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Education and Training Reform Act 2006

THE CONSTITUTION OF THE HOLMESGLEN INSTITUTE ORDER 2013

The Lieutenant-Governor, as the Governor's Deputy, with the advice of the Executive Council, acting under section 3.1.11 of the **Education and Training Reform Act 2006**, on the recommendation of the Minister for Higher Education and Skills made in accordance with that section, makes the following Order:

Dated 9 April 2013

Responsible Minister:

HON. PETER HALL MLC

Minister for Higher Education and Skills

MATTHEW McBEATH
Clerk of the Executive Council

DIVISION 1 – PRELIMINARY

1. ***Title of Order***

This Order is called the Constitution of Holmesglen Institute Order 2013.

2. ***Purposes***

The purposes of this Constitution are –

- (a) to continue in existence the Holmesglen Institute of Technical and Further Education; and
- (b) to change the name of the Holmesglen Institute of Technical and Further Education to 'Holmesglen Institute'; and
- (c) to make provision or further provision for or with respect to the objectives, functions and powers of the Institute; and
- (d) to establish a board to oversee and govern the Holmesglen Institute; and
- (e) to make provision or further provision for or with respect to the constitution, management structure, membership, objectives, powers, duties or functions of the board of the Institute, the manner of appointment and the terms and conditions of appointment of directors of the board; and
- (f) to make provision for the board to make rules for the governance of the Institute; and
- (g) to make provision for the board to delegate its powers and functions; and
- (h) to revoke previous Orders relating to the board of the Institute; and
- (i) to make provision for or with respect to matters of a consequential, transitional or savings nature.

3. ***Authorising powers***

This Constitution is made under the powers conferred by section 3.1.11 of the **Education and Training Reform Act 2006** and all other enabling powers.

4. ***Commencement***

This Constitution comes into operation on 15 April 2013.

5. ***Interpretation***

In this Constitution, unless inconsistent with the context or subject-matter –

Act means the **Education and Training Reform Act 2006**;

board means the Board of the Holmesglen Institute established under this Constitution;

board nominee director means a director appointed under clause 15 for the purposes of section 3.1.16(1)(c) of the Act;

SPECIAL

board secretary means the person appointed by the board under clause 27;

chairperson means the chairperson of the board appointed under clause 13;

commercial activity means –

- (a) the provision or sale by the Institute (or the Institute in partnership, trust, joint venture or association with others) of land, property, goods, services or other activities on a commercial basis; or
- (b) the acquisition by the Institute of, or capital expenditure on, land, property, goods, services or other things; or
- (c) other activities conducted on a commercial basis or of a commercial nature;

Notes

A TAFE institute may engage in an activity on a commercial basis if the activity is consistent with any direction, guideline or direction issued by the Minister from time to time in relation to commercial activity. At the time of the making of this Constitution, the current guidelines are known as the *Guidelines concerning commercial activities in accordance with Part 5.2 of the Act*.

See also section 3.1.12B(3) of the Act.

committee member means a member of a committee established by the board under this Constitution and includes an acting member of a committee;

this Constitution means this Order in Council;

controlling interest has the same meaning as it has in section 72(2) of the **Payroll Tax Act 2007**;

Department has the same meaning as it has in section 1.1.3(1) of the Act;

Deputy Secretary means the person for the time being holding, acting in or performing the duties of the Deputy Secretary, Higher Education and Skills Group within the Department, and if its name is changed, means the person for the time being holding, acting in or performing the duties of the Deputy Secretary of that part of the Department with responsibility for vocational education and training;

director includes the chairperson, a Ministerial nominee director and a board nominee director and includes any person acting as a director;

Note

Under clause 4 of Schedule 2 to the Act, the Minister may appoint an acting director in certain circumstances.

Institute means the Holmesglen Institute continued in existence by clause 6(1) with the change of name made by clause 6(2) of this Constitution;

internal auditor means an auditor appointed by the board under clause 25;

major commercial activity means commercial activity that involves a transaction or transactions with a total estimated cost greater than 5 per cent of annual revenues of the Institute, but does not include –

- (a) the supply of vocational training or higher education in accordance with the Institute's strategic plan; or
- (b) the supply of vocational training or higher education that is supplied pursuant to a competitive tender process;

Ministerial nominee director means a director appointed under clause 14 for the purposes of section 3.1.16(1)(b) of the Act;

Secretary has the same meaning as it has in section 1.1.3(1) of the Act.

Notes

This Constitution is a subordinate instrument for the purposes of the **Interpretation of Legislation Act 1984**. That Act contains provisions that apply to this Constitution's interpretation.

Expressions used in this Constitution have the same meaning as they have in the **Education and Training Reform Act 2006** unless the contrary intention appears — see **Interpretation of Legislation Act 1984**, section 23.

DIVISION 2 – ESTABLISHMENT, POWERS, OBJECTIVES AND DUTIES OF THE INSTITUTE**6. Establishment and change of name of the Institute**

- (1) There continues to be established the TAFE institute formerly known as the Holmesglen Institute of Technical and Further Education, subject to the change of name made by subclause (2).

Notes

The Institute is a body corporate by operation of sections 3.1.12 and 6.1.32 of the **Education and Training Reform Act 2006** with effect from 1 January 2013.

The Institute is the successor in law to the Board of the Holmesglen Institute of Technical and Further Education, which was established under the previous Orders to be revoked by clause 44 of this Constitution. That Board was an incorporated body up to and including 31 December 2012.

See the transitional and savings provisions in section 6.1.32 of the Act and in clause 45.

- (2) The name of the Holmesglen Institute of Technical and Further Education is changed to 'Holmesglen Institute'.

Notes

Section 3.1.11(1)(e) of the Act enables an Order in Council under section 3.1.11 to change the name of a TAFE institute.

See clause 10 in relation to the name of the board of the Institute.

7. Objectives of the Institute

In addition to the objectives set out in section 3.1.12A of the Act, the objectives of the Institute include to facilitate higher education through excellent teaching, innovation and educational leadership that delivers quality outcomes.

8. Functions of the Institute

In addition to the functions set out in section 3.1.12B of the Act, the functions of the Institute include to confer vocational training awards.

9. Powers of the Institute

- (1) The powers of the Institute are subject to, and must be exercised in accordance with, the functions, duties and obligations conferred or imposed on the Institute by—
- the Act and other laws; and
 - this Constitution; and
 - Ministerial and Government directions and guidelines under the Act and other legislation, laws and conventions; and
 - the general administrative, social and economic directives and policies established by the Government of Victoria from time to time.
- (2) For the avoidance of doubt, it is the intention of subclause (1) to limit the power of the Institute so that it does not have power to act in a manner that is contrary to, or inconsistent with, its duties and obligations under laws, legislation, guidelines, directions and policies that apply to the Institute.

Note

Section 3.1.12C of the Act sets out general powers of the Institute. The exercise of these powers may be subject to directions issued by the Minister under section 5.2.1 of the Act, or to the provisions of an Institute's constitution. Subclause (1) requires that the Institute's powers be exercised in accordance with legislation, policies and directions that apply to the Institute.

Examples

The Institute must exercise its powers subject to the directions of the Minister for Finance under section 8 of the **Financial Management Act 1994**, which have legislative force. Direction 4.5.6 of the *Standing Directions of the Minister for Finance under the Financial Management Act 1994* sets out binding requirements in relation to public sector agencies' borrowings, investments and financial arrangements.

The Institute must also exercise its powers in relation to commercial activity, borrowing or investment subject to direction or guidelines issued by the Minister administering the Act.

DIVISION 3 – ESTABLISHMENT, POWERS AND DUTIES OF THE BOARD**10. Establishment of the board**

- (1) In accordance with section 3.1.11(2) of the Act, there is established a board to oversee and govern the Institute.
- (2) The board established under subclause (1) is named the Board of the Holmesglen Institute.

Note

See the transitional and savings provisions in section 6.1.32(4) of the Act.

11. General duties of the board

- (1) The board must –
 - (a) take all reasonable steps for the advancement of the objectives of the Institute and the board under the Act and this Constitution;
 - (b) operate in accordance with the economic and social objectives and public sector management policy established from time to time by the Government of Victoria;
 - (c) meet at intervals prescribed in this Constitution;

Note

See section 3.1.18D of the Act and clauses 20(2) and 21.

- (d) provide all assistance and information as the Minister, the Secretary or the Deputy Secretary may reasonably require from the board; and
 - (e) ensure the safe custody and proper use of the common seal of the Institute.
- (2) These duties are in addition to, and do not take away from, the duties imposed on the board by the Act, other provisions of this Constitution, and any other duties imposed by any other Act or law.

DIVISION 4 – COMPOSITION OF THE BOARD**12. Board composition**

The board consists of not less than nine and not more than eleven directors, of whom –

- (a) one is the chairperson of the board appointed by the Governor in Council under clause 13; and

Note

See section 3.1.16(1)(a) of the Act and clause 13.

- (b) of the remaining directors –
 - (i) if there is an even number, half are to be Ministerial nominee directors;
 - (ii) if there is an odd number, half of that number rounded up to the next whole number are to be Ministerial nominee directors –
 appointed by the Minister under clause 14 for the purposes of section 3.1.16(1)(b) of the Act;

Notes

Section 3.1.16(1)(b) of the Act requires the Constitution to provide that a certain proportion of the directors are to be appointed by the Minister.

Directors appointed for the purposes of paragraph (b) are referred to in this Constitution as *Ministerial nominee directors*.

- (c) the remaining directors are to be appointed under clause 15 for the purposes of section 3.1.16(1)(c) of the Act.

Notes

Directors appointed for the purposes of paragraph (c) are referred to in this Constitution as *board nominee directors*.

See section 3.1.16(1)(c) of the Act and clause 15 of this Constitution in relation to the appointment of board nominee directors.

The criteria for appointment of all directors are set out in section 3.1.16(2) of the Act.

The Chief Executive Officer of the Institute is not eligible to be appointed as a director: see section 3.1.16(3) of the Act.

Staff (other than the Chief Executive Officer) and students of the Institute may be eligible to be appointed as directors, if qualified.

13. *Appointment of chairperson*

The Governor in Council may, by instrument, appoint a person as the chairperson of the board.

Notes

The chairperson holds office for the term specified in the instrument of appointment, not being more than three years: see clause 2(1) of Schedule 2 to the Act.

The Minister may appoint an acting chairperson in the case of illness, absence or inability to act, and the Governor in Council may appoint an acting chairperson in the case of a vacancy: see clause 4(1) of Schedule 2 to the Act and section 41 of the **Interpretation of Legislation Act 1984**.

14. *Appointment of Ministerial nominee directors*

(1) The Minister may, by instrument, appoint a person to a Ministerial nominee director position referred to in clause 12(b).

(2) The Minister may consult with the chairperson before appointing a person to a Ministerial nominee position.

Note

Under section 3.1.16(1)(b) of the Act, these director appointments are made by the Minister alone.

15. *Appointment of board nominee directors*

(1) The Minister may, in accordance with this clause and clause 16, by instrument, appoint a person to a board nominee director position referred to in clause 12(c).

Note

Section 3.1.16(1)(c) of the Act provides that the Constitution must provide that the remaining directors are to be appointed by the Minister after considering the advice of the directors who have been appointed under paragraphs (a) and (b) of section 3.1.16(1), namely, the chairperson and the directors appointed by the Minister alone.

(2) The chairperson and Ministerial nominee directors must provide advice to the Minister within four months of a board nominee director position becoming vacant.

(3) In providing advice to the Minister for the purposes of subclause (2), the chairperson and Ministerial nominee directors must comply with clause 16.

(4) Subject to subclause (5), before appointing a board nominee director, the Minister must consider advice provided by the chairperson and Ministerial nominee directors in accordance with subclause (2) and clause 16.

(5) If the chairperson and Ministerial nominee directors do not provide advice within four months, or such longer period approved by the Minister, of a position of board nominee director becoming vacant, the Minister may proceed to make an appointment.

16. *Merit-based assessment and advice on appointment of board nominee directors*

(1) When a board nominee director position falls vacant, the chairperson and Ministerial nominee directors must provide advice to the Minister, for the purposes of section 3.1.16(1)(c) of the Act, on one or more candidates who have been assessed by the chairperson and Ministerial nominee directors as suitable for appointment to the position.

(2) Before providing advice on the appointment of a board nominee director, the chairperson and Ministerial nominee directors must assess candidates for appointment on merit against the criteria set out in section 3.1.16(2) of the Act.

- (3) When providing advice to the Minister on the appointment of a board nominee director, the chairperson and Ministerial nominee directors must also provide to the Minister –
- (a) a report on the process that was used by the chairperson and Ministerial nominee directors in identifying potential candidates for appointment and the assessment of those candidates; and
 - (b) a report on the qualifications, skills and experience of each candidate assessed as suitable for appointment, including an assessment of the candidate against the criteria set out in section 3.1.16(2) of the Act.

17. Notification of vacancies, absences or inability of directors to perform their duties

- (1) If a vacancy occurs in an office of the chairperson or a director, the board must inform the Minister of the vacancy in writing as soon as practicable, and in any event no later than 20 business days after a vacancy arises.

Note

Notification of a vacancy starts the process for filling it. Notifications also enable the Minister to appoint an acting chairperson or director where necessary. Where an office of chairperson or director is vacant, the Minister may appoint an acting director under section 41(1) of the **Interpretation of Legislation Act 1984**.

- (2) If, in the opinion of the board, the chairperson or a director is absent or, for any other reason, unable to perform the duties of the office for 10 or more consecutive business days, the board must immediately inform the Minister.

Note

Where a director is absent or, for any other reason, unable to perform the duties of the office, the Minister may appoint an acting director under clause 4(1) of Schedule 2 to the Act. Notifications under this subclause enable the Minister to exercise this power to appoint an acting chairperson or director.

- (3) A notice under subclause (1) or (2) must state –
- (a) the date on which the office became vacant, or from which the chairperson or director has been absent or otherwise unable to act; and
 - (b) the reason for the vacancy, absence or inability – as the case requires.

Note

Notifying the Minister is also a responsibility of the board secretary – see clause 27(4).

18. Terms and conditions of office of directors

- (1) Directors hold office for the term, not exceeding 3 years, that is specified in the instrument of appointment.

Notes

Ministerial directions or guidelines or Government policy may set limits on the number of terms a director may serve.

Appointment of directors must be consistent with any applicable Victorian Government policies as amended from time to time. At the time of the making of this Constitution, the relevant guidelines are known as the *Appointment and Remuneration Guidelines for Victorian Government Boards, Statutory Bodies and Advisory Committees*.

A director is eligible for re-appointment: see clause 2(1) of Schedule 2 to the Act.

- (2) A director may resign by writing to the Minister.

19. Indemnity of directors and committee members

The board must arrange insurance or an indemnity for each director and committee member for an amount of not less than \$10 million per event to indemnify that director or committee member against liability in respect of any injury, damage or loss suffered by the board or any person caused or arising out of anything necessarily or reasonably done by that director or committee member in good faith –

- (a) in the exercise of a power or the performance of a function or duty of a director or committee member; or
- (b) in the reasonable belief that the act or omission was in the exercise of a power or the performance of a function or duty of a director or committee member.

Note

The Victorian Managed Insurance Authority advises and assists authorities, including TAFE institutes, in relation to risk management.

DIVISION 5 – MEETINGS**20. Procedure for meetings of the board, other than the annual meeting**

- (1) The board must hold a meeting designated as the Annual General Meeting for the purpose of electing office bearers on or before 31 May each calendar year.

Notes

The Annual General Meeting under this clause is different from the Annual Meeting to be conducted under section 3.1.18D of the Act, which is a public meeting.

Clause 5 of Schedule 2 to the Act sets out some matters in relation to meeting procedure.

Office bearers may include, for example, the deputy chairperson, and the chairperson and members of committees.

- (2) The board must meet at least six times between each Annual General Meeting and at least once every three months.

Notes

Clause 5(4) of Schedule 2 to the Act sets out quorum requirements for a meeting of the board, namely, a majority of the directors in office at the time.

Clause 12 of Schedule 2 to the Act relevantly provides that an act or decision of an authority is not invalid only because –

- of a vacancy in its membership; or
- of a defect or irregularity in the appointment of any of its members; or
- in the case of a presiding or acting member, the occasion for that person so presiding or acting had not arisen or had ceased.

21. Procedure for annual meetings

- (1) The board must conduct its annual meeting, for the purposes of section 3.1.18D of the Act, in accordance with this clause.
- (2) The notice required under section 3.1.18D(2) of the Act must be published at least 15 business days before the date on which the annual meeting is to be held.

Notes

Sections 3.1.18D(2) of the Act requires that the Chief Executive Officer of the Institute must cause notice of the annual meeting to be published in a newspaper circulating generally in the area where an institute is located giving notice –

- (a) of the date, time and place of the meeting; and
- (b) that the meeting is open to the public.

Notice must also be given to the Secretary.

- (3) A notice for the purposes of section 3.1.18D(2) of the Act must also include—
 - (a) the date, time and location at which the meeting will be held; and
 - (b) a contact person, including telephone number, postal and email address, in relation to arrangements for attendance at the meeting and to obtain a copy of the papers referred to in subclause (4).
- (4) The board must arrange for copies of the material referred to in section 3.1.18D(4) of the Act to be available on request to members of the public at least 10 business days before the date on which the annual meeting is to be held.

22. Minutes of meetings and records of decisions to be kept and made available to the Deputy Secretary

- (1) The board must –
 - (a) keep a record of its decisions, including decisions of its committees; and
 - (b) keep full and accurate minutes of its meetings, its committee meetings and of annual meetings conducted for the purposes of section 3.1.18D of the Act.
- (2) The board must make a copy of all –
 - (a) records of decisions of the board, its committees and its delegates; and
 - (b) minutes of the board, its committees and of annual meetings conducted for the purposes of section 3.1.18D of the Act –
 available to the Deputy Secretary on request.

Note

Keeping minutes and making copies of documents available to the Deputy Secretary is also a responsibility of the board secretary – see clause 27(3) and (4).

DIVISION 6 – BOARD COMMITTEES

23. Establishment of committees

- (1) The board may, to facilitate its functioning, establish and dissolve committees.
- (2) The board may, at any time –
 - (a) appoint to office a member of a committee;
 - (b) remove from office a member of a committee and must provide in writing to the member the reasons for the removal;
 - (c) by resolution, make rules and give directions, with which committees must comply, about –
 - (i) their quorums;
 - (ii) voting powers of their members;
 - (iii) their proceedings; and
 - (iv) any other matter; and
 - (d) confer any functions on a committee to advise or assist the board in relation to the performance or exercise of any of the board's powers, duties, objectives or functions as are delegated by the board from time to time.
- (3) A committee may meet and act despite vacancies in its membership so long as a quorum is present.
- (4) The position of a committee member becomes vacant if –
 - (a) the member becomes bankrupt; or
 - (b) the member is found guilty of an offence which is, or which would if committed in Victoria be, an indictable offence; or
 - (c) the member is absent from 3 consecutive meetings of the committee without the leave of the chairperson of the committee, or in the case of the chairperson without the leave of the chairperson of the board; or
 - (d) becomes a represented person within the meaning of the **Guardianship and Administration Board Act 1986** (Vic.); or
 - (e) ceases to hold a qualification necessary for his or her appointment.

Notes

For the corresponding provision in relation to a director, see clause 2(3) of Schedule 2 to the Act. Any remuneration must be in accordance with current Government policy.

DIVISION 7 – FINANCIAL AND ASSET MANAGEMENT**24. General powers and duties**

- (1) The board and each of its directors are subject to the same duties that apply to investments by trustees under the law relating to trustees.

Note

See section 6 of the **Trustee Act 1958**, which requires a trustee exercising a power of investment to “exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons”.

- (2) The board must develop and implement procurement policies and procedures for letting contracts or authorising expenditure on the supply of goods or services or the carrying out of works for the Institute.
- (3) The procurement policies and procedures must include—
- (a) a provision in relation to the expenditure levels at which tenders or competitive quotations are required;
 - (b) the process for calling for tenders and competitive quotations;
 - (c) the evaluation of tenders and competitive quotations—
 - (i) based on objective criteria designed to assess value for money; and
 - (ii) that provide tenderers and prospective tenderers a fair opportunity to compete for work;
 - (d) the level of clearance required for letting contracts of particular kinds or of particular value;
 - (e) contract management procedures, responsibilities and accountabilities; and
 - (f) regular review of the procurement policy and its implementation.
- (4) In developing and reviewing its procurement policy and procedures, the board must have regard to the procurement policies adhered to by departments of the Victorian Government from time to time.

Note

Victorian Government departments currently apply procurement policies published by the Victorian Government Purchasing Board.

- (5) When entering any contract for or authorising expenditure on the supply of goods or services or the carrying out of works for the Institute, the Institute must apply its procurement policies and procedures.
- (6) The Institute need not comply with subclause (5) for the engagement of professional advisors whose charges are normally made at rates fixed and published by statutory bodies or professional associations.
- (7) The board must ensure that adequate records of the tenders sought and received are retained as part of the records of the Institute.

Note

Keeping these records is also a responsibility of the board secretary – see clause 27(3).

25. Audits

The board may, in its discretion, appoint an internal auditor to advise and assist the board in the management of the Institute and its other functions, subject to and in accordance with any requirements under the **Financial Management Act 1994**.

Note

The Institute and entities it controls are subject to annual audit by the Auditor-General – see section 9 of the **Audit Act 1994**.

The requirement to arrange for a continuous audit of the income and expenditure is set out in section 3.1.15(3) of the Act.

DIVISION 8 – MANAGEMENT AND GOVERNANCE**26. Staff**

- (1) The board must have a process for recruitment and employment of the Chief Executive Officer of the Institute based on merit and must exercise appropriate oversight over the Chief Executive Officer.
- (2) The board must decide what powers, duties and responsibilities it will assign to the Chief Executive Officer.

Notes

The board must give proper direction to, and exercise proper control over, the Chief Executive Officer and other staff employed by the Institute and to monitor that they are carrying out their functions in a fit and proper manner: See section 3.1.13(1)(g) of the Act.

The Chief Executive Officer of the Institute must promote to the staff of the Institute the public sector values that are set out in section 7 of the **Public Administration Act 2004**.

In relation to the employment of staff, see section 3.1.23 of, and Schedule 3 to, the Act.

27. Board secretary

- (1) The board must appoint a board secretary.
- (2) The board secretary must be—
 - (a) an executive member of the staff of the Institute; or
 - (b) if not an executive member of the staff of the Institute, must be qualified to be a company secretary under the *Corporations Act 2001* of the Commonwealth – but must not be the Institute’s Chief Executive Officer.

Note

In relation to the employment of executive staff, see section 3.1.23 of, and Part 2 of Schedule 3 to, the Act.

- (3) It is the duty of the board secretary to keep full and accurate minutes of meetings and records of decisions of the board and of its committees.
- (4) Where a duty is imposed on the board –
 - (a) to give notice or information to the Minister, the Department or the Deputy Secretary; or
 - (b) to publish or provide information to any person – that duty is also the personal duty of the board secretary.
- (5) Non-compliance by the board secretary with the duties imposed by this clause is capable of being misconduct.

Note

Section 41 of the **Interpretation of Legislation Act 1984** enables the board to appoint a qualified person as acting secretary of the board.

28. Delegations

- (1) The board’s power of delegation under clause 11(4) of Schedule 2 to the Act may be exercised subject to subclauses (2) to (4).

Note

Clause 11(4) of Schedule 2 to the Act enables the board, by instrument, to delegate to –

- the members of a committee established by the board,
- a director of the board,
- the Chief Executive Officer of the Institute, or any other person employed in the Institute,
- or any person employed in the Department in the administration or execution of the Act – any power of the board, other than the power of delegation itself.

- (2) The board must not, and does not have power to, delegate –
 - (a) the making, amending or revoking of institute rules, the standing orders, nor any regulation made by it;

- (b) the approval of, or a decision to undertake or participate in, any major commercial activity;
 - (c) the submission of the strategic plan to the Minister;
Note
Section 3.1.18A of the Act requires that a strategic plan is submitted to the Minister.
 - (d) the submission of the annual statement of corporate intent to the Minister;
Note
Section 3.1.18B of the Act requires that a statement of corporate intent is submitted to the Minister.
 - (e) the approval of the audited financial annual reports; or
Note
Audited financial annual reports are required to be submitted in accordance with the **Financial Management Act 1994**.
 - (f) the formation of a partnership, trust or joint venture.
- (3) A delegation by the board may limit the delegated authority by reference to the type of commercial activity, financial limits or any other criteria determined by the board.
 - (4) In delegating a power or function, the board must take into account the need for the delegate to have appropriate commercial or other experience relevant to the power or function or to have access to the advice of an appropriately qualified person.
 - (5) A delegation must be recorded in the board's minutes and given in writing and must specify –
 - (a) the period for which it is valid; and
 - (b) any limitations or conditions on the delegation.**Note**
It is the duty of the board secretary to keep full and accurate minutes of meetings and records of decisions of the board and of its committees – see clause 27(3).
 - (6) The board may revoke a delegation at any time.
 - (7) The board may continue to exercise or perform a power, duty or function which it has delegated.
 - (8) Anything done under a delegation –
 - (a) has the same effect as if it had been done by the board; and
 - (b) will not be invalidated by the later lapse, revocation or variation of the delegation.
 - (9) If the power, duty or function depends on the board's opinion or belief, a delegate will exercise or perform it in accordance with his or her or its own opinion or belief.
 - (10) The board remains responsible for actions taken under delegation.
 - (11) The board must ensure a copy of every delegation is retained as part of the records of the board and available to the Deputy Secretary on request.
 - (12) A delegation of the board is revoked by operation of this subclause three years after its making.
 - (13) For the avoidance of doubt –
 - (a) the purpose of the sunseting of delegations under subclause (12) is to require the board to review the appropriateness of delegations periodically; and
 - (b) the revocation of a delegation by subclause (12) does not prevent the making of a new delegation in the same or a similar form by the board following that review.

Note

In relation to delegations made by the former board, see clause 48(1) to (3).

29. Institute rules

- (1) The board may make institute rules for the good order and management of the Institute on matters within its power and may amend or revoke those institute rules.

Note

Section 3.1.11(2)(g) of the Act states that a constitution may make provision for the board of a TAFE institute to make rules for the governance of the institute.

- (2) The board may amend or revoke any rule or regulation made by its predecessors.
- (3) An institute rule is revoked by operation of this subclause 5 years after its making.
- (4) For the avoidance of doubt—
- (a) the purpose of the sunseting of institute rules under subclause (3) is to require the board to review the appropriateness of institute rules periodically; and
- (b) the revocation of an institute rule by subclause (3) does not prevent the making of a new institute rule in the same or a similar form by the board following that review.

Note

In relation to institute rules made by the former board, see clause 48(4) to (6).

30. Common seal

- (1) The common seal of the Institute must –
- (a) be kept in the custody of the board secretary or such other custody as the board directs;
- (b) not be used except as authorised by the board.
- (2) Every document on which the common seal is affixed must be signed by at least two directors who are not members of staff of the Institute, or by the board secretary and at least one director who is not a member of staff of the Institute.

Note

Section 3.1.12(b) of the Act provides that the Institute has a common seal.

**DIVISION 9 – CONDUCT AND ACCOUNTABILITY OF DIRECTORS,
COMMITTEE MEMBERS AND INSTITUTE STAFF**

Note

The provisions of this Division are in addition to requirements of other legislation in relation to the conduct of public officials, such as the **Public Administration Act 2004** and Codes of Conduct for directors and public sector employees under that Act.

31. Interpretation

In this Division –

direct interest means an interest in a matter of a kind described in clause 40;

family member has the same meaning as in section 78(1) of the **Local Government Act 1989**;

indirect interest means an interest in a matter of a kind described in clause 41;

matter means a matter with which the board, committee or a member of Institute staff is concerned and that will require –

- (a) a power to be exercised, or a duty or function to be performed, or a decision to be made, by the board or a committee in respect of the matter;
- (b) a power to be exercised, or a duty or function to be performed, or a decision to be made by a member of Institute staff in respect of the matter;

relative has the same meaning as in section 78(1) of the **Local Government Act 1989**;

relevant person means –

- (a) a director; and
- (b) a committee member; and
- (c) a member of the Institute staff, including the Institute’s Chief Executive Officer.

32. Primary principle of director and committee member conduct

A director or a committee member must, in performing their duties –

- (a) act with integrity; and
- (b) impartially exercise his or her responsibilities in the interests of the Institute; and
- (c) not improperly seek to confer an advantage or disadvantage on any person.

33. General conduct principles

(1) In addition to acting in accordance with the primary principle of conduct specified in clause 32, in performing the role of a director or committee member, a relevant person must –

- (a) take all reasonable steps to avoid conflicts between his or her duties as a director or committee member and his or her personal interests and obligations;
- (b) disclose any conflict of interest in accordance with the Act and this Constitution;
- (c) act honestly and avoid statements (whether oral or in writing) or actions that will or are likely to mislead or deceive a person;
- (d) treat all persons with respect and have due regard to the opinions, beliefs, rights and responsibilities of other directors, committee members, Institute staff and other persons;
- (e) exercise reasonable care and diligence and submit himself or herself to the lawful scrutiny that is appropriate to his or her office;
- (f) endeavour to ensure that Institute resources are used prudently and solely in the Institute’s and the public interest;
- (g) act lawfully and in accordance with the trust placed in him or her as director of a major State public sector body or as a member of one of that body’s committees;
- (h) support and promote these principles by leadership and example and act in a way that secures and preserves confidence in the office of director or committee member; and
- (i) not make improper use of any information acquired as a member of the committee.

Note

Clause 2(4)(c) of Schedule 2 to the Act provides that a director must not make improper use of information acquired as a director.

(2) For the avoidance of doubt, a committee member is subject to any code of conduct applicable to a director under section 63 of the **Public Administration Act 2004**.

34. Misuse of position

(1) A relevant person must not misuse his or her position –

- (a) to gain or attempt to gain, directly or indirectly, an advantage for themselves or for any other person; or
- (b) to cause, or attempt to cause, detriment to the board or another person.

(2) For the purposes of this clause, circumstances involving the misuse of a position by a director or a committee member include –

- (a) making improper use of information acquired as a result of the position he or she held or holds; or

- (b) disclosing information that is confidential information within the meaning of clause 36; or
 - (c) directing or improperly influencing, or seeking to direct or improperly influence, a member of Institute staff in contravention of clause 35; or
 - (d) exercising or performing, or purporting to exercise or perform, a power, duty or function that he or she is not authorised to exercise or perform; or
 - (e) using Institute funds or resources in a manner that is improper or unauthorised; or
 - (f) failing to disclose a conflict of interest as required under the Act or this Constitution.
- (3) This clause has effect in addition to, and not in derogation from, any Act or law relating to the criminal or civil liability of directors or members of committees.

35. *Improper direction and improper influence*

- (1) A director or a committee member must not improperly direct or improperly influence, or seek to improperly direct or improperly influence, a member of Institute staff in the exercise of any power or in the performance of any duty or function by the member.
- (2) A director or committee member must not direct, or seek to direct, a member of Institute staff –
 - (a) in the exercise of a delegated power, or the performance of a delegated duty or function of the board; or
 - (b) in the exercise of a power or the performance of a duty or function exercised or performed by the director or committee member under the Act or this Constitution; or
 - (c) in the exercise of a power or the performance of a duty or function the director or committee member exercises or performs in an office or position the director or committee member holds under another Act; or
 - (d) in relation to advice provided to the board or a committee, including advice in a report to the board or committee.

Note

This does not apply in the circumstances set out in subclause (3) below.

- (3) This clause does not apply to a decision of the board or a committee that is made within the powers, duties or functions conferred under this or any other Act.

36. *Confidential information*

- (1) A relevant person must not release information that the person knows, or should reasonably know, is confidential information.
- (2) For the purposes of this clause, information is *confidential information* if –
 - (a) the information has been designated as confidential information by a resolution of the board or a committee and the board or committee has not passed a resolution that the information is not confidential; or
 - (b) subject to subclause (3), the information has been designated in writing as confidential information by the board secretary and the board has not passed a resolution that the information is not confidential.

Example

A director must not disclose information relating to the board's position in commercial or industrial negotiations which –

- the board or the committee has resolved is confidential information, or
- the board secretary has certified is confidential information.

- (3) Confidential information referred to in subclause (2)(b) ceases to be confidential at the expiry of the period of 65 days after the designation is made unless subclause (2)(a) applies to the information.
- (4) For the avoidance of doubt, this clause does not prevent the disclosure of information as required by law, including this Constitution.

37. Disclosure of interests of committee members

- (1) A committee member who has a pecuniary or other interest in any matter in which the committee is concerned must –
 - (a) if the committee member is present at a meeting of the committee at which the matter is to be considered, disclose the nature of the interest immediately before the consideration of that matter; or
 - (b) if the committee member is aware that the matter is to be considered at a meeting of the committee at which the committee member does not intend to be present, disclose the nature of the interest to the committee chairperson before the meeting is held.
- (2) A committee member who has made a disclosure in accordance with subclause (1)—
 - (a) may, at the discretion of the board, take part in the discussion in the meeting; and
 - (b) must leave the meeting while any vote is taken on a question relating to the matter.
- (3) The chairperson of the committee must ensure that a disclosure made to a committee is reported to the next meeting of the board.
- (4) All disclosures must be recorded in the minutes of the committee and the board.

Note

It is the duty of the board secretary to keep full and accurate minutes of meetings and records of decisions of the board and of its committees – see clause 27(3).

- (5) A disclosure can be in the form of a general notice read at a board meeting and entered in its minutes that the committee member holds an office or possesses certain property or has other relevant interests.
- (6) The requirements of this clause in relation to committee members do not apply to conflicts in respect of positions, offices or employment held which are a necessary qualification for the appointment of a person to the committee.

Note

If it is a necessary qualification for a particular committee member to be a member of staff of the Institute, then the mere fact that the person is a member of staff would not be something that the committee member has to disclose under this clause.

- (7) For the avoidance of doubt, this clause applies to a director who is a member of a committee when acting in that capacity.

Note

In relation to disclosures of interest of a director, see clause 6 of Schedule 2 to the Act.

38. Disclosure of interest of staff members

A member of the Institute's staff who –

- (a) prepares material for the board or a committee in relation to a matter; or
- (b) is present at a meeting of the board or a committee to provide assistance or advice in relation to a matter –

must disclose to the board or committee (as the case may be) if he or she has an interest in relation to that matter.

39. Assessing whether a person has an interest in a matter

- (1) For the purposes of –
 - (a) in relation to directors – clause 6 of Schedule 2 to the Act and this Division; and
 - (b) in relation to committee members and Institute staff – this Division – a relevant person will be taken to have an interest in any matter in which the board or committee (as the case may be) is concerned if the relevant person has a direct interest or indirect interest in the matter.
- (2) A relevant person does not have an interest in a matter under this Division if the direct interest or indirect interest of the relevant person is so remote or insignificant that the direct interest or indirect interest could not reasonably be regarded as capable of influencing any actions or decisions of the relevant person in relation to the matter.
- (3) A relevant person does not have an interest in a matter if the direct interest or indirect interest the relevant person holds –
 - (a) is held as a resident of the area served by the Institute and does not exceed the interests generally held by other residents of the areas served by the Institute; or
 - (b) is held in common with a large class of persons and does not exceed the interests generally held by the class of persons.
- (4) A relevant person does not have an interest in a matter if the relevant person –
 - (a) does not know the circumstances that give rise to the interest; and
 - (b) would not reasonably be expected to know the circumstances that give rise to the interest.
- (5) For the avoidance of doubt, this provision operates in addition to and is not intended to take away from the operation of clause 6 of Schedule 2 to the Act.

40. Assessing whether a person has a direct interest in a matter

- (1) For the purposes of this Division, a person has a direct interest in a matter if there is a reasonable likelihood that the benefits, obligations, opportunities or circumstances of the person would be directly altered if the matter is decided in a particular way.
- (2) Without limiting subclause (1), a person has a direct interest in a matter if –
 - (a) there is a reasonable likelihood that the person will receive a direct benefit or loss that can be measured in financial terms if the matter is decided in a particular way; or
 - (b) the person has, or the person together with a member or members of the person's family have, a controlling interest in a company or other body that has a direct interest in the matter.

Note

For the definition of *controlling interest*, see clause 5.

41. Assessing whether a person has an indirect interest in a matter

- (1) For the purposes of this Division, a person has an indirect interest in a matter in the circumstances set out in this clause.
- (2) A person has an indirect interest in a matter if –
 - (a) a family member of the person has a direct interest or an indirect interest in a matter; or
 - (b) a relative of the person has a direct interest in a matter; or
 - (c) a member of the person's household has a direct interest in a matter.

- (3) A person has an indirect interest in a matter if the person is likely to receive a benefit or incur a loss, measurable in financial terms, as a consequence of a benefit received or loss incurred by another person who has a direct or indirect interest in the matter.
- (4) A person has an indirect interest in a matter if the person –
- (a) has a beneficial interest in shares of a company or other body that has a direct interest in the matter, unless the combined total value of all the shares owned by the person and their family members is less than \$10,000 and the total value of issued shares of the company or body exceeds \$10 million; or
 - (b) is owed money from another person and that other person has a direct interest in the matter, unless the money is owed by an approved deposit taking institution.
- (5) A person has an indirect interest in a matter because of conflicting duties if the person –
- (a) is a manager or a member of a governing body of a company or body that has a direct interest in a matter; or
 - (b) is a partner, consultant, contractor, agent or employee of a person, company or body that has a direct interest in a matter; or
 - (c) is a trustee for a person who has a direct interest in a matter –
but does not have an indirect interest in a matter under this subclause only because the person –
 - (d) is a member of the Victorian Public Service or a member of staff of a Victorian public sector body and the person has no expected duties in that capacity in relation to the matter; or
 - (e) holds a position, with the board's approval as a representative of the board, in an organisation for which the person receives no remuneration; or
 - (f) is a director who holds a position in the Victorian TAFE Association Inc. (registration no. A37584B, ABN 43 308 387 581) or in another body that has the purpose of representing the interests of TAFE institutions.
- (6) A person has an indirect interest in a matter if the person has received a gift or gifts with a total value of \$10,000 or more in the preceding 5 years, directly or indirectly from –
- (a) a person who has a direct interest in the matter; or
 - (b) a director, contractor, consultant, agent or employee of a person, company or body that the person knows has a direct interest in a matter; or
 - (c) a person who gave the gift or gifts to the person on behalf of a person, company or body that has a direct interest in the matter.

42. Additional duties

- (1) The duties imposed by this clause are in addition to, and do not take away from, those imposed by the Act or other laws.

Note

In relation to duties of directors, see in particular Schedule 2 to the Act.

- (2) Before being eligible to take up the position of director, a person must sign an instrument agreeing to be bound by and to comply with –
- (a) the Act and other laws applying to the Institute and board;
 - (b) this Constitution; and
 - (c) subject to the above, any governance protocols adopted by the board from time to time.
- (3) A person who is, or has been a director of the board must not disclose confidential information acquired in the course of his or her duties as a board director except as authorised by the board.

43. Breach of this Division may be misconduct

A breach of this Division by a relevant person is capable of being misconduct.

Examples

Breach of conflict disclosure requirements by a director could be grounds for removal from office under section 3.1.18 of the Act.

Breach of conflict disclosure requirements by a member of staff could be grounds for disciplinary action.

DIVISION 10 – REVOCATION, SAVINGS AND TRANSITIONAL**44. Revocation of former Orders**

On the day this Constitution takes effect (*the handover date*), the following Orders (*the former Orders*) are revoked –

- (a) the Order in Council, dated 31 January 1995, made under the **Vocational Education and Training Act 1990** that established the board of the Institute; and
- (b) the following Orders that amended the Order in Council referred to in paragraph (a) –
 - (i) the Order in Council, dated 18 July 1995, made under the **Vocational Education and Training Act 1990**; and
 - (ii) the Ministerial Order No. 12, dated 9 October 2007, made under the **Education and Training Reform Act 2006**.

Note

The Order in Council dated 31 January 1995 made under the **Vocational Education and Training Act 1990** (as amended) continued in operation after the repeal of that Act on 1 July 2007 as if the Order were made under the **Education and Training Reform Act 2006**: see section 6.1.13 of, and item 1.12 of Schedule 8 to, the **Education and Training Reform Act 2006** and section 16 of the **Interpretation of Legislation Act 1984**.

45. Abolition of former board and transitional arrangements

- (1) On the handover date, the board established under the former Orders (*the former board*) is abolished and the directors of the former board go out of office.

Note

The effect of section 6.1.32(4)(b) and (c) of the Act is that, despite changes to board membership requirements in section 3.1.16 of the Act under the amendments made by the **Education Legislation Amendment (Governance) Act 2012** on 1 January 2013, the current boards and directors remain in place until the handover date.

- (2) Subclause (1) does not affect the eligibility of any person for appointment to the board established by this Constitution (*the incoming board*).

46. First appointments to the incoming board

For the avoidance of doubt, directors may be appointed to the incoming board after this Constitution is made but before the commencement date in accordance with and subject to section 26 of the **Interpretation of Legislation Act 1984**.

Note

Section 26(1)(c) of the **Interpretation of Legislation Act 1984** enables appointments to be made under a subordinate instrument, such as this Constitution, after it is made but before it is in operation, for implementation purposes.

47. Savings of acts under the former Orders

Unless otherwise specified, this Constitution does not affect the validity or continuity of anything validly done in accordance with the former Orders before the handover date.

Note

See section 6.1.32(4)(c) of the **Education and Training Reform Act 2006**, which provides that, despite the amendments made to board composition requirements under section 3.1.16 of that Act by the **Education Legislation Amendment (Governance) Act 2012**, the former board, its directors and the constitution under which it was established remain in place until remade following the required review.

48. Matters relating to the establishment of the new board

- (1) Delegations made by the former board continue in operation as if they were made by the incoming board until they are revoked –
 - (a) by resolution of the incoming board; or
 - (b) by operation of subclause (2) –whichever is the earlier.
- (2) All delegations made by the former board or its predecessors are revoked by operation of this subclause on the day that is six months after the handover date.
- (3) For the avoidance of doubt –
 - (a) the purpose of subclause (2) is to require the incoming board to review all delegations by the former board and its predecessors; and
 - (b) the revocation by subclause (2) of a delegation by the former board or one of its predecessors does not prevent the making of a new delegation in the same or a similar form by the incoming board following that review.
- (4) Institute rules and standing orders made by the former board continue in operation, as if they were made as institute rules by the incoming board under clause 30, until they are revoked –
 - (a) by resolution of the incoming board; or
 - (b) by operation of subclause (5) –whichever is the earlier.
- (5) All institute rules and standing orders made by the former board or its predecessors are revoked by operation of this subclause on the day that is six months after the handover date.
- (6) For the avoidance of doubt –
 - (a) the purpose of subclause (5) is to require the incoming board to review all institute rules and standing orders by the former board and its predecessors; and
 - (b) the revocation by subclause (5) of an institute rule or a standing order made by the former board or one of its predecessors does not prevent the making of a new institute rule in the same or a similar form by the incoming board following that review.

Note

This Constitution does not authorise the making of standing orders in future.

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