



**Review of the impact of the  
TEQSA Act on the higher  
education sector**

March 2017

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Glossary

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# Glossary

AAT	Administrative Appeals Tribunal
AQF	Australian Qualifications Framework
ASQA	Australian Skills Quality Authority
ATAR	Australian Tertiary Admission Rank
AUQA	Australian Universities Quality Agency
CEAIE	China Education Association for International Exchange
CEO	Chief Executive Officer
COPHE	Council of Private Higher Education
CRICOS	Commonwealth Register of Institutions and Courses for Overseas Students
ERG	Expert Reference Group
ESOS	Education Services for Overseas Students
ESOS Act	<i>Education Services for Overseas Students Act 2000 (Cth)</i>
HEDC	Higher Education Data Committee
HEIMS	Higher Education Information Management System
HESA	Higher Education Support Act
HESF	Higher Education Standards Framework
HESP	Higher Education Standards Panel
MoU	Memorandum of Understanding
NAGHEDI	National Advisory Group for Higher Education Data and Information
NUHEP	Non-university higher education provider
NVTER Act	National Vocational Education and Training Regulator 2011 (Cth)
QUT	Queensland University of Technology
SES	Student Experience Survey
TEQSA	Tertiary Education Quality and Standards Agency
TEQSA Act	<i>Tertiary Education Quality and Standards Agency Act 2011 (Cth)</i>
TimesHE	Times Higher Education
UA	Universities Australia
UK	United Kingdom
VET	Vocational Education and Training

# Acknowledgements

Deloitte Access Economics would particularly like to recognise the extensive guidance, direction and expert input provided by Professor (Emeritus) Sally Walker, who collaborated with us on this Review. A lawyer by training, Professor Walker was an academic in the Law School, President of the Academic Board and Senior Deputy Vice-Chancellor at the University of Melbourne; she then served as Vice-Chancellor of Deakin University.

We would also like to acknowledge the contribution of the Expert Reference Group (ERG) that helped guide both the conduct and findings of the Review. The ERG comprised people with significant experience in the Higher Education sector, both within universities and non-university higher education providers: Professor Joan Cooper, Professor Gael McDonald, Professor Philippa Pattison and Dr John Wood. We gratefully recognise the value that their specialist knowledge and deep experience provided.

Finally, we would also like to make mention of TEQSA and the manner in which its representatives were open and responsive to our engagement over the course of this Review.

The findings and recommendations as part of this Review should be attributed to Deloitte Access Economics.

# Executive summary

Australia's higher education sector plays a crucial role in providing students with the skills that the 21<sup>st</sup> century workforce requires, undertaking basic and applied research and contributing to the common good of society through the scholarly mission to expand human knowledge. The sector is viewed as an engine of economic prosperity and innovation, a producer of human capital and professional skills, a driver of regional growth, skilled migration and global competitiveness, and a contributor to equality of opportunity. Beyond these important economic and socio-economic rationales, higher education institutions are valued also for the way they advance scholarship and learning for their own intrinsic value.

The *Tertiary Education Quality and Standards Agency Act 2011* (Cth) (the TEQSA Act) established the Tertiary Education Quality and Standards Agency (TEQSA) in 2011 and a new national regulatory and quality assurance environment for Australian higher education (which largely took effect from January 2012). The aim was to establish a national system of regulation to assure the quality of all higher education providers as the sector went through a period of expansion arising from the move to a demand-driven system. The objective, as set out in the Explanatory Memorandum, was to:

*"combine and replace the regulatory activity currently undertaken in the states and territories with the quality assurance activities currently undertaken by the Australian Universities Quality Agency (AUQA). In so doing, it will reduce the number of federal, state and territory regulatory and quality assurance bodies from nine to one.*

*... TEQSA will undertake a variety of regulatory functions including registration and re-registration, accreditation and re-accreditation ... and compliance and quality assessments."*<sup>1</sup>

TEQSA would regulate against Threshold Standards, with an approach to regulation that was "proportionate and risk-based" with its focus to be on

*"higher risk providers, allowing higher quality, lower risk providers to operate without unnecessary intrusion".*<sup>2</sup>

The 'basic principles for regulation' (regulatory necessity, reflecting risk, and proportionate regulation) were seen by the sector as key to ensuring that the regulatory system did not unreasonably encroach on values on which universities in particular place great importance—institutional autonomy and academic freedom.

Section 203 of the TEQSA Act requires that a review of the impact of the Act on the sector be commenced before 1 January, 2016. On 12 December, 2015 the Minister set six Terms of Reference (set out in the Introduction to this Report) and agreed that the Higher Education Standards Panel should oversee the Review.

Deloitte Access Economics was commissioned to undertake this Review. This Report presents its findings.

These findings have benefitted significantly from consultations with the sector and written submissions made by higher education providers and other stakeholders. The consultations were based on questions put to providers that sought to isolate the ways in

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<sup>1</sup> Explanatory Memorandum, Tertiary Education and Quality Standards Agency Bill 2011 (Cth), 2 <<https://www.legislation.gov.au/Details/C2011B00046/Explanatory%20Memorandum/Text>> .

<sup>2</sup> Ibid.

which the TEQSA Act, or the standards-based framework established pursuant to the Act, had changed behaviour in ways that may materially impact on quality. The Review has also benefitted from numerous discussions with TEQSA and information that it provided. The Review has also analysed a suite of indicators of quality at the sector level based on data provided by the Department of Education and Training. The findings of the Review are based on an assessment of the information collected.

While the Review seeks to assess the impact of the TEQSA Act on the higher education sector, the experience of the sector with the new regulatory system in part reflects the Threshold Standards, how these are interpreted and administered by TEQSA and by the sector, and how TEQSA exercises its functions under the Act. The content of the 2011 and the 2015 Threshold Standards, and TEQSA's interpretation and administration of them, are outside the Terms of Reference for this Review. Instead, the Review considers the general nature of a system of quality assurance based on regulation against standards, as established by the TEQSA Act, and what this has meant for the sector.

TEQSA's governance and operations are also beyond the scope of this Review, although it has at times been difficult to ignore them, especially since the stakeholders with whom the Review consulted were challenged in separating the Act from its administration. This Review has sought to remain within the Terms of Reference by focusing on amendments to the Act that would improve its impact or administration.

#### **The sector's view of the TEQSA Act and the overall assessment of this Review**

The sector's early experience of the Act saw the new regulator impose what were seen as excessive demands on higher education providers. This culminated in the 2013 *Review of Higher Education Regulation*,<sup>3</sup> following which Ministerial Direction No. 2 of 2013 effectively directed TEQSA to scale back its "sectoral quality assessment activities" and focus on its key regulatory functions of registration and accreditation.

Consultations undertaken as part of this Review revealed that the early problems are seen as having been remedied; overall, the sector's views regarding both the regulatory system established by the Act, and TEQSA as the regulator, are positive. In TEQSA, the sector now sees a regulator that is seeking to reduce the burden imposed by its activities, tailoring its requirements to meet individual features of providers (such as through the 'Core +' model), and seeking to engage more fully with the sector (such as through the November 2016 TEQSA Conference).

The use of the Threshold Standards is seen as key to maintaining quality in the sector and the perception of quality outside Australia. The sector's overall response to the 2015 Threshold Standards developed by the Higher Education Standards Panel (HESP) is also positive.

**Reflecting the overall sentiments of the sector, and an assessment of how the TEQSA Act is working, this Review does not recommend changes that would significantly alter the current regulatory architecture established by the Act. Broadly, this Review finds that the Act is operating effectively and as intended. Some recommendations that seek to improve the TEQSA Act are made to place TEQSA and the regulatory and quality assurance system established by the Act on a stronger footing.**

If the recommendations of this Review are adopted, Ministerial Direction No. 2 of 2013 can be repealed. This Review also recommends action to ensure that the HESP and TEQSA be proactive in anticipating and responding to innovative practices that might affect the regulatory system – indeed, to ensure that they facilitate innovation, provided

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<sup>3</sup> Professor Kwong Lee Dow AO and Professor Valerie Braithwaite, *Review of Higher Education Regulation: Report* (Australian Government, 2013) <<http://www.voced.edu.au/content/ngv%3A57656>>.



that the innovation is of a kind that enhances or, at the very least, does not detract from quality.

The remainder of this summary reports the findings against the six Terms of Reference and lists the associated recommendations.

### **Term of Reference One: what has changed for the sector in moving to a single national regulator?**

The analysis regarding this Term of Reference begins by noting that, for constitutional law reasons, there are some gaps in the reach of the TEQSA Act and in TEQSA's regulatory purview. There are, however, currently only a small number of Australian providers not subject to the Act and the Review recommends only a 'watching brief' approach to this.

Providers that had prior experience of multiple jurisdictional regulators reported a reduction in compliance burden in moving to a single national regulator. However, perhaps the most cited advantage was that of Australia being seen to have a consistent level of quality in relation to the provision of higher education. One benefit of this is the confidence that this gives to international students regarding the quality of Australian higher education providers.

A national regulator has the capacity to develop a greater knowledge base than that which can be acquired by smaller, jurisdictional regulators; it can develop and share insights based on that knowledge base. There is evidence that the benefits that can flow from this have been achieved under TEQSA, although perhaps not to the fullest extent possible.

One example of how a national regulator can provide benefits to the sector is through a national conference in which quality and best practice can be discussed and shared. The inaugural TEQSA conference, held in November 2016, was well received by the sector.

Overall, the move to a single national regulator has brought about changes that have delivered benefits to the sector in reduced compliance burden, improved consistency, the confidence that stakeholders (particularly international students) have in the quality of the Australian higher education sector and the research and networks TEQSA has facilitated.

This Review notes that sub-paragraph 134(1)(e)(iii) of the Act provides that TEQSA's functions include disseminating information about quality assurance and quality improvement in higher education. This Review encourages TEQSA, within the resources available to it, to continue to fulfil that aspect of its role by sharing better practice with the sector and disseminating information to higher education providers about trends in quality assurance practice and quality improvement in higher education.

### **Term of Reference Two: the extent to which the TEQSA Act has contributed to improved quality in the delivery of higher education**

An examination of a range of measures of quality, at an aggregate level across the sector, reveals no significant changes in quality for the sector as a whole. The feared lowering of quality, about which concern was expressed leading up to the commencement of the TEQSA Act, has not materialised in this data to date.

A variety of indicators show that the TEQSA Act has been successful in *maintaining* the quality of higher education in Australia. It is likely that this has been facilitated by the TEQSA Act excluding some low-quality providers, both through TEQSA's rejection of applications for registration and through an unknown number of providers being deterred from applying for registration due to them being unable to meet the Threshold Standards.

In addition to TEQSA's 'gatekeeper' role, this Review has also considered how the TEQSA Act has affected the quality of existing providers. In this regard, the Threshold Standards generate benefits by providing a level of guidance on best practice. There is also the

potential for TEQSA and the Higher Education Standards Framework to promote quality more broadly across the sector. This was the role of the Australian Universities Quality Agency (AUQA) prior to the TEQSA Act. AUQA audits, while subject to considerable criticism, particularly on the ground that they were resource intensive, were seen as providing benefits through the communication of best practice principles following a detailed peer review undertaken at an institution-wide level.

There are, however, limits to the degree of quality assurance (and assurance of quality improvement) that can be achieved under a framework based principally on regulation against standards. For instance, a framework of this kind can require that providers submit to the regulator evidence of their quality assurance and quality improvement frameworks. But the regulator in such a system is limited in its capacity to play a proactive role in driving a higher level of quality above the Threshold Standards. For example, it cannot easily monitor the ongoing quality of expert peer review at an institutional level, or audit and advise on a provider's quality assurance framework (where it is based on expert peer review).

This finding should not be interpreted as a criticism of the TEQSA Act (or TEQSA) having regard to the purpose of the Act — which is to maintain (through standards-based regulation) the high quality of Australia's higher education system. Nonetheless, it does point to a potential role within the broader quality assurance regime for the provision of greater 'assurance of quality improvement', towards an aspirational vision of quality for the sector.

It should be noted that aspects of the current regulatory regime do contribute towards important aspects of quality improvement for the sector. For example the requirement for external benchmarking in the Threshold Standards (2015), and information sharing such as guidance notes and TEQSA's 2016 national conference.

Section 60 of the TEQSA Act does give TEQSA a role in conducting sector-wide quality assessments. However, following the negative experiences under the first of these, this role was effectively revoked by Ministerial Direction No. 2 of 2013.

The opinion of this Review is that there could be value in sector-wide quality assessments being undertaken as circumstances require, and that they could play a role in maintaining and enhancing quality in the sector. However, owing to the need to provide funding to conduct quality assessments of this kind, it is the Minister for Education who should be responsible for deciding on the need for sector-wide quality reviews. The Minister might do so based on advice from TEQSA, the HESP, or any other stakeholder, and might direct any of these groups to form the body that undertakes the review. Section 60 of the TEQSA Act should be amended accordingly.

The Review notes the connection between the financial viability of Australia's higher education providers and the reputation of the sector. In a more market-driven system, the financial performance of some providers will be better than others. In this environment, the Report finds that it is important that TEQSA and the Department continue to work together to identify and monitor providers that might be at risk financially; it also recommends a change to the Act to ensure that those providers who are not audited by Auditors-General are audited by registered company auditors.

Finally, the higher education sector is evolving. Current trends include the increasing uptake of online education, a greater demand for micro-credentials, and the disaggregation of units of study offered by individual providers. There is no evidence that the Act or the 2015 Threshold Standards stifle practices of this kind. However, it is important that TEQSA and the HESP retain a proactive approach in anticipating and responding to innovative practices that might affect the regulatory system, and that innovation of a kind that may enhance quality, or that is at least of a kind that does not detract from quality, is encouraged. One way of facilitating this is provided in the context of Term of Reference Six (see below).

**Term of Reference Three: The extent to which the TEQSA Act has contributed to improved regulation**

Sections 13 - 17 of the TEQSA Act require TEQSA to regulate according to the principles of 'regulatory necessity', 'reflecting risk' and 'proportionate regulation'. It was the perceived deviation from these principles that led to the *Review of Higher Education Regulation* in 2013 and the changes flowing from that Review.

In the period since that Review, there is evidence that TEQSA has moved closer to a regulatory approach embodying the three principles. It appears that the regulatory principles are now being applied as originally intended. The three principles of regulation received strong support from the sector as providing appropriate guidance to TEQSA; the Review finds that they have been helpful in improving the quality of regulation. Further, many providers noted that compliance costs had fallen relative to the previous state or territory scheme and the AUQA audit system.

Some concern was expressed that the Threshold Standards encourage homogeneity across the sector; it was suggested that risk aversion on behalf of both TEQSA and providers may lead to more innovative approaches being discouraged. The Review returns to the theme of innovation in the treatment of Term of Reference Six below.

**Term of Reference Four: whether there is unnecessary overlap with other legislation**

The TEQSA Act operates within a broader tertiary education regulatory architecture, intersecting with various legislative instruments. Since the 2013 *Review of Higher Education Regulation* and amendments to the *Education Services for Overseas Students Act 2000* (Cth) (the ESOS Act), TEQSA has worked to streamline areas of unnecessary duplication, including working with other regulators as required.

This has been welcomed by the sector; however, providers have noted that there are some remaining areas where there is a duplication of compliance effort in adhering to both the Threshold Standards and the National Code<sup>4</sup> made pursuant to the ESOS Act. Administrative savings are likely to be realised from further streamlining the regulatory frameworks established by the ESOS Act and the TEQSA Act. The review of the National Code in 2017 as part of the overall reform of the ESOS framework is the most appropriate mechanism to achieve this.

Similarly, a review of the Australian Qualifications Framework (AQF) is recommended to clarify whether Diploma, Advanced Diploma, Graduate Certificate and Graduate Diploma qualifications are regulated by TEQSA or the Australian Skills Quality Authority (ASQA), the regulator of Vocational Education and Training.

Fewer concerns were expressed regarding duplication between the TEQSA Act and the *Higher Education Support Act 2003* (Cth) (the HESA). However, there appears to be a concern that the HESA, like the ESOS framework, may be outdated, creating uncertainty about its purpose and alignment with the TEQSA Act.

**Term of Reference Five: whether there are amendments to the TEQSA Act or other changes that would enhance the Act's impact or its administration**

The TEQSA Act does not apply to higher education awards offered by overseas providers from a campus or office outside Australia by way of online delivery to students in Australia. While acknowledging the limits of Commonwealth law-making power and the practical limitations of dealing with overseas providers, the Review considers that more should be done to protect students in Australia and to provide information regarding overseas providers' online learning offerings, even where these are provided from a campus or office outside Australia.

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<sup>4</sup> National Code of Practice for Providers of Education and Training to Overseas Students 2007.

The Review recommends some changes to the architecture of the Higher Education Standards Framework that is established by the TEQSA Act. These recommendations are based on the experience of making Threshold Standards since the Act came into operation, but they retain the capacity to make Standards of a kind different from Threshold Standards in the future should the need arise.

A range of other issues were raised during the course of this Review. These are considered either in the body of this Report, or in Appendix A. Where they have led to this Review finding that changes should be made to the TEQSA Act, these suggested changes are listed in the recommendations set out below.

**Term of Reference Six: whether the required functions of the Higher Education Standards Panel are adequately reflected in the TEQSA Act**

Section 168 of the Act provides that the functions of the Higher Education Standards Panel (the HESP) include advising and making recommendations to the Minister on making and varying, and on other matters relating to, the Higher Education Standards Framework. The functions also include advising and making recommendations to TEQSA on matters relating to the Higher Education Standards Framework.

The HESP has, however, undertaken tasks that deal with matters wider than the Higher Education Standards Framework. Most recently this has included providing advice to the Minister of Education on improving the transparency of higher education admissions.

The Review has considered whether the functions of the HESP should be expanded in the Act to reflect this wider advisory role. The Panel itself expressed a preference for doing so, although it noted that its recent advisory roles:

*“could be seen as falling within the remit of the role currently specified in the TEQSA Act. However, greater specificity could provide clearer authority to both Panel members and stakeholders for the scope of activity being sought by government”.*<sup>5</sup>

There is currently nothing in the Act that prohibits the Minister from tasking the HESP with roles wider than those referred to in the legislation. While the sector was generally supportive of a broader role being played by the Panel, there appears to be no confusion that requires clarification by amending the Act. Further, making such an amendment may limit the current flexibility regarding the matters with which the HESP may be tasked. Accordingly, subject to one exception, this Review does not recommend any amendment of the Act to broaden the functions of the Higher Education Standards Panel.

The exception relates to the role of the former TEQSA Advisory Council, which was created following the *Review of Higher Education Regulation* to advise TEQSA on ways to reduce regulatory burden. The TEQSA Advisory Council has been disbanded and its members now form part of the Higher Education Standards Panel. The Review recommends that an advisory role be formally transferred to the Panel by way of an amendment to the Act.

Finally, sub-section 167(2) of the TEQSA Act requires that, when appointing members of the Higher Education Standards Panel, the Minister must ensure that Panel members “collectively possess an appropriate balance of professional knowledge and demonstrated expertise”. Given the diversity of the higher education sector and the importance of the HESP proactively anticipating and responding to innovative practices that might affect the regulatory system, it is considered important that the HESP include members who understand evolving and innovative practices adopted by universities and other higher education providers. The Review sees benefit in requiring that the Panel include those

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<sup>5</sup> Letter from the Higher Education Standards Panel to Deloitte Access Economics, 5 December 2016.

with contemporary experience regarding the provision of higher education by university and non-university providers.

### **Recommendations**

The recommendations arising from this Review are set out below. The recommendations are numbered according to the Term of Reference to which they relate; for example, recommendation 4.2 is the second recommendation made regarding Term of Reference Four.

Attention is drawn to recommendation 5.4 regarding Appendix A. The somewhat disparate matters dealt with in Appendix A, many of which are quite technical in nature and were raised by a single stakeholder, did not fall under the main themes discussed in the body of the Report. The Review has recommended that some of the suggested amendments to the Act examined in Appendix A should be adopted; these are identified in Appendix A and listed in paragraph 8.3.3.

In addition to formal recommendations, the Review has made a number of findings that are set out in this Report, but not separately listed.

#### **Recommendation 1.1:**

TEQSA and the Department should keep under review the number of Australian higher education providers that are not regulated entities and cannot apply for registration under the TEQSA Act. If the number increases significantly, or if the lack of regulatory controls detracts from the quality of the provision of higher education in Australia, consideration should be given to seeking a referral of legislative powers from the States and Territories to the Commonwealth; this would allow the Act to be amended to enable TEQSA to operate as a truly national regulator.

#### **Recommendation 2.1:**

Section 60 and sub-paragraph 134(1)(c)(i) of the TEQSA Act should be amended to allow TEQSA to undertake sector-wide quality assessments only by direction from the Minister for Education, drawing on advice from TEQSA, the Higher Education Standards Panel, and other sector stakeholders. The TEQSA Act should provide for the Minister to empower any other body or working group to undertake a sector-wide quality assessment, where such a review may draw on information collected by TEQSA and the information-collecting powers of TEQSA. That part of Ministerial Direction No. 2 of 2013 that deals with sectoral quality assessment activities should then be repealed (see also recommendation 6.1 regarding Ministerial Direction No. 2 of 2013).

#### **Recommendation 2.2:**

The definition of 'qualified auditor' in section 5 of the TEQSA Act should be amended to exclude paragraph (c). TEQSA should give adequate notice to providers who are affected so they are able to make the necessary adjustments to their auditing arrangements; if necessary, TEQSA should use sub-section 27(4) to allow for exceptions to provide the necessary time.

#### **Recommendation 4.1:**

Consideration should be given to amending the National Code to improve alignment between the ESOS audit cycle and the TEQSA and ESOS registration cycles. The extent to which there is duplication of compliance effort in adhering to both the Threshold Standards and the National Code should be examined and processes streamlined. The review of the National Code in 2017 as part of the overall reform of the ESOS framework is the most appropriate mechanism for examining these issues. That review could

consider establishing a process so that, where the standards overlap, providers are not required to demonstrate compliance with both sets of standards, but only the ascendant standards.

**Recommendation 4.2:**

The next review of the AQF should clarify which courses leading to Diploma, Advanced Diploma, Graduate Certificate and Graduate Diploma qualifications are regulated by TEQSA and which are regulated by ASQA.

**Recommendation 5.1:**

TEQSA or the Department should maintain a public register to provide information of value to students in Australia who might be considering enrolling in higher education awards offered online by providers that cannot apply for provider registration or course accreditation because they are beyond the constitutional reach of the TEQSA Act. The register might identify online higher education providers that have been accredited by recognised overseas quality assurance agencies or it might identify international accreditation bodies that accredit such providers.

**Recommendation 5.2.1:**

Section 58 of the TEQSA Act should be amended to delete paragraphs 58(1)(f) and (g) and sub-section 58(2) (consequential amendments will be required to sub-sections 58(3) and 58(4)). Paragraph 58(1)(h) should remain in place so that, if the need arises, Standards may be made that are of a nature different from Threshold Standards, noting that Threshold Standards set minimum acceptable requirements for the provision of higher education.

**Recommendation 5.2.2:**

The TEQSA Act should be amended to remove references to the categories of Threshold Standards, that is, the Act should not require the development of Provider Standards (the Provider Registration Standards, the Provider Category Standards and the Provider Course Accreditation Standards) and Qualification Standards. This amendment, and related consequential amendments, should not come into operation until the next formal review of the 2015 Threshold Standards.

**Recommendation 5.3:**

The TEQSA Act should be amended to include a new section:

*"195B 'Disclosing information in relation to complaints': Where TEQSA receives a complaint which relates to a regulated entity's compliance with:*

- (a) this Act; or*
- (b) the Education Services for Overseas Students Act 2000;*  
*or*
- (c) legislative instruments made under those Acts;*

*TEQSA may, with the consent of the regulated entity, disclose higher education information in relation to that regulated entity to the person who made the complaint."*

**Recommendation 5.4:**

It is recommended that the proposed changes to the TEQSA Act adopted in Appendix A should be enacted.

**Recommendation 6.1.1:**

The responsibilities of the TEQSA Advisory Council as set out in Ministerial Direction No. 2 of 2013 should be formally transferred to the Higher Education Standards Panel (the HESP) via an amendment to section 168 of the TEQSA Act; the legislation should enable the HESP to provide advice to TEQSA and authorise TEQSA's Chief Executive Officer (CEO) to seek such advice rather than setting out a requirement that the CEO of TEQSA must perform his or her functions under the Act consistently with the advice. That part of the Ministerial Direction dealing with the TEQSA Advisory Council should then be repealed (see also recommendations 2.1 and 6.1.2 regarding Ministerial Direction No. 2 of 2013).

**Recommendation 6.1.2:**

Clause 3i of Ministerial Direction No. 2 of 2013 dealing with advice from the National Advisory Group for Higher Education Data and Information (NAGHEDI), which is now the Higher Education Data Committee (HEDC), should be repealed.

**Recommendation 6.2:**

Sub-section 167(2) of the TEQSA Act should be amended to provide that the Minister must ensure that the Higher Education Standards Panel includes members with contemporary experience regarding the provision of higher education by university and non-university providers.

**Deloitte Access Economics**

# 1 Introduction

Section 203 of the *Tertiary Education Quality and Standards Agency Act 2011* (Cth) (the TEQSA Act) requires the Minister to initiate a review of the Act no later than 1 January, 2016. In December 2015 the Minister for Education and Training provided Terms of Reference and in June 2016 Deloitte Access Economics was commissioned to undertake this Review.

The Terms of Reference require this Review to:

*assess the impact on the higher education sector of the TEQSA Act by examining:*

- 1. what has changed for the sector in moving to a single national regulatory framework from multiple state- and territory-specific arrangements;*
- 2. the extent to which the TEQSA Act has contributed to improved quality in the delivery of higher education;*
- 3. the extent to which the TEQSA Act has contributed to improved regulation;*
- 4. whether there is unnecessary overlap with other legislation, for example, the Education Services for Overseas Students Act 2000 (Cth), the National Vocational Education and Training Regulator Act 2011(Cth) and the Higher Education Support Act 2003 (Cth);*
- 5. whether there are amendments to the TEQSA Act or other changes that would enhance the Act's impact or its administration; and*
- 6. whether the required functions of the Higher Education Standards Panel are adequately reflected in the TEQSA Act.*

Importantly, this is a Review of the TEQSA Act and not of TEQSA's governance or operations. Further, the Review does not consider the detailed content of the *Higher Education Standards Framework (Threshold Standards)*; the 2011 iteration of the Threshold Standards was subject to a separate review process that resulted in the 2015 Threshold Standards that have only just come into operation. This Review does, however, consider what it means for the sector to be regulated under a standards-based framework. It should be noted that, in their submissions, often providers referred to 'the Threshold Standards' without identifying whether their comments related to the 2011 or the 2015 Threshold Standards. Given that the detailed content of the Threshold Standards is outside the Terms of Reference of this Review, the Threshold Standards are identified as the 2011 Threshold Standards or the 2015 Threshold Standards only when the distinction is material to the analysis.

Separating the impact of the TEQSA Act from the impact of TEQSA's regulation against the Threshold Standards, and the design of the Standards themselves, is difficult given how interlinked these three aspects are. TEQSA's resourcing also affects its ability to regulate according to the intent of the TEQSA Act and the sector's experience of being regulated. While this Review attempts to isolate those impacts that can be attributed to the Act itself, it is not silent on these related issues, particularly where they have noticeable impacts on the sector. The focus of this Review and its recommendations is, however, on the TEQSA Act.

## 1.1 The process of the Review

In conducting this Review, Deloitte Access Economics has benefited from consultations with providers and other stakeholders, and submissions from a range of interested stakeholders. In total, the stakeholder engagement undertaken as part of this Review comprised:

- consultations with 19 higher education providers, including:
  - 14 non-university higher education providers (NUHEPs); and
  - five universities;



- consultations with five industry bodies representing various parts of the higher education sector;
- consultations with other stakeholders, including TEQSA and the Higher Education Standards Panel, the Australian Skills Quality Authority and state government departments of education; and
- written submissions addressing the Terms of Reference from 36 organisations.

Lists of submissions received and stakeholders consulted are provided in Appendix B and Appendix C, respectively.

The selection of providers to be consulted was designed to elicit as wide a range of views as possible. The sample was structured to include a broad cross-section of providers rather than a smaller number of representative entities. Stakeholders were provided with a set of questions ahead of each consultation, with the questions designed to focus the discussion on the impacts of the TEQSA Act.

In addition to feedback from these consultations and submissions, the Review's findings are based on a range of other evidence. This includes:

- TEQSA risk assessment data;
- TEQSA registration and accreditation applications data;
- TEQSA statements of reasons for rejection of applications;
- Higher Education Information Management System data;
- Quality Indicators for Learning and Teaching (QILT);
- research reports (for example, the TEQSA Regulator Performance Framework Report);
- journal articles and discussion papers; and
- primary legislative instruments.

The nature of the questions asked by the Terms of Reference means that no single source of information was able to conclusively address many of the questions this Review has sought to answer. Conclusions have been based on a balanced assessment of the evidence and views put to the Review.

While some five years have now elapsed since the TEQSA Act was enacted, not all of the impacts of the Act will be fully realised or observable in sector outcomes. Institutions take time to adapt to a changed regulatory environment; this will filter through to program design and student outcomes over a period of years. Indeed, some providers have yet to undergo their first renewal of registration or renewal of accreditation under the Act.

The Review has therefore focused on the impacts of the TEQSA Act that are likely to be evident at the present time rather than in the future. This has meant seeking to understand how the Act and, in broad terms, the Threshold Standards, have changed the behaviour of providers, rather than trying to gauge aggregate measures of performance in the sector. The sector is still adjusting and aggregate measures will tell an incomplete story.

In undertaking this Review, Deloitte Access Economics drew upon the expertise of an Expert Reference Group (ERG) that helped guide both the conduct and findings of the Review. The ERG comprised people with significant experience in the Higher Education sector, both within universities and NUHEPs: Professor Joan Cooper, Professor Gael McDonald, Professor Philippa Pattison and Dr John Wood; the Department participated in ERG meetings as an observer. While the views of ERG members have informed this Report, Deloitte Access Economics remains solely responsible for its final form.

## **1.2 Overview and structure of this Report**

In 2013 Professors Kwong Lee Dow and Valerie Braithwaite conducted a *Review of Higher Education Regulation*.<sup>6</sup> That Review was in response to the early experience of a new

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<sup>6</sup> Lee Dow and Braithwaite, above n 3.

regulator that was seen to be overextending, especially in exercising its data collection powers. Following that Review, there have been changes to the way TEQSA interacts with the sector. In particular, TEQSA has worked to reduce the information demands it has placed on providers in registration and accreditation processes.

Overall, providers express positive views of TEQSA, the Threshold Standards and the TEQSA Act. Most stakeholders regard the move to a single national regulator that regulates against a standards framework as upholding quality in the sector and the perception of quality in the eyes of domestic and international students and other stakeholders.

Accordingly, this Review does not recommend substantial changes to the TEQSA Act. Consultations and submissions did draw attention to some improvements that could be made to place TEQSA and the regulatory and quality assurance system established by the Act on a stronger footing. For example, the use of technology has changed the way in which higher education can be delivered and this Review includes a recommendation that aims to provide some protection to students in Australia who might be considering enrolling in higher education awards offered online by providers outside Australia who are not subject to the registration requirements of the TEQSA Act.

Term of Reference Five asks whether any amendments should be made to the TEQSA Act to enhance its impact or its administration. The response to that Term of Reference is more specific than responses to others that focus more on assessing the impact of the Act.

A number of amendments to the TEQSA Act were proposed by stakeholders in consultations and submissions. Not all of these are addressed in this Report as it was necessary to set aside proposals that appeared to be based on a misunderstanding of the TEQSA Act or that were not feasible for various reasons. More technical proposals are dealt with in Appendix A.

The remainder of this Report is set out as follows:

- Chapter 2 provides an overview of the regulation of the higher education sector in Australia and it identifies emerging trends in the sector that may influence regulation;
- Chapter 3 provides an overview of quality in higher education;
- Chapters 4-9 respond to each of the six Terms of Reference;
- Appendix A examines suggested amendments to the TEQSA Act that are not addressed in detail in the body of the Report. It is important to emphasise that this Review does recommend that some of these proposed changes should be enacted (see paragraph 8.3.3 of this Report); and
- Appendices B and C list the organisations that provided a submission to this Review and those individuals or organisations that were interviewed as part of this Review.

## 2 Regulation of the Australian higher education sector

This Chapter provides an overview of the current regulatory framework for higher education in Australia under the TEQSA Act. This includes an explanation of the purpose of the Act, the regulatory activities empowered by the Act and the purpose of any legislative instruments that support the functions of the regulator. It also provides context regarding the broader trends occurring within the Australian higher education sector, in respect of provider and student numbers, as well as emerging practices.

The Chapter is arranged chronologically. It first describes the regulatory environment before the TEQSA Act, and introduces the rationale for the Act and the issues that TEQSA was expected to address. It then outlines the core responsibilities of TEQSA arising from the Act and how TEQSA performs these responsibilities in practice.

The Chapter then examines the 2013 *Review of Higher Education Regulation*,<sup>7</sup> and identifies the changes that flowed from that Review.

Finally, the Chapter reviews the current state of the higher education sector, including how it has evolved since the introduction of the TEQSA Act, and highlights emerging trends likely to affect higher education and the regulation of the sector.

### 2.1 The regulation of the higher education sector before the enactment of the TEQSA Act; the rationale for the TEQSA Act

Before the introduction of the TEQSA Act, higher education in Australia was governed by the *National Protocols for Higher Education Approval Processes* (the 'National Protocols'), which were developed in 2000 and revised in 2007. These were broad, principles-based guidelines that higher education institutions were required to meet.

The role of registering providers and accrediting courses was assigned to State and Territory accreditation authorities. Decisions in relation to provider registration and course accreditation were guided by the National Protocols. Quality was monitored by the Australian Universities Quality Agency (AUQA).

The regulatory system under the National Protocols and AUQA is described in further detail below, as are the perceived weaknesses with the system before the enactment of the TEQSA Act.

#### 2.1.1 The regulatory regime before the TEQSA Act The National Protocols

Five National Protocols<sup>8</sup> were introduced in 2000 as a set of guidelines designed to ensure consistent criteria across Australia in matters such as:

- the registration of higher education providers;
- the operation of overseas higher education institutions in Australia; and

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<sup>7</sup> Lee Dow and Braithwaite, above n 3.

<sup>8</sup> Ministerial Council on Education, Employment Training and Youth Affairs, *National Protocols for Higher Education Approval Processes* (2007), 1

<<http://scseec.edu.au/site/DefaultSite/filesystem/documents/Reports%20and%20publications/Archive%20Publications/Higher%20Ed/Revised-Nat%20Protocols%20HE%20Approval%20Process.pdf>>.

- the accreditation of higher education courses offered by non-self-accrediting providers.

### **Provider registration and course accreditation**

To perform the function of provider registration and course accreditation, State and Territory governments established accreditation authorities. These agencies were required to give consideration to the National Protocols, but, as TEQSA says:

*"The National Protocols were drafted as guidelines rather than standards and did not contain measures of performance".<sup>9</sup>*

Non-self-accrediting institutions reportedly found the course accreditation processes to be onerous (sometimes taking up to 18 months), considered the processes to be unfair (as often approval from a university academic employed by a competitor institution would be required to accredit a new course), and inconsistently applied across the states and territories.<sup>10</sup>

### **AUQA and provider quality audits**

AUQA was established by the Ministerial Council on Education, Training and Youth Affairs in March 2000. AUQA conducted audits of:

1. all Australian self-accrediting higher education institutions, including universities;
2. Commonwealth, State and Territory government accreditation authorities;
3. Australian non-self-accrediting institutions approved as higher education providers under the Commonwealth *Higher Education Support Act 2003* (Cth); and
4. other higher education institutions under contract.<sup>11</sup>

In 2007, AUQA finished its first cycle of audits of self-accrediting higher education institutions and accreditation agencies. In 2008, it began a second cycle of audits of existing self-accrediting institutions.<sup>12</sup>

AUQA undertook audits based on self-review; the audit process involved:

*"a systematic and independent examination to determine whether activities and related results comply with planned arrangements and whether these arrangements are implemented effectively and are suitable to achieve objectives".<sup>13</sup>*

The self-review method aimed to encourage higher education providers to reflect on their own practices and improve internal processes. AUQA did not impose externally determined standards of quality upon higher education providers.

The focus of AUQA's quality audits was largely on the extent to which institutions were meeting their own objectives, and how they monitored and improved their performance. Audits also included an investigation of the extent to which an institution's objectives reflected the National Protocols.

In addition to its quality audits, AUQA released publications with a view to quality *improvement* (as opposed to quality *assurance*). These publications allowed AUQA to

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<sup>9</sup> *TEQSA Glossary of Terms*, TEQSA <<http://www.teqsa.gov.au/media-publications/glossary>>.

<sup>10</sup> Department of Industry, Innovation, Science, Research and Tertiary Education, *Reform of National Regulation of Higher Education Providers. Regulation Impact Statement* (2012), 7 <<http://ris.pmc.gov.au/sites/default/files/posts/2012/01/03-Reform-of-National-Regulation-of-Higher-Education-Providers-Regulation-Impact-Statement.pdf>>.

<sup>11</sup> *Quality Audit*, AUQA <<http://pandora.nla.gov.au/pan/127066/20110826-0004/www.auqa.edu.au/qualityaudit/qa/index.html>>.

<sup>12</sup> *Ibid.*

<sup>13</sup> AUQA, *AUQA Audit Manual, Version 8.0*, AUQA (2011), 79

<[http://pandora.nla.gov.au/pan/127066/20110826-0004/www.auqa.edu.au/files/auditmanuals/audit\\_manual\\_version\\_8.pdf](http://pandora.nla.gov.au/pan/127066/20110826-0004/www.auqa.edu.au/files/auditmanuals/audit_manual_version_8.pdf)>.

share insights into best practice approaches to quality assurance. In publishing this research, AUQA aimed to assist higher education providers to identify drivers of quality.

AUQA's quality improvement function was augmented by the establishment of the AUQA Good Practice Database.<sup>14</sup> The Database was intended to share activities undertaken by higher education providers that had been found to maintain or enhance provider quality.

### **2.1.2 Limitations of the pre-TEQSA Act higher education regulatory system**

Successive reviews of the higher education sector identified weaknesses in the regulatory environment.<sup>15</sup> A brief summary of the key findings of these reviews is set out below.

#### **Inconsistent application of provider registration and course accreditation and the associated regulatory burden**

While the National Protocols provided a basis for consistency in the regulation of higher education, registration and accreditation were governed by bodies specific to each State and Territory. In practice, this resulted in inconsistent application, or perceptions of inconsistent application, of the National Protocols across jurisdictions. The *Review of Australian Higher Education* referred to submissions which pointed to:

*"perceptions of inconsistent requirements between states and territories in terms of registration, accreditation and annual reporting"*<sup>16</sup>

The *Inquiry into the desirability of a national higher education accreditation body* also noted that there was potential to reduce regulatory burdens, especially for multi-jurisdiction providers, through a national higher education accreditation agency.<sup>17</sup>

#### **The National Protocols as guidelines and the need for minimum standards**

The lack of minimum quality standards had also been identified as a limitation of the regulatory framework.<sup>18</sup> In particular, as the National Protocols were guidelines, rather than standards, enforcing quality improvement was not possible. The National Protocols were also considered to be complex, and difficult to understand.<sup>19</sup>

The *Review of Australian Higher Education* recommended the Australian Government develop a set of formal academic standards to which providers must adhere, with the enforcement of these standards intended to ensure the quality of the higher education sector.<sup>20</sup>

The *Review of Australian Higher Education* also identified the focus on inputs and processes to be a weakness with the National Protocols, and suggested focusing more on outcomes.<sup>21</sup> It should be noted that this aligns with the Organisation for Economic Co-

<sup>14</sup> AUQA Good Practice Database, AUQA <<http://www.auqa.edu.au/gp/search/index.php>>.

<sup>15</sup> The first of these reviews – the *Review of Australian Higher Education* – examined the future of the higher education sector in Australia and its fitness for purpose; it was initiated in 2008 (Professor Denise Bradley et al., *Review of Higher Education in Australia* (Department of Education, Employment and Workplace Relations, 2008) <<http://www.voced.edu.au/content/ngv%3A32134>>). The second was motivated by the findings of that Review, and examined the regulatory framework for overseas students (The Hon Bruce Baird, *Stronger, simpler, smarter ESOS: supporting international students, Review of the Education Services for Overseas Students (ESOS) Act 2000: final report* (Commonwealth of Australia, 2010) <<http://www.voced.edu.au/content/ngv%3A36098>>). A third review was commissioned by the Ministerial Council on Education, Employment, Training and Youth Affairs, examining the desirability of a national higher education accreditation body (Phillips KPA, Joint Committee on Higher Education, *Inquiry into the desirability of a national higher education accreditation body* Final Report (2008) <<http://www.voced.edu.au/content/ngv%3A32253>>).

<sup>16</sup> Bradley et al., above n 15, 119.

<sup>17</sup> Phillips KPA, above n 15, 63.

<sup>18</sup> Department of Industry, Innovation, Science, Research and Tertiary Education, above n 10, 10 (referring to the submission made by the Innovative Research Universities to the *Review of Australian Higher Education*).

<sup>19</sup> Ibid, 13.

<sup>20</sup> Bradley et al., above n 15, 116 (Recommendation 19) and 137 (Recommendation 23).

<sup>21</sup> Bradley et al., above n 15, 115.

operation and Development, which emphasises that quality assurance frameworks should demonstrate a focus on student outcomes.<sup>22</sup>

### Concern regarding the impact of the demand-driven system

In 2009, higher education was to commence the move to a 'demand-driven system'—a system without regulated caps on the number of Commonwealth-funded places for bachelor degree students. This was expected to create opportunities for a number of under-represented groups, such as low socio-economic status, regional and remote and Indigenous students, to access higher education.

There was concern that expanding the higher education system could lead to a lowering of the quality of higher education provision. The enrolment of students who, in the past, would not have participated in higher education due to their low Australian Tertiary Admission Rank (ATAR) scores, led to apprehension about how course content and assessment might adapt to cater for these students.<sup>23</sup>

The National Protocols, which served as guidelines rather than standards, were "*not suited to the new demand-driven system*".<sup>24</sup> The need was seen for a national regulator enforcing minimum quality standards that all providers would be obliged to meet.

### 2.1.3 The rationale for establishing TEQSA

The TEQSA Act, which established TEQSA, was aimed at assuring students and other members of the public, particularly employers of graduates, of the quality of higher education provision, especially in the face of an expanding sector.<sup>25</sup>

Some of the key changes to the regulatory environment included:

- Replacing the National Protocols with a clear and enforceable set of Standards applied across all providers nationally.
- Combining in TEQSA the roles of State and Territory accreditation agencies and AUQA. TEQSA's role was to include provider registration and course accreditation, as well as to undertake quality assessments. This was intended to reduce the number of regulatory bodies, and therefore help move towards a more consistent application of quality standards throughout Australia. It was also considered likely to reduce the regulatory burden on providers that operated across jurisdictions.

The TEQSA Act sets out how TEQSA is required to regulate—according to principles of risk, necessity and proportionality.

The objects of the Act, as set out in section 3, are:

- (a) to provide for national consistency in the regulation of higher education; and
- (b) to regulate higher education using:
  - (i) a standards-based quality framework; and
  - (ii) principles relating to regulatory necessity, risk and proportionality;
 and
- (c) to protect and enhance:
  - (i) Australia's reputation for quality higher education and training services; and
  - (ii) Australia's international competitiveness in the higher education sector; and

<sup>22</sup> Paulo Santiago et al., *Tertiary Education for the Knowledge Society. Volume 1* (OECD, 2008), 311-312 <<http://www.oecd.org/education/skills-beyond-school/41266690.pdf>>.

<sup>23</sup> The Hon David Kemp and Andrew Norton, *Review of the Demand Driven Funding System* (Department of Education, 2013), 9 <<https://docs.education.gov.au/node/35537>>.

<sup>24</sup> Department of Industry, Innovation, Science, Research and Tertiary Education, above n 10, 19.

<sup>25</sup> See Explanatory Memorandum, Tertiary Education Quality and Standards Agency Bill 2011 (Cth), 2 <<https://www.legislation.gov.au/Details/C2011B00046/Explanatory%20Memorandum/Text>>: "As the higher education sector goes through a period of expansion, it is important for Australia to have a national system of regulation to assure the quality of all providers. A national approach is vital so that all students, domestic and international, can be assured of the quality of their education."

- (iii) excellence, diversity and innovation in higher education in Australia; and*
- (d) to encourage and promote a higher education system that is appropriate to meet Australia's social and economic needs for a highly educated and skilled population; and*
- (e) to protect students undertaking, or proposing to undertake, higher education in Australia by requiring the provision of quality higher education; and*
- (f) to ensure students undertaking, or proposing to undertake, higher education, have access to information relating to higher education in Australia.*

## **2.2 Outline of the TEQSA Act; the Higher Education Standards Framework and TEQSA's regulation of higher education providers**

Section 4 sets out a simplified outline of the Act:

*An entity must be registered before it can offer or confer any of the following awards (regulated higher education awards):*

- (a) Australian higher education awards;*
- (b) overseas higher education awards, if those awards relate to courses of study provided at Australian premises.*

*Registered higher education providers must have their courses of study accredited before those courses can be provided in connection with regulated higher education awards. Some providers (including Australian universities registered in the Australian university provider category) are authorised to self-accredit their courses of study.*

*The Tertiary Education Quality and Standards Agency (TEQSA) registers providers and accredits courses of study. TEQSA regulates higher education using principles relating to regulatory necessity, risk and proportionality, and using a standards-based quality framework.*

*That quality framework is a series of standards made by the Minister on the advice of the Higher Education Standards Panel.*

Some of the elements referred to in this outline of the Act are described in paragraphs 2.2.1 – 2.2.4 below. Detailed analyses of the entities that can be registered under the TEQSA Act and what constitutes a “regulated higher education award” are examined in paragraph 2.3 below.

### **2.2.1 The Higher Education Standards Framework**

Part 5 of the TEQSA Act sets out how the Minister is to make the Standards that constitute the Higher Education Standards Framework. Standards are developed by the Higher Education Standards Panel (the HESP) (paragraphs 58(3)(a) and 58(4)(a) of the Act). The HESP provides advice and makes recommendations to the Minister and TEQSA on matters relating to the Framework (sub-section 168(1)).

The TEQSA Act provides for ‘Threshold Standards’, which are made pursuant to paragraphs 58(1)(a)–(d) of the TEQSA Act and comprise four categories of Standards:

- the Provider Registration Standards;
- the Provider Category Standards;
- the Provider Course Accreditation Standards; and
- the Qualification Standards.<sup>26</sup>

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<sup>26</sup> Note 1 to sub-section 58(1) defines the Threshold Standards as those standards referred to in paragraphs (a) to (d) of sub-section 58(1); see also the section 5 definition of ‘Threshold Standards’.

The *Higher Education Standard Framework (Threshold Standards) 2011* were the first set of Threshold Standards. The Higher Education Standards Panel (HESP) commenced a review of the 2011 Threshold Standards in 2012, consulting widely with the higher education sector and other stakeholders.

On 1 January 2017, a new set of Threshold Standards—the *Higher Education Standards Framework (Threshold Standards) 2015*—came into operation. The Explanatory Statement to the new Standards states that the HESP concluded that:

*"while the initial standards cover issues of corporate and academic governance, course accreditation and qualifications, they do not provide adequate assurance of the quality of higher education learning, teaching and research. ... The revised framework has been structured to better align with the operational characteristics of a typical higher education provider."*<sup>27</sup>

The Explanatory Statements regarding both the 2011 and the 2015 Threshold Standards make it clear that a key purpose of the Standards is to ensure sufficiently high entry standards for providers entering the higher education sector.<sup>28</sup>

In addition to the Threshold Standards, the Higher Education Standards Framework established by section 58 of the TEQSA Act provides for Teaching and Learning Standards (paragraph 58(1)(f)), Information Standards (paragraph 58(1)(g)), other standards against which the quality of higher education can be assessed (paragraph 58(1)(h)) and Research Standards (sub-section 58(2)). The role of these 'non-threshold' standards is unclear. TEQSA's responsibilities under the Act regarding registration and course accreditation refer only to the Threshold Standards. It is possible that the non-threshold standards were envisaged as having a role to play in quality or thematic assessments conducted by TEQSA under section 60 of the Act. No 'non-threshold' standards have been made.

### **2.2.2 Provider registration and course accreditation**

It is an offence for a higher education provider not to be registered.<sup>29</sup> Part 3 of the TEQSA Act deals with how to apply for registration as a higher education provider. An application for registration undergoes a preliminary assessment by TEQSA (section 19) before being subjected to a substantive assessment (section 20). The Act requires TEQSA to make decisions on preliminary assessments and substantive assessments within 30 days and 9 months, respectively.

TEQSA grants an application for registration when satisfied that the regulated entity meets the Threshold Standards (sub-section 21(1)) and determines the period for which the entity is registered, which is not to exceed seven years (sub-section 21(6)). As part of the registration process, TEQSA determines the category in which a provider is to be registered:

- Higher Education Provider
- Australian University
- Australian University College
- Australian University of Specialisation
- Overseas University

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<sup>28</sup> Explanatory Statement to the 2011 Threshold Standards *"The Threshold Standards are crucial to ensuring that the entry gateway to the higher education sector is sufficiently high and provides a solid basis of performance from which all providers can build excellence and diversity."* Explanatory Statement to the 2015 Threshold Standards *"[the Threshold] Standards ensure that the barrier to entry into the higher education sector is set sufficiently high to underpin and protect the quality and reputation of the sector as a whole"*  
<<https://www.legislation.gov.au/Details/F2015L01639/Explanatory%20Statement/Text>>.

<sup>29</sup> *Tertiary Education Quality and Standards Agency Act 2011* (Cth) s105; see also the related sections 106-114.



- Overseas University of Specialisation.

TEQSA also determines applications made by providers to self-accredit their courses (section 41); higher education providers registered as Australian universities are authorised by the legislation to self-accredit their courses (sub-section 45(1)).

Providers who are not authorised to self-accredit are required to apply to have their courses accredited by TEQSA (sections 47-48); TEQSA considers whether the courses meet, among other conditions, the Provider Course Accreditation Standards (sub-section 49(1)) which are part of the Threshold Standards. Courses may be accredited for up to seven years (sub-section 49(6)).

Approaching the end of its period of registration, a provider can apply to TEQSA to have its registration renewed (sections 35-37); course accreditation is also subject to renewal (sections 55-57).

### **2.2.3 TEQSA's regulatory, investigative and enforcement powers**

TEQSA is established pursuant to section 132 of the TEQSA Act and is headed by a Chief Commissioner and up to four other Commissioners (section 133). A person may be appointed as a Commissioner if the Minister is satisfied that the person has appropriate qualifications, knowledge or experience (paragraph 138(4)(a)). Currently, there is a Chief Commissioner and two other Commissioners.

TEQSA is to perform its functions independently (section 135), but can be subject to directions of a general nature made by the Minister by legislative instrument (see section 136). Pursuant to sub-section 134(1), TEQSA's functions are:

- (a) *to register regulated entities as registered higher education providers in accordance with the Act;*
- (b) *to accredit courses of study in accordance with the Act;*
- (c) *to investigate whether the Act or associated provisions have been or are being complied with, including by:*
  - (i) *conducting compliance assessments and quality assessments; and*
  - (ii) *conducting accreditation assessments of accredited courses;*
- (d) *to advise and make recommendations to the Minister on matters relating to the quality or regulation of higher education providers, if requested by the Minister or on its own initiative;*
- (e) *to collect, analyse, interpret and disseminate information relating to:*
  - (i) *higher education providers; and*
  - (ii) *regulated higher education awards; and*
  - (iii) *quality assurance practice, and quality improvement, in higher education; and*
  - (iv) *the Higher Education Standards Framework;*
- (f) *to advise and make recommendations to a higher education provider on matters relating to the Threshold Standards, if requested by the provider in the approved form;*
- (g) *to conduct training to improve the quality of higher education;*
- (h) *to make resources and facilities available to the Panel for the purposes of enabling the Panel to perform its functions;*
- (i) *to give the Secretary an independent assessment of information the Secretary provides about higher education providers, that uses assessment criteria provided by the Secretary;*
- (j) *to cooperate with its counterparts in other countries;*
- (k) *to develop service standards that TEQSA must meet in performing its functions;*
- (l) *any function ... [determined by the Minister that relate to higher education];*
- (m) *such other functions as are conferred on TEQSA by or under the TEQSA Act or any other Commonwealth law.*

TEQSA can undertake compliance assessments involving the review of any aspect of an entity's operations to determine whether a registered higher education provider continues to meet the Threshold Standards (section 59). Similar assessments can be undertaken by TEQSA pursuant to section 61 with respect to accredited courses and whether they continue to meet the Provider Course Accreditation Standards.

TEQSA is also empowered to undertake quality (including thematic) assessments pursuant to section 60, which provides that:

- "TEQSA may review or examine any aspect of an entity's operations to:*
- (a) assess the level of quality of higher education provided by one or more registered higher providers; or*
  - (b) assess whether there are any systemic issues relating to a particular course of study leading to a particular regulated higher education award; or*
  - (c) assess the level of quality of, or whether there are any systemic issues relating to, the courses of study that lead to one or more kinds or regulated higher education awards."*

However, as explained in paragraph 2.4 of this Report and as analysed in paragraph 5.2.2 in the context of Term of Reference Two, the capacity for TEQSA to undertake 'sectoral quality assessment activities' has been limited by a Ministerial Direction.

To perform its regulatory and quality assurance functions effectively, TEQSA is provided with investigative powers (Part 6).

Part 7 of the TEQSA Act provides sanctions and enforcement powers to strengthen TEQSA's ability to regulate higher education providers against the Threshold Standards.

#### **2.2.4 The Risk Assessment Framework**

Section 13 of the TEQSA Act sets out the basic principles for regulation - regulatory necessity, reflecting risk and proportionate regulation. TEQSA must comply with these principles when exercising a power under the Act in relation to a regulated entity. TEQSA's risk-based approach is underpinned by risk assessments of registered higher education providers, which are informed by a 'Risk Assessment Framework'.

While the Risk Assessment Framework is independent of the Threshold Standards, each risk indicator can be mapped to one (or more) of the Threshold Standards.<sup>30</sup> The purpose of the risk assessments is not to test compliance with the Threshold Standards, but rather to identify *potential risks* of non-compliance.<sup>31</sup> Findings from these risk assessments inform the scope and depth required for the assessment activities regarding each provider.<sup>32</sup>

Each risk assessment relies on qualitative expert judgment, taking into account a provider's context, history and standing, and analysis of risk indicators. There are currently twelve risk indicators, as outlined in the 2016 Risk Assessment Framework.<sup>33</sup>

A TEQSA case manager is responsible for assessing each provider as high-, medium-, or low-risk against each indicator. These are combined to produce an overall risk profile for

<sup>30</sup> TEQSA, *Risk Assessment Framework, Version 2.1* (2016), 10-14, <[http://www.teqsa.gov.au/sites/default/files/publication-documents/TEQSARiskAssessFramework\\_v2.1\\_1.pdf](http://www.teqsa.gov.au/sites/default/files/publication-documents/TEQSARiskAssessFramework_v2.1_1.pdf)>.

<sup>31</sup> Ibid page 2.

<sup>32</sup> TEQSA, *A risk and standards based approach to quality assurance in Australia's diverse higher education sector* (2015), 2 <<http://www.teqsa.gov.au/sites/default/files/publication-documents/RiskStandardsSectorPaperFeb2015.pdf>>.

<sup>33</sup> The current risk assessment framework has been in place since 2014. Before this, the Regulatory Risk Framework consisted of 46 quantitative and qualitative risk indicators. There were concerns that this created an unnecessary data collection process, and TEQSA acknowledged there was scope to improve the efficiency and effectiveness of the risk framework (Lee Dow and Braithwaite, above n 3, 34-35).

providers across two domains—provider risk to students, and provider risk to its financial position.<sup>34</sup>

The purpose of these risk assessments is to identify and monitor risks faced by providers between their re-registration points, but also to ensure the burden imposed on providers is proportionate to their risk of non-compliance. A higher-risk provider will be required to provide more evidence, and will face a more in-depth re-registration (or course re-accreditation) process than a lower-risk provider.

### 2.3 The constitutional reach of the TEQSA Act

Australian State and Territory legislatures did not refer their legislative powers regarding the regulation of higher education to the Commonwealth when the decision was made to regulate higher education under a single national framework. This means that the TEQSA Act must be referable to a head, or heads, of Commonwealth legislative power in the Constitution.

So far as the constitutional basis of the TEQSA Act is concerned, the Act relies on the corporations power, the incidental power and the territories power (see section 8 of the TEQSA Act). Reliance on a number of different ‘heads’ of legislative power inevitably makes the TEQSA Act quite complex. For example the key concept of a “regulated higher education award” is defined in section 6 of the Act as:

- an Australian higher education award offered or conferred for the completion of an Australian course of study. “Australian higher education award” is, in turn, defined as a higher education award offered or conferred by an Australian corporation, a corporation established by or under a law of the Commonwealth or a Territory, a person (other than an individual) established in Australia who conducts activities in a Territory, or an Australian resident who conducts activities in a Territory (section 5); or
- an overseas higher education award offered or conferred for the completion of an overseas course of study provided wholly or mainly from Australian premises. “Overseas higher education award” is, in turn, defined as a higher education award offered or conferred by a foreign corporation, a person (other than an individual) established outside Australia who conducts activities in a Territory, or an individual, who is not an Australian resident, who conducts activities in a Territory (section 5).

Terms such as “Australian corporation” and “foreign corporation” are defined by reference to the provisions of the Constitution. The resulting complexity is not unique to the TEQSA Act, but is a characteristic of Commonwealth legislation that relies on a number of different heads of legislative power.

It does, however, follow that TEQSA can regulate only those entities that fall within the constitutional reach of the TEQSA Act; that is, an entity that meets the definition of a “regulated entity” set out in section 5 of the Act:

- a constitutional corporation; or
- a corporation established by or under a law of the Commonwealth or a Territory; or
- a person who conducts activities in a Territory.

This means that there are some gaps in the reach of the Act and in TEQSA’s regulatory purview. For example, the TEQSA Act does not currently apply to higher education awards offered by overseas providers from a campus or office outside Australia by way of online delivery to students in Australia— such a provider would generally not meet the definition of “regulated entity”.

This issue is returned to in Chapter 4 when dealing with Term of Reference One and in Chapter 8 regarding Term of Reference Five.

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<sup>34</sup> TEQSA, above n 30, 5.

## 2.4 The Review of Higher Education Regulation and the subsequent Ministerial Direction

Providers' initial experience with TEQSA led to concerns regarding the time and effort required to respond to very detailed requests for information. These requests related to information to fulfil TEQSA's basic requirements and additional requests such as those made as part of its sector-wide quality assessment of *Third Party Arrangements* pursuant to section 60 of the TEQSA Act.<sup>35</sup>

In response to growing provider discontent, the Government commissioned an expert review into TEQSA's approach to regulation<sup>36</sup> – the 2013 *Review of Higher Education Regulation*. The Review was, among other things, tasked with looking at ways to reduce the regulatory burden on higher education providers.

The Review concluded that the experience of the sector under TEQSA had diverged from the ideal premised in the regulatory principles.<sup>37</sup> This divergence manifested as an unnecessary burden for providers, as well as slow decision-making by TEQSA.

The 2013 Review identified several shortcomings with the regulatory environment. These included TEQSA instituting a 'one size fits all' approach to regulation, the validity and effectiveness of TEQSA's then regulatory risk framework,<sup>38</sup> a perceived lack of value in TEQSA's role as a 'quality assurance' body, and regulatory requirements proving to be an unreasonable burden on providers, especially on smaller providers.<sup>39</sup> TEQSA's sector-wide quality assessment of *Third Party Arrangements* was considered to be overly burdensome, and was negatively received and strongly resisted by the sector.<sup>40</sup>

The findings from the Review led to some amendments to the TEQSA Act and to the Minister issuing a ministerial direction—Ministerial Direction No. 2 of 2013.<sup>41</sup>

Ministerial Direction No. 2 of 2013:

1. Provided that the Chief Executive Officer (CEO) of TEQSA should consult broadly across the higher education sector;
2. Required the CEO of TEQSA to seek the advice of the National Advisory Group for Higher Education Data and Information (NAGHEDI) and, when established, the TEQSA Advisory Council, and perform his or her functions consistently with the advice;
3. Required the CEO of TEQSA to simplify processes and improve time lines of decision-making for what was characterised as TEQSA's "key activities" of provider registration and re-registration and course accreditation and re-accreditation; and
4. Directed the CEO of TEQSA to work on "sectoral quality assessment activities" only if TEQSA has "surplus resources".

At the same time, TEQSA's funding was reduced.

The most significant change was the instruction to TEQSA to focus on its "key activities" of provider registration and course accreditation. This limited TEQSA's capacity to undertake quality assessment activities under section 60 of the TEQSA Act, unless it had 'surplus resources after fully achieving the above tasks and priorities'.<sup>42</sup> In practice,

<sup>35</sup> Australian Government, *Assuring quality while reducing the higher education regulatory burden*, 2013, Foreword <<http://www.cubenet.org.au/wp-content/uploads/2013/06/AssuringQualitywhileReducingtheHigherEducationRegulatoryBurden.pdf>>.

<sup>36</sup> Ibid, 5.

<sup>37</sup> Lee Dow and Braithwaite, above n 3, 42.

<sup>38</sup> Ibid, 43-45.

<sup>39</sup> Ibid, 47-49.

<sup>40</sup> Ibid, 36.

<sup>41</sup> The *Tertiary Education and Standards Agency Amendment Act 2014* (Cth) did not include all provisions within the initial Bill of the same name. The excluded provisions were intended to repeal section 60 of the TEQSA Act (regarding quality assessments) and to make other consequential amendments to the TEQSA Act.

<sup>42</sup> Minister for Education (Cth), *Direction [No 2] – Tertiary Education Quality and Standards Agency Act 2011*, 2013 Pt 2 <<https://www.legislation.gov.au/Details/F2013L01824>>.

TEQSA has interpreted this as a direction to cease activities of a kind similar to the sector-wide quality assessment of *Third Party Arrangements*.

Changes to the TEQSA Act were intended to reduce the time taken for TEQSA to perform its core functions, through amending the period of provider registration or accreditation,<sup>43</sup> and improving the delegation process so appropriate staff were empowered to make decisions.<sup>44</sup>

The Review also led to changes to the ESOS Act, streamlining it with domestic quality assurance frameworks administered by TEQSA. This is revisited in paragraph 7.1 below.

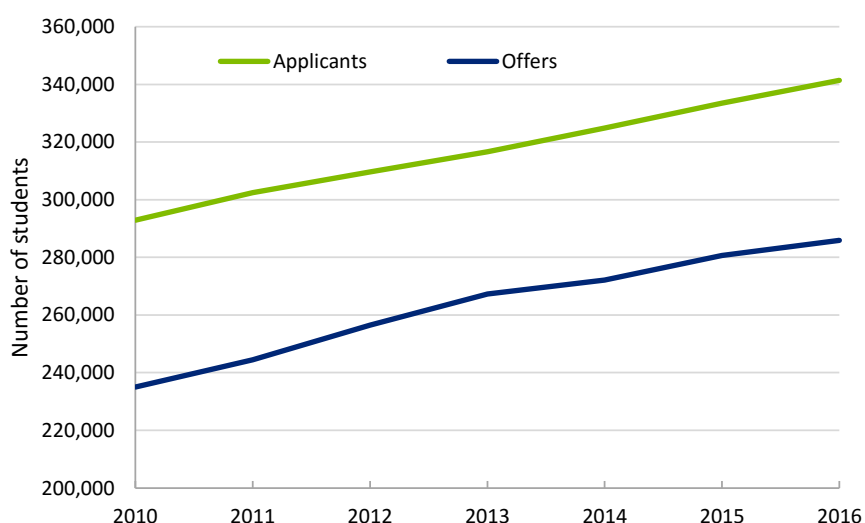
## 2.5 The evolution of the higher education sector since 2011

The introduction of the TEQSA Act was in part motivated by the substantial increases in enrolments (and therefore the numbers of providers) expected to occur after the removal of caps on Commonwealth-funded places for bachelor degree students. The government began easing the caps on bachelor degree student places in 2009 and the caps were mostly removed by 2012<sup>45</sup> (caps remain for Medicine). While student enrolments increased markedly following the removal of caps, the number and nature of higher education providers have not significantly changed.

### 2.5.1 Evolution of student enrolment

Chart 2.1 illustrates growth rates in offers to students between 2010 and 2016.<sup>46</sup> While the number of applicants has increased steadily (between 2% and 3% per annum from 2012 to 2016), the number of offers increased by between 4% and 5% per annum from 2011 to 2013, before reducing to 2-3% per annum growth since 2014. This moderation in growth is likely to represent the maturation of the demand-driven system, and evidence that much of the excess demand that existed has been met.

Chart 2.1 Number of student applicants and offers,<sup>1</sup> 2010-2016



Source: Department of Education and Training (2016), Undergraduate applications, offers and acceptances, appendix table 8.1.

Note (1): the chart only includes offers to domestic applicants for a commonwealth supported place in an undergraduate course.

<sup>43</sup> *Tertiary Education Quality and Standards Agency Amendment Act 2014* (Cth), Pt 3.

<sup>44</sup> *Ibid* Pt 2.

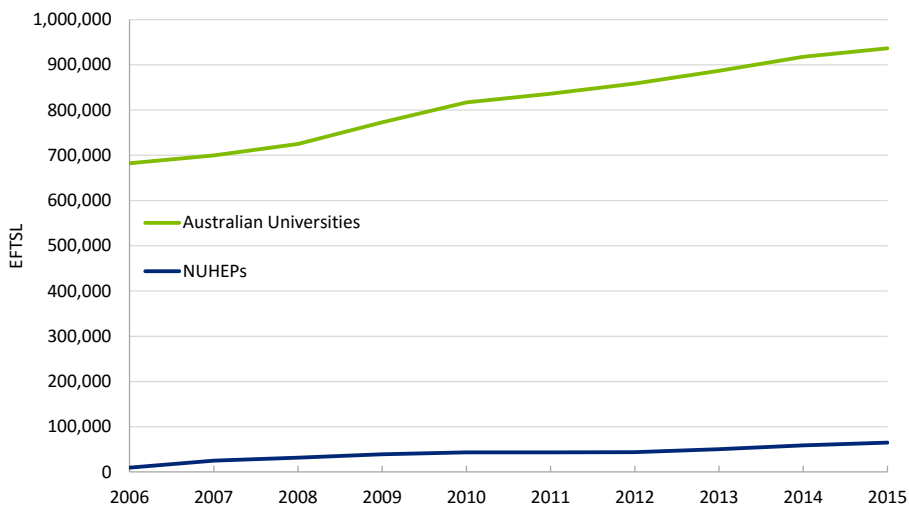
<sup>45</sup> Kemp and Norton, above n 23, 45.

<sup>46</sup> Data on applicants and offers has only been collected comprehensively since 2010.

Further evidence of a spike, and subsequent moderation, can be seen in the number of student enrolments.<sup>47</sup> Enrolment growth at Australian universities exceeded 6% per annum in both 2009 and 2010, but has been slower, between 2% and 3.5% per annum, since 2011 (Chart 2.2).

As anticipated, enrolment growth in NUHEPs has been greater than at universities, and has exceeded 10% per annum in all but two years since 2008. This is, however, from a significantly lower base. In 2007, total EFTSL at universities was 725,000, while only 25,000 EFTSL were enrolled at NUHEPs, representing around 3% of the sector.

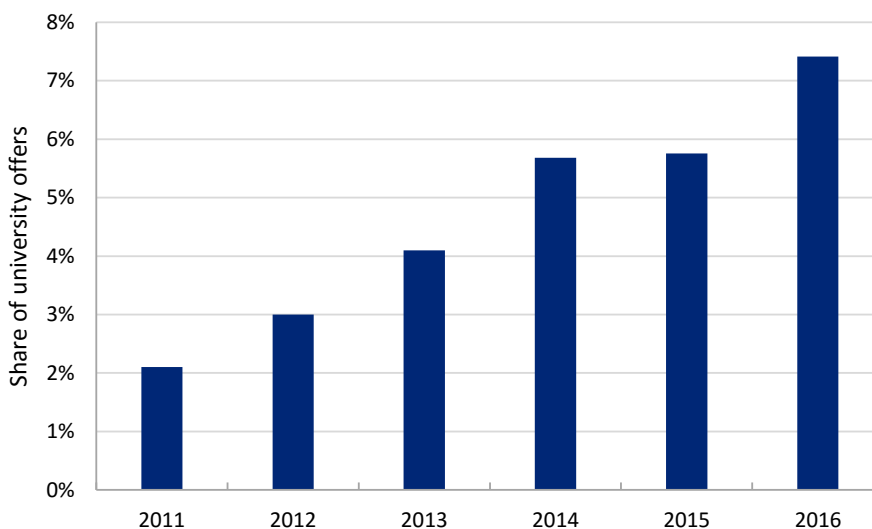
Chart 2.2 Equivalent full-time study load (EFTSL), 2007-2015



Source: Department of Education, Higher Education Information Management System Statistics (2016) unpublished data

Chart 2.3 shows that the proportion of offers from universities to students with an ATAR of less than 50 has increased from 2% in 2011 to over 7% of all offers in 2016.

Chart 2.3 Offers to students with ATAR scores of less than 50<sup>1</sup>



<sup>47</sup> Student enrolments are measured by equivalent full-time student loads (EFTSL). An equivalent full time student load is assumed to be an annual total of 80 credit points (8 units of study). Student enrolment data is recorded by the Australian Government’s Higher Education Information Management System (HEIMS).

Source: Department of Education and Training (2013–2016), Undergraduate applications, offers and acceptances, appendix table 8.1.

Note (1): Data shown is only for acceptances made through Tertiary Admissions Centres for undergraduate Commonwealth-supported places.

### 2.5.2 Evolution of the number higher education providers

Despite the growth in student numbers, the number of providers has remained relatively stable since 2011.<sup>48</sup> Data from the TEQSA register, in combination with provider registration data supplied by TEQSA, provide an overview of the nature of higher education providers. When TEQSA commenced operations (in 2012), the sector consisted of 41 higher education providers classified as universities (which included two providers in the 'Overseas university' provider category). Since 2012, one additional provider has been registered as a university and another as a university of specialisation; no university has been deregistered.

In 2012, there were an estimated 131 NUHEPs in Australia. Between 2012 and 2016, 24 new NUHEPs have registered as higher education providers; this has been offset by 27 NUHEPs exiting the higher education sector (12 withdrew their registration,<sup>49</sup> ten allowed their registration to lapse, three providers have had their applications for renewal of registration rejected and two providers have had their registration cancelled by TEQSA).<sup>50</sup>

There has been an increase in the number of NUHEPs with self-accrediting status over this period. Ten NUHEPs are currently granted this status, up from three in 2012.

Overall, some of the changes that had been expected in the number and nature of higher education providers have not materialised. This is not to say that there may not be future growth in the sector. At the time of writing this Report, TEQSA had:

- a. 25 applications for initial registration at the substantive assessment stage;
- b. completed the preliminary assessment of two applications and was waiting for the applicant to continue with those applications by paying the substantive assessment fee;
- c. [eight] applications for which it was undertaking a preliminary assessment;
- d. given 58 other entities access to the portal for the purposes of submitting an application for registration.<sup>51</sup>

TEQSA received a higher number of initial registration applications in 2016 than in past years:

*"Prior to 2016, TEQSA had received 35 applications for initial registration, including six applications inherited from previous state regulators under the Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provision) Act 2011. In 2016, TEQSA received 45 applications for initial registration."<sup>52</sup>*

<sup>48</sup> The National Register of Higher Education Providers (<http://www.teqsa.gov.au/national-register>) is a requirement of section 198 of the TEQSA Act. Before the creation of the Register, data regarding non-self-accrediting higher education providers was incomplete; see Jeanette Baird and Karen Treloar, 'Overview of the NSAI sector' in *Higher education private providers and non-self-accrediting institutions in Australia* (Australian Universities Quality Agency, Commonwealth of Australia, 2011), 4 <[http://pandora.nla.gov.au/pan/127066/20110826-0004/www.auqa.edu.au/files/publications/heps\\_and\\_nsais\\_in\\_australia.pdf](http://pandora.nla.gov.au/pan/127066/20110826-0004/www.auqa.edu.au/files/publications/heps_and_nsais_in_australia.pdf)>. The description of the evolution of higher education providers should therefore be considered in light of this limitation.

<sup>49</sup> Discussions with TEQSA suggest that a withdrawn application of re-registration almost invariably involves a withdrawal following a proposed rejection of a provider's application by TEQSA.

<sup>50</sup> Information is a combination of the TEQSA Provider Register <<http://www.teqsa.gov.au/national-register>>, and TEQSA, submission, Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector, November 2016, 8.

<sup>51</sup> Letter from TEQSA to Deloitte Access Economics, 25 January 2017.

<sup>52</sup> Ibid.

This may mean that the pressures envisaged at the time of the *Review of Australian Higher Education* may yet come to pass.

## 2.6 Emerging trends in the higher education sector

While the composition of the higher education sector has not changed significantly, teaching practices and the external environment within which the sector operates have continued to evolve. In Australia, the greater availability of information for students, new technologies (particularly online technology), the rise of globalisation, and mass education are challenging the traditional paradigm of higher education. It will be important for the regulatory system to evolve accordingly.

Australian universities have begun to offer massive open online courses (MOOCs). These courses are commonly provided free of charge and enable active, interactive, and connected learning. In some cases students can choose to receive a verified certification in exchange for a fee.<sup>53</sup> A review of these new delivery models noted that:

*"The trajectory of MOOCs is an interesting one, having expanded from the provision of courses by established universities to the development of high quality educational resources by commercial consortia..."*<sup>54</sup>

Some MOOCs are also offered by foreign providers from locations outside Australia to students in Australia. A provider of this kind would generally not be a regulated entity for the purposes of the TEQSA Act (see paragraph 2.3).

There is also growth in universities offering 'micro-credentials' (or 'nanodegrees').<sup>55</sup> Micro-credentials are a form of competency-based recognition that students can use to showcase their skills and knowledge. In Australia, to date, they are largely used to scaffold formal qualifications and to certify students' acquisition of co-curricular or generic capabilities such as leadership, mentoring or community volunteering. These micro-credentials can be quicker and cheaper than formal degrees, and can be seen to provide more detailed information about students to prospective employers. However, their quality is not yet regulated.

Other innovative practices include the use of Open Education Resources (OERs), which involve educational materials being released into the public domain with free access to users; and personalisation, which allows students to choose their courses and the titles of their degrees. Groups are also arising that offer credentials based on a bundling of aggregated online material developed by unrelated providers.<sup>56</sup>

Such practices are growing internationally, and a review of these new delivery models in Australia found that:

*"it is ... inevitable that Australia will eventually need to formulate a collaborative response to not only ensure the maintenance of quality and reputation in Australian higher education but also to ensure the sustainability of its higher education markets and business models."*<sup>57</sup>

The nature of competition in the higher education 'market' may also change as more information becomes available to students (for example, through better indicators of

<sup>53</sup> See, for example, MOOCs offered by the Australian National University: *ANUX* <<https://www.edx.org/school/anux>>.

<sup>54</sup> Christine Ewan, 'Higher Education Standards in a Disaggregated Learning Environment' (Office of Learning and Teaching, 2016), 24. <[http://www.olt.gov.au/system/files/resources/Ewan%2CC\\_HESP\\_Fellow\\_Report\\_2016.pdf](http://www.olt.gov.au/system/files/resources/Ewan%2CC_HESP_Fellow_Report_2016.pdf)>.

<sup>55</sup> For example, the Curtin Extra Certificate offer by Curtin University <<https://graduations.curtin.edu.au/graduate/curtinExtra.cfm>> or UOWx offered by the University of Wollongong <<http://www.uow.edu.au/student/life/uowx/overview/index.html>>.

<sup>56</sup> For example, Alison.com <<https://alison.com/company/about/>>, or Saylor Academy <<https://www.saylor.org/>>.

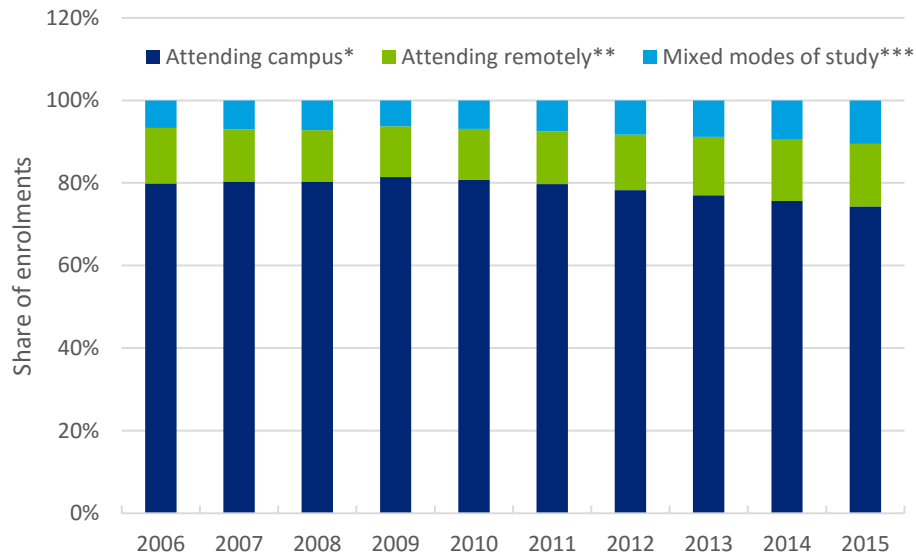
<sup>57</sup> Ewan, above n 54, 29.



quality). The drivers of students’ decisions may change as transparency regarding quality, satisfaction and outcomes increases.<sup>58</sup>

The rising use of technology to deliver higher education courses can already be seen in Australia. Since 2010, the share of students studying remotely has increased. Students enrolled off-campus (or partly off-campus) made up 19% of enrolments in 2010; this had grown to 26% of all enrolments by 2015 (Chart 2.4).

Chart 2.4 Student enrolment, by mode of delivery



Source: Department of Education and Training, uCube Commonwealth of Australia  
 <<http://highereducationstatistics.education.gov.au/Help.aspx>>

\*Study undertaken through attendance at a higher education provider

\*\*Study undertaken with course materials and exams delivered to the student

\*\*\*A combination of student attendance and remote study

Note (1): An enrolment involves a person currently admitted to an award course, non-award course, enabling course, cross-institution program or Bridging for Overseas Trained Professionals at the higher education institution at the census date and the person is still entitled to continue with their studies and has not formally indicated before the census date that they have withdrawn from or deferred their studies.

Finally, competition is expected to be shaped by an increasingly global 'market' for higher education.

<sup>58</sup> See, for example, the Quality Indicators for Learning and Teaching website, <<https://www.qilt.edu.au/about-this-site>>.

# 3 Quality in higher education

The objects of the TEQSA Act (outlined in section 3 of the Act) refer to protecting and enhancing Australia's reputation for *quality* higher education and training services and protecting students undertaking, or proposing to undertake, higher education in Australia by requiring the provision of *quality* higher education. The objects also embrace other characteristics associated with quality or that advance quality.

In light of these objects, a key test of the impact of the TEQSA Act is the extent to which it has contributed to improved quality in the delivery of higher education.

It is important to understand what constitutes '**quality**' and what drives quality outcomes. Quality '**assurance**', quality '**improvement**' and what this Review describes as the '**assurance of quality improvement**' are relatively broad notions that go to the heart of what the TEQSA Act has sought to achieve. These concepts were important aspects of stakeholder discussions during this Review.

This Chapter defines quality, quality improvement, quality assurance, and the assurance of quality improvement, and identifies how each are achieved by regulation as provided under the TEQSA Act and the broader quality assurance powers provided for by the Act. This Chapter also briefly outlines how quality can be measured and understood in this context.

This Review recognises the limitations of attributing to the TEQSA Act variation in quantitative measures of quality over time. In part, this relates to some concerns about the limitations of certain quality measures, which lie beyond the scope of this Review to assess. Further, a holistic assessment of quality is necessarily informed by a range of inter-related quality measures, analysed and interpreted in the operational contexts of different providers. However, detailed evidence of this nature was not available for this study.

As a result, in identifying what impacts the Act has had on quality, more fruitful findings are likely to be drawn from analysis of how the Act has contributed to **quality assurance** and/or **quality improvement**. That is, how it has changed the behaviour of providers with respect to quality improvement, relative to what would have otherwise occurred (in the absence of the Act).

These issues have occupied the minds of policymakers, regulators, providers and researchers for some time. This Review seeks to establish an understanding of these concepts through a targeted review of the relevant research literature. This evidence directly informs the analysis and findings of this Review regarding Term of Reference Two in Chapter 5.

## 3.1 What is meant by 'quality', 'quality assurance', 'quality improvement' and the 'assurance of quality improvement'?

*Quality* in higher education may be defined in relation to the *purpose* of higher education;<sup>59</sup> *quality* is meant to capture the extent to which higher education fulfils its

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<sup>59</sup> Graham Gibbs, *Dimensions of quality* (Higher Education Academy, 2010) 11.

purpose. Similarly, *quality assurance* is any process that provides "a measure of whether the purposes of higher education have been achieved".<sup>60</sup>

The multi-faceted nature of the contribution of higher education to society has meant that there is "no globally agreed definition of quality in higher education and [quality in higher education] does not have a single purpose, a single method or a single operational definition."<sup>61</sup> In Australia, an understanding of this evolving purpose can be found in an account of the episodes of reform in the higher education sector, in particular the 'waves of reform' led by Menzies, Whitlam and Fraser, and Dawkins.<sup>62</sup> More recently, the *Review of Australian Higher Education* established an aspiration for Australia to boost the level of participation in higher education (through the introduction of the demand-driven system for bachelor degree student places).<sup>63;64;65</sup>

Through this broad definition, quality assurance has regard to an implicit *standard* of quality, against which an assessment (and assurance) of attainment can be made. This is distinct from a standards-based regulatory framework of quality assurance, which may be considered as a specific (and technical) *form* of quality assurance (as discussed further in paragraph 3.2.1 below).

Quality 'improvement' is defined as a measurable and verifiable increase in quality with respect to the purpose of higher education. Quality improvement is often understood in the context of continuous quality improvement activities and/or processes, which may be assured under a technical regime of quality assurance (including through standards-based regulation).

In contrast to this form of quality assurance, this Review defines the 'assurance of quality improvement' with reference to an assessment that improvement has been **demonstrably achieved, and** where this measure of improvement is informed by an aspirational vision of quality for the sector as a whole.<sup>66</sup>

This is an expansive definition of quality improvement that is used by this Review to assist in distinguishing what specific forms of quality assurance are provided for under the TEQSA Act and the extent to which the TEQSA Act effectively allows for such activities.

### 3.2 Quality assurance under the TEQSA Act

Quality assurance is broadly defined as encompassing a process, or set of processes, used to demonstrate or verify quality (and the extent of quality that is being achieved).

Standards-based regulation, such as that established by the TEQSA Act, is a form of quality assurance. However *not all forms of quality assurance necessarily contain*

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<sup>60</sup> Vin Massaro, 'TEQSA and the holy grail of outcomes-based quality assessment' in Simon Marginson (ed), *Tertiary Education Policy in Australia* (Centre for the Study of Higher Education, The University of Melbourne, 2013) 49, 52

<[http://www.cshe.unimelb.edu.au/research/policy\\_dev/docs/Tert\\_Edu\\_Policy\\_Aus.pdf](http://www.cshe.unimelb.edu.au/research/policy_dev/docs/Tert_Edu_Policy_Aus.pdf)>.  
<sup>61</sup> Vin Massaro, 'Cui bono? The relevance and impact of quality assurance' (2010) 32(1) *Journal of Higher Education Policy and Management* 17, 20.

<sup>62</sup> Professor Janice Reid AM, *Menzies, Whitlam, and Social Justice: A View from The Academy*, Sir Robert Menzies Oration on Higher Education, University of Melbourne, 2012, 2-8  
 <[http://www.uws.edu.au/\\_\\_data/assets/pdf\\_file/0013/405202/INC3553\\_VC\\_Menzies\\_Oration\\_Speech.pdf](http://www.uws.edu.au/__data/assets/pdf_file/0013/405202/INC3553_VC_Menzies_Oration_Speech.pdf)>.

<sup>63</sup> Conor King and Richard James, 'Creating a demand-driven system' in Simon Marginson (ed), *Tertiary Education Policy in Australia* (Centre for the Study of Higher Education, The University of Melbourne, 2013) 11, 11-20  
 <[http://www.cshe.unimelb.edu.au/research/policy\\_dev/docs/Tert\\_Edu\\_Policy\\_Aus.pdf](http://www.cshe.unimelb.edu.au/research/policy_dev/docs/Tert_Edu_Policy_Aus.pdf)>.

<sup>64</sup> Bradley et al., above n 15, xiii-xvii.

<sup>65</sup> In this context, some researchers have also identified a modern aspiration to achieve 'universal access' to higher education' see: Martin Trow, 'From mass higher education to universal access: The American advantage' (2000) 37 *Minerva* 1, 1-26.

<sup>66</sup> In this regard, quality improvement may be understood as giving reference to 'best practice' or 'state of the art' processes or practices which demonstrably lead to better outcomes and quality.

*standards or regulation.* An alternative example is the quality assurance function performed by AUQA that was based on external peer review.

In analysing the extent to which this standards-based regulation has contributed to improved quality in the higher education sector, the analysis below examines how the use of standards can contribute to maintaining and improving quality. In addition, it considers what aspects of quality assurance are understood to be limited through the use of this particular approach and the role of the broader quality assurance activities provided for under the TEQSA Act in assuring for quality improvement in the sector.

### 3.2.1 A standards-based framework

Standards, as they relate to quality, can be interpreted as a set of principles and/or a series of thresholds which inform an assessment of quality attainment, with the latter interpretation more commonly accepted in systems of quality assurance against which providers are regulated.<sup>67</sup> Importantly, while standards generally imply a threshold (for the purposes of measurement), this **need not equate to a minimum standard or level of quality.**

It is possible to conceive of three types of 'standards', broadly defined, with respect to systems of quality assurance:

1. a minimum standard, which represents a *threshold* that must be met in order for a provider to be considered to be of **sufficient** quality (where *sufficient* quality does not necessarily mean a *low* level of quality);
2. a normative or typical standard, which is a more elusive threshold that *should* be met in order for a provider to be considered to be of 'good' quality, where the notion of what is considered 'good' is distinct from what might be considered 'sufficient' or a minimum threshold; or
3. a high standard, which elicits notions of excellence, that may never be achievable in practice but may be continuously aspired to.<sup>68</sup>

A number of established standards in higher education (including those set out in the Threshold Standards) have historical reference points in the evolution of higher education delivery in Australia and have, in effect, become part of the *normative* standards that establish a benchmark for *typical* quality in the sector. Often, when minimum standards are set, they are considered largely irrelevant for the majority of institutions who see themselves as exceeding this minimum level. In contrast, high standards have the potential to unite institutions around an aspiration for quality improvement, based on notions of best practice or international excellence.

The Higher Education Standards Panel (HESP) has made it clear that it sees the Threshold Standards as

*"codifying the 'minimum' acceptable level of performance for providing higher education in Australia".<sup>69</sup>*

In this respect the HESP's interpretation of standards, for the purposes of regulation by TEQSA, corresponds to the first of the three types of standards outlined above (that is, a minimum threshold).

The HESP states that:

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<sup>67</sup> Scott Thompson-Whiteside, 'Assessing academic standards in Australian higher education' in Simon Marginson (ed), *Tertiary Education Policy in Australia* (Centre for the Study of Higher Education, The University of Melbourne, 2013), 39, 42

<[http://www.cshe.unimelb.edu.au/research/policy\\_dev/docs/Tert\\_Edu\\_Policy\\_Aus.pdf](http://www.cshe.unimelb.edu.au/research/policy_dev/docs/Tert_Edu_Policy_Aus.pdf)>.

<sup>68</sup> Ibid.

<sup>69</sup> Higher Education Standards Panel, *Communique Number 2* (August 2012) Australian Government Department of Education And Training, 1

<<https://docs.education.gov.au/system/files/doc/other/communique2-hestandards.pdf>>.

*"The Panel sees such 'threshold' standards as unlikely to lead to 'grades' of compliance; 'threshold' standards would either be met or not met. It is important to note that the use of the term 'minimum' is not taken by the Panel to imply 'low'."*<sup>70</sup>

Recognising this interpretation, it is important to draw a distinction between standards in *general terms* and Threshold Standards, for the purpose of regulation. In principle, some Threshold Standards may allow for an assessment with respect to a minimum compliance threshold, without precluding judgments of 'normative' or 'high' standards of quality with respect to the same Threshold Standard.

For example, standard 3.2.1 of the Threshold Standards (2015) establishes a standard that *"the staffing complement for each course of study is sufficient to meet the educational, academic support and administrative needs of student cohorts undertaking the course."*<sup>71</sup> While the term 'sufficient to meet the educational, academic support and administrative needs of students' is explicitly phrased in terms of a minimum threshold (that is, 'sufficient'), the notion of what comprises the 'needs' of student cohorts is inherently normative.

For the purposes of accreditation and registration, the Act requires TEQSA to assess this Standard with reference to appropriate threshold measures or assessments of quality in each provider's operational context, which may incorporate input- or output-based indicators. This interpretation is supported through the provision of relevant guidance notes (by TEQSA) and explanatory memoranda (by the Department). However, outside of this particular application (that is, regulation for provider registration and course accreditation), it is possible for this Threshold Standard to incorporate normative standards of quality that are more aspirational in nature, or made with reference to a 'high standard' of quality.

For example, 'student educational need' may require a high level of value-added in learning outcomes, or the successful attainment of a vocational outcome that exceeds that achieved by most existing providers or courses. Such a *standard* would clearly be inappropriate for the purpose of *regulation* (in particular, for registration or accreditation) which are the key activities of TEQSA, but may play an important role in supporting continuous quality *improvement*. Normative standards may also support broader quality assurance activities such as those envisaged by section 60 of the TEQSA Act.

In recognition of the potentially normative aspects of the Threshold Standards, TEQSA has stated that:

*"The standards are applied flexibly and with regard to the diversity of teaching methods and delivery modes that exist and are emerging within the sector. The standards are not intended, or applied, to limit higher achievement."*<sup>72</sup>

### **3.2.2 What is missing from a standards-based framework of quality assurance?**

A 'standards'-based framework for quality assurance may be effectively understood in contrast to a 'fitness-for-purpose'-based framework. As outlined in paragraph 3.2.1 above, a standards-based framework can make reference to objective, outcome-oriented Standards that are applied universally across all providers. In contrast, a 'fitness-for-purpose'-based framework (which was the objective of the AUQA peer-review, quality assurance model) emphasises *input or process-based* quality assurance, which has *"an important role [to play] in monitoring the processes and performance of achievements*

<sup>70</sup> Ibid.

<sup>71</sup> Higher Education Standards Framework (Threshold Standards) 2015 (Cth), 8.

<sup>72</sup> TEQSA, Regulatory approach <<http://www.teqsa.gov.au/regulatory-approach>>.

*against an institution's own set of standards, but arguably does not demonstrate that standards have been achieved".<sup>73</sup>*

This is not to suggest that standards (including the Threshold Standards) cannot incorporate aspects of quality assurance related to inputs and processes; including where such processes provide for ongoing *quality improvements*.<sup>74</sup> Indeed, the maintenance of quality improvement cycles form an important part of the current Threshold Standards (2015). Rather, it is *regulation* pursuant to a universal set of Threshold Standards that distinguishes the current framework from its predecessor.

Importantly, as outlined in paragraph 3.2.1 above, *regulatory enforcement* of Threshold Standards relies on a universal minimum threshold standard—which is defined with reference to universal quality measures, and/or processes that assure quality improvement. That is, providers can be assessed as being at risk of not meeting the Threshold Standards, currently not meeting the Threshold Standards, or not at risk of not meeting the Threshold Standards. The regulator can only *require* changes to a provider's behaviour where an assessment is made that this provider is at risk of not meeting, or found to not meet, the Threshold Standards. In this regard, the enforcement of standards (by itself) may improve quality, but usually only insofar as this quality improvement is essentially *remedial* in nature. That is, where improvements are mostly limited to instances where quality or associated quality assurance practices are raised from a level below that required by the minimum Threshold Standards (or address a risk of future non-compliance with the Threshold Standards).

Regulation against the Threshold Standards has a limited capacity to incentivise the achievement of a normative, or higher standard above what is considered sufficient for the purposes of meeting the Threshold Standards (which may be associated with higher levels of quality, or enhanced processes of continuous quality improvement). This application of Standards through regulation necessarily has limited reference to a more aspirational vision of quality or *quality improvement* for individual providers, or for the sector as a whole.

In this regard, a distinction can be made between (1) the *regulatory* functions of TEQSA; and (2) *quality assurance (and assurance of quality improvement)* functions more broadly. This distinction draws attention to the objectives of AUQA, whose quality assessments and recommendations aimed to provide assurance of quality improvement.

There is no direct replacement for this role in a system based only on regulation against standards (recognising that the TEQSA Act established a system that extends beyond just regulation, including, in particular, quality assessments). Regulation against standards can assess whether providers have quality assurance processes that meet a particular standard, but it may not more proactively audit whether these processes have actually resulted in quality improvements.

This is not to suggest that the TEQSA Act does not provide for standards that support processes of continuing quality improvement, including those based on peer review. For example, section 5 of the 2015 Threshold Standards is headed "Institutional Quality Assurance"; it deals with matters including course approval and accreditation and with monitoring, review and improvement. TEQSA has made it clear that this requires that higher education providers undertake:

*"Frequent monitoring of the day-to-day delivery of courses of study e.g. periodic reviews of units and annual review of student performance. TEQSA will expect to see that such reviews are conducted (or will be conducted in the case of a new provider or course of study) according to the requirements of the Threshold*

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<sup>73</sup> Thompson-Whiteside, above n 67, 41.

<sup>74</sup> See Gibbs, above n 59, 43.

*Standards as part of the provider's normal operations, and that the findings of the reviews are evidently used to generate improvements. In demonstrating that it meets this Threshold Standard, a provider will need to demonstrate in particular that reviews of courses of study involve considered oversight by the institutional academic governance processes, external referencing (which can include moderation of assessment against other programs, benchmarking of student success and course design against programs at other providers) and feedback from students.”<sup>75</sup>*

Standards of this kind go some way towards closing the gap between a model based on external peer review and one based on standards. However, the monitoring of peer review (for the purposes of quality improvement) at a comprehensive *institutional level* is not currently supported by Threshold Standards established under the TEQSA Act.

It should be emphasised that the TEQSA Act establishes a system of quality assurance that is more expansive than standards-based regulation. The powers of TEQSA to undertake broader quality assurance activities are a critical aspect of the Act, and help support TEQSA in monitoring and assuring for quality beyond the narrow functions of provider registration and course accreditation. Currently these activities have included the recent TEQSA conference which focused on best practice activities and processes, and support for systematic issues of quality in the sector (such as those relating to admissions), among other activities.

Recognising the relative infancy of TEQSA and the changes to its focus and direction over the past few years, there currently does not appear to be a coherent view of the practical way in which TEQSA's functions (regulation and quality assurance) interact with each other. Similarly, a clear view is still emerging of the extent to which the Act supports quality assurance and quality improvement beyond the primary function of standards-based regulation.

Independently of TEQSA, the QILT website (which provides transparency of a limited set of quality indicators) also has a role to play, through its influence on student-driven 'market forces', as a form of quality assurance. Commonwealth, and State and Territory Governments, through policy direction and funding, also play an important role in establishing future directions for the sector.

If TEQSA is first and foremost a (standards-based) *regulator* of the sector, it has limited capacity to set an aspirational vision for quality improvement. This is notwithstanding the important and necessary work that TEQSA does and should continue to do with respect to broader quality assurance activities, and through its key activities regarding provider registration and course accreditation.

This finding **should not be interpreted as a criticism of the TEQSA Act (or TEQSA) having regard to the purpose for enacting the Act** —to maintain (through standards-based regulation) the high quality of Australia's higher education system following the introduction of the demand driven system. Nonetheless, it does point to a potential role within the broader quality assurance regime to provide for greater 'assurance of quality improvement', towards an aspirational vision of quality for the sector. As one researcher has questioned when examining the role of TEQSA in supporting an expansive vision of quality assurance:

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<sup>75</sup> TEQSA, *HESF Domain 5: Institutional Quality Assurance*, [5.3] <<http://www.teqsa.gov.au/hesf-domain-5-institutional-quality-assurance>>.

*"What will drive more aspirational behaviour on the part of providers? What will encourage universities and other providers to continue to lift quality, and seek excellence in research and education?"<sup>76</sup>*

Of course, this vision should be a shared one. Government (including the Department), the sector and the regulator will play a role in setting, monitoring and achieving this vision.

These observations are drawn upon again in relation to Term of Reference Two of this Review.

### 3.3 Measures of quality in the higher education sector

The type of measures used in quality assurance frameworks depend on the purpose for which they are used. In general terms, there are three types of quality indicators and measures:

1. **Input**—measures of the contributing elements to higher education activity, such as course content, academic qualifications of staff, and class sizes.
2. **Throughput**—processes which support the activity of higher education, such as peer review, self-evaluation, and internal reporting requirements.
3. **Output**—typically observations of student achievement and higher education value, often represented in the form of student outcomes or evaluations of the student experience. Higher level (more aggregate) output indicators also include the capacity to meet workforce demands and the societal impacts of an educated citizenry.<sup>77</sup>

Drawing on evidence from the outcomes of TEQSA's quality assessments, as well as other key sources of evidence, the following paragraphs are structured in terms of:

1. Measures derived from TEQSA's regulatory activities;
2. Institutional-level measures; and
3. Student-level measures.

This evidence is not intended to provide for a definitive assessment of quality in Australian higher education. Rather, the paragraphs below include a brief overview of what can be determined about quality at the aggregate sector level, given the available data. Recognising the limitations of the available evidence, the discussion of quality measures provides context for the Review in determining the extent to which quality is understood to have broadly changed in the sector, following the introduction of the TEQSA Act.<sup>78</sup>

#### 3.3.1 TEQSA's regulatory activities

TEQSA has collected data on all assessments of provider registration and course accreditation applications since 2012, as well as data on risk assessments of each higher education provider.<sup>79</sup> Recognising that TEQSA considers a range of indicators of quality as part of a multivariate analysis of quality, evidence of assessments across the sector over time provides some indication of how overall quality in the sector has changed following the introduction of the TEQSA Act.

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<sup>76</sup> Pip Pattison, 'Standards and Quality in Australian Higher Education' in Richard James, Sarah French and Paula Kelly (eds), *Visions for Australian Tertiary Education* (Centre for the Study of Higher Education, The University of Melbourne, 2017), 101,102 <[http://melbourne-cshe.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0006/2263137/MCSHE-Visions-for-Aust-Ter-Ed-web2.pdf](http://melbourne-cshe.unimelb.edu.au/__data/assets/pdf_file/0006/2263137/MCSHE-Visions-for-Aust-Ter-Ed-web2.pdf)>

<sup>77</sup> Thompson-Whiteside, above n 67, 47.

<sup>78</sup> It should be noted these indicators represent the best data currently available, but this is not an exhaustive list of all indicators that are needed to offer a fulsome assessment of quality in the higher education sector.

<sup>79</sup> See paragraph 2.2.4 above regarding risk assessments conducted by TEQSA.



### TEQSA risk assessment data

As providers are assessed at least once every seven years, TEQSA collects annual data to ascertain the risks to quality posed by providers between provider assessments (TEQSA risk assessments are explained in paragraph 2.2.4 of this Report). To monitor risk, TEQSA conducts annual risk assessments by collecting a suite of relevant indicators regarding all higher education providers. These indicators are used to make an assessment of each provider's:

- **risk to financial position**, which takes into account the provider's financial viability and sustainability; and
- **risk to students**, which takes into account student load, experience and outcomes.

The risk assessments are a qualitative expert judgment taking into account the provider's context, history and standing, and an analysis of risk indicators.<sup>80</sup> That is, the risk indicators themselves are used only to indicate areas that TEQSA may want to investigate in providing the overall risk rating. The outcome of these assessments is each provider being classified as 'high-', 'medium-' or 'low-risk' by TEQSA.<sup>81</sup>

Overall, the TEQSA risk indicators show a small increase in the number of providers assessed as 'moderate-' or 'high-risk' over time. A lack of movement between risk categories across both domains (risk to financial position and risk to students), indicates risks to the sector being isolated to a small number of providers. It should, however, be noted that these are not final assessments of quality; they are only indicators that an institution is at greater *risk* of deteriorating in quality, based on various measures and indicators available to TEQSA in making its assessments.

### 3.3.2 Institutional level measures

Institutional quality criteria are measured in terms of scholarly standards or institutional reputations that are effectively grounded in the quality of research and the academic qualifications of teaching staff.<sup>82</sup>

In addition to overall reputation, institutional level measures of quality also include 'presage' (or input-based) dimensions of quality; these include, funding, staff to student ratios, the quality of teaching staff and other aspects of how providers invest in and 'produce' higher education teaching and learning, and research.<sup>83</sup>

A summary of evidence under each of these elements of institutional-level quality is provided below.

### International university rankings

International university rankings can be viewed as a signal of the quality of higher education institutions.<sup>84</sup> Rankings generally focus on academic research indicators (such as peer-reviewed journal citations) as the basis for their rankings. Two ranking systems—the Times Higher Education (TimesHE) World University Rankings, and the QS World

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<sup>80</sup> TEQSA, above n 30, 5-7.

<sup>81</sup> TEQSA risk indicators, in their current form, have been collected since 2014. Variations in risk rating are therefore illustrated below by presenting the changes to assessment outcomes over time, between 2014 and 2016. As the risk to quality of the higher education sector is considered to be more significant from new, non-university providers entering the market, the data has also been stratified into universities and NUHEPs. This allows for comparisons of the risks borne by NUHEPs, separate to universities.

<sup>82</sup> Probert, Belinda, 'The quality of Australia's higher education system: How it might be defined, improved and assured' (2015) *Discussion Paper 4, Office for Teaching and Learning, Australian Government*, 19-21 < <http://www.hes.edu.au/assets/HECQN-2015/Probert-Quality-Aust-HE-2015.pdf>>.

<sup>83</sup> Gibbs above n 59, 14.

<sup>84</sup> Using international rankings as a measure of quality has a number of weaknesses. In particular, the rankings identify only the highest performing universities and do not extend to NUHEPs. Accordingly, they do not give a holistic view of the quality of the sector.

University Rankings—include indicators of teaching and learning in their rankings system in addition to research.<sup>85</sup>

Overall, rankings of Australian institutions among world ranking systems show some evidence that quality of the higher education system has improved over time. The number of Australian universities ranked as being in the top 500 in the world has grown over recent years, with 23 and 24 ranked in the QS and TimesHE top 500 university rankings, respectively. Further, six Australian universities are included in the top 100 best global research institutions in the 2016 Academic Ranking of World Universities (ARWU), the most ever recorded for Australia since the ARWU was established in 2003.<sup>86</sup>

The 2015 Excellence in Research for Australia (ERA) evaluation of research conducted within Australia's higher education research institutions provides further evidence of improvement in research output and quality. Since 2012, research output at higher education research institutions has grown by 5% (in terms of volume), while total research 'esteem', as measured through the ERA, has grown by 10%.<sup>87;88</sup>

### **'Presage' dimensions of quality**

Input based measures such as staff to student ratios, and teaching staff qualifications, are often considered as proxy indicators of quality at an institutional level.<sup>89</sup>

Over recent years, there has been a trend at Australian universities towards higher ratios of students to staff, in terms of both academic, and non-academic staff.<sup>90</sup> This trend is understood to be related to a range of factors, including the intent of universities to improve on operating costs and efficiency and investing in other aspects of the student experience. Importantly, while this measure may be traditionally considered as a proxy for teaching quality, there is limited evidence to suggest a link between moderate changes in student to staff ratios and student learning.

A related trend to overall staff to student ratios has been a general increase in the rate of casualisation of the higher education workforce and the rise of contingent (contract based) academic employment at Australian universities. The share of university staff employed on a casual basis has increased from 20% in 1990 to around 45% in 2013 (noting that much of this increase occurred from the period 1990-2000, and then from 2008-2013).<sup>91</sup>

Similar analysis may be conducted for a wide range of input based measures for Australian universities, however there is limited evidence to suggest a link between these

<sup>85</sup> QS World University Rankings are based on 6 indicators across four domains: research, teaching, employability and internationalization. See <http://www.topuniversities.com/qs-world-university-rankings/methodology> (accessed 30 January, 2017). THE rankings are based on 13 indicators covering four domains: teaching, research, knowledge transfer and international outlook. See <https://www.timeshighereducation.com/world-university-rankings/methodology-world-university-rankings-2016-2017> (accessed 30 January 2017).

<sup>86</sup> Academic Ranking of World Universities, ARWU top 100 2016, <<http://www.shanghairanking.com/ARWU2016.html>>.

<sup>87</sup> The ERA evaluation measures 'esteem' through a variety of measures, including 'editor of a prestigious work of reference'; 'Recipient of a Nationally Competitive Research Fellowship'; and 'Membership of a learned academy or AIATSIS'. See [http://www.arc.gov.au/sites/default/files/filedepot/Public/ERA/ERA%202015/ERA\\_2015\\_National\\_Report/ERA2015\\_Appendices.pdf](http://www.arc.gov.au/sites/default/files/filedepot/Public/ERA/ERA%202015/ERA_2015_National_Report/ERA2015_Appendices.pdf) (accessed 6 February 2017).

<sup>88</sup> Australian Research Council (ARC), 'State of Australian University Research 2015–16: Volume 1 ERA National Report' (Australian Research Council, 2016) 35-36 <<http://www.arc.gov.au/era-reports>>.

<sup>89</sup> Gibbs above n 59, 14.

<sup>90</sup> Andrew Norton and Beni Cakitaki, 'Mapping Australian higher education 2016' (Grattan Institute, August 2016) 13-26 <<https://grattan.edu.au/wp-content/uploads/2016/08/875-Mapping-Australian-Higher-Education-2016.pdf>>.

<sup>91</sup> Stuart Andrews et al., 'Contingent academic employment in Australian universities' (LH Martin Institute, 2016) 14 <<http://www.lhmartininstitute.edu.au/documents/publications/2016-contingent-academic-employment-in-australian-universities-updatedapr16.pdf>>.

aggregate factors and overall higher education teaching quality (particularly with respect to student outcomes).<sup>92; 93</sup>

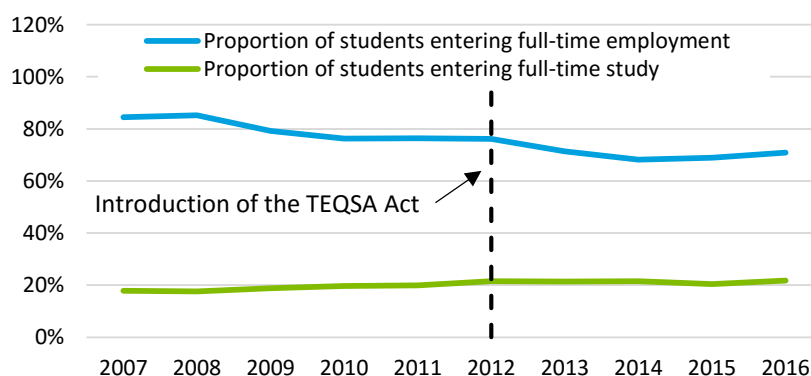
### 3.3.3 Student level measures

For the individual student, the quality of higher education correlates with their observed achievement upon graduation, as well as the (more intangible) personal growth that they may experience. The first of these attributes is largely understood in terms of vocational outcomes, measured by employment and wages (as a measure of skill or productivity, often in a professional setting). The latter attribute may encompass broader personal attributes such as critical thinking, ethical intelligence, and a sense of community and development of character.<sup>94</sup>

#### Employment and further study outcomes

The Graduate Destination Survey considers the transition of university graduates four months after course completion.<sup>95</sup> These results are shown in Chart 3.1 below. Notably, the share of graduates in full-time employment has been declining steadily since 2007 (from 84% in 2007 to 71% in 2016).

Chart 3.1 Student post-university transition outcomes



Source: Deloitte Access Economics analysis of the Graduate Destination Survey.

In general terms, the decrease in numbers of graduates in full-time employment can be understood to reflect three main influences: a change in labour market conditions; a change in the supply of graduates; and structural changes in the graduate labour market (which may include changes to the preferences of graduates or their capabilities which result from the *quality* of their higher education).<sup>96</sup>

There is some evidence that suggests that recent declines in graduate outcomes are not fully explained by demand and supply side labour market conditions. This may suggest that an emerging structural change in graduate employment outcomes has occurred in recent years—which may relate to the underlying quality of Australian higher education,

<sup>92</sup> See for example: Norton and Cakitaki, above n 90.

<sup>93</sup> The reliance on process and input based indicators of quality in higher education in lieu of robust student outcome measures has led several commentators to call for greater transparency in how higher education providers invest resources in teaching and learning activities, to allow for a more systematic and objective assessment of quality—see for example: Andrew Norton and Ittima Cherastidham, 'The cash nexus: how teaching funds research in Australian universities' (Grattan Institute, November 2015) <<https://grattan.edu.au/wp-content/uploads/2015/10/831-Cash-nexus-report.pdf>>.

<sup>94</sup> Probert above n 82, 12-17

<sup>95</sup> NUHEPs were only included in the survey in 2015. To allow for comparability over time, only the outcomes of university graduates are presented.

<sup>96</sup> Tom Karmel and David Carrol, 'Has the graduate job market been swamped?' (NILS working paper series No 228, 2016) 9 and 13 <<http://www.flinders.edu.au/sabs/nils-files/publications/working-papers/WP%20228%20Has%20the%20graduate%20job%20market%20been%20swamped.pdf>>.

as a central source of human capital for the labour market.<sup>97</sup> These findings are by no means definitive and—among other factors—do not account for the changing characteristics of students who participate in higher education. As such, it is too early to conclude that this analysis is evidence of declining quality in the sector.

Graduate outcomes three years after graduation ('medium-term employment outcomes') have also declined modestly between 2007 and 2016, from 92.6% of graduates in full-time employment in 2007, to 88.4% in 2016 (recognising that this period includes the Global Financial Crisis of 2008/09).<sup>98</sup> The growing gap between short- and medium-term employment outcomes suggests graduates are taking longer to establish themselves in the labour market, but are eventually successful in finding full-time work.<sup>99</sup>

In general, it is not possible to conclude whether or not such a trend is unfavourable for higher education graduates, as these measures do not account for the quality of the employment outcomes achieved by graduates. This unobserved measure of quality may be related to the time spent seeking employment (that is, search time spent to find the job that best fits a graduate's skills).

### Student experience surveys

As a measure of quality, surveys of student experience provide an indication of the quality of the teaching and learning environment, including the resources and support provided to students in undertaking their studies. These indicators are also proxies for the criterion of student achievement or 'real learning', in the absence of well-established, direct measures of value-added outcomes for students. In this regard, there are understood to be some limitations, as research has shown that students may be poor judges of the longer term transformational potential of their immediate learning environment.<sup>100; 101</sup>

The Student Experience Survey (SES) measures five aspects of the student learning experience: Skills Development, Learner Engagement, Teaching Quality, Student Support, and Learning Resources. Data collection began in 2012 and at that time included only students enrolled in universities. In 2015, the survey expanded to include students enrolled at NUHEPs (limited data for these students was available for this Review).

Overall, student satisfaction measured through the SES has remained stable over the survey period. There is also little variation in responses, with minimum and maximum satisfaction rates across each university very similar to the average satisfaction rate.<sup>102</sup> While satisfaction rates among existing students have been steady, the satisfaction of students *completing* their courses has been steadily increasing over the same period.<sup>103</sup>

Testing specific areas of student satisfaction reveals all domains have either been stable or improving since 2012 (Chart 3.2). There could be various explanations for the stability or improvement of these indicators, such as improved teaching methods, improved use of technology or better alignment with regulatory standards.<sup>104</sup>

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<sup>97</sup> Ibid, 22.

<sup>98</sup> Social Research Centre, *2016 Graduate Outcomes Survey – Longitudinal. Medium Term Graduate Outcomes* (November 2016) Social Research Centre and Department of Education and Training, 2016, 3 <<https://www.qilt.edu.au/docs/default-source/gos-reports/2016/gos-l-national-report.pdf?sfvrsn=8>>.

<sup>99</sup> Ibid.

<sup>100</sup> Probert, above n 82, 19.

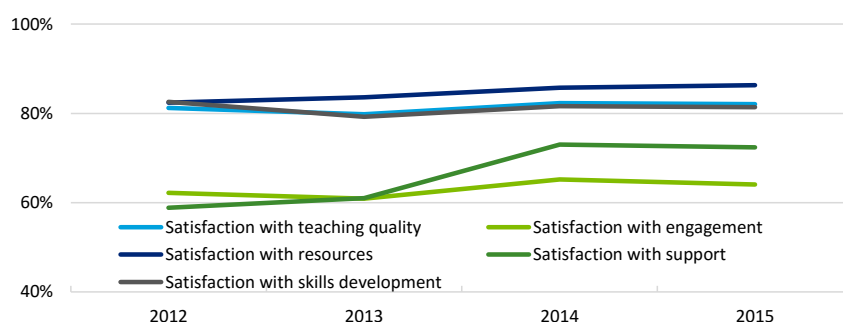
<sup>101</sup> Michela Braga, Marco Paccagnella and Michele Pellizzari, 'Evaluating Students' Evaluations of Professors' (IZA Discussion Paper No. 5620, April 2011) 30-31 <<http://ftp.iza.org/dp5620.pdf>>.

<sup>102</sup> It is understood that student survey measures are generally more variable across higher education disciplines than higher education providers and that the value of these surveys is often more apparent within (rather than across) institutions (see Probert, above n 82, 27-34). Analysis at a discipline level was not available for this review.

<sup>103</sup> Norton and Cakitaki, above n 90, 77.

<sup>104</sup> Ibid.

Chart 3.2 Student satisfaction with their university across a variety of indicators



Source: Deloitte Access Economics analysis of the Student Experience Survey data provided by the Australian Government Department of Education and Training.

### Student completions

Longitudinal analysis of student completion by the Department of Education and Training has found that the four year completion rate (that is, the rate of student completion of study four years following commencement) for the 2010 and 2011 university student cohorts was around 45%, compared with an average of around 46-47% for the 2005 to 2009 cohorts.<sup>105</sup> For students at NUHEPs, four years after commencement, 39.2% of 2011 cohort students had completed a course, 19.1% were still enrolled, and the remainder had either re-enrolled, but dropped out before 2014 (18.4%) or never returned after 2011 (23.2%).<sup>106</sup>

Overall, these marginal changes in overall completion rates do not suggest any significant deterioration in quality has occurred with the recent expansion of the higher education system, and the subsequent introduction of the TEQSA Act.

### 3.3.4 Conclusions

A targeted assessment of aggregate measures of quality in the Australian higher education sector does not reveal any significant change to overall quality in the sector. However, this Review recognises the limitations in attributing variation in quantitative measures of quality over time to the TEQSA Act. As such, the data and analysis presented here is considered to be largely contextual in nature.

Recognising this context, in Chapter 5, when identifying what impact the Act has had on higher education, this Review focuses on the behaviour of providers with respect of ongoing quality improvement, relative to what would have otherwise occurred in the absence of the Act. That is, it is through the ways in which the TEQSA Act has changed behaviour at the provider level that this Review seeks to determine the impact that the Act has had on quality in the sector.

<sup>105</sup> Department of Education and Training, Australian Government, *Completion Rates of Higher Education Students Cohort Analysis, 2005-2014* (2017), 4  
<[https://docs.education.gov.au/system/files/doc/other/cohort\\_analysis\\_2005-2014\\_0.pdf](https://docs.education.gov.au/system/files/doc/other/cohort_analysis_2005-2014_0.pdf)>.

<sup>106</sup> Ibid.

## 4 Term of Reference One: What has changed for the sector in moving to a single national regulatory framework from multiple State- and Territory-specific arrangements

This Chapter examines what it has meant for Australia's higher education sector to operate under a single national framework as established by the TEQSA Act. A 'single national framework' is understood to mean:

- one regulator with the responsibility for assuring the quality of all higher education provision across all Australian jurisdictions; via
- national registration, accreditation and risk assessment processes that are underpinned by a single set of Threshold Standards.

The primary rationale for moving to a standards framework regulated by TEQSA was to provide a more robust assurance of quality across a sector facing a significant expected increase in higher education places and in higher education providers. Moving to a national regulator and a standards framework was also expected to deliver other benefits. These included the *direct* benefits that harmonisation of regulation across state boundaries typically brings, including lower compliance burdens for multi-jurisdiction operators, as well as *indirect* benefits, including economies of scale and scope that can improve the efficiency and efficacy of regulation, and benefits to providers from the ability to discuss common concerns relating to quality or data.

At the outset, it should be noted that Australia has not quite achieved a single national regulatory framework for higher education. As explained in paragraph 2.3 above, TEQSA can regulate only those entities that fall within the constitutional reach of the TEQSA Act. There are some gaps in the reach of the Act and in TEQSA's regulatory purview. In its submission to this Review, TEQSA noted that it has:

*"referred a small number of entities to the relevant state governments for offering higher education without being registered to do so, where those entities fall outside TEQSA's remit. A small number of other higher education providers*

*previously registered under state legislation were also unable to obtain registration with TEQSA for this reason.*<sup>107</sup>

The only way in which a truly national regulatory framework could be achieved would be through the states and territories referring their legislative powers regarding the regulation of higher education to the Commonwealth. Given the small number of providers operating in Australia beyond the reach of the TEQSA Act, the Review regards the issue as immaterial and does not recommend seeking a referral of powers at this time. Should a problem arise in the future, this matter might be reconsidered and the Review recommends a 'watching brief' approach to this.

**Recommendation 1.1:**

**TEQSA and the Department should keep under review the number of Australian higher education providers that are not regulated entities and cannot apply for registration under the TEQSA Act. If the number increases significantly, or if the lack of regulatory controls detracts from the quality of the provision of higher education in Australia, consideration should be given to seeking a referral of legislative powers from the States and Territories to the Commonwealth; this would allow the Act to be amended to enable TEQSA to operate as a truly national regulator.**

The remainder of this Chapter assesses the extent to which the various potential benefits of moving to a single national framework have been realised. These benefits could include:

- greater consistency and transparency in regulation relative to the former State- and Territory-based systems;
- reduced burdens on those providers subject to multiple regulatory processes as a result of operating in more than one Australian State or Territory;
- a 'better' regulator, with the ability to develop a greater understanding of the higher education sector and how to regulate it effectively; and
- improved reputation of Australia's higher education sector.

The findings of this Review are based on the experiences and perceived benefits to providers operating both before and following the establishment of TEQSA. The Review also draws on findings from a sector-wide survey of providers undertaken by TEQSA in July 2016 and published in its TEQSA Regulator Performance Framework Report 2015-16.<sup>108</sup>

#### 4.1 Greater consistency and transparency in regulation

One of the objects of the TEQSA Act is to "provide for national consistency in the regulation of higher education" (see paragraph 3(a) of the Act). A single national regulatory framework was considered necessary to assure quality across the whole of Australia's higher education sector, and in a way that is transparent to both domestic and international stakeholders.

Consistent national regulation leads to uniformity in the approach to regulation; as Universities Australia noted in its submission:

*"There is now no issue of differing requirements or processes between jurisdictions, so there is no possibility that differing levels of rigour can accidentally arise."*<sup>109</sup>

<sup>107</sup> TEQSA, above n 50, 6.

<sup>108</sup> TEQSA, *TEQSA Regulator Performance Framework Report 2015-2016* (November 2016) <[http://www.teqsa.gov.au/sites/default/files/TEQSARegPerfFrameworkReport2015\\_2016.pdf](http://www.teqsa.gov.au/sites/default/files/TEQSARegPerfFrameworkReport2015_2016.pdf)>.

<sup>109</sup> Universities Australia, submission, *Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector*, November 2016, 2.

Equally important is the *perception* of consistent quality across Australia's higher education sector. Consultations reinforced the notion that the reputation of the sector has benefited significantly from being seen to be regulated at a national level.

Regulation of the higher education sector before the introduction of the TEQSA Act did not provide a sound basis for consistency and transparency. With responsibility allocated to State and Territory governments, regulation of higher education in Australia was governed by eight distinct Acts of Parliament and as many decision-making bodies. The number of different instruments and decision-makers militated against consistent and transparent regulation.

In its submission to this Review, TEQSA explained:

*"While the legislative tests for assessment of applications for registration or course accreditation were linked to the National Protocols for Higher Education Approval Processes (National Protocols), the means by which those links were made varied across the relevant legislation. The State/Territory Acts also differed in relation to matters including the specification of the other legislative requirements to be met by applicants, the nature of what was required to be submitted and the nature of the decision maker (in some cases the relevant Minister, in some cases officials in the Minister's Department and in other cases a statutory body established under State/Territory law). These differences in approaches were exacerbated by the lack of a mechanism to moderate regulatory outcomes."*<sup>110</sup>

This assessment is supported by the findings of the *Review of Australian Higher Education*<sup>111</sup> and affirmed by the sector in views expressed to this Review. This is not to say that there were no efforts to enhance consistency between the State and Territory systems that existed prior to TEQSA, but the current system, both in principle and in practice, is characterised by a greater degree of consistency than previously existed.

When commenting on the previous State and Territory systems, providers operating in more than one jurisdiction referred to the need to reproduce application materials to meet specific jurisdictional requirements and they identified jurisdictions that had requirements that were 'easier' to meet.

The TEQSA Act established a single, independent national regulator that would be solely responsible for provider registration and course accreditation using a single set of Threshold Standards. By combining in TEQSA regulatory activities previously undertaken by eight different bodies, the TEQSA Act is seen by the sector as having introduced a more consistent regulatory *process*.

The same set of rules and standards now govern the process from which regulatory outcomes are determined throughout Australia; all of which is administered by a single decision-making body. It is no longer possible – if it ever was – for a provider to seek entry into the higher education sector via a 'low threshold' jurisdiction.

The TEQSA Act also appears to have instilled greater confidence in the consistency of regulation across Australia. For example, the Council of Private Higher Education (COPHE) reflected a commonly expressed view from the sector:

*"A single national regulator in TEQSA and Higher Education Standards, against which it regulates, with the standards applicable across all institutions delivering*

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<sup>110</sup> TEQSA, above n 50, 4.

<sup>111</sup> Bradley et al, above n 15.



*higher education ... established the basis for confidence in the quality of Australian higher education.*"<sup>112</sup>

The TEQSA Act and the Threshold Standards set out the requirements that must be met to be registered as a higher education provider operating in Australia. As the single regulator, TEQSA is able to communicate nationally consistent advice to providers about issues and outcomes regarding these requirements.

This can facilitate collaboration and benchmarking among providers as well as the establishment of networks to address common issues related to quality, governance and data collection and dissemination. For example, Charles Sturt University (CSU) suggested that:

*"A unified national regulatory framework has also assisted in building partnerships, both domestically and internationally, and in benchmarking processes against other institutions. It is now easier to obtain information about practice and institutions across the entire sector without needing to contact multiple State and Territory departments."*<sup>113</sup>

Similar sentiments were expressed during consultations with the sector.

Deakin University commented that the *"establishment of a single national framework has provided a common basis for collaboration and benchmarking between providers across Australia..."*. Formal steps to assist benchmarking have also been coordinated through representative groups of providers, such as recent work by COPHE in this regard. These networks were less likely to develop when providers operated under different jurisdictional rules.

The weight of evidence and opinion points to greater consistency and transparency in the regulation of higher education arising from the TEQSA Act, but a small number of providers raised a different form of inconsistency. For example, Macleay College commented:

*"The Act and its regulations incorporated many terms and requirements that are subject to the interpretation and discretion of TEQSA officers. Thus, inconsistencies between States were replaced with inconsistencies in interpretation across TEQSA. Still, perhaps a marginal gain."*<sup>114</sup>

This did not reflect a widely held view and the potential for inconsistency *within a regulator* cannot easily be controlled for by an Act. In assessing whether its dealings with higher education providers are open, transparent and *consistent*, TEQSA's survey of providers, undertaken as part of its Regulator Performance Framework Report 2015-16, found that:

*"74.8% of principal contacts (and around 84% of those from low risk providers) rated consistency of information provided to their organisation as good or excellent. Consistency of TEQSA's decisions about their organisation was rated at 73.7% in total (and over 80% for low risk providers)."*<sup>115</sup>

The extent to which the benefits of moving to a single national regulator have been realised has depended in part on TEQSA's interaction with the sector. On balance, the feedback and the evidence are positive.

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<sup>112</sup> Council of Private Higher Education, submission, *Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector*, November 2016, 1.

<sup>113</sup> Charles Sturt University, submission, *Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector*, November 2016, 6.

<sup>114</sup> Macleay College, Submission, *Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector*, November 2016, 1.

<sup>115</sup> TEQSA, above n 108, 24.

#### 4.2 Reduced burdens for multi-jurisdictional providers

The simplicity of the national approach has been particularly beneficial for providers that operate in more than one Australian jurisdiction. Charles Darwin University, an example of such a provider, offered a view shared by many in the sector:

*"Having a single set of national standards, supported by consistent processes run by a single regulator, has made working nationally considerably simpler while retaining appropriate regulatory oversight."<sup>116</sup>*

These providers have also benefited from streamlined processes that reduce the burden associated with having to comply with different (and often duplicate) State and Territory processes and reporting requirements. They are now governed by a single application process and are no longer required to complete multiple forms (and pay multiple fees).

#### 4.3 A 'better' regulator

A national regulator may be able to provide improved regulation relative to individual State and Territory regulators through:

- improved knowledge of the sector through staff having experience across a broader range of providers;
- other economies of scale contributing to the in-house knowledge base relative to smaller individual regulators;
- the ability to undertake research at the sectoral level allowing a better understanding of the sector and identification of issues as they arise;
- greater ability for the sector to form networks of providers that can share in benchmarking and best practices; and
- the ability of the regulator to bring the sector 'under one roof' to convey ideas, share research or facilitate sharing of best practices.

The evidence provided by the comments made by the sector suggests that these benefits have been achieved under TEQSA. A proviso relates to the fact that some providers noted that high staff turnover at TEQSA may have limited its ability to accumulate knowledge.

A possible benefit of moving to a single national regulator is the potential for sector-wide research and analysis to contribute to a better understanding of the sector and quality issues or other trends.<sup>117</sup> TEQSA has undertaken research and analysis beyond its core regulatory functions. This is mainly in the form of statistical reports and financial metrics, but more recently includes working papers on particular topics of interest. In March 2015, at the direction of the then Minister for Education and Training, TEQSA produced a *Report on Student Academic Integrity and Allegations of Contract Cheating by University Students*.<sup>118</sup>

In January 2016 TEQSA published its first *Regulator Performance Framework Report*. Only around 60% of principal contacts surveyed by TEQSA rated the availability of material regarding trends and observations on sector performance as good or excellent; this represents one of the lowest regulatory performance areas examined. Stakeholders commonly requested that TEQSA:

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<sup>116</sup> Charles Darwin University, submission, *Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector*, November 2016, 1.

<sup>117</sup> Indeed, the TEQSA Act aims to facilitate this. For example, paragraph 134(1)(e) of the Act permits TEQSA "to collect, analyse, interpret and disseminate information relating to (i) higher education providers; and (ii) regulated higher education awards; and (iii) quality assurance practice, and quality improvement, in higher education; and (iv) the Higher Education Standards Framework. Paragraph 134(1)(g) provides that TEQSA can "conduct training to improve the quality of higher education".

<sup>118</sup> TEQSA, *Report on Student Academic Integrity and Allegations of Contract Cheating by University Students* (March 2015) <<http://www.teqsa.gov.au/sites/default/files/publication-documents/ReportOnAllegationsOfStudentMisconduct.pdf>>.

*"create more opportunities to share better practice and to discuss the sector in general, including provision of more information on trends and sector benchmarks."*<sup>119</sup>

The inaugural TEQSA Conference in November 2016 - *Sharing Excellence: Assuring Quality* - made it possible for higher education stakeholders to meet as a single national sector and share insights on best practice. Stakeholders were overwhelmingly supportive of the event; indeed it might have been of value to providers had TEQSA commenced such initiatives earlier in its existence.

Finally, a single national regulator is better placed to engage with international regulatory networks than individual state regulators. TEQSA has agreements and affiliations with international higher education quality regulators. For example, in September 2016, TEQSA signed a Memorandum of Cooperation with the Higher Education Evaluation Centre, a national Chinese authority for higher education quality assurance, monitoring and evaluation, with responsibility *inter alia* for accreditation and educational quality monitoring in China. The Memorandum of Cooperation includes an agreement to *"collaborate in external review, taking multiple forms as appropriate, such as considering the feasibility of joint accreditation of Sino-Australian programs (or institutions) and regulation of providers"* and to *"develop an approach to implement joint accreditation to the extent possible"*.<sup>120</sup>

TEQSA also signed a Memorandum of Understanding (MoU) with the China Education Association for International Exchange (CEAIE) in 2014. This MoU outlines an agreement to collaborate in several areas, including exchanging information regarding each body's approach to quality assurance and considering the joint accreditation of Sino-Australian programs or institutions. This built on a 2013 Agreement on Cooperation in Higher Education between Universities Australia and the CEAIE, which included an intention to work towards mutual recognition of qualifications. TEQSA has similar partnerships and agreements with regulators in other countries including Singapore, the United Kingdom, Hong Kong, Malaysia, Japan, the United Arab Emirates, New Zealand, and Papua New Guinea.

Overall, the move to a single national regulator has improved aspects of regulation that have delivered benefits to the sector. The scale of these benefits might have been greater if TEQSA had done more over the years since it was established to share better practice with the sector and to disseminate information to higher education providers about trends in quality assurance practice and quality improvement in higher education. More recent action taken by TEQSA – particularly the inaugural 2016 TEQSA Conference - suggests that TEQSA is now seeking to play a greater role in facilitating the knowledge enhancement and sharing that a national regulator can provide. This Review notes that this aspect of TEQSA's role is consistent with its functions set out in section 134 of the Act, particularly sub-paragraph 134(1)(e)(iii), and it encourages TEQSA, within the resources available to it, to continue to fulfil this aspect of its functions.

#### 4.4 Improved international reputation

Subparagraph 3(c)(i) of the TEQSA Act provides that an object of the Act is *"to protect and enhance Australia's reputation for quality higher education and training services"*. A common view from the sector was that a single national regulatory framework has helped to create a perception of quality and robustness in Australia's regulation of higher education. For example, the University of Tasmania explained that a single national framework:

<sup>119</sup> TEQSA, above n 108, 30.

<sup>120</sup> Memorandum of Cooperation Between Tertiary Education Quality and Standards Agency, Australia and Higher Education Evaluation Center of the Ministry of Education, P. R. China <<http://www.teqsa.gov.au/sites/default/files/MoU-TEQSA-HEEC-13-September-2016.pdf>>.

*"sends a clear message to our international students about a national commitment to ensuring the quality of our higher education providers."*<sup>121</sup>

Universities Australia agreed that the introduction of the TEQSA Act signalled a commitment by Australia to ensuring quality in the higher education sector:

*"National consistency in regulatory requirements is particularly important in international education. For a start, a national regulator sends a positive and unambiguous message to the international market. By setting up a national regulator, Australia has shown its commitment at a national level to protecting quality. Taking decisive action to close regulatory loopholes made a powerful contribution to quality, and sent a clear message that Australia is committed to effective action to deal with unethical practices in international education recruitment and delivery."*<sup>122</sup>

A national regulator provides international markets with greater confidence in the Australian higher education sector. This is likely to have supported the marketing of Australian higher education internationally. For example, Charles Darwin University noted:

*"a single national regulator is a simple and powerful concept to promote when conducting international marketing and recruitment activities."*<sup>123</sup>

Favourable comments about Australia's regulatory system made by commentators and overseas agencies must also support the confidence of international students and universities in other jurisdictions. For example, a study undertaken for the Higher Education Funding Council for England included a lengthy description and analysis of the Australian system and concluded:

*"In comparison with Australia, the regulatory framework in England is fragmented and incomplete ... review processes do not consistently cover all aspects of institutional governance and financial management and planning as is the case ... in Australia ... Having undertaken this study, this expert team is of the view that there are important points to be considered and lessons to be learned across the UK from the QA approaches of the comparator systems [Norway, the United States, and Australia]".*<sup>124</sup>

As evidence of the high standing in which it is held internationally, TEQSA also drew attention to numerous requests it receives to undertake quality assurance activities in offshore jurisdictions and to present workshops in other countries.<sup>125</sup>

Regardless of the actual increase in consistency achieved by TEQSA relative to the State and Territory schemes, the perception of quality and consistency across the entire sector is likely to have created significant benefits in itself. While a rough indicator only, international student numbers have grown since the TEQSA Act commenced, and this may in part reflect this perception of quality.

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<sup>121</sup> University of Tasmania, submission, *Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector*, November 2016, 1.

<sup>122</sup> Universities Australia, above n 109, 2.

<sup>123</sup> Charles Darwin University, above n 116, 1.

<sup>124</sup> Carolyn Campbell, Robin Middlehurst and William Lawton, 'International comparator study to inform the quality assessment review in England, Wales and Northern Ireland' (Report to Higher Education Funding Council for England, February 2015) 51  
<[http://dera.ioe.ac.uk/22067/1/2014\\_intcomparator.pdf](http://dera.ioe.ac.uk/22067/1/2014_intcomparator.pdf)>.

<sup>125</sup> Letter from TEQSA to Deloitte Access Economics, 25 January 2017. Paragraph 134(1)(j) of the TEQSA Act provides that one of TEQSA's functions is "to cooperate with its counterparts in other countries".

#### 4.5 Conclusions

In examining what has changed for the sector in moving to a single national framework, it is clear that there is now a consistent basis on which (almost) all providers of higher education in Australia can be registered and have courses accredited (for those providers without self-accrediting authority). This consistency has led to a range of benefits.

One such benefit is greater confidence in the regulator, and improved international perceptions of quality in Australian higher education. The former point is borne out by the consistently positive feedback that TEQSA received in the consultations undertaken during this Review, while the latter reflects the consistent, if anecdotal, views of stakeholders about perceptions of Australia's international reputation.

The experience that providers have with TEQSA is via their interactions with case managers. The majority of responses regarding interactions with TEQSA were positive, but there is a perception that high rates of staff turnover have limited the development and retention of institutional knowledge.

More broadly, recent steps by TEQSA to build international networks, conduct research on issues of sectoral quality, and host its inaugural conference have been well received. The sector clearly views TEQSA as having a role in such initiatives and regards these as positive developments.

# 5 Term of Reference Two: The extent to which the TEQSA Act has contributed to improved quality in the delivery of higher education

Section 3 of the TEQSA Act sets out the objects of the Act, which include:

- *to protect and enhance:*
  - *Australia’s reputation for quality higher education and training services; and*
  - *Australia’s international competitiveness in the higher education sector; and*
  - *excellence, diversity and innovation in higher education in Australia; and*
- *to encourage and promote a higher education system that is appropriate to meet Australia’s social and economic needs for a highly educated and skilled population; and*
- *to protect students undertaking, or proposing to undertake, higher education in Australia by requiring the provision of quality higher education.*

These objects refer to protecting and enhancing Australia’s reputation for quality higher education and protecting students by requiring the provision of quality higher education. The objects also embrace other characteristics associated with quality or that advance quality.

Chapter 3 of this Report provides an analysis of ‘quality’ as it relates to higher education. The current Chapter draws on this understanding in assessing the extent to which the TEQSA Act has contributed to improved quality in the delivery of higher education.

This Term of Reference asks how the TEQSA Act has contributed to ‘improved’ quality. Improvement must be assessed relative to a baseline of what would have been observed in the absence of the TEQSA Act. Improvement in this sense involves considering both:

1. how the TEQSA Act has been effective in preventing a deterioration in quality that may otherwise have occurred; and
2. how the Act has contributed to improvement in the quality of higher education.

The former point concerns quality improvement achieved through the ‘gatekeeper’ role that regulation against a standards framework provides. The latter point assesses how the TEQSA Act has contributed to quality assurance and quality improvement activities relative to the pre-existing regime under AUQA, as outlined in paragraphs 2.1.1 and 3.2.2.

There are several components of the TEQSA Act that aim to advance quality in higher education delivery. These include the implementation of:

- a standards-based framework for quality assurance and, through this framework, the development of a set of Threshold Standards as an external (to providers) guide to indicators of quality in higher education;

- an agency with regulatory 'gatekeeper' powers to enforce the Threshold Standards; and
- legislation that allows for what this Report terms 'sector-wide quality assessments' of the Australian higher education sector to be undertaken for the purpose of ongoing quality assurance and improvement (see section 60 of the TEQSA Act).<sup>126</sup>

While the aggregated data outlined in paragraph 3.3 above demonstrates no significant changes to quality metrics (albeit imperfect metrics) at the sector level, it is ultimately not definitive in attributing any changes (or lack of changes) to the TEQSA Act. The evidence base for addressing this Term of Reference instead seeks to identify the impact that the Act has had by identifying ways in which the Act has changed the behaviour of providers to advance quality outcomes regarding matters such as governance, teaching and research.

This Review examines the extent to which the quality assurance system established by the TEQSA Act has fulfilled its intended purpose in replacing the existing framework which was *"too focused on inputs and processes and does not give sufficient weight to assuring and demonstrating outcomes and standards"*.<sup>127</sup>

This Term of Reference has therefore considered the following matters:

- The extent to which the standards-based regulatory framework has contributed to improved quality, including through:
  - TEQSA's regulation against the Threshold Standards (that is, its 'gatekeeper' role); and
  - The role that the Threshold Standards play as a form of guidance to providers beyond this gatekeeper role
- The extent to which the TEQSA Act more broadly has promoted ongoing quality improvement, through:
  - The accountability for Standards and outcomes; and
  - The capacity to conduct sector-wide quality assessments
- The extent to which the TEQSA Act is supportive of future innovation in the sector, and therefore capable of supporting quality improvements into the future; and
- Other matters raised by stakeholders in the course of this Review.

Finally, quality and student protection are also maintained through TEQSA's assessment of the financial viability of providers. This Chapter therefore also considers this aspect of TEQSA's work under the Act.

## **5.1 The extent to which the standards based framework for quality assurance has contributed to improved quality in higher education**

### **5.1.1 Regulation against the Threshold Standards - TEQSA's role as gatekeeper**

The expectation at the time the TEQSA Act was enacted was that, following the introduction of the demand-driven system, there would be an increase in the number of private higher education providers seeking to enter the sector.

It is difficult to know whether this anticipated increase in private providers would have occurred in the absence of the TEQSA Act, as the legislative provisions were largely state- and territory-based and disparate in nature. Whether providers rejected by TEQSA (or that did not seek registration through TEQSA) would have been registered under the previous State and Territory regimes is difficult to assess.

Nonetheless, in considering the impact of the TEQSA Act, this Review considers the numbers of higher education providers that have failed registration, or have been

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<sup>126</sup> These quality assessments might benefit from being framed by standards that are not Threshold Standards (see paragraph 8.2 below for further discussion).

<sup>127</sup> Bradley et al., above n 15, 115.

deregistered, through the regulatory functions of TEQSA. Since the commencement of TEQSA's operations:

- of the 27 registration applications *for new providers* processed as at June 2016:
  - three have been rejected;
  - ten providers have been registered with additional requirements in the form of conditions that the provider must meet in the sense that non-compliance provides a trigger for the exercise of further powers;
  - the remaining fourteen applications have been granted without conditions;
- of the providers already registered to deliver higher education:
  - three providers have had their applications for renewal of registration rejected;
  - two providers have had their registration cancelled; and
  - twelve providers have withdrawn from being a registered provider (that is, self-terminating their registration), while ten providers have allowed their registration to expire.<sup>128</sup>

While it is not possible to establish what would have been an 'optimal' proportion of rejections of registration, this Review sees the number of applications for registration and renewal of registration that have been rejected (6) or granted with additional requirements in the form of conditions (10) and the number of registrations cancelled (2) or withdrawn (12), as evidence that TEQSA has played a material role as a gatekeeper of quality, and has likely helped *maintain* the quality of the sector as intended by the TEQSA Act.

In its submission to this Review, TEQSA drew attention to the fact that the registration of five providers ended following either a TEQSA decision to refuse to renew registration or to cancel a registration. TEQSA has stated that "*These decisions are made following a rigorous assessment process and the provision of a reasonable opportunity to address concerns identified by TEQSA.*"<sup>129</sup>

With respect to new entrants, TEQSA states that it "*has rejected five applications for registration—of these, two applicants obtained registration following consent orders in the Administrative Appeals Tribunal.*"<sup>130</sup>

The reasons behind TEQSA's decisions to reject applications for registration or renewal of registration appear to be consistent with an effective assessment of quality, as provided by the Threshold Standards. These reasons included concerns regarding governance and risk management, the quality of course design, and the qualifications of teaching staff.

It is therefore reasonable to conclude that the 'gatekeeper' role of TEQSA has contributed to quality improvement in the sector by excluding low quality providers. Consideration should also be given to whether there is evidence that this role has been too weak, or too strong, and therefore limiting in the *extent* to which it has contributed to improved quality in the sector.

There has been no failure of a provider under TEQSA's watch. While this may represent serendipity, it suggests that the regulatory powers of TEQSA have not been too weak in protecting quality in the sector at a threshold level. Further, the fact that two providers were successful in obtaining registration following appeals to the AAT would indicate that TEQSA has not been too 'soft' in granting registration.

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<sup>128</sup> Discussions with TEQSA suggest that a withdrawn application almost invariably involves a withdrawal following a proposed rejection of a provider's application by TEQSA.

<sup>129</sup> TEQSA, above n 50, 8.

<sup>130</sup> *Ibid*; Interview with TEQSA, Melbourne, 30 November 2016: In discussions with TEQSA, it is understood that TEQSA has been involved in AAT proceedings with 13 higher education providers (eight were resolved by private agreement on receipt of further evidence; one in favour of TEQSA's decision to reject an application; three withdrawn by the provider; one currently before the AAT).



Whether TEQSA has been too *strong* in fulfilling its function as a gatekeeper is more difficult to assess. While a review of TEQSA's decisions on applications for new registration is beyond the scope of this Review, the data on successful registrations outlined above do not suggest that its approach has been too strong. The proportion of registrations that have been rejected has to date been relatively low (around 11% for new providers).

The requirements imposed by the Provider Registration Standards and the Provider Course Accreditation Standards must act as a deterrent to the entry of low-quality providers. That is, they inform prospective providers that would not meet the Standards that they will not be registered by TEQSA should they apply. Recognising this, it is not possible to detect from the available data whether *too few* (sufficiently) high quality providers have been deterred from applying for because of this barrier.

As a general observation, entry to the sector may be considered to be lower than anticipated following the introduction of the demand driven system. However, the fear that insufficient entry has occurred was not commonly supported in submissions to this Review (recognising the caveat that the majority of such respondents were registered providers).

Further, current data on prospective providers indicates that a significant number of providers may seek registration in the near future. This may therefore represent a delay in the pressures anticipated at the time of the *Review of Australian Higher Education* rather than a lack of realisation of those pressures altogether.

Overall, this Review sees the data on applications for registration as indicating that the TEQSA Act has been effective in empowering TEQSA with an ability to remove from the sector those providers that would not meet the standards expected of higher education providers, in a high quality system. In this sense, it is likely that it has contributed materially to the *maintenance* of quality in the sector. The following parts of this Chapter investigate what the Act has achieved for the quality of the remaining providers, that is, those that are judged to meet the Threshold Standards.

### **5.1.2 The use of the Threshold Standards by providers**

In addition to assisting with the gatekeeper function, the Threshold Standards may support quality if they are of value to providers in guiding internal behaviour towards best practice. A significant proportion of providers consulted indicated that the Standards had been useful in guiding their activities and decisions with respect to quality assurance.

Similar sentiments were expressed by a large number of providers, particularly by those outside the university sector. This suggests that the Standards are not viewed simply as compliance obstacles, but as providing guidance on aspects of what it means to be a high quality provider. As discussed in paragraph 3.2.1 of this Report, such a role for the Threshold Standards is consistent with a standards-based approach to quality assurance, and the intended function of the Threshold Standards.

In addition to these general findings, a number of specific aspects of the Threshold Standards were drawn to the attention of this Review as contributing to improved quality.

- The better connection between the Threshold Standards and the AQF has encouraged some providers to focus on the course level, rather than only the unit level.
- The collection of information by providers as part of their renewal of registration process was found by some providers to support the development of internal metrics of performance and quality.
- The Threshold Standards concerning governance led some providers to alter their governance arrangements, and internal information flows.

- One provider noted that it had drafted internal guidelines for its offshore partners based on the Threshold Standards.<sup>131</sup>

In its submission to this Review, TAFE Queensland further illustrated the capacity for the Threshold Standards to promote reflection on internal practices:

*"The Act and introduction of threshold standards has led to educators thinking more critically about their practice; it has meant, for example, that greater focus is placed on linking assessment to learning outcomes. The strong focus on scholarly activity for staff has also contributed to ensuring that staff continually develop their learning and teaching as well as maintaining discipline-specific knowledge and relevance as a consequence. This has led to improvements in outcomes for students."*<sup>132</sup>

Providers also indicated that the Threshold Standards enabled compliance and quality officers within institutions to effect change in a way that they otherwise would not have been able to do; pointing to the requirement to comply with the Standards assisted in overcoming internal resistance to change that may otherwise have occurred.

Overall, the Threshold Standards appear to generate benefits from the perspective of providing guidance on best practice. The assessment of this Review is that these benefits are largely (but not wholly) realised by NUHEPs; universities are unlikely to have changed their internal processes significantly as a result of the Threshold Standards. As the University of Newcastle put it:

*"There is little evidence that the TEQSA Act itself has impacted significantly on the university sector directly, as Australian universities have generally been recognized as quality institutions for many years."*<sup>133</sup>

For those providers that meet the Threshold Standards and do not receive significant benefits from any guidance they provide, there is likely to have been relatively little impact arising from the Threshold Standards. This is, of course, in line with the intent of the TEQSA Act, which was to leave high performing parts of the sector largely alone. The Threshold Standards will, however, have validated the practices of these providers and underpinned public accountability for the robustness of their internal processes.

TEQSA was able to point to examples of working with existing providers to address particular concerns regarding quality. These examples are consistent with the vision of TEQSA as a regulator that would play a gatekeeper role against low-quality providers entering the sector, as well as intervening in cases where existing providers are not operating to the expected level of quality. Quality improvement in such circumstances is remedial in nature and reliant on TEQSA's regulatory functions, as distinct from 'continuous quality improvement' for all providers across the sector. It is, however, recognised that aspects of continuous quality improvement can be achieved through the provision of guidance notes, and similar documentation made available to the sector.<sup>134</sup>

## 5.2 The role of the TEQSA Act and TEQSA itself in quality assurance

In the course of this Review, the limitation most commonly referred to by stakeholders related to the limitations of TEQSA as a regulatory agency in providing for quality assurance, in the sense of 'continuous quality improvement'. These limitations relate to

<sup>131</sup> SAE Institute in an interview as part of this review.

<sup>132</sup> TAFE Queensland, submission, *Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector*, November 2016, 4.

<sup>133</sup> University of Newcastle, submission, *Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector*, November 2016, 2.

<sup>134</sup> TEQSA has developed "provider resources" of this kind along with resources from its roundtable discussions and workshops; see <http://www.teqsa.gov.au/for-providers/provider-resources> and <http://www.teqsa.gov.au/news-publications/events>.

the distinction between the 'regulatory functions' of TEQSA and 'quality assurance' as discussed in paragraph 3.2.2 of this Report.

This Review agrees with the views of the HESP that:

*"the nature of the regulatory role changed with the transition from AUQA to TEQSA. TEQSA's role is primarily to undertake standards based compliance assessment, rather than a peer review as was the case with AUQA."*<sup>135</sup>

As discussed in paragraph 3.2.1 and 3.2.2 above, 'standards based compliance assessment' protects against substandard quality, but it is less able to promote quality improvement from those providers that already meet the threshold levels. This Review emphasises that the comparison made here is between the regulatory framework that currently exists and that which existed prior to the TEQSA Act; this is not meant as a comparison between the organisations themselves (that is, TEQSA and AUQA) and how effectively they have operated. The consideration is instead focused on what it has meant to have moved from a system of whole of institution, peer review to one based on regulation against standards.

To the extent that assurance based on peer review made greater allowance for the *assurance* of continuous quality improvement, this observation gives rise to the notion that something has been lost in moving to a system based on standards, and this has to do with the lack of an external body to play a formal, whole-of-institution, peer review role. While peer review can, and does, take place, it is almost exclusively done in relation to individual disciplines offered by a provider rather than in relation to the institution as a whole.

This limitation regarding the functions of TEQSA is in part the result of the response from the sector to the way TEQSA undertook its sector-wide quality assessment of *Third Party Arrangements*; this response led to the making of Ministerial Direction No. 2 (2013) which has had the effect of narrowing TEQSA's scope of quality assurance functions (see paragraph 2.4 above). The ability of TEQSA (or others) to effectively perform sector-wide quality assessments would go part of the way towards addressing what was lost in moving to a standards-based framework.

In addressing this Term of Reference, this Review has therefore considered two separate—but related—matters addressed by stakeholders in consultations and submissions:

1. the inherent capacity of TEQSA—as a regulator—to provide accountability for Standards, while simultaneously assuring continuous quality improvement; and
2. whether the TEQSA Act should authorise the conducting of quality (thematic) assessments (that is, through the powers provided by section 60 and sub-paragraph 134 (c)(i) of the TEQSA Act).

These matters are dealt with in turn below.

### **5.2.1 Accountability for standards and ongoing quality improvements**

Under the current Threshold Standards, continuous quality improvement is supported largely as determined by the individual provider, which is judged to be best placed to decide how to achieve quality in its context. Providers are then required only to demonstrate that these processes are in place. Universities Australia supports this approach:

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<sup>135</sup> Letter from the Higher Education Standards Panel to Deloitte Access Economics, 5 December 2016.

*"UA supports TEQSA's approach, based on a culture of externally validated quality assurance by universities themselves. This approach promotes not only quality but also diversity and innovation.*

*Any moves away from this system would tend to encourage uniformity across the sector. If TEQSA took a more interventionist role in quality assurance, its advice on quality improvement would tend, over time, to be reflected in regulated requirements, with the result that the sector would become increasingly homogeneous. This would be a negative and unhelpful trend."<sup>136</sup>*

This is not to suggest that providers are, by design, required to develop processes of quality assurance in isolation. As Navitas acknowledged:

*"The Act through the HESF is also quite specific regarding the need for sharing of best practice and the ongoing process of benchmarking as a genuine endeavour. It is a requirement that will generate a greater sense of sharing and adoption of effective practice and reduce the silo mentality that is sometimes present in the higher education sector, which is to the detriment of enhanced learning and teaching across the sector."<sup>137</sup>*

These two views support a system where standards encourage external peer review and the sharing of best practice across providers; that is, a sector with a regulator, but where this regulator supports, through the standards, the external quality assessments that the sector itself is best placed to provide. Nonetheless, a significant number of stakeholders suggested that the move to a standards framework, with a focus on regulation against the Threshold Standards, has resulted in a more 'top-down' compliance-focused approach, in contrast to a more 'collegial, bottom-up' quality assurance process of peer review.

Indeed, it is the view of some stakeholders that the regulatory approach taken by TEQSA has amounted to an overly zealous application of a (necessarily) standardised interpretation of the Threshold Standards, such that:

*"The original objective of 'continuous improvement' has become lost in the drive toward an uninspiring, standards-based middle ground. Innovation has become more difficult and risky for any provider at the very time it should be encouraged."<sup>138</sup>*

This issue was identified most strongly by NUHEPs. Given that one of the objects of the TEQSA Act is to protect and enhance innovation in higher education, it would be concerning if the regulator were in fact pushing the sector towards a risk-averse approach under which experimental approaches to delivery were discouraged in favour of the status quo. Innovation is inherently risky, and there will be cases of 'good' and 'bad' innovation. What is needed is a set of Standards, drafted by those with a strong practical knowledge of how innovative practices may facilitate quality. TEQSA, through its appropriately skilled Commissioners and staff, would then regulate providers against the Standards, distinguishing cases of 'good' from 'bad' innovation in its decisions on registration and course accreditation. TEQSA could further facilitate innovation by trialling particular innovative practices with providers. These points are addressed further in Chapters 6 and 9.

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<sup>136</sup> Universities Australia, above n 109, 3.

<sup>137</sup> Navitas, submission, *Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector*, November 2016, 2.

<sup>138</sup> Macleay College, above n 114, 2.

The particular function of 'collegial bottom-up quality assurance' is generally incompatible with TEQSA's capacity as a regulator, which necessarily sits overarching, and independent of, the higher education sector.

A significant number of respondents to this Review indicated that clarity is required on how the current quality assurance regime can better support continuous quality improvements (as opposed to remedial quality interventions). This may include greater formal reliance on external forms of peer review, or independent expert advice developed through collaborative leading agencies such as the (former) Office for Learning and Teaching.

Importantly, an expanded quality assurance regime in Australian higher education would not preclude a continued role for TEQSA in supporting ongoing quality improvement, but rather *complement* TEQSA's role as a regulator by quality assurance functions (such as peer review) which fall outside the scope of the agency, as (principally) the sector's regulator. As the Higher Education Standards Panel said:

*"TEQSA's role is primarily to undertake standards based compliance assessment, rather than a peer review as was the case with AUQA. The Panel would not want TEQSA to operate like AUQA and it is not resourced to facilitate that kind of interaction. There is an expectation that providers will themselves systematically embed quality improvement activities into their business models. Section 5.3 of the Higher Education Standards Framework 2015 (Monitoring, Review and Improvement) explicitly requires external referencing to and benchmarking against suitable comparators [in relation to courses of study]. TEQSA can and should check that these systems are in place. But it should not be the agent that drives their achievement. There is a legitimate role for TEQSA to encourage and possibly facilitate the sharing of best practice at the system-wide level. Activities such as the first TEQSA conference and some current follow-up work to an earlier investigation of responses to contract cheating incidents are examples of this."*<sup>139</sup> (Emphasis added)

TEQSA, as a regulator, is of course only one (albeit, central) force of quality assurance for Australian higher education providers. Quality assurance may best be promoted through a combination of regulatory and non-regulatory approaches, where the latter may better promote cultures of continuous improvement within institutions. In this regard, Probert (2015) states that:

*"There is little enthusiasm among experts in regulation and quality assurance for models that rely on one central regulator, and lessons have been learned (both here and by overseas observers) from the first incarnation of TEQSA. In the UK the Higher Education Commission has proposed a 'New Pluralist Regulatory Architecture for Higher Education' that is subtitled 'Protecting students, encouraging innovation, enhancing excellence.'"*<sup>140</sup>

In describing an alternative quality assurance regime for Australian higher education, Massaro outlines a model that extends the role of TEQSA and its predecessor (AUQA) in establishing professional accreditation processes and discipline reviews (provided by external experts) as a central component to the demonstration of quality assurance under a regulatory regime. Such aspects would necessarily be provided by participants in the quality assurance regime that are beyond the regulatory agency. Under this model:

*"TEQSA's role would be limited to a periodical assessment of whether an institution was acting on the results of its peer review, intervening only when an institution is not responding adequately. In such cases TEQSA would be armed*

<sup>139</sup> Letter from the Higher Education Standards Panel to Deloitte Access Economics, 5 December 2016.

<sup>140</sup> Probert, above n 82, 73.

*with expert evidence that it needs to take action and the focus of that action would be clear.*<sup>141</sup>

One provider illustrates a similar vision for a new quality assurance regime comprising a “big carrot, little stick”:

*“In other words, where the TEQSA Act was predicated on collegial and peer review processes and where that peer review process had a level of enforceability (as in the previous State-based regulatory regimes) in establishing whether standards had been met might result in a higher level of educational quality and student experience.”*<sup>142</sup>

In principle, an expanded regime of quality assurance to support the functions of TEQSA as a regulator need not be provided for directly in the TEQSA Act, and the provision of this sort of model of quality assurance is achievable within the existing regulatory framework. However, there may be value in providing clarification regarding the extent of TEQSA’s role (or another body tasked with this role) beyond its regulatory powers (for example, by amending section 60 of the Act, as discussed below).

### **5.2.2 Sector-wide quality assessments**

In 2013 TEQSA undertook a sector-wide quality assessment of *Third Party Arrangements*; it postponed, and ultimately did not reactivate, a second such quality assessment regarding *English Language Proficiency*.<sup>143</sup> This paragraph and Recommendation 2.1 are directed at sector-wide quality assessments of this kind.

Discontent regarding the way TEQSA conducted the sector-wide quality assessment of *Third Party Arrangements* was a major theme of the *Review of Higher Education Regulation (2013)*.<sup>144</sup> That Review led to the making of Ministerial Direction No. 2 of 2013 which requires that TEQSA work on “sectoral quality assessment activities” only if it has surplus resources after fully achieving its key regulatory activities.<sup>145</sup>

Section 60 of the Act, which is headed “Quality (including thematic) assessments”, together with sub-paragraph 134(1)(c)(i), provides *inter alia* the authority for TEQSA to undertake what this Report refers to as ‘sector-wide quality assessments’. In light of the findings of the *Review of Higher Education Regulation (2013)* and the making of Ministerial Direction No. 2 of 2013, the role of section 60 of the Act has been a particular focus of this Review.

The following question was put to stakeholders:

*“Should the TEQSA Act authorise the conducting of quality (thematic) assessments to assess the level of quality of higher education provided by particular providers and/or to identify systemic issues? If so, who should conduct these reviews—TEQSA, the Department, the HESP, or another organisation or body?”*

The responses to this question were varied.

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<sup>141</sup> Massaro, above n 60, 57.

<sup>142</sup> JMC, submission, Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector, November 2016, 6.

<sup>143</sup> See <http://www.teqsa.gov.au/for-providers/quality-assessments>; and Lee Dow and Braithwaite, above n 3, para 3.6.

<sup>144</sup> Lee Dow and Braithwaite, above n 3, paras 3.6 and 4.6.

<sup>145</sup> Tertiary Education Quality and Standards Agency Act 2011 – Ministerial Direction No. 2 of 2013, para 4ii.

The Department of Education and Training took the view that the current restriction "should continue to operate [through Ministerial Direction], given TEQSA's resourcing challenges".<sup>146</sup> The Department emphasised that:

*"The key activities for TEQSA are to register and re-register higher education providers, as well as accredit and re-accredit courses."*<sup>147</sup>

The Higher Education Standards Panel took a very similar approach, but, significantly, it went on to say that:

*"there should also be an option for TEQSA to provide other functions and activities, such as sectoral quality assessment activities if required and resources permit."*<sup>148</sup>

Some providers see value in sector-wide reviews of quality, particularly if the reviews are conducted independently of government and so long as they comply with the three guiding regulatory principles set out in the TEQSA Act (necessity, reflecting risk and proportionality). Universities Australia submitted:

*"With regard to which agency is responsible for quality assessments, UA believes that TEQSA should retain responsibility. This is not an appropriate role for [the] HESP. This function should remain with the regulator rather than returning to the Department, so that quality assessments are conducted at arm's length from Government. It would not be appropriate for the Department [of Education and Training] to undertake assessments of this kind."*<sup>149</sup>

Other respondents suggested that section 60 of the Act should be amended to formally remove TEQSA's sector-wide quality assessment function. For example, the University of Melbourne submitted that:

*"The University does not see a specific need as is currently the case for the TEQSA Act itself to authorise the conducting of quality (thematic) assessments... If such were to be undertaken they should be meaningfully resourced and targeted in order to provide useful advice to government and to higher education providers."*

*Assessing the body best placed—i.e. [the] Department of Education and Training, TEQSA or any other body such as the Higher Education Standards Panel (HESP)—to undertake thematic quality assessment is contingent on the purpose of such a review. Quality review to better inform practice is a fundamentally different undertaking than reviews [for quality (thematic) assessments]. Review to promote good practice almost certainly implies a smaller risk of unintended consequences than review [for quality (thematic) assessments]."*<sup>150</sup>

The Australian Technology Network:

*"is of the view that TEQSA should concentrate on its responsibility for the regulation of higher education, the Higher Education Standards Panel (HESP) should focus on providing advice to the Minister on the standards for higher education, and the Department of Education [and Training should be] responsible"*

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<sup>146</sup> Letter from the Department of Education and Training to Deloitte Access Economics, 11 January 2017.

<sup>147</sup> Ibid.

<sup>148</sup> Letter from the Chair of the Higher Education Standards Panel to Deloitte Access Economics, 5 December 2016.

<sup>149</sup> Universities Australia, above n 109, 3.

<sup>150</sup> University of Melbourne, submission, *Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector*, 2.

*for responding to system-wide issues, thematic reviews and enacting policies and funding arrangements.*<sup>151</sup>

TEQSA submitted that the effect of Ministerial Direction No. 2 (2013) is to limit the extent to which it is able to perform its work; it went on to emphasise that:

*"If this restriction were lifted, TEQSA anticipates that any work on quality assessments would focus on systemic risks... TEQSA anticipates that work to address systemic risks would be undertaken in a consultative and collaborative way, drawing on examples of good practice in Australia and abroad as a means to inform providers about the approaches taken to deal with these risks. TEQSA considers that its oversight of all Australian higher education, as well as its connections with international regulatory and quality assurance bodies, mean that TEQSA is well placed to perform this work.*"<sup>152</sup>

This Review notes that this articulation of what TEQSA says would be its approach to sector-wide quality assessments of the kind discussed in this paragraph if the restriction in the Ministerial Direction were lifted, is broadly consistent with the approach considered appropriate by a large number of those with whom this Review consulted, but, at the same time, a number of providers favour formally removing TEQSA's sector-wide quality assessment function.

This Review recognises the presence of a range of varied views regarding the power that should be afforded to TEQSA under the Act to conduct sector-wide quality assessments. Notwithstanding this, this Review finds that there is broad agreement that:

- There is value in TEQSA's regulatory expertise and independence (from government and the sector) which extends beyond the functions of registration and accreditation to the conducting of sector-wide quality assessments provided the focus of any such sector-wide quality assessment is supported by relevant stakeholders; and
- Any role for TEQSA in supporting further levels of quality assurance by way of conducting sector-wide quality assessments must be characterised by a collaborative approach (that is, where TEQSA's role is supported by others, including the Minister, the HESP, the Department of Education and Training and, indeed, the sector).

Furthermore, TEQSA may not always be the best authority to conduct a particular sector-wide quality assessment. As the Innovative Research Universities said:

*"Where the Government wishes to inquire into an issue or theme it should commission suitable people to undertake the review allowing them to request input from TEQSA. TEQSA, through its actions to register higher education providers and accredit higher education courses, will have considerable knowledge and expertise about the delivery of higher education which could inform any review.*"<sup>153</sup>

In light of the findings outlined above, and on the balance of the available evidence, this Review concludes that there could indeed be value in sector-wide quality assessments of the kind discussed in this paragraph being undertaken when circumstances require, and that they could play an important role in maintaining and, indeed, enhancing, quality in the sector.

Nonetheless, while TEQSA may be well placed to conduct some such reviews and form an opinion regarding when they are required, it is the Minister for Education who should be

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<sup>151</sup> Australian Technology Network of Universities, submission, Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector, November 2016, 1.

<sup>152</sup> TEQSA, supplementary submission, Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector, November 2016, 5.

<sup>153</sup> Innovative Research Universities, submission, Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector, November 2016, 2.



responsible for deciding on the need for sector-wide quality assessments and how a particular sector-wide quality assessment should be resourced. The Minister might do so based on advice from TEQSA, the Higher Education Standards Panel, or any other stakeholder and might direct any of these groups to form the advisory group that undertakes the review.

It should be emphasised that under this recommendation TEQSA would not have the power to initiate sector-wide quality assessments. Instead, TEQSA could provide one source of advice to the Minister that such a review was necessary. The Minister could take advice from a range of sources, including TEQSA, the Higher Education Standards Panel, industry bodies or other stakeholders. Furthermore, the Minister might take the view that a particular quality review would be best conducted by some body or working group other than TEQSA, with TEQSA playing a supportive role by supplying information it already holds or could obtain using its information collecting powers. If this recommendation is acted upon, the relevant part of Ministerial Direction No. 2 of 2013 should be reversed.

Finally, there is, of course, a role for the sector itself to play in ensuring quality, beyond the traditional quality assurance practices and peer review that are currently undertaken by providers. Networks of providers can play a peer review and benchmarking function, facilitated by representative bodies. There is evidence that groups like COPHE do assist in benchmarking and establishing networks that can provide meaningful assistance to providers seeking to assure their quality.

#### **Recommendation 2.1:**

**Section 60 and sub-paragraph 134(1)(c)(i) of the TEQSA Act should be amended to allow TEQSA to undertake sector-wide quality assessments only by direction from the Minister for Education, drawing on advice from TEQSA, the Higher Education Standards Panel, and other sector stakeholders. The TEQSA Act should provide for the Minister to empower any other body or working group to undertake a sector-wide quality assessment, where such a review may draw on information collected by TEQSA and the information-collecting powers of TEQSA. That part of Ministerial Direction No. 2 of 2013 that deals with sectoral quality assessment activities should then be repealed (see also recommendation 6.1 regarding Ministerial Direction No. 2 of 2013).**

### **5.3 Addressing financial risks**

The financial viability of Australia's higher education providers is fundamental to the protection of students; the failure of a provider could have a negative impact on the reputation of the sector as a whole.

The Act recognises the significance of financial matters. Section 15 (reflecting risk) requires TEQSA to exercise its powers having regard to the history of an entity, including "*its financial status and capacity*", and having regard to matters relating to the risk of an entity not complying with the Threshold Standards or the Act, including "*its financial status and capacity*". An important element in the 'Risk Assessment Framework' described in paragraph 2.2.4 above is TEQSA's assessment of each provider's financial viability and sustainability; one of the two domains in the overall risk profile for each provider is risk to its financial position.<sup>154</sup> The Risk Assessment Framework draws on financial information provided annually to TEQSA by each registered provider.

TEQSA explained that it has a range of options to address concerns raised by these risk ratings; for example, it:

*"cancelled the registration of [a provider] after undertaking a compliance assessment which identified that there were substantial risks that [the provider]*

<sup>154</sup> See also paragraph 3.3.1 which discusses TEQSA's recent financial risk assessments.

*did not have the capacity to continue to apply sufficient financial resources to ensure the achievement of its higher education objectives. In other cases, TEQSA may be able to address its concerns through dialogue with a higher education provider and the provision of details about the provider's plans to address the concerns raised by the risk assessment.*<sup>155</sup>

Deloitte Access Economics was advised by the Department and TEQSA that they work closely together to identify and address concerns regarding financial viability; information is shared and confidence was expressed regarding the capacity of the Department and TEQSA to identify and deal with any provider that might be at risk financially.

The demand driven system has meant that higher education providers face greater competitive pressures. In the more market-driven environment, the financial performance of some providers will be better than others. In this environment, this Review finds that it is important that TEQSA and the Department continue to work together to identify and monitor any providers that might be at risk financially so that students and the reputation of the sector can be protected.

In a related matter, TEQSA suggested a change be made to the auditing requirements for providers submitting financial information to TEQSA. Sub-section 27(1) of the TEQSA Act requires providers to give their annual financial statements to TEQSA and paragraph 27(3)(b) requires that these statements be accompanied by a report on the statement by an 'independent qualified auditor'. 'Independent qualified auditor' is defined in section 5 as:

- (a) the Auditor-General of a State, of the Australian Capital Territory or of the Northern Territory; or*
- (b) a person registered as a company auditor or a public accountant under a law in force in a State, the Australian Capital Territory or the Northern Territory; or*
- (c) a member of the Institute of Chartered Accountants in Australia, or of the Australian Society of Certified Practising Accountants; or*
- (d) a person approved by TEQSA under sub-section 27(4).*

TEQSA suggested that paragraph (c) of the definition be repealed to bring the requirements regarding qualified auditors into line with the requirements regarding the auditors of companies. In exceptional cases, sub-section 27(4) would allow TEQSA to authorise the appointment of an auditor who is not a registered company auditor.

This amendment would impose additional costs on those higher education providers that currently have auditors who are not registered company auditors (or not an Auditor-General), reflecting the higher fees that the Australian Securities and Investments Commission approved auditors charge. This is, however, a prudential amendment. This Review recommends that this amendment be adopted; TEQSA should give adequate notice to providers who are affected so they are able to make the necessary adjustments to their auditing arrangements (if necessary, TEQSA should use sub-section 27(4) to allow for exceptions to provide the necessary time).

**Recommendation 2.2:**

**The definition of 'qualified auditor' in section 5 of the TEQSA Act should be amended to exclude paragraph (c). TEQSA should give adequate notice to providers who are affected so they are able to make the necessary adjustments to their auditing arrangements; if necessary, TEQSA should use sub-section 27(4) to allow for exceptions to provide the necessary time.**

<sup>155</sup> Letter from TEQSA to Deloitte Access Economics, 31 January 2017.

#### 5.4 The extent to which the TEQSA Act is supportive of future innovation in the sector

One of the objects of the Act is "to protect and enhance...innovation in higher education in Australia" (see sub-paragraph 3(c)(iii)). Innovation is not defined in the Act; this Review takes it to mean any new or changing practice that results, or might result, in improved quality of teaching or research or at least would not detract from such quality.

The sector has evolved since the TEQSA Act was enacted. Practices such as blended learning are commonplace, and aspects of artificial intelligence are being used to provide an improved and more responsive learning experience; wholly online higher education courses are also becoming increasingly common.

In addition to innovation in practices, changes in the suite of programs offered are also occurring. This includes increased prevalence of disaggregated learning (whereby programs are made up of courses from multiple providers) and micro-credentials (or nano degrees). Micro-credentials are not regulated by TEQSA.

There is a growing view (including in economic and social research) that the labour market has an appetite for this emerging type of credential, potentially undermining the traditional qualification structure for many (non-entry level professional) degrees.<sup>156</sup>

Disaggregated learning programs are becoming increasingly prevalent in higher education internationally. While not prohibited by the TEQSA Act, concerns have been expressed about how these would be assessed by TEQSA (these concerns related to the capacity of a provider to 'vouch for' the ability of its partner providers to meet the Threshold Standards<sup>157</sup>). In recognition of these issues, TEQSA has published a guidance note regarding third party arrangements.<sup>158</sup>

In determining whether the TEQSA Act is facilitating innovation in higher education this Review focused on understanding how the Act, and those with responsibilities under the Act, were responding to these trends. This Review considered whether innovations of the kind mentioned were being protected and enhanced. To maintain quality, without stifling innovation, the regulatory system must be able to adapt to such practices and evidence was sought on how and whether it was doing so.

No substantive evidence was provided to the Review in support of some assertions that were made by a small number of providers that the TEQSA Act prohibits innovation. Some of those consulted asserted that the Act and the Threshold Standards assume that all providers are of a kind usually associated with traditional, bricks and mortar universities. Again, this Review does not find evidence to support this assertion, particularly since the coming into operation of the 2015 Threshold Standards which are drafted in a manner that encompasses different learning environments.

The Act appears to fulfil the object of 'protecting' innovation in the sense that it does not specifically prohibit or discourage innovation.

It can, however, be argued that the Act and the Threshold Standards do nothing to 'enhance' or encourage innovation. There appears to be no formal mechanism through which higher education providers are encouraged to innovate and experiment with the delivery of higher education. More than one provider suggested the development by

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<sup>156</sup> Tiffany Dovey Fishman and Linsey Sledge, *Reimagining higher education* (22 May 2014), Deloitte University Press < <https://dupress.deloitte.com/dup-us-en/industry/public-sector/reimagining-higher-education.html>>.

<sup>157</sup> See section 26 of the TEQSA Act.

<sup>158</sup> TEQSA, *Guidance Note: Third-Party Arrangements* <[http://www.teqsa.gov.au/sites/default/files/GuidanceNote\\_ThirdPartyArrangements2.0.pdf](http://www.teqsa.gov.au/sites/default/files/GuidanceNote_ThirdPartyArrangements2.0.pdf)>; see also TEQSA, *Guidance Note: Technology-Enhanced Learning* <[http://www.teqsa.gov.au/sites/default/files/GuidanceNote\\_Technology-EnhancedLearning1.0.pdf](http://www.teqsa.gov.au/sites/default/files/GuidanceNote_Technology-EnhancedLearning1.0.pdf)>.

TEQSA of a mechanism that encourages mature higher education providers to negotiate with TEQSA to trial controlled innovations (with respect to pedagogy, course structure and delivery).

Overall, this Review concludes that more could be done to signal that diversity and innovation are not inconsistent with the TEQSA system and to indicate that a higher education provider may have features that are in some sense different from those associated with the traditional notion of a university. This Review considers it to be important that both TEQSA and the Higher Education Standards Panel are proactive in anticipating and responding to the developments identified at the beginning of this paragraph, and how they might impact on the current regulatory system. This may be addressed by recommendation 6.2 which is explained in the context of Term of Reference Six.

### **5.5 Conclusions**

Overall, based on the information available at this time, the TEQSA Act appears to have been successful in maintaining quality in the sector. There have been no provider failures, and the perceptions of Australia's sector as being of high quality have been maintained, and possibly enhanced.

The Threshold Standards have also been a useful mechanism for some providers to improve processes internally; this appears to be more the case for NUHEPs than universities. While some providers have not realised this benefit, this is in keeping with the expectation that the Threshold Standards were to embody practices that high quality providers would implement in any case.

The sector has, however, lost an aspect of the quality assurance regime in moving to a standards-based regulatory framework, namely the assurance of continuous quality improvement by way of external, whole of institution peer review. Recommendation 2.1 will go some way towards addressing this in a measured manner.

There are also various 'passive' ways that TEQSA can assist in improving quality in the sector that are not resource-intensive or out of line with its role as a regulator. For example, by continuing to provide guidance notes on the interpretation and application of the Threshold Standards, and facilitating communication in the sector regarding best practice process and models of quality assurance (including in the form of national conferences and symposiums).

## 6 Term of Reference Three: The extent to which the TEQSA Act has contributed to improved regulation

The TEQSA Act brought an approach to regulation that sought to “*regulate higher education using (i) a standards-based quality framework; and (ii) principles relating to regulatory necessity, risk and proportionality.*”<sup>159</sup> The principles are more fully described in sections 13- 16 of the Act where they are referred to as “basic principles for regulation”.

The basic principles for regulation were intended to provide TEQSA with the flexibility to monitor higher risk providers more closely, allowing higher quality, lower risk providers to operate without unnecessary intrusion. If realised, effective application of the principles would lead to quality being maintained, while imposing a minimal burden on the sector commensurate with that quality. This in part reflects the rationale for the Threshold Standards that are designed to establish a gatekeeper role for a regulator to protect against low quality entrants to the sector, while not imposing significantly on those providers that were already judged to be operating effectively and at low risk.

It is difficult to disentangle the question of whether regulation has improved from the question of what has happened to quality in the sector, a question addressed in Chapter 3. The Review therefore interprets this Term of Reference as questioning whether the *practice* of regulation has improved, as distinct from the *outcome* of regulation. This calls for an assessment of the way the basic principles of regulation have been applied, and the burden experienced by the sector as a result of the TEQSA Act. At a broader level, it involves assessing whether regulation pursuant to the Act has ‘pushed’ the sector in particular (desirable or undesirable) directions.

‘Improved regulation’ is connected to the concept of ‘regulatory burden’. Here regulatory burden is not interpreted as the total time a provider spends meeting its compliance requirements, but, instead, that portion of this time that is not of value to the provider and is therefore a burden in the true sense. Much of the time spent on ‘compliance’ with the Threshold Standards may in fact be time usefully spent by a provider using an application (for registration or renewal of registration or for course accreditation or renewal of accreditation) to improve governance, or matters associated with teaching or research, and in the collection of data that assists with these ends. As such, the full extent of this time should not be considered a regulatory ‘burden’ in the usual sense of the term.

To address Term of Reference Three, this Chapter considers:

- how the regulation of the sector has changed under the governing regulatory principles of necessity, risk and proportionality;

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<sup>159</sup> Paragraph 3(b) of the TEQSA Act.

- the change in the burden experienced by providers in meeting registration and course accreditation requirements under the TEQSA Act; and
- the extent to which the current Threshold Standards facilitate provider diversity across the sector, and facilitate self-accreditation.

While TEQSA's resourcing is not within the Terms of Reference for this Review, it has been difficult to disassociate this from the assessment of the quality of regulation. The consultations undertaken during this Review made it clear that the realised experience of the sector has been a function, at least in part, of TEQSA's ability to regulate given its resourcing (for example, in affecting the time taken to assess applications).

These matters are discussed in turn below.

### 6.1 Implementation of the legislative principles of regulatory necessity, risk and proportionality

Section 13 of the TEQSA Act provides that TEQSA must comply with the principles of necessity, risk and proportionality when exercising a power under the Act. Sections 14-16 of the Act provide some guidance on what these principles mean and when TEQSA is deemed to have regulated according to them. However, the provisions are not prescriptive. Section 14 of the TEQSA Act states that:

*"TEQSA complies with the principle of regulatory necessity if its exercise of the power does not burden the entity any more than is reasonably necessary".*

It follows that TEQSA is required to make a judgment on what constitutes "reasonably necessary". Judgment needs to be exercised in applying both section 15 ('reflecting risk'), although in this case the matters to which TEQSA must have regard are specified, and section 16 ('proportional regulation') where, again, the matters to which TEQSA is to have regard are set out, albeit in rather broad terms in this case.

The Review has concluded that the three principles of regulation are desirable features of the TEQSA Act. They provide a sound conceptual basis for efficient and effective regulation by TEQSA. Importantly, the principles allow TEQSA to customise its regulation to the individual features of each provider, rather than employing a 'one size fits all' approach.

It is clear that in the initial years of TEQSA's operation the principles were not adhered to in the way intended. The *Review of Higher Education Regulation in Australia* described TEQSA's initial approach as involving "a culture of top-down data collection ... that has become widespread and cost-insensitive."<sup>160</sup>

The exercise of TEQSA's judgment in its initial years of operation was characterised by the sector as involving excessive regulation; TEQSA was seen as failing to properly apply the regulatory principles. This highlights the vulnerability of the principles to interpretation and judgment and raises the question whether the legislation should be more prescriptive. The University of Canberra suggested that this lack of prescription may have been largely responsible for the issues experienced in the initial years:

*"the TEQSA Act does not prescribe how the regulator ought to go about its work and the interpretation of the Act by the regulator has led to some onerous requests. Information required from HEPs in the first tranche of TEQSA renewal of registrations is an example of this."*<sup>161</sup>

However, providers more commonly recognised the guiding properties of the regulatory principles and their usefulness in serving as a reference point for good regulation. They

<sup>160</sup> Lee Dow and Braithwaite, above n 3, covering letter to the Minister.

<sup>161</sup> University of Canberra, submission, *Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector*, November 2016, 2.

understood the challenge for the regulator in striking the right balance in interpreting the principles, but did not view this challenge as one that could not be managed by TEQSA through ongoing consultation with the sector and improved processes. Charles Darwin University noted:

*"TEQSA does indeed work hard to ensure that it gives effect to these principles when establishing its processes and managing specific casework, and while these judgment calls have not always been entirely to the sector's liking, the principles provide valuable reference points for discussion."*<sup>162</sup>

Navitas commented that:

*"in a few cases the proportionality of regulatory interventions could be interpreted as excessive imposition of one individual regulator/expert's preference over another expert's preference. But for the most part TEQSA has managed this tension well."*<sup>163</sup>

The issue of overly burdensome regulation of the higher education sector under the TEQSA Act, including by way of disproportionate data collection, appears to have been addressed. From the perspective of stakeholders, the activities of TEQSA appear to have moved more in line with that intended by the regulatory principles.

TEQSA has developed more sophisticated assessment frameworks that distinguish between providers based on perceived risk, such as the 'Core +' approach to regulation. Such frameworks more clearly reflect the application of the regulatory principles as intended and the sector expressed positive views on this development. For example, Navitas concluded that the *"'needs' based consideration of minor and major course changes is an exemplar of the application of proportionality."*<sup>164</sup>

### **The 'Core +' model**

In recent years TEQSA has introduced what it describes as a 'Core +' model for provider assessment. The model was intended to reduce the regulatory burden on providers by requiring less information as part of their application processes; only providers considered by TEQSA to be at greater risk of failing to comply with the Threshold Standards will be required to supply additional information to TEQSA. The 'Core +' model was first introduced for provider registration and subsequently for course accreditation.

TEQSA's 'core' assessment scope for provider registration (that is, the minimum evidence required of all providers) includes evidence relating to governance, planning and performance, academic quality assurance, and student experience and support.<sup>165</sup> A higher education provider would then be required to provide additional information if it were assessed as a moderate or high risk to students and/or risk to financial position during its most recent TEQSA risk assessment, or if issues had been raised in the past with the provider (such as conditions being imposed).<sup>166</sup>

In July 2015, building on the implementation of the 'Core +' model established for provider registration, TEQSA introduced a similar model in relation to course accreditation.<sup>167</sup> Under the 'Core +' model for course accreditation, providers with a sound history of higher education provision, and no significant compliance or risk concerns are

<sup>162</sup> Charles Darwin University, above n 116, 2.

<sup>163</sup> Navitas, above n 137, 4.

<sup>164</sup> Ibid, 3.

<sup>165</sup> TEQSA, *Process guide: applying for renewal of registration. Version 1.1* (2014) 6 <[http://www.teqsa.gov.au/sites/default/files/RenewalReg\\_ProcessGuide\\_V1.1.pdf](http://www.teqsa.gov.au/sites/default/files/RenewalReg_ProcessGuide_V1.1.pdf)>.

<sup>166</sup> Ibid, 8.

<sup>167</sup> Under the 'Core +' model for course accreditation, only new courses *from new providers* will undergo a full assessment, although new courses from existing providers will undergo a slightly greater degree of scrutiny, relative to re-accreditation of existing courses.

expected to face a reduced scope of assessment.<sup>168</sup> As with the registration process, if TEQSA identifies certain risks with a provider (as indicated by student indicators, or if a significant issue is raised in the provider's regulatory history), the evidence requirement for course accreditation or renewal of course accreditation can be expanded.<sup>169</sup>

In the consultations undertaken during this Review, providers commonly noted that TEQSA's risk assessments have helped them to more efficiently target their attention to the high risk aspects of their operations.

The tailoring by TEQSA of its approach to different providers has not met with unanimous approval. Some stakeholders have seen the 'tailored' approach as discriminatory. A view commonly expressed in consultations was that the application of the regulatory principles in a way that places greater burdens on sub-groups within the sector has a disproportionate impact on NUHEPs when compared with universities. The Council of Private Higher Education asserts:

*"The widely held view across non-university institutions is that universities experience light touch regulation. Any additional regulatory burden borne by non-university providers is a factor that limits competition and diverts resources that would otherwise be directed to teaching."*<sup>170</sup>

It goes on to note:

*"Table A (Public) Universities enrol 90% of students yet there is not one condition recorded against universities in the TEQSA register. On the balance of probabilities it is highly unlikely that our public universities, operating across dispersed locations, are quite so risk free."*<sup>171</sup>

Different views are held in the sector regarding whether TEQSA's actions are proportionate to the risks being managed. TEQSA found in its survey of its regulatory performance that:

*"65% of principal contacts surveyed rated TEQSA's regulatory actions as being proportionate to the risks being managed. This rating increased to more than 75% for low risk providers. The results also varied considerably when viewed by TEQSA market grouping. For example, 84% of university based principal contacts and 92.9% of faith based contacts rated TEQSA as good or excellent in response to this question, while only 40% of for profit providers did so."*<sup>172</sup>

It was suggested by the Council of Private Higher Education that the TEQSA Act should be amended to include consideration of "size and scale" in the basic principles of regulation. With universities typically much larger than NUHEPs, an amendment of this nature would address the perception by NUHEPs of an uneven application of a 'light touch' approach to regulation.

It may be the case in some situations that smaller providers 'feel' the impact of their compliance requirements more intensely, relative to that of larger and better resourced providers. However, it not clear that this necessarily equates to additional regulatory burden; nor is it clear that an amendment to the basic principles would be more effective in this case than refinements in the processes adopted by the regulator. Indeed, in its

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<sup>168</sup> TEQSA, *Summary report of the consultation process. TEQSA's 'Core +' model for course re-accreditation* (July 2015) 2

<<http://www.teqsa.gov.au/sites/default/files/SummaryReportCorePlusAccredFINAL.pdf>>.

<sup>169</sup> TEQSA, *Application Guide for Registered Higher Education Providers, Course Accreditation and Renewal of Course Accreditation*, (2016) 5

<[http://www.teqsa.gov.au/sites/default/files/ApplicationGuide\\_CourseAccredReAccred3.5.pdf](http://www.teqsa.gov.au/sites/default/files/ApplicationGuide_CourseAccredReAccred3.5.pdf)>.

<sup>170</sup> Council of Private Higher Education, above n 112, 3.

<sup>171</sup> Ibid.

<sup>172</sup> TEQSA, above n 108, 23.



2015-2016 Regulator Performance Framework Report TEQSA has indicated that it will make refinements to its processes in response to stakeholder feedback, including “ensuring that actions are proportionate to risk” and that “consultation with private providers” occurs.

Finally, while it would certainly be problematic if the regulator were inappropriately imposing regulatory burden on certain sub-groups within the sector, it is entirely appropriate that higher burdens are faced by higher risk providers. The Review has not reviewed TEQSA’s risk rating system, and therefore cannot conclude whether certain provider groups have been inappropriately targeted for more intensive review by TEQSA. However, it is quite possible that providers with ‘earned autonomy’ have processes in place that are also correlated with having a lower risk rating, resulting in closer scrutiny being placed on those providers that are not in that position.

## 6.2 Regulatory burden associated with provider registration and course accreditation

The primary impact of the compliance expectations for providers under the TEQSA Act is experienced through the provider registration and course accreditation processes. These processes, and how they connect to the Threshold Standards, are described in paragraph 2.2.2 above. Both processes are subject to maximum statutory timeframes, but the TEQSA Act does not specify what information TEQSA may seek.

While this Review did not undertake a quantitative analysis of the compliance costs imposed on providers, the overall impression from the sector is that the cost of compliance currently experienced by the sector has not increased since the introduction of the TEQSA Act. This position was supported by both universities and NUHEPs.

However, universities often pointed to the higher costs associated with AUQA reviews when asked to compare provider registration and course accreditation under the TEQSA Act with the previous system of regulation. Compared to participating in an AUQA audit, applying for registration (or renewal of registration) under the TEQSA Act is significantly less burdensome for universities. While the AUQA process was substantively different in scope and aim to the current TEQSA process, it does provide some basis for comparison of regulatory burden. Indeed, this was one of the most cited views raised by the sector. For example the University of Notre Dame noted:

*“The University experienced a renewal of registration process (as a Higher Education Provider and under CRICOS) in 2015. Our experience of these processes compared with the previous Australian University Quality Agency (AUQA) quality audit processes has been that TEQSA’s regulatory processes are less onerous and resource intensive.”<sup>173</sup>*

Similarly, the University of Melbourne notes:

*“The University is currently undergoing reregistration and notes the positive relative differences in compliance costs (time and financial) between the current and past (pre-TEQSA Act) regulatory landscapes. The current TEQSA process is significantly less onerous in the required resources for compliance than the previous AUQA process that required significant resources and dedicated personnel working full time on development of the submission.”<sup>174</sup>*

And finally, from Charles Sturt University:

<sup>173</sup> University of Notre Dame, submission, *Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector*, November 2016, 1.

<sup>174</sup> University of Melbourne, submission, *Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector*, November 2016, 3.

*"Having recently undertaken re-registration under the new Core+ TEQSA process, significantly less administrative effort and cost was incurred than in earlier Australian Universities Quality Agency (AUQA) processes."<sup>175</sup>*

This Review received a small number of estimates of the resources costs associated with an AUQA audit and the relative savings brought about by the introduction of the TEQSA Act. One university suggested that an AUQA audit required resourcing equivalent to two full time equivalent workers for twelve months. Two other universities estimated that provider renewal of registration under the TEQSA Act required less than half the resources requirements of an AUQA quality audit.

Several reasons explain why the TEQSA model of regulation is less onerous compared with the AUQA process. The reason most often given by providers was that the documentation required by TEQSA is largely based on existing operational documentation that is typically already in the possession of a provider (such as minutes from executive meetings). This removed the need to develop a bespoke package of documents as required by AUQA.

#### **Approval times for applications**

The time taken to accredit courses can impose costs on non-self-accrediting providers. It can take a long time to get a course to market and if, through regulatory delays, it takes longer for non-self-accrediting providers to offer a course relative to those with self-accrediting status this can restrict competition in the sector; it can also restrict agility.

A number of stakeholders expressed the view that TEQSA's current resourcing is leading to unnecessarily high burdens on providers. The nature of this burden can vary across providers, but most commonly cited were experiences of long application processes, low quality interactions with TEQSA's case managers (predominantly reflecting a lack of a consultative approach regarding applications), and a 'tick-a-box' approach to regulation. Macleay College's submission provided a summary of the issues:

*"the time necessary to address the level of detail specified in the Act for both Registration of providers and Accreditation of courses has grown beyond the capacity of the Agency. The allowance in the Act of 1 month for TEQSA to confirm that an application is complete, plus 9 months to assess it, plus a further month to formally sign off their reply, was, in the early days, referred to as a worst case scenario. This time frame quickly became the norm. When institutions began to complain about delays and lack of consultation, the detailed assessment process shifted toward conservative 'tick-a-box' checklists based on 'national standards'. Recent shifts in the stance of TEQSA back toward the historically more developmental approach to quality control is to be commended. Unfortunately this has done nothing to shorten an unreasonably lengthy process."<sup>176</sup>*

The views expressed by this provider are representative of broader frustration that the sector expressed in relation to approval times in particular. Many providers suggested that the inclusion of statutory timeframes had led, more often than not, to the utilisation of the maximum time limit before decisions are made. It was argued that this caused uncertainty and reduced the ability of providers to respond to market pressures.

Data provided by TEQSA indicates that improvements have been made in average processing times from 2012-13 (the financial year before Ministerial Direction No. 2 of 2013 was made) to 2015-16. These improvements occurred despite a reduction in TEQSA's staffing numbers from 95 at the end of 2012-13 to 53 at the end of 2015-16. By 2015, the average time taken to make a decision on registration and accreditation fell

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<sup>175</sup> Charles Sturt University, above n 113, 8.

<sup>176</sup> Macleay College, above n 114, 1.

below the maximum statutory period (that is, around nine months), with further improvements made in 2016 regarding average registration decision timelines.

Table 6.1 TEQSA's decision-making timeframes (days)<sup>177</sup>

	2012-13	2013-14	2014-15	2015-16
Registration	381	303	256	172
Re-registration	229	279	256	238
Accreditation	263	292	195	197
Re-accreditation	215	255	230	213

Source: TEQSA, submission, Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector, November 2016.

Long processing times may also reduce the capacity of non-self-accrediting providers to innovate and respond to market demand, contrary to the objects of the TEQSA Act. The data indicate that average processing times for course accreditation are improving. Between 2013-14 and 2015-2016, the average number of days for accreditation and re-accreditation reduced by 95 days and 42 days, respectively (see Table 6.1).

However, without reliable information on the time taken for providers with self-accrediting status to accredit courses, it is difficult to establish the extent to which current processing times impose differential impacts.

Overall, in moving to a standards-based framework against which compliance must be demonstrated, there does not appear to have been an increase in compliance costs. Indeed, many providers indicated that compliance burden may have fallen. This is likely to have been facilitated by the more targeted information collection adopted by TEQSA through the 'Core +' model for both renewal of registration and accreditation (described in paragraph 6.1 above). Finally, while the sector may have lost external, whole of institution peer-review with the removal of AUQA, a significant trade-off appears to be the aggregate reduction in regulatory burden.

### 6.3 Higher level impacts of TEQSA's regulation

At a higher level, addressing whether the TEQSA Act has improved the quality of regulation should go beyond issues of regulatory burden to assess whether the approach to regulation has in some way 'pushed' the sector in a particular direction that is either beneficial or detrimental. The previous Chapter touched briefly on what regulation may have meant for innovation (see paragraph 5.4). Here the Review identifies other ways in which TEQSA's regulation of providers against the Threshold Standards may have impacted on aspects of course design or delivery.

Some concern was expressed over the course of this Review that the Threshold Standards, and TEQSA's regulation against them, encourage homogeneity across the sector. This could be caused by risk-averse providers changing practices to more 'conformist' approaches to ensure registration or course accreditation. To some extent this would be a concern whether or not the Threshold Standards, or TEQSA's regulation against them, did in fact discourage innovation: the mere fact that some providers interpret them as doing so could limit innovation.

In this regard, JMC Academy notes:

<sup>177</sup> Notes: 2015-16 figures are to 5 May 2016, as this data was prepared for the purposes of the Senate Estimates Committee hearings on 6 May 2016. The average processing times measure, in relation to decisions made in the specified financial year, the number of days between the day on which TEQSA received an application and when TEQSA made a decision in relation to the application. For applications for registration and accreditation, TEQSA is taken to have received an application when it receives payment of the substantive assessment fee. For applications for renewal of registration or accreditation, TEQSA is taken to have received an application when the steps required by sections 35 or 55 (as applicable) have occurred.

*"It would seem that currently higher education providers (especially private providers) are tending towards ... 'risk-averse activities and homogenised provision'. But not only are providers being driven in this direction, but the TEQSA Act has had the effect of driving the regulator in this direction as well."*<sup>178</sup>

JMC Academy notes that alternative regulatory regimes, such as quality assurance based on extensive use of peer review, need not create such problems:

*"Were the TEQSA Act to be amended such that decisions on the registration of a higher education provider and/or the accreditation of courses [were] left to a peer review panel, it is highly likely that there would be far greater diversity in reasons for regulatory decisions and far less "homogenised" regulation and, by extrapolation, a better, more applicable and individualised regulation."*<sup>179</sup>

To some extent these pressures will be present in any standards framework in which a provider's ongoing ability to operate or deliver a course is contingent on receiving prior regulatory approval. Applications will almost necessarily gravitate towards those that are more likely to receive this regulatory approval, and at the margin this may mean changing provider structure or governance, course design, or course delivery to achieve this. Nonetheless, the Review agrees that it is possible to conceive of arrangements that could at the margin improve incentives here. A practical example that has been mentioned in the course of this Review is the trialling of particular innovative practices with providers. This would send the message that TEQSA is indeed willing to work with the sector to encourage and facilitate innovative practice, and reduce any negative consequences that may arise from the risk averse approach that some providers have flagged.

Overall, however, it is difficult to identify the extent to which such homogeneity or risk aversion has been realised in the sector to date. Intuitively these pressures are very real, however, providers who raised these concerns were not able to point to concrete examples of where particular action had not been explored due to fears of regulatory disallowance. Nonetheless, a recurring theme in this Review is the need to ensure that the TEQSA Act, and TEQSA, facilitate and, where possible, encourage innovative practices that do not negatively impact on quality. The concerns expressed here should therefore be addressed, and some suggestions to provide for this are included in the treatment of Term of Reference Six below.

Finally, there are features of the current regulatory system that actively encourage providers to become self-accrediting (the significance of this is explained in paragraph 2.2 above). COPHE notes that:

*"COPHE has seen more Members granted self-accrediting authority, reflecting their capacity for continuous improvement, mature processes and sound governance. TEQSA is further encouraging this development for institutions that have a good track record, to become self-accrediting and we will see further progress in due course."*<sup>180</sup>

Indeed, a number of providers in consultations expressed a desire to seek self-accrediting authority in the near future. This is to be encouraged. A sector in which the regulator encourages providers to reach a level of competence and quality to self-accredit their activities would see the quality of the sector overall rise over time.

## 6.4 Conclusions

The basic principles for regulation are widely accepted by the sector and do not require any amendment. There is evidence that TEQSA has changed its approach to more closely

<sup>178</sup> JMC Academy, above n 142, 6.

<sup>179</sup> Ibid.

<sup>180</sup> Council of Private Higher Education, above n 112, 3.

comply with the principles. The principles have enabled TEQSA to customise a regulatory approach to providers based on their perceived risk, with re-registration and re-accreditation focussing on only those aspects deemed to be of higher risk for the provider.

Previously, some providers were required to comply with both their state or territory regulator (and possibly multiple regulators for multi-jurisdictional providers) and, in some cases, submit to an AUQA audit. In total, the regulatory burden is likely to have reduced under TEQSA, particularly in recent years.

Further, the benefits that providers receive from the registration or accreditation process can temper the extent to which these processes are considered a regulatory burden.

The time taken to accredit courses can impose costs on non-self-accrediting providers (see paragraph 6.2 of this Report above). It can take a long time to get a course to market and if, through regulatory delays, it takes longer for non-self-accrediting providers to offer a course relative to those with self-accrediting status this can restrict competition and agility. Long processing times may also reduce the capacity of non-self-accrediting providers to innovate and respond to market demand, contrary to the objects of the TEQSA Act.

While the data indicates that average processing times for course accreditation are improving, without reliable information on the time taken for providers with self-accrediting status to accredit courses, it is difficult to establish the extent to which current processing times impose differential impacts.

There is insufficient evidence to support a need to amend the TEQSA Act to address the issues identified, including an amendment to statutory timeframes. TEQSA should continue to seek ways to reduce the regulatory impost for low risk providers.

# 7 Term of Reference Four: Whether there is unnecessary overlap with other legislation

The TEQSA Act sits alongside other legislation enacted to govern and regulate aspects of the tertiary education sector. As the 2013 *Review of Higher Education Regulation* noted, this legislation was enacted at different points in time and with different objectives.

Since the 2013 Review, there have been efforts to reduce the degree of overlap between the TEQSA Act and other legislation. For example, TEQSA's work with the Department of Education and Training in transferring responsibility for the data collection behind Provider Information Requests to allow for a single data collection has reduced the reporting burden on the sector. This represents a streamlining of the requirements imposed by the TEQSA Act and, in this case, the *Higher Education Support Act 2003* (Cth).

Term of Reference Four relates to remaining areas of overlap between the TEQSA Act and other legislation. Through the consultations and submissions, stakeholders pointed to various examples of overlap, and these form the basis for the findings in this Chapter.

It is important to note that not all of the examples of overlap identified by stakeholders related to the TEQSA Act itself. Some related to potential overlap between the Threshold Standards and the National Code established by the *Education Services for Overseas Students Act 2000* (Cth) (see paragraph 7.1 below).

A small number of providers raised issues of legislative duplication that did not, on the evidence, appear significant enough to warrant any changes to the TEQSA Act.

This Chapter therefore outlines the most commonly raised areas of overlap that are likely to have a more material impact on providers; these are the issues that would benefit from more detailed consideration. They relate to the:

- *Education Services for Overseas Students Act 2000* (Cth);
- *National Vocational Education and Training Regulator Act 2011* (Cth); and
- *Higher Education Support Act 2003* (Cth).

Each is discussed in turn below.

## **7.1 Education Services for Overseas Students Act 2000 (Cth)**

The *Education Services for Overseas Students Act 2000* (Cth) (ESOS Act) is the primary legislation governing delivery of education in Australia to international students on a student visa. The National Code is established by the ESOS Act and sets out enforceable standards for the conduct of registered providers. The ESOS Regulations 2001 support the implementation of the ESOS Act and set out additional requirements that must be met by providers. These instruments largely comprise the ESOS framework.

In December 2015, amendments to the ESOS Act streamlined it with TEQSA's frameworks, establishing TEQSA as an ESOS agency and giving it power to regulate providers under the ESOS Act; this represented the mechanism by which TEQSA could

streamline assessment processes for providers subject to the requirements of both Acts and realise regulatory efficiencies for the sector.

With providers able to be registered under the ESOS Act for up to seven years, TEQSA is able to harmonise the re-registration processes under the TEQSA and ESOS Acts, thereby avoiding duplication for the provider. Providers have indicated their strong support for these changes and many anticipate benefiting from the reduced burdens. The Queensland University of Technology noted:

*"ESOS changes were implemented in December 2015. Our operational matters with TEQSA are running smoothly with TEQSA as QUT's Designated Authority. The ability for TEQSA to align the re-registration processes as a higher education provider and provider of education services to overseas students at our next renewal cycle is likely to be of benefit to QUT and TEQSA."*<sup>181</sup>

The conditions to be met under the ESOS framework are, however, more prescriptive than those required under the Threshold Standards. This has meant that, while application processes have been streamlined, some providers still employ two administrative streams—one for domestic students, governed by the TEQSA Act, and one for international students under the ESOS Act—to meet the requirements of the respective legislation.

Indeed, more than one provider argued that self-accrediting institutions under the TEQSA Act should receive automatic registration under the ESOS Act. This Review does not agree with this argument. ESOS is a specific framework governing the provision of quality education to international students; it sits adjacent to the TEQSA Act, ensuring specific protections for this particular student cohort.

Another provider raised an issue with the *Requirements for registered self-accrediting providers* in 'Part D: Standards for registered providers' of the National Code. The National Code requires that:

*"Registered self-accrediting providers must undertake an independent external audit once every five years which must assess its compliance with the National Code and include a full inspection of the premises. The results of this audit are to be provided to the designated authority."*<sup>182</sup>

These audits help to inform TEQSA in undertaking its assessment of ESOS re-registration applications. However, they are to occur every five years,<sup>183</sup> which does not align with the seven year registrations that can be granted under both the ESOS and TEQSA Acts.<sup>184</sup> While TEQSA may be able to coordinate a relatively streamlined approach, it is reasonable to amend the National Code to improve alignment between the ESOS audit cycle and the TEQSA and ESOS registration cycle.

Indeed, this appears to be the direction to be taken. At the time of writing, the Australian Government Department of Education and Training has released a consultation draft of a

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<sup>181</sup> Queensland University of Technology, Submission, *Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector*, November 2016, 2.

<sup>182</sup> Department of Education, Australian Government, *National Code Part D: ESOS Standards* <<https://internationaleducation.gov.au/Regulatory-Information/Education-Services-for-Overseas-Students-ESOS-Legislative-Framework/National-Code/nationalcodepartd/Pages/ESOSNationalcode-PartD.aspx>>.

<sup>183</sup> Department of Education, Employment and Workplace Relations, *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007* (2007), Australian Government, 10 <[http://www.teqsa.gov.au/sites/default/files/National\\_Code\\_2007\\_pdf.pdf](http://www.teqsa.gov.au/sites/default/files/National_Code_2007_pdf.pdf)>.

<sup>184</sup> *Education Services for Overseas Students Act 2000* (Cth) s6B(1)(f); *Tertiary Education Quality and Standards Agency Act* (Cth) s21(6).

revised National Code.<sup>185</sup> The paper proposes a change to the National Code such that 'Standard 11 Additional Registration Requirements' includes Standard 11.4:

*"Registered providers who are self-accrediting must undertake an independent external audit during their period of CRICOS registration, at least within 18 months prior to renewal of that registration to inform the re-registration of the provider".*

A requirement of this kind would appear to improve the level of alignment between the registration cycles of the ESOS and TEQSA Acts.

Duplication between the Threshold Standards (2015) and the National Code was an issue commonly raised by providers during this Review. Some providers identified individual standards in both frameworks to support arguments of duplication. The making of the Threshold Standards led some to question the need to retain the National Code.

The Review judges that the duplication between the standards is not significant. However, it is understood that the current review of the National Code is being undertaken as part of the overall reform of the ESOS framework. This Review recommends that a detailed and broader assessment of the overlap should be undertaken as part of the review of the National Code. That review could also determine processes so that, if one of the Threshold Standards is satisfied, then the corresponding standard in the National Code is taken to be satisfied (or vice versa).

**Recommendation 4.1:**

**Consideration should be given to amending the National Code to improve alignment between the ESOS audit cycle and the TEQSA and ESOS registration cycles. The extent to which there is duplication of compliance effort in adhering to both the Threshold Standards and the National Code should be examined and processes streamlined. The review of the National Code in 2017 as part of the overall reform of the ESOS framework is the most appropriate mechanism for examining these issues. That review could consider establishing a process so that, where the standards overlap, providers are not required to demonstrate compliance with both sets of standards, but only the ascendant standards.**

**7.2 National Vocational Education and Training Regulator Act 2011 (Cth)**

Two issues were commonly raised in the context of the *National Vocational Education and Training Regulatory Act 2011* (Cth) (NVTER Act):

- the jurisdictional overlap between vocational education and training and higher education; and
- the governance of the Australian Qualifications Framework.

These issues are discussed in turn.

**7.2.1 Jurisdictional overlap between vocational education and training (VET) and higher education**

The primary issue raised by the sector regarding the NVTER Act concerned the overlap in regulation between TEQSA and the Australian Skills Quality Authority (ASQA)<sup>186</sup> in relation to certain Australian Qualification Framework (AQF) courses;<sup>187</sup> these are courses that

<sup>185</sup> Department of Education, Australian Government, *National Code of Practice for Providers of Education and Training Services to Overseas Students – Consultation draft February 2017* <<https://www.education.gov.au/news/release-consultation-draft-national-code-public-comment?>>.

<sup>186</sup> The *National Vocational Education and Training Regulator Act 2011* (Cth) along with the *National Vocational Education and Training Regulator (Transitional Provisions) Act 2011* (Cth) established the Australian Skills Quality Authority as the national VET Regulator in Australia.

<sup>187</sup> The AQF is the national policy for regulated qualifications in Australian education and training. It incorporates the qualifications from each education and training sector into a single comprehensive national qualifications framework.



lead to a Diploma (Level 5), Advanced Diploma (Level 6), and Graduate Certificate and Graduate Diploma (Level 8). These are all “higher education awards” as defined in section 5 of the TEQSA Act.

ASQA explained that:

*“TEQSA accredits courses at Diploma and Advanced Diploma level which by title are also accredited as VET qualifications. Examples include Diploma in Management, Advanced Diploma in Accounting, [and] Diploma in Hotel Management. These courses are in many cases delivered by both universities and TAFEs as higher education programs. A similar issue arises in the VET sector where some Graduate Diploma and Graduate Certificate courses are accredited in fields which traditionally are the domain of higher education such as health sciences.”<sup>188</sup>*

There is no mechanism currently in place to establish which of TEQSA or ASQA is to accredit courses leading to these qualifications. This creates uncertainty for providers, students, employers and other stakeholders. TEQSA also added:

*“In particular, TEQSA’s understanding is that there is no basis on which either TEQSA or ASQA can refuse to consider an application for such a course once it has been made, even where it appears clear that the course would be more appropriately considered by the other agency.”<sup>189</sup>*

Both TEQSA and ASQA recommended greater legislative clarity of the remit of each agency in dealing with these qualifications. Potential solutions suggested for consideration included:

- Amending the AQF to reinstate the distinction between a VET AQF level 8 course and a higher education AQF level 8 course; or
- Amending the NVETR Act and the TEQSA Act to confer on TEQSA responsibility for accrediting all courses at a specified AQF level, for example, level 5 and above.

The Review agrees that greater legislative clarity is required. What form that is to take should be the focus of a review separate to this, and perhaps more concerned with the operation of the AQF in general as discussed in the next paragraph. Clarifying which courses are to be regulated by TEQSA and which are to be regulated by ASQA is likely to lead to a need for consequential amendments to the TEQSA Act.

**Recommendation 4.2:**

**The next review of the AQF should clarify which courses leading to Diploma, Advanced Diploma, Graduate Certificate and Graduate Diploma qualifications are regulated by TEQSA and which are regulated by ASQA.**

**7.2.2 Governance of the AQF**

Emerging disaggregated learning models (such as “micro-credentialing”, which is referred to in paragraphs 2.6 and 5.4 above) are posing challenges to regulators and quality assurers of higher education all over the world. TEQSA is aware of the issues:

*“The rise of such “micro-credentialing” poses significant challenges: which entity is being quality-assured? From which jurisdiction should regulation be applied? Do the packages of accumulated learning amount to a recognised qualification? In TEQSA’s case, should the obligation to protect the interests of Australian [higher*

<sup>188</sup> Australian Skills Quality Authority, submission, *Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector*, November 2016, 2.

<sup>189</sup> TEQSA, above n 152, 10.

education] *students apply even when the students' studies are not part of a recognised Australian qualification?*<sup>190</sup>

Current qualification frameworks do not recognise new and emerging educational products of this kind. The AQF was commonly pointed to as being in need of review. The AQF Council was, however, disbanded in 2014, and it is not clear that there is a process in place by which the AQF can be reviewed to address the challenges posed by developments such as disaggregated learning models or to deal with the problem of jurisdictional overlap referred to in paragraph 7.2.1 above. The sector did not provide strong views on whether the AQF requires an established governing body or what that body should be.

There were no major issues raised regarding the manner in which the Department of Education and Training is currently managing the AQF. It was put that a clear process for ongoing development of the AQF would benefit the sector and position it to better respond and deal with the challenges that are being raised by disaggregated learning models.

Some stakeholders proposed that the Higher Education Standards Panel (HESP) should lead the development of the AQF. However, a designated role for the HESP is not recommended as the AQF encompasses a broader set of awards than just higher education. It is recommended that the HESP should be consulted on changes to the AQF. Further, this Review sees no need to empower the AQF via the TEQSA Act or through any other legislation. Doing so might risk creating a level of rigidity that restricts the AQF from evolving as a policy framework.

### 7.3 Higher Education Support Act 2003 (Cth)

This Review did not reveal strong concerns from the sector of unnecessary overlap between the TEQSA Act and the *Higher Education Support Act 2003* (Cth) (HESA). However, some stakeholders noted that the HESA appeared to be outdated, particularly in light of the introduction of the TEQSA Act.

Perhaps this is most clearly demonstrated by Chapter 2 Part 2-1 Division 16 of the HESA dealing with what is a higher education provider (section 16-1). The Minister is empowered to approve a body as a higher education provider if certain conditions are met (section 16-25) and to decide an application for approval (section 16-50). Further, section 16-60 of the HESA states:

*"The Minister may impose conditions on a body corporate's approval as a higher education provider. Such conditions need not be imposed at the time notice of approval is given to the provider."*

It is apparent that there is a degree of overlap between the TEQSA Act (see Chapter 2 above) and these provisions in the HESA. JMC Academy notes that:

*"This seems at variance with (if not in contradiction to) the TEQSA Act which defines the nature of a higher education provider and the conditions pertaining to the registration as a higher education provider. Therefore, it appears that there is significant overlap between these two legislative Acts."*<sup>191</sup>

And further that:

*"HESA should not determine whether an institution is a higher education provider. That should be the preserve of the TEQSA Act. Nor should the Minister impose conditions on whether an institution can function as a higher education provider. That too is the preserve of the TEQSA Act. The HESA Act should confine its*

<sup>190</sup> Ibid, 1.

<sup>191</sup> JMC Academy, above n 142, 8.

*concerns to the administration of the FEE Help grants such that these grants only apply to higher education providers registered under the TESQA Act.*<sup>192</sup>

However, the references to "higher education provider" in HESA and the TEQSA Act are working to different ends. The TEQSA Act was established to regulate providers against a set of quality standards and HESA sets out the conditions on which providers can access funding.

Moreover, a provider cannot be approved under HESA without being registered under the TEQSA Act:

- Section 16-27 of HESA states that the "*Minister must not approve a body corporate as a higher education provider unless the body is a registered higher education provider.*"
- Paragraph 22-2(1)(a) of HESA states that the "*Minister must revoke a body's approval as a higher education provider if the body is no longer a registered higher education provider.*"<sup>193</sup>

This Review has not been presented with any evidence, including from either TEQSA or the Department of Education and Training, that an overlap between HESA and the TEQSA Act is causing any problems in practice. However, the confusion to which it gives rise reinforces the need to further clarify the alignment of purposes and activities between the different Acts.

#### 7.4 Conclusions

The TEQSA Act operates within a broader tertiary education regulatory architecture, intersecting with other Commonwealth legislation. Since the *Review of Higher Education Regulation* and amendments to the ESOS Act, TEQSA has improved streamlining in areas where unnecessary duplication has been caused by regulatory overlap. This has been welcomed by the sector; however providers seek further improvements with respect to some duplication of compliance effort in adhering to both the Threshold Standards and the National Code. Providers would benefit from further streamlining between the regulatory frameworks established by the ESOS Act and the TEQSA Act; for example, by amending the National Code to improve alignment between the ESOS audit cycle and the TEQSA and ESOS registration cycles. The review of the National Code as part of the overall reform of the ESOS framework is the most appropriate mechanism to achieve greater efficiencies across the two sets of standards.

A review of the AQF is recommended to clarify which courses leading to Diploma, Advanced Diploma, Graduate Certificate and Graduate Diploma qualifications are regulated by TEQSA. AQF governance could also be considered in that review, which might include an emphasis on developing a mechanism for ongoing development of the AQF as models of higher education delivery continue to evolve.

Fewer concerns were expressed regarding duplication between the TEQSA Act and the HESA. However, there appears to be a growing sense that the HESA, like the ESOS framework, may be outdated and creating uncertainty about its purpose and alignment with the TEQSA regulatory framework.

The extent to which these intersecting Commonwealth legislative frameworks are seen by the sector as overlapping and, in some cases, inconsistent, raises the question whether the relevant elements of HESA, the TEQSA Act, the Threshold Standards and the National Code should be brought into a single framework. Advising on this is outside the Terms of

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<sup>192</sup> Ibid.

<sup>193</sup> A registered higher education provider in schedule 1 of HESA has the same meaning as in the TEQSA Act; section 5 of the TEQSA Act states that a "*registered higher education provider means a higher education provider registered under Part 3 and listed on the Register...*".

Reference for this Review, but the submissions made to Deloitte Access Economics us suggest that it is an issue that should be explored in the future.

## 8 Term of Reference Five: Whether there are amendments to the TEQSA Act or other changes that would enhance the Act's impact or its administration

The TEQSA Act has now been in force for five years and with that comes the opportunity to identify amendments to the Act that would enhance its impact or its administration. The nature of the amendments may look to address issues that have arisen to date, or that could better position the TEQSA Act in the future in light of emerging trends.

This Review was provided with a wide range of suggested amendments in response to Term of Reference Five. These varied in:

- *specificity*: from single administrative provisions to normative questions related to jurisdictional reach;
- *topic*: concerning the TEQSA Act, Ministerial Direction No. 2 of 2013, the Threshold Standards and the Australian Qualifications Framework; and
- *source*: including providers and peak bodies, TEQSA, the Higher Education Standards Panel and the Australian Government Department of Education and Training.

Some of these have already been considered in the treatment of other Terms of Reference in this Report (or are covered in Chapter 9). This Chapter considers the more commonly raised or significant issues that have not been identified elsewhere in this Report. Other issues and suggested amendments not considered in this Chapter or elsewhere in this Report are addressed in Appendix A.

Each suggested amendment has been carefully considered in light of:

- the objects of the TEQSA Act;
- whether the amendment would assist TEQSA to operate more in line with the intention of the guiding regulatory principles; and
- any loss of stability and/or unintended consequences that could result from the proposed amendment to the TEQSA Act.

It is possible to classify some of these issues in themes, and this Chapter is arranged accordingly. It begins by addressing concerns regarding the reach of the Act to online delivery of higher education awards from outside Australia to students in Australia. The second theme deals with whether the TEQSA Act should allow for Standards other than the Threshold Standards (as it currently does). Finally, a number of relatively disparate,

but important, issues were raised that do not fall neatly into a single theme. These are addressed in a 'catch all' paragraph (paragraph 8.3).

### 8.1 Reach of the TEQSA Act; online delivery from outside Australia to students in Australia

The TEQSA Act is Commonwealth legislation; it relies for its constitutional validity on a number of different 'heads' of Commonwealth legislative power. The limits of Commonwealth law making power mean that there are some 'gaps' in the coverage of the Act. One matter of concern to us is that, as explained in paragraph 2.3 above, the TEQSA Act does not currently apply to higher education awards offered by overseas providers from a campus or office outside Australia by way of online delivery to students in Australia.

The provision of online content that crosses national boundaries represents a significant policy challenge for the regulation of higher education in Australia. This was recognised by Universities Australia:

*"Given the increasing prevalence and importance of online delivery, including across national boundaries, it is advisable to consider carefully how TEQSA might most usefully deal with these courses for the benefit of Australian students."*<sup>194</sup>

This contrasts with the view of the HESP and the Department of Education and Training both of which took the view that, from a policy perspective, it is not necessary for the legislation to apply where the award being offered online from outside Australia to Australian students or students located in Australia is an 'overseas qualification'.<sup>195</sup> The HESP explained:

*"Purchases of such education would likely be subject to the consumer and corporate legislation of the country from which the provider is operating. Potential students should take that into consideration and make their own judgment accordingly when considering their choice to study with such a provider."*<sup>196</sup>

The Department added:

*"The proposal that TEQSA should be required to take on responsibility for advising the quality or standing of overseas provider offerings seems unrealistic in practice and beyond the role the Government would envisage for an Australian regulator."*<sup>197</sup>

It is noted, however, that the objects of the TEQSA Act include to protect students undertaking, or proposing to undertake, higher education in Australia and to ensure that students undertaking, or proposing to undertake, higher education, have access to information relating to higher education in Australia (see paragraphs 3(e) and (f) of the TEQSA Act).

While acknowledging the limits of Commonwealth law making power and the practical limitations arising from dealing with overseas providers, the Review considers that more should be done to protect students in Australia and to provide information to them

<sup>194</sup> Email from Universities Australia to Deloitte Access Economics, 12 December 2016.

<sup>195</sup> Both the HESP and the Department were of the view that, from a policy perspective, the Act should apply if what is being offered is an 'Australian award'. In fact, the Act draws no distinction between Australian and overseas qualifications. Both the terms 'Australian higher education award' and 'overseas higher education award' are defined in section 5 of the Act to mean 'a higher education award'; 'higher education award' is, in turn, defined broadly in section 5 in a manner that does not limit it to Australian qualifications. The distinction between an 'Australian higher education award' and 'overseas higher education award' relates only to who offers the award.

<sup>196</sup> Letter from the Higher Education Standards Panel to Deloitte Access Economics, 5 December 2016.

<sup>197</sup> Letter from the Australian Government Department of Education and Training to Deloitte Access Economics, 11 January 2017.

regarding the provision of higher education by overseas providers via online learning even where the online learning is provided from a campus or office outside Australia. As Universities Australia pointed out:

*"This may be through regulation, or through a non-regulatory regime of environmental scanning, quality assurance and dissemination of information to Australian students about which online courses are available and which ones are and are not reputable."<sup>198</sup>*

The Review considers a non-regulatory approach to be feasible and one that can advance the objects of the Act. TEQSA (or the Department) could develop and maintain a register of information regarding online higher education providers who have been accredited by recognised overseas quality assurance agencies or about international accreditation bodies that accredit such providers. This would provide information for students studying in Australia in what is likely to be a growing source of education.

TEQSA was asked as part of this Review to consider this issue; its response identified several non-regulatory options:

*"More difficult questions arise in cases where a higher education course is delivered outside Australia (or from premises outside Australia to students in Australia) by an overseas entity... the emphasis on a student-centric approach is one of the key recent developments in international higher education quality assurance. Further, TEQSA's current functions in section 134 of the TEQSA Act cover some of this activity through:*

- *[t]he collection, analysis, interpretation and dissemination of information relating to quality assurance practice, and quality improvement, in higher education*
- *[c]onducting training to improve the quality of higher education; and*
- *[c]ooperating with TEQSA's counterparts in other countries.*

*Some opportunities may exist to allow TEQSA to play a greater role in these areas. This could include:*

- *Creating an information centre with information about options for studying overseas, the interaction between study in Australia and overseas and the recognition of overseas qualifications in Australia. While some of this information is provided by the Department of Education and Training and by state qualifications recognition units, this could benefit from a more central approach such as the one adopted by the United Kingdom National Recognition Information Centre.*
- *Permitting TEQSA to support the development of quality assurance overseas by assisting in the development and implementation of domestic quality assurance frameworks in other countries. For instance, the Hong Kong Council for Accreditation of Academic and Vocational Qualifications has undertaken a range of projects in other jurisdictions to assist in the development of quality assurance frameworks and the reviews of particular institutions.*
- *Developing TEQSA's cooperation with international agencies to provide for publication of more detailed information about the activities of other agencies, including information for Australian students on developments in countries which are the subject of TEQSA's international cooperative arrangements.*
- *Providing an Australian forum for the dissemination of information about global quality assurance and quality improvement activities in higher education."<sup>199</sup>*

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<sup>198</sup> Email from Universities Australia to Deloitte Access Economics, 12 December 2016.

<sup>199</sup> TEQSA, above n 152, 10.

TEQSA's suggestions are not inconsistent with the proposal of this Review that TEQSA (or the Department) could protect students by developing a register of online higher education providers who have been accredited by recognised overseas quality assurance agencies or that it might identify international accreditation bodies that accredit such providers.

It is noted that, in Australia's recent free trade agreement with China, Australia agreed that it would provide China with TEQSA's regulatory decisions concerning Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) registered providers, TEQSA's public reports on renewal of registration decisions (and reasons for decisions that result in registration for less than the full seven years), provide to China the courses that listed institutions are accredited to deliver, and the dates by which the institutions will have to apply for TEQSA and CRICOS renewal of registration or renewal of course accreditation. This is the type of information that TEQSA or the Department might seek to collect from other countries so that it can make it available to Australian students.

**Recommendation 5.1:**

**TEQSA or the Department should maintain a public register to provide information of value to students in Australia who might be considering enrolling in higher education awards offered online by providers that cannot apply for provider registration or course accreditation because they are beyond the constitutional reach of the TEQSA Act. The register might identify online higher education providers that have been accredited by recognised overseas quality assurance agencies or it might identify international accreditation bodies that accredit such providers.**

**8.2 Standards other than the Threshold Standards**

Section 58 of the TEQSA Act deals with the making of the Higher Education Standards Framework. As explained in paragraph 2.2.1 above, sub-sections 58(1) and (2) provide for standards falling into two groups. First, what the Act refers to as the "Threshold Standards"; these are the:

- Provider Registration Standards;
- Provider Category Standards;
- Provider Course Accreditation Standards; and
- Qualification Standards.<sup>200</sup>

Secondly, what can be referred to as the "non-Threshold Standards"; these are:

- the Teaching and Learning Standards;
- the Information Standards;
- other standards against which the quality of higher education can be assessed; and
- the Research Standards.

TEQSA's regulatory role involves the application of the Threshold Standards and makes no reference to any of the non-Threshold Standards (see paragraph 2.2.1 above). No non-Threshold Standards have been made.

While the 2015 Threshold Standards are organised into 'Domains' that deal with matters including teaching, research and information, they do not purport to be the Teaching and Learning Standards, the Information Standards or the Research Standards.

Given that no non-Threshold Standards have been made and that the Threshold Standards refer to teaching, research and information, is there any role for non-Threshold Standards? The answer to this is influenced by the way the Threshold Standards are

<sup>200</sup> See also the definition of "Threshold Standards" in section 5 of the TEQSA Act.



characterised. The Threshold Standards are, as the Explanatory Statement to the 2015 Threshold Standards says:

*"the minimum acceptable requirements for the provision of higher education in or from Australia by higher education providers registered under the TEQSA Act."*<sup>201</sup>

The first reason for retaining power to make non-Threshold Standards is that a small number of providers were, rightly in the opinion of this Review, uncomfortable about the notion that the only Standards that could be made pursuant to the TEQSA Act are those dealing with 'minimum acceptable requirements'. This is not to suggest that this Review, or the providers who raised this point, consider that the term 'minimum' implies 'low'. Rather the point is that Standards of a different kind may be needed for a purpose other than the purposes served by the Threshold Standards. For example, it may be necessary to establish Standards with grades of compliance rather than Threshold Standards that are met or not met. It is possible that the objects of the Act set out in section 3, including protecting and enhancing excellence in higher education in Australia, may demand Standards of a different kind, in addition to the Threshold Standards, in the future.

Secondly, in paragraph 5.2.2 of this Report, this Review recommends that it should be possible to undertake sector-wide quality assessments when so directed by the Minister for Education. It is possible that a review of this kind could require the framework of a non-Threshold Standard or that the outcome of the review could include a recommendation that a new, non-Threshold Standard be developed.

Thirdly, it seems advisable, as a matter of principle, to retain the flexibility that the Act currently provides for the making of non-Threshold Standards. It is possible to envisage that, in the future, concern regarding a particular issue, such as student attrition or entry standards regarding a particular course or courses, might best be addressed by the making of a Standard that required something different, or more, than minimum acceptable standards.

These three reasons would be addressed if the possibility of the making of "other standards against which the quality of higher education can be assessed" as currently provided for in paragraph 58(1)(h) of the Act were retained. Unless there is any real prospect of Teaching and Learning Standards, Information Standards or Research Standards being made in the foreseeable future, reference to these particular Standards in the Act is misleading and should be repealed.

The Higher Education Standards Panel raised a different matter. The Panel suggested that there should no longer be categories of Threshold Standards, that is, the Act should not require the development of Provider Standards (the Provider Registration Standards, the Provider Category Standards and the Provider Course Accreditation Standards) and Qualification Standards. This suggestion was driven by the way the 2015 Threshold Standards have been developed and structured:

*"The revised framework ... is structured around the operational lifecycle of a typical provider, rather than the regulatory transactions of provider registration and course accreditation. ... To accommodate the revised framework directly, the TEQSA Act should be amended to enable a standards framework to be specified as a unified whole, and remove reference to separate standard types —threshold standards, provider registration standards, course accreditation standards, etc."*<sup>202</sup>

<sup>201</sup> Explanatory Statement to the Higher Education Standards Framework (Threshold Standards) 2015, 4 <<https://www.legislation.gov.au/Details/F2015L01639/Explanatory%20Statement/Tex>>.

<sup>202</sup> Letter from the Higher Education Standards Panel to Deloitte Access Economics, 5 December 2016.

In assessing and analysing this suggestion, this Review noted that, while it is clear on the face of the 2015 Threshold Standards that considerable drafting effort was required to make them 'fit' the various categories of Threshold Standards, the 2015 Threshold Standards have, indeed, been made to conform to the various categories. These new Threshold Standards have only just come into operation in January, 2017 after an extensive period of explanation and consultation with the sector.

These factors militate against making the considerable changes that would need to be made to the Act and the, albeit less significant, changes that would need to be made to the 2015 Threshold Standards to remove references to the categories of Threshold Standards. On the other hand, the categories of Threshold Standards add a layer of complexity that, having engaged in a lengthy review of the 2011 Threshold Standards, the Higher Education Standards Panel has found to be unnecessary.

On balance, this Review has concluded that the TEQSA Act should be amended to remove the categories of Threshold Standards, that is, the Act should not require the development of Provider Standards (the Provider Registration Standards, the Provider Category Standards and the Provider Course Accreditation Standards) and Qualification Standards, but that this amendment should not come into operation until the next formal review of the 2015 Threshold Standards.

This amendment will not only require changes to the definition of "Threshold Standards" in section 5 and changes to sub-section 58(1), but it will also require consequential amendments to sections such as section 49 (paragraph 49(1)(b) refers to the Provider Course Accreditation Standards).

This Review has not accepted the Higher Education Standards Panel's suggestion that the Act should remove references to different types of standards such as Threshold Standards. Given that TEQSA is responsible for applying the Threshold Standards when making decisions regarding registration and accreditation, the Threshold Standards must be clearly distinguishable from other standards. For the reasons set out above, this Review considers that, if the need arises, it should be possible to make 'non-threshold standards', that is, standards that do more than set minimum acceptable requirements for the provision of higher education. Both the Threshold Standards and "other standards against which the quality of higher education can be assessed", would be part of the Higher Education Standards Framework as provided for in sub-section 58(1).

**Recommendation 5.2.1:**

**Section 58 of the TEQSA Act should be amended to delete paragraphs 58(1)(f) and(g) and sub-section 58(2) (consequential amendments will be required to sub-sections 58(3) and 58(4)). Paragraph 58(1)(h) should remain in place so that, if the need arises, Standards may be made that are of a nature different from Threshold Standards, noting that Threshold Standards set minimum acceptable requirements for the provision of higher education.**

**Recommendation 5.2.2:**

**The TEQSA Act should be amended to remove references to the categories of Threshold Standards, that is, the Act should not require the development of Provider Standards (the Provider Registration Standards, the Provider Category Standards and the Provider Course Accreditation Standards) and Qualification Standards. This amendment, and related consequential amendments, should not come into operation until the next formal review of the 2015 Threshold Standards.**

### 8.3 Other significant issues

#### 8.3.1 Student complaints

The number of complaints made by students about Australian higher education providers is difficult to quantify as students have a variety of avenues for making complaints. These include making a complaint directly to the higher education provider or to TEQSA, to the Overseas Student Ombudsman (for international students at private higher education providers), to a Commonwealth, State or Territory Ombudsman, to consumer affairs, to the Australian Competition and Consumer Commission and to the Office of Migration Agents Registration Authority (for complaints against registered migration agents).

TEQSA deals with complaints relevant to a provider's compliance with the Threshold Standards or the TEQSA Act (and some complaints regarding compliance with the ESOS Act). Between February 2015 and June 2016, around 330 complaints were received by TEQSA; approximately 70% of these complaints concerned registered higher education providers, with the others relating to VET providers and other issues. Complaint topics included: outcomes of provider complaint processes; satisfaction with the quality of courses and timeliness of placements; fee/financial issues (overcharges, requests for refunds); accusations of staff misconduct at one provider; non-recognition of prior learning; appeals regarding grades/assessments, conflict with teaching staff, course quality and alleged theft of intellectual property.<sup>203</sup>

TEQSA does not handle complaints regarding matters such as those relating to FEE-HELP or grievances against individual staff.<sup>204</sup>

An issue that was raised in this Review concerned ways in which student complaints about higher education providers could be better dealt with. The Australian Catholic University submitted that:

*"another specific object of the TEQSA Act is to protect students undertaking, or proposing to undertake, higher education and to ensure that students have access to information relating to higher education in Australia. As such, TEQSA is well positioned to act as the official body for handling student grievances and complaints on matters relating to the higher education sector. This will ensure students have a centralised and single point of contact rather than applying through various independent third parties or ombudsmen that are not necessarily specialised in the complexities of the higher education sector."*<sup>205</sup>

It may be that there is a need to establish an official complaints handling body to deal with student grievances, but conferring that role on TEQSA would be a major expansion to TEQSA's current functions and would not necessarily sit comfortably with its role as a regulator. Currently, TEQSA deals only with complaints that are relevant to TEQSA's functions, that is, complaints that relate to a provider's compliance with the Threshold Standards or the TEQSA Act (and the ESOS Act). The Review does not recommend any expansion of TEQSA's complaints handling role.

TEQSA revised its organisational structure in October 2016. As part of this revised structure, it established a new group titled 'the Engagement Group' which:

*"has responsibility for managing complaints about higher education providers. Arrangements for reporting on complaints are currently being revised as part of the establishment of that group."*<sup>206</sup>

<sup>203</sup> TEQSA, *Complaints*, <<http://www.teqsa.gov.au/complaints>>.

<sup>203</sup> Letter from TEQSA to Deloitte Access Economics, December 2016.

<sup>204</sup> TEQSA, *Complaints*, <<http://www.teqsa.gov.au/complaints>>.

<sup>205</sup> Australian Catholic University, submission, *Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector*, November 2016, 2.

<sup>206</sup> Letter from TEQSA to Deloitte Access Economics, December 2016.

TEQSA has proposed an amendment to the TEQSA Act to enable it to disclose information to complainants. The proposed amendment involves the introduction of a new section:

*"195B 'Disclosing information in relation to complaints':*

*Where TEQSA receives a complaint which relates to a regulated entity's compliance with:*

- (a) this Act; or*
- (b) the Education Services for Overseas Students Act 2000; or*
- (c) legislative instruments made under those Acts;*

*TEQSA may disclose higher education information in relation to that regulated entity to the person who made the complaint."*

TEQSA argued that this amendment:

*"would facilitate better engagement between TEQSA and students at higher education providers. In many cases, it may also be in a provider's interest for TEQSA to be able to inform a complainant of the steps TEQSA has taken to satisfy itself that a provider continues to meet the Threshold Standards. Currently TEQSA can publish such information (see sections 196 and 198) but cannot disclose information to individual students."<sup>207</sup>*

The proposed amendment applies to complaints that "relate to ... compliance with" the TEQSA Act, the ESOS Act or legislative instruments made under those Acts which would, of course, include the Threshold Standards. The proposed amendment would allow TEQSA to disclose "higher education information", a term defined in section 5 to extend only to information relating to a regulated entity that is obtained by TEQSA and that relates to TEQSA's functions and which is not personal information within the meaning of the Privacy Act.

Concerns were expressed that disclosing information of the kind contemplated by the proposed new section may give rise to undesirable consequences. Universities Australia noted its concern that:

*"TEQSA would potentially be in a position whereby it could provide information to student complainants (or others) that the university involved may not want disseminated, for instance because it is sensitive for some reason or because it may reflect issues/processes that are at that time under review or revision (and thus may not reflect an on-the-ground reality)."<sup>208</sup>*

The Review has found it difficult to assess the weight to be accorded to this concern. The reason for this is that, until the amendment came into operation, and TEQSA disclosed some information pursuant to it, it is difficult to know what kinds of information will be disclosed. If it were only to draw attention to the fact that the Threshold Standards include a particular requirement and that the provider in question was recently judged to have complied with the Threshold Standards, it should not be problematic. If more specific information were disclosed regarding particular processes or the handling of a complaint by a provider, the concern expressed by Universities Australia can be understood. Universities Australia suggested:

*"We appreciate TEQSA's desire to be able to provide some information back to complainants [p]erhaps an amendment to suggest that TEQSA should seek*

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<sup>207</sup> Letter from TEQSA to Deloitte Access Economics, August 2016.

<sup>208</sup> Email from Universities Australia to Deloitte Access Economics, 15 January 2017.

*approval from the [higher education] provider involved before it can give information out might be appropriate here.”<sup>209</sup>*

In light of uncertainty regarding how the proposed amendment would operate in practice, this Review considers that obtaining the consent of the provider to the disclosure is appropriate.

**Recommendation 5.3:**

**The TEQSA Act should be amended to include a new section:**

***“195B ‘Disclosing information in relation to complaints’:  
Where TEQSA receives a complaint which relates to a  
regulated entity’s compliance with:***

***(a) this Act; or***

***(b) the Education Services for Overseas Students Act  
2000; or***

***(c) legislative instruments made under those Acts;***

***TEQSA may, with the consent of the regulated entity,  
disclose higher education information in relation to that  
regulated entity to the person who made the complaint.”***

**8.3.2 Enforcement Powers**

The investigative and enforcement powers provided to TEQSA under the TEQSA Act were widely seen by the sector as a positive feature in moving to a single national framework. However, questions were raised in this Review regarding the extent to which these powers are needed. Some provisions have never been used; for example, to date TEQSA has not obtained a warrant (sections 90-93) nor has it sought an injunction (sections 127-131).

TEQSA has, however, used some of its investigative and enforcement powers; it has visited sites, exercising its investigative powers under Division 2 of Part 6 of the TEQSA Act, and has entered into two enforceable undertakings under Division 3 of Part 7 of the TEQSA Act.<sup>210</sup>

That TEQSA has to date not exercised the full extent of its enforcement powers is not a signal of their lack of efficacy. These powers appropriately signal the seriousness with which non-compliance can be treated by the regulator. The ‘teeth’ which they provide TEQSA were, and remain, an important aspect of the TEQSA Act. Any weakening of these powers might send an undesirable signal.

**8.3.3 Appendix A to this Report**

Some of the suggested amendments to the Act raised highly technical issues; these, and a number of disparate matters that did not fall under the main themes of this Review, are addressed in Appendix A.

The suggested amendments with which the Review agrees relate to:

**Section 151**, which deals with TEQSA’s ability to make decisions without meeting; the recommended amendment will bring the rules regarding the

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<sup>209</sup> Ibid.

<sup>210</sup> Interview with TEQSA (Melbourne, 30 November 2016).

minimum number of Commissioners required for decisions without meetings into line with the quorum required for meetings.

**Section 188**, which creates an offence of unauthorised disclosure or use of information; the amendment will ensure that the disclosure is not unauthorised if the regulated entity to which the information relates has consented, in writing, to the use or disclosure.

**Section 192**, which deals with disclosing higher education information to the Minister and Secretary; the Review has found this proposed amendment challenging as it will permit TEQSA to disclose personal information (within the meaning of the *Privacy Act 1988* (Cth)) to the Minister, her/his staff, and the Secretary. It will also permit the disclosure of information, including personal information, to an Australian Public Service employee in the Department.

**Section 108** which creates certain offences regarding the use of the term 'university' by those not authorised to use that term; the recommended amendment will address an anomaly that an overseas university that is not capable of being registered by TEQSA would commit an offence under section 108, as currently drafted, by operating in Australia without registration.

**Sub-section 186(2)** which concerns timelines for TEQSA to review internal decisions; the recommended amendment will make it clear that the 90-day period relates to the period within which a decision must be made rather than the period within which the applicant must be notified of the decision.

**Proposed new sub-section 185(2A)**; the recommended new sub-section will allow TEQSA to ensure that an internal review of a decision can take place without the decision under review taking effect before the outcome of the review process.

**Sub-section 199(1)**, which deals with delegations by TEQSA; the recommended amendment will enable TEQSA to delegate its functions and powers to its CEO.

TEQSA also suggested the inclusion of a new section 195A dealing with disclosing information for research purposes; the Review has agreed in principle that this is an appropriate amendment, but no recommendation has been made as there are concerns regarding the way the proposed section has been drafted.

**Recommendation 5.4:**

**It is recommended that the proposed changes to the TEQSA Act adopted in Appendix A should be enacted.**

## 9 Term of Reference Six: Whether the required functions of the Higher Education Standards Panel are adequately reflected in the TEQSA Act

The TEQSA Act sets out the responsibilities and composition of the Higher Education Standards Panel in Part 9. Sub-section 168(1) of the Act lists the HESP's functions:

- a) *to advise and make recommendations to the Minister or the Research Minister:*
  - i. *on making and varying; and*
  - ii. *on other matters relating to;**the Higher Education Standards Framework, if requested by the Minister or on the Panel's own initiative; and*
- b) *to advise and make recommendations to TEQSA on matters relating to the Higher Education Standards Framework, if requested by the Minister or on the Panel's own initiative.*

The Panel is required to consult with 'interested parties' when performing these functions. It may also establish advisory committees to assist it in performing its functions.

Section 167 requires that the HESP consist of a Panel Chair and at least four and up to ten other members. When appointing the Panel, the Minister must ensure that the Panel members "collectively possess an appropriate balance of professional knowledge and demonstrated expertise" including in higher education and the development of quality standards. The Minister must also have regard to the interests of the States and Territories, students, and staff of higher education providers.

So far as the Act is concerned, the focus of the HESP is the Higher Education Standards Framework. The core work of the Panel to date has involved reviewing the 2011 Threshold Standards, over the period 2012 to December 2014, and advising on the new Threshold Standards (2015) that were made by the Minister and commenced on January 1, 2017.

In 2014, following the recommendations of the 2013 *Review of Higher Education Regulation*, the TEQSA Advisory Council was established. The Advisory Council was to work with TEQSA to reduce the regulatory and reporting impost that it was found to have placed on the sector. In February 2015 the Advisory Council was formally disbanded by

the Minister and its members were appointed to the HESP.<sup>211</sup> The Panel today includes the members and observers of the former TEQSA Advisory Council, and an additional member appointed in 2016.

While the core focus of the HESP has been on the Threshold Standards, it has not been limited to this. In 2016 the Panel was asked to provide a report to the Minister on options to improve the transparency of higher education student admissions policies. The Panel's report, *Improving the transparency of Higher Education admissions*,<sup>212</sup> was released in late 2016. The HESP also indicated that it has been asked to provide advice in relation to attrition and completions, advice on student academic integrity issues, and deregulatory opportunities in relation to professional accreditation in higher education.

The Panel has also had roles in assisting TEQSA on various matters, including external validation of TEQSA's self-assessment of its 2015-16 performance under the Government's Regulator Performance Framework. Finally, the HESP has also supported the Higher Education Standards Panel Research Fellowship, funded by the Office of Learning and Teaching, leading to the report by Professor Ewan referred to in Chapter 5 of this Report.

The role of the HESP therefore has not been limited to a narrow focus on the Threshold Standards, but has instead included tasks from time-to-time that have had a somewhat broader purpose, although perhaps still in keeping with providing advice on 'matters relating to' the Standards. It is likely that the HESP will continue to play such an advisory role in the future: indeed in its response to recommendation 14 of the Panel's report on improving admissions transparency (that "*further consideration should be given to assessing the factors and approaches that contribute to student success, completion and attrition rates in higher education*") the Government noted that "*the Panel is well placed to investigate and provide advice on this issue*".<sup>213</sup>

In addressing the sixth Term of Reference, the Review has therefore considered the following matters:

- whether the role for the Higher Education Standards Panel should be broadened in the Act to reflect the wider advisory role it may play, as evidenced by its recent work;
- whether the functions of the Panel are appropriately separated, and distinct, from those of TEQSA;
- whether the composition of the Panel set out in the Act is appropriate given its functions; and
- other matters raised by stakeholders in the course of this Review.

These are set out in turn below.

### 9.1 Defining the role of the Higher Education Standards Panel

The TEQSA Act does not currently limit the capacity of the Higher Education Standards Panel to advise the Minister, or TEQSA, on any issues related to the Standards, or indeed to undertake any other task that the Minister may ask the Panel to undertake. It follows that, whether an expanded role for the Panel should be formalised in the Act depends on whether the clarity itself provides a benefit to stakeholders. This may include, for example, the increased certainty that such a provision would provide for the sector that

<sup>211</sup> The composition of the Panel itself was changed at this point, following the completion of the three year terms of the majority of its original members.

<sup>212</sup> Higher Education Standards Panel, *Improving the transparency of higher education admissions* (December 2016)

<[https://docs.education.gov.au/system/files/doc/other/revised\\_20161115\\_pm\\_final\\_accessibility\\_version\\_hesp\\_admissions\\_transparency\\_report.pdf](https://docs.education.gov.au/system/files/doc/other/revised_20161115_pm_final_accessibility_version_hesp_admissions_transparency_report.pdf)>.

<sup>213</sup> Commonwealth of Australia, *Improving the transparency of higher education admissions Australian Government response to the report of the Higher Education Standards Panel* (December 2016) 8

<[https://docs.education.gov.au/system/files/doc/other/australian\\_government\\_response\\_to\\_hesp\\_admissions\\_transparency\\_report.pdf](https://docs.education.gov.au/system/files/doc/other/australian_government_response_to_hesp_admissions_transparency_report.pdf)>.



emerging issues in higher education will be addressed by drawing on the expertise of the HESP.

The Review has consulted the HESP regarding this question and the Panel favoured the expanded role of the Panel being formalised in the Act. In addition to its current role, the Panel expressed a view that the TEQSA Act should be amended to formally recognise the following roles:

*"The role of the former TEQSA Advisory Council to advise the Minister and TEQSA on minimising regulatory burden, TEQSA's objectives, plans and performance and on data reporting in higher education.*

*A broader advisory role on matters relating to quality and standards in higher education as requested by the Minister for Education and Training from time to time.*"<sup>214</sup>

Taking the second of these points, in suggesting that this expanded role be recognised in the legislation, the Panel lists several examples where it has provided advice beyond making recommendations regarding the Threshold Standards and notes that:

*"All of these examples could be seen as falling within the remit of the role currently specified in the TEQSA Act. However, greater specificity could provide clearer authority to both Panel members and stakeholders for the scope of activity being sought by government.*"<sup>215</sup>

The consultations and submissions to this Review generally indicated no concern on the part of the sector regarding the role that the HESP plays. Indeed, as noted, comments were almost entirely positive when mentioning the various tasks the Panel has performed to date. A small number of submissions expressed some lack of clarity around the role of the Panel, including the following from the University of Canberra:

*"The functions of the Panel, to advise the Minister on the making or varying of Standards or the Higher Education Standards Framework and to advise TEQSA on matters relating to the Standards, are adequately reflected in the TEQSA Act. However, there may be other activities that the Panel could undertake which are not currently articulated. The Minister has already sought to utilise the Panel to investigate options for improvement of the transparency of higher education student admission policies and there may be value in broadening the scope of the activities of the Panel.*"<sup>216</sup>

And further from Victoria University that:

*"The Act sensibly provides a broad power for HESP to advise the Minister and TEQSA on matters it considers appropriate in relation to the Higher Education Standards Framework. In effect, however, this limits HESP's function to an advisory role on the standards that may be made under section 58 of the TEQSA Act.*"<sup>217</sup>

In noting a broader advisory role for the HESP, these statements may imply that these providers see that the Act in some way limits the advice that the HESP may be called

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<sup>214</sup> Letter from the Higher Education Standards Panel to Deloitte Access Economics, 5 December 2016.

<sup>215</sup> Ibid.

<sup>216</sup> The University of Canberra, above n 161, 4.

<sup>217</sup> Victoria University, submission, *Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector*, November 2016, 7.

upon to provide. Nonetheless, if this is what is being implied this view did not appear to be widespread.

Generally, there does not appear to be any significant benefits to stakeholders from providing additional clarity on a broader role the Panel may play. Further, including an expanded role for the Higher Education Standards Panel in the TEQSA Act may only formalise in legislation a role that it may not be called upon to perform in the future. Given that the Act does not currently in any way restrict the advice that the Panel may be called upon to provide, the Review sees no compelling reason to alter the current provisions.

There does, however, appear to be merit in formally expanding the role of the Panel to include those duties with which the disbanded TEQSA Advisory Council was previously tasked. Clause 3ii of Ministerial Direction No. 2 of 2013 requires that the CEO of TEQSA take advice from the Advisory Council, a body that is no longer in existence and whose members now form part of the Higher Education Standards Panel. While disbanded, the role of the Advisory Council continues in effect to be performed by the Higher Education Standards Panel. For example, recent advice from the Panel to TEQSA included guidance on how regulation against the Threshold Standards (2015) should be conducted in a manner commensurate with the three regulatory principles of the TEQSA Act.<sup>218</sup>

There is one change the Review would recommend. Ministerial Direction No. 2 of 2013 required that the CEO "*perform his or her functions under the Act consistently with the advice* [of the TEQSA Advisory Council]". The sense of this Review is that this is no longer a necessary or appropriate requirement and that it would be more consistent with the excellent relationships developed over time by the TEQSA Commissioners, the CEO and the members of the HESP that HESP's advisory role should, indeed, be merely advisory.

In light of the recommendation of this Review regarding the advice giving role of the HESP, the Review also recommends that Clause 3i of Ministerial Direction No. 2 of 2013 be repealed. Clause 3i requires that the CEO of TEQSA take advice from the National Advisory Group for Higher Education Data and Information (NAGHEDI) regarding its policies and approaches for Provider Information Requests and any sector-wide data collection and/or survey activities; the CEO is required to perform his or her functions under the Act consistently with the advice.

The activities of the kind referred to in Clause 3i are no longer conducted by TEQSA in a manner that causes concern to the sector; the Review considers that the current approach of TEQSA and its CEO, taken together with the advisory function of the HESP, will be sufficient to ensure that this remains the case. The Review notes that TEQSA is represented on the Higher Education Data Committee (HEDC) which replaced NAGHEDI and that TEQSA could, if it wished, obtain the advice of the HEDC.

**Recommendation 6.1.1:**

**The responsibilities of the TEQSA Advisory Council as set out in Ministerial Direction No. 2 of 2013 should be formally transferred to the Higher Education Standards Panel (the HESP) via an amendment to section 168 of the TEQSA Act; the legislation should enable the HESP to provide advice to TEQSA and authorise TEQSA's CEO to seek such advice rather than setting out a requirement that the CEO of TEQSA must perform his or her functions under the Act consistently with the advice. That part of the Ministerial Direction dealing with the TEQSA**

<sup>218</sup> Higher Education Standards Panel, *Advice from the Higher Education Standards Panel to TEQSA regarding the application of the Higher Education Standards Framework for regulatory purposes* (May 2015) <[https://docs.education.gov.au/system/files/doc/other/advice\\_to\\_teqsa.pdf](https://docs.education.gov.au/system/files/doc/other/advice_to_teqsa.pdf)>.

**Advisory Council should then be repealed (see also recommendations 2.1 and 6.1.2 regarding Ministerial Direction No. 2 of 2013).**

**Recommendation 6.1.2:**

**Clause 3i of Ministerial Direction No. 2 of 2013 dealing with advice from the National Advisory Group for Higher Education Data and Information (NAGHEDI), which is now the Higher Education Data Committee (HEDC), should be repealed.**

## 9.2 The composition of the Panel

The Panel currently consists of six members, including the Panel Chair, and two observers. These members combined have a wealth of experience in the higher education sector and in relation to the development of standards. Further, the work of the members of the original Higher Education Standards Panel is reflected in the near universal praise for the revised Threshold Standards (2015) that the Review heard in the consultation phase of this work.

In ensuring that both future standards, and other advice provided by the Panel, continue to be appropriate for what will be a quickly changing higher education environment (see paragraph 2.6 above), it may be desirable to more clearly specify in the TEQSA Act the experience and skills required of HESP members.

In the consultations undertaken during this Review, several stakeholders suggested specifying a minimum representation from different parts of the sector (private, public, university and NUHEP). The submission made by Navitas was more nuanced and supports the conclusions of this Review. It called for:

*"a requirement that the panel have increased representation of appropriately qualified and skilled people with diverse experience and background in all provider types."*<sup>219</sup>

This may be *implicit* in the current drafting of the Act, which requires the Minister to appoint members who *collectively possess an appropriate balance of professional knowledge and demonstrated expertise*. Nonetheless, the Review believes that there could be benefits in making the experience required explicit in the Act.

As noted elsewhere in this Report, the Review considers that more should be done to encourage innovation and to signal that a higher education provider may have features different from those associated with a traditional university. It is also important that TEQSA and the HESP are proactive in anticipating and responding to innovative practices (see paragraphs 5.4 and 6.3).

While there is no evidence that the 2015 Threshold Standards explicitly prohibit any non-traditional models, there is the perception held by some in the sector that there is a lack of understanding about what the future provider may look like.

Specifying the composition of the Panel in a manner that emphasises the inclusion of those with *contemporary* experience of higher education would not only help to allay the concerns that the Review has identified, but also to ensure that the Higher Education Standards Panel, and through the advice it gives to TEQSA, TEQSA are better positioned to identify and address developments in parts of the sector that might not be thought of as 'traditional'. Those with 'contemporary' experience are likely to bring an understanding of how innovation will change the landscape of higher education in Australia.

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<sup>219</sup> Navitas, above n 137, 7.

The Review also favours referring to members who have experience of higher education delivered by university providers and to those who have experience of non-university higher education provision.

**Recommendation 6.2:**

**Sub-section 167(2) of the TEQSA Act should be amended to provide that the Minister must ensure that the Higher Education Standards Panel includes members with contemporary experience regarding the provision of higher education by university and non-university providers.**

**9.3 Other points raised by stakeholders:**

Term of Reference Six received by far the least number of responses from the sector in both the consultations and submissions. This is likely to reflect, at least in part, the positive role that the Higher Education Standards Panel is seen to be playing, and the high regard in which the Threshold Standards (2015) are generally held. Where responses were received from stakeholders, they generally suggested no changes to the Act in relation to the role of the Panel.

Those that did suggest changes tended to fall into three groups:

- those that saw the need to further clarify the roles of the Panel, including its role as distinct from that of TEQSA;
- those that saw the need to formalise a requirement for the Panel to consult with the sector (rather than simply 'interested parties') on changes to the standards framework; and
- those that saw a role for the Panel in interpreting the Standards to assist in clarifying how they are to apply for regulatory purposes.

The Review notes that these calls were from a minority of the sector, but they are nonetheless pertinent to the Act and are discussed below.

Several stakeholders raised the importance of clearly separating the roles of the Higher Education Standards Panel (as the body that develops and makes recommendations to the Minister about the standards) from that of TEQSA (the regulator). For example, the submission from the Group of Eight noted that:

*"Providing greater clarity in the roles of the two bodies in terms of the setting of standards for higher education, the regulatory role of TEQSA and potential 'thematic reviews' that explore contemporary, sector-wide standards issues (should these be deemed to be appropriate functions for either or both bodies) would be very beneficial. While important, this would need to be approached with a degree of caution so as not to release unintended consequences in drafting."*<sup>220</sup>

While Universities Australia notes:

*"HESP's functions are properly specified as advising the Minister and TEQSA on matters related to the Higher Education Standards Framework. UA does not consider it necessary to modify these functions or to add new ones.*

*As a matter of principle, it is important to ensure a separation of functions between the body responsible for formulating Standards and the regulator that is tasked with regulating against these [S]tandards. UA considers that*

<sup>220</sup> Group of Eight, submission, Review of the impact of the Tertiary Education Quality and Standards Agency Act 2011 (Cth) on the higher education sector, November 2016, 5.

*the current legislative architecture establishes and protects this separation well.*<sup>221</sup>

The Review finds that the Act currently adequately distinguishes between the role of the standards-developing body and that of the regulator. Some of the concern appears to relate to those functions that the two bodies may play in addition to these roles, particularly relating to sector-wide quality assessments or other advice or research roles. Overlap in advice-giving functions is not necessarily something to be avoided, and there are situations where either the Higher Education Standards Panel or TEQSA may be best placed to perform a particular advice-giving role. Further, as recommended in paragraph 5.2.2 above, whether to undertake a sector-wide quality assessment should be a matter for the Minister. The Minister may seek or receive advice from either or both TEQSA and the Higher Education Standards Panel in forming his or her decision.

Sub-section 168(2) of the Act requires the HESP to consult with 'interested parties' without specifying who these parties may be. Some stakeholders, while noting that the consultation process around the Threshold Standards (2015) was robust and inclusive, expressed concern that the sector may not be consulted on issues for which it is both interested and has views in the future, and that the need to consult with the sector should be formalised in the Act.

The consultation process for the making of the revised Threshold Standards was indeed comprehensive and inclusive. The Review also notes that the recent review of admissions transparency included the opportunity for any stakeholder to provide a written submission to the Panel. Thus, to date the work undertaken by the HESP appears to have provided sufficient opportunities for the sector to contribute their views. It is also likely that the Panel itself is best placed to identify who the 'interested parties' are for future work, and that there is little to be gained by specifying these groups in the Act.

Finally, TEQSA noted that, while there was no requirement for the Panel to consult with TEQSA, the two have a close working relationship and there is no need for this to be formalised. The Review notes that the Minister must consult with TEQSA about the draft standards developed by the HESP and, indeed, he or she is required to have regard to advice or recommendations given by TEQSA (see sub-paragraphs 58(3)(b)(iii) and 58(4)(b)(i)).

A small number of stakeholders suggested a possible role for the HESP in interpreting the Threshold Standards and how they are to be applied from a regulatory perspective. From the various communiqués on the Panel's website, it appears that such comments have been previously raised.<sup>222</sup>

There is, however, currently an appropriate and clear delineation of the duties of the Panel and TEQSA in this regard: the Panel is responsible for developing the Threshold Standards, while TEQSA is responsible for applying them.

The Panel may choose to give advice to TEQSA on issues relating to the standards and its regulation against them (see paragraph 168(1)(b)), and indeed it did so following the creation of the 2015 Threshold Standards. The advice in that case included, among other things, guidance on how regulation against the revised Threshold Standards should be undertaken in a way that was commensurate with the three principles of regulation set out in the TEQSA Act.

It is, however, TEQSA's role to interpret the Standards and how they should apply. It may choose to clarify issues of interpretation as they arise through the use of guidance notes,

<sup>221</sup> Universities Australia, above n 109, 6.

<sup>222</sup> See for example: Higher Education Standards Panel, *Communique Number 6 – December 2012* (April 2015) <[https://docs.education.gov.au/system/files/doc/other/communique\\_number6-hestandards.pdf](https://docs.education.gov.au/system/files/doc/other/communique_number6-hestandards.pdf)>.

and indeed it has issued a long list of such notes. One provider suggested that the interpretation of the Standards by TEQSA through the issuing of guidance notes amounted to, in effect, revising the Standards by stealth. However, TEQSA's role in interpreting the Standards and communicating this to the sector is in line with the intention of its functions set out in the Act.

#### **9.4 Conclusions**

Overall, there was broad satisfaction across the sector with the role that the Higher Education Standards Panel has played in formulating the revised Threshold Standards (2015) and the consultations that it undertook in doing so. There is also broad recognition that the expertise of the HESP is such that it may be tasked with providing advice to the Minister on issues identified by the Minister from time to time. As explained, the Review sees no need to formalise this wider role.

It is appropriate that the functions of the now-disbanded TEQSA Advisory Council be formally transferred to the Higher Education Standards Panel to reflect that it is now undertaking the role of the former Council, and includes the members of that Council.

The consultations broadly revealed little concern regarding other aspects of the role for the Higher Education Standards Panel as set out in the TEQSA Act.

# Appendix A: Additional suggested amendments to the TEQSA Act

Section	Issue	Recommendation
27	<p>Universities Australia raised an issue with respect to section 27 of the TEQSA Act, which deals with the financial information that higher education providers must give to TEQSA. It was suggested that <i>“it is advisable to redraft this section to make it clear that providers can submit to TEQSA the financial statements they provide to state auditors-general, rather than in a specific form specified by TEQSA, which may be different from the submission to state auditors-general.”</i><sup>223</sup></p> <p>Sub-section 27(1) requires that a registered higher education provider must give TEQSA a financial statement for each financial reporting period for which the provider is registered. Paragraph 27(3)(a) provides that the statement must be ‘in the <u>approved form</u>’.</p> <p>TEQSA’s website provides that <i>“the annual financial statements of Table A providers under the HESA Act, and The University of Notre Dame Australia, will be taken to be in the <u>approved form</u> if they have been prepared in accordance with the Financial Statement Guidelines for Australian Higher Education Providers released by the Department of Innovation, Industry, Science and Tertiary Education in relation to the relevant annual financial reporting period.”</i><sup>224</sup></p> <p>It also states:  <i>“For higher education providers that are not Table A providers under the Higher Education Support Act 2003 (HESA Act), annual financial statements will be taken to be in the <u>approved form</u> if they are: General Purpose Financial Statements prepared in accordance with all the current standards set by the Australian Accounting Standards Board; include a signed and dated Directors’ declaration made in accordance with section 295 of the Corporations Act 2001, or equivalent such declaration; include all explanatory notes, including a summary of significant accounting policies; include a signed and dated auditor’s report; include a</i></p>	<p><i>The Review does not consider it necessary or appropriate to amend section 27.</i></p> <p>TEQSA’s website makes it clear that the financial statements provided, <i>inter alia</i>, to state auditors-general are ‘in the <u>approved form</u>’ for the purpose of section 27.</p> <p>An amendment to section 27 of the kind suggested would lessen the capacity of TEQSA to add additional requirements in the future if, due to changed circumstances, this were necessary.</p>

<sup>223</sup> Email from Universities Australia to Deloitte Access Economics, 12 December 2016.

<sup>224</sup> *Annual financial statements*, TEQSA < <http://www.teqsa.gov.au/for-providers/provider-obligations/annual-financial-statements>>.

	<p><i>signed and dated auditor's independent declaration. Where a Non-Table A provider is not required by the Corporations Act 2001 or relevant Australian Accounting Standards Board (AASB) to prepare General Purpose Financial Statements, annual financial statements will be taken to be in the approved form if they are special purpose financial statements prepared in accordance with [certain current standards] set by the Australian Accounting Standards Board."</i><sup>225</sup></p> <p>It follows that, the financial statements provided to state auditors-general are in the <u>approved form</u>. This was confirmed with TEQSA.<sup>226</sup></p>	
32	<p>Section 32 deals with conditions that TEQSA may impose on a registered provider's registration other than the particular conditions mentioned in sections 25-31.</p> <p>Universities Australia argued that it was not clear why paragraph 32(1)(b) lists specific examples of conditions that TEQSA can impose (regarding staffing profiles, access to particular facilities, particular support services): <i>"It is not clear that s.32 should apply to self-accrediting providers in good standing. TEQSA should retain the power to 'restrict or remove the provider's authority to self-accredit one or more courses of study' (as currently set out at paragraph 32(1)(c)). Other conditions could then be applied as necessary to those courses where self-accreditation had been restricted or revoked."</i><sup>227</sup></p>	<p><i>The Review does not recommend amending section 32.</i></p> <p>Paragraph 32(1)(b) sets out 'examples' of the kinds of conditions that may be imposed; a provider of the kind to which Universities Australia refers (self-accrediting and in good standing) is unlikely to have a condition of this kind imposed on it.</p>
N/A	<p>The Australian Government Department of Education and Training argued that the Australian Higher Education Graduate Statement (AHEGS) has the potential to make Australian awards better understood internationally, enhancing the international mobility of Australian graduates and Australia's competitiveness in the international higher education market. The issue raised is whether the AHEGS should be empowered by the TEQSA Act?</p> <p>AHEGS is a graduation statement issued to students who successfully completed a qualified higher education qualification (post 2011). The objective is to develop a statement that is clear and consistent across all higher education institutions to assist in both national and international recognition of Australian qualifications, and to promote the international mobility and professional recognition of Australian graduates.</p>	<p><i>The Review does not recommend amending the TEQSA Act to make the provision of an AHEGS mandatory.</i></p> <p>If a requirement to issue an AHEGS statement were desirable, it should be established by the Threshold Standards rather than the TEQSA Act. As the Standards have recently been reviewed and the provision of an AHEGS statement not mandated, the Review does not consider it appropriate for the TEQSA Act to be amended to mandate the provision of the statement.</p>

<sup>225</sup> Ibid.

<sup>226</sup> Email from TEQSA to Deloitte Access Economics, 25 January, 2017: *"TEQSA has never refused to accept financial statements which were prepared in accordance with the requirements for submission to a Commonwealth, State or Territory Auditor-General"*.

<sup>227</sup> Email from Universities Australia to Deloitte Access Economics, 12 December 2016.



	<p>Currently there is no legislative requirement making it mandatory to provide an AHEGS certificate to a student. However, a majority of institutions do so. Section 2.1 of the <i>Threshold Standards (2011)</i> provided that: The higher education provider issues graduates who complete a higher education award: a testamur, and, a record of results, and <i>may</i> also issue an Australian Higher Education Graduation Statement (Graduation Statement). Section 1.5.4 of the <i>Threshold Standards (2015)</i> requires: 'Awardees of qualifications are issued with authorised certification documentation including a testamur, and either a record of results or an Australian Higher Education Graduation Statement (graduation statement) ...'.</p>	
136, 155	<p>The Australian Government Department of Education and Training noted the difference in the nature of a direction that the Minister can give to TEQSA compared with a direction to the CEO of TEQSA. Section 136 of the TEQSA Act provides that the Minister may "give directions to TEQSA in relation to the performance of its function and the exercise of its powers" and that such directions must be of a "general nature only". This contrasts with section 155 of the TEQSA Act which permits the Minister to give "written directions to the Chief Executive Officer about the performance of his or her functions and the exercise of his or her powers" but which does not specify that such directions must be of a general nature.</p>	<p><i>The Review does not recommend amending either section 155 or section 136.</i></p> <p>There is no evidence that suggests that the power of the Minister to give general directions to TEQSA in one instance and to give specific directions to TEQSA's CEO in another was or could cause problems.</p> <p>In fact, no concern was raised with the application of section 136.</p> <p>Ministerial Direction No.2 of 2013 was made pursuant to section 155(1); it includes quite specific directions to the Chief Executive Officer. The Review finds that this Direction effectively facilitated an improved approach to regulation by TEQSA. There is no evidence suggesting any need for section 155 to be amended or repealed.</p>
19	<p>Section 19 deals with preliminary assessments of provider registration applications.</p> <p>TEQSA proposed that this section be deleted (and that other consequential amendments should be made) as it considers that this section "involves an unnecessary administrative process which has no meaningful benefit for a higher education provider. Insofar as the preliminary assessment is intended to be used as a vehicle to raise issues associated with the quality of an application before a decision is made, such issues can be raised through direct discussions between TEQSA and an applicant both before and after an application is made."<sup>228</sup></p>	<p><i>The Review does not recommend adopting the amendment.</i></p> <p>On its face, section 19 appears to be sensible; a preliminary assessment of the kind referred to in section 19 (that is, regarding (a) whether the application for registration in a particular provider category is appropriate and, if not what provider category, if any, would be appropriate; and (b) whether an application is required for a course of study to be accredited might save applicants the time and cost of proceeding with an application that cannot succeed because, for example, it is for registration in an inappropriate provider category.</p> <p>TEQSA advised that it was aware of only one case in which, pursuant to paragraph 19(1)(a), it advised that an application for registration in a</p>

<sup>228</sup> Correspondence from TEQSA to Deloitte Access Economics, 8 August 2016.

		particular category was not appropriate; this does not mean that the section is 'unnecessary'.
47	<p>Section 47 deals with preliminary assessments of course accreditation applications.</p> <p>TEQSA proposed that this section be deleted (and that other consequential amendments should be made) as it considers that it involves <i>"an unnecessary administrative process which has no meaningful benefit for a higher education provider. Insofar as the preliminary assessment is intended to be used as a vehicle to raise issues associated with the quality of an application before a decision is made, such issues can be raised through direct discussions between TEQSA and an applicant both before and after an application is made."</i><sup>229</sup></p>	<p><i>The Review does not recommend adopting the amendment.</i></p> <p>Again, on its face, section 47 appears to be sensible; a preliminary assessment might save applicants the time and cost of proceeding with an application that needs further information if it is to succeed.</p> <p>While TEQSA estimates that it has issued advice of the kind contemplated by section 47 in relation to less than 5% of the applications submitted for accreditation, this does not make the section 'unnecessary'.</p>
41	<p>Section 41 deals with applications to self-accredit courses of study.</p> <p>TEQSA argued that sub-section <i>"41(1) does not specifically restrict TEQSA's power to authorise a provider to self-accredit its own courses. However to the extent that the provision is interpreted in that way (as the explanatory memorandum suggests) TEQSA considers that it would be appropriate to have the capacity to authorise a provider to self-accredit courses of its subsidiaries."</i><sup>230</sup> TEQSA also noted that <i>"while [it] can appropriately tailor its approach to the assessment of individual courses, this amendment would provide greater flexibility to manage the accreditation of low risk providers where the relevant courses are already subject to governance processes of a self-accrediting provider."</i><sup>231</sup></p>	<p><i>The Review does not recommend adopting the amendment.</i></p> <p>This proposed change would require 'subsidiary' to be defined and provision made for the consequences of changes in ownership; this would create a 'blunt instrument'. The current arrangements, which allow TEQSA to tailor its approach, are considered more appropriate.</p>
151	<p>Section 151 deals with TEQSA's ability to make decisions without meeting. TEQSA proposed that section 151 be amended to provide that a decision is taken to have been made at a meeting of TEQSA if: (a) without meeting, a majority of Commissioners who <i>take part in making the decision</i> indicate agreement with the proposed decision in accordance with the method determined by TEQSA under sub-section (2); (b) all Commissioners were informed of the proposed decision, or reasonable efforts were made to inform all Commissioners of the proposed decision; and (c) <i>at least two Commissioners take part in making the decision</i>. The proposed amendment is the inclusion of 'in making the decision' in paragraph (a) and paragraph (c).</p> <p>TEQSA explain that <i>"AGS advice indicates that the effect of this provision [section 151</i></p>	<p><i>The Review recommends adopting the amendments.</i></p> <p>The suggested change brings the rules regarding the minimum number of Commissioners required for decisions without meetings (section 151) into line with the quorum required for meetings (section 149).</p>

<sup>229</sup> Ibid.

<sup>230</sup> Ibid.

<sup>231</sup> Ibid.

	<p>in its current form] is to require a majority of all Commissioners (not just a majority of those involved in making the decision) to agree with the decision. The proposed amendments to section 151 mean that a decision without a meeting could be made by two Commissioners, irrespective of the number of Commissioners appointed at the relevant time, consistent with the requirements for a quorum at a meeting [in sub-section 149(3)]. This amendment would allow s151 to be used in a wider range of cases while requiring the involvement of at least two commissioners, consistent with the quorum.”<sup>232</sup></p>	
188	<p>Sub-section 188(1) creates an offence of unauthorised disclosure or use of information.</p> <p>TEQSA suggested that section 188 should be amended to insert paragraph 188(2)(c) so as to provide that: “sub-section (1) does not apply if: ... (c) the regulated entity to which the information relates has consented, in writing, to the use or disclosure.”<sup>233</sup></p> <p>TEQSA “considers that the legislation should facilitate the open sharing of relevant information where the higher education provider has consented to the use or disclosure of that information for a specified purpose. This will enable TEQSA to share information with peak industry bodies to improve the quality and integrity of Australian tertiary education.”<sup>234</sup> TEQSA also argued that such sharing “would involve little or no burden on a higher education provider.”<sup>235</sup></p>	<p><i>The Review recommends adopting the amendment.</i></p> <p>On its face, the proposed paragraph appears to be a sensible one, and in line with the objects of the TEQSA Act. The proposed amendment was tested with a small number of providers and Universities Australia; no concerns were raised, particularly as consent is required from providers prior to use or disclosure of information by TEQSA.</p>
192	<p>Section 192 deals with disclosing information to the Minister and Secretary.</p> <p>TEQSA suggested that section 192 should be amended to provide that “For the purposes of administering laws relating to higher education, TEQSA may disclose information covered by sub-section (2) to: ... or (d) an APS employee in the Department. (2) This sub-section covers the following information: (a) higher education information; (b) information that would be higher education information but for paragraph (c) of the definition of higher education information. Note: This section allows TEQSA to disclose personal information (within the meaning of the Privacy Act 1988) for the purposes of administering a law relating to higher education.”<sup>236</sup></p>	<p><i>The Review recommends adopting the amendment to section 192 of the TEQSA Act.</i></p> <p>The Review has found this issue challenging, but agrees with TEQSA that it “is sensible that TEQSA has the same power to share information with the Department as the Department has to share information with TEQSA.”<sup>242</sup> For example, section 180-15 of HESA provides that the “Secretary may disclose Higher Education Support Act information [including personal information within the meaning defined in the Privacy Act] to: (a) TEQSA; or (b) a member of the staff of TEQSA (within the meaning of the TEQSA Act); for the performance of duties or functions, or the exercise of powers, under, or for the purposes of, that Act.”<sup>243</sup></p>

<sup>232</sup> Ibid.

<sup>233</sup> Ibid.

<sup>234</sup> Ibid.

<sup>235</sup> Ibid.

<sup>236</sup> Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

	<p>TEQSA stated that this amendment would provide “legislative authority to disclose (1) personal information (within the meaning defined in the Privacy Act), where the information relates to a regulated entity, is obtained by TEQSA and relates to TEQSA’s functions, or (2) higher education information”<sup>237</sup> and would also allow disclosures to be made to Department staff.</p> <p>This, according to TEQSA, would facilitate a “general public interest in TEQSA being able to share information with the Department to assist the Department to perform functions under HESA and other laws relating to higher education. This includes the capacity to disclose information obtained as part of national data collections undertaken by TEQSA as well as information collected in the course of particular activities”.<sup>238</sup> Specific examples of information sharing would include “sharing information from previous data collections to inform Departmental policy analysis about approaches to FEE-HELP and...sharing information collected in the course of a compliance assessment (for instance, in relation to transition options being offered to students whose course is being discontinued) to assist the Department to make a decision about particular action it may wish to take under HESA.”<sup>239</sup></p> <p>TEQSA also explained that “[m]ost of this amendment was included at clause 176 of Schedule 1 to the Higher Education Research and Reform Amendment Bill 2014. The reasons for that change are set out in the Explanatory Memorandum for that Bill. This proposal also includes proposed new paragraph 192(1)(d). While TEQSA arguably has the capacity to disclose information to employees in the Department (rather than only to the Secretary) under ss 189 (‘Disclosing information about breaches of regulatory requirements’) and 194 (‘Disclosing information to certain government bodies etc.’) (to the extent that the Department is named in the Information Guidelines), this amendment would clarify that such disclosures can be made. This is particularly relevant in framing confidentiality orders in the Administrative Appeals Tribunal.”<sup>240</sup></p> <p>However, TEQSA added the amendment “was not enacted because it was included in a bill whose principal purpose was to enact higher education reforms which attracted significant controversy. TEQSA is not aware that the amendment proposed to s192 was the subject of any controversy.”<sup>241</sup></p> <p>The Explanatory Memorandum for the <u>Higher Education Research and Reform</u></p>	
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<sup>237</sup> Letter from TEQSA to Deloitte Access Economics, 31 January 2016.

<sup>238</sup> Ibid.

<sup>239</sup> Ibid.

<sup>240</sup> Correspondence from TEQSA to Deloitte Access Economics, 8 August 2016.

<sup>241</sup> Ibid.

	<p><i>Amendment Bill 2014</i> stated that: “<i>This change is necessary so that TEQSA can provide personal information for the purposes of ‘fit and proper person’ requirements to the Secretary (and the Minister, or the Minister’s staff when appropriate). This information is an attachment to many of TEQSA’s application forms and similar information is also provided to TEQSA in ‘notifications of material change’. All of the relevant declarations concerning this information require the signature of the person providing the information. In addition, TEQSA’s application forms and guidelines include a privacy notice informing individuals that TEQSA is obliged to protect personal information in accordance with the Privacy Act (as indeed are the Minister, the Minister’s staff and the Secretary) and that personal information is collected in order to check an applicant’s suitability to be a higher education provider and to assess compliance with relevant legislation that TEQSA enforces. In addition, the privacy notices explain that TEQSA usually discloses personal information it collects for these purposes to Commonwealth agencies responsible for the regulation of education.</i>”</p>	
<p>New section 195A</p>	<p>TEQSA suggested the inclusion of a new section dealing with disclosing information for research purposes; the new section would provide: “<i>195A Disclosing information for the purposes of research’— (1) TEQSA may disclose higher education information to a person or body referred to in sub-section (3) for the purposes of research relating to the provision of higher education or vocational education and training, including research relating to: (a) quality assurance; or (b) planning the provision of higher education or vocational education and training. (2) However, if the information was provided by a regulated entity, then TEQSA may only disclose the information under sub-section (1) to a person referred to in paragraph (3)(b) or (c) if the provider consents to that disclosure. (3) For the purposes of sub-section (1), the persons are the following: (a) a Commonwealth authority, or a State or Territory authority; (b) a person who is employed or engaged by a higher education provider; (c) a person who is employed or engaged by a body or association determined by TEQSA under a legislative instrument made for the purposes of this section.</i>”<sup>244</sup></p> <p>TEQSA argues that “<i>these changes to information disclosure provisions will enable information sharing for research purposes similar to the exception provided in the Higher Education Support Act 2003. This exception will provide TEQSA more flexibility</i></p>	<p><i>The Review approves the amendment, in principle.</i></p> <p>The aim of the proposed section appears to be a sensible one and in line with the objects of the TEQSA Act. However, the Review notes that some of the constraints in section 180.25 of the <i>Higher Education Support Act 2003</i> (Cth) are not included in the proposed new section. The Review also notes that, as proposed by TEQSA, higher education information provided by a regulated entity could be disclosed to a Commonwealth authority, or a State or Territory authority, without the provider’s consent.</p> <p>Consultation with TEQSA revealed that the wording proposed is merely illustrative of the amendment TEQSA seeks to have adopted. Accordingly, while the Review approves of the proposed section in principle, the precise wording of the section will require detailed consideration.</p>

<sup>244</sup> Correspondence from TEQSA to Deloitte Access Economics, 8 August 2016

	<p>to use such information to generate insights through research.” TEQSA also argued that this amendment would “strengthen its capacity to perform” its functions pursuant to “paragraphs 134(1)(d) to (j).”<sup>245</sup></p>	
New section	<p>TEQSA suggested the inclusion of a new section dealing with providing or advertising cheating services; the new section would provide:</p> <p><i>“112A ‘Providing or advertising cheating services’</i></p> <p><i>(1) A person commits an offence if the person provides any service specified in sub-section (4) with the intention of securing a financial advantage or giving a student an unfair advantage over other students.</i></p> <p><i>(2) A person commits an offence if the person advertises any service described in sub-section (4) knowing that the service has or would have the effect of giving a student an unfair advantage over other students.</i></p> <p><i>(3) A person commits an offence who, without reasonable excuse, publishes an advertisement for any service described in sub-section (4).</i></p> <p><i>(4) The services referred to in subsections (1) to (3) are as follows:</i></p> <p><i>(a) drafting or completing an assignment or any other work that a student is required to complete to be conferred a regulated higher education award (b) providing or arranging the provision of an assignment that a student is required to complete to be conferred a regulated higher education award; (c) providing or arranging the provision of answers for an examination that a student is required to sit to be conferred a regulated higher education award; (d) sitting an examination that a student is required to sit to be awarded a regulated higher education award or providing another person to sit the exam in place of the student.</i></p> <p><i>(5) A person who commits an offence against this section is liable on conviction to a fine not exceeding \$10,000.</i></p> <p><i>(6) In this section: student means a student that will be awarded a regulated higher education award at the successful completion of the particular course in respect of which cheating is alleged.”<sup>246</sup></i></p> <p>TEQSA argued that “contract cheating is a significant issue that needs to be addressed to preserve the integrity of regulated higher education awards”; and there is “no criminal provision in Australia which specifically prohibits a higher education student from cheating, or a cheating service provider from providing or advertising such services in Australia. Offences of fraud, forgery, conspiracy to defraud or uttering are relevant to certain aspects of cheating services but the particular offences and</p>	<p><i>The Review does not recommend adopting the amendment.</i></p> <p>Contract cheating is an issue that needs to be addressed, and doing so might well be said to advance the objects of the Act (sub-paragraph 3(c)(i) regarding Australia’s reputation for quality higher education and training services), but this Review does not consider the TEQSA Act to be an appropriate vehicle to address this issue. A provision in the TEQSA Act would limit the scope of the offence to circumstances involving a student undertaking a higher education award. Furthermore, the constitutional validity of Federal legislation dealing with this would be questionable as it is not clear what ‘head’ of Commonwealth legislative power could form the basis for legislation directed at ‘a person’ who engages in the specified action.</p> <p>The New Zealand Act is omnibus legislation dealing with education generally; the provision dealing with contract cheating is not in that Part of the Act that deals with the equivalent of TEQSA.</p>

<sup>245</sup> Ibid.

<sup>246</sup> Ibid.

	<p><i>circumstances in which these offences apply vary considerably across jurisdictions. We have adapted the offence outlined in s292E of the Education Act 1989 (NZ) to illustrate the terms on which a similar provision might be included in the TEQSA Act.</i><sup>247</sup></p>	
New section	<p>TEQSA suggested the inclusion of a new section regarding the issuing of false qualifications and falsifying records; the new section would provide:</p> <p><i>“112B ‘Issuing false qualifications and falsifying records’</i>  <i>(1) A person commits an offence who knowingly or recklessly issues an award that falsely represents, expressly or by implication, that a person has achieved a regulated higher education award.</i>  <i>(2) A person commits an offence— (a) who enters or changes results on a student’s record of achievement, knowing that the results or changes have the effect of falsifying the student’s record:(b) who, without reasonable excuse or lawful authority, causes entries or changes to be made on a student’s record that have the effect of falsifying the student’s record.</i>  <i>(3) A person commits an offence who receives an award knowing that the award falsely represents, expressly or by implication, that he or she has achieved a regulated higher education award.</i>  <i>(4) A person who commits an offence against this section is liable on conviction to a fine not exceeding \$10,000.</i><sup>248</sup></p> <p>TEQSA argued that “falsification of qualifications is a significant issue that needs to be addressed to preserve the integrity of regulated higher education awards”<sup>249</sup>; and that it has “<i>adapted the offences outlined in s292C of the Education Act 1989 (NZ) to enable TEQSA to investigate and pursue persons who issue false qualifications or falsify records to effectively issue false qualifications. This reduces the current complexity and cost of pursuing such persons.</i>”<sup>250</sup></p>	<p><i>The Review does not recommend adopting the amendment.</i></p> <p>As above re proposed section 112A.</p>
Various	<p>TEQSA proposed that the Act should define “<i>the Commissioners, collectively, as ‘the TEQSA Commission’ for the purposes of the Act and confer the various powers and functions of TEQSA on the TEQSA Commission [and define] the agency in s 156 as the Tertiary Education Quality and Standards Agency, or TEQSA.</i>”<sup>251</sup></p> <p>This was suggested on the basis that it “<i>would help to avoid confusion about references to ‘TEQSA’. Currently ‘TEQSA’ is generally used to refer to the Agency as a whole, while the Act contemplates that</i></p>	<p><i>The Review does not recommend adopting the amendment.</i></p> <p>Assuming there is some confusion regarding the formal body known as ‘TEQSA’, the Review found no evidence that any such confusion is creating any problems.</p>

<sup>247</sup> Ibid.

<sup>248</sup> Ibid.

<sup>249</sup> Ibid.

<sup>250</sup> Ibid.

<sup>251</sup> Ibid.

	<p><i>‘TEQSA’ is the body established in s 132. Referring to the Commissioners as ‘the TEQSA Commission’ (or a similar term) would help to ensure that the Act reflects the common usage of relevant terminology.”<sup>252</sup></i></p>	
108	<p>TEQSA suggested an amendment to section 108 <i>“designed to address the potential incongruity involved where an overseas university is not capable of being registered with TEQSA but would commit an offence by operating in Australia without registration.”</i><sup>253</sup> It proposed that subparagraph 108(1)(a)(ii) should be amended by the inclusion of the words “wholly or mainly” so it refers to <i>“(ii) an overseas course of study, to the extent that the course of study is, or is to be, provided wholly or mainly from Australian premises that are related to an overseas higher education award.”</i><sup>254</sup></p> <p>TEQSA explained that <i>“this issue is currently managed by the Department and TEQSA but aligning the rules will ensure providers are clear on the expectations. The evolving nature of partnerships between universities and other bodies is likely to further test the boundaries of the legislation in this area.”</i><sup>255</sup></p>	<p><i>The Review recommends adopting the amendment.</i></p> <p>The current misalignment between subparagraph 108(1)(a)(ii) and the sections that define who can apply for registration as a higher education provider could result in an overseas university committing an offence by reason of operating in Australia without registration when, in fact, it is not capable of being registered.</p> <p>It is recommended that subparagraph 108(1)(a)(ii) should be amended by the inclusion of the words “wholly or mainly”.</p> <p>A similar amendment may also be required to subparagraph 108(2)(a)(ii).</p>
183	<p>Section 183 lists the decisions made by TEQSA under the Act that are reviewable decisions. TEQSA submitted that the current drafting of the section <i>“involves an incongruous position in which TEQSA’s decisions about the period of registration or accreditation are not subject to review but its decisions about the extension of such periods are subject to review.”</i><sup>256</sup> TEQSA proposed the deletion of the reference in section 183 to the following:</p> <p><i>“A decision under section 37A to extend the period of a registered higher education provider’s registration.</i>  <i>A decision under section 37A not to extend the period of a registered higher education provider’s registration</i>  ...  <i>A decision under section 57A to extend the period of the accreditation of a course of study</i>  <i>A decision under section 57A not to extend the period of the accreditation of a course of study.”</i></p> <p>This would have the effect that these are no longer reviewable decisions.</p> <p>TEQSA note that the <i>“[Explanatory Memorandum] for the TEQSA Amendment Bill (which introduced these provisions) specified that it was intended that the power to extend be exercisable ‘on TEQSA’s own</i></p>	<p><i>The Review does not recommend adopting the amendment.</i></p> <p>The Explanatory Memorandum for the TEQSA Amendment Bill 2014 states <i>“[o]ften a provider’s registration may expire earlier or later than a course accreditation expires. The TEQSA Act currently does not contain any provisions allowing TEQSA to extend an existing registration or accreditation on its own initiative. Part 3 would amend the TEQSA Act to give TEQSA the power to extend the period of registration or accreditation, thus enabling TEQSA to manage the registration and accreditation processes more flexibly.”</i> However, the Explanatory Memorandum goes on to state that <i>“section 183 is amended so that decisions made under section 37A to extend (or not extend) the period of a registered higher education providers registration and a decision under section 57A to extend (or not extend) the period of the accreditation of course of study, will be reviewable decisions for the purposes of the TEQSA Act.”</i></p> <p>To date, no Administrative Appeals Tribunal proceedings have been</p>

<sup>252</sup> Ibid.

<sup>253</sup> Ibid.

<sup>254</sup> Ibid.

<sup>255</sup> Ibid.

<sup>256</sup> Ibid.



	<p><i>initiative'. Clayton Utz has expressed the view that it is likely that TEQSA would be required to consider, and make a decision on, requests for an extension. Given this view, the capacity to seek merits review means that decisions to grant a period of registration or accreditation of less than seven years carry a risk of TEQSA's resources being drained by requests for extensions and AAT proceedings about TEQSA's decisions on those requests. This does not reflect the intention specified in the [Explanatory Memorandum]."</i><sup>257</sup></p>	<p>brought in relation to decisions under sections 37A or 57A. TEQSA does not record the number of cases in which a provider has requested an extension under section 37A or section 57A (noting that the Act does not provide for an application for an extension under sections 37A or 57A).</p> <p>Against this background, the Review considers that the current references should remain in section 183 so these are reviewable decisions.</p>
186(2)	<p>Sub-section 186 concerns timelines for TEQSA to review internal decisions. TEQSA proposed an amendment to sub-section 186(2) because "[c]urrently, the provision would mean that a decision to vary or revoke a reviewable decision could be of no effect; even where the decision is made within the 90-day period and the provider is notified of the decision within 30 days of the decision on review, as required by sub-section 185(5)."<sup>258</sup></p> <p>TEQSA suggested that sub-section 182(2) section should read "TEQSA is taken, for the purposes of this Part, to have made a decision under sub-section 185(2) affirming the reviewable decision if it has not made a decision on the application for internal review before the end of that 90-day period" instead of "TEQSA is taken, for the purposes of this Part, to have made a decision under sub-section 185(2) affirming the reviewable decision if it has not notified the applicant of its decision on review before the end of that 90-day period."<sup>259</sup></p> <p>TEQSA argued that this "amendment would clarify that the 90- day period relates to the period within which a decision must be made rather than the period within which the applicant must be notified of the decision."</p>	<p><i>The Review recommends adopting the amendment.</i></p> <p>The proposed amendment would allow TEQSA the full 90 day period, clarifying the decision and notification timelines and making them consistent with the structure of other sections of the Act (for example, section 185).</p>
New sub-section 185(2A)	<p>TEQSA proposed a new section that "would allow TEQSA to ensure that an internal review of a decision could take place without the decision under review taking effect prior to the outcome of the review process."<sup>260</sup></p> <p>The proposed new sub-section 185(2A) would read "Upon receiving an application for internal review, TEQSA may decide that the effect of the reviewable decision is suspended pending the outcome of the review." TEQSA also noted that "while TEQSA has some capacity to manage this issue without an amendment, the proposed amendment would facilitate the smoother operation of internal review processes."<sup>261</sup></p>	<p><i>The Review recommends adopting the amendment.</i></p> <p>The proposed amendment appears sensible as it would help to avoid a disrupted internal review process.</p>

<sup>257</sup> Ibid.

<sup>258</sup> Ibid.

<sup>259</sup> Ibid.

<sup>260</sup> Ibid.

<sup>261</sup> Ibid.

<p>199</p>	<p>Pursuant to sub-section 199(1), TEQSA is able to delegate its functions to its Commissioners and certain staff members. TEQSA currently cannot delegate any of its functions or powers to its CEO. TEQSA argues that this “unnecessarily restricts TEQSA’s capacity to manage its internal operations.”<sup>262</sup> TEQSA has recommended that this “anomaly” to be addressed via the introduction of a new paragraph to sub-section 199(1).</p> <p>TEQSA has also suggested the inclusion of a new paragraph to that sub-section that will enable it to delegate to “a member of the staff of the Department who holds the classification of APS Executive Level 1 or higher, or an equivalent classification.”<sup>263</sup> This amendment is designed to remove any “unnecessary confusion and administrative inconvenience” that may arise from TEQSA, the body attributed with the authority to request certain information from providers, making that request and the Department, in practice, collecting that information (for example, the Department is now responsible for collecting data from providers in regard to the Provider Information Request).</p>	<p><i>The Review recommends adopting the amendment to enable TEQSA to delegate its functions to its CEO.</i></p> <p>The proposed amendment to sub-section 199(1) that will enable TEQSA to delegate its functions and powers to its CEO will enable TEQSA to better manage its operations.</p> <p><i>The Review does not recommend adopting the amendment to enable TEQSA to delegate its functions to the Department.</i></p> <p>Both TEQSA and the Department have noted that the current approach can be managed. Despite the opportunity for streamlining certain activities, it appears reasonable that TEQSA retain the authority the Act has provided it with, and continue to draw on data support from the Department as it is currently provided.</p>
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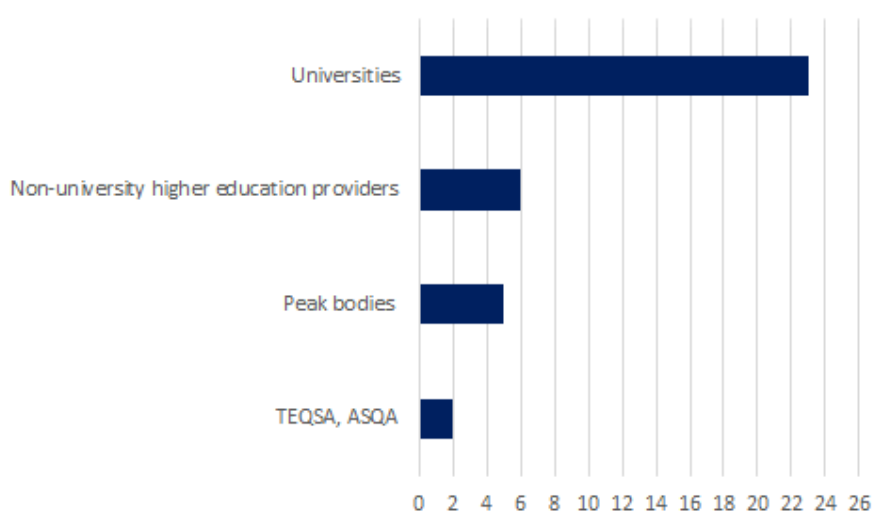
<sup>262</sup> Ibid

<sup>263</sup> Ibid

# Appendix B: List of submissions received

This Review received submissions from 36 organisations; these comprised 23 from universities, six from non-university higher education providers, five from peak bodies and submissions each from TEQSA and the Australian Skills Quality Authority (Chart B.1). A list of organisations that made a submission to this Review is provided below.

Chart B.1: Stakeholders that made a written submission to this Review



Three submissions were provided in confidence and the names of these organisations have not been included in the list of submitting organisations below.

## B.1. Universities

1. Australian Catholic University
2. Australian National University
3. Charles Darwin University
4. Charles Sturt University
5. Deakin University
6. Flinders University
7. Queensland University of Technology
8. RMIT University
9. University of Canberra
10. University of Adelaide
11. University of Melbourne
12. University of Newcastle
13. University of Notre Dame
14. University of Queensland
15. University of the Sunshine Coast
16. University of Southern Queensland
17. University of Tasmania
18. University of Technology Sydney
19. Victoria University
20. Western Sydney University
21. Confidential

- 22. Confidential
- 23. Confidential

**B.2. Non-university higher education providers**

- 24. Australian Film Television and Radio School
- 25. JMC Academy
- 26. Macleay College
- 27. Montessori Institute
- 28. Navitas
- 29. TAFE Queensland

**B.3. Peak bodies**

- 30. Australian Technology Network
- 31. Council of Private Higher Education
- 32. Group of Eight
- 33. Innovative Research Universities
- 34. Universities Australia

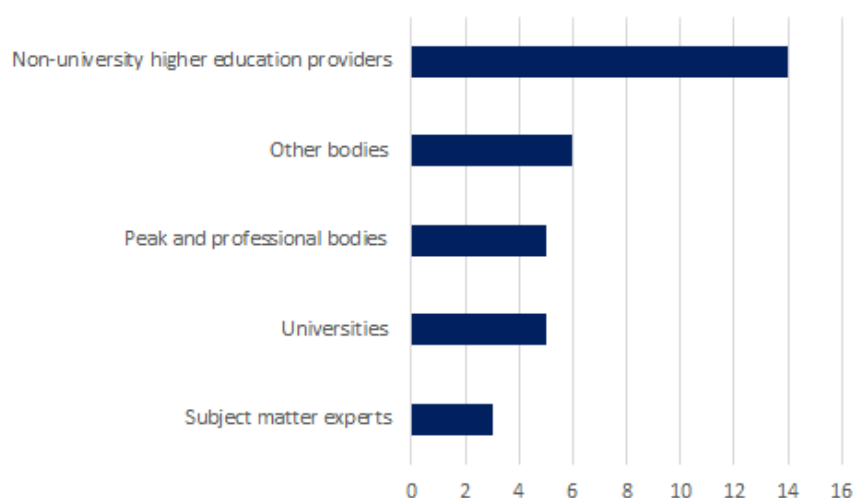
**B.4. Other bodies**

- 35. Australian Skills Quality Authority
- 36. Tertiary Education Quality and Standards Agency

# Appendix C: List of stakeholders interviewed

A total of 33 organisations and individuals were interviewed during this Review; including 14 non-university higher education providers and five universities, five peak and professional bodies, three subject matter experts and other bodies such as Open Universities and the Higher Education Standards Panel (Chart C.1).

Chart C.1: Stakeholders consulted in this Review



The organisations and individuals that were interviewed as part of this Review are listed below.

## C.1. Universities

1. Australian Catholic University
2. Carnegie Mellon University
3. Charles Darwin University
4. University of Melbourne
5. University of Wollongong

## C.2. Non-university higher education providers

6. Australian College of Nursing
7. Academy of Design Australia
8. Edith Cowan College
9. Engineering Institute of Technology
10. INSEARCH Limited
11. International College of Hotel Management
12. National Art School
13. Macleay College
14. Monash College
15. Moore Theological College
16. Perth Institute of Business and Technology
17. SAE Institute
18. TAFE Queensland

19. Worldview Centre of Intercultural Studies

**C.3. Peak and professional bodies**

20. Australian Council for Private Education and Training

21. Council of Private Higher Education

22. CPA Australia

23. International Education Association of Australia

24. Universities Australia

**C.4. Subject matter experts**

25. Professor Kwong Lee Dow

26. Professor Valerie Braithwaite

27. Professor Vin Massaro

**C.5. Other entities and individuals**

28. Australian Skills Quality Authority

29. Australian Government Department of Education and Training

30. Higher Education Standards Panel

31. Open Universities

32. Queensland Government Department of Education and Training

33. Tertiary Education Quality and Standards Agency

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### Contact us

#### Deloitte Access Economics

ACN: 149 633 116  
550 Bourke Street  
Melbourne VIC 3000  
Tel: +61 3 9671 7000  
Fax: +61 2 9671 7001

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