

Contract Notification

CN No.	2020-03	Date:	7 February 2020
To:	Chief Executive Officer or equivalent		
Purpose:	Advice on Contract requirement		
Scope:	All 2018-19 VET Funding Contracts (extended to 31 Dec 2020)		
Subject:	Notice of a Change in Control or other significant changes		

For all Training Provider staff

Purpose

This Contract Notification is to give training providers advice about the following requirements of the VET Funding Contract (the Contract):

- Notice of a Change in Control (Clauses 7.5-7.6 of the Contract)
- Notice of significant changes to CEO, ownership or operations (Clause 7.8 of the Contract).

Background

The Department of Education and Training (the Department) has previously given advice to individual training providers about when to notify us of a Change in Control or other significant changes.

The Department is revising this advice to better align with the intent of the Contract requirements and reduce the administrative burden on training providers.

This Contract Notification supersedes all previous advice given about Clauses 7.5-7.6 and 7.8 of the Contract.

Main Points

The Contract requires training providers to give the Department Notice of certain events, because we need to manage risks in different circumstances.

We also want to make sure that training providers do not use their Contract as an asset to trade with someone else without us having the opportunity to evaluate them against our stringent criteria for entering the Victorian government-subsidised VET market.

NOTICE OF A CHANGE IN CONTROL

What is 'Control' of a training provider?

Control has a specific definition in the Contract, but in simple terms it means when a person (which can be either an individual or another organisation) has sufficient capacity to have overall control of your training provider.

'Control' is demonstrated when a person and/or organisation has:

- legal, financial or equitable ownership (either directly or indirectly) of 50 percent or more of share capital (or an equivalent level of other ownership interest if there are no shares)

- significant capacity to control or influence either:
 - the composition of a board or other decision-making body (for example, having the right to add or remove someone from a Board or governance committee, without involving other Board or committee members)
 - decision making about financial or operating policies (in their own right, without seeking involvement or approval of a Board, committee or other governing body)
 - 'effective control' of the training provider.

How do I know who has 'Control' at my training provider?

Whether a person and/or organisation has 'Control' will depend on the company structure or governance arrangements you have in place.

You will need to decide who meets this definition. If you are in doubt, you should seek legal advice about your own circumstances.

However, in general:

- These descriptions apply to people or organisations who have the highest level of influence over your training provider. A position or job title alone doesn't necessarily mean a person has Control – it depends on how much overall influence they have in practical terms. Conversely, just changing a person's position title to imply a lower level of influence would not change whether or not they meet the definition of Control.
- Individual members of Boards, committees of management or similar governance structures, or individuals who hold high level executive positions such as a CEO, **do not** usually have the level of influence that meets the definition of Control. While these people can have voting rights or can contribute to decisions, they usually can't make decisions entirely on their own.
- In corporate environments where there are shareholders, Control is usually obtained by having ownership of a majority of shares, where a person or entity will be able to make major decisions in their own right, for example, about things like appointing or removing directors.
- Other than through holding a majority of shares, there may be other ways a person or organisation may have Control. For example if someone doesn't have a majority of shares but they have rights to company profits, or there are agreements in place between individual shareholders to be able to exert a certain level of control or exercise proxy rights.

What is a 'Change in Control'?

A Change in Control means that any person or organisation will start to have, or will finish having, Control over your training provider.

This does not include changes from transferring shares or other securities on a stock exchange.

When do I have to give Notice of a Change in Control?

You have to give us Notice of any Change in Control immediately when you become aware of it, and at least 20 business days before it will take effect.

When you tell us about a Change in Control, you need to:

- tell us when the change will take effect
- explain any changes it makes to the information you gave us when you first applied for your Contract.

What happens when I give Notice of a Change in Control?

We will review your Notice and consider the circumstances. We may receive the information and take no further action, or we may write back and ask you for more information.

We may inform you that we don't approve of a Change in Control. This doesn't mean that we are making a judgement about the merits of the business decision itself. Instead, it means that we might determine that the Change in Control has had such a significant effect that we can no longer rely on the information we used to decide to give your training provider a Contract.

It is important to note that if we do not approve the Change in Control, or if you don't inform us of a Change in Control in the way you are required to do under the Contract, we have the right to take enforcement action, including terminating your Contract.

Examples of when a training provider may need to give Notice of a Change in Control

- It sells 50 per cent or more of its shares (or equivalent ownership interest).
- Its shareholders make a new agreement about voting rights or other control of the company. For example a shareholder is given a proxy right or other right that gives them a majority vote on questions about the company (even if they don't hold 50 per cent or more of the shares).
- There is a holding company that exists between the training provider and its shareholders, and the shareholders of that holding company change.

NOTICE OF OTHER SIGNIFICANT CHANGES

As well as giving us Notice of a Change in Control, you also need to give us Notice of any significant changes to:

- ownership
- who is your CEO (or any other person who holds an equivalent position to a CEO)
- your operations (including your financial viability, or if you've decided to stop operating as a registered training organisation in Victoria).

What is the difference between a significant change in ownership and a Change in Control?

A significant change in ownership is where the change has a substantial impact on your training provider, but it doesn't result in any person or organisation gaining an amount of influence that meets the definition of 'Control'.

This may be where you make a change to your corporate structure that doesn't result in a company or person gaining 'Control', but still results in them gaining a significant and new level of influence. For example, a significant change to your governance structure that might impact your ability to deliver training services.

There may be times when a significant change in ownership is also a Change in Control, in which case you need to give Notice to the Department of it in advance.

When do I have to give Notice of significant changes?

You need to tell us immediately.

What happens when I give Notice of significant changes?

When you give us Notice of significant changes, we may simply note the information and use it to update our records about your training provider, or we may contact you to ask for more information.

We may consider whether the significant changes represent any risk from the Department's perspective, but the Contract doesn't state that we will decide whether or not we approve of the changes the way we would if you were giving us Notice of a Change in Control.

Examples of when a training provider may have to give Notice of significant changes

- The CEO (or equivalent, for example a Managing Director at a Learn Local Organisation (LLO)) leaves their position and a new person is appointed to the role.
- The Board or Committee of Management decides it will completely disband and re-form, or it decides to establish an entirely new governance model.
- A new owner acquires an amount of shares that doesn't meet the definition of Control, but they will be given a significant role in the company structure.
- It has a company structure and it splits its training provider function into a different part of the organisation under different governance arrangements.
- It experiences, or expects that it will experience, a significant issue with its financial operations.
- It decides it doesn't want to continue being a registered training organisation.
- The training provider is an LLO and decides it will give up its registration with the ACFE Board.

IMPORTANT INFORMATION ABOUT GIVING 'NOTICES'

If you have to tell us about a Change in Control or other significant changes, you must do this using a formal 'Notice'. This means the information has to be:

- sent to us in writing
- signed by a Party to the Contract (and this cannot be an electronic signature)
- delivered by hand or sent by priority post (for example Express Post or Registered Post, where a tracking number is issued and delivery can be confirmed).

You can let us know about a Change in Control or other significant changes initially via the SVTS, but you do need to follow up with a formal Notice as well.

Critical Dates

- 7 February 2020

Greg Norton
Executive Director
Training Market Services