Tertiary Education Quality and Standards Agency Bill 2011

Victorian Submission

to the Senate Committee on Education, Employment and Workplace Relations

1. Victoria is pleased to have the opportunity to comment on the Tertiary Education and Quality Standards Agency (TEQSA) Bill 2011.

2. Victoria is concerned that the TEQSA Bill, as currently drafted, fails to recognise the ongoing, legitimate interest of Victoria in the regulation and oversight of higher education. There are strong justifications for this interest:

   - under the Australian Constitution, the Commonwealth does not have a specific power to legislate for education. Education has traditionally been the responsibility of the State;
   - universities have been established under State law and have received significant State investment in their establishment and ongoing operation;
   - higher education institutions play a significant role in the economic development and social cohesion of the State, including developing human capital, innovation and research, and employment; and
   - the interaction between higher education and vocational education and training is significant (Victoria has several universities and other institutions operating across both sectors) and is growing.

3. Victoria recognises the significant risk the Commonwealth carries through its funding of undergraduate places and research, along with income contingent loans schemes. However, Victoria is concerned the proposed approach is insufficiently robust and does not take into account the need for all jurisdictions to collaborate on a national framework for regulation of the tertiary sector. To ensure that Australia gains maximum value from this system and puts in place strong and appropriate checks and balances, States need the ongoing ability to contribute meaningfully to the establishment of quality standards to ensure a competitive, innovative world-best tertiary education sector.

4. Victoria supports in-principle the national registration of providers and courses by a national regulator. In November 2009, Commonwealth, State and Territory Ministers at the Ministerial Council for Tertiary Education and Employment (MCTEE) agreed to cooperate in the development of a new national framework for higher education.

5. Rather than seek State and Territory agreement to the proposed model - as is typical for such significant matters that fundamentally affect State responsibilities and assets – the Commonwealth Government has elected to act unilaterally and include in the Bill provisions that purport to exclude the operation of State laws regulating the higher education sector.

6. There has been no formal consideration or agreement by State and Territory First Ministers on the TEQSA legislation.

7. As a direct consequence, the Commonwealth's TEQSA Bill has not benefited from the system management and regulatory expertise of the States and Territories in this area, and the proposed new regulatory framework is

fundamentally flawed. The combination of significant policy, legal, technical and practical issues still unresolved in the current TEQSA Bill presents significant issues for the robustness and stability of the system.

The Commonwealth's constitutional overreach

8. In lieu of gaining the agreement of all States and Territories, the Commonwealth has elected to act unilaterally over the top of State laws for the higher education sector.

9. However, the Commonwealth does not have a specific power under the Australian Constitution to legislate for higher education or education generally, including universities. These matters have traditionally been areas of State responsibility and Australia's universities are established under State and Territory laws.

10. The TEQSA Bill relies on the "corporations power" in s51(xx) of the Constitution as the foundation of its regulation of higher education providers and "regulated entities", which are incorporated in the States. Application of the legislation to the university and higher education sector relies on characterisation of universities and higher education providers as "constitutional corporations".

11. There is a threshold question whether such a characterisation would be upheld by the High Court, particularly in relation to all universities. Universities are established by State law and their primary purpose is to educate. They are more than trading bodies.

12. The Commonwealth's reliance on the corporations power is a significant risk to the sector, as it may lead to constitutional invalidity of the Bill. The ramifications for the sector, if the proposed legislation were enacted and held not to apply to certain higher education bodies, should be considered. It should be kept in mind that many persons and bodies, who may be affected by the legislation, and not only the States, may have standing to challenge its constitutional validity.

13. The Commonwealth has in the past insisted on constitutional certainty in major regulatory schemes. Such certainty is an important principle. Victoria questions why this is not the case here.

Best practice approach to national regulation

14. Victoria supports the establishment of a national system of regulation to assure the quality of all providers and has been, and continues to be, willing and open to discuss and agree a best practice model to achieve this. However, there remain fundamental issues with the regulatory and governance arrangements of TEQSA that have yet to be resolved by States and Territories.

15. The proposed governance arrangements for TEQSA provide for an all-encompassing role for the Commonwealth Minister. As well as giving the Minister powers to appoint key individuals to TEQSA, the Bill makes the Minister responsible for all facets of standard setting and regulation.

16. The appointments of the TEQSA Commissioners and all members of the Higher Education Standards Panel are to be made by the Commonwealth Minister for Tertiary Education and/or Minister for Research. State and Territory Ministers would have no formal, legislative role in the determination of Commissioners. While the Commonwealth is required to have regard to the interests of the States and Territories in deciding panel appointments, the States and Territories have no direct role in determining appointees.

17. Further, the legislation provides for the Commonwealth Minister for Tertiary Education and/or Minister for Research to 'have regard to' the views of the Ministerial Council, TEQSA and the Panel, on any draft provider standards. However there is no requirement for the Commonwealth Minister to obtain the Council's *endorsement* of these standards (cl 58(4)).

18. Finally, as currently proposed, the Higher Education Standards Panel is to be contained within the body of TEQSA. While it would have a form of organisational separation, the Panel would share secretariat functions, and would be closely involved in TEQSA's application of standards.

19. In summary, there is significant risk of conflict of interest in the close interaction of TEQSA and the Standards Panel. This is then compounded by the Commonwealth Ministers' unilateral power to determine all appointees to the TEQSA and the Panel, and the Ministers' power to then make a final determination on both sides of the equation: standard setting and the application of those standards. As such, the Minister would set the standards and be responsible for the enforcement and application of those standards.

20. Not only does this serve to marginalise the legitimate interests of States and Territories, it also avoids the checks and balances on a single jurisdiction's executive power that is required for an appropriate regulatory environment for universities. It needs to be remembered that universities are civic institutions of fundamental importance to the rights and liberties enjoyed by a free society. They are also institutions of great economic importance.

21. A best practice approach would see the standards setting function existing in a different entity, for example in the body being created to develop and maintain standards in the VET sector. This separation would ensure that the standard setting function and the regulatory function, while informed by each other, were not so interwoven as to contaminate each other. The Ministerial Council should agree unanimously on any new appointments, as well as any new standards, after they have been developed and agreed by the Panel.

22. It is also noteworthy that the proposed model for the development of standards is not compatible with the regulatory regime for the VET sector, leading to the possibility of significant difficulties in merging the two regulators from 2013, as has been proposed by the Commonwealth.

Proposed regulatory regime of TEQSA

23. Victoria also has a number of significant policy questions around the proposed categories of standards and the strength of enforcement powers, particularly in respect of self-accrediting universities.

24. Within the draft TEQSA legislation it is proposed that TEQSA's approach to regulation will be proportionate and risk-based. The three basic principles with which TEQSA must comply are: the principle of regulatory necessity; the principle of reflecting risk; and the principle of proportionate regulation.

25. It remains unclear how these principles would work in practice, particularly as the standards have not yet been finalised. The operation and enforceability of the five sets of standards - against which all higher education providers would be regulated - is fundamental to the operation of TEQSA. It is therefore critical that the Commonwealth outlines how it intends these principles will be used by TEQSA to enforce these standards.

26. As articulated above, more fundamentally, the Ministerial Council must have the opportunity to consider and endorse any standards that would apply to the sector. Checks and balances to the Commonwealth Minister's power are critical for the reasons explained above.

27. The Consequential Amendments and Transitional Provisions Bill provides for the transition of providers' registration from the States and Territories to TEQSA. It provides that universities' self-accrediting authority will be automatically transitioned into the new regulatory environment as part of universities' registration with TEQSA.

28. Universities currently have power to accredit courses under State law. The process for accreditation is set out in Statutes made under State law. However, it is not clear how the exclusion of State laws regulating the higher education sector (in clause 9(1) of the Bill) will impact on these State laws. While the TEQSA Bill enables the universities to continue to self-accredit, if authorised by TEQSA to do so, the Bill may exclude the operation of existing State laws that enable this to occur and affect the current process and framework under which this occurs.

29. Once the period of transitional registration period for each university ends (see Part 2, Schedule 3 of the Transitional Bill), universities will need to apply to TEQSA for authorisation to continue to self-accredit. It is not clear from the Bill whether this authorisation will be provided on an ongoing basis or will be limited to the maximum 7 year period of accreditation for courses.

Impact on State legislation: ambiguities and anomalies in the TEQSA Bill

30. Assuming that the Commonwealth can enact the Bill and rely on its corporations power to regulate all higher education providers, Victoria is of the view that the provisions of the Bill that deal with the interaction of State laws are uncertain and will be complex to apply. There are several points here:

- drafting and scope of the provisions that exclude the operation of State laws;
- relationship of proposed new powers for TEQSA, and the existing powers of the State to establish new universities;
- relationship of proposed new powers for TEQSA, and the existing powers of the State to *legislate* for new universities (such as in respect of their governance arrangements);
- the possible exclusion of State laws on voluntary student unionism;

- position of dual-sector institutions is not clear;
- information gathering powers are also not clear; and
- the need for complementary State legislation has not yet been considered.

31. First, there is a significant lack of clarity around the drafting and scope of the immunity from State laws about higher education in clause 9 of the TEQSA Bill. Clause 9(1) states that a higher education provider is "not required to comply" with a State law purporting to regulate the provision of higher education. The wording of this provision is ambiguous and appears to imply that higher education providers are not required to comply with State laws but perhaps could choose to do so. This issue is discussed in more detail in Attachment A.

32. Second, the relationship between the proposed powers for TEQSA to register and regulate universities and the continuing capacity of States to establish and legislate for new universities (as well as disestablish universities) is also unclear.

33. For example, under clause 38, TEQSA could change a State university's provider category so that it is no longer registered as a "university". Once this happens, it is an offence under clause 108 for that institution to continue to use the word "university" in its name. It is not clear how these powers will affect State laws that provide that Victorian universities can call themselves universities (see Attachment B).

34. Third, State laws establishing universities do more than simply establish a university. They provide for the making of university statutes and regulations, and include powers and obligations in relation to property, and financial and borrowing powers. It is not clear that the operation of these laws would be preserved under clause 9(2) as laws establishing higher education providers. This is discussed in more detail in Attachment C.

35. States must retain the ability not merely to establish, but to regulate the governance of State institutions, and to hold them accountable. This should include the ability to require the provision of information by State institutions to State Ministers, and the exercise of oversight powers by State Ombudsmen, Auditors-General and the like without the need for validating federal regulations.

36. A university is a body which performs public functions under State law, beyond being a "corporation". The exclusion of State laws in relation to the regulation of such State entities would significantly weaken the State's capacity to hold its entities to account, and weaken the capacity of the State to function as a government.

37. Fourth, it appears the TEQSA Bill may exclude the operation of State laws pertaining to voluntary student unionism, which protect students against being required to join and contribute funds to student organisations as a compulsory condition of enrolment at higher education institutions.

38. It is possible that these laws would be characterised as laws about the *provision* of higher education and it is possible that their operation will be excluded by clause 9 of the TEQSA Bill.

39. Fifth, the position of dual-sector institutions is not clear. Victoria has four of the five dual sector institutions in Australia: testament to the innovative nature of higher and vocational education in our jurisdiction. Are these institutions to be subject to the NVR Bill, the TEQSA Bill, or both? If both, how will inconsistencies between the two be resolved? For instance, will they have the greater immunity from State laws conferred by the TEQSA legislation, or the lesser degree of immunity conferred by the NVR legislation? What about the institutions that also provide secondary education, a matter of ongoing State regulatory responsibility?

40. Sixth, Victoria also has information gathering powers in relation to universities. While the Bill creates a scheme for the recording of information by, and the collection of information from, higher education providers, it does not indicate whether it is intended that these powers will operate in parallel with State laws.

41. Finally, the TEQSA proposal does not consider the need for complementary legislation in the State to facilitate information transfers to TEQSA on providers.

42. Attachment D sets out in more detail anomalies of the TEQSA Bill around dual-sector institutions and information gathering powers.

Summary and Conclusions

43. Consultation with the States should be initiated by the Commonwealth as a matter of urgency, to develop and implement complementary State and Federal legislation and administrative arrangements.

44. There must be recognition that State, Territory and Commonwealth Governments all have a legitimate interest in the ongoing responsibility for regulation of higher education institutions. As such, amendments to the legislation sought by Victoria include:

- provision for the setting of standards for higher education by an advisory body reporting to the relevant Ministerial Council;
- provision for appointments to TEQSA to be endorsed by the relevant Ministerial Council;
- provision for the clear separation of the development of standards and the application of standards;
- retention of States' ability to establish and disestablish, and also to regulate the governance of State institutions, and to hold them accountable (including requiring the provision of information by State institutions to State Ministers, and the exercise of oversight powers by State bodies such as the Ombudsmen and Auditors-General); and
- formalisation of TEQSA's responsibility to investigate matters at the request of State and Territory ministers and to ensure the ongoing involvement of States and Territories in investigations relevant to individual jurisdictions.

Next Steps

45. Given the significant legal, governance, policy and operational concerns of States and Territories about the TEQSA legislation, Victoria considers it is essential that the final proposal for TEQSA, including the final legislation, be fully endorsed through an Intergovernmental Agreement by all jurisdictions' First Ministers, prior to introduction in the Commonwealth Parliament.

46. Victoria also asks that the Committee recommend that the Commonwealth initiate the necessary consultation to develop and put in place appropriate transitional and cooperative arrangements, including agreement around any necessary complementary State legislation.

47. Anything less will amount to sub-optimal arrangements for the higher education sector, with the real potential to compromise the independence and stability of our universities, besides undermining States' and Territories' constitutional responsibility for education within the Federation.

Examples of undesirable or unclear effects of the TEQSA Bill on Victorian law

1. This section sets outs concerns arising from the interaction of the TEQSA Bill with Victorian laws that apply to the higher education sector.

What State legislation establishes higher education providers?

2. In Victoria, there are eight Acts that establish Universities, namely—
    - the **Deakin University Act 2009**,
    - the **La Trobe University Act 2009**,
    - the **Monash University Act 2009**,
    - the **Royal Melbourne Institute of Technology Act 2010**,
    - the **Swinburne University of Technology Act 2010**,
    - the **University of Ballarat Act 2010**,
    - the **University of Melbourne Act 2009**, and
    - the **Victoria University Act 2010**.
3. The Acts confer on the Universities substantial powers of self-government, including the power to make statutes for their governance. The Acts also confer broad powers on the universities to carry out their educational and other functions, such as the power to award degrees and other academic awards. It is uncertain whether universities can be properly characterised "trading corporations".
4. Other institutions established by State legislation engaged in the provision of higher education include:
    - The **Melbourne College of Divinity Act 1910**: The College is authorised to award higher education degrees, including doctorates.
    - The **Trinity College Act 1979**: The College is established by the Act and is affiliated with the University of Melbourne, and the members of its governing body include certain office-holders in the Anglican Church. The College's functions include a theological school for the training of candidates for ordination in the Anglican Church.
    - TAFE institutes established under the **Education and Training Reform Act 2006** (ETRA), several of which deliver higher education programs.
5. In addition, Part 3.2, Division 2 of the ETRA enables the State, by Order in Council, to establish post-secondary education institutions and governing councils, and confer upon the council power to award degrees.

The Bill says higher education providers are "not required to comply with" State higher education laws. What does this mean?

6. Clause 9(1) of the Bill states that higher education providers and certain other entities are "not required to comply with a State…law purporting to regulate the provision of higher education".
7. However, this immunity from State laws does not apply in relation to laws that:

- establish higher education providers;
- regulate who may carry on an occupation; and
- are specified in regulations (see section 9(2)).

8. The wording of section 9(1) is ambiguous and could lead to a number of possible interpretations.
9. One possible interpretation is that relevant State laws do not apply in relation to higher education providers (subject to section 9(2)). On this interpretation, all State laws other than those set out in paragraph 7 above, would be excluded.
10. This interpretation could exclude the operation of State laws about the accountability of State institutions, including universities such as laws about financial management and the jurisdiction of the State Auditor-General and Ombudsman.
11. This interpretation could also affect the process for self-accreditation. The TEQSA Bill enables universities to continue to self-accredit (if authorised by TEQSA). Universities currently self-accredit through a process set out in Statutes made under State law. However, it is possible that these laws could be regarded as laws "regulating the provision of higher education" and excluded by clause 9(1) of the Bill.
12. A second possible interpretation is that, although higher education providers are "not required" to comply with State laws, they can choose to do so. This interpretation would appear to give higher education providers a choice about whether to comply with State laws. This is likely to raise complex legal issues.
13. In contrast, the corresponding provision (section 9(3)) of the National Vocational Education and Training Regulator Act says that a provider registered under that Act "is not subject to the law of a non-referring State" in relation to a range of specified matters, such as provider registration and course accreditation.

Inconsistency in the TEQSA Bill – University names

1. Clause 9(2) of the Bill, on its face, appears to preserve the power of the States to establish or disestablish universities. The identity or name of a corporation is fundamental to its establishment. On this basis, it would appear that, by retaining power to establish universities, the States also retain power to name them.
2. However, whilst the Bill, with one hand, leaves this power to the States, it potentially takes it away with the other.
3. Under clause 38 of the Bill, TEQSA may on its own initiative, withdraw permission for a provider to be registered as a "university". Once this happens, it is an offence under clause 108 for that institution to continue to use the word "university" in its name.
4. If TEQSA initiates a decision to change a university's registration category, under section 39 it must give notice to the State Minister and consider his or her response (see clause 39). However, the merits of the TEQSA decision are not reviewable by the Administrative Appeals Tribunal under cl. 183 of the Bill.
5. In short, State universities can continue to operate for the time being, but TEQSA can withdraw their permission to operate as, or call themselves, universities at any time, and such a decision is not reviewable by the AAT.
6. Again, this represents an unwarranted intrusion into State powers to establish and operate educational institutions.

What is meant by "to the extent that … the law establishes the higher education provider"?

1. Clause 9(2)(a) of the Bill states that the operation of State laws regulating higher education are not excluded to the extent that they "establish" a higher education provider. It is not clear what is meant by "establish".
2. State Acts establishing universities also deal with a number of matters relevant to the ongoing operation of universities and their governance. It is not clear that the State's University Acts, as listed above, would be preserved as a whole.
3. While the Explanatory Memorandum indicates that "establish" is meant to cover internal governance, it is possible that a narrower interpretation might be adopted. A narrow interpretation might only cover the actual incorporation of the institution, its legal personality and name, and powers as a legal person, such as owning property, entering contracts and suing or being sued.
4. The effect of such a narrow interpretation would be to exclude the operation of many aspects of University Acts, including:
    - power under those Acts for the making of University statutes;
    - the conferral by those Acts of powers and obligations relating to property, such as management of State land assigned to the University, the compulsory acquisition of property, etc.;
    - the conferral by those Acts of borrowing and investment powers, and commercial powers.

Examples of undesirable or unclear effects of the TEQSA Bill on Victorian law

Information gathering

1. Under Victorian legislation, universities and other institutions are required to provide information reasonably required by the State. For example, section 5.1.2 of ETRA requires Victorian post-secondary education institutions to provide information to the State Minister for the effective monitoring, development and planning of education and training in Victoria.
2. It is possible that such a law could be regarded as a law about the regulation of higher education providers. If so, these provisions may not apply in relation to Victorian higher education providers under section 9(1) of the Bill.
3. The Bill could operate to break the lines of reporting and accountability between major State institutions and the State Government and Parliament. This puts State Governments in an invidious situation. The Victorian Universities and other higher education providers listed earlier remain public entities of the State.

Multi-sector institutions

4. The Commonwealth has foreshadowed that, at some future time, it expects to combine the TEQSA and the new National VET Regulator. The State has already made a submission to the Committee on the problems and anomalies in the NVR legislation and notes that these were not adequately addressed in the Commonwealth's response.
5. The issues and problems with both pieces of legislation will be compounded in relation to multi-sector institutions, of which there are a number in Victoria.
6. Neither the TEQSA nor the NVR Bill appears to take into account the situation of these multi-sector providers. Both Bills appear to have been drafted on the assumption that all education institutions provide either higher education, or VET, or secondary education but not more than one of those.
7. Swinburne University, Victoria University, RMIT and the University of Ballarat have, for many years, operated as both TAFE and higher education institutions. In addition, some secondary education is delivered through the TAFE segments of their operations. Under recent legislation, other universities can operate across both sectors.
8. Conversely, some Victorian TAFE institutes deliver higher education programs.
9. This adds another layer of complexity and uncertainty in relation to the regulation of these institutions. For example:

    - Must a State University that is also a TAFE institution comply with State laws applying to its TAFE activities (to the extent allowed by the NVR Bill), or can it choose not to comply because of its greater degree of immunity from State law (under the TEQSA Bill) as a university?
    - Similarly, does a TAFE institute that registers with TEQSA in relation to its limited higher education activities gain immunity in relation to VET?
    - What will be the effect of the immunities from State laws granted to universities by TEQSA on the regulation of secondary education provided through university TAFE divisions?

Complementary legislation

10. There has been inadequate consultation with the States on transitional matters. For instance, State laws would be necessary to authorise transfer of State records to overcome common law and statutory constraints that might otherwise apply. Presumably, at some stage the Commonwealth will inform the States of the complementary legislation it seeks to facilitate implementation of the TEQSA Bill.

11. Clause 157(2) of the TEQSA Bill is another example where complementary State legislation would be required, but where there has been no consultation. That clause states that the CEO of TEQSA may arrange for officers of a State authority to provide services to TEQSA. Victoria needs to authorise officers to carry out these functions by legislative amendment.