

EXPLANATORY STATEMENT

Tertiary Education Quality and Standards Agency Determination of Fees (Amendment) 2020

Purpose and Authority

Subsection 158(1) of the *Tertiary Education Quality and Standards Agency Act 2011* (the TEQSA Act) allows TEQSA to determine, by legislative instrument, fees that TEQSA may charge for things done in the performance of its functions. Subsection 158(3) of the TEQSA Act specifies that TEQSA may, in the determination under subsection (1), determine other matters relating to the payment of fees.

Among other things, subsection 33(3) of the *Acts Interpretation Act 1901* provides that a power to make an instrument of a legislative character (such as under subsections 158(1) and 158(3) of the TEQSA Act) includes a power to amend such an instrument.

The purpose of the *Tertiary Education Quality and Standards Agency Determination of Fees (Amendment) 2020* (the Amendment Determination) is to amend the *Tertiary Education Quality and Standards Agency Determination of Fees No. 1 of 2020* (the Principal Determination) to:

- provide for merits review in relation to discretionary decisions to waive and refund fees;
- narrow the scope of discretions to waive and refund fees so as to reflect the Australian Government's regulatory relief measure;
- address a referencing issue in relation to applications for registration.

The Amendment Determination retains the effect of the Principal Determination to help ensure the ongoing sustainability and viability of the higher education sector, and to help reduce the financial burden for that sector, while ensuring appropriate provision is made for merits review of discretionary decisions to waive and refund fees.

Commencement

The instrument commences on the day after it is registered.

Consultation

As noted in the explanatory statement for the First Determination, the measures in that Determination are in response to stakeholder feedback in relation to the impacts of the COVID-19 pandemic on the higher education sector. TEQSA also consulted the Department of Education, Skills and Employment and the Australian Skills Quality Authority on that Determination.

Consistent with the requirement in subsection 158(5) of the TEQSA Act, the Minister for Education gave written approval to the making of the First Determination and the Amendment Determination. Prior to making the Amendment Determination, TEQSA also consulted with the Attorney-General's Department, given its responsibility for policy on administrative law and courts and Tribunals.

TEQSA will consult the sector later in 2020 as part of the process of the development of a new instrument to give effect to the new cost recovery arrangements.

Regulation Impact Statement

The Office of Best Practice Regulation (OBPR) has confirmed that the Higher Education Relief Package¹, which includes the measures in the Amendment Determination, does not require a Regulation Impact Statement (RIS). OBPR reference: 26451.

Further to this, the Prime Minister has granted an exemption from the need to complete regulatory impact analysis in the form of RISs for all urgent and unforeseen Government measures made in response to the COVID-19 pandemic event². The measures in the Amendment Determination are considered unforeseen and have been made in response to the COVID-19 pandemic event.

Description of the provisions

Preliminary

Sections 1 to 3 of the Amendment Determination are formal provisions providing for the name, commencement and authority of the instrument.

Section 1 states the name of the instrument as the *Tertiary Education Quality and Standards Agency Determination of Fees (Amendment) 2020*.

Section 2 provides for the Determination to commence on the day after it is registered.

Section 3 states that the Amendment Determination is made under subsections 158(1) and 158(3) of the TEQSA Act.

Section 4 provides that the Principal Determination is amended as set out in the Schedule to the Amendment Determination.

Schedule 1 - Amendments

Item 1 repeals and replaces item 4 in the table at section (1) of Schedule A of the Principal Determination. The replacement item corrects a referencing error identified in the Principal Determination.

Item 2 repeals and replaces Schedule B of the Principal Determination. The replacement Schedule includes two Parts. Part 1 of Schedule B deals with the waiver and refund of fees, while Part 2 deals with merits review of decisions about the waiver and refund of fees.

Section 1 of Schedule B provides TEQSA with a discretion to waive fees in particular circumstances. These include:

- When an applicant was approved as a higher education provider by a government accreditation authority at 29 January 2012 but was not yet offering or conferring a course of study.

¹ <https://www.dese.gov.au/covid-19/higher-education/higher-education-faq>

² <https://ris.pmc.gov.au/2020/03/18/prime-ministers-exemption---covid-19-related-measures>

- Where an application for renewal of accreditation of a course of study is made on the basis that no new enrolments are permitted in the course and the provider ceases to provide the course at the conclusion of the first teaching period that commences after the date on which the provider's current accreditation for the course is to end.
- Where a registered higher education provider's higher education operations are transferred to another person or body including a body politic or a body corporate, and the person or body to which the operations are transferred applies for registration as a higher education provider.

Sections 2, 3 and 4 are designed to give effect to the Australian Government's higher education fee relief measure. Section 2 provides TEQSA with the discretionary capacity to refund fees paid under the TEQSA Act and the ESOS Act, in special or unusual circumstances that cause the fee to be unreasonable or inequitable. Section 3 allows TEQSA to waive fees in the same circumstances. Section 4 is inserted for avoidance of doubt purposes, in order to provide certainty to the higher education sector that the fee waiver and refund capacity provided by sections 2 and 3 of TEQSA includes circumstances related to the COVID-19 pandemic event.

The substantive amendment made by this instrument is to limit the application of the waiver and refund powers in sections 2 and 3 of Schedule B to:

- fees for applications by registered higher education providers or, in relation to fees for applications under the *Education Services for Overseas Students Act 2000*, to fees for applications by registered providers.
- in relation to refunds of fees, fees paid to TEQSA on or after 1 January 2020.

These amendments reflect the scope of the Australian Government's higher education fee relief measure.

Section 5 of Schedule B provides that a decision under section 1, 2 or 3 of that Schedule is a reviewable decision for the purposes of Part 2.

Section 6 provides that an application for internal review of a reviewable decision by a delegate of TEQSA may be made by a person affected by the decision. That section also sets out:

- the time within which an application for internal review must be made – paragraph (2)(a);
- the requirement that an application for internal review set out the reasons for the application – paragraph (2)(b);
- the obligation for TEQSA to review a reviewable decision upon receiving an application for internal review – subsection (3);
- the power for TEQSA to affirm, vary or revoke such a reviewable decision – subsection (4);
- the requirement to notify an applicant, in writing, of a decision on review, and the reasons for that decision, within 30 days of that decision – subsection (5);
- the requirement for TEQSA to make a decision on internal review of a reviewable decision within 90 days after receiving an application for internal review – subsection (6); and

- a statement that TEQSA is taken to have affirmed a reviewable decision if it does not make a decision on review within 90 days – subsection (7).

Section 27A of the *Administrative Appeals Tribunal Act 1977* provides that a person who makes a reviewable decision must take reasonable steps to give a person whose interests are affected by a reviewable decision (within the meaning of that section) notice (written or otherwise) of the making of the decision and of the right of the person to have the decision reviewed by the Administrative Appeals Tribunal.

Section 7 provides that applications may be made to the Administrative Appeals Tribunal to review the following:

- a reviewable decision in circumstances where the decision was not made by a delegate of TEQSA; or
- an internal review decision of TEQSA made under subsection 6(4) (to affirm, vary or revoke a reviewable decision and, in the case of a revocation decision, such other decision that TEQSA thinks is appropriate).

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 Determination of Fees No. 1 of 2020

This Legislative 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 *Tertiary Education Quality and Standards Agency Determination of Fees (Amendment) 2020* (the Amendment Determination) is to amend the *Tertiary Education Quality and Standards Agency Determination of Fees No. 1 of 2020* (Principal Determination) to:

- provide for merits review in relation to discretionary decisions to waive and refund fees;
- narrow the scope of discretions to waive and refund fees so as to reflect the Australian Government's regulatory relief measure;
- address a referencing issue in relation to applications for registration.

In summary, the Amendment Determination retains the effect of the Principal Determination to help ensure the ongoing sustainability and viability of the higher education sector, and to help reduce the financial burden for that sector, while ensuring appropriate provision is made for merits review of discretionary decisions to waive and refund fees.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

Professor Nicholas Saunders AO
Chief Commissioner

Professor Peter Coaldrake AO
Commissioner

Professor Joan Cooper
Commissioner

Professor Cliff Walsh
Commissioner

Tertiary Education Quality and Standards Agency