National Vocational Education and Training Regulator Amendment Bill 2011

Marilyn Harrington
Social Policy Section

Contents

Purpose ........................................................................................................................................... 2
Background ....................................................................................................................................... 3
Financial implications .......................................................................................................................... 4
Main issues ......................................................................................................................................... 4
  The Intergovernmental Agreement for Regulatory Reform of Vocational Education and Training .............................................. 4
  State referral of powers and VET regulation .................................................................................... 5
  The position of Victoria and Western Australia .............................................................................. 5
  Registration arrangements for registered training organisations .................................................. 6
  Text-based referral of state powers to the Commonwealth ............................................................ 7
Other issues ......................................................................................................................................... 8
Key provisions .................................................................................................................................... 9
Concluding comments ....................................................................................................................... 11
National Vocational Education and Training Regulator Amendment Bill 2011

Date introduced: 24 August 2011

House: Senate

Portfolio: Education, Employment and Workplace Relations

Commencement: Sections 1 to 3 will commence on the day the Act receives Royal Assent. All other items in Schedule 1 will commence on a date to be fixed by Proclamation. However, for any item in Schedule 1 that does not commence within six months of the Act receiving Royal Assent, the item will commence on the day after the six-month period.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/bills/. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The National Vocational Education and Training Regulator Amendment Bill 2011 (the Bill) proposes to amend the National Vocational Education and Training Regulator Act 2011 (the Act) to:

- insert an objects clause
- substitute a new section 9 to clarify when a training organisation registered with the National Vocational Education and Training Regulator, now known as the Australian Skills Quality Authority (ASQA), is immune from and when it is subject to, state and territory laws in the jurisdiction in which it is operating and
- to clarify other aspects of ASQA’s powers and operations. These proposed amendments cover matters relating to provider registration, audits of registered training organisations (RTOs), the amendment of accredited courses, cancellation of Vocational Education and Training (VET) qualifications, use of force provisions, the qualifications of ‘authorised officers’, legislative instruments, and information sharing with the Tertiary Education Quality Standards Agency (TEQSA).

1. In this Bills Digest, the National Vocational Education and Training Regulator is referred to by its established name, the Australian Skills Quality Authority (ASQA). See also: Explanatory Memorandum, National Vocational Education and Training Regulator Amendment Bill 2011, op. cit., p. 2.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Background

Three Bills were associated with the establishment of ASQA:

- the National Vocational Education and Training Regulator Bill 2010
- the National Vocational Education and Training Regulator (Transitional Provisions) Bill 2010 and
- the National Vocational Education and Training Regulator (Consequential Amendments) Bill 2011.

These Bills were examined by two Senate Committees—the Standing Committee for the Scrutiny of Bills and the Standing Committee on Education, Employment and Workplace Relations (Senate Education Committee).

The Senate Committee inquiries occurred as stakeholders were raising related concerns to those addressed by the committee inquiries. These stakeholder concerns, which were also the subject of submissions to the Senate Education Committee inquiry, are discussed in the Bills Digests for the original Bills. These Bills Digests provide background to the establishment of ASQA.

The original Bills were passed without amendment. As explained in the Explanatory Memorandum (EM) for the current Bill, amendments were not made prior to the original Bills’ passage because of the nature of the states’ referral of their VET regulation powers to the Commonwealth under which the legislation was introduced.

The referral of powers in this case is ‘text-based’; that is, the states (except for Victoria and Western Australia) agreed to transfer their powers on the basis of an agreed text for the Bill establishing ASQA. As the NSW Parliament had already passed its Act transferring NSW VET regulation powers,

---


Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
the original Bill was passed in its agreed form to ensure that the NSW Act remained valid. The Senate Education Committee also recommended this course of action.

The current Bill now proposes to incorporate a number of the recommendations of the Senate Committee inquiries as well as responding to other concerns raised by stakeholders during the inquiries. Other recommendations and concerns were either considered beyond the scope of the Act or were addressed in a replacement EM for the original Bills.

Financial implications

There is no additional financial impact as a result of the Bill’s measures.

Main issues

The current Bill and the original Bills establishing ASQA have raised broader questions about the process for intergovernmental agreements and text-based referral of state powers. There are also ongoing concerns about the non-participation of Victoria and Western Australia and the implications for VET regulation.

The Intergovernmental Agreement for Regulatory Reform of Vocational Education and Training

Although not a recommendation of the Senate Education Committee, the Government has conceded the concerns raised about the lack of publicly available objects for ASQA during the committee inquiry, hence the proposed amendment to include an objects clause.

Objects clauses are common in legislation, but are not a requirement. The Government originally chose not to include an objects clause in the Act pending the finalisation of the Intergovernmental Agreement for Regulatory Reform of Vocational Education and Training.

---

7. The links to the replacement Explanatory Memorandum and its addendum can be found on the original Bill’s home page, viewed 4 October 2011, [link](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs810%2F2)

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Agreement for Regulatory Reform of Vocational Education and Training (IGA) which, it is reported, includes objects for ASQA.\(^\text{10}\)

The IGA, which will govern the new VET regulatory framework, including both ASQA and the National Skills Standards Council, was agreed to in principle by all states and territories (except Victoria and Western Australia) at the February 2011 meeting of the Council of Australian Governments (COAG) and was scheduled for sign-off by the end of that month.\(^\text{11}\) However, the IGA has not yet been finalised and publicly released.

It is curious that the overarching intergovernmental framework under which ASQA and the Standards Council were to be established has yet to be put in place. Coalition senators, in their dissenting report to the Senate Education Committee’s report, raised their concern about ‘enacting legislation on the basis of an intergovernmental agreement, when the agreement has not been signed and is not public’.\(^\text{12}\) Their concern was that the Parliament was ‘being asked to support the scheme [national VET regulation] in the absence of a signed agreement between jurisdictions and indeed in the absence of even a public draft of that agreement’.\(^\text{13}\) They considered there is ‘the need for reform of parliamentary consideration of legislation in the context of intergovernmental agreements’.\(^\text{14}\)

**State referral of powers and VET regulation**

ASQA was established on the basis of states referring their VET regulation powers to the Commonwealth under section 51(\text{xxxvii}) of the Constitution. To date, only NSW has passed the required legislation. It is expected that the remaining states that have agreed to refer their power (Queensland, South Australia and Tasmania) will enact legislation by the end of the year. All these states have now introduced their Bills.

The Australian Capital Territory and the Northern Territory are not required to ‘refer their powers’ because under section 122 of the Constitution the Commonwealth can legislate for the territories.

**The position of Victoria and Western Australia**

The Victorian and Western Australian governments have not signed up to the IGA and have not agreed to refer their VET regulation powers to the Commonwealth. Instead, they will enact mirror

---

\(^{10}\) SEEWRLC, op. cit., p. 14.


\(^{12}\) Ibid., p. 40.

\(^{13}\) Ibid., p. 42.

\(^{14}\) Ibid.

**Warning:** All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
legislation. However, this legislation has not occurred and, given the views expressed by these governments to the Senate Education Committee inquiry, particularly in relation to the regulation of state-owned RTOs, there is a question about when this legislation will be introduced.

Western Australia, for instance, advised that it will only mirror the Commonwealth legislation when ‘it has the surety it requires that Western Australian state-owned providers will continue to be regulated by the state regulator’. In the meantime, it has assured its regulatory control of its Technical and Further Education institutions (TAFEs) by registering their international students through Education and Training International, which is the international marketing and development arm of the Western Australian Department of Training and Workforce Development.

Registration arrangements for registered training organisations

Under the Act, those RTOs that are required to be registered with ASQA include:

- RTOs that operate in states which have enacted legislation to refer their VET regulation powers to the Commonwealth
- RTOs that operate in the territories
- RTOs that operate in more than one state and
- RTOs that have international student enrolments, (including RTOs in Victoria and Western Australia).

Providers that are not RTOs but offer English Language Intensive Courses for Overseas Students (ELICOS) or university Foundation Programs (FPs) are also required to be registered with ASQA.

RTOs that operate only in Victoria or Western Australia and which do not enrol international students will continue to be registered by the relevant state VET registration authority.

Under these arrangements, of the 4909 currently registered RTOs:

- 2032 are registered with ASQA
- 1514 are registered in Queensland
- 314 are registered in South Australia
- 109 are registered in Tasmania
- 556 are registered in Victoria and

16. SEEWRLC, op. cit., p. 35.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
386 are registered in Western Australia.19

From this data, 41.4 per cent of currently registered RTOS are registered with ASQA. When the Queensland, South Australian and Tasmanian governments refer their VET regulation powers to the Commonwealth, another 1937 RTOs will be registered by ASQA. The remainder, 940 RTOs (19.1 per cent of all RTOs), will remain with the Victorian and Western Australian state VET regulators.

This data does not take into account those ELICOS and FP providers that are not RTOs. ASQA’s Acting Chief Commissioner (now Commissioner) advised that 93 ELICOS providers that are not RTOs transferred to ASQA on 1 July 2011.20

It was expected that ASQA’s establishment would put an end to the complexity of the VET regulatory framework. However, multiple registration arrangements persist, at least for the short term, and nearly 20 per cent of RTOs in Victoria and Western Australia will not be registered with ASQA. The Senate Education Committee has recommended that negotiations with Victoria and Western Australia continue to resolve this situation.21

Text-based referral of state powers to the Commonwealth

The text-based referral of state powers under which the original Bills were enacted have raised broader issues that are beyond the scope of the Bill but which are nevertheless, as the Senate Education inquiry identified, significant for law making and parliamentary scrutiny.

Citing constitutional lawyer, Andrew Lynch, the report of the Senate Education Committee explains:

... text-based referral, such as that undertaken by New South Wales for the VET Regulator bills, is the commonest way in which powers are now referred to the Commonwealth. Examples of such text-based referral include the corporations law and anti-terrorism legislation. Such referrals generally include an initial referral of matters based on an agreed text- of a bill, with a separate referral of the power to amend that text.22

18. Foundation Programs (FPs) are courses designed for international students to equip them with the skills and capabilities to seek entry into higher education programs in Australia. Generally, FPs provide an academic entry pathway to first year undergraduate study or its equivalent.
21. SEEWRLC, op. cit., p. 36.
22. SEEWRLC, op. cit., p. 6.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
As previously mentioned, the original Bills were passed to ensure the validity of the NSW legislation referring VET regulation powers to the Commonwealth was not compromised.

Although there was intergovernmental consultation about the draft legislation and one consultation session for stakeholders, the Senate Education Committee considered that parliamentary scrutiny of the Bill was constrained by the requirements of the text-based referral of powers. It therefore recommended:

That in future, exposure drafts of legislation be made available for examination by parliamentary committees prior to their adoption as text-based referrals of powers by state legislatures, thereby assisting committees to recommend amendments to bills, if necessary, without threatening the viability of the referral of powers.

Other issues

Other issues about the establishment of ASQA have been raised. These include whether ASQA will have sufficient resources to deal with the new regulatory environment:

The tougher approach to regulation that has been foreshadowed by ASQA will require a significant increase in resources. There will be inevitable challenges to its decisions and resolving them in a Tribunal or even a Court will be time consuming, will divert resources away from other important regulatory activity and may be frustrating for all parties.\(^\text{23}\)

With ASQA expected to be operating on full cost-recovery basis by 2014–15\(^\text{24}\), there are also concerns that regulatory costs for VET providers will rise.\(^\text{25}\) The establishment of ASQA was intended to reduce duplication and the complexity of VET regulation. However, It has been reported that there is a growing demand for legal advisers to assist VET stakeholders in ‘navigating the complex web of regulation that now confronts them’ which, in turn, may exacerbate regulatory costs.\(^\text{26}\)

---


*Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.*
Key provisions

Schedule 1

Schedule 1 of the Bill is in two parts. Part 1 contains the proposed amendments to the Act. Part 2 contains provisions relating to the application of some of the proposed amendments and for transitional regulations. The key provisions in Part 1 of Schedule 1 are discussed in this section of the Bills Digest.

Part 1—Amendments

Item 1 proposes to insert an objects clause (clause 2A) into the Act.

Item 2 proposes to replace section 9 of the Act. This section relates to the immunity of an ASQA RTO from the laws of those states that have referred their VET regulation powers to ASQA (referring states) and from the laws of the territories.

The current section 9 states, in general terms only, when an RTO that operates in a referring state or in a territory is immune from the VET-related laws of those jurisdictions. It does, however, itemise the circumstances when an RTO that operates in a non-referring state is immune from the VET-related laws of those states.27

The purpose of the proposed new section 9 is to make these circumstances explicit for both referring and non-referring states. The proposed section 9 now itemises the circumstances when an RTO is immune from state and territory laws, regardless of whether it is operating in a referring or non-referring state. Conversely, proposed subsections 9(2) and 9(3) itemise the circumstances when an RTO is subject to state and territory laws.

The proposed section 9 is in response to concerns raised by the Victorian and Western Australian Governments in their submissions to the Senate Education Committee inquiry that the Act ‘unintentionally overrides laws in non-referring states which were meant to be excluded’.28 Although the Government considers that the Act does not do this, it has, nevertheless, introduced this amendment to make the immunity provisions more explicit as well as enabling states and territories through proposed subsection 9(3) to stipulate specific laws to be excluded from the immunity provisions.29

The remaining items of Part 1 seek to clarify and make more explicit other aspects of ASQA’s powers and operations that were raised as concerns by the Senate Committee inquiries.

---

27. RTOs that operate in a referring state or in a territory, those that operate in more than one jurisdiction that includes a referring state and/or a territory, and those that enrol international students are required to be registered with ASQA.


29. Ibid.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Item 3 proposes to add a note to subsection 16(1), which refers to applications for registration as an RTO, providing an additional warning that it is an offence to provide or offer a VET course without registration. This offence is also currently prescribed in section 116 of the Act which also provides penalties for such offences.

Item 4 proposes to amend subsection 35(1), which refers to the scope of ASQA audits of ASQA registered RTOs. The current provision makes reference to compliance with the VET Quality Framework—the proposed amendment extends the scope of these audits to include all requirements of the Act.

Item 5 proposes to rewrite paragraph 51(2)(a), which currently enables ASQA to amend VET accredited courses on 'its own initiative'. The proposed paragraph lists the circumstances in which an amendment can be made.

Items 6 to 14 propose to make a number of amendments to sections 58 to 61. The proposed amendments relate to, and clarify, ASQA’s obligation to give notice about the cancellation of a person’s VET qualification or statements of attainment, and the requirement for that person to return the cancelled qualification or statement of attainment. The amendments also take into account the effect of reviews of cancellation decisions on the specified timeframes for these actions.

Items 15 to 16 propose amendments to section 70 which provide more specific information about when an authorised officer can use force against a ‘thing’; namely, when the person in charge of the thing has been given the first opportunity to ‘open, move or otherwise deal with the thing’; or when it is not possible to give that person the opportunity to do so. A note is added to say that the section does not authorise the use of force against a person.

Section 89 deals with the appointment of authorised officers. Item 17 proposes to rewrite subsection 89(2) which states that the Chief Commissioner must not appoint someone unless satisfied that the person has ‘suitable qualifications and powers’. The amended subsection would enable the Minister to determine, by legislative instrument, the requisite experience, training and qualifications for authorised officers.

Item 34 proposes to insert new section 191A which will enable the legislative instruments provided in the Act to refer to documents that are not legislative instruments, which are integral to the VET sector, such as Training Packages and their guidelines. Under normal circumstances, provisions in the Legislative Instruments Act 2003 and the Acts Interpretation Act 1901 prevent a legislative instrument from applying matter contained in another instrument or ‘other writing’.  

Section 105 provides that ASQA may disclose information to the Secretary and a Commonwealth or state or territory authority for the purpose of administering laws relating to VET. Item 35 proposes to insert new section 205(A) which will nominate the Tertiary Education Quality Standards Authority (TEQSA) as an agency to which ASQA can disclose information to enable TEQSA to carry out its work.

30. For further information, see: Explanatory Memorandum, op. cit., pp. 15–16.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
This provision will not only enable the sharing of information between the two regulatory agencies but it is also intended, as the EM explains, to minimise the regulatory burden for dual providers that operate in both the higher education and VET sectors.  

### Concluding comments

The establishment of ASQA has been welcomed by key stakeholders. However, until all states have referred their powers or passed mirror legislation, and while Victoria and Western Australia retain their separate VET regulation arrangements, questions will remain about ASQA’s future operation and the complexity of VET regulation.

ASQA’s establishment is also taking place at a time of other significant change for the VET sector. COAG’s [National Agreement for Skills and Workforce Development](http://www.federalfinancialrelations.gov.au/content/national_agreements/skills_workforce/skills_agreement.pdf), which defines the objectives of, and the roles and responsibilities of governments for, the VET sector, is being re-negotiated, with a target implementation date of 1 July 2012 for the new agreement. The Australian Government has also committed to a new National Partnership to reform the VET system. The Government will provide $75 billion over five years from 2012–13, with additional funding for the states and territories contingent upon ‘the level of reform they commit to and achieve’. COAG took its first steps towards these new arrangements at its August 2011 meeting.

---


**Warning:** All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2414.

**Warning:** All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.