



Submission to the
Minister for Industry, Honourable Ian Macfarlane MP
&
VET Reform Task Force
Department of Industry

Reforming Regulation in Vocational Education and Training

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Acknowledgements

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REFORMING REGULATION IN VOCATIONAL EDUCATION AND TRAINING¹.

EXECUTIVE SUMMARY

The Coalition Government is looking closely at reducing “red tape”. This includes the regulation of vocational education and training (VET). Government efforts to reduce any unnecessary regulation in this important area could go a considerable way toward providing valuable gains in education and skills outcomes.

This TAFE Directors Australia (‘TDA’) brief proposes that this approach should especially re-affirm and accentuate as central a risk assessment approach that includes greater delegation of key responsibilities to well-established low risk education providers.

The brief finds that policy review for vocational education and training is moving in a very positive direction by moving towards more red tape reduction including via a risk assessment approach, but this momentum could be enhanced further by:

1. Additional revision of the draft *Standards for VET Regulators 2014* to ensure full comprehensive requirements for risk- management by the National Regulator, using best practice and with improved accountability for its implementation of the Risk Assessment Framework. This allows a strong regulatory focus where potential for risk concern is greatest and, by “lighter touch” approaches elsewhere, facilitates reduced overall direct and indirect regulatory costs.
2. More frequent and transparent use by the Regulator of delegation of its powers to low risk, high quality organisations for the purposes of scope approval and course accreditation. This could be reinforced if needed by revision of the *Risk Assessment Framework* guidelines from the Minister agreed by the Ministerial Council, and any accompanying organisational changes to the National Regulator also needed to facilitate this.

Such enhancement would further reduce overall regulatory costs, facilitate flexibility and innovation, and allow regulatory resources to be focussed where they are most needed viz. high risk areas. This approach will strengthen VET as a dynamic, high quality contributor to national economic and social outcomes.

BACKGROUND.

The importance of vocational education and training (VET) to Australia’s future is clear. It significantly influences and underpins our economic and social outcomes.

Stakeholders such as the Business Council of Australia have increasingly emphasised the need for increased attention to this area. According to BCA CEO Jennifer Westacott “We’ve got to stop the erosion of the VET sector” (TDA Annual Conference, 1 September 2014).

¹ This is a report to TAFE Directors Australia (TDA). It was prepared by Professor Glenn Withers of the Australian National University as the principal author, assisted by a Reference Group comprising Kim Bannikoff of the AQF Council, Jim Davidson, Fellow of the L H Martin Institute, Patrick McKendry of Careers Education Australia, Adrian Marron of the Canberra Institute of Technology, and Dr. Anne Jones of Victoria University, supported by Stephen Conway, Martin Riordan and Pam Caven of TDA. The views expressed remain those of the principal author.

Minister Macfarlane has stated that ‘In recent years the skills and training system has become complex and bogged down in red tape’ (National Skills Summit Address, 25 June 2014)

For this reason a regulatory approach that assists this sector in delivering suitable high quality outcomes is crucial.

The present regulatory framework for VET derives primarily from the *National Vocational Education and Training Regulator Act 2011*. Since this Act was one which sought to accommodate previously divergent state and territory approaches it was in some respects a compromise and can be now usefully and appropriately looked at afresh.

There was no Regulation Impact Statement conducted for the 2011 Act, but subsequent work by Deloitte Access for COAG officials and by Price Waterhouse Coopers for the Industry and Skills Council each suggested the opportunity for improvement of regulation through revision of associated legislative instruments including the *Standards for VET Regulators 2011*. These *Standards* in particular are the legislative instrument under the Act which govern expectations of the National Regulator for VET.

Price Waterhouse Coopers in particular saw opportunities for reducing the number of applications made by providers, the number that need auditing and the number that were non-compliant. It stated that “a more responsive model of regulation” is possible, including through enabling some providers to self-assess some applications. (Price Waterhouse Coopers, *ASQA Process Review: Final Report, 2013, p.vii*)

Of course there do remain two non-referring state jurisdictions for VET regulation, WA and Victoria, plus an earlier ambition to better integrate VET and higher education regulation by the Commonwealth which largely remains unrealised.

The national VET regulator is the Australian Skills Quality Authority (ASQA) which is a statutory agency which reports annually to the Minister for Industry and the COAG Industry and Skills Council. The agency provides a report to the Industry Skills Council Advisory Committee twice yearly. ASQA’s performance is examined by the Australian Parliament at Senate Estimates Committee hearings.

At its meeting of April 2014, the Ministerial Council released revised Registered Training Organisation and VET Regulators Standards for public consultation, with a view to implementation of revised standards from 1 January 2015.

THE CHANGE IMPERATIVE

There are concerns that the regulatory burden for all of tertiary education (VET and higher education) has been too high. Certainly the submissions to the National Skills Standards Council review made these concerns systematically known (NSSC, *Review of the Standards for the regulation of Vocational Education and Training, Analysis of Submissions, August 2012*). Likewise Minister for Industry Macfarlane has concluded from all the evidence becoming available to him that: “Training providers feel weighed down by red tape, endless process and excessive regulation. High quality providers are not rewarded for their hard work, and low quality providers are still allowed to operate.” (National Skills Summit Address, 25 June 2014)

The regulatory burden in higher education has been addressed through the Lee Dow and Braithwaite Inquiry, *Review of Higher Education Regulation* (2013), and adoption of that report's recommendations by government.

Regulatory burden and red tape is also being addressed in a range of other government areas and initiatives, whilst still maintaining standards and protection of the public. In May 2014 the Government introduced a "Red Tape Repeal Day" into Parliament embracing proposed removal of a wide range of legislation and regulations deemed redundant, unnecessary or counterproductive. There is also a major Competition Policy Review currently in train, chaired by Professor Ian Harper, with a remit to, inter alia, "identify regulations and other impediments across the economy that restrict competition and reduce productivity, which are not in the broader public interest" (*Terms of Reference*, p.1).

VET itself is undergoing substantial policy change, including major policy changes based on contestability at state and territory level. Substantial consultancy and committee analysis of VET regulation has also been undertaken, as indicated. And now the actual reform of the VET regulatory framework is clearly anticipated in Minister Macfarlane's 2014 Skills Summit Address where he spoke of the commitment to "reforming the way the VET system is regulated so as to cut red tape" (p.5). It was in this context the Minister identified a problem where "High quality providers are not rewarded for their hard work, and low quality providers are still allowed to operate". (p.3)

While awaiting the finalisation of this VET regulatory change, it is notable that some registered training organisations (RTOs) are:

- increasing their focus on education and training outside the formal government VET framework eg privately certified qualifications, executive training etc, or
- looking to access higher education options under that alternative more flexible framework, and that higher education dual sector providers in particular have increasingly chosen to lessen their VET role.

So we observe the opposite of what policy intends and signals that encourage a flight away from attested quality VET skills. This suggests that the change in VET regulation being considered by the Commonwealth government is timely indeed. The regulatory burden involves high transaction costs for providers and inhibits flexibility and innovation, even for the quality providers. Reform therefore can be a very important part of the solution to the challenges facing VET and to meeting the growing skilling needs of the economy and society

MANAGING RISK

In considering reform of VET regulation, the Government has issued discussion drafts for the key legislative instruments implementing the *National VET Regulator Act 2011*.

Under the Act itself a key provision is s157-4 which states that "in performing the national vocational education and training regulator functions the regulator must apply the Risk Assessment Framework".

s190 of the Act then further specifies that:

“(1) The Minister may, by writing, make guidelines for the National VET Regulator to use when assessing risk, as agreed by the Ministerial Council”

“(2) The agreed guidelines are to be known as the Risk Assessment Framework”

“(3) The guidelines made under subsection (1) are not a legislative instrument”.

The inclusion of these provisions in the Act were most valuable. They stated the intended key role for a risk sensitive regulatory approach, and for the Minister and Ministerial Council in directing the regulator on this.

Such mandated risk sensitivity is to be commended as it is central to efficient and effective regulation. It allows strong regulatory focus where potential for risk concern is greatest and, by “lighter touch” approaches elsewhere, facilitates reduced overall direct and indirect regulatory costs, including the cost-based fees levied by the Regulator.

However the actual *Standards for VET Regulators 2011* which sought to implement the mandates of the Act arguably did not reflect the intended centrality of such a risk assessment approach². Risk management is mentioned only briefly and in passing in the 2011 *Standards* (s4.2, 14.1, 14.2) and little guidance is provided for its application and accountability in its use.

ASQA itself has gradually developed over time a risk assessment model. It states that it now “regulates according to a risk assessment model - meaning that the authority applies proportionate regulatory intervention based on risk assessment. ‘Proportionate’ intervention means that the regulatory focus is concentrated on providers of concern (those that are not delivering quality training outcomes). Similarly regulatory interventions are minimised for providers that consistently deliver high quality training outcomes” (“How does ASQA regulate?” www.asqa.gov.au, accessed, 20 August 2014)

This development of a risk approach by the Regulator is to be commended. What is now needed is to ensure that the changing framework for the Regulator sustains this focus and that accountability in its use is firmly in place.

The proposed draft *Standards for VET Regulators 2014* are in fact much more clearly and comprehensively aligned with this requirement and are to be strongly supported. Indeed there are major improvements in the 2014 *Standards* over the 2011 provisions across a number of key criteria including:

- encouragement and assistance with compliance;
- pursuit of best practice including through review and improvement and engagement with other regulators;
- requiring adherence to natural justice and procedural fairness; and
- strengthening of requirements for effectiveness and efficiency and transparency.

² Separate provisions apply for financial risk, including a separate legislative instrument, the *National VET Regulator Financial Viability Risk Assessment Requirements 2011*, which are not considered here as they are not under current review.

But the biggest improvement in the draft *Standards for VET Regulators* is the centrality now evident for Risk Assessment. Nevertheless there are possibilities, and indeed a major need, for consolidating and enhancing this valuable advance even further.

FURTHER ENHANCEMENT

Strengthening the Regulator Standards

Since the Act firmly mandates application of a risk assessment framework, there is no requirement for amendment of the Act itself to further this injunction. The appropriate path now is instead to overcome the weaknesses on risk assessment of the *VET Regulator Standards 2011* by endorsing the provisions of the draft *VET Regulator Standards 2014* and strengthening them further.

Such strengthening would aim to ensure that:

- the application of risk assessment is stated as applying explicitly across both audit and course accreditation roles;
- the application of risk assessment is conducted according to best practice informed by both internal and external review;
- the nature and conduct of the risk assessment approach by the regulator is transparent;
- allowance is made for the risks and costs of both under-regulation and over-regulation;
- there is full accountability specifically for the development and implementation of the risk framework.

This could be done quite readily through refinements to the draft *VET Regulator Standards 2014* (draft as of August 2014) as follows:

PART 1-Preliminary. Amend the last sentence in the Context statement to read “The regulatory approach should engender self-evaluation and improvement within RTOs and the VET Regulators in a way that makes regulation valued for what it contributes to RTOs, industry stakeholders and learners”

PART 1 – Preliminary. Amend the fourth dot point to add course accreditation so as to read: “delegating regulatory powers to low-risk RTOs, such as the ability to amend their scope of registration and accredit courses”

Glossary. To the definition of Risk-based approach add “and the VET Regulator Standards” to the list of instruments where non-compliance may have adverse consequences. This ensures the possibility of poor regulatory performance due to failure to examine the risk performance of the regulator itself, is also explicitly recognised.

Standard 2. Add clauses for Standard 2 on course accreditation, as are already appropriately provided for Standard 1 regulation of RTOs, so that the VET Regulator “adopts contemporary best practice course accreditation regulation approaches”; and “in its regulatory activity in matters of course accreditation, the VET Regulator engages with other regulators as appropriate, including industry regulators, and with industry.”

Standard 4. Add a new 4.3: “The VET Regulator reports annually to the Industry and Skills Council or its delegate on the standing and operation of the Risk Assessment Framework, including as provided

in guidelines by the Minister and agreed by the Ministerial Council". This obliges explicit accountability for both the Regulator and the Council.

Standard 5. Add a new 5.3: "The VET Regulator reviews and improves the way it regulates RTOs and accredits courses by examination of regulatory practice in other related or relevant agencies in Australia and overseas". This encourages explicit best practice accountability.

Such adjustments would assist in making even more explicit to the Regulator the comprehensive nature of its obligations under the *Act* and the *Regulator Standards* to centrally pursue a risk-sensitive regulatory approach. They would also assist the Regulator by ensuring explicit accountability for this to the Minister and Ministerial Council. This approach would also enhance the potential for stakeholders to have structured recourse to the Administrative Appeals Tribunal were such parties of a view that required risk-assessment was not being implemented as intended under the *Act* and *Standards*.

Enhancing the Practice of Delegation

Of course, where further direction for the Regulator is required but is not suited to legislative instrument form such as within the *Standards*, there does remain the option for revision of the detail of the Risk Assessment Framework itself, as provided for under s.190 of the *Act*. The Minister, as agreed by the Ministerial Council, may make guidelines to use when assessing and reviewing risk.

For example, a major option for the Regulator is to use the power for delegation of its own powers as provided for under ss 224, 225 and 226 of the *Act*. These sections provide for delegation of powers to government authorities, occupational licensing bodies and industry bodies and to RTOs. For RTOs the delegation is restricted to two areas: scope of registration and/or course accreditation.

This power has in practice been used exceedingly sparingly by the Regulator to date and mainly for purposes associated with transition from previous State and Territory arrangements. The 2012-13 ASQA *Annual Report* (p.39) indicates that only 19 delegations were in place, despite a risk assessment being available for 3695 providers with half of those being deemed "low risk". Of the 19 delegations, 13 were delegations carried over from state authorities in 2012. Yet it is instructive that all were renewed after close review in 2012-13. A strong precedent does therefore exist that external delegation can work well.

Within delegation possibilities, provision of more frequent delegation of each of scope of registration and accreditation and reaccreditation of new courses, as permitted by the *Act*, to low risk training providers demonstrating capability of appropriate staffing, resourcing and facilities would have many benefits. These include reduced regulatory costs and greater innovation, flexibility and responsiveness in training provision. Monitoring and intervention powers would remain with the Regulator, including a suitable external audit requirement in relation to the delegated powers, but ongoing comprehensive, in-depth, frequent regulatory intrusion would be reduced. Indeed the *Act* obliges the delegated provider to report use of the delegation to the Regulator.

It would be helpful in its monitoring for the regulator to look at systems for ensuring quality as much as outputs such as randomly selected examples of assessment tools. In delegating the power to change scope of registration or self-accreditation it would be important to look at the robustness and longevity of an institution's educational quality policies, processes and systems.

Greater use of delegation provisions in these circumstances might also significantly and positively influence the attitude of the non-referring States to inclusion within the national system.

Regulators may sometimes be reluctant to delegate in this manner, for example to maintain power or revenue flows, but it is not clear of course if this is why such infrequent delegations to RTOs have been approved by ASQA. Nevertheless if such circumstances are construed as not adequately protecting the integrity of the VET sector, the Minister may choose to direct the Regulator to delegate eg to all providers classified by the Regulator under the agreed risk assessment procedures as low risk, or to withdraw delegation if that has been excessive. ASQA at present has certainly not chosen to delegate to any significant degree itself, though there is the possibility that this is a matter of growing experience and is intended.

ASQA has stated in its 2012-13 *Annual Report* that it has developed new administrative arrangements for the granting of external delegations, so these should be widely examined and the question of their extension to all low risk providers or a major sub-set thereof should be discussed in appropriate forums with the onus on ASQA to justify any remaining intended restrictive approach to delegation for low risk organisations.

ASQA's "Compliance Pyramid" does specify that its strategy and response for lowest risk category of providers is to "minimise compliance costs eg approvals without audit, delegations" (www.asqa.gov.au, accessed, 20 August 2014). There is a danger that this policy could be practiced more in the breach, which means more revenue from limited delegations could be outweighing reduced costs of regulation where more delegations are approved to low risk providers.

The risk assessment itself, of course, could allow for exemption of certain areas from such delegation where public safety or other relevant criteria to be enunciated by ASQA mean no such delegation is desirable and that direct public regulation only will meet the public interest test required of good regulation. Finalisation of this requires closer knowledge than the publicly available information on the ASQA risk assessment presently provides eg detailed risk criteria, current metrics and data used and in prospect and, especially, the weights or priorities given for the various criteria. A full and independent professional multi-criteria analysis review of the risk classification system would help finalise reasonable settings for low risk delegation and also and importantly for other priority regulatory action for high risk providers.

In higher education, large comprehensive service providers with strong internal checks and balances and major accountability mechanisms have worked successfully not only with delegation but substantial self-accreditation and autonomy for many years. The Lee Dow Braithwaite Review found that such delegation indeed enhances education outcomes and wished to see such education imperatives facilitated as well as ensuring, where relevant, that stricter occupational licencing objectives can be met. Such a balance could also be struck for VET with due allowance for its own imperatives, such as need for greater national consistency than for research-oriented universities.

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