Department of Education, Employment and Workplace Relations
National Vocational Education and Training Regulator Bill 2010 [2011]
Response to EEWR Committee questions on notice of 8 March 2011.

Introduction

Stronger, more effective regulation

One of the key objectives of the implementation of a National VET Regulator is to ensure stronger regulation. In announcing the decision to establish a National VET Regulator the Australian government said it would 'develop strong and cohesive national regulatory arrangements for VET'. A regulator with teeth.

Recent problems in the international student market highlighted weaknesses in the current regulatory system and in particular the domestic regulatory framework which underpins the international student training quality assurance. In the 2010 Baird report, it was noted that:

> Many submissions raised concerns that the level of monitoring and enforcement work undertaken, and seen to be undertaken, by the various regulatory bodies is inadequate and ineffective.....Too many international education providers have become comfortable with the idea that they will not get caught, and if they do get caught, the sanctions will be weak and they will be given time to come up to standard. This is not a sensible way to operate a regulatory system.
> *Stronger, simpler, smarter ESOS: supporting international students p22*

The COAG International Student Strategy working group found that:

> Issues associated with the delivery of education services to international students highlighted a number of pressures on the current regulatory arrangements in the VET sector. The Working Group identified that there were no issues around quality assurance specific to international students, but that they relate to the Australian Quality Training Framework (AQTF) and that the standards in the AQTF impact on international students.

The importance of the VET sector to Australia's skills requirements and productivity means that serious non-compliance with VET regulation can have consequences that go beyond fair trading and consumer (ie student) protection issues. Serious non-compliance by only a few providers has the potential to undermine confidence in the entire sector. It also has the potential to pose health and safety risks to the public through the provision of qualifications to students, who have not completed the necessary requirements, who then participate in the building and construction or electrical industries.

An example of the type of behaviour that can occur is in the *Report on Corruption in the Provision and Certification of Security Industry Training* (ICAC, 2009). The Commission identified a level of corruption in security industry training where both RTOs and students were complicit in deceiving the registering authority. RTOs were falsely claiming the students had an adequate level of English, and had passed examinations where the students had poor or no English skills and had been given the answers to the exam in advance by the RTO.

The 2010 McCann report, *Regulation of VET services for overseas students in South Australia*, recommends:

> a shift to a much stronger compliance based model of regulation .....new powers for the regulator, new criminal and civil offences and the acquisition of new skills to support compliance based regulation. Because of a lack of clarity around timing and the speed at which the market and policy environment is changing, the report argues strongly that South Australia should adopt this model now rather than wait for the national system of regulation to emerge.
> *Regulation of VET services for overseas students in South Australia, Executive Summary v*

The National VET Regulator bill seeks to establish a suite of regulatory responses which the National VET Regulator can use to secure compliance. It creates an escalating hierarchy of sanctions which can be deployed depending on the circumstances of the breach, the history of the provider and the risks associated with the training delivered. The existence of criminal sanctions is recognised as a significant tool in deterrence:

> The greater the heights of tough enforcement to which the agency can escalate (at the peak of its enforcement pyramid), the more effective the agency will be at securing compliance and less likely it will have to resort to tough enforcement. Regulatory agencies will be able to speak more softly when they are perceived as carrying big sticks.
> John Braithwaite in *Sparrow, Malcom K. 'The Regulatory Craft' p41.*

The decision to pursue criminal penalties is one that the National VET Regulator will take in the context of the effective use of its resources and would require referral of matters to the Commonwealth Director of Public Prosecutions. Authorised officers may only enter premises with consent or under warrant issued by a magistrate. These are important checks and balances.

A. General questions

1. Why does the conduct covered by the offences in Part 6 merit criminal sanctions?

The offences found at Part 6 relate to behaviour which goes to the integrity of the VET sector and public (including employers and licensing bodies) confidence in skills and qualifications, taking into account the experiences of the current State and Territory VET Regulators.
The Committee is referred to the statements in the introduction in response to this question.

The use of criminal penalties is considered appropriate because:

- The policy decision to establish the NVR was made in the context of strengthening the regulatory system.
- There have been instances in the VET sector of corruption and serious non-compliance where criminal penalties have been warranted.
- Having criminal sanctions as the peak of its enforcement powers increases the ability of the regulator to secure compliance through less severe sanctions.

Criminal offences have been part of the VET regulatory framework for a number of years. In October 2002 the Ministerial Council agreed Model Clauses for Training National Registration

and Accreditation. These model clauses include offences found in Part 6 of the NVR Bill including: falsely claiming to be an RTO; falsely issuing, or claiming to be able to issue a qualification; falsely claiming to be able to provide training or assessments resulting in the issue of a qualification or statement of attainment; and falsely claiming to be able to offer training resulting in the issuing of a qualification or statement of attainment by another person knowing that the other person is not lawfully able to issue the qualification or statement of attainment. The Education Services for Overseas Students (ESOS) Act 2000 deals with similar behaviour and the same sector (see ss. 8, 108, 110). The ESOS Act also contains a criminal sanction for interfering in the operations of the regulator when exercising monitoring and search warrant powers (ss. 120, 121, 135 136).

2. Could this conduct be deterred through administrative sanctions, such as deregistration or fines, or through civil penalties?

The *Guide to framing Commonwealth offences* (2007) states p65, that "it has been acceptable to have the same physical elements covered by both civil penalties and criminal sanctions where culpability differs.

Part 6 contains both civil and criminal sanctions for the same offences. It is intended that the NVR enforcement scheme allow for both criminal and civil pecuniary penalties that are of a sufficient punitive nature to effectively deter non-compliant behaviour. By utilising a mix of penalties, the intent is to build a framework for enforcement activity that allows flexibility and a range of options in responding to and correcting non-compliant behaviour by RTOs.

A number of the offences cannot rely on an administrative sanction such as deregistration as they relate to behaviour of persons/organisations that are not registered.

3. The offences appear to be setting service delivery standards. For example, the offence at clause 103 is in essence requiring RTOs to not issue VET qualifications without first assessing whether the student fulfils the requisite criteria. Are offences the most appropriate means of setting up service delivery standards? Couldn't standards also be effectively established through requiring RTOs to meet these standards in order to be registered, and to continue to be registered, or through the use of civil penalties?

The policy intent behind the offences goes beyond setting service delivery standards to reducing the risk of corruption in the VET sector, for example the behaviour referred to above as identified by ICAC in the security training industry. This is significant given the potential for a relatively small number of unscrupulous providers to damage the reputation of the sector and confidence in the skills of its graduates, both nationally and internationally.

4. The offence at clause 114 has the heading 'falsely claiming to be an NVR registered training organisation'. The heading suggests that the person has to know that they're not registered as an RTO. However, the person commits this offence if being reckless as to whether or not they are registered as an RTO. Is it intended that the offence only target persons who deliberately, that is knowingly, hold themselves out to be RTOs when not an RTO or is it intended to have broader application?

The intention is that the offence is directed towards persons who intentionally hold themselves out as being an NVR RTO while being reckless as to whether they are are an NVR RTO. This reflects section 5.6 of the Criminal Code. Under subsection 5.4(4) of the Code, recklessness can be established by proving intention, knowledge or recklessness. A defence under section 9.1 of the Code may be available to persons prosecuted for the offence depending on the circumstances.

B. Uncertainty about what conduct is being prohibited

1. Clauses 107 and 109 contain offences that appear to cover the same content as the offences at clause 103 and clause 105.

- **How would an RTO satisfy itself that a student has satisfied that requirements of the qualification or the statement of attainment? Would this be through assessment?**
- **If through assessment, don't the offences cover the same conduct as covered in clauses 103 and 105?**

Clauses 103 and 105 cover situations where the RTO is providing the assessment required to satisfy the requirements of a qualification. These clauses create an offence where the RTO has issued a qualification or statement of attainment without ensuring adequate assessment. Clauses 107 and 109 cover situations where the RTO is not directly responsible for the assessment. For example partnership agreements currently exist between an RTO and a non-RTO such as a school. Under the partnership agreement the school may provide the training and an independent assessment and the RTO then issues the qualification. These provisions require the RTO to remain responsible for satisfying itself that all requirements for the qualification have been met.

2. For the offences at clauses 103 and 105:

- **What is meant by 'necessary assessment'? Is a certain kind or quality of assessment required?**
- **If a certain kind or quality of assessment is required, will guidance be provided about the form of assessment that is required?**

Assessment necessary for the purpose of clauses 103 and 105 will depend on the type of VET qualification or statement of attainment that is being awarded. Guidance is provided through training packages and accredited course documentation which provide the basis for the development of strategies for training and assessment by each RTO and describe essential course information including the packaging rules, outcomes to be achieved, standards for assessment and required resources.

Assessment in the VET sector does not necessarily involve examination but will include an assessment of skills. For example students may have gained prior skills through informal or formal training, experience in the workplace, voluntary work, or social or domestic activities. Whole or part qualifications can be awarded to students on the basis of these skills without further deliver of training.

C. Offence content delegation

Under clause 101 an RTO, whose registration has been suspended, commits an offence if it fails to do something that the National VET Regulator required it to do, or if it does something that the National VET Regulator required it not to do.

1. Could you tell us what the National VET Regulator may require these RTOs to do or not do?

Clause 101 allows the NVR to escalate penalties when an RTO continues with non-compliance of clause 38 of the Bill, without necessarily cancelling the registration of the RTO or affecting the operation of the RTO.

Clause 38 gives examples of what the NVR may ask the RTO to do or not do during suspension, including restrictions on;

(a) enrolling a student in a VET course or part of a VET course; or

(b) allowing a VET student to begin a VET course of part of a VET course; or

(c) publishing or broadcasting an advertisement relating to a VET course or any part of a VET course; or

(d) causing to be published or broadcast an advertisement relating to a VET course or any part of a VET course.

For example, to ensure that current students are not penalised by the RTO's suspension an RTOs scope of registration may be suspended for a course on the basis that it teach out current students but not enrol new students into the course. If the RTO disregards the basis of the suspension and continues to advertise for or enrol new students then the NVR has the option of pursuing civil or criminal sanctions for failure to comply with the direction of the NVR.

2. Why does the doing or not doing of these 'somethings' merit criminal sanctions?

The availability of a criminal sanction is part of a range of penalties available to the NVR and would not necessarily be used in each circumstance. Clause 101 will be used in the context of an RTO that potentially has already contravened part of the Bill resulting in suspension. An effective enforcement regime is crucial for an effective regulator, otherwise the entire regulatory framework will be undermined if the regulator is unable to tailor a response effectively to the circumstances of a case.

3. Does the offence overlap with offences that apply where an RTO acts outside the scope of its registration (for example offences at clause 93, clause 95 and clause 97)?

It is not envisaged that the NVR would use clause 101 where clauses 93, 95 or 97 apply. Clauses 93, 95 and 97 relate to providing VET courses or issuing VET qualifications or statements of attainment outside the scope of registration, whereas clause 101 relates to a failure to do something required by the NVR to be done, or doing something which the NVR has specifically required not to be done, under clause 38.

D. Extended geographical jurisdiction

1. Why is extended geographical jurisdiction appropriate for the offences in Subdivisions A and C, Division 1, Part 6 of the NVR Bill?

Offshore delivery of Australian VET qualifications is a growing area of activity for Australian VET providers. There is growth in numbers of offshore students who are undertaking these Australian qualifications along with corresponding growth in the numbers of public and private providers engaged in offshore delivery. One hundred and five private providers (approximately 2% of all registered Australian private providers) and thirty seven public providers (61% of all Australian TAFE institutes) were involved in the delivery of VET offshore in 2009.

There are considerable financial and reputational risks to individuals, providers and the Australian VET system as a whole with offshore delivery of AQF qualifications by Australian RTOs and by overseas providers. The NQC report *Offshore Quality Assurance Monitoring against the AQTF, Dec 2009,* found:

> Fundamental to the quality of the system is that Australian Industry can have confidence that training offshore is equivalent to that provided onshore and not a lesser qualification. Graduates of Australian qualifications gained through offshore training should be equally prepared to graduates and workers onshore.

It is therefore necessary to allow for the geographical jurisdiction to be extended to allow for confidence in Australian qualifications provided offshore by Australian RTOs and to deter overseas providers from falsely claiming to be registered in Australia and adversely affecting the reputation of AQF qualifications and Australian registration.

2. How will enforcement action be carried out overseas for these offences?

There are several mechanisms available to Australian law enforcement officers to carry out law enforcement action and obtain information and evidence from offshore providers in foreign countries for the purposes of criminal investigations and prosecutions. These mechanisms include mutual assistance (formal government to government assistance), police-to-police assistance and agency-to-agency assistance processes.

E. Civil penalties

1. The civil penalties in Subdivision 4, Division 2, Part 4 relate to a person's failure to return VET qualifications or statements of attainment, and the use of same, after the qualification or statement of attainment has been cancelled. Of the five civil penalties in clauses 60 and 61, whether or not the person was aware that the statement of attainment or civil penalty was cancelled is only relevant to the civil penalty at subclause 60(3). Why do the remaining civil penalties in clauses 60 and 61 not include a requirement that the person know the qualification or statement of attainment has been cancelled?

Clause 60(3) is not the only clause that requires knowledge of the cancellation of the statement of attainment. Subclauses 60(1) and (2) require the NVR to give written notice to a person of a

proposed cancellation under subclause 57(1). A person who has received written notice would be aware of the cancellation.

Subclause 60(4) requires a person to return their qualification or statement of attainment to the NVR in circumstances where the Administrative Appeals Tribunal (AAT) has reviewed the NVR's initial cancellation decision and confirmed it. This penalty is appropriate as a person who has applied to the AAT to review the NVR's cancellation decision must have knowledge of the decision.

Clause 61 contains the word purport. The plain English meaning of 'purport' incorporates an element of pretending which implies knowledge and intent. It is therefore intended that clause 61 will be used where the person knowingly pretends to hold a qualification that has been cancelled.

2. For the civil penalty at subclause 60(3) the person must 'be aware' of the notice. What will need to be demonstrated to establish that the person 'was aware' of the notice? Why hasn't the fault element of 'knowledge', as defined in Chapter 2 of the *Criminal Code*, been applied?

For there to be a contravention of subclause 60(3) the person to whom the notice relates must be aware of the notice and contravene the requirement to return the cancelled qualification. This is an appropriate safeguard for the individual affected as the notice given under subclause 57(2) is not personally given to the affected person, but rather is given by way of a public notice when it has not been possible for the person to be given notice personally. The fault element here is the same or very similar to the concept of 'knowledge' in Chapter 2 of the *Criminal Code*.

3. By letter dated 1 March 2011, Senator Chris Evans, Minister for Tertiary Education, Skills, Jobs and Workplace Relations, advised the Senate Standing Committee for the Scrutiny of Bills that the penalty attached to the civil penalty at clause 61 is appropriate as the conduct covered by clause 61 is comparable to the offence of corruption. An example given is the offence at section 145.1 of the *Criminal Code*, which requires the person to know the document is false and to intend to mislead. Knowledge and intention do not appear to be relevant to the civil penalty at clause 61. If the civil penalty is meant to be targeting corrupt conduct, then should the person be required to know that the qualification or statement of attainment has been cancelled?

As stated above it is intended that clause 61 will be used where a person who purports to hold a VET qualification or VET statement of attainment has knowledge that the qualification or statement has been cancelled.

F. Infringement notices

Commonwealth legislative standards, as set out in *A guide to framing Commonwealth offences, civil penalties and enforcement powers*, direct that infringement notices:

- **should only be available for relatively minor offences or civil penalties**
- **should not be used unless the offences are strict or absolute liability offences, and**

- **should have a penalty not exceeding 12 penalty units for a natural person and 60 penalty units for a body corporate.**

Why are infringement notices considered appropriate given the offences under the Act are not strict or absolute liability offences, the offences and civil penalties appear to be significant rather than minor in nature, and the penalty level for many of the civil penalties applying to natural persons will exceed the penalty limit of 12 penalty units?

Clauses 148 and 149 state that the regulations may provide for a penalty to be paid as an alternative to civil penalty proceedings or criminal prosecution. When drafting the regulations the Commonwealth will have regard to the *Guide to framing Commonwealth offences, civil penalties and enforcement powers*. Infringement notices will be appropriately applied to the offences and civil penalties in the Bill based on consideration of the Guide.

2. Infringement notices schemes should generally operate within the framework of safeguards set out in *A guide to framing Commonwealth offences, civil penalties and enforcement powers*. Will the scheme comply with these safeguards, for example that the issuing officer must have reasonable grounds to believe that the offence has been committed before issuing the notice and that the notice contain appropriate contents such identifying the alleged offence?

The infringement notice scheme will consist of regulations drafted by the Office of Legislative Drafting and Publishing. As a Commonwealth instrument the infringement notice scheme will have regard to the safeguards as set out in *A guide to framing Commonwealth offences, civil penalties and enforcement powers*, including that the issuing officer must have reasonable grounds to believe that the offence has been committed before issuing the notice and that the notice contain appropriate contents such identifying the alleged offence.

Commonwealth Response to submission from Victorian Government

Paragraphs 7, 10-27, 37 – Exclusion of Victorian laws

The Commonwealth understands that in Victoria's view the 'doubt' Victoria refers to in relation to the power of non-referring States to manage their own TAFE institutes and to regulate apprenticeships, and enforce legislation in relation to consumer protection, in the same way as referring states arises because:

(i) the different approaches in s 9(1) and s 9(3) regarding exclusion of laws in referring States and non-referring States respectively – Victoria considers that s 9(3) may operate to exclude laws in a non-referring State which relate to matters other than the matters expressly listed in s 9(3) and so lead to direct inconsistency of the NVR Bill with Victorian laws; and

(ii) in Victoria's view the NVR Bill may show an intention to 'cover the field', and so there may be 'indirect' inconsistency between the NVR bill and Victorian law (this concern is based on the fact that inconsistency within the meaning of s 109 of the Constitution can also arise where a Commonwealth law 'covers the field' or was intended to be a complete statement of the law governing a particular matter, and the state law purports to deal with that matter).

The Commonwealth view is that s 9(3) only excludes laws about the matters listed in s 9(3), (and then only when the law does not apply whether or not a person is a training organisation) and *does not* have the effect of directly excluding laws about the 'carve out' matters listed in s 6(2).

The Commonwealth's view is also that the NVR Bill does not show an intention to cover the field in relation to all matters relating to VET. Section 9(3) specifically confers immunity on NVR registered training organisations in non-referring States from complying with laws dealing with particular listed subject matters, and thereby strongly indicates that those organisations are *not* immune from complying with other laws of the State.

Paragraph 9 – Identification of NVR providers

Subclause 8(4)(a) of the Bill provides that the Bill applies to organisations registered under the ESOS Act. To be registered under the ESOS Act a provider must first pay the relevant charges and be registered on CRICOS. Subclause 8(4)(b) and (c) applies to organisations that provide, or offer, all or part of a VET course in both a referring and non-referring state, which is a matter of fact.

Paragraphs 29-32 – Improving the national standards

One of the key principles underpinning the COAG agreement to establish the National VET Regulator is that the setting of standards will be fully separate from regulation by the national VET Regulator which is to be responsible for the *application* of standards. The Intergovernmental Agreement agreed in principle by COAG in February 2011 states that the Ministerial Council will approve the standards for registration of providers on advice from the

National Standards Council, which will replace the NQC.

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

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

The National Standards Council will continue to develop and refine the national standards, and will be required to consult extensively on these changes. Any substantial changes to the legislative instruments will also be subject to standard regulatory impact analysis (RIA) requirements, which involve significant consultation with all affected parties.

Paragraph 33 – Implementation issues

The NVR and the Victorian state regulator are currently in discussions about the terms of an agreement to be reached in relation to the implementation and operational aspects of the Bill.

Paragraph 38 – Amendment of clause 10

Clause 10 is included in the Bill in the context of States and Territories who have agreed to the Intergovernmental Agreement that supports the establishment of a National VET Regulator (with the objectives of national consistency sustainable over time and simplicity in the regulatory governance of the VET system) and have agreed to the referral of powers. It is in that context that the Commonwealth and the referring States have agreed on the content of the NVR legislation including s10.

Paragraph 39 – Commonwealth exempting State law

Section 9(3) of the draft TEQSA Bill does not operate in the manner suggested by Victoria. In fact s 9(3) of the TEQSA Bill would enable the Commonwealth to make a regulation to include matters in the override in s 9(1), not exempt those matters.

Questions taken on notice at hearing on 7 March 2011

1. Scope of consultation

COAG agreed to the implementation of a National VET Regulator in December 2009. Consultations to inform the development of the legislation took place with stakeholders throughout 2010. An exposure draft process was held on 29 October, to allow stakeholders the opportunity to comment on the draft.

Attendees list for meeting on the 29/10/10

Name	Organisation
Pam Caven	TDA - Director Policy & Stakeholder Engagement
Natalina Velardi	TDA - Director of Compliance Services, Victoria University
Darrell Cain	TDA - Deputy CEO & Chief Operating Officer, Box Hill Institute of TAFE
Claire Field	Australian Council Private Education Training
Darin Ritchie	VECCI – Victorian Employers' Chamber of Commerce and Industry
Jodee Price	VACC – Victorian Automobile Chamber of Commerce
Mary Hicks	ACCI – Australian Chamber of Commerce and Industry
John Churchill	Enterprise RTO Association
Nik Mavrommatis	Group Training Australia
Alex Moruya	Master Builders Australia
Tim Shipstone	Australian Council of Trade Unions
Stuart Maxwell	CFMEU and sits on the ACTU VET committee
John Ingram	ACTU VET committee
Mr Mark Brown	Department of Education Services WA
Stephanie Trestrail	Department of Education Services WA
David Collins	Department of Education and Training NSW
David Garner	Department of Education and Training- Director, Training Quality QLD
Stuart Busby	Department of Education and Training- Director, Special Projects QLD
Linda Macintyre	Skills VIC
Phil Clarke	Skills VIC
Mark Miller	Skills VIC
Sheryl Hanson	Skills VIC
Wendi Masters	Department of Education and Training (NT)
Carly Piper	Department of Education and Training (NT)
Liza Quinn	Office of Parliamentary Council
Jim Faulkner	Attorney General's Department
Joanna Palser	Skills Australia Secretariat
Sue Beitz	Skills Australia Secretariat
Marg Tregurtha	DEEWR
Jennifer Taylor	DEEWR
Maryann Quagliata	DEEWR
Melissa McEwen	DEEWR
Erica Lewis	DEEWR
Ben Lyons	DEEWR
Renee Price	DEEWR
Kathryne Parkes	DEEWR
Kate Chipperfield	DEEWR
Margaret Tregurtha	DEEWR
John Smyth	DEEWR - NVR
Di Orr	DEEWR - NVR

2. Scope to amend the text of the draft legislation

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. The Commonwealth has received advice that 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 minor editorial amendments will therefore delay or prevent the establishment of the National VET Regulator.