



Tertiary Education Quality and Standards Agency Bill 2011

Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Bill 2011

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Date introduced: 23 March 2011

House: Senate

Portfolio: Education, Employment and Workplace Relations

Commencement: See table in **Clause 2** of Tertiary Education Quality and Standards Agency Bill 2011 (the primary Bill) and table in **Clause 2** of the Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Bill 2011 (the consequential Bill) .

Links: The links to the Tertiary Education Quality and Standards Agency [Bill, the Explanatory Memorandum and second reading speech](#) can be found on the [Bill's home page](#), or through <http://www.aph.gov.au/bills/>.

The links to the Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) [Bill, the Explanatory Memorandum and second reading speech](#) can be found on the [Bill's home page](#), or through <http://www.aph.gov.au/bills/>.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

Purpose

The Tertiary Education Quality and Standards Agency Bill (the primary Bill) will establish the Tertiary Education Quality and Standards Agency (TEQSA) as a new national regulatory and quality assurance agency for higher education, which would combine regulatory functions currently undertaken by states and territories and quality monitoring currently performed by the Australian Universities Quality Agency (AUQA).

The primary Bill will create a national Agency, which will be responsible for:

- the registration of higher education providers, including the recognition of Australia's current universities
- the accreditation of higher education qualifications which registered providers may deliver and
- for ensuring higher education providers comply with a national quality framework.

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Background

In 2008, the Rudd Labor Government undertook a wide-ranging review of Australian higher education with Professor Denise Bradley as chair of the panel. The review—commonly referred to as the Bradley review—reported in December 2008.¹ The report stated ‘there is a strong case for a comprehensive and independent national regulatory body to carry out accreditation and quality audit functions in the higher education sector’ and that ‘current arrangements are complex, fragmented and inefficient.’² Among the 46 recommendations made by the Bradley review, was that the Australian Government ‘establish by 2010, after consultation with the States and Territories, a national regulatory body’.

The need for a national body was driven by a number of existing factors and future developments. These included the growing complexity and diversity of tertiary education with provision through universities, private providers, TAFE institutes and dual sector institutes which provide both vocational and university courses. The increasing complexity and diversity has resulted in a need to improve consumer protection, risk management and to maintain standards in order to protect Australia’s reputation for quality provision. The case for a national body was strengthened by the Bradley review’s recommendation, and the Government’s acceptance, of a student demand driven university system to be implemented in 2012. The new system guarantees funding for all domestic students admitted to a place at a funded university. There is an agreed need that all students in such a system receive education at the required level and that this be achieved through quality assurance.

The Government’s response to the review was released in the context of the 2009-10 Budget. The Government accepted the recommendations for a new regulatory framework and announced that the new body, TEQSA, would be established in 2010.³

The Bradley review recommended a greater articulation between higher education and vocational education and envisaged the new agency’s role would be ‘extended to cover the whole of tertiary education and training’. The Government has however, separated the regulation and quality assurance of tertiary education through the establishment of the National Vocational Education and Training Regulator for the VET sector and the proposed TEQSA for higher education.⁴ Though, the

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1. Department of Education, Employment and Workplace Relations, *Review of Australian Higher Education: final report*, Canberra, December 2008, viewed 14 April 2011, <http://www.deewr.gov.au/HigherEducation/Review/Pages/ReviewofAustralianHigherEducationReport.aspx>
 2. *Ibid.*, pp. 115, 116.
 3. See: Australian Government, *Transforming Australia’s Higher Education System*, Canberra, 2009, viewed 14 April 2011, http://www.deewr.gov.au/HigherEducation/Documents/PDF/Additional%20Report%20-%20Transforming%20Aus%20Higher%20ED_webaw.pdf
 4. For background on the national VET regulator see: C Kempner, *National Vocational Education and Training Regulator Bill 2010*, Bills Digest, nos 61-62, 2010-2011, Parliamentary Library, Canberra, 2011, viewed 14 April 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillsdgs%2F542615%22>

The National Vocational Education and Training Regulator Bill 2010 passed in the Senate on 23 March 2011 and in the House of Representatives on 24 March 2011. A new Standards Council will provide advice to the Ministerial Council for Tertiary Education and Employment (MCTEE) on national standards for regulation including registration,

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then Minister for Education, the Hon Julia Gillard, told providers the Government aimed to ‘bring TEQSA and the National Regulator for VET together after 2013. This will help provide more seamless regulation for dual sector providers who currently deal with regulatory agencies fragmented across jurisdictions and sectors’.⁵

Committee consideration

The primary and consequential Bills have been referred to the Senate Education, Employment and Workplace Relations Committee for inquiry and report by 10 May 2011.⁶

Financial implications

In the 2009–2010 Budget, the Government announced funding of \$60.8 million over four years to establish ‘a new national quality and regulatory agency for higher education’.⁷ Redirection of \$3.9 million in funding over three years to 2012–13 from AUQA was also announced.⁸

The 2010 *Incoming Government Brief* provided estimates of annual funding for the five years 2009–2010 to 2013–14 totalling \$74 million, of which \$54.4 million would fund the years 2011–12 to 2013–14.⁹ The Explanatory Memorandum states that ‘TEQSA will have appropriations of \$54 million between commencement in 2011 and 2014’.¹⁰

Main issues

There has been a lengthy process in drawing up the legislation, including stakeholder consultation and two briefings in 2010 attended by representatives from state and territory governments and key bodies. At the time, it was reported there was widespread concern with parts of the proposed legislation. This resulted in the Government delaying introduction of the Bills and releasing a draft Bill for consideration in February 2011.

While there now appears to be greater stakeholder support for the provisions in the Bills, there remain concerns about aspects of the Bills and the framework under which TEQSA will operate. For example, passage of the Bills will radically change the regulation of tertiary education. TEQSA will have powers that are wider than any previous regulatory framework and, through the Standards

quality assurance, and accreditation of VET qualifications.

<http://www.deewr.gov.au/Skills/Overview/Policy/NationalVETRegulator/Pages/Overview.aspx>

5. J Gillard, *Address to the Universities Australia Annual Higher Education Conference*, media release, 3 March 2010, viewed 15 April 2011,

http://www.deewr.gov.au/Ministers/Gillard/Media/Speeches/Pages/Article_100303_102842.aspx

6. Details of the inquiry are at http://www.aph.gov.au/Senate/committee/eet_ctte/teqsa/index.htm

7. Australian Government, *Budget measures: budget paper no. 2: 2009-10*, Commonwealth of Australia, Canberra, 2009, p. 151.

8. AUQA will be subsumed by TEQSA. See *ibid.*, p. 142.

9. *Incoming Government Brief 2010*, DEEWR, Canberra, 2010, p. 440, viewed 5 May 2011,

http://www.deewr.gov.au/Department/Publications/Documents/IGB_Chapter10.pdf

10. Explanatory Memorandum, Tertiary Education Quality and Standards Agency Bill 2011, p. 3.

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Framework, it will be directly involved in the academic content of university teaching which has been the preserve of individual university governing bodies and academic boards.

The following main issues are described in general. For further comment in relation to specific provisions, see the Main Provisions below.

Self-accreditation

Self-accreditation refers to academic autonomy universities currently possess in relation to courses they offer and their content. Stakeholders argue that the self-accreditation status of universities is effectively removed because TEQSA would have the capacity to withdraw a university's accreditation to offer a certain course.

Universities are adamant that they wish to maintain this autonomy. Universities Australia, the peak body for all universities, argues that 'self-accreditation is a central characteristic of true universities around the world in their role as long-standing independent centres of knowledge and learning. This in turn underpins distinctive public benefits for our society. At present, reflection of this in the Bill is indirect and uncertain'.¹¹ Universities Australia 'is concerned that TEQSA's powers regarding accreditation (under proposed sections 32 and 33 especially) may pose an unwarranted potential for intrusion into a university's autonomy as provided by state legislation. The Bill does provide for consultation between state ministers and TEQSA when TEQSA seeks to make changes to university operations, but the overall implications of the Bill for university autonomy remain unclear'.¹²

University autonomy and academic freedom

Some commentators and stakeholders see significant dangers in the power TEQSA will have in accrediting courses, setting standards and measuring quality. Such powers are perceived as a threat to the importance of existing independence of universities and the values of academic freedom and critical inquiry. Academic Andrew Norton argues that:

The TEQSA path to academic standards is one that could too easily lead to universities going the way of schools, where the curriculum becomes another battleground for the political conflicts of the day, and in which diversity and experimentation is lost in a quest for unnecessary 'national consistency'.¹³

Elsewhere, Andrew Norton argues that 'this is not just a centralisation of government power over higher education, it is a substantial increase of government power over what happens in higher

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11. Universities Australia, *Universities Australia releases its statement regarding the draft TEQSA legislation*, media release, 24 February 2011, viewed 18 April 2011, <http://www.universitiesaustralia.edu.au/page/media-centre/2011-media-releases/universities-australia-releases-its-statement-regarding-the-draft-teqsa-legislation/>
 12. Universities Australia, *Submission to the Senate Inquiry into the Tertiary Education and Quality Standards Agency (TEQSA) Bills 2011*, Canberra, 12 April 2011, viewed 5 May 2011, <http://www.universitiesaustralia.edu.au/resources/1081/sub11.pdf>
 13. A Norton, 'A tertiary regulator will directly involve a government agency in academic affairs for the first time. It puts much at risk', *The Age*, 22 February 2011.

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education, with the federal government planning to introduce controls never imposed by state governments'.¹⁴

Standards

Higher education providers will need to meet a number of standards. These include provider standards (for registration), teaching and learning standards, qualification standards, information standards, 'other' standards, and, for universities, research standards. Universities have expressed concern that these standards will be made by the Minister in legislative instruments that, although disallowable by the Parliament, will not be able to be amended by the Parliament. Universities argue that these standards should be in the primary Bill allowing greater scrutiny and the ability for legislative amendment.

The Group of Eight goes further stating that 'TEQSA should not have any legal power to set standards. Rather its powers should be to monitor, evaluate and report on how well providers meet the standards they set for themselves and the expectations determined by government and other stakeholders in relation to capacity and performance.'¹⁵

Standards Panel

The Higher Education Standards Panel will advise and make recommendations relating to the standards. Concerns regarding the appropriate expertise and independence of panel members have been raised. This is further discussed in the main provisions below.

States powers

Some concern has been expressed that powers invested in universities and their governing bodies through state enabling Acts will be overridden by Commonwealth powers provided for in the Bills and through section 109 of the Constitution.¹⁶

Universities Australia states that the Bill 'does not adequately delineate the States' powers to establish universities through legislation and TEQSA's power to register them, or define the process to be followed should there be conflict between them (i.e. if a university is established through a state Act but refused registration by TEQSA). While such a conflict is considered very unlikely, the potential for it to happen suggests that more work needs to be done in this area'.¹⁷

14. A Norton, 'The coming end of academic autonomy', Andrew Norton blog, 27 February 2011, viewed 5 May 2011, <http://andrewnorton.info/2011/02/27/the-coming-end-of-academic-autonomy/>

15. Group of Eight, 'Higher education standards and quality', *Go8 backgrounder* 13, p. 2, October 2010.

16. University of Sydney, *Submission to the Senate Education, Employment and Workplace Relations Committee inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, op. cit.

17. Universities Australia, *Submission, Inquiry into the Tertiary Education and Quality Standards Agency (TEQSA) Bills 2011*, Canberra, 12 April 2011, viewed 5 May 2011, <http://www.universitiesaustralia.edu.au/resources/1081/sub11.pdf>

Investigative Powers

Concern has been raised regarding TEQSA's investigative powers which have been described as 'excessive and largely unnecessary'.¹⁸

Quality Issues

Will TEQSA impose bureaucratic processes that hinder and restrict the wider assessment of higher education outcomes? Academic Ross Milbourne argues that TEQSA 'must recognise innovation, the changing nature of education, and individual missions, and focus on outcomes and achievements and not be drawn into the standard bureaucratic approach of obsession with inputs'.¹⁹ Such views are part of a broader fear that TEQSA will be overly bureaucratic, centralised and impose restrictive 'red tape' on the sector.

Constitutional Issues

The Government is relying on the corporations power in the Commonwealth Constitution to override the states and give TEQSA its regulatory powers. There has been some debate on the constitutional validity of the primary Bill and the classification of universities as trading corporations.²⁰

Key provisions

The TEQSA primary Bill

Due to time constraints, the Digest will focus on provisions in the primary Bill, which have been the subject of concern expressed by interest groups.

Part 1

Clause 3 of the primary Bill lists the objects of the legislation, which include:

- providing national consistency in the regulation of higher education provision using a standards-based quality framework and principles relating to regulatory necessity, risk and proportionality²¹
- consumer information and protection and
- protecting and enhancing Australia's reputation and international competitiveness for the higher education sector.

18. See National Tertiary Education Union, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*.

19. R Milbourne, 'Standards body must be robust', *Australian Financial Review*, 8 February 2010, p. 30.

20. See for example: B Lane, 'TEQSA statute vulnerable to High Court challenge', *The Australian*, 13 April 2011; A Blackwell, 'Go8 queries legality of TEQSA', *Campus Review*, 6 December 2010.

21. For the meaning of 'regulatory necessity', 'reflecting risk' and 'proportionate regulation', see **clauses 14–16** of the Bill.

Comments on constitutional issues

It is noted that under the Constitution, the Commonwealth does not have specific power to legislate for education, which has typically been the responsibility of States. Consequently, particular issues have arisen in relation to this Bill.

Constitutional validity of the primary Bill

Clause 8 provides that the primary Bill relies on, among other things, paragraphs 51(xx) and (xxxix) and section 122 of the Constitution. These relate to:

- foreign corporations; and trading or financial corporations formed within the Commonwealth
- matters incidental to the exercise of powers vested in the Commonwealth Parliament in the Constitution and
- the power to legislate for the government of territories.

As previously mentioned, it has been argued that constitutional validity of the primary Bill might be questionable. For example, Professor George Williams states in his submission to the Education, Employment and Workplace Relations Committee:

1. the Bill would be a valid enactment under the Commonwealth's corporations power in section 51(xx) of the Constitution;
2. some or all of Australian universities may not be trading corporations under that power (or, even if they are, they may be taken outside the scope of that power by States reconstituting them other than as corporations); and
3. there are reasons to believe that the Bill, if enacted, will not be capable of applying to some or many of Australia's universities.²²

Professor Williams goes on to state that:

The Tertiary Education Quality and Standards Agency Bill 2011, in so far as it relies under section 8 upon the corporations power, is capable of being passed under that power. However, the Bill could not actually apply to a university unless that university is a constitutional corporation.

...

If a university created by State legislation is a constitutional corporation, it will be because it is a trading corporation rather than a financial or foreign corporation.²³

22. G Williams, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, p. 1. See also Victorian Government, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, p. 2.

23. G Williams, *op. cit.*, pp. 2–3.

Are universities trading corporations? This question cannot be definitively answered at this point in time because, as pointed out by Professor Williams, the High Court of Australia has not yet determined whether a university is a trading corporation.²⁴

Professor Greg Craven has expressed a contrasting perspective on this issue. During the Education, Employment and Workplace Relations Committee's inquiry into the TEQSA Bills, Professor Craven stated:

Universities are interesting entities in relations to the corporations power because they are all corporations but if you are talking about trading corporations, they are in a sense at the outer edge; they are corporations whose purpose would not be said to be primarily trading but all of them have trading activities.

...

There is a line of cases in the High Court going back at least to the dam case in 1982 which I believe adequately demonstrate the fact that although you can have good arguments about it, and I have had them myself, a trading corporation is a corporation which has trading activities and therefore Australian universities are trading corporations. I have great respect for Professor Williams; he is one of my co-chief investigators on an ARC project on federalism. But, the plain fact is I would not like to be appearing before the High Court and arguing that universities were not trading corporations. I had that conversation with a very senior law officer of a state the other day and he expressed exactly the same view. I do not see it as a constitutional impediment.²⁵

Role of the States

The existing National Protocols for Higher Education Approval Processes (National Protocols) were approved by the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA) in 2007. Legislative change to give effect to the National Protocols and the National Guidelines for Higher Education Approval Processes was enacted by the Commonwealth and each state and territory.²⁶

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24. However, the question of whether a university is a trading corporation was determined by the Full Court of the Federal Court in *Quickenden v O'Connor* (2001) 109 FCR 243, where the Court found that the University of Western Australia was in fact a trading corporation: see *ibid.*, p. 3 (the current test used to determine whether an entity is a trading corporation would involve, among other things, examining the extent of a particular university's trading activities).
 25. Commonwealth of Australia, 'Tertiary Education Quality and Standards Agency Bill 2011', *Committee Hansard*, Education, Employment and Workplace Relations Committee, Senate, 19 April 2011, p. 6, viewed 4 May 2011, <http://www.aph.gov.au/hansard/senate/commtee/S13775.pdf>
 26. For further information, see Department of Education, Employment and Workplace Relations, 'National protocols for higher education', viewed 5 May 2011, <http://www.deewr.gov.au/HigherEducation/Programs/StudentSupport/NationalProtocolsforHEApprovalProcesses/Pages/default.aspx>; Ministerial Council for Education, Early Childhood Development and Youth Affairs (MCEECDYA), 'National Protocols for Higher Education Approval Processes', viewed 5 May 2011, http://www.mceetya.edu.au/mceecdya/national_protocols_for_higher_education_mainpage,15212.html

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However, no intergovernmental agreement exists for the Commonwealth to assume responsibility to regulate higher education providers, nor is there a requirement for each jurisdiction to refer their powers as there had been in relation to the vocational education sector.²⁷ Importantly, note that section 109 of the Constitution provides that, in the event of inconsistency between a state law and Commonwealth law, the Commonwealth law will prevail to the extent of the inconsistency.

Subclause 9(1) provides for certain exclusions of state and territory higher education laws purporting to regulate the provision of higher education.

However, **subclauses 9(2)** and **(3)** set out the kinds of state and territory laws which would not be so excluded. These include:

- laws establishing the higher education provider or regulated entity
- laws regulating who may carry on particular occupations and
- laws of which provision of education is only a part but which purport to regulate the provision of higher education.

Strong concerns have been expressed by some states about the limited, ‘marginalised’ and ambiguous role of the states, how **clause 9** would actually operate and the status of existing legislation if the primary Bill is passed.²⁸

Part 2

Principles for regulation

Part 2 of the primary Bill relates to those principles mentioned in **clause 3** above:

- regulatory necessity
- reflecting risk and
- proportionate regulation.

Clause 13 provides that TEQSA *must* comply with these principles when exercising a power under the Act.

Clauses 14–16 explain what those principles mean. Thus, for example, TEQSA complies with the principle of regulatory necessity if its exercise of powers does not burden the entity any more than is reasonably necessary.

27. It is noted that the State of Victoria has requested that the final TEQSA legislation be subject to an Intergovernmental Agreement: see Victorian Government, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, p. 7.

28. See, for example, Western Australia, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, p. 1; Victorian Government, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*; Universities Australia, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, p. 2.

Part 3

Registration

Part 3 of the primary Bill provides the legislative framework for the registration of higher education providers.

Clauses 18–23 relate to applications by higher education providers for registration.

Under **clause 18**, a regulated entity that is, or intends to become, a higher education provider *may* apply to TEQSA for registration within a particular ‘provider category’.²⁹ Under **clause 5**, a ‘higher education provider’ is:

- a constitutional corporation offering or conferring a regulated higher education award
- a corporation that offers or confers such award and is established under a Commonwealth or territory law or
- a person offering or conferring a regulated higher education award for completion of a course of study provided either wholly or in part in a territory.³⁰

Under **subclause 19(2)**, before making a decision as to whether a particular provider category is appropriate, TEQSA *must*:

- have regard to the Threshold Standards and
- if the appropriate provider category permits the use of the word ‘university’—consult with the minister for each state and territory responsible for higher education, including having regard to advice and recommendations given by each of those ministers.

Under **subclause 18(3)**, TEQSA’s decision on the appropriateness of an application for registration in a particular provider category under **paragraph 19(1)(a)**; and a decision to register an applicant for registration in a particular provider category, or to reject an application for registration under **clause 21**, would be reviewable decisions (see below).

Clause 21 provides that TEQSA may grant the application for registration where it is satisfied that the applicant meets the **Threshold Standards**, which means, provider standards, qualification standards, and any other standards made under paragraph 58(1)(e).

Clause 22 provides that within 30 days of deciding whether to grant an application for registration, TEQSA *must* notify the applicant in writing of its decision, as well as providing other specific information including the reasons for its decision if TEQSA decides to reject the application.

TEQSA may impose conditions on a higher education provider’s registration, as set out in **Division 2 of Part 3**.

29. A ‘provider category’ is one that is listed in the Provider Category standards made under paragraph 58(1)(b), which is part of the section on ‘Making the Higher Education Standards Framework’.

30. **Clause 5** of the primary Bill also contains a definition of ‘regulated entity’. ‘Constitutional corporation’ is a corporation to which section 51(xx) of the Constitution applies: **clause 5** of the primary Bill.

Clause 24 provides that a registered higher education provider must comply with conditions imposed on its registration under **clauses 25–32**. These conditions include:

- offering at least one accredited course (**clause 25**)
- where the provider offers or confers a regulated higher education award for completion of a course of study that is offered by another entity—ensuring that the other entity provides the course consistently with the Threshold Standards (**clause 26**)
- providing TEQSA with annual financial statements (**clause 27**)
- providing certain information requested by TEQSA (**clause 28**)
- keeping adequate records (**clause 30**) and
- cooperating with TEQSA (**clause 31**).

It is noted that **paragraphs 32(1)(c)** and **(d)** enable TEQSA to impose conditions on a registered higher education provider's registration that restrict or remove the provider's authority to self-accredit one or more courses of study; as well as the provider's ability to provide an accredited course.

Subclause 32(2) and **(3)** gives TEQSA a discretionary power to vary or revoke a condition imposed under **subclause 32(1)** either on its own initiative, or at the application of the registered higher education provider.

Under **clause 33**, if the registered higher education provider is a university, and if TEQSA intends to impose a condition under **subclause 32(1)** restricting or removing the provider's authority to self-accredit one or more courses of study (or vary or revoke such condition), TEQSA *must* give the provider and the minister for each state and territory responsible for higher education a written notice of its intention for reasons as specified, and a reasonable opportunity to make representations to TEQSA about the proposed decision. In addition, TEQSA *must* have regard to any such representations.

Under **clause 183**, decisions under **clause 32** to impose a condition on registration or to vary such condition would be reviewable decisions (see below).

Division 3 relates to registration renewal.

Clause 36 gives TEQSA discretionary power to renew a registered higher education provider's registration if TEQSA is satisfied that the provider continues to meet the Threshold Standards.

Where TEQSA proposes to reject an application for registration renewal, **subclauses 36(5)–(7)** contains similar protections as those provided in relation to TEQSA imposing, varying or removing a condition to restrict or remove a provider's authority to self-accredit (see **subclause 33(2)–(3)**).

Decisions to refuse to renew registrations under **clause 36** would be reviewable under **clause 183** (see below).

Clause 38 enables TEQSA to change a registered higher education provider's provider category at its own initiative or on application by the provider but requires TEQSA to have regard to the Threshold Standards before doing so.

A decision made under this provision to refuse to change a provider category would be reviewable under **clause 183** (see below).

In circumstances where the provider is a university, **clause 39** sets out similar protections as those provided in relation to TEQSA imposing, varying or removing a condition to restrict or remove a provider's authority to self-accredit (see **subclause 33(2)–(3)**).

Clause 41 enables TEQSA to authorise a registered higher education provider to self-accredit one or more courses of study. However, TEQSA *must* have regard to the Threshold Standards before doing so.

A decision made under this provision to refuse to authorise a registered higher education provider to self-accredit one or more courses of study, would also be reviewable under **clause 183** (see below).

Comment

Clause 26 (mentioned above) has been criticised for being too broad in scope, which is said to particularly affect dual sector institutions. Mr Michael Beaton-Wells, Universities Australia, stated during the Education, Employment and Workplace Relations Committee's inquiry into the TEQSA Bills:

section 26 needs to be clarified so that the myriad of arrangements that are important in terms of articulation within Australia's tertiary education system, inclusive of VET and higher education, as well as Australia's arrangements with the world, particularly exchange arrangements and co-badged arrangements, are not caught by that provision. It is vital for innovation and it is vital for efficiency between these sectors that we are not seeking to impose, if you like, higher education standards in Australia on other sectors or on other parts of the world which are not being regulated here in Australia.³¹

It is also noted that, as mentioned earlier, preservation of the self-accreditation status of universities was an important issue for several interest groups, particularly the universities.³² In relation to this concern, it is noted that under **subclause 12(1)** of **Schedule 3** of the consequential Bill, existing state or territory authorisation to self-accredit courses of study would automatically be transferred once the TEQSA Act commences. However, **paragraph 12(4)(b)** and **subclause 12(4)** of the consequential Bill have the effect that once transferred, the self-accreditation status would end and then, it would appear that the university would come under TEQSA's regulatory powers, such as those in relation to registration and self-accreditation (**Part 3**); and in relation to assessing a provider's compliance with the Higher Education Framework (**Part 5**). As Monash University points out:

31. Commonwealth of Australia, 'Tertiary Education Quality and Standards Agency Bill 2011', op. cit., p. 4. See also discussion at *ibid.*, pp. 16–17.

32. See note 42 for examples.

... notwithstanding this inclusion of authority in the transfer of registration, TEQSA is not constrained from restricting or removing the authority under the TEQSA Act.

There is no statement about what happens when the transferred registration ends, but in the TEQSA Bill, there is provision for applying for renewal of registration after the end date for the transferred registration (with no mention of including an existing self-accreditation authority) and there is provision for applying to self-accredit. This needs to be clarified – as presently drafted it is not clear whether the transferred authority to self accredit continues until TEQSA says otherwise, or whether the authority must be applied for (under section 41, page 34 of the Bill) at the time of applying for renewal of registration. This is important and the position should be made quite clear.³³

In addition, at the time of preparing submissions, several interest groups stated that it was difficult to comment about aspects of the primary Bill, such as self-accreditation of universities, without access to a more up-to-date version of the relevant Standards.³⁴

A revised draft copy of Provider Standards was released in April 2011, after many of the submissions to the Senate Education, Employment and Workplace Relations Committee inquiry into the TEQSA Bills had been lodged. It is understood that consultations on these Standards continue.

Part 4

Part 4 of the primary Bill relates to accreditation of courses of study but only in relation to registered higher education providers *not authorised to self-accredit* the course of study.

Clauses 46–51 relate to applying for accreditation.

Under **clause 46**, a registered higher education provider or an entity who has applied to become a registered higher education provider may apply to TEQSA for a course of study to be accredited.

If TEQSA is satisfied that the applicant is a registered higher education provider and that the course of study meets the Provider Course Accreditation Standards, TEQSA *may* accredit the course of study under **subclause 49(1)**.

A decision to reject an application for accreditation of a course of study under **clause 49** would be reviewable under **clause 183** (see below).

Clause 50 provides that within 30 days of making a decision to grant or reject such application, TEQSA *must* notify the applicant of its decision. If TEQSA grants the application, TEQSA must also

33. Monash University, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, p. 6.

34. See, for example, National Union of Students, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, p. 3; Southern Cross University, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, p. 1; Universities Australia, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, p. 2.

notify the applicant of the period of time for which the course of study is accredited. If TEQSA rejects the application, TEQSA must also notify the applicant of the reasons for its decision.

Clauses 52–54 provide for conditions that TEQSA may impose on the accreditation of a course of study.

Clause 53 gives TEQSA discretionary power to impose, vary and revoke such conditions and **clause 54** requires TEQSA to notify the higher education provider of its decision to impose, vary or revoke such conditions within 30 days of making the decision, as well as the reasons for doing so and where TEQSA decides to impose a condition—the period of time for which the condition is imposed.

Decisions to impose conditions on an accreditation of a course of study and to vary such conditions under **clause 53** would be reviewable under **clause 183** (see below).

Note that according to **clause 52**, a registered higher education provider *must* comply with any conditions that TEQSA places on the accreditation of a course of study.

Clauses 55–57 relate to renewing accreditation of courses of study.

A registered higher education provider may apply to TEQSA to renew an accreditation of a course of study under **clause 55**.

Clause 56 gives TEQSA discretionary power to renew an accreditation if it is satisfied that the accredited course continues to meet the Provider Course Accreditation Standards. The current accreditation continues until TEQSA decides whether to renew it. If TEQSA intends to reject an application to renew accreditation, it *must* give the provider both written notice of its intention to reject the application for specified reasons; and a reasonable opportunity to make representations to TEQSA relating to the proposed decision, which TEQSA *must* consider.

A decision to refuse to renew accreditation under **clause 56** would also be reviewable under **clause 183** (see below).

Clause 57 requires TEQSA to notify the provider of its actual decision regarding renewal within 30 days of making its decision. If TEQSA grants the application, TEQSA must also notify the applicant of the period of time for which the accreditation is renewed. If TEQSA rejects the application, TEQSA must also notify the applicant of the reasons for its decision.

Part 5

Part 5 relates to the Higher Education Standards Framework (the Framework).

Making standards

Subclause 58(1) gives the Minister for Education, Employment and Workplace Relations (the Minister) discretionary power to make particular standards by legislative instrument.³⁵

Subclause 58(2) gives the Research Minister discretionary power to make research standards by legislative instrument.

However, under **subclause 58(3)**, neither Minister may make such standards unless the Higher Education Standards Panel (the Panel) has developed a draft of the relevant standard and the relevant Minister has consulted the Ministerial Council, the other Minister and TEQSA about the draft. In addition, before making a standard, the relevant Minister *must* have regard to the Panel's draft standard; and any advice or recommendation given by the Panel, Ministerial Council, the other Minister and TEQSA.

It is noted that under **subclause 58(5)**, a standard may provide for a matter by applying, adopting or incorporating anything contained in an instrument or other document that is in force or existing from time to time.

Comment

Concern has been expressed about **paragraph 58(1)(e)** and **(h)** in relation to unspecified 'other standards' that the Minister may make. For example, Ms Wantrup, Monash University solicitor, stated during the Education, Employment and Workplace Relations Committee's inquiry into the TEQSA Bills:

we have not got the standards either. I think you made the point before, Senator, or you made it in relation to another matter, that if there are to be additional standards—because they are very important, being the thresholds and they have to be complied with for registration—they should be added to by parliament if more are going to be added.³⁶

However, it is noted that **subclause 58(3)**, as mentioned above, requires the Minister to meet certain requirements, which include consultations with particular people, before making any 'other standards'. Furthermore as mentioned above, under **subclauses 58(1)**, such 'other standards' would be made by legislative instruments, which would be subject to parliamentary scrutiny.³⁷

35. Legislative instruments are subject to parliamentary scrutiny: see Part 5 of the *Legislative Instruments Act 2003* and are generally disallowable under section 42 of that Act. However, section 42 is subject to section 44 of that Act, which states that particular types of legislative instruments are not disallowable.

36. Commonwealth of Australia, 'Tertiary Education Quality and Standards Agency Bill 2011', op. cit., p. 17.

37. See Part 5 of the *Legislative Instruments Act 2003*.

Concerns have also been expressed that the relevant Minister need only consult the Ministerial Council and have regard to any advice given by the Council about draft standards—not obtain the Council’s approval.³⁸

In addition, concerns have been expressed that **subclause 58(5)** may allow the Australian Qualifications Framework (AQF) to be incorporated into the Act without further consultation.³⁹ As Ms Rea, National Tertiary Education Union stated during the Education, Employment and Workplace Relations Committee’s inquiry into the TEQSA Bills:

The national qualifications framework within the AQF are essentially descriptors of the national education system structure and qualifications, and they were prepared for that purpose. Should these descriptors be adapted as regulatory tools for TEQSA, as it appears is intended, then we are very concerned that the overly prescriptive nature of these descriptors may impair the self-accrediting status of universities. Where that could be a problem is that one of the aspects of being a self-accrediting institution is that it is indeed at universities that new awards and qualifications are actually often developed and also varied. That is indeed part of the role of universities to do that.

Furthermore, the NTEU is highly concerned that where there is scope for the AQF descriptors to be incorporated into the legislation without additional public consultation it could be highly problematic. We would argue that there would need to be further public consultation about this—reiterating again that the AQF descriptors were developed actually for another purpose and not specifically for this purpose.⁴⁰

It is noted, however, that the Explanatory Memorandum explains:

This provision is included to allow for the intersections between the various parts of the Higher Education Standards Framework. For example, elements of the Qualifications Standards (once made) might be included in the Provider Course Accreditation Standards.⁴¹

Subclause 58(5) does not identify the types of ‘other writing’ that may be incorporated by reference, and the Explanatory Memorandum provides insufficient assistance in this regard. While recognising the need for flexibility in defining the content of standards, it does not provide sufficient guidance to affected entities in terms of the range of sources they should be expected to consult to assist them in complying with their obligations.

38. See, for example, Victorian Government, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, p. 3; Intermediate Government Liaison and Advisory, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, p. 10.

39. Bond University, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, pp. 1 and 2; National Union of Students, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, p. 2; National Tertiary Education Union, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, p. 3.

40. Commonwealth of Australia, ‘Tertiary Education Quality and Standards Agency Bill 2011’, op. cit., pp. 34–35.

41. Explanatory Memorandum, op. cit., p. 34.

Lastly, some interest groups expressed the view that self-accreditation should be expressly enshrined in the legislation itself and not in the Threshold Standards.⁴² Reflecting that view, Professor Craven from Universities Australia, stated during the Education, Employment and Workplace Relations Committee's inquiry into the TEQSA Bills:

self-accreditation should indeed be recognised in the legislation.

...

We have a clear view on what form that recognition should take. It should appear at the end of part 5, which is the accreditation part of the legislation. It should be a new section 58 and it should have four elements. First of all it should recognise that universities are self-accrediting institutions who accredit their own courses; in other words, both the definitional character is institutions and the operative fact that flows from that that they do self-accredit their courses. Secondly it should be recognised that this is subject to the right of TEQSA to take any action under the legislation which it is entitled to make. There is no desire to get out of the scope of TEQSA with this recognition; that is part of it. Thirdly, that this self-accrediting recognition should apply only to those universities which are what we might call full Australian universities; in other words, the universities that we presently have now, 39, and a sparrow on the floor. These should be the universities that take the scope of that. It should not apply, for example, to foreign universities, university colleges or universities of specialisation because these are different. Also, the scheme of the act makes it very, very hard to pick up those types of universities in this type of provision. Finally there should be a provision in this new section 58 which says that this self-accreditation provision operates notwithstanding anything else in the act to make sure that it is fully embedded. But of course it is only fully embedded according to its terms, so you are still subject to the requirements of TEQSA. That would be the form we would see as recognising the philosophical principle.⁴³

Compliance with the Framework

Clause 59 enables TEQSA to review or examine *any* aspect of an entity's operations to assess whether a registered higher education provider continues to meet the Threshold Standards.

Clause 60 enables TEQSA to review or examine any aspect of an entity's operations for the purposes of assessing:

- the quality of higher education provided by one or more registered higher education providers

42. See, for example, Southern Cross University, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, pp. 1–2; Group of Eight, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, pp. 1 and 2; National Tertiary Education Union, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, pp. 2–3; University of Western Sydney, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, p. 1.

43. Commonwealth of Australia, 'Tertiary Education Quality and Standards Agency Bill 2011', op. cit., pp. 1–2.

- whether there are any systemic issues relating to a particular course of study that leads to a particular regulated higher education award or
- the quality of, or whether there are any systemic issues relating to, courses of study that lead to one or more kinds of regulated higher education awards.

It is important to note that ‘operations’ is not limited to the entity’s higher education operations (**subclause 62(4)**).

In addition, **clause 61** enables TEQSA to review or examine an accredited course to assess whether that course continues to meet the Provider Course Accreditation Standards.

However, although **clauses 59–61** are subject to the requirement that TEQSA *must* get an entity’s consent before entering the entity’s premises or doing anything on those premises for the purposes of conducting such assessments, it is important to note that **subclause 62(3)** provides that the requirement to obtain consent is subject to **clause 24**, which requires a registered higher education provider to comply with conditions imposed by TEQSA, including the condition that it cooperate with TEQSA under **clause 31**.

Comment

As mentioned earlier, concern has been expressed that TEQSA’s proposed powers under **clauses 59–61** are broad and excessive, seemingly inconsistent with the principles in **Part 2** of the primary Bill.⁴⁴

In relation to consent requirements, it has been argued that given that **subclause 62(3)**, the requirement to obtain consent has little actual meaning.⁴⁵

Part 6

Part 6 sets out various provisions relating to TEQSA’s investigative powers, which generally include:

- requiring people to give information (**Division 1**)
- searching premises (**Division 2**) and
- seizing property (**Division 5**).

Abrogation of self-incrimination privilege

Clauses 69 and **76** provide for the abrogation of the self-incrimination privilege.

44. See, for example, Bond University, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, p. 1.

45. See University of Sydney, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*— attached legal advice to the University of Sydney, p. 4. See also below footnote 49 re - the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* states about obtaining consent.

Clauses 69 and **76** provide that a person is *not* excused from providing information; answering a question; or producing documents or things under **clauses 63** and **75** on the grounds of self-incrimination or that it would expose the person to a penalty.

However, it is important to note that **subclauses 69(2)** and **76(2)** provide that the information; answer or documents or thing, *or anything obtained as a direct or indirect consequence* of giving such information ; answer or documents or thing, cannot be used in evidence against the person in certain *civil* proceedings or *criminal* proceedings other than criminal proceedings for an offence for failure to provide information; answers, documents or things; the provision of false or misleading information, documents or evidence; or the obstruction of Commonwealth officials.

Comment

According to the Explanatory Memorandum, abrogation of the self-incrimination privilege is appropriate in these particular circumstances as TEQSA will rely on the information provided by the relevant people, such as people on premises when authorised officers, who enter with consent, seek answers to questions or the production of documents.⁴⁶ The validity of such answers or the documents produced would be important for TEQSA to be able to perform its regulatory and quality assurance functions.⁴⁷

It is noted that **proposed clauses 69** and **76** are worded in a similar way to section 65 of the *National Vocational Education and Training Regulator Act 2011* (NVR Act).

Appointing authorised officers

Clause 94 provides that TEQSA *may* only appoint a staff member of TEQSA as an authorised officer if that staff member holds a classification of at least an APS Executive Level 1 (or an equivalent classification) and TEQSA is satisfied that the staff member has suitable qualifications and experience to properly exercise the powers of an authorised officer.

Comment

The Explanatory Memorandum states:

TEQSA staff members appointed as authorised officers would therefore hold relatively senior positions within the organisation.⁴⁸

This provision is consistent with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, which states:

46. Explanatory Memorandum, op. cit., pp. 39 and 45.

47. Ibid., p. 45.

48. Ibid., p. 54.

Legislation that confers coercive powers should require that these powers may only be exercised by appropriately qualified persons.

...

The Scrutiny of Bills Committee has been critical of provisions that would allow intrusive powers to be exercised by 'any person'... In Report 4/2000, the Scrutiny of Bills Committee indicated that entry powers 'should be conferred only on those officials who are of sufficient maturity to exercise it and who have received appropriate training' (paragraph 1.51).⁴⁹

Note also that **clause 17** in **Part 2** of the primary Bill provides that authorised officers would have to apply the principles of regulation in the same way as TEQSA when exercising their powers.

Consent in exercising search and entry powers

Under **clause 70**, an authorised officer may only enter premises by consent or under a warrant in particular circumstances. **Clause 77** provides that consent must be voluntary and that before obtaining consent by the occupier of the premises, the authorised officer must inform the occupier that he or she may refuse consent. In addition, consent may be limited to entry during a particular period of time and may be withdrawn at any time.

However, it is noted that **clause 31** provides that as a condition of registration, a registered higher education provider *must* cooperate with TEQSA to facilitate TEQSA's performance of its functions and that **clause 113** provides that it is an offence for a higher education provider to breach a condition of its registration.⁵⁰

Comment

As mentioned previously, it has been argued that given **clauses 24** and **31** (see above), the requirement to obtain consent has little actual meaning.⁵¹

It is noted that the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* states:

Legislation providing for entry by consent should require that the occupier be informed of the right to refuse consent, and that consent be voluntary.

...

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49. Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, December 2007, p. 80, viewed 28 April 2011, http://www.ema.gov.au/www/agd/agd.nsf/Page/Publications_GuidetoFramingCommonwealthOffences,CivilPenaltiesandEnforcementPowers
50. This offence attracts a penalty of 120 penalty units (\$13 200: *Crimes Act 1914* subsection 4AA(1)). In addition, **clause 24** requires registered higher education providers to comply with conditions imposed on registration.
51. See University of Sydney, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*— attached legal advice to the University of Sydney, p. 4.

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Where legislation provides for entry to premises with consent, there should not be a requirement to cooperate with the officer / inspector and failure to cooperate should not be an offence.

...

Requiring cooperation or penalising non-cooperation is fundamentally inconsistent with the notion of consent.⁵²

Use of force

Under **clause 74**, an authorised officer executing a warrant may use force against things (*not against people*), which is both necessary and reasonable in the circumstances.

Comment

According to the Explanatory Memorandum:

One example of where it might be necessary and reasonable to use force could involve using a locksmith to unlock a room or cabinet that an authorised officer is entitled to search under a warrant where the occupier will not or cannot provide the authorised officer with access.⁵³

This is provision generally similar to section 70 of the NVR Act (which, unlike **clause 74**, actually does not stipulate that force against people is unauthorised).

Part 7

Part 7 sets out provisions relating to enforcement measures that would be available to TEQSA in carrying out its regulatory functions. This includes:

- administrative sanctions
- criminal offence provisions
- civil penalty provisions
- TEQSA's ability to accept enforceable undertakings and
- TEQSA's ability to seek injunctions from the Federal Court or Federal Magistrates Court.

Comment

The Explanatory Memorandum explains:

The amounts of the civil penalties are greater than the amounts of the offence penalties. This is considered appropriate to cover corporate wrongdoing and is in accordance with the Commonwealth's A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement

52. Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, op. cit., p. 83.

53. Explanatory Memorandum, op. cit., pp. 43–44.

Powers. Civil penalties do not require proof of a fault element and this is justifiable in circumstances where offenders are corporations.⁵⁴

It is also noted that the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* states:

If civil penalty proceedings may be instituted against a natural person or a body corporate, it will often be appropriate to specify a higher maximum penalty for a body corporate.

The 'corporate multiplier' in subsection 4B(3) of the Crimes Act applies to penalties for criminal offences but not civil penalties. The three examples of Commonwealth civil penalty regimes outlined in Section 7.2 contain higher civil penalties for bodies corporate. It would generally be desirable to impose a penalty that is 5 times higher for a body corporate, to maintain consistency with the approach applicable to criminal offences under subsection 4B(3). This is also consistent with recommendation 26-4 in ALRC Report 95: Principled Regulation.⁵⁵

It is important to note that the amounts imposed are maximum amounts, which are not always going to be imposed. As the Explanatory Memorandum explains:

The civil penalties provided for in the Bill are considered necessary to maintain and improve the quality of the higher education sector in a demand-driven funding environment. As there is no corporate multiplier for civil penalties, and the size of providers ranges from relatively small to large, it is necessary that the Bill allows for a range of penalties in order to adequately regulate the higher education sector. The more substantial civil penalties are reserved for serious matters that will have a significant adverse impact on the reputation of Australia's higher education sector and on the well-being of students. As a further safeguard, a civil penalty may only be applied by a court once a provider has been found to have contravened a civil penalty provision.⁵⁶

The penalties imposed for offences and civil penalties are generally consistent with those in the NVR Act.

Concerns have been expressed that **clauses 99** and **100**, enabling TEQSA to shorten accreditation periods for courses of study, cancel the accreditation of courses of study, and shorten registration periods, should contain the same protections afforded in **clause 101** relating to cancelling registration.⁵⁷ Such protections include providing specific parties notice of TEQSA's intention to take such action and allowing reasonable opportunity for representations to be made to TEQSA to which TEQSA must have regard.

54. Ibid., p. 58. See also Attorney-General's Department, *Guide To Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, op. cit., p. 66.

55. Ibid., pp. 66–67.

56. Explanatory Memorandum, op. cit., p. 60.

57. See, for example, University of Adelaide, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, p. 3.

However, it is noted that decisions made relating to administrative sanctions under **clauses 99–101** (shortening periods of accreditation or registration; and cancelling an accreditation or registration) would be reviewable under **clause 183** (see below).

Part 8

Part 8 contains provisions relating to the establishment of TEQSA, as well as TEQSA's functions and powers.

Establishment of TEQSA

Clause 132 establishes TEQSA.

Under **clause 133**, TEQSA would consist of a Chief Commissioner and four other Commissioners (of which two would be full time). In addition, **note 1** of **clause 133** states that TEQSA does not have a legal identity separate from the Commonwealth.

Minister's powers to direct TEQSA

Concern has been expressed about extent of TEQSA's political independence.⁵⁸

Although **clause 135** states that TEQSA would not be subject to direction from anyone in relation to performing its functions and exercising its powers, this provision is subject to **clause 136**, which states that the Minister may give a direction to TEQSA, by legislative instrument, if the Minister considers that such direction is necessary to protect the integrity of the higher education sector.⁵⁹ Under **subclause 136(3)**, TEQSA *must* comply with such direction.

Importantly, however, under **subclause 136(2)**, the Minister must not give a direction about or in relation to a particular regulated higher education provider.

Appointment of Commissioners

Division 2 of **Part 8** of the primary Bill contains provisions relating to this matter.

In particular, **clause 138** provides that the Minister will appoint the Commissioners if he or she is satisfied that the appointees have appropriate qualifications, knowledge or experience and he or she has consulted the Research Minister about the proposed appointments.

58. See, for example: National Union of Students, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, p. 1; Victorian Government, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, p. 2.

59. Legislative instruments are usually subject to parliamentary scrutiny: see *Legislative Instruments Act 2003*, Part 5. However, the **note** to **subclause 136(1)** states that disallowance and sunset provisions of this Act would not apply to such directions.

The primary Bill does not specifically provide for any direct involvement of the Ministerial Council in these appointments.

Ministerial approval in TEQSA's strategic and operational plans

Clauses 160 and **161** provide for the requirement to obtain the Minister's approval for TEQSA's strategic plans prepared under **clause 159**, as well as for variations of those plans respectively.

Clause 162 requires TEQSA to give the Minister its annual operational plan, which the Minister *may* either approve or request that TEQSA revise and resubmit under **clause 163**. Ministerial approval is also required for variations of TEQSA's operational plans under **clause 164**.

Although similar requirements for ministerial approval can be found in other legislation relating to establishing a Commonwealth agency,⁶⁰ it is noted that the primary Bill does not provide for any kind of direct Ministerial Council involvement in the approval process.

Comment

These proposed provisions raise questions regarding:

- the scope of the Minister's power in relation to the establishment and operations of TEQSA
- the apparent lack of any role of States and Territories in TEQSA's establishment and planning and
- the extent of TEQSA's political independence.

Part 9

Establishment of the Higher Education Standards Panel

Clause 166 establishes the Higher Education Standards Panel (the Panel).

Panel's functions

Clause 168 provides for the Panel's functions, which are—if requested by the Minister or TEQSA as the case may be; or on the Panel's own initiative:

- advising and making recommendations to the Minister or Research Minister about making or varying; and other matters relating to the Higher Education Standards Framework
- advising and making recommendations to TEQSA on matters relating to the Higher Education Standards Framework.

When performing its functions, the Panel *must* consult interested parties under **subclause 168(2)**.

60. See, for example: *Australian National Preventive Health Agency Act 2010*, Part 6; *NVR Act* Part 11.

Appointing Panel members

Clause 170 provides that the Minister appoints Panel members on a part-time basis but that Panel members cannot be TEQSA Commissioners.

In addition, under **subclause 167(2)**, when appointing Panel members, the Minister *must*:

- ensure an appropriate balance of professional knowledge and demonstrated expertise
- consider the interests of the states and territories, as well as students undertaking or proposing to undertake higher education and
- consult the Research Minister about the proposed appointments.

Comment

Again, it is noted that the primary Bill does not specifically provide for direct Ministerial Council involvement in the Panel's establishment and operations.

Concern has also been expressed about the level of knowledge and experience required of Panel members. For example, Monash University states:

The expertise and knowledge required of members requires some strengthening to ensure the appropriate balance of expertise in both setting standards in higher education and in ensuring their implementation and management at an institutional level.

Monash recommends that Section 167 (2) (a) be amended as follows:

(2) When appointing the Panel members, the Minister must:

(a) ensure an appropriate balance of professional knowledge and demonstrated expertise *in the setting of standards in higher education and their implementation at an institutional level*.⁶¹

In addition, concern has been expressed about the Panel's separation and independence from TEQSA. For example, the Victorian Government states:

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.

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

61. Monash University, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, p. 4. See also National Tertiary Education Union, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, pp. 3–4.

those standards. As such, the Minister would set the standards and be responsible for the enforcement and application of those standards.

...

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.⁶²

Division 1 of Part 10

This Division contains provisions relating to the review of decisions.

Clause 183 sets out what decisions would be reviewable.

Under **clause 184** and **subclause 185(1)**, a person affected by and dissatisfied with a reviewable decision may apply to TEQSA for TEQSA to review the decision, and TEQSA must review that decision on receiving the application.

Under **subclause 185(2)**, after conducting its review, TEQSA may then affirm, vary or revoke the reviewable decision—if TEQSA revokes the decision, it may make another decision that it thinks appropriate.

Clause 187 provides for review by the Administrative Appeals Tribunal of particular reviewable decisions.

Comment

Concern has been expressed by interest groups that TEQSA's compliance with the principles set out in **Part 2** of the primary Bill is not included in the list of reviewable decisions under **clause 183**.⁶³

Concern has also been expressed that TEQSA's exercise of powers under **Part 6** of the primary Bill is not subject to internal review under **Division 1 of Part 10**.⁶⁴

62. Victorian Government, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, p. 3.

63. See, for example, University of Sydney, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, p. 2 (see also attached legal advice to the University of Sydney, p. 2); Monash University, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, p. 5.

64. University of Sydney, Submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Tertiary Education Quality and Standards Agency Bill 2011*, op. cit.

Part 12

TEQSA's powers to delegate

Subclause 199(1) enables TEQSA to delegate its functions and powers to:

- a Commissioner
- a TEQSA staff member with a classification level of APS Executive Level 1 or higher (or equivalent classification)
- a Commonwealth authority or
- a person holding an office or appointment under a Commonwealth law.

However, **subclause 199(2)** lists particular decisions that TEQSA may make which cannot be delegated. These include decisions to:

- grant or reject applications for registration under **clause 21**; applications to self-accredit courses of study under **clause 41**; and applications for a course of study to be accredited under **clause 49**
- impose, vary or revoke conditions on registration under **clause 32** and on accreditation under **clause 53**
- change provider registration categories under **clause 38**
- refer possible criminal offences to the Director of Public Prosecutions
- apply for civil penalty orders and
- review reviewable decisions under **paragraph 183(3)(b)**.

It is also noted that notwithstanding **subclause 199(2)**, particular decisions may be delegated to individual Commissioners under **clause 200**. These are decisions to:

- approve or reject applications for a course of study to be accredited under **clause 49**
- impose, vary or revoke a condition imposed on accreditation under **clause 53** and
- approve or reject applications for renewals of accreditation under **clause 56**.

Comment

Although it is noted that under **clause 201**, delegates (which would include individual Commissioners) would have to comply with any written directions by TEQSA, these provisions raise questions regarding the scope of TEQSA's delegation powers.

The Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Bill 2011

In summary, the consequential Bill contains the following provisions:

- amendments to the *Education Services for Overseas Students Act 2000* (the ESOS Act) and the *Higher Education Support Act 2003* (the HES Act) as a consequence of the establishment of

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TEQSA, to ensure that the proposed higher education regulatory framework fits in with existing education frameworks and funding programs and

- transitional provisions relating to the primary Bill to transition the necessary functions from state and territory authorities to TEQSA.⁶⁵

Schedule 1 proposes amendments—applying before and after the *Vocational Education and Training Regulator Act 2011* commences—to the ESOS Act, which provide for TEQSA and its staff to undertake functions relating to higher education provider registration and monitoring.⁶⁶

Schedule 2 proposes amendments to the HES Act relating to new registration requirements for higher education providers and TEQSA administering those requirements as established by the TEQSA primary Bill.⁶⁷

Schedule 3 contains provisions to effect the transition of functions currently undertaken by state and territory agencies to TEQSA. These provisions would ensure such matters, which include the following:

- a state or territory registered higher education provider would automatically be registered for the TEQSA Act (see **Schedule 3 clause 2**), in which case, TEQSA *must* give the provider advance notice of the provider category in which the provider is likely to be registered (see **Schedule 3 clause 3**)
- a state or territory registered higher education provider would be taken to be registered for the TEQSA Act in circumstances where, before Part 2 of the TEQSA Act commences, there are review decisions about state or territory registrations pending (see **Schedule 3 clause 4**)
- certain overseas higher education providers would have automatic transitional registration (see **Schedule 3 clause 9**)
- existing state or territory authorisation to self-accredit courses of study would be transferred (see **Schedule 3 clause 12**)
- TEQSA would have to decide whether to grant registration of higher education providers in circumstances where there are pending applications for state or territory registration or re-registration (see **Schedule 3 clause 14**)—in cases of re-registration applications, a higher education provider is taken to be transitionally registered for the purposes of the TEQSA Act while TEQSA considers the application (see **Schedule 3 clause 16**)
- existing state or territory accredited courses of study would automatically be accredited for the TEQSA Act (see **Schedule 3 clause 18**)
- TEQSA would have to decide whether to grant accreditation of a course of study in relation to a higher education provider in circumstances where there is a pending application for state or territory accreditation or re-accreditation (see **Schedule 3 clause 24**)—in cases of re-accreditation applications, the course of study is taken to be transitionally accredited for the purposes of the TEQSA Act while TEQSA considers the application (see **Schedule 3 clause 26**)

65. See Explanatory Memorandum, op. cit., p. 2.

66. Ibid.

67. Ibid.

- particular decisions made by TEQSA under the consequential Bill would be reviewable under **Part 10** of the primary Bill, for example:
 - decisions relating to provider categories under **subclauses 3(3), 5(1), 10(3) and 16(3)**, and
 - decisions that a higher education provider cannot self-accredit one or more courses of study under **subclauses 10(3) and 16(3)**.

Concluding comments

The stimulus for change of the regulation and quality assurance of the higher education sector has been provided by the growing diversity of the sector and the anticipated growth in student numbers with the introduction of an uncapped student demand driven system in 2012.

Stakeholders, with the exception of some state governments, are in general agreement that the existing system has allowed the growth of providers and courses without the necessary attention to standards and quality assurance. It is interesting to note that, unlike the regulation of the vocational educational sector, the proposal to regulate the higher education sector is not subject to an intergovernmental agreement and does not yet have the support of all jurisdictions. However, since 1975, when the states and territories agreed to transfer funding of universities to the Commonwealth, their role in higher education, unlike the vocational education and training sector, has diminished.

Students, both domestic and international, need to be assured of the quality of their courses and there is agreement that this should be provided by the Commonwealth through a regulator 'with teeth'. However there is some concern that TEQSA's powers will be intrusive, unnecessary and possibly misplaced. Targeting focus, and getting the balance of appropriate regulation and quality assurance of a growing sector with the expectation of universities for continuing autonomy and intellectual rigour has resulted in a long consultation period with some provisions in the Bills still under debate.

In particular, the concerns that remain outstanding include:

- the constitutional validity of the legislation
- what role the states and territories would have in the new regulatory regime
- preserving universities' self-accreditation status
- the political independence of TEQSA and the Panel and
- the extent of the Minister's powers in relation to such matters as making standards.

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