INTERMEDIATE
Government Liaison & Advisory

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Submission to the
Senate Education, Employment and Workplace Relations Committees:

Tertiary Education Quality and Standards Agency Bill(s) 2011

1. This submission on the Tertiary Education Quality and Standards Agency Bill(s) 2011 is made by **InterMediate Government Liaison and Advisory**, a public policy consulting practice, with a particular interest in higher education issues[1].

2. As Australia moves to significantly expand participation and attainment in tertiary education generally and higher education in particular, it is appropriate to ensure that the quality assurance framework is itself 'fit for purpose'. **InterMediate** submits that TEQSA ought to be established in accordance with the following principles:
   - the arrangements be cooperative and national in character, with appropriate governance arrangements;
   - the making of standards be separate from the application of standards, and the standards be owned by Ministers through the Ministerial Council;
   - the ownership of universities and legislative responsibility for universities be not disturbed; and,
   - the distinctive character of universities be preserved.

3. **InterMediate** submits that the purposes of the Bill would be achieved in accordance with these principles with amendments as follow, for the reasons set out in this submission.
   - Clause 74 concerning "use of force in executing a warrant" be omitted.
   - A separate and distinctive "register of universities" be provided for, specifying that Commonwealth funding for a university is contingent upon entry on this register.
   - Standards be subject to approval by the Ministerial Council.

[1] About **InterMediate** – **www.interadvisory.com.au**

Background

4. The proposal to establish a national regulatory agency in higher education, which has found its form in the model of the *Tertiary Education Quality and Standards Agency (TEQSA) Bill* currently before the Senate, has its conception in an inquiry into the desirability of establishing such an agency, which was commissioned by Ministers, through MCEETYA, in late 2006. It ultimately reported to Ministers in early 2008. The report set out a range of options, from an enhancement of existing arrangements through to the full blown, highly centralised, highly directive model now being championed by the Commonwealth[2]. Ministers referred the report to the *Review of Australian Higher Education* (Bradley Review) initiated in March 2008.

5. Bradley reported in December 2008. In its entirety, the Bradley Report was measured and constructive in its analysis and recommendations. It proposed not only a program of renovation of a sector that had seen public disinvestment by the Commonwealth over more than a decade; it set out a firm agenda for growth, in the context of greater choice for students, diversity of institutional types and responsiveness to community and industry needs.

6. Among other things, the Review proposed a new agency to subsume the Australian University Quality Agency (AUQA) and assume the regulatory responsibilities for higher education which currently rest with the States/Territories[3].

7. While the present draft of the TEQSA Bill is a considerable improvement on earlier drafts - by for example establishing TEQSA as a multi-member commission, rather than as a single member authority - **InterMediate** submits that the present Bill remains seriously flawed in respect of each of the principles set out at paragraph 2 above.

Context: quality in the university sector[4]

8. Commonwealth thinking on regulation and standards is based on an *a priori* assumption that there is a real problem with quality in the university sector, which reflects the line of reasoning in the Bradley

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2 *Inquiry into the desirability of a national higher education accreditation body – Final report to the Joint Committee on Higher Education* (2008)

3 *Review of Australian Higher Education: Final Report*, Recommendations19-24 and 44-45.

4 It might also be observed that there is no evident serous quality problem in the non-university higher education sector.

Report[5]. While there will always be quality issues with some institutions at any one time, and while there is a need to be attentive to quality assurance in an expanding system, it is *not* the case that "Australia is losing ground against our competitors...." because of any diminution in quality, as the Commonwealth, following Bradley, has asserted.

9. All the evidence indicates that even in what has been a difficult environment over the past decade, in terms of funding at least, Australian universities generally maintained a high level of quality. The Lisbon Council, a European think tank, has ranked *university systems* of 17 OECD countries based on six criteria, including "effectiveness", with Australia being ranked *first,* ahead of the UK, Denmark, Finland, US and Sweden[6].

10. Similarly, a survey of 11 university systems by the British Council ranked Australia's system as *second* overall and first in terms of quality assurance and degree recognition.[7]

11. As one commentator has recently observed, Australian universities stack up well internationally and "we can stop worrying that our system is about to crumble." [8]

Sub-text: the TEQSA "sledgehammer"

12. With this context in mind, it is difficult to understand the "sledgehammer" model the Commonwealth has preferred in establishing TEQSA. The investigative and enforcement powers proposed for TEQSA are more appropriate for a crime fighting agency than a quality assurance and regulatory agency in what has to be conceded is a generally well ordered and well mannered (if not entirely genteel) sector.

13. For example, clause 74 of the Bill provides for the "use of force in executing a warrant" as follows:

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5 See the discussion in Bradley at pp.115-139. To be fair, Bradley did connect its quality concerns to resourcing : *"….without additional public funding and support, some other institutions established more recently or located in regional or remote parts of Australia may struggle to fulfil all the expectations of what popularly constitutes a modern university."* (p.2). What constitutes a "modern university" is itself a moot point.

6 *University Systems Ranking: Citizens and Society in the Age of Knowledge* (Lisbon Council Policy Brief), December 2008

7 *Measuring and benchmarking the internationalisation of education* (British Council March 2010)

8 *Local institutions among best and brightest* (Peter van Onselen in **The Australian** 13 April 2011).

In executing a warrant, an authorised officer executing the warrant, and a person assisting the authorised officer, may use such force against things as is necessary and reasonable in the circumstances[9].

14. Earlier in the Bill ***premises*** is defined as including the following:
(a) a structure, building, vehicle, vessel or aircraft;
(b) a place (whether or not enclosed or built on);
(c) a part of a thing referred to in paragraph (a) or (b).

15. It is not at all clear why such provisions are necessary, except for dramatic effect – the "regulator with teeth" argument.

16. Does the Commonwealth really anticipate the need to ram down the doors of a university chancellery and/or the need the power to intercept a delinquent vice-chancellor and his/her henchmen/women in their fast getaway boat?

17. Surely, in extreme (and highly improbable) circumstances where obstructive action might reasonably be anticipated, TEQSA could seek appropriate court orders (although the Bill seems to provide for the granting of an appropriate array of orders, as it is) and rely on properly constituted and trained police agencies for the enforcement of such orders?

Context: The role of the Commonwealth & the States

18. Formally, the States retain constitutional responsibility for education, including higher education.

19. Nevertheless, the Commonwealth is the primary *public* funder of higher education, and overall *direct* State funding of HE provision is relatively minor (at 2.2%). It is reasonable that the Commonwealth have primacy in policy and direction setting. It does not follow that it is reasonable to refuse the States a "seat at the table."[10]

20. , in Victoria[11] the State has made significant capital contributions and funded substantial research (about 13 % of research funding in

[9] Thankfully the clause has been clarified with a notation that the section does not authorise the use of force against people which at least removes the possibility of university officials being Tasered.

[10] A reference to the States is also a reference to the Territories, where this is relevant.

[11] These observations are in relation to Victoria but similar considerations would apply to the other jurisdictions.

Victorian universities came from the State in 2008). A 2009 study showed the value of the State's overall contribution to be worth $350 million per annum. That in itself arguably acts to protect (and, indeed, supplement) university base funding. There's also the considerable contribution of the State to the four multi-sector universities which helps in a variety of ways to support institutional stability: for example, in 2009, State funding of Victoria University's TAFE activities (about $87 million) was equivalent to about 45% of HE base funding ($192.4 million).

21. The Victorian Expert Panel on a Tertiary Education Plan observed that it is necessary to maintain a vibrant and active State interest in higher education as an area of vital concern to Victoria and Victorians. The Panel cited an OECD study that regional/state policies can have a significant impact and that state governments are vitally positioned to influence the operation of the knowledge economy within and across their borders. Similarly, they are best positioned to take an integrated view of the whole process of the formation of human capital, including pre-school, school, post-school education and training and the transition to employment, and to adopt whole-of-government approaches. The higher education sector is a key enabling sector, generating skills and knowledge for the business, industry, community and government sectors as well as being a significant knowledge-based service industry in its own right. The sector is therefore central to Victoria's economic development.[12]

22. However, unlike the Australian Universities Quality Agency and the new National VET Regulator, the legislation to establish TEQSA provides that this agency will be *wholly* the creature of the Commonwealth. The States will be reduced to the role of spectators with respect to these vitally important public institutions, established by State laws and initially endowed by the States. There would be no obligation on the Commonwealth to do anything other than "consult" with the States over, for example, the registration or deregistration of universities in their jurisdictions. The States would continue to "own" the institutions but have no say in their direction or regulation.

23. These are not "national arrangements" but purely "Commonwealth arrangements".

[12] *Report advising on the development of the Victorian Tertiary Education Plan* (2009), p.28.

Sub-text: taking the hammer to the Constitution

24. There are legitimate issues as to "States' rights": basically, if enacted, this legislation would ride roughshod over the States' constitutional prerogatives in the area of education.

25. The Commonwealth has asserted that it has no desire to disturb constitutional arrangements or the relationship of the States to their universities, including the States foundation acts of the universities.

26. However, the TEQSA Bill, if enacted in its current form, does precisely that: Clause 9 (1), taken with other clauses, basically renders nugatory any power or responsibility of a State in respect of its universities. As the heading indicates, the clause is intended to exclude State and Territory higher education laws.

27. Clause 9(2) is mere window dressing and does nothing to soften that intent. The foundation act of a university in Victoria declares at section 4 (1) that the particular university was established from a certain date.[13] Attached to this submission is the index of the general provisions of the *Victoria University Act* 2010. Assuming, according to clause 9(2), section 4 (1) would be "protected" from the application of clause 9(1), what other parts of the Act would be so protected? None or not a lot, it would seem.[14]

28. The universities generally have expressed concern about the authority of TEQSA to intrude into the academic governance of a university, by way of its power to limit or withdraw a university's self-accrediting capacity. It goes somewhat further: the Bill would vest TEQSA with extraordinary authority to delve into matters of university governance, finance and administration via the provider standards and such other standards as might in future be made by the Commonwealth Minister. If enacted, this Bill would make universities, like TEQSA itself, creatures of the Commonwealth – in effect, Commonwealth instrumentalities.

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13 The eight Victorian university acts were remade in 2009-2010 and are essentially the same in their structure and content.

14 The Explanatory Memorandum does note that clause 9(2) "is intended to cover laws that establish the internal governance arrangements for the provider or entity – such as provisions that deal with such matters as a university's governing council etc".

29. That of itself would seem to overturn the foundation acts of universities. But it is not even the case that the establishment section (section 4(1) in the case of a Victorian university) would be in any way protected. TEQSA would have the authority to not renew the registration of a higher education provider, including a "university"; to change a provider's category, including from "university" to some other provider category; and to cancel the registration of a provider, including that of a university. As clause 108 makes it an offence for an entity which is not a registered higher education provider in a provider category that permits the use of the word "university", from the point that registration of an entity to represent itself as a "university" was withdrawn, it would seem to follow that it would cease to be a "university". Accordingly, it seems TEQSA could disestablish (or establish, for that matter) a "university", State legislation notwithstanding.

30. This does not sit easily with the assertion in the Second Reading Speech that:

> *Universities will continue to operate under the Acts by which they are established…. The establishment of TEQSA will not affect state or territories' capacity to establish or disestablish universities. The establishment of new universities will remain the responsibility of state and territory governments and new public universities will continue to require legislation in their jurisdiction to be established.*

31. The registration/deregistration provisions would also seemingly give rise to the rather extraordinary situation that statutory officers of the Commonwealth could overturn, essentially by administrative fiat, the Act of a State Parliament in a matter for which the State has clear constitutional responsibility.

32. The Commonwealth relies on the corporations power to establish TEQSA. There is an issue as to the limits of that power: there is a strong body of opinion that it does not extend to establishing or disestablishing a university.[15] How far does it extend to defining the characteristics of a university and regulating the traditional activities of universities, as set out in State legislation?

33. The universities are well able to speak for themselves on the possible encroachment upon their traditions of self-governance, as eloquently expressed by the University of Sydney:

[15] In that the Commonwealth originally sought a reference of powers to establish TEQSA, this might indicate recognition that there are limits to the constitutional reach of the corporations power.

…given the possibility that the draft bill provides scope for a Federal Government to intervene in the affairs of the University in a way that is unprecedented in its history, [we are] obliged to advise you that the University is strongly opposed to the passage of legislation that does not include appropriate safeguards to protect the autonomy of self-accrediting universities. The existence of universities that are independent from government and have autonomy over their activities is in our view simply fundamental to the maintenance of a strong democracy and civil society, and must be protected.

Context: Standards

34. The Ministerial Council for Tertiary Education and Employment (MCTEE**)** considered regulatory issues for both the VET and higher education sectors at its meeting of 20 November 2009. Ministers specifically considered these in the context of a potential merger in 2013, to achieve a more "interconnected tertiary sector".

35. It is sensible to anticipate such a merger in the initial design of TEQSA, including with respect to its oversight and governance, and to provide for an agency with comprehensive coverage of the tertiary sector, rather than partial coverage. It would be sub-optimal to either simply attempt to "bolt together" the two agencies into an agency that is "not fit for purpose" or to have to seek to re-engineer it to accommodate VET and higher education together.

36. In this context, **InterMediate** reiterates the key principles stated at the outset of this submission, particularly the need to ensure that TEQSA is truly national in character and outlook and there is a meaningful role for the States/Territories in its governance and oversight. This will be even more relevant should TEQSA and ASQA be merged, given the primary public funding role of the States/Territories in the VET sector. This is of particular concern to Victoria, given its four multi-sector institutions.

37. For the most part the provisions of the TEQSA Bill do line up with the *National Vocational Education and Training Regulator Act* 2011, with one critical exception: ownership of standards.

38. The current quality framework was established in 2000, following extensive consultations, with the adoption by the then Ministerial Council of the Protocols, which codified for the first time a national approach to higher education accreditation criteria and procedures, and

agreement to the establishment of the Australian Universities Quality Agency (AUQA).

39. The Protocols were reviewed through 2005-2006, again involving extensive sector consultations, approved and adopted by the Ministerial Council in July 2006 and the substantially enhanced Protocols came into effect on 1 January 2007[16].

40. Australia, through the National Protocols, already has the most specific – and demanding - regime for registering higher education providers and institutions, particularly with respect to defining a university, compared to other jurisdictions in the OECD area. Development of the Protocols was initiated through the Ministerial Council and they are "owned" by the Ministerial Council, in that they are subject to the Council's approval. There is no question that they are in any way "defective": they do, after all, form the basis for the draft Provider Standards.

Subtext: Maintaining real standards

41. Despite this history of effective and constructive Commonwealth and State co-operation in higher education regulation, the TEQSA Bill provides no meaningful role for the States in the development and approval of standards. The TEQSA Bill provides, at clause 58(1), that the "Minister may, by legislative instrument, make the following standards….". In contrast, the NVR Act, at section 185(1), provides that the "Minister may, by legislative instrument, make standards for NVR registered training organisations, *as agreed by the Ministerial Council*."

42. There's been no clear rationale stated for this difference (and the change from the current arrangements): the Commonwealth has just obdurately insisted that, for no particular reason, it is "good policy".

43. This is of more importance than a pedantic argument as to "States' rights" (although in a federation, "States' rights" do have relevance). As noted above (paragraphs 27-32), via the Provider Standards and such other standards as might be made by the Commonwealth Minister, TEQSA would be vested with extraordinary authority to dictate on just about any matter concerning university affairs, including matters which have traditionally been - and properly are - the responsibility of a university itself.

[16] See National Protocols for Higher Education Approval Processes.

44. As an example of the way an untrammelled power might be used[17], the Bradley Report argued strongly for a strengthening of the so-called "teaching-research nexus" and lifting the research requirement from the current three broad fields of study to four fields. As Bradley acknowledged, this could have far reaching ramifications. It would undoubtedly place an almost impossible and unnecessary burden on many, if not most, Australian universities[18], possibly lead to the demise of regional and outer urban university campuses, probably lead to dissipation of research effort, stifle innovation, and discourage collaborations and the emergence of new institutional structures. It would seem an unwise thing to do – but who knows what a future Commonwealth Minister might think or be persuaded to think[19]. Making the standards subject to Ministerial Council approval, as now, would at least ensure detailed scrutiny and debate of such a radical change, given the vital contribution of universities to the social, cultural and economic wellbeing of the various States (including their regions). The TEQSA Bill merely requires that the Commonwealth Minister "consult" the Ministerial Council on proposed changes. Making the standards subject Ministerial Council approval would require the Commonwealth to actually take account of reasoned and reasonable objections and proposals.

Regulation Impact Statement

45. The Office of Best Practice Regulation Handbook states:

> *A Regulatory Impact Statement is mandatory for all decisions made by the Australian Government and its agencies that are likely to have a regulatory impact on business or the not-for-profit sector, unless that impact is of a minor or machinery nature and does not substantially alter existing arrangements.*
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> *Regulation is any 'rule' endorsed by government where there is an expectation of compliance. It includes primary legislation and legislative instruments (both disallowable and non-disallowable).*

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17 While standards would be legislative instruments and so subject to disallowance by Parliament, this is an effective check in circumstances of the Parliament today, but not much in a Parliament where a government enjoys an effective majority.

18 To put this into perspective, the Commonwealth of Massachusetts - home of Harvard, MIT and a host of other universities of international standing –requires a university to provide graduate programs in two or more professional fields and programs leading to a doctoral degree in *two or more fields of study.*

19 The first iteration of the draft Provider Standards did just that but this was admitted as a drafting mistake and the current standard restored.

46. This would seemingly cover both the primary legislation (the TEQSA Bill) and the proposed subordinate legislation (the proposed standards). If neither is to be subject to the RIS process, it is reasonable to seek an explanation from the Commonwealth as to the justification of any exemption.

Attachment

VICTORIA UNIVERSITY ACT 2010 (NO. 14 OF 2010)

TABLE OF PROVISIONS