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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**TERTIARY EDUCATION QUALITY AND STANDARDS AGENCY BILL  
2011**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Tertiary Education, Skills, Jobs and  
Workplace Relations)

# **TERTIARY EDUCATION QUALITY AND STANDARDS AGENCY BILL 2011**

## **GENERAL OUTLINE**

The *Tertiary Education Quality and Standards Agency Bill 2011* (the Bill) establishes the Tertiary Education Quality and Standards Agency (TEQSA) and a new national regulatory and quality assurance environment for Australian higher education.

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.

TEQSA will 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 be an independent body operating at arms length from the Government.

TEQSA will undertake a variety of regulatory functions including registration and re-registration, accreditation and re-accreditation (both on up to a 7 year cycle) and compliance and quality assessments.

TEQSA's approach to regulation will be proportionate and risk-based.

The Government has established a set of principles for regulation which are enshrined in the Bill.

Together, these principles underpin TEQSA's risk-based regulatory approach which will take into account the scale, mission and history of each provider.

TEQSA's focus will be on higher risk providers, allowing higher quality, lower risk providers to operate without unnecessary intrusion.

As a statutory agency, TEQSA will be subject to the *Financial Management and Accountability Act 1997* and its staff engaged under the *Public Service Act 1999*. Its governance arrangements will be based on a commission model, led by a Chief Commissioner, who will also be the Chief Executive Officer.

TEQSA will be constituted by five Commissioners and major regulatory decisions will be taken by the Commission as a whole. This provides higher education providers further certainty that regulatory action taken by TEQSA will be soundly based and subject to appropriate checks and balances.

A key mechanism for consistent regulation will be the regulation against a set of national standards.

The Higher Education Standards Framework will incorporate national quality standards and performance indicators. These will be central 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.

The Higher Education Standards Framework will be developed and maintained by the Higher Education Standards Panel. The Panel's functions will be to provide advice and make recommendations to the Minister for Tertiary Education, the Minister for Research and TEQSA on matters relating to the framework.

Although established by the Bill, the Panel will be independent of TEQSA and will report to the Minister. This ensures the separation of TEQSA's quality assurance and regulatory functions.

Consistent with the shared arrangements that exist in higher education, responsibility for TEQSA will be shared by the Minister for Tertiary Education and the Minister for Research, in line with their portfolio responsibilities. All commissioners and members of the Higher Education Standards Panel will be appointed by the Minister for Tertiary Education in consultation with the Minister for Research. The Minister for Tertiary Education will be responsible for making the standards that form the Higher Education Standards Framework except the Research Standards. The Minister for Research will make the Research Standards.

Before making a standard, the Minister for Tertiary Education will be required to consult with the Minister for Research. Similarly, the Minister for Research will be required to consult with the Minister for Tertiary Education before making the Research Standards.

## **FINANCIAL IMPACT STATEMENT**

TEQSA will be financed by Parliamentary appropriation. In this regard, the *Financial Management and Accountability Act 1997* will allow the Minister for Finance and Deregulation, or his or her delegate, to issue drawing rights as to the amounts in which, and the times at which, money may be drawn by TEQSA. TEQSA will have appropriations of \$54 million between commencement in 2011 and June 2014

# TERTIARY EDUCATION QUALITY AND STANDARDS AGENCY BILL 2011

## NOTES ON CLAUSES

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### *Part 1*

#### *Introduction*

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#### **Division 1 - Preliminary**

##### **Clause 1 - Short title**

This clause provides for the Bill, when it is enacted, to be cited as the *Tertiary Education Quality and Standards Agency Act 2011*.

##### **Clause 2 - Commencement**

Subclause 2(1) inserts a three column table setting out commencement information for various provisions of the Bill. Each provision of the Bill specified in column 1 of the table commences (or is taken to have commenced) in accordance with column 2 of the table and any other statement in column 2 has effect according to its terms.

The table has the effect of providing for:

- clauses 1 and 2 and anything in the Bill that is not covered in the table to commence on the day this Bill receives Royal Assent
- clauses 3 to 8 of Part 1; Division 5 of Part 1; Division 1 of Part 5; Parts 8 to 10; and Part 12 to commence on the later of 1 July 2011 and the day after the end of the 1 month period that begins on the day this Bill receives Royal Assent
- clause 9 of Part 1; Parts 2, 3 and 4; Division 2 of Part 5; Parts 6 and 7; and Part 11 to commence on the later of 1 January 2012 and the day after the end of the 7 month period that begins on the day this Bill receives Royal Assent.

A Note makes it clear that these commencement times will not be amended by any later amendments of the Bill (once enacted).

Subclause 2(2) provides that information in column 3 of the table does not form part of the Bill. Information in column 3 may be inserted or varied in any published version of the Bill (once enacted).

## **Division 2 – Objects and simplified outline**

### **Clause 3 – Objects**

Provides that the objects of the Bill are as follows:

- to provide for national consistency with respect to higher education; and
- to regulate higher education using a standards-based quality framework and principles relating to regulatory necessity and proportionality; and
- to protect and enhance: Australia’s reputation for delivering quality higher education and training services; 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;
- to protect students undertaking or proposing to undertake higher education in Australia by requiring that quality higher education be provided; and
- to ensure that students undertaking or proposing to undertake higher education have access to information about higher education in Australia.

### **Clause 4 – Simplified outline**

This clause explains the outline of the Bill as follows:

- entities must be registered with TEQSA before they can offer or confer any of the following types of awards (called ***regulated higher education awards***):
  - o Australian higher education awards; or
  - o overseas higher education awards (if they relate to courses of study provided at Australian premises)
- registered higher education providers must have their courses of study accredited by TEQSA before they are allowed to provide those courses of study in connection with regulated higher education awards
- TEQSA registers providers, accredits courses of study and is responsible for ensuring that higher education provided in Australia or by Australian providers, meets the Higher Education Standards Framework

- the Higher Education Standards Framework is a series of standards made by the Minister on the advice of the Higher Education Standards Panel.

## **Division 3 - Definitions**

### **Clause 5 - Definitions**

This clause defines certain terms that appear in the Bill. These definitions include the following:

***accredited course*** means a course of study that is either:

- accredited by the provider itself (some higher education providers such as universities will have the authority to self-accredit their courses); or
- is otherwise accredited by TEQSA.

***acquisition of property*** has the same meaning as in paragraph 51(xxxi) of the Constitution – which provides that the Commonwealth Parliament has the power to make laws with respect to “the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has the power to make laws”.

***Australia***, when used in a geographical sense, includes the external Territories. Clause 10 of the Bill provides that the Bill extends to every external Territory.

***Australian corporation*** means a trading or financial corporation formed within the limits of the Commonwealth to which paragraph 51(xx) of the Constitution applies. Pursuant to paragraph 51(xx), the legislative powers of the Commonwealth include laws with respect to “foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.” Clause 5 also defines ***foreign corporation*** as meaning a foreign corporation to which paragraph 51(xx) applies.

***Australian course of study*** means either:

- a single course that leads to an Australian higher education award (eg a Master of Public Policy); or
- a course of study that the higher education provider where the student studies recognises can be taken as part of a combined or double course leading to 1 or more Australian higher education awards such as a Bachelor of Arts and a Bachelor of Laws.

***Australian higher education award*** means a ***higher education award*** (which is separately defined) that is offered or conferred by any of the following (either solely, or jointly):

- an Australian Corporation; or
- a corporation established under Commonwealth or Territory laws; or
- a person (that is not an individual) established in Australia who conducts activities in a Territory; or
- an Australian resident who conducts activities in a Territory.

Offered or conferred by refers to the higher education provider from whom a student obtains his or her qualification.

***Australian premises*** relates to overseas higher education providers and means premises that are in Australia that are occupied by the person who offers or confers the award in question (the ***offeror***), or by another entity and from which the offeror, or another entity under an arrangement it has with the offeror, provides all or part of a course of study. This definition is not intended to cover premises such as internet cafes or a student's home etc.

***Australian resident*** means an individual person who is an Australian resident and who is either an Australian citizen, or who holds a permanent visa (within the meaning of the *Migration Act 1958*).

***course of study*** means either an Australian course of study or an overseas course of study.

***evidential material*** in relation to offences under this Bill, or offences under the Bill's ***associated provisions*** (which means the *Crimes Act 1914* or the *Criminal Code* that relate to this Bill), means:

- things with respect to which an offence has been committed, or it is reasonably suspected an offence has been committed; or
- things with respect to which it is reasonably suspected the things will afford evidence of an offence having been committed, or are intended to be used to commit the offence.

In relation to contraventions of civil penalty provisions, ***evidential material*** means:

- things with respect to which a civil penalty provision has been contravened, or it is reasonably suspected a civil penalty provision has been contravened; or
- things with respect to which it is reasonably suspected the things will afford evidence of a civil penalty provision having been contravened, or are intended to be used to contravene a civil penalty provision.

***executive officer*** of an entity means someone who is concerned in, or takes part in, the management of the entity. It doesn't matter what title they have and whether or not they are a director of the entity.

***Federal Magistrate*** means a Federal Magistrate in relation to whom (other than in clause 96) a subclause 96(1) consent and a subclause 96(2) nomination are in force.

***foreign corporation*** means a foreign corporation to which paragraph 51(xx) of the Constitution applies. Pursuant to paragraph 51(xx) the Commonwealth Parliament can pass laws with respect to *foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.*

***higher education award*** means

- a diploma, advanced diploma, associate degree, bachelor degree, graduate certificate, graduate diploma, masters degree, or doctoral degree; or
- a qualification that is covered by levels 5, 6, 7, 8, 9 or 10 of the Australian Qualifications Framework; or
- an award of a similar kind to those above, or that is represented as being of a similar kind to those above.

other than an award that is offered or conferred for the completion of one or more vocational education and training courses.

***higher education provider*** is defined as meaning:

- a constitutional corporation (ie a corporation to which paragraph 51(xx) of the Constitution applies – that is a foreign corporation or a trading or financial corporation formed within the limits of the Commonwealth) that offers or confers a regulated higher education award; or
- a corporation established under a law of the Commonwealth or a Territory that offers or confers a regulated higher education award (eg the Australian National University); or
- a person who offers or confers a regulated higher education award for completing a course of study that is provided wholly or partly in a Territory.

***Higher Education Standards Framework*** means the following:

- the Provider Standards, which consist of:
  - o the Provider Registration Standards (made under paragraph 58(1)(a))
  - o the Provider Category Standards (made under paragraph 58(1)(b))



- the Provider Course Accreditation Standards (made under paragraph 58(1)(c))
- the Qualification Standards (made under paragraph 58(1)(d))
- the Teaching and Learning Standards (made under paragraph 58(1)(f))
- the Research Standards (made under paragraph 58(2))
- the Information Standards (made under paragraph 58(1)(g))
- any other standards against higher education providers can be assessed (made under paragraph 58(1)(e) and against which the quality of higher education can be assessed (made under paragraph 58(1)(h)).

*just terms* has the same meaning as in paragraph 51(xxxi) of the Constitution – which provides that the Commonwealth Parliament has the power to make laws with respect to “the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has the power to make laws”.

*overseas course of study* means either:

- a single course that leads to an overseas higher education award; or
- a course of study that the higher education provider where the student studies recognises can be taken as part of a combined or double course leading to 1 or more higher education awards such as a Bachelor of Arts and a Bachelor of Laws.

*overseas higher education award* means a *higher education award* (which is separately defined) that is offered or conferred by (either solely, or jointly):

- a foreign corporation; or
- a person (that is not an individual) established outside of Australia who conducts activities in a Territory; or
- An individual who is not a resident of Australia who conducts activities in a Territory.

*provide a course of study*: an entity is able to provide a course of study via one of more of the following means:

- a lecture, class or examination on campus or at other premises
- a postal service or another service like a postal service
- a computer that is adapted for communicating over the internet or another communications network
- a television receiver that is adapted to allow the viewer to transmit information via a cable television or other communication network
- telephone
- any other electronic device.

This definition includes a combination of these means – for example, a course of study could be provided by way of a lecture that includes a video feed.

***regulated entity*** means the following:

- a constitutional corporation (ie a corporation to which paragraph 51(xx) of the Constitution applies); or
- a corporation that has been established by or under a Commonwealth law, or a law of a Territory; or
- a person who conduct activities in a Territory.

***State or Territory authority*** means a Department or an agency of a State or Territory, or a body (that can be incorporated or not incorporated) that is established for a public purpose by or under a law of a State or Territory.

***Threshold Standards*** means the following:

- the Provider Standards, which consist of:
  - o the Provider Registration Standards (made under paragraph 58(1)(a))
  - o the Provider Category Standards (made under paragraph 58(1)(b))
  - o the Provider Course Accreditation Standards (made under paragraph 58(1)(c))
- the Qualification Standards (made under paragraph 58(1)(d))
- any other standards against which higher education providers can be assessed (made under paragraph 58(1)(e)).

***vocational education and training course*** means the following:

- the units of competency that comprise a training course endorsed by the Council comprised of Commonwealth and State and Territory Ministers responsible for vocational education and training (currently the Ministerial Council for Tertiary Education and Employment); or
- the modules of a course that has been accredited under a State or Territory law about vocational education and training; or
- any course that is similar to such training packages or courses.

A Note explains that, if the *National Vocational Education and Training Regulator Act 2011* commences, this definition of ***vocational education and training course*** will change to mean a VET course within the meaning of that Act, or a course that is of a similar kind. The Note also draws attention to Part 2 of Schedule 2 of the Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Bill 2011 which concerns transitional provisions required for the purposes of this Bill.

The other definitions are straightforward and do not require additional explanation.

## **Clause 6 – Meaning of *regulated higher education award***

This clause explains the meaning of *a regulated higher education award*.

Subclause 6(1) states that a *regulated higher education award* is either:

- an Australian higher education award that is offered or conferred for the completion of an Australian course of study [per subclause 6(3) this does not apply to an Australian higher education award to the extent that it is offered or conferred by a foreign corporation, or a person (who is not an individual) established outside of Australia who conducts activities in a Territory, or an individual who is not a resident of Australia and who conducts activities in a Territory. For example, this covers the case where an Australian higher education award is jointly conferred by an Australian university and a foreign university – in which case it is simpler to just require that the Australian university is registered with TEQSA]; or
- an overseas higher education award that is offered or conferred for completing an overseas course of study provided wholly or mainly from Australian premises that are related to the award.

Subclause 6(2) provides that the course of study itself does not need to be provided by the person that offers or confers the award.

## **Clause 7 – Meaning of *vacancy***

This clause provides that, for the purposes of references in this Bill to a *vacancy* in the office of a Commissioner or a Panel member or the *Acts Interpretation Act 1901* to a *vacancy* in the membership of a body then:

- there are taken to be 4 offices of Commissioners in addition to the Chief Commissioner
- there are taken to be 10 offices of Panel members in addition to the Panel Chair.

This provision would allow, for example, the Minister to appoint 2 acting part-time Commissioners rather than 2 substantive part-time Commissioners.

## **Division 4 – Relationship with State and Territory laws**

### **Clause 8 – Constitutional basis**

The effect of this clause is to explain that the Constitutional basis for the Bill is as follows:

- the Commonwealth's legislative power in paragraph 51(xx) of the Constitution (foreign corporations and trading or financial corporations formed within the limits of the Commonwealth)
- the Commonwealth's legislative power in paragraph 51(xxxix) of the Constitution (matters incidental to the exercise of powers vested in the Commonwealth Parliament under the Constitution)
- the Commonwealth's legislative power in section 122 of the Constitution (the power to legislate for the government of territories)
- any other Commonwealth legislative power to the extent that the Commonwealth relies upon, or has relied upon, that power to establish a corporation (eg section 4 of the *Australian Film, Television and Radio School Act 1973* established the Australian Film, Television and Radio School as a body corporate).

### **Clause 9 – Act excludes State and Territory higher education laws**

Subclause 9(1) provides that the following entities need not comply with State or Territory laws that purport to regulate the provision of higher education:

- higher education providers
- regulated entities who intend to become higher education providers where they have applied to TEQSA for registration under clause 18 and TEQSA has not yet made a decision on the application.

Subclause 9(1) is not intended to apply to State and Territory vocational education and training (VET) laws because VET is not a subset of higher education.

Subclause 9(2) provides that subclause 9(1) does not apply in relation to State and Territory laws to the extent that such laws:

- establish a higher education provider or a regulated entity (this is intended to cover laws that establish the internal governance arrangements for the provider or entity – such as provisions that deal with such matters as a university's governing council etc)
- regulate who may carry on an occupation (eg teacher registration laws)
- are of a kind specified in regulations (this would allow the regulations to prescribe kinds of State and Territory laws that would continue to apply – which could, for example, include State ombudsman legislation).

Subclause 9(3) provides that subclause 9(1) does not apply to State and Territory laws if they purport to regulate a matter only part of which relates to the provision of higher education – unless that law is of a kind specified in regulations. Examples of such State or Territory laws that may only partly cover the provision of higher education could include privacy laws, fair trading laws, auditor-general laws and ombudsman laws.

## **Division 5 – General application of this Act**

### **Clause 10 – Crown to be bound**

The effect of this clause is to bind the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory and of the Northern Territory. However the Crown (in any of these capacities) is not liable to a pecuniary penalty or to be prosecuted for an offence.

### **Clause 11 – Application to external Territories and outside Australia**

Subclause 11(1) provides that the Bill will apply in every external Territory of Australia. Section 17 of the *Acts Interpretation Act 1901*, together with section 122 of the *Commonwealth of Australia Constitution Act 1901*, defines external Territory to broadly mean Territories not otherwise included within Australia, which are governed by the Commonwealth of Australia. This means, for example, that the Bill will cover the Indian Ocean Territories (Cocos (Keeling) Island and Christmas Island) and Norfolk Island.

Subclause 11(2) provides that the Bill will extend to acts, omissions, matters or things outside of Australia, unless a contrary intention applies.

### **Clause 12 – Geographical jurisdiction of offences**

This clause provides that category D (extended geographical jurisdiction) of section 15.4 of the *Criminal Code* applies to offences against this Bill or offences against the Bill's associated provisions (the *Crimes Act 1914* or the *Criminal Code* that relate to this Bill).

Category D enables an offence to operate whether or not the conduct occurs in Australia or overseas, and whether or not the result of that conduct occurs in Australia or overseas.

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# *Part 2*

## *Basic principles for regulation*

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### **Outline of Part**

Part 2 of the Bill sets out how TEQSA should approach its regulatory activities in line with the principles of regulatory necessity, acknowledging risk and proportionate regulation. TEQSA's risk-based regulatory approach will take into account the scale, mission and history of each provider. The focus will be on marginal and higher risk providers, allowing higher quality, lower risk providers to operate without unnecessary intrusion.

### **Detailed explanation**

#### **Clause 13 – Basic principles for regulation**

This clause sets out the principles that TEQSA must comply with when exercising its powers under this Bill in relation to a regulated entity. These principles are:

- regulatory necessity
- reflecting risk
- proportionate regulation.

The purpose of the basic principles of regulation is to guide TEQSA in the exercise of its regulatory functions and to outline how TEQSA will exercise its powers in a risk-based and proportionate way. While the nature of the three basic principles means that there will be some overlap between them, each principle is integral to guiding TEQSA's approach to regulation.

#### **Clause 14 – Principle of regulatory necessity**

This clause provides that TEQSA will comply with the principle of regulatory necessity if, when it exercises its powers, it does not burden the entity concerned any more than is reasonably necessary.

#### **Clause 15 – Principle of reflecting risk**

This clause provides that TEQSA will comply with the principle of reflecting risk if, when it exercises its powers, it has regard to the following:

- an entity's history including its history of: scholarship, teaching and research; students' experiences; financial status and capacity; and

compliance with the Threshold Standards, this Bill and its associated provisions (the provisions of the *Crimes Act 1914* or the *Criminal Code* that relate to this Bill) and other laws that relate to higher education

- the risk that an entity might not in the future comply with the Threshold Standards, this Bill or its associated provisions (the provisions of the *Crimes Act 1914* and the *Criminal Code* that relate to this Bill) including the entity's internal quality assurance mechanisms and its financial position and capacity.

#### **Clause 16 – Principle of proportionate regulation**

This clause provides that TEQSA will comply with the principle of proportionate regulation if, when the exercise of its powers in relation to an entity is in proportion to any non-compliance or risk of future non-compliance by the entity with the Threshold Standards, this Bill or its associated provisions (the provisions of the *Crimes Act 1914* and the *Criminal Code* that relate to this Bill).

#### **Clause 17 – Application to authorised officers**

This clause provides that Part 2 of the Bill applies to authorised officers (who are appointed under clause 94) in the same way that Part 2 applies to TEQSA.

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# ***Part 3***

## ***Registration***

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### **Outline of Part**

Part 3 of the Bill sets out how to apply for registration as a higher education provider and how TEQSA will go about determining applications and notifying providers of its decisions. As part of its decision making processes, TEQSA will be able to determine the category in which a provider is to be registered, the period of registration (up to 7 years) and whether a provider may self-accredit its courses. Part 3 specifies a number of conditions that will apply to all registered providers and that TEQSA will also be able to impose other conditions on a provider's registration (such as restricting the number of students they may enrol in a particular course).

The conditions that will apply to all registered providers are:

- they must offer at least one accredited course;
- where they offer or confer regulated higher education awards that are provided by other entities – they must ensure those entities provide the courses of study consistently with the Threshold Standards;
- they must provide annual financial statements to TEQSA;
- on request, they must provide other information to TEQSA;
- they must notify TEQSA of matters concerning their ability to comply with the Threshold Standards, or when the Register needs to be updated in respect of them;
- they must keep adequate records for the purposes of the Bill;
- they must cooperate with TEQSA to enable it to perform its functions; and
- they may be subject to other conditions imposed by TEQSA at any time during a period of registration.

Part 3 also sets out how registration is renewed, how a change in a registered higher education provider's category occurs and how registered higher education providers can make an application to TEQSA for authority to self-accredit one or more courses of study.

### **Detailed explanation**

#### **Division 1— Applying for registration**

##### **Clause 18 – Applying for registration**

Subclause 18(1) provides that a regulated entity who is or intends to become a higher education provider may apply to TEQSA to be registered within one of the provider categories.



Subclause 18(2) provides that if such an application is made, the entity may also make an application to TEQSA for a course of study to be accredited. A Note draws the reader's attention to clause 46 which concerns applications for accreditation of courses.

Subclause 18(3) provides that applications for registration must be made by way of the approved form and must be accompanied by any information, documents or assistance requested by TEQSA and the fee for a preliminary assessment under Part 3 as determined under clause 158. Assistance may include, without limitation, providing permission for TEQSA to contact and consult staff or students of the relevant provider.

### **Clause 19 – Preliminary assessment of application**

Subclause 19(1) provides that TEQSA must advise an applicant for registration, within 30 days after an application is made:

- whether its application for registration in a particular provider category is appropriate and, if it is not appropriate, what provider category would be appropriate (if any); and
- whether the provider also needs to make an application to TEQSA for any of its courses of study to be accredited.

Subclause 19(2) provides that before it makes a decision about the appropriate category for a provider TEQSA must:

- have regard to the Threshold Standards
- if the provider category (either applied for by the provider or that TEQSA thinks is appropriate) permits the use of the word 'university':
  - o consult the Minister for higher education in the relevant State or Territory; and
  - o have regard to the advice or recommendations given by the Minister or Ministers.

Subclause 19(3) provides that an applicant may withdraw an application for registration but that, if it does so, the preliminary application fee is not refundable.

### **Clause 20 – Substantive assessment of application**

Subclause 20(1) provides that applicants may continue with their applications (for registration within a provider category) by providing any further information, documents and assistance requested by TEQSA and paying the fee determined under clause 158 for a substantive assessment under Part 3. Assistance may include, without limitation, providing permission for TEQSA to contact and consult staff or students of the relevant provider.

Subclause 20(2) provides that when TEQSA conducts a substantive assessment, it must:

- proceed to do so on the basis that the provider category the applicant has applied for is the category which TEQSA has advised is appropriate under paragraph 19(1)(a)
- if the provider category permits the use of the word ‘university’:
  - consult the Minister for higher education in the relevant State or Territory; and
  - have regard to the advice or recommendations given by the Minister or Ministers.

Subclause 20(3) provides that the substantive application fee is not refundable if the applicant withdraws its application (ie after it has decided to proceed and has paid the substantive assessment fee).

### **Clause 21 – Registration**

Subclause 21(1) provides that TEQSA may approve an application for registration if satisfied that the applicant meets the Threshold Standards.

Subclause 21(2) requires TEQSA to make a decision on an application for registration within 12 months of receiving the application, or within a further period that is determined by TEQSA under subclause 21(3). Subclause 21(2) also provides that TEQSA is taken to have received an application for registration when it has received payment of the substantive assessment application fee.

Subclause 21(3) allows TEQSA to determine that it needs a longer period of time to decide the outcome of an application (up to a further 12 months) – where TEQSA is satisfied that it cannot make a decision within the initial 12 months period due to reasons that are beyond its control. This would allow a potential period of up to 24 months for deciding the application.

Subclause 21(4) provides that, if TEQSA makes a determination that it needs extra time to decide the outcome of an application, its decision that more time is required must be made no later than 6 weeks before the end of the 12 months time period from receipt of an application for registration.

Subclause 21(5) provides that, where it has made a determination that a longer period of time is required to decide the outcome of an application, it must notify the applicant in writing within 7 days of making the determination and must also give the applicant written reasons for its decision.

Subclause 21(6) provides that when TEQSA approves an application it must also determine a period for which the applicant will be registered. This period must not be more than 7 years. A Note draws the reader’s attention to clause 36 which concerns renewals of registration.

Subclause 21(7) provides that TEQSA is taken to have rejected an application for registration if it does not make a decision within the period mentioned in subclause

21(2) (ie either the 12 month period from receipt of an application, or within any longer period that it has determined under paragraph 21(2)(b) that it needs).

### **Clause 22 – TEQSA to notify applicant of decision about registration**

This clause requires TEQSA to notify applicants of the following within 30 days of TEQSA making a decision to either grant or reject an application for registration as a higher education provider:

- TEQSA’s decision
- if TEQSA decides to approve the application, the following:
  - o the provider category in which the applicant is registered and the reasons for deciding on that category
  - o the period for which the applicant is registered
  - o whether or not an applicant is entitled to self-accredit one or more courses of study
- if TEQSA decides to reject an application – the reasons for this decision.

A Note explains that TEQSA must also notify applicants of conditions that TEQSA imposes on the applicant’s registration under subclause 32(1) (per clause 34).

### **Clause 23 – Commencement and duration of registration**

This clause provides that an applicant’s registration:

- starts on the day specified in the written notice given to the applicant under clause 22; and
- ends at the end of the registration period specified in the most recent notice given by TEQSA under either clause 22 or clause 37. This has effect subject to subclause 36(3) about renewing registration, clause 43 (which is about withdrawing registration) and Division 1 of Part 7 (which is about cancelling registration and other administrative sanctions).

## **Division 2— Conditions of registration**

### **Clause 24 – Complying with conditions**

This clause provides that a registered higher education provider must comply with the conditions set out in clauses 25 to 31 and with any conditions imposed on the provider’s registration under subclause 32(1). A Note explains that, if a winding-up order is made with respect to a provider, its registration will be automatically cancelled (see clause 102).

### **Clause 25 – Condition – accredited course**

This clause provides that a condition of registration is that a registered higher education provider must offer at least one accredited course.

### **Clause 26 – Condition – courses to be provided consistently with the Threshold Standards**

This clause concerns situations where a registered higher education provider offers or confers a regulated higher education award for the completion of a course of study that is provided either wholly or partly by another entity. In such circumstances, the registered higher education provider must ensure that the other entity provides the course of study consistently with the Threshold Standards. If the other entity does not comply with the Threshold Standards, TEQSA may impose sanctions on the registered higher education provider's course accreditation or registration status.

### **Clause 27 – Condition – financial information must be provided**

Subclause 27(1) provides that a condition of registration is that the registered higher education provider must give TEQSA financial statements for each annual financial reporting period for which the provider is registered.

Subclause 27(2) provides that an annual financial reporting period for a registered higher education provider is the 12 month period to which the provider's accounts relate and for which notification has been received by TEQSA in writing as being the provider's annual financial period.

Subclause 27(3) provides that the financial statement must:

- be in the approved form; and
- be accompanied by a report on the statement from a qualified and independent auditor; and
- be provided to TEQSA within 6 months of the end of the relevant financial reporting period.

Subclause 27(4) provides that TEQSA may, in writing, approve someone as a qualified auditor for the purposes of the Bill.

### **Clause 28 – Condition – other information must be provided**

Subclause 28(1) allows TEQSA, where it reasonably believes that a registered higher education provider has information relevant to TEQSA's functions, to give a written notice to the provider requesting it to give the information to TEQSA within the period specified in the notice (which must not be shorter than 14 days after the notice is given) and in the manner specified in the notice.

It is a condition of registration that the registered higher education provider must comply with the request (subclause 28(2)).

### **Clause 29 – Condition – notifying TEQSA of material changes**

This clause provides that a condition of registration is that the registered higher education provider must notify TEQSA if an event happens or is likely to happen that would significantly affect the provider's ability to comply with the Threshold Standards, or would require the Register to be updated with respect to the provider. This notification must be given within 14 days after the provider would reasonably be expected to have become aware of the event. Examples of material changes could include, without limitation, change of ownership or the expansion of an offshore entity, the inclusion of offshore delivery (where it was not previously offered), a reduction in the fields of study offered, or matters affecting financial viability.

### **Clause 30 – Condition – record keeping**

This clause provides that a condition of registration is that the registered higher education provider must keep accurate records for the purposes of this Bill. Examples include, but are not limited to, records in relation to auditing and accounting, governing body meetings and decisions, policies, faculty and staff, enrolment and course details.

### **Clause 31 – Condition – cooperation**

This clause provides that a condition of registration is that the registered higher education provider must cooperate with TEQSA to facilitate TEQSA to perform its functions.

An example of cooperation would be that a provider would need to cooperate with TEQSA for any assessment under Division 2 of Part 5 which concerns compliance with the Higher Education Standards Framework.

### **Clause 32 – Other conditions**

Subclause 32(1) allows TEQSA to impose other conditions on a registered higher education provider's registration. These conditions need not be imposed at the time of registration and may be imposed later. Examples of the kinds of conditions that TEQSA may impose include:

- if clause 26 applies to the provider (a condition imposed on a registered higher education provider's registration to ensure courses are provided consistently with the Threshold Standards where the courses are provided wholly or partly by another entity), that the provider and the entity do certain things

- being required to maintain a particular staffing profile, or provide access to particular facilities, or to provide particular support services in relation to one or more accredited courses
- restricting or removing a provider’s authority to self-accredit one or more of its courses of study (Note 1 explains that TEQSA may need to consult before it imposes a condition of this kind – see clause 33)
- restricting or removing a provider’s ability to provide an accredited course (Note 2 explains that such a condition could, for example, prohibit a registered higher education provider from doing anything concerned with the purpose of recruiting or enrolling students or intending students for an accredited course, or from soliciting or accepting money from a student or an intending student for an accredited course)
- restricting the number of students that a provider is permitted to enrol in a particular accredited course provided by the provider
- restricting or removing a provider’s ability to offer or confer a regulated higher education award.

Subclause 32(2) provides that TEQSA may, on its own initiative, vary or revoke conditions imposed under subclause 30(1). In doing so, TEQSA would need to comply with the basic principles for regulation as set out in Part 2 of the Bill – ie the principles of regulatory necessity, reflecting risk and proportionate regulation. In addition, clause 183 provides that such a decision by TEQSA would be a *reviewable decision*.

Subclause 32(3) provides that TEQSA may also vary or revoke the conditions if the registered higher education provider in question makes an application for a variation or revocation. Such an application must be in the approved form and be accompanied by any information, documents and assistance requested by TEQSA and the relevant fee determined under clause 158 (subclause 32(4)). Assistance may include, without limitation, providing permission for TEQSA to contact and consult staff or students of the relevant provider.

### **Clause 33 – TEQSA to consult if condition about authority to self-accredit**

Subclause 33(1) explains that this clause applies if a registered higher education provider’s registration is in a category permitting the use of the word “university” and TEQSA proposes to make a decision to impose a condition under subclause 32(1) to restrict or remove its authority to self-accredit one or more of its courses, or to vary or revoke any such condition.

Subclause 33(2) provides that, before it does so, TEQSA must give the provider and each relevant State or Territory Minister for higher education a written notice of intention to make the decision (for reasons specified in the notice) and allowing them a reasonable opportunity to make representations to TEQSA about the proposed decision.

TEQSA must have regard to representations it receives under subclause 33(2) (subclause 33(3)).

### **Clause 34 – TEQSA to notify provider of decision to impose, vary or revoke a condition**

This clause provides that TEQSA must, within 30 days of making a decision to impose or vary a condition on a registered higher education provider under subclauses 32(1), (2), or (3), notify that provider in writing of the decision, the reasons for the decision and, if the decision is to impose a condition, the period for which the condition is imposed.

## **Division 3— Renewing registration**

### **Clause 35 – Applying to renew registration**

Subclause 35(1) provides that a registered higher education provider may apply to TEQSA for its registration to be renewed (using the approved form). If so, it must do this at least 180 days before its registration is due to end, or within any shorter period that TEQSA may allow.

Subclause 35(2) provides that applications for renewal of registration must be accompanied by the relevant fee for applications for renewal of registration as determined under clause 158.

### **Clause 36 – Renewing registration**

Subclause 36(1) provides that once TEQSA has received a registered higher education provider's application for renewal of registration it may, if satisfied that the provider continues to meet the Threshold Standards, renew the provider's registration.

Subclause 36(2) provides that, in order to help it to make a decision under subclause 36(1), TEQSA may do a number of things including the following:

- request that the provider give TEQSA information, documents or assistance (assistance may include, without limitation, providing permission for TEQSA to contact and consult staff or students of the relevant provider); and
- conduct a compliance assessment on the provider.

Subclause 36(3) provides that the provider's registration continues until TEQSA makes a decision about renewal of registration.

Subclause 36(4) provides that, if TEQSA decides to renew the provider's registration, it must determine a period for the renewed registration, which must not be longer than 7 years. A Note explains that any conditions imposed on the provider's registration, and in force immediately before registration renewal, will apply to the renewed registration.

Subclause 36(5) provides that if TEQSA proposes to make a decision to reject the provider's application for renewal of registration it must give the entities mentioned in subclause 36(6) a written notice giving reasons for the intended decision and allowing a reasonable opportunity for them to make representations to TEQSA about the intended decision. The entities specified in subclause 36(6) are as follows:

- the provider in question; and
- if the provider's registration is in a provider category that allows the provider to use the word "university" – each relevant State and Territory Minister for higher education.

Subclause 36(7) provides that TEQSA must consider any representations that it receives under subclause 36(5).

### **Clause 37 – TEQSA to notify provider of decision about renewal**

This clause requires TEQSA, within 30 days of making a decision to grant or refuse an application for renewal of registration, to notify the registered higher education provider in writing of:

- its decision
- if the decision is to grant the application, the period for which registration is renewed
- if the decision is to refuse the application, the reasons for the refusal.

## **Division 4— Changing provider registration category**

### **Clause 38 – Changing provider registration category**

Subclause 38(1) provides that TEQSA may change the provider category in which a registered higher education provider is registered, either on its own initiative, or where the provider has applied for a change in category.

Before doing so, TEQSA must have regard to the Threshold Standards (subclause 38(2)).

Applications by a provider for a change must be in the approved form and must be accompanied by any information, documents and assistance that TEQSA requires and the application fee determined under clause 158 (subclause 38(3)). Assistance may include, without limitation, providing permission for TEQSA to contact and consult staff or students of the relevant provider.



### **Clause 39 – Consultation—change relates to use of “university”**

Subclause 39(1) explains that this clause applies if TEQSA proposes to make a decision under subclause 38(1) to change the category in which a provider is registered and the provider’s current provider category, or the proposed provider category, allows the use of the word “university”.

Subclause 39(2) provides that, before it does so, TEQSA must give the provider and each relevant State or Territory Minister for higher education a written notice of intention to make the decision (for reasons specified in the notice) and allowing them a reasonable opportunity to make representations to TEQSA about the proposed decision.

TEQSA must have regard to representations it receives under subclause 39(2) (subclause 39(3)).

### **Clause 40 – TEQSA to notify provider of decision**

This clause requires TEQSA, within 30 days of making a decision on changing the provider category in which a provider is registered (under subclause 38(1)), to notify the registered higher education provider in writing of its decision and the reasons for the decision.

## **Division 5— Applying to self-accredit**

### **Clause 41 – Applying to self-accredit courses of study**

Subclause 41(1) provides that TEQSA may, after receiving an application, authorise a registered higher education provider to self-accredit one or more of its courses study.

Subclause 41(2) provides that before TEQSA does so it must have regard to the Threshold Standards.

Subclause 41(3) provides that applications for self-accrediting authority must be made by way of the approved form and must be accompanied by any information, documents and assistance requested by TEQSA and the relevant fee under clause 158. Assistance may include, without limitation, providing permission for TEQSA to contact and consult staff or students of the relevant provider.

### **Clause 42 – TEQSA to notify provider of decision**

This clause provides that within 30 days of making a decision under subclause 41(1) about self-accrediting authority, TEQSA must notify the registered higher education provider in writing about its decision and provide reasons for the decision.

## **Division 6— Withdrawing registration**

### **Clause 43 – Withdrawing registration**

This clause provides that a registered higher education provider can apply to TEQSA (using the approved form) to withdraw its application and that TEQSA can then, if it thinks it appropriate to do so, allow the registration to be withdrawn.

### **Clause 44 – TEQSA to notify provider of decision about withdrawal**

This clause requires TEQSA, within 30 days of making a decision on an application to withdraw registration, to notify the registered higher education provider in writing of its decision and:

- if it grants the application, the date from which the withdrawal takes effect
- if it rejects the application, the reasons for the decision.

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# ***Part 4***

## ***Accreditation of courses of study***

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### **Outline of Part**

Part 4 of the Bill covers the accreditation of courses of study where either a higher education provider is a non self-accrediting entity, or the provider is not allowed to accredit a particular course of study. For a course of study to be accredited, TEQSA must be satisfied that the course meets the Provider Course Accreditation Standards. Courses may be accredited for up to 7 years and accreditation may be renewed. A provider's accredited course may be subject to an accreditation assessment at any time and TEQSA may impose other conditions on the assessment of a course and these conditions are taken to also be imposed on the provider's registration.

### **Detailed explanation**

#### **Division 1— Application of this Part**

##### **Clause 45 – Application**

This clause provides that Part 4 applies to registered higher education providers that are not authorised to self-accredit a particular course of study.

#### **Division 2— Applying for accreditation**

##### **Clause 46 – Applying for accreditation**

Subclause 46(1) provides that regulated entities that are or who have applied to become registered higher education providers, may apply to TEQSA for a course of study to be accredited.

Subclause 46(2) provides that applications for course of study accreditation must be made by way of the approved form and must be accompanied any information, documents and assistance requested by TEQSA and the relevant application fee for a preliminary assessment under Part 4 as determined under clause 158. Assistance may include, without limitation, providing permission for TEQSA to contact and consult staff or students of the relevant provider.

### **Clause 47 – Preliminary assessment of application**

Subclause 47(1) provides that TEQSA must advise an applicant for course of study accreditation, within 30 days after an application is made, whether its application has been accompanied by enough information, documents or assistance and, if not, what further information, documents and assistance the applicant needs to provide. Assistance may include, without limitation, providing permission for TEQSA to contact and consult staff or students of the relevant provider.

Subclause 47(2) provides that, if an applicant withdraws its application for course of study accreditation, the preliminary assessment application fee is not refundable. This is appropriate in light of the *Australian Government Cost Recovery Guidelines* which require agencies to set charges to recover all the costs of products or services where it is appropriate to do so. The preliminary assessment fee, to be determined by way of disallowable legislative instrument, is likely to be relatively moderate in quantum.

### **Clause 48 – Substantive assessment of application**

Subclause 48(1) provides that applicants may continue with their applications (for course of study accreditation) by providing any further information, documents and assistance requested by TEQSA and paying the fee determined under clause 158 for a substantive assessment under Part 4. Assistance may include, without limitation, providing permission for TEQSA to contact and consult staff or students of the relevant provider.

Subclause 48(2) provides that the substantive assessment application fee is not refundable if the applicant withdraws its application (ie after it has decided to proceed and has paid the substantive assessment fee). This is appropriate in light of the *Australian Government Cost Recovery Guidelines* which require agencies to set charges to recover all the costs of products or services where it is appropriate to do so.

### **Clause 49 – Accreditation of course of study**

Subclause 49(1) provides that TEQSA may approve an applicant's application for a course of study to be accredited if satisfied that the applicant is a registered higher education provider and the course meets the Provider Course Accreditation Standards.

Subclause 49(2) requires TEQSA to make a decision on an application for accreditation of a course of study:

- within 12 months of receiving the application (which TEQSA is taken to have received when it receives payment of the substantive assessment application fee – see subclause 48(1) and clause 158), or
- within a further period that is determined by TEQSA under subclause 49(3).

Subclause 49(3) allows TEQSA to determine that it needs a longer period of time to decide the outcome of an application (up to a further 12 months) – where TEQSA is satisfied that it cannot make a decision within the initial 12 months period due to reasons that are beyond its control. This would allow TEQSA a total period of up to 24 months to decide the application.

Subclause 49(4) provides that, if TEQSA makes a determination that it needs extra time to decide the outcome of an application, its decision that more time is required must be made no later than 6 weeks before the end of the 12 months time period from receipt of an application for accreditation.

Subclause 49(5) provides that, where it has made a determination that a longer period of time is required to decide the outcome of an application, it must notify the applicant in writing within 7 days of making the determination and must also give the applicant written reasons for its decision.

Subclause 49(6) provides that if TEQSA has accredited a course of study, then it must also determine the period of accreditation – which cannot be more than 7 years, but can be different to the period for which the provider is registered. Note 1 states that the period of course accreditation will automatically end if the provider ceases to be a registered higher education provider (see subparagraph 51(2)(a)). Note 2 explains that accreditations can be renewed and draws the reader's attention to clause 56 which concerns renewals of accreditation. Note 3 explains that TEQSA can impose conditions on course accreditation (see subclause 53(1)).

Subclause 49(7) provides that TEQSA is taken to have rejected an application for accreditation of a course of study if it does not make a decision within the applicable period mentioned in subclause 21(2) (ie either the 12 month period from receipt of an application, or within any longer period that it has determined under paragraph 49(2)(b) that it needs).

### **Clause 50 – TEQSA to notify provider of decision about accreditation**

This clause requires TEQSA to notify applicants in writing of the following within 30 days of TEQSA making a decision to either grant or reject an application for a course of study to be accredited:

- TEQSA's decision
- if TEQSA decides to accept the application, the period for which the course of study is accredited
- if TEQSA decides to reject an application – the reasons for this decision.

A Note states that TEQSA must also notify the applicant about conditions imposed under subclause 53(1) (see clause 54).

## **Clause 51 – Commencement and duration of accreditation**

Subclause 51(1) provides that the accreditation of an applicant’s course of study starts on the first day of the period specified in the written notice given to the applicant under clause 50 and ends at the end of the accreditation period specified in the most recent notice given by TEQSA under either clause 50 or clause 57.

Subclause 51(2) provides that the end of the accreditation period is subject to the following:

- accreditation will end immediately if the provider ceases to be a registered higher education provider (a Note explains that this will not apply if registration is renewed); and
- subclause 56(3) which is about renewing accreditation; and
- Division 1 of Part 7 which is about cancelling accreditations and other administrative sanctions.

## **Division 3— Conditions of accreditation**

### **Clause 52 – Complying with conditions**

This clause provides that registered higher education providers must comply with any conditions imposed on the accreditation of a course of study under subclause 53(1).

### **Clause 53 – Conditions**

Subclause 53(1) provides that TEQSA may impose conditions on the accreditation of a course of study.

Subclause 53(2) provides that TEQSA may, on its own initiative, vary or revoke conditions imposed under subclause 53(1).

Subclause 53(3) provides that TEQSA may also vary or revoke the conditions if the registered higher education provider concerned makes an application for a variation or revocation.

Subclause 53(4) provides that such an application must be in an approved form and be accompanied by any information, documents and assistance required by TEQSA and the relevant fee determined under clause 158. Assistance may include, without limitation, providing permission for TEQSA to contact and consult staff or students of the relevant provider.

### **Clause 54 – TEQSA to notify provider of decision to impose, vary or revoke a condition**

This clause provides that TEQSA must, within 30 days of making a decision under subclauses 53(1), (2) or (3) to impose a condition on an accredited course, notify that provider in writing of the decision, the reasons for the decision and, if TEQSA decides to impose a condition, the period for which the condition is imposed.

## **Division 4— Renewing accreditation**

### **Clause 55 – Applying to renew accreditation**

Subclause 55(1) provides that a registered higher education provider may apply in writing to TEQSA (in the approved form) to have the accreditation of one of its courses of study renewed. Such an application must be made at least 180 days before the accreditation of the course ends, or within any shorter period that TEQSA might allow.

Subclause 55(2) provides that an application for renewal of accreditation must be accompanied by the relevant application fee determined under clause 158.

### **Clause 56 – Renewing accreditation**

Subclause 56(1) provides that upon receiving an application TEQSA may renew the accreditation of a registered higher education provider’s course of study if TEQSA is satisfied that the course continues to meet the Provider Course Accreditation Standards.

Subclause 56(2) provides that, in order to help it make a decision, TEQSA may do a number of things including the following:

- request that the provider give TEQSA information, documents or assistance (assistance may include, without limitation, providing permission for TEQSA to contact and consult staff or students of the relevant provider); and
- conduct an accreditation assessment.

Subclause 56(3) provides that the accreditation of a course of study continues until TEQSA makes a decision about whether to renew the accreditation.

Subclause 56(4) provides that, if TEQSA decides to renew the accreditation of a course of study, it must determine a period for the renewed accreditation which must not be longer than 7 years. A Note draws the reader’s attention to the fact that the period of accreditation ends automatically if the provider ceases to be a registered higher education provider (see subparagraph 51(2)(a)).

Note 1 to subclause 56(4) explains that the period of renewed accreditation will end immediately if the provider ceases to be a registered higher education provider (see paragraph 51(2)(a)). Note 2 to subclause 56(4) explains that conditions which are imposed on accreditation, and are in force immediately before the accreditation is renewed, will apply to the renewed accreditation.

If TEQSA is proposing to make a decision to reject a provider's application for renewal of accreditation, it must give the provider a written notice setting out the reasons for this intended decision and giving the provider a reasonable time to provide representations to TEQSA in relation to the matter (subclause 56(5)). TEQSA must consider any such representations it receives from the provider (subclause 56(6)).

### **Clause 57 – TEQSA to notify provider of decision about renewal**

This clause requires TEQSA to notify registered higher education providers in writing of the following within 30 days of TEQSA making a decision to either grant or reject an application for renewal of accreditation:

- TEQSA's decision
- if TEQSA grants the application – the period for which accreditation is renewed
- if TEQSA rejects the application – the reasons for this decision.



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# ***Part 5***

## ***Higher Education Standards Framework***

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### **Outline of Part**

Part 5 of the Bill sets out how the Minister makes the various Standards that make up the Higher Education Standards Framework. Part 5 also sets out the assessments that TEQSA may conduct. These are compliance assessments of an entity's operations to see whether a registered higher education provider continues to comply with the Threshold Standards, quality assessments to determine the quality of higher education delivered and assessments to determine any systemic issues relating to particular courses of study. TEQSA may also conduct assessments of accredited courses to see if they continue to meet the Provider Course Accreditation Standards.

### **Detailed explanation**

#### **Division 1— Higher Education Standards Framework**

##### **Clause 58 –Making the Higher Education Standards Framework**

Subclause 58(1) provides that the Minister may make the following Standards (that together with the Research Standards, comprise the Higher Education Standards Framework) by way of legislative instruments:

- the Provider Registration Standards
- the Provider Category Standards
- the Provider Course Accreditation Standards
- the Qualification Standards
- other standards against which higher education providers can be assessed
- the Teaching and Learning Standards
- the Information Standards
- any other standards against which the quality of higher education can be assessed.

Note 1 to subclause 58(1) explains that the Threshold Standards are those standards referred to in paragraphs 58(1)(a) to (e).

Note 2 to subclause 58(1) draws the reader's attention to subsection 33(3) of the *Acts Interpretation Act 1901* which provides that, where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be construed as including a power exercisable in

the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Subclause 58(2) provides that the Research Minister may make the Research Standards by way of legislative instrument. A Note draws the reader's attention to subsection 33(3) of the *Acts Interpretation Act 1901* which provides that, where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Subclause 58(3) provides that the Minister and the Research Minister must not make any of the standards (ie those mentioned in subclauses 58(1) and (2)) unless a draft has been prepared by the Panel and the Minister or Research Minister, as the case may be, have consulted each other, the Ministerial Council of State and Territory higher education ministers, and TEQSA.

Subclause 58(4) provides that, before making a Standard, the Minister or the Research Minister, as the case may be, must have regard to the draft prepared by the Panel and to advice or recommendations on the draft given by the Panel, the other Minister, the Ministerial Council or TEQSA.

Subclauses 58(3) and (4) apply in a like manner to any proposal to change or revoke a Standard (by virtue of subsection 33(3) of the *Acts Interpretation Act 1901*).

Subclause 58(5) provides that, despite subsection 14(2) of the *Legislative Instruments Act 2003*, a Standard may apply, adopt, or incorporate any matter contained in an instrument or other writing as in force from time to time. This provision is included to allow for the intersections between the various parts of the Higher Education Standards Framework. For example, elements of the Qualifications Standards (once made) might be included in the Provider Course Accreditation Standards.

## **Division 2— Compliance with the Framework**

### **Clause 59 – Compliance assessments**

This clause provides that TEQSA has the power to review or examine any aspect of an entity's operations in order to see whether a registered higher education provider continues to comply with the Threshold Standards. A Note explains that this would allow TEQSA to review the operations of an entity that provides part of a course of study where that course of study leads to a regulated higher education award which is offered or conferred by the registered higher education provider.

### **Clause 60 – Quality (including thematic) assessments**

This clause provides that TEQSA can review or examine any part of an entity's operations to assess:

- the level of quality of higher education provided by one or more registered higher education providers; or
- if there any systemic issues relating to a particular course of study that leads to a particular regulated higher education award; or
- with respect to courses of study leading to one or more kinds of regulated higher education awards – their level of quality, or any systemic issues.

### **Clause 61 – Accreditation assessments**

This clause provides that TEQSA can review or examine accredited courses to see whether they continue to meet the Provider Course Accreditation Standards.

### **Clause 62 – Matters relevant to assessments**

The effect of subclause 62(1) is that TEQSA's ability to conduct compliance assessments (under clause 59), quality assessments (under clause 60) and accreditation assessments (under clause 61) is subject to subclause 62(2).

Subclause 62(2) provides that, for the purposes of conducting a review or examination under Division 2 of Part 5, before TEQSA enters premises or does anything on those premises, it must obtain the concerned entity's consent.

Subclause 62(3) makes it clear that subclause 62(2) itself is subject to clause 24 which requires registered providers to comply with conditions on their registration. Note 1 explains that when a registered higher education provider decides whether or not to give consent under subclause 62(2), it should consider the condition that it needs to cooperate with TEQSA (see clause 31). Note 2 makes it clear that TEQSA could impose a condition under subclause 32(1) for a provider to arrange for another entity to give the consent.

Subclause 62(4) provides that, for the purposes of clauses 59 and 60, 'operations' is not limited to the entity's higher education operations.

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# *Part 6*

## *Investigative powers*

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### **Outline of Part**

TEQSA needs adequate powers in order to be able to effectively carry out its roles and responsibilities as a regulatory and quality agency of higher education providers.

These powers reflect similar regulatory schemes across the Commonwealth. Their inclusion ensures that TEQSA has a complete toolbox of powers to investigate providers where the exercise of these powers would be proportionate to the risk that the provider posed through its underperformance.

Part 6 sets out the investigative powers available to TEQSA for the purposes of finding out whether the provisions of this Bill have been or are being complied with.

Part 6 deals with:

- Powers of authorised officers to search premises, either by consent or under warrant.
- The obligations and incidental powers of authorised officers.
- The rights and responsibilities of the occupiers of premises.
- General provisions relating to the seizure of things.
- The appointment of authorised officers to undertake searches.

### **Detailed explanation**

#### **Division 1— Requiring people to give information etc.**

##### **Clause 63 – Requiring person connected with a regulated entity to give information etc.**

Subclause 63(1) explains that this clause applies to a person who was or is connected with a regulated entity or a former regulated entity and TEQSA reasonably believes that the person possesses or controls information, or documents or things relevant to TEQSA's function as specified in paragraph 134(1)(c) of this Bill (investigating whether this Bill has been or is being complied with).

Subclause 63(2) provides that TEQSA may give the person a written notice requiring him or her to, within the time and manner stated in the notice:

- give TEQSA information (paragraph 63(2)(a)); or

- produce documents or things (paragraph 63(2)(b)); or
- make copies of documents and give them to TEQSA (paragraph 63(2)(c)).

Subclause 63(3) provides that the notice must give a period for compliance of at least 14 days after the notice is given, or a shorter time of at least 24 hours in circumstances where TEQSA reasonably considers a shorter time is necessary. The notice must also set out the effect of clause 64. Although TEQSA's consideration about the necessity for the shorter timeframe would be subjective, subclause 63(1) also requires TEQSA to have a reasonable expectation that the person concerned is capable of giving the information, document or thing. The 24 hour timeframe is also consistent with other Commonwealth legislation, such as paragraph 114(2)(b) of the *Education Services for Overseas Students Act 2000*.

Examples of circumstances where a shorter time may be considered necessary include but are not limited to:

- the person is expected to permanently leave the jurisdiction
- the information relates to a matter with health and safety implications
- TEQSA reasonably considers it likely that records will be destroyed or lost without immediate action.

To further specify the circumstances in which TEQSA could impose the shorter notice period would not allow TEQSA sufficient flexibility to tailor the notice requirements to the requirements of each individual situation.

Subclause 63(4) provides that subclause 63(1) does not apply to:

- lawyers who act for or have acted for the regulated entity or former regulated entity; or
- national security information within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*; or
- documents or things relating to national security within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

#### **Clause 64 – Contravening requirement to give information etc.**

This clause provides that a person commits an offence if he or she has been given a notice under subclause 63(2) and fails to comply with a requirement specified in the notice. The maximum penalty for this offence will be 30 penalty units (currently \$3,300).

#### **Clause 65 – Copying documents – compensation**

This clause provides that a person is entitled to be paid reasonable compensation by TEQSA (on behalf of the Commonwealth) for complying with a requirement of paragraph 63(2)(c) (ie for making and giving copies of documents to TEQSA).

## **Clause 66 – TEQSA may retain documents and things**

Subclause 66(1) provides that if documents (including copies of documents) or things are produced to TEQSA under clause 63, then:

- under paragraph 66(1)(a), TEQSA is entitled to take possession of the documents or things and take copies or extracts of them; and
- under paragraph 66(1)(b), TEQSA is entitled to retain the documents or things for a period necessary for the purposes of:
  - this Bill; or
  - an investigation to which the documents or things relate; or
  - enabling evidence to be secured for a prosecution or civil penalty proceedings.

Subclause 66(2) provides that subclauses 66(3) to 66(5) apply to documents produced under paragraph 63(2)(b) (ie in relation to documents produced in response to a written notice from TEQSA requiring someone to produce documents or things).

Subclause 66(3) provides that where TEQSA does retain possession of a document, the person who would otherwise be entitled to possession of it is entitled to be given a copy of it by TEQSA (that TEQSA certifies is a true copy) as soon as practicable. The certified true copy must be received by courts and tribunals as evidence as if it were the original (subclause 66(4)). Until TEQSA supplies the certified copy, the person (or someone authorised by the person) is entitled, at such times and places as TEQSA thinks appropriate, to inspect the document and take copies or extracts from it (subclause 66(5)).

## **Clause 67 – Returning documents or things produced**

This clause provides that where a document or thing is produced to TEQSA under clause 63 (other than a copy of a document) and TEQSA can no longer retain it under paragraph 66(1)(b) – it must take reasonable steps to return it, unless it is forfeited or forfeitable to the Commonwealth or is the subject of an ownership dispute. The document or thing must be returned to either the person who produced it or, if he or she is not entitled to possession, to the owner.

## **Clause 68 – Disposal if cannot be returned**

Subclause 68(1) provides that TEQSA may dispose of a document or thing produced under clause 63 in a manner it thinks appropriate in circumstances where under clause 67 TEQSA is required to take reasonable steps to return it and the person to whom it is to be returned cannot be found despite reasonable efforts to locate them, or the person refuses to take possession of the thing.

Subclause 68(2) provides that where clause 68 would result in the acquisition of property from a person on unjust terms, the Commonwealth must pay reasonable compensation to the person concerned. If agreement on compensation cannot be reached, the person may institute proceedings in the Federal Court for the recovery of

reasonable compensation from the Commonwealth (subclause 68(3)). *Acquisition of property* and *just terms* are defined in clause 5.

### **Clause 69 – Self-incrimination**

Subclause 69(1) provides that a person is not excused from giving information or producing a document or thing under clause 63 (including a copy of a document) on grounds that production of the information or document requested could incriminate them.

Subclause 69(2) provides that, in the case of an individual, the information given, or the document, copy or thing produced, or the giving of the information or the producing of the document, copy or thing, or any information, document, copy, or thing obtained as a result – direct or indirect – of giving the information or producing the document or thing, is inadmissible in evidence in civil proceedings for recovery of a penalty, or in criminal proceedings, with the exception of the following criminal proceedings:

- proceedings for an offence against clause 64 (contravening a requirement to give information); or
- proceedings for an offence against section 137.1, 137.2 or 149.1 of the *Criminal Code*. These sections refer to false or misleading information or documents and obstruction of Commonwealth public officials.

This clause abrogates the privilege against self-incrimination in certain circumstances where a person is requested to give information or produce a document or thing under clause 63 – but only with respect to the offences listed in subclause 69(2).

This is appropriate in these circumstances given TEQSA will necessarily rely on the information provided by persons who are, or were, connected with current or former registered higher education providers in undertaking its regulatory and quality assurance functions, one of the aims of which is to protect the students of these bodies. In some cases, it will be important for TEQSA to use the information, document or thing gathered under clause 63, which would otherwise not have been able to be gathered, as the basis for proceedings under clause 64 and sections 137.1, 137.2 and 149.1 of the *Criminal Code*. This will assist TEQSA in maintaining integrity in higher education.

## **Division 2— Search of premises**

### **Clause 70 – Authorised officer may enter premises by consent or under a warrant**

Subclause 70(1) provides that, for the purpose of ascertaining whether the Bill or its associated provisions (the *Crimes Act 1914* or the *Criminal Code* that relate to this Bill) have been or are being complied with, authorised officers may enter any premises and exercise the monitoring powers set out in clause 71.

Subclause 70(2) provides that if an authorised officer has reasonable grounds for suspecting that there may be evidential material on any premises, the authorised officer may enter the premises and exercise the enforcement powers set out in clause 72.

However, under subclause 70(3) an authorised officer is not authorised to enter the premises unless the occupier of the premises has consented to the entry and the authorised officer has shown their identity card if required by the occupier or the entry is made under a warrant.

A Note explains that where entry to premises is made with the occupier's consent, the authorised officer must leave the premises if that consent is withdrawn (see clause 77).

'*Evidential material*' is defined in clause 5.

### **Clause 71 – Monitoring powers of authorised officers**

This clause sets out the monitoring powers of authorised officers for the purposes of clause 70 in relation to premises.

The monitoring powers under subclause 71(1) are as follows:

- to search premises and any things on the premises;
- to examine any activities carried on at the premises;
- to inspect, examine, take measurements of or conduct tests on any things on the premises;
- to take pictures (still or moving) of, or make recordings of any things on the premises;
- to inspect any documents on the premises and to take extracts from them or make copies of them; and
- to take any equipment and materials onto the premises that are required for the purpose of exercising monitoring powers.

Under subclause 71(2), the monitoring powers include the power to operate electronic equipment on the premises to establish whether it, or other storage devices on the premises (this includes disks and tapes) that can be used with the equipment (or is associated with it), contains information relevant to determining whether this Bill or its associated provisions (the *Crimes Act 1914* or the *Criminal Code* that relate to this Bill) have been complied with.

In relation to the monitoring powers set out in subclause 71(2), subclause 71(3) provides for further monitoring powers enabling authorised officers to:

- operate electronic equipment on the premises so as to convert information into documentary form and to remove such documents from the premises; and
- operate electronic equipment on the premises in order to transfer information to a disk, tape or other storage device (that the authorised



officer either brings to the premises, or which is already there and the occupier gives written consent to allow the authorised officer to use) and to remove the disk, tape or storage device from the premises.

Authorised officers can only operate electronic equipment for the purposes of subclauses 71(2) or (3) if they believe on reasonable grounds that they can do so without damaging the equipment (subclause 71(4)).

Where the entry onto premises is made under a monitoring warrant, subclause 71(5) provides that the monitoring powers include the power to secure a thing for up to 24 hours if the following apply:

- the thing is found during the exercise of the monitoring powers;
- the authorised officer reasonably believes the thing would afford evidence of either or both of the commission of an offence under this Bill or its associated provisions (the *Crimes Act 1914* or the *Criminal Code* that relate to this Bill), or the contravention of a civil penalty provision; and
- the authorised officer reasonably believes the circumstances are serious and urgent and require the thing to be secured pending a warrant being obtained to seize it (to prevent the thing being concealed, lost or destroyed in the meantime).

Subclause 71(6) allows the authorised officer to apply to a magistrate to secure the thing for longer than 24 hours if the authorised officer reasonably believes this is necessary. The authorised officer must give notice to the occupier (or the occupier's representative) of the authorised officer's intention to apply for an extension of time and the occupier or representative is entitled to be heard in relation to the application (subclause 71(7)). The provisions of Part 6 relating to issuing monitoring warrants apply (with any necessary modifications) to the issue of an extension (subclause 71(8)) and the 24 hour period may be extended more than once (subclause 71(9)).

## **Clause 72 – Enforcement powers of authorised officers**

This clause sets out the enforcement powers available to authorised officers who enter premises by consent or under an enforcement warrant for the purposes of clause 70. These enforcement powers are as follows:

- If the occupier of the premises has consented to the entry, the authorised officer has the power to search the premises and things on the premises for evidential material that the authorised officer reasonably suspects may be on the premises (paragraph 72(1)(a)).
- If the entry is under an enforcement warrant, the power to search the premises and any things on the premises for the type of evidential material mentioned in the enforcement warrant, and the power to seize any such evidential material found (paragraph 72(1)(b)).
- To inspect, examine, take measurements of or conduct tests on or take samples of evidential material (paragraph 72(1)(c)).

- To take pictures (still or moving) of, or make recordings of the premises or evidential material (paragraph 72(1)(d)).
- To take any equipment and materials onto the premises that are required for the purpose of exercising enforcement powers (paragraph 72(1)(e)).

Under subclause 72(2), the enforcement powers include the power to operate electronic equipment on the premises to establish whether it, or other storage devices on the premises (this includes disks and tapes) that can be used with the equipment (or is associated with it), contains evidential material.

In relation to the enforcement powers set out in subclause 72(2), subclause 72(3) provides for further enforcement powers enabling authorised officers to do the following:

- where the entry to premises has been under an enforcement warrant – the power to seize the electronic equipment or storage devices (including disks and tapes) (paragraph 72(3)(a));
- operate electronic equipment on the premises so as to convert evidential material into documentary form and to remove such documents from the premises (paragraph 72(3)(b); and
- operate electronic equipment on the premises in order to transfer evidential material to a disk, tape or other storage device (that the authorised officer either brings to the premises, or which is already there and the occupier gives written consent to allow the authorised officer to use) and to remove the disk, tape or storage device from the premises (paragraph 72(3)(c)).

Authorised officers can only operate electronic equipment for the purposes of subclauses 72(2) or (3) if they believe on reasonable grounds that they can do so without damaging the equipment (subclause 72(4)).

Subclause 72(5) provides that, where entry to premises has been under an enforcement warrant, authorised officers are only entitled to seize electronic equipment or storage devices (including disks and tapes) where:

- it is not practicable to operate electronic equipment on the premises so as to convert evidential material into documentary form and to remove such documents from the premises; or
- it is not practicable to operate electronic equipment on the premises in order to transfer evidential material to a disk, tape or other storage device (that the authorised officer either brings to the premises, or which is already there and the occupier gives written consent to allow the authorised officer to use) and to remove the disk, tape or storage device from the premises; or
- continued possession of the electronic equipment or storage devices (including disks and tapes) by the occupier would amount to an offence under a Commonwealth law.

Pursuant to subclause 72(6), the enforcement powers also include seizing things found on premises where:

- entry is under an enforcement warrant; and
- the authorised officer reasonably believes that the things found amount to evidential material of a kind that is not specified in the warrant; and
- the authorised officer reasonably believes that it is necessary to seize the things to prevent them from being concealed, lost or destroyed.

Subclause 72(6) is qualified by the objective requirement that the authorised officer has a reasonable belief that the things found are evidential material.

Evidential material is defined in clause 5 of the Bill as meaning a thing that there are reasonable grounds for suspecting will afford evidence as to the commission or suspected commission of an offence against the Bill or its associated provisions (the provisions of the *Crimes Act 1914* or the *Criminal Code* that relate to this Bill), or a thing that there are reasonable grounds for suspecting is intended to be used for the purpose of committing any such offence. This limits the kinds of things that can lawfully be seized under this provision.

Section 70A(6) of the *National Health Security Act 2007* is similar to subclause 72(6).

### **Clause 73 – Persons assisting authorised officers**

Subclause 73(1) makes provision for other persons to provide assistance to authorised officers who enter premises by consent or under a warrant where the assistance is necessary and reasonable. These persons are called persons assisting the authorised officer.

Subclause 73(2) provides that a person assisting may enter premises and exercise monitoring or enforcement powers, but only in accordance with directions given to them by an authorised officer. Where this occurs, the powers exercised by a person assisting are taken to have been exercised by the authorised officer (subclause 73(3)).

Subclause 73(4) provides that, if the authorised officer gives a written direction to a person assisting, the written direction is not a legislative instrument. This provision is taken to assist readers, as the instrument would not be a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

### **Clause 74 – Use of force in executing a warrant**

This clause provides that, in executing a warrant, the authorised officer and a person assisting the authorised officer may use such force against things as is necessary (ie force which cannot be dispensed with) and reasonable in the circumstances. This will allow sufficient flexibility for the effective execution of warrants while ensuring that inappropriate force cannot be used. A Note explains that this clause does not authorise the use of force against a person.

One example of where it might be necessary and reasonable to use force could involve using a locksmith to unlock a room or cabinet that an authorised officer is

entitled to search under a warrant where the occupier will not or cannot provide the authorised officer with access.

Clause 74 is similar to existing Commonwealth legislation such as section 147 of the *Education Services for Overseas Students Act 2000* and section 38J of the *Mutual Assistance in Criminal Matters Act 1987* (although section 38J allows the use of force against persons and things, not just things).

Some State and Territory legislation contains similar provisions to clause 74 such as:

- subsection 265(2) of the *Vocational Education, Training and Employment Act 2000* (QLD)
- subsection 61C(7) of the *Vocational Education and Training Act 1996* (WA)
- subsection 57(8) of the *Tasmanian Qualifications Authority Act 2003*(TAS).

#### **Clause 75 – Authorised officer may ask questions and seek production of documents**

Under subclause 75(1), if an authorised officer enters premises with consent, the authorised officer may ask the occupier to:

- answer any questions put by the authorised officer relating to the operations of the Bill, information provided under the Bill, or the reasons for which the authorised officer entered the premises; and
- produce any documents requested by the authorised officer relating to the operations of the Bill, information provided under the Bill, or the reasons for which the authorised officer entered the premises.

Under subclause 75(2), if an authorised officer enters under warrant, the authorised officer may require any person on the premises to:

- answer any questions put by the authorised officer relating to the operations of the Bill, information provided under the Bill, or the reasons for which the authorised officer entered the premises; and
- produce any documents requested by the authorised officer relating to the operations of the Bill, information provided under the Bill, or the reasons for which the authorised officer entered the premises.

The powers of authorised officers in subclause 75(2) are necessary to prevent the immediate destruction or loss of evidence in circumstances where a search is being conducted under a warrant. It would not be practicable for authorised officers to instead rely upon the power in clause 63 of the Bill to give a written notice to the person concerned, requiring him or her to give the information or produce the document in question (within the timeframe specified in such a notice).

Subclause 75(3) provides for an offence with a maximum penalty of 30 penalty units (currently \$3,300) where a person is subject to a requirement under subclause 75(2) and fails to comply with that requirement.

### **Clause 76 – Self-incrimination**

Subclause 76(1) provides that a person is not excused from answering a question or producing a document under subclause 75(2) on grounds that production of the information or document requested could incriminate them or expose them to a penalty.

Subclause 76(2) provides that, in the case of an individual, the answer given, or the document produced, or the answering of the question or producing of the document, or any information or document obtained as a result – direct or indirect – of answering the question or producing the document, is admissible in evidence in civil proceedings for recovery of a penalty or in criminal proceedings with the exception of the following criminal proceedings:

- proceedings for an offence against subclause 75(3) (contravening a requirement to answer questions or produce documents); or
- proceedings for an offence against section 137.1, 137.2 or 149.1 of the *Criminal Code*. These sections refer to false or misleading information or documents and obstruction of Commonwealth public officials.

This clause abrogates the privilege against self-incrimination in certain circumstances where an authorised officer asks a person to answer questions or produce documents under subclause 75(2) – but only with respect to the offences listed in subclause 76(2).

This is appropriate in these circumstances given TEQSA will necessarily rely on the information provided by persons on premises when authorised officers who enter with consent seek answers to questions or the production of documents. The validity of such answers or the documents produced will be vital in order to enable TEQSA to perform its regulatory and quality assurance functions, one of the aims of which is to protect students. In some cases, it will be important for TEQSA to use the answers provided or documents produced, which would otherwise not have been able to be gathered, as the basis for proceedings under subclause 75(3) and sections 137.1, 137.2 and 149.1 of the *Criminal Code*. This will assist TEQSA in maintaining integrity in higher education.

## **Division 3— Obligations and incidental powers of authorised officers**

### **Clause 77 – Consent**

This clause provides that the authorised officer must, before obtaining an occupier's consent to enter premises for the purposes of paragraph 70(3)(a), inform the occupier that he or she may refuse consent. In addition, a consent has no effect unless it is voluntary and the occupier may give consent for a limited time and may also withdraw consent – in which case the authorised officer and any person assisting must leave the premises.

### **Clause 78 – Announcement before entry under warrant**

Subclause 78(1) provides that, before entering premises under a warrant, an authorised officer must announce that he or she is authorised to enter the premises, show his or her identity card and allow any person at the premises an opportunity to allow entry.

Subclause 78(2) provides that an authorised officer does not have to do any of these things if he or she believes on reasonable grounds that immediate entry is required to ensure that the effective execution of the warrant is not frustrated.

Subclause 78(3) provides that, if an authorised officer does not comply with subclause 78(1) because of subclause 78(2), and if any person who is or appears to represent the occupier of the premises is present, the authorised officer must as soon as practicable after entering the premises show his or her identity card to the occupier of other person.

### **Clause 79 – Authorised officer to be in possession of warrant**

Subclause 79(1) provides that an authorised officer executing a monitoring warrant in relation to premises must be in possession of the warrant or a copy of the warrant.

Subclause 79(2) provides that an authorised officer executing an enforcement warrant must be in possession of either:

- the warrant issued by a magistrate under clause 91, or a copy of it; or
- if the warrant was issued by telephone, fax or other electronic means under subclause 92(6), the form of that warrant, or a copy of the form.

### **Clause 80 – Details of warrant etc. to be given to occupier**

This clause provides that where an authorised officer is executing a warrant in relation to premises and the occupier or another person who apparently represents the occupier is present, the authorised officer must, as soon as practicable, make available to the person one of the following:

- a copy of a monitoring warrant issued under clause 90 or of an enforcement warrant issued under clause 91 (it need not include the signature of the issuing magistrate); or
- if the warrant was issued by telephone, fax or other electronic means under clause 92, a copy of the form.

The authorised officer must also inform the person of his or her rights under Division 4 of Part 6.

### **Clause 81 – Expert assistance to operate electronic equipment**

Subclause 81(1) provides that this clause applies to premises in relation to which a monitoring warrant or an enforcement warrant applies.

Subclause 81(2) provides that where entry to premises is under a monitoring warrant and the authorised officer reasonably believes that:

- there is information on the premises that is relevant to determining compliance with this Bill, under this Bill or its associated provisions (the *Crimes Act 1914* or the *Criminal Code* that relate to this Bill) and which may be accessible by operating electronic equipment on the premises; and
- expert assistance is required to operate the equipment; and
- if action isn't taken the information may be destroyed or altered

the authorised officer may do what is necessary to secure equipment (including by locking it up or guarding it).

Subclause 81(3) provides that where entry to premises is under an enforcement warrant and the authorised officer reasonably believes that:

- there is evidential material on the premises of the kind specified in the enforcement warrant which may be accessible by operating electronic equipment on the premises; and
- expert assistance is required to operate the equipment; and
- if action isn't taken the evidential material may be destroyed or altered

the authorised officer may do what is necessary to secure equipment (including by locking it up or guarding it).

Subclause 81(4) provides that the authorised officer must give notice to the occupier or the occupier's representative of the authorised officer's intention to secure the equipment and that it may be secured for up to 24 hours.

Subclause 81(5) provides that the equipment may be secured until the end of the 24 hour period, or until the equipment has been operated by the expert – whichever occurs first.

The authorised officer may apply to a magistrate for an extension of the 24 hour period where the authorised officer reasonably believes the equipment needs to be secured for longer (subclause 81(6)). The authorised officer must give the occupier or the occupier's representative notice of the intention to apply for an extension and the person is entitled to be heard in relation to the application (subclause 81(7)).

The provisions of Part 6 relating to issuing monitoring and enforcement warrants apply with any necessary modifications to the issue of an extension (subclause 81(8) and the 24 hour period may be extended more than once (subclause 81(9)).

### **Clause 82 – Compensation for damage to electronic equipment**

This clause provides for compensation to be payable by the Commonwealth for damage caused to electronic equipment, or data, or programs.

Subclause 82(1) provides that the clause applies where:

- as a result of electronic equipment being operated as mentioned in Part 6, damage is caused to equipment or data recorded on the equipment, or programs associated with use of the equipment are damaged or corrupted; and
- the damage or corruption happened because the person operating the equipment exercised insufficient care, or insufficient care was exercised in selecting the person who operated the equipment.

Subclause 82(2) provides that the Commonwealth must pay the owner of the equipment, or the user of the data or programs, reasonable compensation as the parties agree upon.

If the parties fail to reach agreement, the owner or user may commence proceedings for compensation in the Federal Court (subclause 82(3)).

In determining how much compensation should be paid, regard is to be had as to whether the occupier (or their employees or agents if present at the time) provided any warning or guidance on the operation of the equipment (subclause 82(4)).

Subclause 82(5) provides that for the purposes of clause 82 damage to data includes damage caused by data being erased or added.

## **Division 4— Occupier's rights and responsibilities**

### **Clause 83 – Occupier entitled to observe execution of warrant**

Subclause 83(1) provides that the occupier or their representative who are present at premises where a warrant is being executed are entitled to observe the execution of the warrant. This right ceases if they impede the execution of the warrant (subclause



83(2)) and the warrant may be executed in 2 or more areas of the premises simultaneously (subclause 83(3)).

#### **Clause 84 – Occupier to provide authorised officer with facilities and assistance**

Subclause 84(1) provides that the occupier or their representative must provide the authorised officer executing a warrant, or persons assisting the authorised officer, with all reasonable facilities and assistance required for the effective exercise of their powers under the warrant. It is an offence to fail to do so and the offence carries a maximum penalty of 30 penalty units (currently \$3,300) (subclause 84(2)).

### **Division 5— General provisions relating to seizure**

#### **Clause 85 – Copies of seized things to be provided**

Subclause 85(1) provides that an authorised officer who is executing an enforcement warrant and who seizes documents, films, computer files or other things that can easily be copied, or storage devices that hold information that can easily be copied must, if requested to do so and as soon as possible after the seizure, give copies to the occupier or the representative who are present when the warrant is executed. However, this does not apply where possession of such information or things would amount to an offence against a Commonwealth law (subclause 85(2)).

#### **Clause 86 – Receipts for things seized**

This clause provides that, where things have been seized under Part 6, the authorised officer must provide a receipt for the thing seized and that the receipt can cover more than one thing.

#### **Clause 87 – Return of seized things**

Subclause 87(1) provides that, if an authorised officer has seized a thing under Part 6, then, subject to any contrary court order, the authorised officer must take reasonable steps to return it upon the first of the following occurring (unless the thing is forfeited or is forfeited to the Commonwealth, or it is subject to a dispute as to its ownership):

- the reason for the seizure no longer exists, or a decision has been made not to use the thing in evidence; or
- a period of 60 days has expired since the thing was seized.

Subclause 87(2) provides that, where an authorised officer would otherwise be required to return a seized thing because of the expiry of the 60 day period, the authorised officer does not have to do so if:

- court proceedings have been instituted and have not been completed before the end of the 60 day period (including appeals) and the thing may constitute evidence in those proceedings; or
- a court order made under clause 88 allows the thing to continue to be retained; or
- a law or court order (of the Commonwealth or a State or Territory) allows the Commonwealth, a Commissioner or an authorised officer to retain, destroy, dispose of or otherwise deal with the thing.

Subclause 87(3) provides that a thing required to be returned must be returned to the person from whom it was seized or, if that person is not entitled to possess it, the owner of the thing.

### **Clause 88 – Magistrate may permit a thing to be retained**

Subclause 88(1) provides that an authorised officer can apply to a magistrate for an order to retain a thing for a further period if court proceedings in which the thing may constitute evidence have not yet been commenced either:

- before the end of the 60 day period following the seizure of the thing;  
or
- before the end of any period previously specified in a magistrate’s order made under this clause.

Subclause 88(2) provides that a magistrate may order a thing to continue to be retained for up to 3 years to enable evidence to be secured for the purpose of investigations into and prosecutions or proceedings with respect to either or both of:

- an offence against this Bill or its associated provisions (the *Crimes Act 1914* or the *Criminal Code* that relate to this Bill); or
- an investigation into the contravention of a civil penalty provision.

Subclause 88(3) provides that, before making any such application, the authorised officer must take reasonable steps to discover who has an interest in the retention of the thing and, if practicable, notify them if the authorised officer believes they may have an interest in the proposed application.

### **Clause 89 – Disposal if cannot be returned**

Subclause 89(1) provides that TEQSA may dispose of a thing seized under Part 6 in a manner it thinks appropriate in circumstances where an authorised officer is required to take reasonable steps to return the thing and the person to whom it is to be returned cannot be found despite reasonable efforts to locate them, or the person refuses to take possession of the thing.

Subclause 89(2) provides that where clause 89 would result in the acquisition of property from a person on unjust terms, the Commonwealth must pay reasonable compensation to the person concerned. If agreement on compensation cannot be

reached, the person may institute proceedings in the Federal Court for the recovery of reasonable compensation from the Commonwealth (subclause 89(3)). *Acquisition of property* and *just terms* are defined in clause 5.

## **Division 6— Warrants**

### **Clause 90 – Issuing monitoring warrants**

This clause allows an authorised officer to make an application to a magistrate for a monitoring warrant.

Subclause 90(1) provides that an authorised officer may make an application to a magistrate for a warrant with respect to premises.

Subclause 90(2) provides that a magistrate may issue the warrant if satisfied by information provided on oath or affirmation that it is reasonably necessary for one or more authorised officers to have access to premises for the purpose of determining whether this Bill or its associated provisions (the *Crimes Act 1914* or the *Criminal Code* that relate to this Bill) have been or are being complied with.

Subclause 90(3) provides that the magistrate must not issue the warrant unless the authorised officer or another person has given to the magistrate, orally or by affidavit, any further information that the magistrate requires relating to the grounds for issuing the warrant.

Subclause 90(4) provides that the warrant must:

- describe the premises to which the warrant relates; and
- state that the warrant is to be issued under this clause; and
- state that the warrant is issued for the purposes of determining whether this Bill or its associated provisions (the *Crimes Act 1914* or the *Criminal Code* that relate to this Bill) have been or are being complied with; and
- authorise one or more authorised officers (whether or not they are named in the warrant) to enter premises and exercise the powers that are specified in Divisions 2 and 3 of Part 6 in relation to the premises; and
- state whether entry is authorised at any time of day, or whether it is restricted to specific hours of the day; and
- specify the day on which the warrants ceases to have force (this cannot be more than 6 months after the warrant is issued

Rather than stipulating that entry to premises must occur during reasonable business hours, subclause 90(4) gives magistrates the flexibility to authorise entry outside of such times. This approach accommodates higher education providers with extended hours of operation, and allows for TEQSA to conduct a search outside of business hours to minimise disruption to students and to a provider's business operations.

The 6 month period specified in subclause 90(4) is consistent with other Commonwealth legislation, including the following:

- section 159 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*
- section 38 of the *Energy Efficiency Opportunities Act 2006*
- section 69 of the *National Health Security Act 2007*
- section 16 of the *Automotive Transformation Scheme Act 2009*.

### **Clause 91 – Issuing enforcement warrants**

This clause allows an authorised officer to make an application to a magistrate for an enforcement warrant.

Subclause 91(1) provides that an authorised officer may make an application to a magistrate for a warrant with respect to premises.

Subclause 91(2) provides that a magistrate may issue the warrant if satisfied by information provided on oath or affirmation that there are reasonable grounds for suspecting that within the next 72 hours there is or may be evidential material on the premises.

Subclause 91(3) provides that the magistrate must not issue the warrant unless the authorised officer or another person has given to the magistrate, orally or by affidavit, any further information that the magistrate requires relating to the grounds for issuing the warrant.

Subclause 91(4) provides that the warrant must:

- describe the premises to which the warrant relates; and
- state that the warrant is to be issued under this clause; and
- specify the kind of evidential material that is to be searched for under the warrant; and
- name one or more authorised officers; and
- authorise the authorised officer or authorised officers to enter the premises and exercise the powers that are specified in Divisions 2, 3 and 5 of Part 6 in relation to the premises; and
- state whether entry is authorised at any time of day, or whether it is restricted to specific hours of the day; and
- specify the day on which the warrants ceases to have force (this cannot be more than one week after the warrant is issued).

Rather than stipulating that entry to premises must occur during reasonable business hours, subclause 91(4) gives magistrates the flexibility to authorise entry outside of such times. This approach accommodates higher education providers with extended hours of operation, and allows for TEQSA to conduct a search outside of business hours to minimise disruption to students and to a provider's business operations.

## **Clause 92 – Enforcement warrants by telephone, fax etc.**

Subclause 92(1) provides that an authorised officer can apply by telephone, fax or other electronic means to a magistrate for an enforcement warrant under clause 91 in relation to premises in urgent cases or where the authorised officer reasonably believes that delay caused by making an application in person would frustrate the effective execution of the warrant.

Subclause 92(2) provides that the magistrate may require voice communication to the extent that voice communication is practicable in the circumstances.

Subclause 92(3) provides that the authorised officer must, before applying for a warrant in relation to the premises, prepare information setting out the grounds on which the warrant is sought. This information, on oath or affirmation, must set out that there are reasonable grounds for suspecting that within the next 72 hours there is or may be evidential material on the premises. If it is necessary to do so, the authorised officer, may apply for the warrant before the information is sworn or affirmed.

Subclause 92(4) provides that the magistrate may complete and sign the warrant (that the magistrate would issue under clause 91 if the application had been made under that clause) if the magistrate is satisfied, after considering the information provided and any further information the magistrate requires, that there are reasonable grounds for issuing the warrant.

Subclause 92(5) provides that if the magistrate completes and signs the warrant, the magistrate must inform the authorised officer by telephone, fax or other electronic means of the terms of the warrant and the time and day on which the warrant was signed.

The authorised officer must then complete a form of warrant in the same terms as the warrant completed by the magistrate stating the name of the magistrate and the time and day on which the magistrate signed the warrant (subclause 92(6)).

Subclause 92(7) provides that the authorised officer must also, no later than the day after the warrant ceases to be in force, or the day on which the warrant is executed (whichever occurs earlier), send the magistrate:

- the form of warrant that the authorised officer has completed; and
- the information referred to in subclause 92(3) which must have been sworn or affirmed (ie information that set out the reasonable grounds for suspecting that within the next 72 hours there was or may have been evidential material on the premises).

The magistrate must attach the documents provided under subclause 92(7) to the warrant signed by the magistrate (subclause 92(8)).

Subclause 92(9) provides that the form of warrant completed under subclause 92(6) carries the same authority as the warrant signed by the magistrate.

Subclause 92(10) provides that courts must assume (unless the contrary is proved) that the exercise of powers was not authorised by a warrant if:

- it is a material matter in court proceedings for the court to be satisfied that the power was authorised by this clause; and
- the warrant signed by the magistrate authorising the exercise of the powers is not produced in evidence.

### **Clause 93 – Offence relating to warrants by telephone, fax etc.**

This clause provides that an authorised officer commits an offence carrying a penalty of 2 years imprisonment if:

- the authorised officer states in a document purporting to be a warrant under clause 92 the name of a magistrate – unless that magistrate signed the warrant; or
- the authorised officer states on a form of warrant under clause 92 a matter that, to the authorised officer’s knowledge, departs from the terms of the warrant signed by the magistrate in a material particular; or
- the authorised officer purports to execute or to present to another person a document purporting to be a form of warrant under clause 92 that the authorised officer knows has not been approved by a magistrate, or knows that departs in a material particular from the terms of a warrant signed by a magistrate; or
- the authorised officer gives a magistrate a form of warrant under clause 92 that is not the form of warrant that the authorised officer purported to execute.

## **Division 7— Authorised officers and identity cards**

### **Clause 94 – Authorised officers**

Subclause 94(1) provides that TEQSA may appoint in writing TEQSA staff members as authorised officers for the purposes of the Bill.

Subclause 94(2) provides that TEQSA must only appoint persons as authorised officers if satisfied that they have suitable qualifications and experience to properly carry out the role and they hold an Executive Level 1 or higher classification, or a classification that is equivalent to Executive Level 1 or higher. TEQSA staff members appointed as authorised officers would therefore hold relatively senior positions within the organisation. In carrying out their roles as authorised officers, clause 17 requires that they apply the basic principles for regulation – ie the principles of regulatory necessity, reflecting risk and proportionate regulation.

Subclause 94(3) provides that authorised officers must comply with any directions of TEQSA when exercising powers as authorised officers.

Subclause 94(4) provides that any directions given by TEQSA under subclause 94(3) are not legislative instruments. This provision is included to assist readers as the instrument would not be a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

## **Clause 95 – Identity cards**

Subclause 95(1) provides that TEQSA must issue identity cards to authorised officers.

Subclause 95(2) provides that the identity cards must be in the approved form (ie approved by TEQSA) and contain a recent photograph of the authorised officer.

Subclause 95(3) provides for an offence carrying a penalty of 1 penalty unit if a person has been issued with an identity card, ceases to be an authorised officer and does not as soon as practicable after so ceasing, return his or her identity card to TEQSA.

Subclause 95(4) provides that an offence against subclause 95(3) is an offence of strict liability and a Note draws the reader's attention to section 6.1 of the Criminal Code which concerns strict liability. The strict liability nature of this element reflects the necessity of ensuring that authorised officers quickly return their identity cards to TEQSA after they cease to be authorised officers. The imposition of strict liability is designed to prevent identity cards being misused once a person has ceased to be an authorised officer. Subclause 95(5) gives protection to authorised officers as it provides that the offence does not apply where the identity card has been lost or destroyed. In addition, the imposition of strict liability is appropriate in light of the low penalty of 1 penalty unit (currently \$110).

A Note to subclause 95(5) explains that a defendant bears the burden of proof in any court proceedings in relation to this subclause and draws the reader's attention to subsection 13.3(3) of the *Criminal Code* concerning the evidential burden of proof.

Subclause 95(6) provides that an authorised officer must carry his or her identity card at all times when exercising powers as an authorised officer.

## **Division 8— Powers of magistrates**

### **Clause 96 – Federal Magistrates – consent to nomination**

This clause provides that the Minister may, by writing, nominate a Federal Magistrate to be a magistrate for the purposes of the Bill where a Federal magistrate has, in writing, consented to be nominated by the Minister.

Such a written nomination by the Minister would not be a legislative instrument under section 5 of the *Legislative Instruments Act 2003*, as it is not legislative in character.

**Clause 97 – Magistrates – personal capacity**

Subclause 97(1) provides that powers conferred on magistrates by Part 6 are conferred on them in their personal capacity and not as member of a court.

Subclause 97(2) provides that magistrates do not need to accept the power conferred on them. This does not, however, apply to Federal Magistrates (who would have consented to be nominated by the Minister as a magistrate for the purposes of the Bill).

Subclause 97(3) provides that magistrates who exercise powers under Part 6 have the same protection and immunity as if they exercised the power as the court of which the magistrate is a member, or as a member of the court of which the magistrate is a member.



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# *Part 7*

## *Enforcement*

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### **Outline of Part**

The primary aims of TEQSA are to enhance and strengthen the overall quality of the Australian higher education system and to ensure that all students (domestic and international) receive a high quality education at Australia's higher education providers.

To meet these aims it is important that TEQSA have the ability to properly regulate providers against the Higher Education Standards Framework. This includes the ability to take appropriate enforcement action when merited and Part 7 provides TEQSA with a full suite of sanction and enforcement powers in order to take proportionate action in response to the risk created by the breach.

Powerful enforcement tools already exist under the *Education Services for Overseas Students Act 2000* which regulates the provision of education to overseas students and provides for offences for conduct including providing or promoting courses without a registered provider, failing to keep certain required records, providing false and misleading information and providing non-genuine courses.

Part 7 of the Bill sets out offences and civil penalty provisions. It also provides for enforceable undertakings, infringement notices and injunctions.

Part 7 also provides that higher education providers whose registration is cancelled cannot apply for registration again for a period of 2 years, unless TEQSA allows otherwise.

### **Offences and civil penalties**

Part 7 provides for both offences and civil penalties for engaging in the following conduct:

- Offering a regulated higher education award if not a registered higher education provider.
- Representing the offering of a regulated higher education award if not a registered higher education higher education provider.
- Offering an award without a course of study.
- A regulated entity representing that it is a university when it is not a university.
- A regulated entity falsely representing that it is a registered higher education provider.
- A regulated entity falsely representing that it provides all or part of a course of study leading to a regulated higher education award.

- A regulated entity falsely representing a course of study is an accredited course in relation to the entity.
- Providing an unaccredited course of study.

Civil penalties may also be imposed for breaches of conditions that TEQSA has imposed on a registered higher education provider's registration or course accreditation.

The amounts of the civil penalties are greater than the amounts of the offence penalties. This is considered appropriate to cover corporate wrongdoing and is in accordance with the Commonwealth's *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. Civil penalties do not require proof of a fault element and this is justifiable in circumstances where offenders are corporations.

A contravention of a provision of the Bill imposing a civil penalty is not an offence. That means that a contravention is not a violation of the criminal law.

### **Enforceable undertakings**

In circumstances where TEQSA considers that a registered higher education provider has committed an offence under the Bill, or has contravened a civil penalty provision, Part 7 provides for TEQSA to accept written undertakings from the provider. If TEQSA considers that the provider has breached an undertaking, TEQSA may apply to the Federal Court or Federal Magistrates Court for an order in respect of the matter. The court order may, amongst other things, direct that the provider comply with the undertaking.

### **Injunctions**

In circumstances where a higher education provider engages in conduct in contravention of the Bill, Part 7 enables TEQSA to make applications to the Federal Court or Federal Magistrates Court for injunctions to restrain the provider from doing something, or to require it to do something.

## **Detailed explanation**

### **Division 1— Administrative sanctions**

#### **Subdivision A— Sanctions**

##### **Clause 98 – Provider is non-compliant**

This clause provides that Subdivision A of Division 1 of Part 7 applies where:

- a registered higher education provider has:

- failed to meet the Threshold Standards; or
- breached a condition imposed on the provider's registration; or
- breached a condition imposed on the accreditation of a course that is accredited in relation to the provider; or
- failed to ensure that a course accredited in relation to the provider meets the Provider Course Accreditation Standards; or
- circumstances exist in relation to the provider that are of a kind specified in regulation prescribed for the purposes of this clause.

A Note explains that TEQSA can impose conditions under clauses 32 (other conditions) or 53 (conditions) instead of or in addition to sanctions under Subdivision A of Division 1 of Part 7.

### **Clause 99 – Sanctions about accredited courses**

This clause provides that, where there has been a failure or a breach relating to a course of study, TEQSA may shorten the period of accreditation of the course, or cancel that accreditation.

### **Clause 100 – Shortening period of registration**

This clause provides that TEQSA may shorten the period of a provider's registration.

### **Clause 101 – Cancelling registration**

Subclause 101(1) provides that TEQSA may cancel a provider's registration.

Subclause 101(2) provides that if TEQSA proposes to make a decision to cancel a provider's registration, TEQSA must give the provider and each relevant State or Territory Minister for higher education a written notice giving reasons for the intended decision and allowing a reasonable opportunity for them to make representations to TEQSA about the intended decision. TEQSA must have regard to any representations received (subclause 101(3)). Subclause 101(2) does not, however, apply if TEQSA considers immediate action is required (subclause 101(4)).

## **Subdivision B— Other matters**

### **Clause 102 – Automatic cancellation if provider wound up**

This clause provides that a provider's registration is automatically cancelled if a winding-up order is made in respect of it.

### **Clause 103 – Seeking registration after cancellation**

This clause provides that an entity whose registration as a higher education provider under Part 3 has been cancelled is prevented from applying again for registration for a period of 2 years after the date the cancellation takes effect. TEQSA may shorten this period if it considers it appropriate to do so.

## **Division 2— Offences and civil penalty provisions**

### **Subdivision A— Offences and civil penalty provisions**

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

### **Clause 104 – Guide to offences and civil penalty provisions**

This clause gives a summary guide to the contents of Subdivision A of Division 2 of Part 7. This summary guide is as follows:

- The offences in Subdivision A of Division 2 of Part 7 need to be read in conjunction with other Commonwealth legislation, including the *Criminal Code* and the *Crimes Act 1914* – examples of Criminal Code provisions being:
  - o fault elements of intention or recklessness for the offences
  - o defences such as mistake of fact
  - o the extension of the reach of the offences to, for example, persons who aid or abet the commission of an offence by a provider.
- The civil penalty provisions in Subdivision A of Division 2 of Part 7 need to also be read with Subdivisions B and C – examples being:
  - o clause 120 which provides for a defence of mistake of fact
  - o clause 116 which extends the reach of the civil penalty provisions to persons who are knowingly concerned in providers contravening civil penalty provisions.

### **Clause 105 – Offering a regulated higher education award if unregistered**

Subclause 105(1) provides that a higher education provider commits an offence if it is not a registered higher education provider. The maximum penalty for this offence will be 300 penalty units (currently \$33,000).

Subclause 105(2) provides that a higher education provider contravenes this subclause and is liable for a civil penalty if it is not a registered higher education provider. The maximum civil penalty will be 600 penalty units (currently \$66,000).

### **Clause 106 – Representing offer of a regulated higher education award if unregistered**

Subclause 106(1) clause provides that a regulated entity commits an offence if it represents that it offers or will offer or confers or will confer a regulated higher education award and it is not a registered higher education provider. The maximum penalty for this offence will be 300 penalty units (currently \$33,000).

Subclause 106(2) provides that a regulated entity contravenes this subclause and is liable for a civil penalty if it represents that it offers or will offer or confers or will confer a regulated higher education award and it is not a registered higher education provider. The maximum civil penalty will be 600 penalty units (currently \$66,000).

### **Clause 107 – Offering an award without a course of study**

Subclause 107(1) provides that a regulated entity commits an offence if it offers or confers an Australian higher education award, or an overseas higher education award for completion of a course of study provided wholly or mainly from Australian premises related to the award and, for one or more students, it offers or confers the award without requiring the course of study to be completed and not as an honorary award. The maximum penalty for this offence will be 300 penalty units (currently \$33,000).

Subclause 107(2) provides that a regulated entity contravenes this subclause and is liable for a civil penalty if it offers or confers an Australian higher education award, or an overseas higher education award for completion of a course of study provided wholly or mainly from Australian premises related to the award and, for one or more students, it offers or confers the award without requiring the course of study to be completed and not as an honorary award. The maximum civil penalty will be 600 penalty units (currently \$66,000).

### **Clause 108 – Regulated entity represents itself as a university**

Subclause 108(1) provides that a regulated entity commits an offence if it is not a registered higher education provider that is registered in a provider category that allows the use of the word “university” and it uses the word “university” to represent itself or its operations as a university in relation to:

- an Australian course of study; or
- an overseas course of study to the extent that the course of study is or is to be provided from Australian premises related to an overseas higher education award; or
- a regulated higher education award.

The maximum penalty for this offence will be 300 penalty units (currently \$33,000).

Subclause 108(2) provides that a regulated entity contravenes this subclause and is liable for a civil penalty if it is not a registered higher education provider that is registered in a provider category that allows the use of the word “university” and it uses the word “university” to represent itself or its operations as a university in relation to:

- an Australian course of study; or
- an overseas course of study to the extent that the course of study is or is to be provided from Australian premises related to an overseas higher education award; or
- a regulated higher education award.

The maximum civil penalty will be 600 penalty units (currently \$66,000).

Subclause 108(3) provides that, without limiting the effect of paragraphs 108(1)(a) and 108(2)(a), entities are taken to use the word “university” if they use a variant of the word, or use the word or a variant of it, either alone or in conjunction with other words (eg by using the words “university college”).

### **Clause 109 – Falsely representing entity as a registered higher education provider**

Subclause 109(1) provides that a regulated entity commits an offence if it represents that it is a registered higher education provider and the representation is untrue. The maximum penalty for this offence will be 300 penalty units (currently \$33,000).

Subclause 109(2) provides that a regulated entity contravenes this subclause and is liable for a civil penalty if it represents that it is a registered higher education provider and the representation is untrue. The maximum penalty will be 600 penalty units (currently \$66,000).

### **Clause 110 – Falsely representing entity provides a course of study leading to a regulated higher education award**

Subclause 110(1) provides that a regulated entity commits an offence if it represents that it provides all or part of a course of study leading to a regulated higher education award and the representation is untrue. The maximum penalty for this offence will be 120 penalty units (currently \$13,200).

Subclause 110(2) provides that a regulated entity contravenes this subclause and is liable for a civil penalty if it represents that it provides all or part of a course of study leading to a regulated higher education award and the representation is untrue. The maximum civil penalty will be 240 penalty units (currently \$26,400).

#### **Clause 111 – Falsely representing course of study is accredited**

Subclause 111(1) provides that a regulated entity commits an offence if it represents that a course of study is an accredited course in relation to it and the representation is untrue. The maximum penalty for this offence will be 120 penalty units (currently \$13,200).

Subclause 111(2) provides that a regulated entity contravenes this subclause and is liable for a civil penalty if it represents that a course of study is an accredited course in relation to it and the representation is untrue. The maximum civil penalty will be 240 penalty units (currently \$26,400).

#### **Clause 112 – Providing an unaccredited course of study**

Subclause 112(1) provides that a registered higher education provider commits an offence if one or more entities provide all or part of a course of study that leads to a regulated higher education award that is offered or conferred by the provider and that course is not an accredited course in relation to the provider. The maximum penalty for this offence will be 120 penalty units (currently \$13,200).

Subclause 112(2) provides that a registered higher education provider contravenes this subclause and is liable for a civil penalty if one or more entities provide all or part of a course of study that leads to a regulated higher education award that is offered or conferred by the provider and that course is not an accredited course in relation to the provider. The maximum civil penalty will be 240 penalty units (currently \$26,400).

#### **Clause 113 – Breach of condition of registration**

This clause provides that a registered higher education provider contravenes this clause and is liable for a civil penalty if it does something or fails to do something that breaches a condition imposed on its registration. The maximum civil penalty will be 120 penalty units (currently \$13,200).

#### **Clause 114 – Breach of condition of accreditation**

This clause provides that a registered higher education provider contravenes this clause and is liable for a civil penalty if it does something or fails to do something that breaches a condition imposed on the accreditation of a course of study accredited in relation to it. The maximum civil penalty will be 120 penalty units (currently \$13,200).

## **Subdivision B— Obtaining a civil penalty order**

### **Clause 115 – Civil penalty orders**

Subclause 115(1) provides that, if a person contravenes a provision of the Bill imposing a civil penalty, TEQSA may apply to the Federal Court or Federal Magistrates Court within six years of the contravention for an order that the person pays the Commonwealth a pecuniary penalty.

Subclause 115(2) provides that, if the Court is satisfied that the person has contravened a civil penalty provision, it may order the person to pay a pecuniary penalty to the Commonwealth for each contravention of that provision. The amount of the penalty is determined by the Court and is payable for each contravention, but the penalty for each contravention must not exceed the amount specified in the relevant civil penalty provision.

Subclause 115(3) provides that an order under subclause 111(2) is called a ***civil penalty order***.

Subclause 115(4) provides that the Court, in determining the amount of the civil penalty, must have regard to all relevant matters in determining the pecuniary penalty, including:

- the nature and extent of the contravention; and
- the nature and extent of any loss or damage suffered as a result of the contravention; and
- the circumstances in which the contravention took place; and
- whether the person had previously been found by the Court in proceedings under this Bill to have engaged in similar conduct.

Subclause 115(5) provides that the Court must use the civil evidence and procedure rules when hearing applications for a civil penalty order. A Note explains that the standard of proof in civil proceedings is the balance of probabilities as provided for in section 140 of the *Evidence Act 1995*.

Subclause 115(6) provides that if conduct constitutes a contravention of 2 or more civil penalty provisions, proceedings may be instituted against the person under this clause in relation to the contravention of any one or more of those provisions. However, that person is not liable for more than one pecuniary penalty under this clause in respect of the same conduct.

### **Clause 116 – Involvement in contravening civil penalty provision**

Subclause 116(1) provides that a person must not:

- attempt to contravene a civil penalty provision; or
- aid, abet, counsel or procure a contravention of a civil penalty provision; or



- induce (by threats, promises or otherwise) a contravention of a civil penalty provision; or
- be in any way (either directly or indirectly) knowingly concerned in, or be a party to, a contravention of a civil penalty provision; or
- conspire with anyone else to contravene a civil penalty provision.

Subclause 116(2) deems that a person who contravenes subclause 116(1) in relation to a civil penalty provision is taken to have contravened that provision.

### **Clause 117 – Recovery of a pecuniary penalty**

This clause provides a pecuniary penalty is a civil debt that is payable to the Commonwealth, and that the Commonwealth may enforce civil penalty orders as though they are orders made in civil proceedings against someone to recover debts owed by them. The debts arising from such orders are taken to be judgment debts.

### **Clause 118 – 2 or more proceedings may be heard together**

This effect of this clause is to allow the Federal Court or Federal Magistrates Court to direct that 2 or more civil penalty order proceedings be heard at the same time.

### **Clause 119 – Continuing and multiple contraventions of civil penalty provisions**

Subclause 119(1) provides that where the civil penalty provisions require something to be done within a certain time period, or by a certain time, the obligation continues until the thing is done – even if the stipulated time period has elapsed.

Subclause 119(2) provides that, where there has been a refusal or failure to comply with a requirement of a civil penalty provision, the person commits a separate contravention of the provision in respect of each day the person refuses or fails to comply with the requirement (including the day a relevant civil penalty order is made, or any subsequent day).

Subclause 119(3) provides that the Federal Court or Federal Magistrates Court may make one single order to pay a pecuniary penalty for all of the contraventions described in subclause 119(2). This single order, however, must not exceed the total sum of the maximum penalties that could be ordered by the court if the court were to order separate penalties for each of the contraventions.

### **Clause 120 – Mistake of fact**

This clause relates to a mistake of fact and, in general terms, provides that a person is not liable to have a civil penalty order made against him or her for a contravention of a civil penalty provision if the person considered whether or not facts existed and was under a mistaken but reasonable belief about those facts and, had those facts existed, the conduct would not have constituted a contravention of the civil penalty provision.

A person who wishes to rely on mistake of fact bears an evidential burden in relation to the matter. This approach is justified where a matter is peculiarly within the defendant's knowledge and not available to the prosecution. This is particularly the case in mistake of fact.

### **Subdivision C— Civil penalty proceedings and criminal proceedings**

#### **Clause 121 – Civil proceedings after criminal proceedings**

This clause provides that the Federal Court or Federal Magistrates Court must not make a civil penalty order against a person for contravening a civil penalty provision if that person has been convicted of an offence for substantially the same conduct as that constituting the contravention.

#### **Clause 122 – Criminal proceedings during civil proceedings**

Subclause 122(1) provides that proceedings for a civil penalty order against a person for a contravention of a civil penalty provision are stayed if criminal proceedings are started or have already been started against the person for an offence for substantially the same as the conduct alleged to constitute the contravention.

Subclause 122(2) provides that proceedings for a civil penalty order may be resumed if the person is not convicted of an offence - otherwise, the proceedings for the order are dismissed.

#### **Clause 123 – Criminal proceedings after civil proceedings**

This clause provides that criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision regardless of whether or not a civil penalty order had been made against the person.

#### **Clause 124 – Evidence given in proceedings for civil penalty not admissible in criminal proceedings**

This clause provides that evidence of information given or evidence of the production of documents by an individual is not admissible in criminal proceedings against them if:

- they have previously given the evidence or produced the documents in civil penalty order proceedings against them (whether or not a civil penalty order was made); and
- the conduct alleged to constitute the offence is substantially the same conduct claimed to constitute the contravention.

This does not apply to criminal proceedings relating to the falsity of the evidence in the civil penalty order proceedings.

### **Division 3— Enforceable undertakings**

#### **Clause 125 – Acceptance of undertakings**

Subclause 125(1) provides that TEQSA may accept the following undertaking from regulated entities:

- a written undertaking the entity will take specified action in order to comply with this Bill or its associated provisions (the *Crimes Act 1914* or the *Criminal Code* that relate to this Bill)
- a written undertaking the entity will refrain from taking specified action in order to comply with this Bill or its associated provisions
- a written undertaking the entity will take specified action directed towards ensuring it does not contravene this Bill or its associated provisions in the future, or that it will be unlikely to do so in the future.

The undertaking must be expressed to be made under this clause (subclause 125(2) and the registered higher education provider may, with TEQSA's consent, withdraw or vary the undertaking at any time (subclause 125(3)). TEQSA may, by written notice to the entity, cancel the undertaking (subclause 125(4)).

Subclause 125(5) permits TEQSA to publish undertakings on the Register.

#### **Clause 126 – Enforcement of undertakings**

Subclause 126(1) provides that if TEQSA considers that a regulated entity who gave an undertaking under clause 125 has breached it, and that undertaking has not yet been withdrawn or cancelled, then TEQSA (on behalf of the Commonwealth) may apply to the Federal Court or the Federal Magistrates Court for an order under subclause 126(2).

Subclause 126(2) provides that if the Court is satisfied the regulated entity has breached an undertaking it may make any or all of the following orders:

- an order that the entity comply with the undertaking;
- an order directing the entity to pay an amount to the Commonwealth up to the amount of any financial benefit the entity has obtained attributable to the breach;
- an order directing the entity to compensate any other person who has suffered loss or damage as a result of the breach;
- any other order the Court considers appropriate.

## **Division 4— Injunctions**

Whilst the offence and civil penalty provisions of the Bill may result in higher education providers being penalised financially, there is no guarantee that such financial penalties will change the provider's behaviour. In such circumstances, TEQSA may apply to the Federal Court or Federal Magistrates Court for an injunction to prevent or compel certain actions.

### **Clause 127 – Injunctions**

Subclause 127(1) provides that if a regulated entity has, is or proposes to engage in conduct that contravenes this Bill or its associated provisions (the *Crimes Act 1914* or the *Criminal Code* that relate to this Bill), the Federal Court or Federal Magistrates Court may (on receiving an application from TEQSA, on behalf of the Commonwealth) grant an injunction to either restrain the entity from engaging in the conduct, or to require the entity to do something.

Subclause 127(2) provides that if a regulated entity has refused or failed, or is or is proposing to refuse or fail to refuse to do an act or thing in contravention of this Bill or its associated provisions, the Federal Court or Federal Magistrates Court may (on receiving an application from TEQSA, on behalf of the Commonwealth) grant an injunction to require the entity to do that act or thing.

### **Clause 128 – Interim injunctions**

This clause provides that, before deciding TEQSA's application, the Federal Court or Federal Magistrates Court may also choose to grant an interim injunction that restrains the regulated entity from engaging in conduct or requiring the entity to do something.

### **Clause 129 – Discharge or varying injunctions**

This clause provides that the Federal Court or Federal Magistrates Court may discharge or vary injunctions it has granted under Division 4 of Part 7.

### **Clause 130 – Certain limits on granting injunctions not to apply**

Subclause 130(1) provides that the Federal Court or Federal Magistrates Court may grant an injunction to restrain a regulated entity from engaging in particular conduct:

- whether or not the Court considers that the entity intends to engage in conduct of that kind again; and
- whether or not the entity has engaged in that kind of conduct before; and

- whether or not there is any imminent danger of substantial damage to others if the entity engages in that kind of conduct.

Subclause 130(2) provides that the Federal Court or Federal Magistrates Court may grant an injunction to require a regulated entity to do a thing:

- whether or not the Court considers that the entity intends to refuse or fail to do the act or thing; and
- whether or not the entity has previously refused or failed to do the thing; and
- whether or not there is any imminent danger of substantial damage to others if the entity refuses or fails to do the act or thing.

### **Clause 131 – Other powers of the Court unaffected**

This clause clarifies that the powers of the Federal Court or Federal Magistrates Court to issue injunctions under Division 4 of Part 7 are additional to any other powers that the Court has whether under this Bill or otherwise.

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# ***Part 8***

## ***Tertiary Education Quality and Standards Agency***

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### **Outline of Part**

Part 8 of the Bill establishes TEQSA as a Commonwealth body consisting of a Chief Commissioner and 4 other Commissioners and sets out TEQSA's functions and powers.

Part 8 of the Bill also contains provisions concerning charging of fees and the three year strategic plans and the annual operating plans that TEQSA has to prepare. The plans are to be submitted by TEQSA to the Minister for the Minister's approval. Part 8 also requires TEQSA to provide the Minister, for tabling in Parliament, annual reports on its operations during the past year.

### **Detailed explanation**

#### **Division 1 – Establishment, functions and powers of TEQSA**

##### **Clause 132 – Establishment**

This clause establishes TEQSA and provides that the State and Territory ministers for higher education must be consulted if it is to be abolished.

##### **Clause 133 – Constitution**

This clause provides that TEQSA consists of a Chief Commissioner and 4 other Commissioners. Note 1 explains that TEQSA is a legal identity of the Commonwealth. Note 2 explains that the Chief Commissioner and 2 other Commissioners are to be full-time, while the remaining 2 Commissioners are to be part-time (see clause 138).

##### **Clause 134 – Functions and powers**

Subclause 134(1) provides that TEQSA has the following functions:

- to register regulated entities as registered higher education providers in accordance with this Bill

- to accredit courses of study in accordance with this Bill
- to investigate whether this Bill or its associated provisions (the *Crimes Act 1914* or the *Criminal Code* that relate to this Bill) have been or are being complied with including by: conducting compliance assessment and quality assessments; and conducting accreditation assessments of accredited courses
- to advise and make recommendations to the Minister on matters relating to the quality or regulation of higher education providers if requested to do so by the Minister, or on its own initiative
- to collect, analyse, interpret and disseminate information relating to higher education providers, regulated higher education awards and quality assurance practice and quality improvement in higher education and the Higher Education Standards Framework
- 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
- to conduct training to improve the quality of higher education
- to make resources and facilities available to the Panel for the purposes of enabling the Panel to perform its functions
- to give the Secretary an independent assessment of information the Secretary provides about higher education providers that uses assessment criteria provided by the Secretary
- cooperate with its counterparts in other countries
- to develop service standards that TEQSA must meet in performing its functions
- any function determined under subclause 134(5) (which allows the Minister, by legislative instrument, to determine other functions for TEQSA relating to higher education)
- such other functions as are conferred on TEQSA by or under this Bill or any other Act (a Note states that an example would be functions under the *Education Services for Overseas Students Act 2000*). Subclause 134(2) provides that this function includes functions conferred on TEQSA by authorisations made for the purposes of Commonwealth laws (a Note states that an example would be if the Minister authorised TEQSA to consider whether, for the purposes of section 147 of the *Corporations Act 2001*, consent should be given to a company using the word “university” in its name).

Subclause 134(3) provides that TEQSA can perform its functions in Australia and overseas.

Subclause 134(4) provides that TEQSA has the power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions.

Subclause 134(5) allows the Minister, by legislative instrument, to determine other functions for TEQSA that relate to higher education.

### **Clause 135 – Independence of TEQSA**

This clause provides that, other than directions the Minister may give it under clause 136, TEQSA is not subject to any directions from anyone about the performance of its functions, or the exercise of its powers.

### **Clause 136 – Minister may give directions to TEQSA**

This clause provides that the Minister may, by way of legislative instrument, give directions to TEQSA if the Minister considers that this is necessary in order to protect the integrity of the higher education sector (subclause 136(1)). These directions cannot be about or in relation to a particular regulated entity (subclause 136(2)) and TEQSA must comply with the Minister's directions (subclause 136(3)).

A Note to subclause 136(1) explains that neither section 42 (disallowance), nor Part 6 of the *Legislative Instruments Act 2003* relating to 'sunsetting' apply to the directions. The Note also draws reference to sections 44 and 54 of the *Legislative Instruments Act*.

Pursuant to section 42 of the *Legislative Instruments Act*, where a legislative instrument has been tabled in one of the Houses of Parliament and a notice of motion to disallow the instrument has been given and passed (within the times prescribed in section 42), the instrument ceases to have effect. Part 6 of the *Legislative Instruments Act* ensures that legislative instruments are kept up to date and only remain in force for so long as they are needed.

Item 41 of the table to subsection 44(2) and item 46 of the table to subsection 54(2) of the *Legislative Instruments Act* provide that Ministerial directions to any person or body are not subject to disallowance and sunsetting respectively.

### **Clause 137 – TEQSA has privileges and immunities of the Crown**

This clause provides that TEQSA has the privileges and immunities of the Crown in the right of the Commonwealth. This means that TEQSA falls within the 'shield' of the Crown and is entitled to the privileges and immunities of the Crown in the right of the Commonwealth.

## **Division 2 – Appointment of Commissioners**

### **Clause 138 – Appointment**

Subclauses 138(1) and (2) provide that the Chief Commissioner and two further Commissioners are to be appointed on a full-time basis by the Minister by written instrument. In addition to this, two additional Commissioners are to be appointed on a part-time basis by the Minister by written instrument (subclause 138(3)).



Subclause 138(4) provides that persons may only be appointed as Chief Commissioner or as Commissioners if the Minister is satisfied they are appropriately qualified, knowledgeable and experienced and the Minister has consulted the Research Minister about the proposed appointment.

A Note to subclause 138(4) explains that Commissioners are eligible for reappointment and refers to of the *Acts Interpretation Act 1901* which provides that, in any Act, appoint includes re-appoint (section 33(4A)).

An instrument of appointment would not be a legislative instrument by virtue of the existing exemption in item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

### **Clause 139 – Term of appointment**

This clause provides that a Commissioner's term of office is to be specified in the instrument of appointment and cannot be longer than 5 years.

### **Clause 140 – Remuneration and allowances**

Subclause 140(1) provides that a Commissioner is to be paid such remuneration as is determined by the Remuneration Tribunal or, if no determination of that remuneration is in operation, the Commissioner is to be paid such remuneration that is determined in writing by the Minister. Such a determination would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Subclause 140(2) provides that a Commissioner is to be paid such allowances as are determined in writing by the Minister. Such a determination would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Clause 140 has effect subject to the *Remuneration Tribunal Act 1973* which provides for the Remuneration Tribunal to conduct inquiries and make determinations on the remuneration of certain office holders (subclause 140(3)).

### **Clause 141 – Leave of absence**

Subclause 141(1) provides that a full-time Commissioner's recreation leave entitlements are determined by the Remuneration Tribunal.

Such a determination would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Subclause 141(2) provides that the Minister may grant a full-time Commissioner leave of absence (other than recreation leave) on such terms and conditions as the

Minister determines. Such a grant of leave would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Subclause 141(3) provides that the Chief Commissioner may grant a part-time Commissioner leave of absence on such terms and conditions as the Chief Commissioner determines. Such a grant of leave would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

#### **Clause 142– Outside employment**

This clause provides that a full-time Commissioner must not engage in paid outside employment without the Minister’s approval and that a part-time Commissioner must not engage in paid outside employment that the Minister considers conflicts or may conflict with the part-time Commissioner’s proper performance of duties as Commissioner.

#### **Clause 143 – Disclosure of interests to the Minister**

Subclause 143(1) provides that a Commissioner must disclose by written notice to the Minister all interests, pecuniary or otherwise, that the Commissioner has or acquires which conflict or could conflict with the proper performance of the Commissioner’s functions.

Subclause 143(2) requires a Commissioner to give the notice to the Minister as soon as practicable after becoming aware of a potential conflict of interest.

Such a disclosure given by a Commissioner is not a legislative instrument under section 5 of the *Legislative Instruments Act 2003*, as it is not legislative in character.

#### **Clause 144 – Other terms and conditions**

This clause makes allowance for the Minister to determine in writing any terms and conditions of a Commissioner in relation to matters that are not covered in this Bill.

Such written determinations would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

#### **Clause 145 – Resignation**

Subclause 145(1) provides that a Commissioner may resign by giving a written resignation to the Minister.

Such resignations take effect on the day they are received by the Minister or, if a later day is specified in the resignation, on that later day (subclause 145(2)).

A Note explains that if the Chief Commissioner resigns, then he or she also resigns as the Chief Executive Officer of TEQSA. It also explains that this does not prevent a person who is both a Commissioner and the Chief Executive Officer from later being reappointed as only a Commissioner.

The written resignations would not be a legislative instrument, by virtue of the existing exemption under item 10 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

### **Clause 146 – Termination of appointment**

Subclause 146(1) sets out the grounds upon which a Commissioner's appointment may be terminated by the Minister. The grounds on which the Minister may terminate an appointment are:

- for misbehaviour, or physical or mental incapacity; or
- if the Commissioner becomes bankrupt, applies for relief from bankruptcy or insolvency, enters into an arrangement with creditors regarding the payment of his or her debts, or assigns all or part of his or her remuneration for the benefit of creditors; or
- if the Commissioner is a full-time Commissioner and is absent for 14 consecutive days or for 30 days in any 12 month period – unless the Commissioner is on leave of absence; or
- if the Commissioner is a part-time Commissioner and is absent, without leave of absence, from 3 consecutive TEQSA meetings
- if the Commissioner engages in paid employment contrary to clause 142; or
- if the Commissioner fails without reasonable excuse to comply with clause 143 (disclosure of interests to the Minister) or clause 150 (disclosure of interests).

Subclause 146(2) provides that the Minister must terminate a Commissioner's appointment if he or she becomes an executive officer of a higher education provider.

Any instrument of termination of appointment would not be a legislative instrument, by virtue of the existing exemption under item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

### **Clause 147 – Acting appointments**

Subclause 147(1) allows the Minister, by written instrument, to appoint a Commissioner to act as the Chief Commissioner:

- when there is a vacancy in the office of Chief Commissioner (whether or not an appointment has previously been made); or

- whenever the Chief Commissioner is absent from duty or overseas, or is unable to perform the duties of Chief Commissioner for any reason.

Subclause 147(2) allows the Minister, by written instrument, to appoint a person to act as a Commissioner (other than as the Chief Commissioner):

- when there is a vacancy in the office of Commissioner (whether or not an appointment has previously been made); or
- whenever the Commissioner is absent from duty or overseas, or is unable to perform the duties of Commissioner for any reason.

An instrument of appointment would not be a legislative instrument by virtue of the existing exemption in item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Subclause 147(3) provides that persons may only be appointed to act as Chief Commissioner or as Commissioners if the Minister is satisfied they are appropriately qualified, knowledgeable and experienced and the Minister has consulted the Research Minister about the proposed acting appointment.

Subclause 147(4) provides that the actions of a person purporting to act under an appointment would not be invalid merely because of a technical or other grounds relating to the person's appointment, or because the appointment had ceased to have effect, or the occasion to act had not arisen or had ceased. This will provide certainty and stability.

A Note draws attention to the *Acts Interpretation Act 1901* for further provisions about acting appointments. Section 20 of the Acts Interpretation Act provides that, where an Act mentions a person holding a particular office or position, this is deemed to include all persons who at any time occupy the office or position (unless the contrary intention appears). Section 33A of the Acts Interpretation Act relates to acting appointments and provides, amongst other things, that while the appointee is acting in the office, he or she has and may exercise all the powers and shall perform all the functions and duties of the holder of the office.

## **Division 3 – TEQSA procedures**

### **Subdivision A – Meetings**

#### **Clause 148 – Times and places of meetings**

This clause provides that the Chief Commissioner must ensure that such meetings are held in order that TEQSA can efficiently perform its functions. These meetings are to be convened at such times and places as the Chief Commissioner decides and the

Chief Commissioner must also convene meetings when asked to do so in writing by at least other 2 Commissioners.

#### **Clause 149 – Conduct of meetings**

This clause provides as follows with respect to meetings:

- the Chief Commissioner is to preside at all meetings at which he or she is present
- if the Chief Commissioner is not present, a full-time Commissioner nominated to act by the Chief Commissioner must be present and must preside
- a quorum is constituted by 3 Commissioners
- TEQSA may, subject to Division 3 of Part 8, regulate meetings as it sees fit
- the person presiding at meetings has a deliberative vote but, if votes are tied, does not have a casting vote
- TEQSA must ensure minutes of meetings are kept.

A Note states that section 33B of the *Acts Interpretation Act 1901* provides for participation in meetings by telephone etc.

#### **Clause 150 – Disclosure of interests**

This clause provides that if a Commissioner has a pecuniary or other interest in matters being considered at a meeting, he or she must disclose the nature of the interest to other Commissioners (subclause 150(1)). The disclosure must be made as soon as practicable after the relevant facts come to the Commissioner's knowledge (subclause 150(2)) and must be recorded in the minutes of meeting (subclause 150(3)).

Subclause 150(4) provides that, unless TEQSA determines to the contrary, the Commissioner in question must not be present at or take part in such deliberations on the matter, nor TEQSA's decision on the matter. Such determinations under subclause 150(4) must be recorded in the minutes of the meeting (subclause 150(6)).

Subclause 150(5) provides that when a determination is to be made for the purposes of subclause 150(4), the Commissioner in question must not be present when TEQSA deliberates the matter and must not participate in the decision on the matter.

#### **Subdivision B – Decisions without meetings**

##### **Clause 151 – Decisions without meetings**

This clause makes provision for decisions to have been taken by meetings of TEQSA without meetings actually taking place.

This can only happen if TEQSA has determined both that this will occur and also the method by which Commissioners are to indicate their agreement with proposed decisions (subclause 151(2)).

Where such a determination has been made, subclause 151(1) provides that decisions are taken to have been made at a meeting if:

- without a meeting occurring, a majority of Commissioners indicate their agreement with the proposed decision in accordance with the method determined under subclause 151(2); and
- all Commissioners were actually informed of the proposed decision, or reasonable efforts were made to inform all of them of the proposed decision.

#### **Clause 152 – Record of decisions**

This clause provides that TEQSA must keep records of decisions made without meetings in accordance with clause 151.

### **Division 4 – Chief Executive Officer**

#### **Clause 153 – Chief Executive Officer**

This clause creates the office of Chief Executive Officer of TEQSA and provides that the Chief Commissioner is the Chief Executive Officer.

#### **Clause 154 – Functions and powers of the Chief Executive Officer**

Subclause 154(1) provides that the Chief Executive Officer is responsible for the management and administration of TEQSA.

Subclause 154(2) provides that things done by the Chief Executive Officer in the name of or on behalf of TEQSA are taken to have been done by TEQSA.

#### **Clause 155 – Minister may give directions to Chief Executive Officer**

Subclause 155(1) provides that the Minister may, by legislative instrument, give the Chief Executive Officer written directions about the performance of his or her functions. The Chief Executive Officer must comply with these directions (subclause 155(2)), except to the extent that the directions relate to the Chief Executive Officer's performance of functions or exercise of powers under the *Public Service Act 1999* in relation to TEQSA (subclause 155(3)).

A Note to subclause 155(1) explains that neither section 42 (disallowance), nor Part 6 of the *Legislative Instruments Act 2003* relating to ‘sunsetting’ apply to the directions. The Note also draws reference to sections 44 and 54 of the *Legislative Instruments Act*.

Pursuant to section 42 of the *Legislative Instruments Act*, where a legislative instrument has been tabled in one of the Houses of Parliament and a notice of motion to disallow the instrument has been given and passed (within the times prescribed in section 42), the instrument ceases to have effect. Part 6 of the *Legislative Instruments Act* ensures that legislative instruments are kept up to date and only remain in force for so long as they are needed.

Item 41 of the table to subsection 44(2) and item 46 of the table to subsection 54(2) of the *Legislative Instruments Act* provide that Ministerial directions to any person or body are not subject to disallowance and sunsetting respectively.

## **Division 5 – Staff**

### **Clause 156 – Staff**

This clause provides that the staff of TEQSA are to be engaged under the *Public Service Act 1999*. For the purposes of that Act, the Chief Executive Officer and staff of TEQSA together constitute a Statutory Agency and the Chief Executive Officer is the head of that Statutory Agency.

### **Clause 157 – Staff to be made available to TEQSA**

Subclause 157(1) provides that TEQSA is to be assisted by officers and employees of Commonwealth authorities (a *Commonwealth authority* is defined in clause 5 as an Agency within the meaning of the *Public Service Act 1999*, or a body established for a public purpose by or under a Commonwealth law and whether incorporated or not) and other persons under arrangements made under subclause 157(2).

Subclause 157(2) provides that the Chief Executive Officer may make arrangements for officers or employees of appropriate State or Territory authorities to be made available to TEQSA for the performance of its functions or exercise of its duties. Such arrangements may provide for the Commonwealth to reimburse a State or Territory for such services rendered (subclause 157(3)).

Subclause 157(4) provides that persons performing services for TEQSA under this clause are subject to directions of the Chief Executive Officer.

## Division 6 – Fees

### Clause 158 – Fees

Subclause 158(1) provides that TEQSA may, by legislative instrument, determine fees that it may charge for things it does in performing its functions.

The determinations may:

- determine how a fee is to be calculated (subclause 158(2))
- determine other matters relating to the payment of fees including the payment of fees by instalments, setting off fees payable against other amounts payable and the waiver of fees (subclause 158(3)).

Subclause 158(4) provides that fees determined by TEQSA must not amount to taxation.

This will allow TEQSA to recover some of its operational costs through the collection of fees for activities that it undertakes in performing its functions as a regulator. These fees must not amount to taxation and can only be imposed on a cost recovery basis in accordance with the *Australian Government Cost Recovery Guidelines* (Cost Recovery Guidelines). Amongst other things, the Cost Recovery Guidelines state that:

- Australian Government agencies should set charges to recover the costs of products and services when it is efficient to do so
- agencies that undertake regulatory activities (such as TEQSA) should generally include administration costs when determining appropriate charges
- cost recovery arrangements are to be considered ‘significant cost recovery arrangements’ where, amongst other things, the agency’s total cost recovery receipts will equal \$5 million or more per annum – this is likely to be the case with TEQSA
- agencies with significant cost recovery arrangements should undertake appropriate stakeholder consultations on their fees (including with other agencies), as well as prepare Cost Recovery Impact Statements – which the agency’s chief executive, secretary or board must certify complies with the Cost Recovery Guidelines
- agencies must include a summary of the Cost Recovery Impact Statements in their portfolio budget submissions and statements
- agencies must review their significant cost recovery arrangements at least every 5 years.

There will therefore be significant safeguards in place to ensure that the fees to be imposed by TEQSA are appropriate. Fees will be developed in line with the Cost Recovery Guidelines. A Cost Recovery Income Statement (CRIS) will be made public prior to the commencement of fee charging activities. As the fees determinations will be legislative instruments, they will also be subject to Parliamentary scrutiny and disallowance.



## **Division 7 – Planning**

### **Subdivision A – Strategic plans**

#### **Clause 159 – Developing strategic plans**

Subclause 159(1) provides that TEQSA must develop a rolling series of written 3 year strategic plans that define the principal objectives of TEQSA for the 3 year period and gives a broad outline of the strategies to be used by TEQSA in order to achieve those objectives.

Subclause 159(2) provides that the first strategic plan is to cover the 3 year period from 1 July 2011. Later strategic plans are to cover subsequent periods of 3 years at a time.

Subclause 159(3) provides that a strategic plan is not a legislative instrument. This provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

#### **Clause 160 – Approving strategic plans**

This clause provides for the manner in which the strategic plan is to be approved by the Minister, including the timeframes for its submission by TEQSA to the Minister.

Subclause 160(3) provides that a strategic plan takes effect either:

- if the plans needs to be approved by the Minister – on the later of the day on which it is approved by the Minister, or the first day of three year period it applies to; or
- otherwise – on the first day of the period to which it relates.

Subclause 160(1) provides that TEQSA is required to provide the Minister with the first strategic plan at the end of 3 months from the date this Bill receives Royal Assent. Subsequent strategic plans are to be submitted to the Minister before 31 January of the final year of the 3 year period, unless the Minister allows a later submission.

Subclause 160(2) provides that TEQSA does not need to provide the Minister with a strategic plan for approval if the Minister decides that the plan does not need such approval.

#### **Clause 161 – Varying strategic plans**

Subclause 161(1) allows TEQSA to vary a strategic plan with the approval of the Minister.

If the variation is only of a minor nature, TEQSA may vary a plan without needing to obtain the Minister's approval and the variation takes effect on the day that it is made (subclause 161(5)). In addition, TEQSA must inform the Minister of a variation made of a minor nature as soon as practicable (subclause 161(6)).

Subclause 161(2) provides that when TEQSA gives the Minister a proposed variation of a strategic plan, it must also give the Minister a proposal for any consequential variations that should be made to the relevant annual operating plan.

Subclause 161(3) provides that the Minister may, at any time, request that TEQSA vary a strategic plan and TEQSA must vary the plan accordingly.

If the Minister approves a variation of a strategic plan, the variation has effect from the date the variation is approved (subclause 161(4)).

## **Subdivision B— Annual operating plans**

### **Clause 162 – Developing annual operating plans**

Subclause 162(1) provides that TEQSA must give annual operating plans covering 12 month periods to the Minister. These 12 months periods are from 1 July to 30 June in the following year. TEQSA must give the plans to the Minister before 30 April in the calendar year in which the plan is to commence. The first annual operating plan is to be given to the Minister within 3 months after this bill receives Royal Assent.

Subclause 162(2) provides that the annual operating plan must set out the actions to be taken by TEQSA in that year to contribute to the achievement of the goals set out in the strategic plan, and must also identify those performance indicators against which TEQSA's performance can be assessed.

Subclause 162(3) provides that an annual operating plan is not a legislative instrument. This provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

### **Clause 163 – Approving annual operating plans**

Subclause 163(1) provides that the Minister may, by written notice to TEQSA, approve the annual operational plan put forward by TEQSA or, if the Minister thinks that it is inconsistent with the relevant strategic plan, may request that TEQSA revise and resubmit it.

Subclause 163(2) provides that an annual operating plan takes effect on the later of the date of the Minister's approval of the plan, or the beginning of the period to which it relates.

## **Clause 164 – Varying annual operating plans**

This clause provides that the processes for varying strategic plans that are contained in clause 161 also apply to variations of annual operating plans (with the exception of subclause 161(2)).

## **Division 8 – Annual reports**

### **Clause 165 – Annual reports**

Subclause 165(1) provides that TEQSA must give the Minister (for presentation to Parliament) annual reports relating to its operations during the year. These annual reports relate to each financial year and must be provided to the Minister as soon as practicable after the end of each financial year.

A Note draws the reader's attention to section 34C of the *Acts Interpretation Act 1901* which contains provisions about periodic reports. Amongst other things, section 34C provides that, where an Act requires a periodic report to be given to the Minister for presentation to Parliament, but does not specify a time for tabling the report, the Minister must cause a copy of the report to be tabled in both Houses of Parliament within 15 sitting days after receipt (subsection 34C(3)).

Subclause 165(2) provides that TEQSA must include the following in the annual reports:

- the financial statements that are required by section 49 of the *Financial Management and Accountability Act 1997*; and
- an audit report on those financial statements under section 57 of the *Financial Management and Accountability Act 1997*.

Section 49 of the *Financial Management and Accountability Act 1997* requires a Chief Executive to give the annual financial statements required by the Finance Minister's Orders to the Auditor-General. These annual financial statements must give a true and fair view of the matters required by the Orders to be included in the statements.

Section 57 of the *Financial Management and Accountability Act 1997* requires the Auditor-General to examine those financial statements and report whether they have been prepared in accordance with the Finance Minister's Orders and give a true and fair view of the matters required by the Orders.

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# ***Part 9***

## ***Higher Education Standards Panel***

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### **Outline of Part**

Part 9 of the Bill concerns the Higher Education Standard Panel. The Panel consists of a Chair and between 4 and 10 other members to be appointed on a part-time basis for up to 3 years (renewable up to a maximum of 9 years). The appointments are made by the Minister who must also ensure that the Panel membership contains an appropriate balance of professional knowledge and demonstrated expertise and that the interests of States and Territories and higher education students are represented on the Panel.

Part 9 also sets out the functions of the Panel. These functions include advising the Minister on making and changing the Higher Education Standards Framework and advising and making recommendations to TEQSA on the Framework.

In addition, Part 9 sets out the terms and conditions of appointment of Panel members and contains provisions concerning meetings of the Panel.

### **Detailed explanation**

#### **Division 1—Establishment and functions**

##### **Clause 166 – Establishment**

This clause establishes the Higher Education Standards Panel of TEQSA.

##### **Clause 167 – Constitution**

This clause provides that the Panel consist of a Chair and between 4 and 10 other members. The members are appointed by the Minister who must ensure that the composition of the Panel includes an appropriate balance of professional knowledge and demonstrated experience and has regard to the interests of States and Territories and students undertaking or proposing to undertake higher education. The Minister must also consult the Research Minister about proposed appointments.

A Note explains that the Panel is not a separate legal entity from the Commonwealth.

## **Clause 168 – Functions**

Subclause 168(1) sets out the functions of the Panel which are as follows:

- to advise and make recommendations to the Minister or to the Research Minister on making and varying the Higher Education Standards Framework; and other matters relating to the Higher Education Standards Framework (which it may do either at the request of the Minister or the Research Minister, or on its own initiative)
- to provide advice and recommendations to TEQSA about matters concerning the Higher Education Standards Framework (it may do this either at the request of TEQSA, or on its own initiative).

Subclause 168(2) provides that the panel must consult with interested parties when performing its functions. Interested parties may include representatives from the higher education sector, States and Territories and higher education students.

Subclause 168(3) provides that the Panel may, in writing, set up advisory committees to help it to perform its functions. Subclause 168(4) provides that such a written instrument is not a legislative instrument. Subclause 168(4) is included to assist readers as the instrument would not be a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003* as it would not be of a legislative character.

## **Clause 169 – Panel has privileges and immunities of the Crown**

This clause provides that the Panel has the privileges and immunities of the Crown in the right of the Commonwealth. This means that the Panel falls within the ‘shield’ of the Crown and is entitled to the privileges and immunities of the Crown in the right of the Commonwealth.

## **Division 2—Appointment of Panel members**

### **Clause 170 – Appointment**

Subclause 170(1) provides for the appointment of Panel members on a part-time basis by the Minister by written instrument. An instrument of appointment would not be a legislative instrument by virtue of the existing exemption in item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

A Note to subclause 170(1) assists the reader by clarifying that a member of the Panel is eligible for re-appointment pursuant to the *Acts Interpretation Act 1901*. Subsection 33(4A) of the Acts Interpretation Act states that, in any Act, appointment includes re-appointment.

Subclause 170(2) provides that a Commissioner is ineligible to be appointed as a Panel member, or to act as a Panel member.

Subclause 170(3) requires the Minister, after consulting the Research Minister, to appoint one of Panel members as the Chair of the Panel.

### **Clause 171 – Term of appointment**

Subclause 171(1) provides that Panel members hold office for terms specified in their instruments of appointment, which must not be more than 3 years. Subclause 171(2) provides that Panel members can only hold office for a maximum of 3 consecutive periods. This means that, after serving 3 consecutive periods, a person could, after a break (which need not be 3 years, but could be less), again be eligible to be appointed for further terms as a Panel member.

### **Clause 172 – Remuneration and allowances**

Subclause 172(1) provides that a Panel member is to be paid such remuneration as is determined by the Remuneration Tribunal or, if no determination of that remuneration is in operation, the member is to be paid such remuneration that is determined in writing by the Minister. Such a determination would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Subclause 172(2) provides that a Panel member is to be paid such allowances as are determined in writing by the Minister. Such a determination would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Clause 172 has effect subject to the *Remuneration Tribunal Act 1973* which provides for the Remuneration Tribunal to conduct inquiries and make determinations on the remuneration of certain office holders (subclause 172(3)).

### **Clause 173 – Leave of absence**

Subclause 173(1) provides that the Minister may grant the Chair of the Panel leave of absence on such terms and conditions as the Minister determines. Such a grant of leave would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Subclause 173(2) provides that the Chair may grant another Panel member leave of absence on such terms and conditions as the Chair determines. Such a grant of leave would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

### **Clause 174 – Outside employment**

This clause provides that Panel members must not engage in paid outside employment that the Minister considers conflicts or may conflict with the performance of their duties as Panel members.

### **Clause 175 – Disclosure of interests to the Minister**

Subclause 175(1) provides that the Panel member must disclose by written notice to the Minister all interests, pecuniary or otherwise, that the member has or acquires which conflict or could conflict with the proper performance of the Panel member's functions.

Subclause 175(2) requires the Panel member to give the notice to the Minister as soon as practicable after becoming aware of the potential conflict of interest.

Such a disclosure given by a member would not be a legislative instrument under section 5 of the *Legislative Instruments Act 2003*, as it would not be legislative in character.

### **Clause 176 – Other terms and conditions**

This clause makes allowance for the Minister to determine in writing any terms and conditions of the Panel member in relation to matters that are not covered in this Bill.

Such written determinations would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

### **Clause 177 – Resignation**

Subclause 177(1) provides that a Panel member may resign by giving a written resignation to the Minister. A Note clarifies that if the Chair of the Panel resigns as Chair, he or she also resigns his or her Panel membership appointment – but this does not prevent him or her later being appointed only as a Panel member.

Such resignations take effect on the day they are received by the Minister or, if a later day is specified in the resignation, on that later day (subclause 177(2)).

The written resignations would not be a legislative instrument, by virtue of the existing exemption under item 10 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

## **Clause 178 – Termination of appointment**

This clause sets out the grounds upon which a Panel member's appointment may be terminated by the Minister. The grounds on which the Minister may terminate an appointment are:

- for misbehaviour, or physical or mental incapacity; or
- if the member becomes bankrupt, applies for relief from bankruptcy or insolvency, enters into an arrangement with creditors regarding the payment of his or her debts, or assigns all or part of his or her remuneration for the benefit of creditors; or
- if the member is absent without leave from 3 consecutive meetings of the Panel; or
- if the member engages in paid employment contrary to clause 174; or
- if the member fails without reasonable excuse to comply with clause 175 (disclosure of interests to the Minister) or subclause 182(4) (disclosure of interests to other members).

An instrument of termination of appointment would not be a legislative instrument, by virtue of the existing exemption under item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

## **Clause 179 – Acting appointments**

Subclause 179(1) allows the Minister, by written instrument, to appoint persons to act as Panel members:

- to fill vacancies on the Panel (whether or not appointments have previously been made); or
- to replace Panel members who are absent from duty or overseas, or who are unable to perform their duties for any reason.

An instrument of appointment would not be a legislative instrument by virtue of the existing exemption in item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Subclause 179(2) provides that, with respect to such acting appointments, the Minister must have regard to the matters mentioned in subclause 163(2). A Note also explains that Commissioners are ineligible to be appointed as Panel members (see subclause 170(2)).

Subclause 179(3) provides that the actions of a person purporting to act as a Panel member would not be invalid merely because of a technical or other ground relating to the person's appointment. This will provide certainty and stability.

A Note to subclause 179(3) draws attention to the *Acts Interpretation Act 1901* for further provisions about acting appointments. Section 20 of the Acts Interpretation Act provides that, where an Act mentions a person holding a particular office or position, this is deemed to include all persons who at any time occupy the office or



position (unless the contrary intention appears). Section 33A of the Acts Interpretation Act relates to acting appointments and provides, amongst other things, that while the appointee is acting in the office, he or she has and may exercise all the powers and shall perform all the functions and duties of the holder of the office.

### **Division 3—Panel meetings**

#### **Clause 180 – Holding meetings**

Subclause 180(1) allows the Chair of the Panel to convene meetings of the Panel as necessary for the efficient conduct of the Panel’s functions.

Subclause 180(2) requires the Chair to convene Panel meetings if rested to do so by TEQSA.

Subclause 180(3) provides that a Commissioner may attend all or any part of a Panel meeting.

#### **Clause 181 – Quorum**

This clause provides that a quorum at Panel meetings is constituted by a majority of Panel members.

#### **Clause 182 – Procedure of meetings**

Subclause 182(1) allows the Minister to make written determinations about the operations of the Panel.

Subclause 182(6) provides that such written determinations are not legislative instruments. This provision is included to assist readers as the instruments would not be legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Subclause 182(2) provides that, if no written determinations by the Minister are in force, the Panel may operate in the way it determines.

Subclause 182(3) requires the Chair of the Panel to ensure that minutes of meetings are kept.

Subclause 182(4) provides that if a Panel member has a pecuniary or other interest in matters being considered by the Panel that could conflict with the performance of the Panel’s functions, the member must disclose the interest as soon as practicable to other Panel members. The disclosure and the Panel’s decision on the disclosure must be recorded in the minutes of the meeting (subclause 182(5)).

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# ***Part 10***

## ***Administrative law matters***

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### **Outline of Part**

Part 10 of the Bill sets out which decisions of TEQSA are reviewable decisions. Reviewable decisions made by delegates of TEQSA may be internally reviewed by TEQSA and then subsequently by the Administrative Appeals Tribunal. Reviewable decisions that are not made by delegates of TEQSA may be reviewed by the Administrative Appeals Tribunal.

Part 10 also contains provisions restricting the disclosure or use of certain information by TEQSA and authorising the disclosure of other information.

### **Detailed explanation**

#### **Division 1— Review of decisions**

##### **Clause 183 – Reviewable decisions**

This clause contains a table which sets out the decisions of TEQSA that are reviewable decisions. These reviewable decisions are as follows:

- a decision under paragraph 19(1)(a) that an application for registration in a particular provider category is inappropriate
- a decision under paragraph 19(1)(a) that it would be appropriate for an application for registration to be in a particular provider category, when that provider category differs from that sought by the applicant
- a decision under subclause 21(3) to extend the time within which TEQSA may decide an application for registration
- a decision under clause 21 to register an applicant for registration in a particular provider category
- a decision under clause 21 to reject an application for registration
- a decision under subclause 32(1) to impose a condition on a registration
- a decision under subclause 32(2) to vary a condition imposed on a registration
- a decision under clause 36 to refuse to renew a registration
- a decision under clause 38 to refuse to change the category in which a registered higher education provider is registered
- a decision under clause 41 to refuse to authorise a registered higher education provider to self-accredit one or more courses of study

- a decision under clause 43 to reject an application to withdraw a registration
- a decision under subclause 49(3) to extend the time within which TEQSA may decide an application for accreditation
- a decision under clause 49 to reject an application for accreditation
- a decision under subclause 53(1) to impose a condition on an accreditation
- a decision under subclause 53(2) to vary a condition imposed on an accreditation
- a decision under clause 56 to refuse to renew an accreditation
- a decision under clause 99 to shorten the period of an accreditation
- a decision under clause 99 to cancel an accreditation
- a decision under clause 100 to shorten the period of a registration
- a decision under clause 101 to cancel a registration
- a decision under subclause 198(4) to enter details on the Register.

Note 1 explains that reviewable decisions that are made by delegates of TEQSA can be reviewed by the Administrative Appeals Tribunal, after the TEQSA internal review process has taken place.

Note 2 explains that reviewable decisions that are not made by delegates of TEQSA may be reviewed by the Administrative Appeals Tribunal (see clause 187).

### **Clause 184 – Applying for internal review of reviewable decisions made by delegates of TEQSA**

This clause sets out the process for making applications to TEQSA for reconsideration of reviewable decisions made by delegated decision makers of TEQSA.

Subclause 184(1) provides that clause 184 applies to reviewable decisions where those decisions have been made by delegates of TEQSA.

Subclause 184(2) provides that persons who are affected by and dissatisfied with a reviewable decision may apply to TEQSA for TEQSA to review the decision.

Subclause 184(3) provides that such applications must set out the reasons for the application and must be in the approved form. The applications must also be accompanied by a fee that is determined under clause 158 (if any). A Note explains that the approved form could, for example, require certain statements in applications to be verified by way of statutory declaration.

Subclause 184(4) provides that the application must be made within 30 days after the applicant has been informed of the decision, or any longer period allowed by TEQSA.

## **Clause 185 – Internal review by TEQSA**

Subclause 185(1) provides that, when TEQSA receives an application for reconsideration of a reviewable decision (under clause 184), it must review the decision.

Subclause 185(2) provides that, when undertaking the review, TEQSA may affirm, vary or revoke the reviewable decision and, if it decides on revocation, it may make such other decision as it considers fit.

Subclause 185(3) provides that TEQSA's review must be carried out as follows:

- where the reviewable decision was made by a TEQSA delegate who was a TEQSA staff member – by another delegate who is either a Commissioner or is someone who occupies a position that is senior to the TEQSA delegate who made the reviewable decision; or
- in other cases - TEQSA.

Subclause 185(4) provides that a review decision by TEQSA has effect (apart from for the purposes of clause 183) as though it had been made under the provision under which the original decision was made.

Subclause 185(5) provides that TEQSA must give applicants for review a written statement that gives its decision on the review and the reasons for that decision. It must do so within 30 days of making the review decision.

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.

## **Clause 186 – Deadline for internal review**

This clause provides that TEQSA must make a decision on an application for review of a reviewable decision within 90 days of receiving the application and that, if it does not notify the applicant of its decision within this 90 day period, TEQSA is taken (for the purposes of Part 10) to have made a decision under subclause 185(2) affirming the original decision.

## **Clause 187 – Review by the Administrative Appeals Tribunal**

This clause 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 subclause 185(2) (to affirm, vary or revoke a reviewable decision and, in the case of a revocation decision, such other decision that TEQSA thinks is appropriate).

## **Division 2— Information management**

### **Subdivision A— Restriction on disclosure or use of information**

#### **Clause 188 – Offence of unauthorised disclosure or use of higher education information**

This clause creates an offence carrying a maximum penalty of 2 years imprisonment for unauthorised disclosure or use of higher education information.

Persons will commit the offence in circumstances where:

- they obtain higher education information because they are or were an ‘entrusted person’; and
- the person discloses the higher education information to someone else or uses it and neither of the following apply to the disclosure:
  - o the disclosure or use is made for the purposes of this Bill or otherwise in connection with the person’s performance of his or her duties as an entrusted person; or
  - o the disclosure or use is required or authorised by a Commonwealth law, or a law of a State or Territory.

A Note explains that a defendant bears the evidential burden of proof as to whether the disclosure or use was made for the purposes of this Bill or otherwise in connection with the person’s performance of his or her duties as an entrusted person or the disclosure or use was required or authorised by a Commonwealth law, or a law of a State or Territory (see subsection 13.3(3) of the *Criminal Code*).

**Higher education information** is defined in clause 5 as being information in relation to a regulated entity that is obtained by TEQSA and relates to the performance of TEQSA’s functions. Higher education information does not, however, apply to personal information within the meaning of the *Privacy Act 1988* (the Privacy Act protects the privacy of personal information handled by bodies such as TEQSA and contains provisions that limit the unauthorised disclosure of personal information and provides remedies where such disclosures occur).

An entrusted person for the purposes of this clause means any of the following:

- a Commissioner
- a Panel member

- the Chief Executive Officer
- a TEQSA staff member
- a person performing a service for TEQSA (this would extend to consultants engaged by TEQSA).

## **Subdivision B— Information sharing**

### **Clause 189 – Disclosing information about breaches of regulatory requirements**

This clause provides that TEQSA may disclose higher education information about:

- actual or possible offences against this Bill or its associated provisions (the *Crimes Act 1914* or the *Criminal Code* that relate to this Bill) or the *Education Services for Overseas Students Act 2000*; and
- contraventions or possible contraventions of this Bill, the *Education Services for Overseas Students Act 2000*, or the *Higher Education Support Act 2003*, or legislative instruments made under any of them.

TEQSA may disclose this information to the following:

- a person holding an office or appointment under a Commonwealth law or a law of a State or Territory; or
- a member or special member of the Australian Federal Police (within the meaning of the *Australian Federal Police Act 1979*); or
- a member of a State or Territory police force or police service; or
- employees of a Commonwealth authority (***Commonwealth authority*** is defined in clause 5) or of a State or Territory authority (***State or Territory authority*** is also defined in clause 5) that are specified in the Information Guidelines for the purposes of this clause; or
- in the case of a registered provider within the meaning of the *Education Services for Overseas Students Act 2000* - the Fund Manager or the operator of an applicable tuition assurance scheme (within the meaning of that Act); or
- a regulatory authority of another country that has responsibility for the quality or regulation of higher education.

### **Clause 190 – Disclosing information about proposed cancellations of registration**

Subclause 190(1) provides that TEQSA may advise State or Territory higher education ministers if TEQSA has serious concerns about a registered higher education provider for whom an accredited course is being provided in that State or Territory, or where TEQSA proposes to cancel the registration of a registered higher education provider for whom an accredited course is being provided in that State or Territory.

Subclause 190(2) provides that, if TEQSA does so, it may also advise persons who hold office or appointments under Commonwealth laws or under laws of the State or

Territory in question, or Commonwealth or State or Territory employees of a kind specified in regulations for the purposes of this subclause.

#### **Clause 191 – Disclosing information to Tertiary Admission Centres**

This clause allows TEQSA to disclose information to a Tertiary Admission Centre where:

- TEQSA cancels the accreditation of a course of study; or a;
- TEQSA imposes a condition on the registration of a higher education provider that restricts the number of students that the provider may enrol in a particular course of study in relation to the provider; or
- TEQSA cancels the registration of a registered higher education provider.

A Tertiary Admissions Centre is a State based central office that receives and processes applications for admission to participating higher education providers. Rather than applying separately to each institution, Tertiary Admissions Centres streamline the application process by accepting a single application from students that contains a list of their preferences for courses of study. Once applications are processed, the participating providers decide who will be offered a place in a course of study based on the preferences expressed by applicants in their applications.

It is important that Tertiary Admissions Centres are able to be given the information permitted by this clause, both for their own processes and also to better protect the interests of students.

#### **Clause 192 – Disclosing information to the Minister and Secretary**

This clause provides that TEQSA may disclose higher education information to the Minister, a person employed as a member of the Minister's staff (under sections 13 or 20 of the *Members of Parliament (Staff) Act 1984*) or the Secretary for the purpose of administering laws relating to higher education. Amongst other things, this would allow TEQSA to release information to the Secretary of the current Department of Education, Employment and Workplace Relations for the purposes of its administration of the *Higher Education Support Act 2003*.

#### **Clause 193 – Disclosing information to professional bodies etc.**

This clause provides that TEQSA may disclose higher education information to a body that is responsible for regulating an occupation in a State or Territory.

It is expected that this provision would be used to allow TEQSA to share information with a professional body if a provider had been cancelled, or if conditions had been imposed on a particular course of study. TEQSA may also wish to release aggregated data about the performance of relevant courses to support co-operative work in improving quality.

#### **Clause 194 – Disclosing information to certain government bodies etc.**

This clause provides that TEQSA may disclose higher education information to either:

- a Commonwealth, State or Territory authority if it is of a kind specified in the Information Guidelines for the purposes of this clause and TEQSA is satisfied the disclosure is necessary to enable or assist the authority to perform or exercise any of its functions or powers; or
- a Royal Commission.

#### **Clause 195 – Disclosing information under international cooperative arrangements**

This clause provides that TEQSA may disclose higher education information to a regulatory authority of another country if:

- there are cooperative arrangements in existence with that regulatory authority or country relating to the assessment or regulation of higher education providers; and
- the release of the information is consistent with those arrangements.

#### **Clause 196 – Disclosing information to the public**

This clause provides that TEQSA may disclose higher education information to the public that relates to anything done or omitted to be done under this Bill.

This provision will enable TEQSA to release a range of information to the public. For example, TEQSA might release good practice guides describing the work of registered higher education providers in a particular area. TEQSA might also release information to aid prospective students to make more informed choices about where to study.

#### **Clause 197 – Information about national security**

This clause provides that the following clauses do not apply to national security information within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*:

- clause 193
- clause 194
- clause 195
- clause 196.



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# ***Part 11***

## ***National Register of Higher Education Providers***

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### **Outline of Part**

Part 11 concerns the National Register of Higher Education Providers.

### **Detailed explanation**

#### **Clause 198 – National Register of Higher Education Providers**

Subclause 198(1) provides that TEQSA must establish and maintain a Register of the following:

- registered higher education providers; and
- each entity whose registration as a higher education provider has been cancelled because of a reason set out in the Register Guidelines.

Subclause 198(2) provides that the Register is to be called the National Register of Higher Education Providers.

Subclause 198(3) provides that the Register Guidelines may set out the details that TEQSA must enter on the Register for each registered higher education provider. This does not prevent TEQSA from entering other details about those providers on the Register (subclause 198(4)).

Subclause 198(5) provides that TEQSA must make the Register available for public inspection on the internet.

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# *Part 12*

## *Miscellaneous*

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### **Outline of Part**

Part 12 of the Bill contains the following miscellaneous provisions:

- A provision covering the delegation of the powers of TEQSA.
- A provision providing that individuals such as a Commissioner and staff of TEQSA are not subject to legal actions when they perform their functions under this Bill in good faith.
- A provision requiring the Minister to cause a review of the impact of this Bill to be commenced by 1 January 2016.
- A provision enabling TEQSA to make certain guidelines (by way of disallowable instruments).
- A provision authorising the Governor-General to make regulations.

### **Detailed explanation**

#### **Clause 199 – Delegation—General**

Subclause 199(1) provides that TEQSA may in writing delegate any or all of its functions and powers to the following:

- a Commissioner; or
- a member of staff of TEQSA of Executive Level 1 or higher classification, or an equivalent classification (TEQSA will be a small agency and it is anticipated that its only SES staff will be the Chief Commissioner and the 4 other Commissioners, only 3 of whom (including the Chief Commissioner) will be full-time. While the ability to delegate to Executive Level staff may not be used, the efficient administration of the TEQSA Act may require such delegations); or
- a Commonwealth authority; or
- a person who holds any office or appointment under Commonwealth law.

Note 1 explains that this would extend to, for example, functions and powers that TEQSA may have under the *Education Services for Overseas Students Act 2000*. Note 2 explains that TEQSA may also subdelegate powers that are delegated to it under section 170 of the *Education Services for Overseas Students Act 2000*.

Subclause 199(2) provides that the powers of delegation in subclause 199(1) do not apply to the following:

- a decision under clause 21 to grant or reject an application for registration
- a decision under clause 32 to impose, vary or revoke a condition on a registration
- a decision under clause 36 on an application for renewal of registration
- a decision under clause 38 to change the category in which the provider is registered
- a decision under clause 41 on an application to self-accredit one or more courses of study
- a decision under clause 49 to grant or reject an application for a course of study to be accredited
- a decision under clause 53 to impose, vary or revoke a condition on an accreditation
- a decision under clause 56 on an application for renewal of the accreditation of a course of study
- a decision under subclause 63(2) (about requiring information etc) to give a notice to a person
- a decision under Division 1 of Part 7 (about cancelling registration and other administrative sanctions)
- a decision to refer a matter to the Director of Public Prosecutions for action in relation to a possible offence against this Act or this Act's associated provisions
- a decision to apply for a civil penalty order
- a decision to seek an undertaking under Division 3 of Part 7
- a decision to apply for an injunction under Division 4 of Part 7
- a determination under subclause 158(1) (about determining fees)
- a decision to review a reviewable decision in a case covered by paragraph 185(3)(b).

### **Clause 200 – Delegation—powers delegable only to Commissioners**

This clause provides that TEQSA may in writing delegate its powers to make the following decisions to Commissioners (ie only to Commissioners):

- decisions under clause 49 about applications for a course of study to be accredited
- decisions under clause 53 to impose, vary or revoke conditions imposed on an accreditation
- decisions under clause 56 about applications for renewal of an accreditation.

### **Clause 201 – Delegates must comply with directions**

This clause provides that, when a delegate is exercising a function or power under a delegation under clauses 199 or 200, he or she must comply with any written directions given by TEQSA.

## **Clause 202 – Protection from criminal or civil actions**

This clause provides that no legal actions, suits or proceedings (criminal or civil) can be brought against *protected persons* for things that they do or fail to do in good faith:

- in accordance, or purportedly in accordance, with this Bill; or
- in performing, or purporting to perform, TEQSA's functions; or
- in exercising, or purporting to exercise, TEQSA's powers.

A Note explains that this clause extends to, for example, things done in good faith in accordance with a delegation under clause 199 or 200.

*Protected persons* are the following:

- the Minister
- a Commissioner
- the staff of TEQSA
- a Commonwealth authority
- a person holding an office or appointment under Commonwealth law
- a person who performs a service for TEQSA (this would cover consultants engaged by TEQSA).

## **Clause 203 – Review of impact of Act**

This clause requires the Minister to cause a review of the impact on the higher education sector of the reforms enacted under this Bill to be commenced by 1 January 2016.

## **Clause 204 – Guidelines**

This clause creates a table setting out the Guidelines TEQSA may make for various purposes. The table lists 2 items (column 1), a description of the Guidelines (column 2) and the relevant Part or section of the Bill under which the Guidelines are to be made (column 3). This clause provides that TEQSA may make Guidelines specified in column 2 of the table providing for matters required or permitted by the corresponding Part or section specified in column 3 of the table to be provided, or that are necessary or convenient to be provided in order to carry out or give effect to the provision in question

The Guidelines specified are as follows:

- Information Guidelines (under clause 189)
- Register Guidelines (under clause 198).

### **Clause 205 – Regulations**

This clause enables the Governor-General to make regulations prescribing matters required, necessary or convenient for the operation of or giving effect to this Bill.

Any such regulations would be legislative instruments under section 6(a) of the *Legislative Instruments Act 2003*.