation of a course, a particular NVR registered body or a person for whom a particular VET accredited course is accredited. Ministers' directions are not disallowable.

Division 2 provides for the appointment of Commissioners and for the Governor-General to appoint a Commissioner as Chief Commissioner and another as Deputy Chief Commissioner and acting arrangements. It provides for the conditions and the term of appointment and remuneration and also the conditions for the termination of appointment.

Division 3 provides for NVR procedures including the conduct of meetings, disclosure of interests, and decisions without meetings.

Division 4 requires that the NVR cooperates with the Ministerial Council's assessment of the NVR's compliance with the standards for VET Regulators.

Division 5 provides for a Chief Executive Officer, the functions and powers of the Officer and the capacity for the Minister to issue directions by legislative instrument which as with **clause 7** is also not subject to section 42 (disallowance) of the *Legislative Instruments Act 2003*.

Division 6 provides for the staff of the NVR to be engaged under the *Public Service Act 1999*.

Subclause 182(2) specifies that for the purposes of the *Public Service Act 1999* the Chief Executive Officer and the staff constitute the Statutory Agency.

Clause 183 provides for the NVR to be assisted by employees of Commonwealth agencies and officers or employees of State or Territory authorities. **Clause 184** provides for the NVR to engage consultants.

Part 8—Commonwealth-State arrangements

Division 1 empowers the Minister, through legislative instruments to make standards for NVR registered organisations, VET accredited courses and VET regulators and to make requirements for fit and proper person assessments and data provision, as agreed by the Ministerial Council. **Clause 190** provides for the Minister to make guidelines, as agreed by the Ministerial Council, for the NVR to use when assessing risk to be known as the Risk Assessment Framework.

Division 2 provides for the conferral of functions and powers on the NVR by corresponding state and territory laws, for the conferral of jurisdiction on federal courts and for NVR decisions made through functions and powers conferred by state law to be reviewed by the Administrative Appeals Tribunal.

Part 9—Administrative Law matters

Division 1 provides for the review of decisions and the associated procedures with **clause 199** listing the reviewable decisions.

Division 2 provides a framework for managing information including offences for unauthorised disclosure, conditions for disclosure to various bodies and the release of information to the public, and obligations of the NVR to advise state and territory education ministers about proposed cancellation of registrations. It also provides for the NVR to request the disclosure of information from specified bodies and persons and requires that the information be disclosed.

Subdivision C deals with the provision of copies of VET student records, the requirements for doing so and establishes failure to comply as an offence. It also provides for the conditions for the transfer of VET student records between registered training organisations and from the NVR to a registered training organisation.

Part 10—Reporting requirements

This part covers the requirement for the NVR to provide an annual report to the Minister for presentation to the Parliament and to maintain a National Register. The contents of the annual report and of the National Register are detailed. Among other matters the annual report must include an evaluation of the NVR's performance against the indicators set out in the annual operational plan.

Part 11—Strategic and annual operational plans

This part provides for the development, approval, and variation of the strategic and annual operational plans and compliance with these. The first strategic plan is for a period of 3 years.

Part 12—Miscellaneous

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Division 1 empowers the NVR to delegate all or any of its functions and powers under **clause 224** to a state or territory authority and under **clause 225** to an occupational licensing body or other industry body. Under **clause 226** the NVR may delegate to an NVR registered training organisation the NVR's functions of amending the organisation's scope of registration and/or accrediting a course.

Divisions 2 and 3 respectively deal with provisions for partnerships and unincorporated associations.

Division 4 provides for the Minister by legislative instrument to determine fees for goods and services provided by the NVR and the conditions that must be met to do so. It also provides for protection from civil actions, compensation for the acquisition of property related to the operation of the Act and the making of regulations.

NVR Transitional Bill

The following is a summary of the structure of the NVR Transitions Bill. The Explanatory Memorandum provides a more detailed description of these provisions.

Schedule 1 provides transitional provisions to enable the transfer of functions and powers from state and territory regulators to the NVR that is established under the NVR Act.

Part 2, Division 1 provides for the continuation of existing registrations of training organisations. It sets out the procedures that must be undertaken by registered organisations, state and territory regulators and the NVR for the transfer of registrations to the NVR. **Division 2** sets out the procedures for applications for registration or renewal, **Division 3** applications for changing the scope of a registration, and **Division 4** with applications for withdrawal of registration.

Part 3 deals with the continuation of the accreditation of VET courses and with applications for accreditation and renewal of accreditation of courses.

Provisions for the handling of actions taken by the state VET Regulator during the transition period are dealt with in **Part 4**. **Part 5** deals with provisions for the review of decisions.

Part 6 provides for the engagement of staff from state or territory VET Regulators or from TVET Australia and for continuity in staffing procedures until the relevant commencement day at which time the staffing procedures of the NVR will apply.

Part 7 provides for continuity in the handling of legal proceedings and **Part 8** among other things includes provisions for transitional regulations and clarifies the powers of the NVR during the transition period.

Concluding comments

The establishment of the NVR is a major reform to the national training system. Though it will be conducted by a Commonwealth statutory authority, this new regulatory role for the Commonwealth provides it with a more direct relationship with VET providers than it has had in the past. This is likely to facilitate the institutional changes that it has been driving indirectly through its funding and planning role.

The time appears to be right for the establishment of a national VET regulator and the support is there. The higher level skills required by the Australian economy both at the national and local level, has focused attention on the need for a more integrated tertiary education sector. The establishment of the NVR and of the TEQSA is seen as a step in this direction. In addition VET provision has become a competitive business and the diversity of providers that have entered the market, attracted by contestable public funding, has added to the regulatory challenge. This has been compounded by the enormous growth in the international VET sector which has in recent years seen the collapse of many providers, causing damage to Australia's reputation as an international education destination.

Despite state and territory regulatory reforms undertaken under the existing collaborative arrangements, the lack of uniformity in their application and enforcement, and in the case of international education, the complexity of the inter-jurisdictional responsibilities, have been obstacles to ensuring higher standards for Australia's VET system.

The NVR is not only being referred state powers for the registration of providers and courses, but it will have stronger powers for investigation, enforcement and sanctions. Whether the centralisation and strengthening of these powers will mean that the NVR is better equipped than the state and territory administrations to carry out this regulatory function more effectively and uniformly, remains to be seen. It is likely to depend on the effectiveness of the risk management strategy it uses to delegate functions and deploy limited resources.

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