NSSC REVIEW OF THE STANDARDS FOR THE REGULATION OF VOCATIONAL EDUCATION AND TRAINING

CONSULTATION SUBMISSION: VET REGULATION AT THE CROSSROADS

SUMMARY

1. The situation is that recent tertiary education reforms have great potential. This is excellent for Australian tertiary education and for its contribution to personal development and national productivity. But there is also a clear and present danger that this potential may be undermined by poor policy implementation and administration, especially in VET under ASQA.

2. The problem is the evident emergence of an uncreative compliance culture which threatens the maintenance and development of a vibrant private training sector, just as a poorly developed set of funding strategies is threatening a high quality public vocational training role.

3. The solution on regulation is to improve the regulatory legislation, standards, policies and procedures of the regulators, to enhance the contribution that stakeholders also can make to this and to improve the student role in inducing quality provision.

THE IMPLEMENTATION DILEMMA

Recent reforms in tertiary education and training have placed great emphasis on improved regulatory regimes. The key institutions established to deliver on this, ASQA and TEQSA, do symbolise the potential for great improvement over previous arrangements.

The overall framework developed in recent times in Australia could establish Australia as a new leader in tertiary education globally. The basic elements of change here can come close to matching many of the basics of an earlier era of microeconomic reform in other spheres. The ambition of this reform process has been under-appreciated in many ways.

At the same time, there is widespread political agreement on the need to better regulate to assure the quality of education and training. Indeed expressed concern over “shonky” operators and “rip-off” trainers including those that “milk” public grants, is strong indeed and has been a particular focus of recent political rhetoric. Quite unlike the rhetoric around “pink batts”, here the politicians have been very willing to blame small business.

Beyond this there is pressure from some other stakeholders, especially industry groups, to lobby continuously for better and less variable outcomes than they believe is presently provided.

For the new arrangements to truly fulfil their promise, the devil as ever is in the detail and in proper evaluation of stakeholder expectations. This submission is most concerned to address the precise regulatory powers provided and how they are administered. Regrettably, even at the policy design
or architecture level very serious flaws are evident, and poor implementation does threaten. Good intentions may come awry through poor implementation.

The crucially important matter of administrative behaviour and culture in implementing the new national regulatory regimes especially remains to be determined. Unfortunately some early developments here are worrying. Officials are human and have varying degrees of competence and soundness of motivation. They can get things seriously wrong, and this can bring a grander undertaking undelivered or even undone. Hence it is a blessing that the present NSSC Review offers the opportunity to pause and check that policy implementation can proceed properly in the VET regulation sphere.

Certainly there is some consternation among both private and public VET providers - and it goes beyond standard anti-regulatory rhetoric and beyond simple transitional uncertainty as the system moves from divergent state/territory regimes of varying effectiveness. A danger is that the political consensus on “the need to deal with the dodgy brothers outfits” allows a blind eye to be turned to poor administration- hence the importance and wisdom of this Review.

ASQA to date has displayed some unfortunate signs of significant problems in policy implementation. The key issue there is that ASQA’s approach is emerging as a strong compliance and process approach only. Evaluation of education and training outcomes are potentially being marginalised and co-operative redress or improvement is eschewed.

Amongst private providers, discussion at meetings and conferences and on the VET regulation social media networks and web-sites that abound leads to shared characterisations of worrying practices variously dubbed as “Monty Python cheese-shop”, “don’t ask, don’t tell”, “moving the goalposts”, “got you coming and going”, “how time flies”, “the python squeeze” and more. These refer to issues such as refusing to provide guidance in advance on what evidence is required to demonstrate compliance, not being subject to the same timeliness requirements applied to RTO reporting, refusing applications for any transitions or like modest changes during lengthy audits undermining corporate financial viability, counting the same single deemed non-compliance as a violation under multiple criteria, and micro-regulating down to the point of criticising the use of ampersands rather than the word “and” in an RTO’s brochure. The core of such complaint is an inward-looking, inconsistent, “tick-a-box” compliance regime that is resurrecting the old fears of “Moscow on Molongolo”.

The reason for such a retrograde policing approach rather than a modernist facilitation approach is suspected to be that it is easier for officials to operate and it caters to current political rhetoric and concerns over “shonks” by looking tough. But deficiencies of this approach are that it induces a compliance culture rather than a creative culture amongst the many committed and enterprising firms that remain in the formal sector, and it induces many other businesses to leave the formal regulated sector and operate outside the AQFC/RTO framework.

Tertiary education is too important to Australia’s future for regulation not to be developed with close, intense and ongoing scrutiny to ensure that it is fit for purpose and operating efficiently according to best practice criteria.
AVAILABLE SOLUTIONS

Australia has developed a world leading tertiary education sector. Its structure has three pillars: higher education, TAFE and private VET. Each has achieved much. The regulatory structure is being most directed at private VET since university and TAFE providers tend to be large, complex institutions with well-established quality cultures and their own internal checks and balances.

The danger is that, since the growth of private providers as an equal component of the system is relatively recent, the new regulatory arrangements may misunderstand proper imperatives and incentives in private education and cause as much damage to the provision of more and higher quality education and training as they prevent.

The task is to get the balance right through regulation that supports and enhances a new dynamic entrepreneurial component of tertiary education and training, while ensuring that poor quality provision can be minimised and eliminated. At present the former is missing and the latter is uncertain.

Funding patterns currently are favouring private education and universities and TAFE is being squeezed. The move to contestability in VET funding, a hallmark of the micro-economic reform model applied now to tertiary education, plus any further moves to greater contestability in funding for higher education degrees, must be accompanied by a regulatory framework that works well and does not stultify and drive private VET to:

- Provide mediocre uniform delivery from those private providers that survive the gauntlet;
- Lose many worthy private providers along the way as regulatory collateral damage
- Encourage development of a burgeoning unregulated informal training sector of uncertain standards

Recommendations by this NSSC Review that could help better achieve the desired outcome of good quality education and training with a minimal regulatory burden include:

1. Since NSSC reports to Ministers and does wish to recognise that context for Standards is important, it can recommend that governments support a wider full-scale independent inquiry into VET education. This should be commensurate with, and complementary to, the Bradley Review of higher education and the Gonski review of schools. The inquiry could have the makings of, and stimulus for, a comprehensive plan for the future instead of muddling through on VET. A holistic independent stocktake of VET activity, responsibilities, policies and outcomes does not currently exist and is needed to complete the education sector review process. In the process the issue of integration or complementarity with other regulators and agencies impinging strongly on these responsibilities could be considered eg AQFC. Ultimately the integration of regulation and funding could be considered to ensure they are consistent and mutually reinforcing, but this may be a matter beyond NSSC’s remit and current national political will.

2. Similarly, since NSSC advises ministers and recognises the importance of context for Standards to be appropriate, it should advise Ministers to provide re-commitment to
speedy integration of the presently separate VET and Higher Education regulators within the one agency. With TEQSA legislation being based more firmly on clearer and appropriate principles and with TEQSA culture showing more signs of a constructive and supportive style (though not without teething problems there too), ensure that the TEQSA framework is the dominant basis for the integration. The difference in core regulatory principles between TEQSA and ASQA has no basis in logic.

Where sectoral differentiation is needed eg university self-accreditation, this can be easily reflected in separate provisions within a single legislative instrument, as is the case already in the TEQSA legislation in distinguishing non-self-accrediting and self-accrediting providers. An MOU between agencies that the two principal regulatory agencies have reportedly concluded will assist with this, but it is an administrative “fix” only, welcome as it is. The inclusion of the Chair of the Higher Education Standards Panel on NSSC is another step. NSSC may wish to recommend to Ministers that there be reciprocal representation from NSSC on the HE Panel, if that is not yet in train. The present acrobatics required by dual sector institutions is bizarre and as recent Swinburne-style decisions show, may sadly help reduce this field of innovation in pathways and in scale and scope economies.

3. To ensure that VET regulation operates by best practice standards of regulation, NSSC should advise Ministers that they should amend the National Vocational Education and Training Regulator Act 2011 (Part 7 Section 157) to explicitly enshrine principles of “proportionality” and of “necessity” alongside the requirement to apply the Risk Assessment Framework to guide the operations of the regulator. In the absence of early regulatory integration of the agencies and panels under the TEQSA approach, this would be the most important step that this present NSSC Review could advocate to facilitate consistency and efficiency in VET regulation. These principles would oblige operations that cannot be arbitrary in registration or accreditation and compliance, by ensuring that the actions undertaken can be considered as necessary and/or proportionate as well as properly risk-sensitive by a Federal Court, where such notions are well understood and tested by wide regulatory experience and knowledge.

These fundamental principles are not particular for higher education, or even education itself. They are in fact the standard basic principles of legislation review and regulation review that has been an integral part of the micro-economic reform process and has served Australia so well, despite some shortcomings in the bureaucratic and governmental games still sometimes played in their implementation in some areas. If ASQA and TEQSA are to be ultimately integrated then these principles would then be common. It is very worrying that the ASQA legislation did not incorporate them already, since they were there for the taking in the TEQSA legislation. One can only assume that the weaker ASQA provisions are there to make life easier for officials and influential stakeholders, rather than advance the wider public interest. Or was there simply uninspired drafting?

Of these additional core principles for ASQA, “proportionality” is mentioned but only as a reporting requirement in the Standards for VET Regulators 2011 (not the Act) and
“necessity” is ignored in both. This latter means that the regulator need not establish a truly rigorous public interest basis for its interventions and the relegation of proportionality to Standards only means that a presumption of light touch administration cannot be enforced at Court level.

4. Also NSSC should advise ministers that the “promote and encourage” provision in section 57 (d) of the present National VET Regulator Act 2011 needs elaboration and emphasis if a regulatory regime beyond basic process standards is to emerge. This will make clear that ASQA needs to move beyond uncreative minimum threshold process regulation to also embrace promotion and support functions that can improve capacities and outcomes beyond “one size fits all” or “tick a box” minimum standards.

Markets themselves cannot do this sufficiently as Australian firms are not yet adequately committed to knowledge investment principles and approaches. Moreover it is inherent in private business operation that there will be under-investment in transferable generic skills, as opposed to the firm specific skills that can be fully appropriated by the firms concerned. Firms have incentives not to share advances and ideas, so that self-help will be less beneficial than is possible with complementary public good oriented assistance. Industry bodies can be tapped to be partners with government in generating public good training. Initiatives such as those of the Australian Industry Group provide some good examples of what can be accomplished eg working with the Australian Technology Network universities on internships.

Constructive regulatory purpose will still need complementary enhancement through public funding programs, particularly as Australian business overall does remain well below global best practice in its knowledge investment as a legacy of Australia’s long era of “protection all round” which massively diminished management responsibility and distorted union and worker incentives. At present ASQA has chosen to interpret the existing “promote and encourage” provision in the Act as being nothing more than compliance. As one ASQA Commissioner has put it “ASQA is not a consultancy service. We will not hold your hand and help you over the line”.

5. The NSSC should advise Ministers that the Standards for VET Regulators 2011 themselves also need revision. Part 4 especially is where the regulators are to be held to account. The five standards listed there are important viz. “consistency”, “effectiveness”, “proportionality”, “responsiveness” and “transparency”. But they are said in the instrument to be standards for the purpose of providing “Quality Indicators” for the Commonwealth Minister which “are to be used to assess performance against the standards”, which arguably falls well short of enforceability by third parties under law. This ambiguity should be removed and stronger legally enforceable obligations imposed.

Equally and, surprisingly, the list of Standards does not include any “efficiency” or “timeliness” criteria at all. Nor is there a requirement under Standards for “fairness” with respect to ethical treatment, avoidance of bias and of conflict of interest and acceptance of duty of care. A separate Standard (5.5) does oblig the VET Regulator to ensure that
“Complaints and appeals about regulatory services are resolved efficiently and effectively”, and ASQA itself states that “fairness” is one of the organisation’s values. But no such efficiency, timeliness or fairness obligations seem to exist under legislation or subordinate legislation for registration, accreditation, compliance or enhancement, except for efficiency in complaints and appeals.

6. The NSSC Review should also advise Ministers that there is substantial room to date for further improvement in a number of ASQA activities that are presently matters of managerial discretion as policies, procedures and practices, such that close scrutiny of ASQA reporting to NSSC will be required to ensure full disclosure including of all complaints (properly defined) and of systematic evidence on stakeholder experience of ASQA performance.

Above all a move to greater emphasis upon outcomes as well as process is needed, as indeed is the linkage of the two. At present it is possible that much ASQA activity looks at process in isolation from any related evidentiary or logical linkage to the quality of outcomes for education and training, including via validated employer and student satisfaction measures.

Equally, transparency and the Act’s “encourage and promote” provisions should oblige the Regulator to enhance information provision to providers themselves substantially, especially via a detailed set of Guidelines on the agency’s interpretation of the standards and the manner in which compliance may be demonstrated. At present providers have been advised bluntly that the Act and Standards and auditors’ reports are sufficient information for compliance. Much more is needed given the high resourcing accorded the agency and this can extend to much more open-ness and accessibility for discussion of the registration, accreditation, compliance and quality enhancement processes including provision of a hot-line for those exposed to sudden audit so that they can receive generic guidance on the processes.

Numerous other administration problems arguably need attention ranging from inadequate data bases for risk assessment, openness to arbitrary weighting of elements in risk assessment, inclusion of risk factors not allowed for under the Risk Assessment Framework, double counting of non-compliances in reporting audit outcomes, absence of auditor expertise in key qualification areas, issues of auditor private practice and intellectual property acquired in ASQA audits, moderation issues across auditors as revealed by conflict in AAT proceedings, absences of adequate officer authorisation for and at audit despite explicit provisions under the Act, and slow and passive treatment of complaints despite even the provisions of the Standards.

7. The NSSC Review should also consider the possible development of mechanisms to oblige greater Mutual Responsibility in stakeholder engagement. The importance for the system of industry demand and views and engagement is crucial. It is a feature of VET, though also of substantial higher education where the role of professions particularly is often forgotten. Here the interaction with bodies such as Skills Australia or its new incarnation as an
Australian Workforce and Productivity Agency (a confusing naming overlap with the Productivity Commission notwithstanding) become very important, since they can offer analytic validation of stakeholder views.

The latter views on their own can a little too often become an exercise in seeking to free-ride on the taxpayers’ purse or, sometimes, exercises in limiting training to protect only core existing workers. Government officials are meant to balance out or counter-act such factors, but “capture” is not unknown. Hence evidence-based analysis of claims, and transparency in the transmission of those claims is fundamental. The present NSSC Review for example itself has imposed confidentiality provisions on this first round of submissions. Why? This is surprising as it risks conveying an image of a “club”, it reduces contestability of ideas and it arouses suspicion of selectivity in reporting.

The Review, or NSSC if time is a factor, also needs to undertake serious analysis in support of its objects. Or it could commend the appropriate complementary bodies such as NCVER (whose name could be changed to reflect its wider emit) and the Australian Workforce and Productivity Agency to conduct such research and analysis. It is to be hoped of course that NSSC will be assured that these research endeavours can be pursued in a complementary manner-as their respective responsibilities are not fully clear to external observers.

To particularise by example, it would be instructive for a direct independent and balanced survey of RTOs to be conducted asking them for their views of their regulators and also of the stakeholders that they deal with eg how graduate-ready are they, and how coherent are employers in expressing their skill needs, are ISCs inclusive etc? Are stakeholders accessible and timely in relations with trainers? This is to say that views of training organisations should be sought alongside those of the demand-side of the labour skills equation or a biased and asymmetric system can result. It would likewise be useful for there to be commissioned up-to-date analysis to be used of how much training the employers themselves provide, fund and support.

Another crucial research product could be review of national best practice in regulation in other spheres, and global best practice in tertiary education regulation. With the loss of domestic competitive federal VET regulation benchmarks in the name of consistent and uniform standards, Australian standards must not become poor lowest common denominator creatures backed by poor practice. Centralisation and uniformity can demonstrably come at a major cost unless very considerable care is taken.

Another approach would be for a top private sector consultant to provide guidance on client responsiveness lessons from private sector good practice and see how regulators stand against such benchmarks. NSSC should undertake or commend such investigations as regulators have an incentive to avoid some issues or concerns of this kind. It is well-established in public administration research that risk aversion dominates over pursuit of innovation and improvement in public sector officials’ cultures, though Australia has at times transcended this more than many countries.
Case studies of the regulatory burden, including understanding of “spill-over costs” of regulation such as health, anxiety, and stress effects of a regulatory regime on clients should also be investigated or commissioned to understand the impact of the present regulatory approaches. Currently senior officers for the National Regulator dismiss such concerns asking rhetorically and publicly “if you must have an audit, is that so bad?” In a positive and supportive environment it would not be, but where deficiencies in regulatory process exist audit should be feared. At present there is an undercurrent of such fear and loathing among a good number of quite worthy and respectable education and training providers.

A further review area that could be productively pursued is the compliance evaluation system. The Risk Assessment Framework that precedes it has a ranking and rating approach. There is no reason why this approach cannot itself be improved and extended to overall compliance assessment. The present “cross a box” approach and non-transparent judgements of significance can be transcended by more nuanced assessment such as enhancement of present evaluation into a points system that is accessible and transparent backed by clear rules and guidelines. An expert “multi-criteria analysis” review (backed by some expert form design presently lacking in audit processes) would assist with such clear opportunities for quality improvement at the core of present VET regulation.

8. NSSC should also ensure that ministers are aware of how much promotion of good standards will ultimately also depend upon enhancement and reform of the student financing and representation arrangements. These remain very different from higher education in VET and this inhibits free student choice of programs and pathways that are most suited to student abilities and aspirations. In higher education, the introduction of full fee international students and the imposition of growing HECS burdens for domestic students produced a major step forward in university interrogation of student evaluation and experience well ahead of any regulatory injunctions and well ahead of global higher education standard practice. Fully taxpayer funded French academics are still striking over class evaluations by students.

However the loss of student amenity fee funding did disable the organised student voice. This can be complementary and if both institutional own evaluation and representation mechanisms are healthy then education providers are obliged to much improve their standards of educational delivery and content. At present there is a Commonwealth policy dichotomy that says VET is employer demand driven and that higher education is student demand driven. Surely both are important and valid and each needs some enhancement by policy. Thus, in response to international student disenchantment with the Australian experience in 2008, the Commonwealth did respond with new student representation arrangements - but provided no continuing funding and then seemed surprised when the arrangements went awry.

To take the issue of voice as a mechanism for improvement further would also involve discussion of issues of employee representation. The evidence is strong that enterprise bargaining enhances productivity over highly regulated models or highly deregulated models. There is a U-function here demonstrating the benefit of employee voice under
appropriate industrial arrangements. But getting the balance right is the stuff of politics and is likely to be a matter that NSSC will shy clear of. Even student representation may defy proper rational resolution for like reasons.

CONCLUSIONS

Overall this submission sounds some warning over issues around the structure and practice of current VET regulation in Australia at a time of change. The structure needs to evolve and improve, and the practices currently being adopted have areas of concern.

Certainly many training providers unfortunately do feel unable to complain directly about these matters, especially regulatory practices, for fear of “consequences”, and some are also concerned that peak bodies at times can be unduly close to the regulators. Perceptions these may be, but that very fact is important. The fact is that concern about existence of poor regulatory habits and practices is not at all uncommon in informal industry discussion by providers, even if such practices are not always typical of much or most regulatory behaviour and, especially, not of policy intention as opposed to implementation. That said, there is always much room for improvement.

Some VET providers recall how after 2008 a Commonwealth “clean-up” of migration-related educational quality issues in VET for international students was delivered with such “overkill” that growth that had been quite deliberately fostered by the previous government was brought to a juddering halt by new Commonwealth regulatory over-reach. Billions of dollars of export revenue and hundreds of jobs were lost. A more nuanced approach would have managed the transition with far less damage.

Because of this past precedent private providers have good reason for concern over the nature of Commonwealth policy implementation in this VET arena. A sound NSSC Review will help ensure that the need for a future rescue operation from the excesses of an all too “responsive”, rather than professional, bureaucracy by a new Bruce Baird or Michael Knight will not be needed.

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