

ACCI COMMENTS ON ENFORCEMENT REGIME - NVETR BILL 2010 [2011]

Introduction

ACCI provides this material on notice.¹

As indicated in evidence and submissions, ACCI is supportive of a national regulator and the overall risk management approach. However, ACCI does have a number of concerns regarding the appropriateness of powers of authorised officers and the use of criminal offences in the Bill.

ACCI has undertaken an analysis of the National Vocational Education and Training Regulator Bill 2010 [2011] (the Bill) against the *Fair Work Act 2009* as the latter legislation followed a period of extensive tri-partite consultation during a Committee on Industrial Legislation (sub-committee of the National Workplace Relations Consultative Council) process, in addition to an extensive Senate Committee Inquiry.

Importantly, there was no recommendation by the Senate Committee Inquiry that criminal offences be included in the Fair Work Bill as civil penalty provisions were deemed to be most appropriate².

ACCI believes that the enforcement regime proposed in the Bill is not proportionate to the gravity of the potential harm to individuals or the Australian community.

Criminal Offences

As noted by the Australian Law Reform Commission (ALRC) in the *Principled Regulation Report*, the “*main purpose of criminal law are traditionally considered to be deterrence and punishment. Central to the concept of criminality are the notion of individual culpability and the criminal intention for one’s actions ... a key characteristic of a crime, as opposed to other forms of prohibited behaviour, is the repugnance attached to the act, which invokes social censure and shame*”.³

As the Commonwealth notes in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers (December 2007)* (the Guide) “*perhaps the most important factor to be considered in determining whether a provision should be criminal or civil, is the effect of a criminal conviction.*”

¹ EEW 20, Monday, 7 March 2011. <http://www.aph.gov.au/hansard/senate/commtee/S13685.pdf>

² This does not mean that ACCI agrees with the level of civil penalties in the *Fair Work Act 2009* however.

³ ALRC 95 at 2.9, 2.10.

ACCI COMMENTS ON ENFORCEMENT REGIME - NVETR BILL 2010 [2011]

*Conviction for a crime carries with it a range of consequences beyond the immediate penalty (eg imprisonment or a fine).*⁴ The Guide states that these serious consequences range from: ineligibility to hold certain public offices, requirements to disclose the fact of criminal conviction in a range of circumstances (i.e. employment), ineligibility to travel to many countries, disqualification from becoming accredited under various legislation, ineligibility to be a director, principal officer or auditor of a company.⁵

ACCI does not believe, on balance, that the majority of contraventions in the Bill should be classified as criminal offences. They do not warrant the seriousness and social stigma of criminality, even if they are summary offences (as opposed to indictable offences).

Whilst ACCI believes that there should be an enforcement regime under the Bill, this must be balanced by a range of policy considerations, including the harm to be minimised and whether civil penalties (including civil infringements) are appropriate sanctions for non-compliance which apply in addition to other provisions which have the effect of revoking benefits/privileges granted to a person or organisation (such as registration). The mere imposition of an administrative sanction can have crippling repercussions on an organisation's ability to function.

There does not appear to be any cogent policy reasons provided in the Second reading speech or explanatory materials which explain in detail why criminal offences, in conjunction with civil penalties/administrative sanctions, are necessary or appropriate.

Enforcement Powers

The powers available to authorised officers are akin to those exercised by law enforcement officers. Monitoring powers, warrants, and the abrogation of the privilege against self-incrimination appears unwarranted and excessive given the types of conduct which is proscribed, particularly where these are new offences and powers for regulating the industry.

There does not appear to be any cogent policy reasons provided in the Second reading speech or explanatory materials which explain in detail why these new powers are required.

⁴ At 11.

⁵ Ibid.

ACCI COMMENTS ON ENFORCEMENT REGIME - NVETR BILL 2010 [2011]

Duplication of Laws (Double Jeopardy)

ACCI does not believe it is necessary to create specific industry offences/civil penalties where they are already provided for in other legislation. This includes the laws governing misleading and deceptive conduct under Commonwealth and State/Territory legislation.⁶ It appears possible for proceedings to be taken under other legislation in relation to the same conduct exposing individuals and organisations to double jeopardy legal scenarios.

Notes

There should be greater use of notes included in the Bill or explanatory memorandum clearly indicating whether a civil penalty provision is a strict or absolute liability provision.⁷

If criminal offences are to remain (contrary to our position) the Bill or explanatory memorandum should also clearly indicate what parts of the Criminal Code apply to each offence provision.

Education

Industry will need to be provided with extensive information and education as to the new compliance regime, particularly given the potential for criminal sanctions to be applied in addition to civil/administrative sanctions.

Other Matters

Industry expects that a detailed public litigation policy will be developed which details how the Regulator will exercise its discretion to prosecute persons and organisations. There should also be guidelines published for how it will exercise its powers.

⁶ *Competition and Consumer Act 2010* and similar legislation at the State/Territory level. The Bill does not override state/Territory laws dealing with “fair trading”. Explanatory Memorandum, p 12.

⁷ The defence of honest and reasonable mistake of fact applies only to strict liability offences. Strict Liability offences do not require the prosecution to prove that an accused intended to commit the crime in order to make out a case but they allow the accused to raise honest and reasonable mistake of fact as a defence.

ACCI COMMENTS ON ENFORCEMENT REGIME - NVETR BILL 2010 [2011]

Table: NVETR Bill and Comparative Legislation

National Vocational Education and Training Regulator Bill 2010	Comparative Legislation	Comment
<p>62: Request to person who is, or was, connected with a registered training organisation</p>	<p>No analogous provisions in <i>Fair Work Act 2009</i>.</p> <p>Sections 706, 707 and 708 of the FW Act allows an inspector to enter a premises without force and whilst on a premises, may interview any person or require a person who has the custody or access to a record or document to produce that document.</p> <p>Section 712 allows an inspector to issue a notice to a person to produce a document within 14 days. A person must comply with the notice; however, this does not apply if the person <i>"has a reasonable excuse"</i>. Breach of s.712 (3) is a civil penalty provision.</p> <p>Privilege against self incrimination abrogated, although information and documents are not admissible in criminal proceedings under s.713.</p>	<p>Cl 62(1) is broadly expressed. The National VET Regulator may request <i>"a person who is, or was, connected with an NVR registered training organisation or former registered training organisation"</i>. This is not limited to board, senior officers, employees or agents of the actual organisation. It could also cover contractors and third parties that contract with or on behalf of a training organisation.</p>
<p>64: Failure to comply with National VET Regulator's request</p>	<p>Section 712(3) of the FW Act is a civil penalty provision.</p>	<p>Cl 64 is a criminal offence.</p> <p>No <i>"reasonable excuse"</i> provision.</p> <p>The privilege against self-incrimination is abrogated, although information and documents cannot be used in numerous proceedings under cl.65 (2).</p>

ACCI COMMENTS ON ENFORCEMENT REGIME - NVETR BILL 2010 [2011]

		<p>Criminal sanctions are serious and have long term consequences on persons who are subject to penalty or fine.</p> <p>Prefer civil penalties and not criminal offences.</p>
<p>66: Authorised officer may enter premises by consent or under a warrant</p>	<p>No ability to obtain a warrant to enter.</p>	<p>Under s.708 of the FW Act a Fair Work Inspector may enter a premises without force. However, Fair Work Inspectors are limited to inspecting premises where either work is carried out or there is a nexus to the premises (i.e. office where records are kept).</p> <p>CI 66 is expressed in a broad manner and refers to an "occupier" of any premises. This may or may not be the organisation's office.</p> <p>An authorised officer is not obliged to show their identify card. CI 66(3) (a) is expressed such that an officer is only required to show an identity card only if "required" by the occupier. An inspector should be obliged to show the occupier their identity card prior to entering.</p>
<p>67: Monitoring powers of authorised officers</p>	<p>Sections 708 and 709 of the FW Act outline powers of inspectors.</p>	
<p>68: Enforcement powers of authorised officers</p>	<p>Sections 708 and 709 of the FW Act outline powers of inspectors.</p>	
<p>69: Persons assisting authorised officers</p>	<p>Similar to s.710 of the FW Act.</p>	

ACCI COMMENTS ON ENFORCEMENT REGIME - NVETR BILL 2010 [2011]

70: Use of force in executing warrant	No analogous provisions in the FW Act.	
71: Authorised officer may ask questions and seek production of documents	No analogous provisions in the FW Act.	Criminal offence for refusal to comply.
72: Consent	No analogous provisions in the FW Act.	Important to retain, but note comments for cl.66
73: Announcement before entry under warrant	No analogous provisions in the FW Act.	
74: Authorised officer to be in possession of warrant	No analogous provisions in the FW Act.	
75: Details of warrant etc. to be given to occupier	No analogous provisions in the FW Act.	
76: Expert assistance to operate electronic equipment	Similar to s.710 of the FW Act.	
Subdivision E: Warrants	No analogous provisions in the FW Act.	
89: Authorised Officers	Section 700 of the FW Act requires the Fair Work Ombudsman to be <i>"satisfied that the person is of good character"</i> .	Amend provision to insert additional <i>"good character"</i> condition on Chief Commissioner as per s.700 of the FW Act.
93: Offence – providing all or part of VET course outside scope of registration	FW Act contains civil remedy penalties and not criminal offences. The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW	Prefer civil penalties and not criminal offences.

ACCI COMMENTS ON ENFORCEMENT REGIME - NVETR BILL 2010 [2011]

	Act.	
94: Civil penalty – providing all or part of VET course outside scope of registration	The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.	
95: Offence – issuing VET qualification outside scope of registration	FW Act contains civil remedy penalties and not criminal offences. The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.	Prefer civil penalties and not criminal offences.
96: Civil penalty – issuing VET qualification outside scope of registration	The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.	
97: Offence – issuing VET statement of attainment outside scope of registration	FW Act contains civil remedy penalties and not criminal offences. The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.	Prefer civil penalties and not criminal offences.
98: Civil penalty – issuing VET statement of attainment outside scope of registration	FW Act contains civil remedy penalties and not criminal offences. The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.	Should be expressed as a maximum by express reference or a note.
99: Offence – advertising all or part of VET course outside scope of registration	FW Act contains civil remedy penalties and not criminal offences. The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.	Prefer civil penalties and not criminal offences.

ACCI COMMENTS ON ENFORCEMENT REGIME - NVETR BILL 2010 [2011]

<p>100: Civil penalty – advertising all of part of VET course outside scope of registration</p>	<p>FW Act contains civil remedy penalties and not criminal offences.</p> <p>The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.</p>	
<p>101: Offence – certain conduct prohibited while scope of registration suspended</p>	<p>FW Act contains civil remedy penalties and not criminal offences.</p> <p>The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.</p>	<p>Prefer civil penalties and not criminal offences.</p>
<p>102: Civil penalty – certain conduct prohibited while scope of registration suspended</p>	<p>The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.</p>	
<p>103: Offence – issuing VET qualification without providing adequate assessment</p>	<p>FW Act contains civil remedy penalties and not criminal offences.</p> <p>The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.</p>	<p>Prefer civil penalties and not criminal offences.</p>
<p>104: Civil penalty – issuing VET qualification without providing adequate assessment</p>	<p>The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.</p>	
<p>105: Offence – issuing VET statement of attainment without providing adequate assessment</p>	<p>FW Act contains civil remedy penalties and not criminal offences.</p> <p>The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.</p>	<p>Prefer civil penalties and not criminal offences.</p>
<p>106: Civil penalty – issuing VET statement of attainment without providing adequate assessment</p>	<p>The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.</p>	

ACCI COMMENTS ON ENFORCEMENT REGIME - NVETR BILL 2010 [2011]

<p>107: Offence – issuing VET qualification without ensuring adequate assessment</p>	<p>FW Act contains civil remedy penalties and not criminal offences.</p> <p>The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.</p>	<p>Prefer civil penalties and not criminal offences.</p>
<p>108: Civil penalty – issuing VET qualification without ensuring adequate assessment</p>	<p>The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.</p>	
<p>109: Offence – issuing VET statement of attainment without ensuring adequate assessment</p>	<p>FW Act contains civil remedy penalties and not criminal offences.</p> <p>The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.</p>	<p>Prefer civil penalties and not criminal offences.</p>
<p>110: Civil penalty – issuing Vet statement of attainment without ensuring adequate assessment</p>	<p>The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.</p>	
<p>111: Civil penalty – breach of condition of registration</p>	<p>The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.</p>	
<p>112: Civil penalty – failure to return certificate of registration</p>	<p>The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.</p>	
<p>113: Geographical jurisdiction</p>	<p>No analogous provisions in relation to criminal offences in FW Act.</p>	
<p>114: Offence – falsely claiming to be an NVR registered training organisation</p>	<p>FW Act contains civil remedy penalties and not criminal offences.</p> <p>The civil penalties are generally limited to a</p>	<p>Prefer civil penalties and not criminal offences.</p>

ACCI COMMENTS ON ENFORCEMENT REGIME - NVETR BILL 2010 [2011]

	maximum amount under Part 4-1 of the FW Act.	
115: Civil penalty – falsely claiming to be an NVR registered training organisation	The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.	
116: Offence – providing, or offering to provide, all or part of a VET course without registration	FW Act contains civil remedy penalties and not criminal offences. The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.	Prefer civil penalties and not criminal offences.
117: Civil penalty – providing, or offering to provide, all or part of a VET course without registration	The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.	
118: Offence – issuing VET qualification	FW Act contains civil remedy penalties and not criminal offences. The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.	Prefer civil penalties and not criminal offences.
119: Civil penalty – issuing VET qualification	The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.	
120: Offence – issuing VET statement of attainment	FW Act contains civil remedy penalties and not criminal. The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.	Prefer civil penalties and not criminal offences.

ACCI COMMENTS ON ENFORCEMENT REGIME - NVETR BILL 2010 [2011]

121: Civil penalty – issuing VET statement of attainment	The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.	
122: Offence – making false or misleading representation in advertisement	FW Act contains civil remedy penalties and not criminal offences. The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.	Prefer civil penalties and not criminal offences.
123: Civil penalty – making false or misleading representation in advertisement	The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.	
124: Offence – making false or misleading representation relating to VET course or VET qualification	FW Act contains civil remedy penalties and not criminal offences. The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.	Prefer civil penalties and not criminal offences.
125: Civil penalty – making false or misleading representation relating to VET course or VET qualification	The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.	
126: Offence – purporting to issue VET qualification	FW Act contains civil remedy penalties and not criminal offences. The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.	Prefer civil penalties and not criminal offences.
127: Civil penalty – purporting to issue VET qualification	The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.	

ACCI COMMENTS ON ENFORCEMENT REGIME - NVETR BILL 2010 [2011]

<p>128: Offence – purporting to issue VET statement of attainment</p>	<p>FW Act contains civil remedy penalties and not criminal offences.</p> <p>The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.</p>	<p>Prefer civil penalties and not criminal offences.</p>
<p>129: Civil penalty – purporting to issue VET statement of attainment</p>	<p>The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.</p>	
<p>130: Civil penalty – breach of condition of accreditation</p>	<p>The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.</p>	
<p>131: Civil penalty – using a bogus VET qualification or VET statement of attainment</p>	<p>The civil penalties are generally limited to a maximum amount under Part 4-1 of the FW Act.</p>	
<p>132: Geographical jurisdiction</p>	<p>No analogous provisions in relation to criminal offences in FW Act.</p>	
<p>133: Liability of executive officer of registered training organisation</p>	<p>Section 550 of the FW Act provides that a <i>“person who is involved in a contravention of a civil remedy provisions is taken to have contravened that provision”</i>, if the person has <i>“(a) aided, abetted, counselled or procured the contravention; (b) has induced the contravention, whether by threats or promises or otherwise; or (c) has been in any way, by act or omission, directly or indirectly, knowledge concerned in or party to the contravention; or (d) has conspired with others to effect the contravention”</i>.</p>	<p>Definition of <i>“executive officer”</i> under clause 3 is extremely broad and can cover not only the directors of the organisation. Prefer that cl.133 is replaced with either S.550 of the FW Act or cl.138 of the Bill.</p> <p>Criminal sanctions are serious and have long term consequences on individuals.</p>

ACCI COMMENTS ON ENFORCEMENT REGIME - NVETR BILL 2010 [2011]

134: Reasonable steps to prevent offence or contravention	No analogous provision in FW Act.	
135: Liability of partners in partnerships	See 133.	See 133.
136: Liability of members of unincorporated associations	See 133.	See 133.