

EXPLANATORY STATEMENT

Tertiary Education Quality and Standards Agency Fit and Proper Person Determination 2018

Issued by the authority of the Tertiary Education Quality and Standards Agency (TEQSA)

Subject: *Tertiary Education Quality and Standards Agency Fit and Proper Person Determination 2018*

Authority

Subsection 7A(2) of the *Tertiary Education Quality and Standards Agency Act 2011* (the Act) allows TEQSA to make, by legislative instrument, a determination specifying matters relating to whether a person is a fit and proper person for the purposes of the Act.

Purpose and Description of the provisions

The purpose of the instrument is to specify matters that TEQSA may have regard to when determining whether a person is fit and proper under paragraph 21(1)(b), section 25A and paragraph 36(1)(b) of the Act.

Under subsection 21(1), TEQSA may only grant an application for registration as a higher education provider if it is satisfied that the applicant meets the *Higher Education Standards Framework (Threshold Standards) 2015* (Threshold Standards) and that the applicant, and each person who makes or participates in making decisions that affect the whole, or a substantial part, of the applicant's affairs is a fit and proper person.

Under section 25A of the Act, it is a condition of each higher education provider's registration that the provider, and each person who makes or participates in making decisions that affect the whole, or a substantial part, of the provider's affairs, must be a fit and proper person.

Under subsection 36(1) of the Act, TEQSA may only renew a higher education provider's registration if it is satisfied that the provider continues to meet the Threshold Standards and that the provider, and each person who makes or participates in making decisions that affect the whole, or a substantial part, of the provider's affairs is a fit and proper person.

The instrument clarifies the matters to which TEQSA may have regard in determining whether a person is a fit and proper person for the purposes of the Act. The instrument takes a similar approach to legislative instruments made under other legislation regulating providers of education, including the *Fit and Proper Person Requirements 2011* made under the *National Vocational Education and Training Regulator Act 2011* and the *Fit and Proper Person Specified Matters 2012* made under the *Higher Education Support Act 2003*.

The specific matters to which TEQSA may have regard are set out in Part 2 of the instrument. The basis on which each matter is applied will depend on the circumstances of each case.

Clause 6 of the instrument sets out matters related to a person's compliance with the law, including offences against, or orders to pay a pecuniary penalty under, a law of the Commonwealth or a State or Territory, the seriousness of the offence or contravention, and whether the person is currently involved in proceedings before a court or tribunal.

Clause 7 sets out matters related to a person's financial history. These include whether the person has been bankrupt or insolvent, has taken steps to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounded with creditors or assigned remuneration for the benefit of creditors, been under external administration, or had current outstanding debts owed to the Commonwealth.

Clause 8 of the instrument sets out matters related to a person's management history in the provision of education and as a company director. Subsection 8(1) specifies that TEQSA may have regard to whether one of the things at paragraphs 8(1)(a) to (f) has been cancelled, revoked, shortened, restricted, not renewed or suspended. These matters include registration to provide higher education or vocational education and training, registration to provide courses under the *Education Services for Overseas Students Act 2000*, and funding arrangements for the provision of education. Subsection 8(2) specifies that TEQSA may have regard to whether the person has had a condition imposed on one of the things in subsection 8(1), or has breached such a condition. Subsection 8(3) provides that TEQSA may have regard to whether the person has been disqualified from managing corporations under the *Corporations Act 2001*.

Clause 9 provides that TEQSA may have regard to whether a person has provided false or misleading information to any of the persons or bodies at paragraphs 9(a) to (f) in circumstances where it is reasonable to assume the person knew the information was false or misleading. The list includes TEQSA, the National VET Regulator, State or Territory bodies that register education providers, an authority of a State or Territory that deals with subsidy funding arrangements for education, the Minister, the Department, the Secretary, or a tuition assurance administrator.

Clause 10 of the instrument sets out matters relating to a person's previous conduct and involvements. These include whether the person has been found not to be a fit and proper person under other Acts, instruments and arrangements listed at subsection 10(1), whether the person has engaged in conduct that reasonably suggests a deliberate pattern of unethical behaviour or of acting inconsistently with laws of the Commonwealth, a State or Territory, in relation to the provision of education or training, whether a business providing education would have been a fit and proper person for the purposes of the Act at the time the person was involved with that business, as well as any other matters relevant to the honesty, knowledge or ability of the person.

Consultation

A draft instrument, with an accompanying consultation paper, was published on TEQSA's website (<http://www.tegsa.gov.au/news-publications/current-consultations>) on October 2017. A copy was also provided to Universities Australia, TAFE Directors

Australia, The Australian Council of Private Education and Training and the Council for Private Higher Education. TEQSA sought and received submissions on the draft instrument.

TEQSA received three submissions from individuals, 10 from higher education providers and two from peak bodies representing higher education providers. Submissions generally supported the proposed approach. There were four broad categories of concerns raised:

- a. that the conduct of a body corporate would be unfairly attributed to individuals, and would discourage persons of good standing from taking up leadership or management positions with providers;
- b. that conditions on registration or accreditation of courses and compliance assessments are legitimate risk management tools, the mere use of which should not cast doubt on the fitness or propriety of a person, noting that compliance assessments do not necessarily lead to any adverse findings being made by TEQSA;
- c. that 'offences' cover a broad range of potential contraventions and, without further specification, would unfairly apply to minor conduct or conduct irrelevant to a person's fitness to make or participate in making decisions that affect the whole, or a substantial part, of a provider's affairs;
- d. that broad 'catch all' provisions are too subjective and add no meaning to the instrument.

As to these matters:

- a. sub-item 10(2) of the instrument clarifies the extent to which an individual's status will be affected by the conduct of a provider. We propose that this issue be addressed further in guidance to be provided by TEQSA about its approach to these matters;
- b. the instrument would permit TEQSA to consider whether (and to what extent) a particular condition affects a person's fitness or propriety, having regard to the basic principles for regulation in the TEQSA Act;
- c. sub-item 6(2) now includes consideration of the seriousness of any offence or contravention;
- d. a number of provisions have been removed which were the subject of concerns.

TEQSA provided a revised draft of the instrument, after incorporating these changes, to Universities Australia, TAFE Directors Australia, the Australian Council of Private Education and Training and the Council for Private Higher Education. TEQSA has not amended the instrument following this further consultation, though it received a number of useful suggestions in relation to guidance about TEQSA's application of the instrument and future reviews of the contents of the instrument.

Commencement

This instrument is a legislative instrument for the purposes of the *Legislation Act 2003* and will commence on the day after it is registered on the Federal Register of Legislation.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Tertiary Education Quality and Standards Agency Fit and Proper Person Determination 2018

This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the instrument is to specify matters that TEQSA may have regard to when determining whether a person is fit and proper for the purposes of paragraph 21(1)(b), section 25A and paragraph 36(1)(b) of the *Tertiary Education Quality and Standards Agency Act 2011*.

Human rights implications

Right to education

The Instrument engages the right to education, contained in Article 13 of the International Covenant on Economic, Social, and Cultural Rights. In particular, this instrument has an effect on the provision of education services by higher education providers by specifying the matters that TEQSA may take into account when it considers whether a higher education provider, and certain persons involved with a higher education provider, are fit and proper. This consideration may lead to a decision about the registration of a higher education provider.

The instrument provides that the matters that may be considered by TEQSA include a person's compliance with the law, a person's financial record, a person's management history, whether a person has provided false or misleading information, and a person's previous conduct and involvements. Consideration of these matters by TEQSA in making a decision as to whether a person is fit and proper will help ensure integrity in the higher education sector.

To the extent that the right to education is engaged, this right is promoted by the instrument as the instrument improves TEQSA's capacity to protect and enhance the quality and integrity of Australia's higher education sector.

Right to privacy and reputation

The instrument also engages the right to privacy and reputation contained in Article 17 of the International Covenant on Economic, Social and Cultural Rights as the instrument requires TEQSA to collect and use personal information. The information will be collected to ensure that individuals who make or participate in making decisions that affect the whole, or a substantial part, of an applicant or provider's affairs are fit and proper persons. The minimum amount of personal information

required will be collected and TEQSA will comply with the *Privacy Act 1988* in relation to the collection (and any use and disclosure) of the information.

The collection and use of the information will improve TEQSA's capacity to protect and enhance the quality and integrity of Australia's higher education sector, and any limitation on the right to privacy is reasonable, necessary and proportionate to this policy objective. The instrument is therefore compatible with the right to privacy.

Conclusion

This instrument is compatible with human rights because it advances the protection of human rights.

Professor Nicholas Saunders AO

Chief Commissioner

Dr Linley Martin

Commissioner

Professor Cliff Walsh

Commissioner

Tertiary Education Quality and Standards Agency