

**Government of Victoria submission**

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1. Victoria is pleased to have the opportunity to comment on the National Vocational Education and Training Regulator (NVR) Bills which, as currently drafted, will have a significant impact on Victoria's VET sector and the State's policy autonomy and responsibility, and could also affect the State's finances.
2. COAG decided on 7 December 2009 to establish a national regulator for the VET sector, to be established under Commonwealth legislation. Victoria and Western Australia agreed to enact mirror legislation and would continue to regulate providers in their jurisdictions. COAG further decided that the national regulator would cover all providers operating interstate or offering services for international students. This decision was noted, but not agreed, by Victoria and Western Australia.
3. The Commonwealth and some States prefer a model which relies on a referral of powers to the Commonwealth but have not been able to get agreement from all States (Victoria and Western Australia have not agreed to refer powers and are thus 'non-referring States'). By proceeding to legislation without that agreement, an uncertain legal environment (with apparently unintended consequences for non-referring States) is created, which in turn will create a highly complex operating environment for training providers and potentially students.
4. If the Commonwealth Bill establishing the NVR were passed in its current form, almost half of Victoria's 1,250 VET providers, including all TAFE institutes, and providers in receipt of almost 80 per cent of Victoria's public funding, would be subject to regulation by the Commonwealth's NVR. The remainder would continue to be regulated by the Victorian Registration and Qualifications Authority.
5. Victoria's policy rationale for maintaining regulation of all VET providers based in Victoria, but particularly those accessing Victorian Government funds, is as follows:
  - States hold primary constitutional and funding responsibility for the VET sector. Victoria considers that regulatory responsibility should sit alongside funding responsibility, an argument used by the Commonwealth Government in support of the proposed establishment of the Tertiary Education Quality and Standards Agency. Victoria provides around 70 per cent of all government funding for VET delivery, with the Commonwealth contributing around 30 per cent. The State is in fact accountable for all outcomes agreed through the national funding arrangements.
  - For Victoria, there is the wider issue of the impact of the reforms currently being undertaken to the Victorian training market. With the introduction of student-centred funding, where an eligible student can determine their choice of training provider, the Victorian Government as funder is exposed to a wider range and larger group of non-government providers than any other jurisdiction.

6. The Victorian VET sector is governed by the *Education and Training Reform Act 2006* (ETRA). In response to weaknesses in the regulatory environment for VET that were exposed in the downturn in international education, Victoria has moved in the last two years to strengthen the ETRA significantly, through the *Education and Training Reform Amendment (Overseas Students) Act 2009* and the *Education and Training Reform Amendment (Skills) Act 2010* (Skills Act). These will strengthen VET regulation, both in respect of provider registration and consumer protection measures.
7. The NVR legislation significantly mimics the ETRA amendments, but is silent on consumer protection. This creates a situation where international students receive protection through the Commonwealth ESOS legislation not available to domestic students while, at the same time, the NVR legislation overrides many consumer protections for both domestic and overseas students under State law.
8. Victoria considers that, in respect of those Victorian providers that will be regulated by the NVR, there is a real likelihood that a number of provisions in the ETRA and related legislation will be directly inconsistent with the NVR Bill and thus be invalid.
9. It is also unclear how providers potentially covered by the NVR would be identified. There is a possible risk that providers which only intend, but do not ultimately enrol international students or operate interstate, may seek to register with the NVR to avoid the Victorian Government's regulatory compliance. This may expose funding bodies and students to significant risk in terms of quality of training and financial loss.

***What Victorian laws are affected?***

10. As the Committee is aware, under section 109 of the Commonwealth Constitution Commonwealth laws override State laws to the extent of any inconsistency between them. The range and scope of Victorian laws that may be overridden in this way by the NVR Bill appears to be very wide, possibly wider than intended by the drafters of the Bill.
11. The NVR Bill deliberately creates direct inconsistencies with State legislation on certain issues, the intention being to override State laws in those areas. In particular, clause 9 (3) of the NVR Bill says that a VET provider registered with the National VET Regulator is immune from certain laws of the non-referring States.
12. Clause 9(3) states:

*To the extent that a registered training organisation is an NVR registered training organisation that operates in a non-referring State, the organisation is not subject to a law of the non-referring State that relates to:*

- (a) the registration and regulation of vocational education and training organisations (other than secondary schools); or*
  - (b) the accreditation or other recognition of vocational education and training courses or programs; or*
  - (c) the issue and cancellation of vocational education and training qualifications or statements of attainment; or*
  - (d) the collection, publication, provision and sharing of information about vocational education and training; or*
  - (e) the investigative powers, sanctions and enforcement in relation to any of the above;*
- other than a law that applies whether or not a person is a training organisation.*

13. These are the overrides specifically made by the NVR Bill. In addition, according to the case law, where a federal law creates an exhaustive legislative scheme (or "covers the field"), any State law in the same area may be inconsistent and overridden if it would detract from the uniform national scheme. See for example the High Court decision in *Victoria v Commonwealth* (1937) 58 CLR 618 at 630. It appears that the NVR Bill could invalidate other Victorian VET laws in this way.
14. Victorian laws that appear to be overridden by the NVR Bill to a greater or lesser extent include laws that deal with:
  - (a) the management and administration of Victorian Government TAFE Institutes by the State Government;
  - (b) consumer protection safeguards specifically for VET students;
  - (c) regulation of apprenticeships;
  - (d) reserve powers of the Victorian Supreme Court to appoint an administrator to a failing training provider.

#### *Management of Victorian TAFE Institutes*

15. Under the *Education and Training Reform Act 2006* (Vic), the boards of Victorian TAFE Institutes are separately incorporated and have power to manage their institutions, employ staff and deliver educational programs. The bulk of their funding comes from State Government under performance agreements that set out the services the institutes are to provide. Institutes must comply with State Government directions on administrative and policy matters, including the delivery of their programs. Further, once amendments made by the *Education and Training Reform Amendment (Skills) Act 2010* (the Skills Act) commence, institute boards must prepare strategic plans and statements of corporate intent and submit them to the State Minister, who may accept or vary them.
16. If Victorian TAFE Institutes have to become NVR registered training organisations (which appears to be the effect of the NVR Bill), then they may gain immunity, under clause 9(3)(a) of the NVR Bill, from the Victorian laws governing administration of State TAFE institutes outlined above.
17. Such an outcome would be fundamentally inconsistent with the status of TAFE Institutes as public authorities of the State. Whilst this may not be an outcome intended by the drafters of the NVR Bill, it is nonetheless a fundamental flaw that must be corrected before the NVR Bill can become law.
18. It is interesting, however, that the drafters of the Bill appear to have considered this point in relation to the referring States. Clause 6 (2) (f) provides that "*the establishment or management of any agency of the State or Territory that provides vocational education and training*" is not a referred matter. In other words, the NVR Bill stipulates that the national scheme will not interfere with State Government management of a TAFE institute in, say, New South Wales but that it may in Victoria.

#### *Consumer protection laws*

19. The Explanatory Memorandum for the NVR Bill states (at page 12) that it is not intended to affect the operation of State consumer affairs laws. Despite this, the NVR

Bill does appear to override a number of Victorian laws designed to protect the rights of VET students as consumers. An Explanatory Memorandum cannot change what is clear on the face of the legislation. An Explanatory Memorandum can only be used to determine the meaning of a provision where the intent of the Statute on its face is ambiguous.

20. For instance, the following Victorian consumer protection laws for VET students may be invalidated by the NVR Bill:
  - (a) Handling of complaints by students against decisions, actions or omissions of registered training organisations [*see section 31 of the Skills Act, which will insert a new Pt 4.6A into the ETRA*].
  - (b) Regulations to set "fair contract terms" for student / provider contracts, and to set standards with which a registered training organisation must comply when dealing with students [*see sections 36 and 49 of the Skills Act, which will amend Schedule 5 to the ETRA*].
  - (c) Power of the Victorian Supreme Court to make, in certain circumstances, an order for judicial administration of a registered training organisation to protect the interests of students [*see section 50 of the Skills Act, which will insert Pt 4.3, Div 7 into the ETRA*].
21. All these consumer protection laws would appear to be invalidated by clause 9 (3) (a) of the NVR Bill, at least insofar as they relate to NVR registered providers, as laws regulating VET providers.
22. Clause 9 of the NVR Bill does not grant immunity from State laws that apply generally and not only to VET providers. This might have been intended to exempt consumer protection laws of a general nature, such as the *Fair Trading Act 1999* (Vic), from the override. However, the consumer protection provisions mentioned above are specific to the VET sector, and therefore do appear to be overridden.
23. An important point here is that, whilst the NVR Bill appears to be largely modelled on recent Victorian legislative reforms in the VET sector, the Bill does not contain provisions for complaints systems, fair student contracts or judicial administration of failing providers of the kind found in the Victorian laws that are being displaced.

#### *Apprenticeship regulation*

24. All States have apprenticeship laws. Victoria's apprenticeship laws deal with approval of training schemes for apprentices, including the nature and syllabus of the training scheme and any course of study, instruction or practical or workplace training and the standards of skill and knowledge required to adequately perform the activities or tasks of the vocation [*see ETRA, s 5.5.2*].
25. In the case of New South Wales and other referring States, clause 9 (1) the NVR Bill specifically provides that it will not override apprenticeship laws. This is because apprenticeship laws are not "referred VET matters", as defined in clause 6 of the Bill.
26. The same exception is not made for the apprenticeship laws of non-referring States. By exempting apprenticeship laws from override for some States but not Victoria, the clear implication of the Bill is that Victorian apprenticeship laws, at least to the extent that they may affect NVR registered providers, are to be overridden.

27. Again, no equivalent arrangements will be established by the NVR Bill to replace the State laws it displaces. This appears to create a substantial regulatory gap.

### ***Other aspects of the NVR Bill***

28. As a general comment, the focus of the NVR Bill is on establishing administrative and regulatory machinery. Less emphasis is given to the rights of students, and the obligations of providers in relation to students.

29. Further, Victoria does not accept that a convincing case has been made that it is impossible to establish an effective national system of State-based regulation, with mutual recognition between jurisdictions of each others' regulatory decisions. This is particularly the case given a Victorian commitment to enact mirror legislation and to create a Memorandum of Understanding between regulators to ensure consistent application of the national standards. Rather, in Victoria's view, most of the difficulties that have occurred have arisen from national standards that have been vaguely expressed and lack the degree of certainty and clarity needed for effective regulation and enforcement.

30. In essence, the national standards set out in the Australian Quality Training Framework (AQTF) are a set of policy statements and objectives. Whilst adequate as statements of policy, they are not crafted to serve as the basis for a robust regulatory system in the modern administrative law context.

31. It is understood that the Commonwealth proposes to resolve this problem by giving the AQTF the status of a legislative instrument. In Victoria's view, this does not solve the fundamental problem. Making a vaguely expressed document into a legislative instrument will not make it any easier to administer. For this reason, Victoria's approach has been to develop Acts and regulations that give effect to the policies set down in the AQTF in enforceable statutory form.

32. More work needs to be done to articulate the standards with greater clarity and precision to give providers and regulators better guidance on what they require.

### ***Outstanding issues with the NVR***

33. In addition to the critical issues outlined above, and irrespective of the NVR Bill's coverage, arrangements for transitioning to nationally consistent regulatory operations in the coming months are yet to be finalised. For example, for those that are to be transferred to the NVR, Victorian privacy law would require legislative amendment to allow for the necessary handover of information.

34. Governments need agreed shared protocols and procedures codified in a Memorandum of Understanding between the Commonwealth, Victorian and Western Australian regulators, to ensure we have a single, consistent national approach to regulation.

### ***What changes to the NVR Bill does Victoria seek?***

35. Victoria seeks to limit the scope of the NVR through the NVR Bill to only those providers based in referring States. Non-referring States should retain responsibility for the regulation of all VET providers based in their jurisdiction, including providers that operate interstate and/or offer services to international students. Victoria has consistently supported a nationally consistent approach to the regulation of the VET sector. In place of a practical approach to national regulation agreed by all

jurisdictions, the Commonwealth's use of its powers to override States' constitutional responsibility for education, is inappropriate and undermines the Federation.

36. In relation to the effect on State laws as currently proposed, Victoria submits to the Committee that the NVR Bill ought to be amended to establish parity of treatment between referring and non-referring States.
37. In particular, clause 9 of the Bill should be amended so that the laws of non-referring States are not overridden in relation to matters that are not "referred VET matters" as defined in clause 6. This would avoid the doubts that the NVR Bill creates, as presently drafted, in relation to the power of non-referring States to manage their own TAFE institutes and to regulate apprenticeships, among other things, in the same way as referring States.
38. Secondly, clause 10 of the Bill should be amended so that non-referring States, as well as referring States, may pass laws that exclude parts of the NVR Bill. This would enable Victoria to preserve the operation of the special consumer protection laws of this State, both existing and proposed, in relation to the VET sector. It would also enable Victoria to preserve the reserve step-in powers of its State Supreme Court to appoint a judicial administrator to a failing training provider, so as to protect the interests of students.
39. Alternatively, if the Commonwealth is not prepared to confer such a power on a non-referring State, the Bill could be amended to enable the Commonwealth Minister to exempt specified State laws from the override. This could be done by regulation or legislative instrument. The exposure draft of the Tertiary Education Quality Standards Agency Bill contains such a mechanism in clause 9(3).
40. If the Committee requires further information on the material contained in this submission, they should contact Kym Peake, Deputy Secretary, Skills Victoria, Department of Education and Early Childhood Development, 2 Treasury Place, Melbourne 3000.