The following addenda respond to the Senate Education, Employment and Workplace Relations Committees report of 21 March 2011.

After the fifth paragraph of the General Outline to the Bill (which commences ‘The NVR will form the basis of quality assurance in the VET sector’), add the following:

‘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 (i.e. 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.

After the fourth paragraph of the general outline of Part 6, (which reads ‘Part 6 of this Bill sets out offences and civil penalty provisions. It also provides for enforceable undertakings, infringement notices and injunctions’), add the following:

‘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 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 Act 2000 deals with similar behaviour and the same sector (see ss. 8, 108, 110). That 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).’

After the explanation in relation to clause 113 – Geographical jurisdiction, add:

‘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.

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.’

**After the explanation in relation to clause 132 – Geographical jurisdiction, add:**

‘See also the explanation in relation to clause 113 above.’

**After the explanation in relation to clause 148 – Infringement notices in respect of offences, add:**

‘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. Infringement notices will be appropriately applied to the offences and civil penalties in the Bill based on consideration of the Guide.’

**After the explanation in relation to clause 149 – Infringement notices in respect of civil penalties, add:**

‘See also the explanation in relation to clause 148 above.’

(Circulated by authority of the Minister for Tertiary Education, Skills, Jobs and Workplace Relations, Senator the Honourable Chris Evans)