

Higher Education in Australia – forward to 2025 with TEQSA: Treading the Education Quicksand Shakily or Assertively?

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Australia's universities are drowning in red tape, crippled by funding shortages and struggling against an incoherent research policy, according to University of NSW vice-chancellor Fred Hilmer. He says too many policy changes, combined with a lack of opposition by university leaders, have led to oppressive government regulation and chronic under-funding.²

So says the Vice-Chancellor of one Australian university. Is he right?

The world of higher education in Australia is undergoing significant reform, precipitated by a multitude of factors, both national and global. Many innovations are encased in a suite of new acronyms. Managers, governors and academics in tertiary institutions are working hard to adapt to and embrace new concepts and old ones in 'new clothing', like national standards and regulation, driven by new bodies such as the Higher Education Standards Panel and the Tertiary Education Standards and Quality Agency. At the same time there are many global factors fuelling uncertainty and speculation which go right to the heart of the sector and to the current understanding of what is a university and a university education. Some are predicting that 'tinkering' around the edges of the current systems will no longer wash and the climate in which the sector now finds itself has been likened to a tsunami, where we have felt the earthquake but the wave is yet to come.³

Australia of course is not alone in this. As elsewhere, the tertiary education sector is being called upon to respond to phenomena variously referred to as 'massification', 'commodification' and 'commercialisation', accompanied and assisted by the rapidly accelerating impact of technology. Governments are requiring much of universities in terms of widening participation without compromising standards and quality, and accountability for the public dollar spent in teaching and

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² 'Uni sector strangled by red tape', [The Australian & ABC News](#), 26 July 2012.

³ 'Unis to face high degree of change in mobile era', *Sydney Morning Herald*, 13-14 October 2012; and 'Time to trade in well-worn university model', Professor Stephen Parker, Vice-Chancellor, Canberra University, *Campus Review*, 2 October 2012.

learning, and research. While the Australian Commonwealth Government has no power to legislate with respect to education *per se*, it has increasingly used its constitutional funding leverage⁴ to impose controls over universities.⁵

In past decades, the sector has become increasingly reliant on the international student dollar and in recent years various factors, mostly outside the universities' control, have led to worrying fluctuations in international student numbers.⁶ In any event, such reliance has been criticized by many as 'immoral'. There are now calls by some for deregulation of the fees of local students and murmurings about reducing government tuition fee contributions. At the same time and consistent with comparative jurisdictions, there is (and rightly) a greater national call for initiatives in equity and diversity, indigenous education and generally widening participation in university education.

As an imperative, universities are directed evermore to have their primary focus on quality and standards. They are required to pay increasing attention to the identification and amelioration of academic risk while being encouraged to be innovative and creative. For academics, there are ever mounting pressures in terms of research and the need to demonstrate 'research impact' to account for the public dollar.

At the same time, universities are coping with the emergence of new (and exciting) teaching and learning methods and platforms afforded by technology, and considering how best they may be implemented to accommodate the new generation of students. Now, in that context, the sector is exercised by the rise in MOOCs or Mass Online Open Courses developed primarily by some US universities. Should they be feared or embraced, and what do they mean to our perception of 'a university' and a university education? There is a sense of urgency on the part of Australian universities as how best to adapt. Deakin University in Geelong, Victoria, is the first to announce a

⁴ Section 96, Australian Constitution.

⁵ The funding of universities is pursuant to the (CTH) *Higher Education Support Act 2003*. Regulation was through the mechanism of the National Protocols for Higher Education Approval Processes (the National Protocols) and the Australian Universities Quality Agency (AUQA), which have both now been replaced by the Tertiary Education Standards Authority (TEQSA) and its Provider Standards. In the context of education and federal and state powers in the Australian Constitution it is of interest to note the recent decision of the High Court of Australia in *Williams v Commonwealth of Australia* [2012] HCA 23 (20 June 2012). This case concerned a contest to the Commonwealth Government's implementation and funding of a chaplaincy program in state schools throughout Australia.

⁶ For example, the high Australian dollar and reported situations of violence against international students in some Australian cities.

new strategy by which MOOCS would be embedded in curriculum. Their Vice-Chancellor, Jane den Hollander, is reported as saying:⁷

Traditional lectures would go by the wayside with free content being cherry-picked online from the world's best universities. That would, in theory, free up academics to focus on assessment tasks and more personalised teaching, including face-to-face, video and online.

There are many apparent inconsistencies in higher education policy. While many of the changes driving the reforms are a product of, and integral to, the rapidly moving environment in which universities operate, they nevertheless put ever greater pressure on the system, and on those who govern, manage and deliver higher education.

This paper outlines the key features of law and policy of the higher education environment in Australia. It first paints a picture of the contextual and legal background. It then outlines the changes, and considers the current debates in the current environment.

In relation to the UK and the US: different country, different hemisphere, same challenges...

The Background

Australia is a federation of states and territories, pursuant to the Commonwealth of Australia Constitution Act. In addition to the Commonwealth or Federal Parliament, there are six states: New South Wales, Victoria, South Australia, Western Australia, Queensland and Tasmania; and two territories: Australian Capital Territory and Northern Territory. All have executives and judiciaries, and, bar one (Queensland), bicameral legislatures.

The tertiary sector providing post-compulsory education, includes technical and further education ('TAFE'), vocational education and training ('VET') and higher education. VET refers generally to vocational education and training related to the development of skills and competencies in a trade, technical or other skilled occupation. TAFE refers to pre-vocational education and education in the theory and practice of trades and vocations in industry and commerce provided by publicly funded providers. TAFE institutes and private providers may operate on either a for-profit or not-for-profit basis. Commonwealth legislation relating to TAFE and vocational education is concerned with

⁷ "Online courses winning prestige" *The Australian, Higher Education Supplement*, 4 July 2012.

funding that education.⁸ The Commonwealth promotes a national vocational education and training system and provides advice about and allocates funding for TAFE and vocational education.

Higher education refers to education provided by universities and other tertiary institutions defined as 'higher education providers'. Five universities are 'dual sector' and another twenty to twenty-five have some activities within the VET sector. All are regulated by a confusion of state and federal control. Constitutionally, responsibility for all sectors of public education lies with the State and Territory governments, and each jurisdiction has its own legislation setting out the requirements for operating as a higher education provider.⁹ Traditionally, this legislation regulated universities generally by providing for recognition of institutions from Australia and overseas, authorisation of other higher education institutions and accreditation of higher education courses. National regulation was provided by the *National Protocols for Higher Education Approval Processes 2007* (The National Protocols)¹⁰ which were produced by the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA)¹¹ and incorporated into state and territory legislation. University statutes provide for the constitution and governance of individual universities.

So, at least in theory, the Commonwealth does not control the provision of higher education. Increasingly however it has influenced the development of the whole tertiary education sector through the exercise of its financial powers.¹² There has always been considerable consultation and negotiation at executive level by ministers and senior public servants in the development of policies relating to education and there are a number of other government bodies which have been recently created, or reworked, by the Commonwealth Government for this purpose.

⁸ Pursuant to the Bradley Report and resultant government policy, and in conjunction with TEQSA (all discussed below), the Commonwealth government has introduced an equivalent regulatory body for the VET sector, the Australian Skills Quality Authority (ASQA). This body, set up under the (CTH) *National Vocational Education and Training Regulator Act 2011* is a national regulator responsible for registering training organisations and accrediting courses in the VET sector. This sector will not be covered in substance here.

⁹ For example, (NSW) *Higher Education Act 2001* and (Qld) *Higher Education (General Provisions) Act 2008*. It should be noted that there is an exception for certain institutions in the Australian Capital Territory which are established by Commonwealth legislation.

¹⁰ Now, in the new regime, forming the basis for the Provider Standards discussed below.

¹¹ Now replaced by a new body known as the Standing Council on Tertiary Education, Skills and Employment (SCOTESE).

¹² Primarily through conditional funding provision in s 96 of the Australian Constitution.

The Commonwealth government's power relating to the financing of education and the development and review of national policies relating to education, is largely pursuant to the (CTH) *Higher Education Support Act 2003* (HESA). The level of funding provided to a university will depend on how the university is classified in HESA. There are three classes of university higher education provider: Table A providers (which includes universities traditionally known as public universities); Table B providers (which is constituted by private universities incorporated in Australia including Bond and Notre Dame); Table C providers (which is constituted by the private universities incorporated outside Australia, for example the Carnegie Mellon University). These are all self-accrediting.

For students assistance is provided via the Higher Education Contribution Scheme (HECS) in the form of loans which enable them to meet the costs of higher education.¹³ Loan assistance is now be provided to students in three ways: HECS-HELP, which provides assistance to meet the student contribution amount for a Commonwealth supported unit of study; a student who is paying tuition fees for non-Commonwealth supported units of study may obtain FEE-HELP assistance; and a student who has to undertake overseas study may obtain OS-HELP.¹⁴ Amounts advanced under HECS-HELP, FEE-HELP or OS-HELP are loans and a debt to the Commonwealth.¹⁵ The Commonwealth also provides financial assistance to students through the Youth Allowance and financial support is provided for indigenous education.¹⁶

The provision of education to overseas students is provided for in the (CTH) *Education Services to Overseas Students Act 2000* and the National Code made pursuant to that Act.¹⁷ Overseas student charges are regulated by Commonwealth legislation.

The system under which the sector operated was long seen to be problematic. In a national sense, while there were the *National Protocols* to provide a common frame of reference, different approaches in different states led to a divergence from consistency in standards and oversight of providers. This was the case in relation to the private providers, or providers other than the

¹³ (CTH) *Higher Education Support Act 2003*.

¹⁴ (CTH) *Higher Education Support Act 2003*, s 137.

¹⁵ (CTH) *Higher Education Support Act 2003*, s 154.

¹⁶ (CTH) *Indigenous Education (Targeted Assistance) Act 2000*. Discussion of indigenous education and the Widening Participation Strategy is to follow.

¹⁷ "Provision of Education to International Students: Code of Practice and Guidelines for Australian Universities" Australian Vice-Chancellors' Committee, April 2005. Discussed below within the context of International Students.

universities who are self-accrediting. It was noted that there were serious quality issues, particularly with the proliferation of entry in to the sector in recent years of these providers, mostly in the VET sector but some also being in the business of providing higher education.¹⁸ There has been extensive media coverage relating to the collapse of some of these institutions leaving students ‘adrift’. This was a troubling situation for many reasons, most obvious being the potential for damage to the reputation of Australia overseas as a provider of quality tertiary education.

In addition, the ‘over-government’ of higher education by the Commonwealth and State and Territories, was much criticised by universities as leading to duplication in terms of reporting. Also, there were overlapping frameworks in relation to quality across the higher education and the VET sectors.

In 2011, Australia had 44 self-accrediting higher education providers: 37 public universities, 2 private universities, one Australian branch of an overseas university, and four other self-accrediting institutions, not universities, including the Bachelor Institute of Indigenous Tertiary Education. There were 150 non-self-accrediting providers, about half of which were approved under the (CTH) *Higher Education Support Act 2003* to provide Commonwealth supported places and student fee help, under the HELP program.¹⁹

In terms of research, the Australian Research Council (ARC), established under Commonwealth legislation, is responsible for making recommendations to the Federal Minister in relation to the financing of proposals. It is the ARC that, since 2008, has had responsibility for administering the Excellence in Research Australia policy (ERA) which is aimed at allocating funding to universities based on their research output and impact (the ERA is discussed later).

¹⁸ Note particularly the concern of the Australian Government relating to the establishment of Greenwich University in 1998 (no relationship to Greenwich University in the UK). This university operated from Norfolk Island, an external territory of Australia and awarded degrees from 1998 -2002 even though the then AQF had denied accreditation finding that the standard and quality of its courses was below that required of an Australian university. In 2002 the Australian government legislated to prevent its continued operation on Norfolk Island citing the risk it posed to the reputation of Australian higher education.

¹⁹ Figures taken from the *Explanatory Statement, Higher Education Standards Framework (Threshold Standards) 2011*, 11-12. Accessed at www.teqsa.gov.au. In October 2012, TEQSA is responsible for regulating 172 higher education providers, 43 self-accrediting universities and 129 non-self-accrediting private providers, both for-profit and not (address given by TEQSA Commissioner Ian Hawke to the National Conference on University Governance, University of Sydney, 10 October 2012).

Mounting criticism of the system led the Commonwealth Government to institute a series of reviews.

The Path to Quality Assurance – The Reviews

In the past few years, the provision of tertiary education in Australia has, it could be said, been reviewed ‘within an inch of its life’. Three major reviews have led to massive innovations in the sector, leaving both providers and bureaucrats grappling with the changes. In the words of Dr Carol Nicholl, Chief Commissioner for the Tertiary Education Quality and Standards Agency (TEQSA), the new national regulator: ‘We are building the plane as we are flying it’.²⁰ A fourth review, that of base funding, has been concluded but is yet to be implemented and the Government has announced its intention to move on this before the end of the year.²¹

The first review, with the most wide-ranging terms of reference and the potential for major impact, was the *Bradley Review into Tertiary Education*.²² This review was commissioned by the Commonwealth Government in 2009, charged with considering the fundamental question: is the Australian higher education sector appropriately structured and financed to allow the country to ‘compete effectively in a global economy’? This aim necessitated a thorough and wide-ranging investigation of the whole tertiary sector, fundamentally to consider how best to ensure a high standard of quality across the sector, and to provide funding certainty in terms of both teaching and learning and research. Its purview embraced also at issues such as the support of life-long learning and access to higher and further education of all Australians including those in regional areas and from lower socio-economic backgrounds, and building and maintaining the educational export industry,

The other two reviews related specifically to international education and were completed in close succession following the Bradley Review. In 2010 Australian Education International released the Baird Review “*Stronger, simpler, smarter ESOS – Supporting International Students: Review of the*

²⁰ Higher Education: Risky Business? Academic Board Q & A Forum, University of Technology, Sydney, 26 July 2012.

²¹ The Higher Education Base Funding Review led by Professor Jane Lomax-Smith, released its Final Report on 19 December 2011. It defines the principles to underpin the long term funding of higher education in Australia and makes recommendations for a reformed funding model. A formal government response is awaited.

²² Led by Emeritus Professor Denise Bradley AO the former Vice-Chancellor and President of the University of South Australia (UniSA).

Education Services for Overseas Students (ESOS) Act 2000; and in 2011 the Department of Immigration and Citizenship released the Knight Review: ‘*Strategic Review of the Student Visa Program 2011*’. These reviews, while each with a different focus, dealt essentially with overlapping issues relating to the provision of education to international students. They also have had significant impact on the sector. While each found that Australia generally offered a high quality of tertiary education, there was an accompanying concern over weaknesses in the regulatory system leading to a lack of clarity which allowed inconsistencies to develop. This extended to features of the immigration system, identified by the Knight Review, which acted as impediments to international student enrolments and the appeal of Australia as an education destination.

Because the Baird Review and the Knight Review related specifically to the provision of education to international students they will be discussed below in this specific context. However, many of the points made in the Baird Review as they relate to the quality of education generally apply equally to local students. As noted by Baird:²³

In reviewing these frameworks I believe international education is a leading indicator for domestic policy makers. For the Australian Government’s aspiration of increasing participation in education to be realised the education sector will need to grow. The international education experience has shown that the private sector has the greatest ability and capacity to be responsive to demand and hence grow quickly. However, where profit is a key outcome from delivering education services, the quality of the service will at some point and for some providers come under pressure.

First, the reforms precipitated by the Bradley Review...

The Response of the Government

The Bradley Review affirmed that the reach, quality and performance of this nation’s higher education system is central to Australia’s economic and social progress. To be globally competitive and to secure high skilled jobs of the future, Australia needs an outstanding, internationally competitive higher education system with increased participation and higher attainment levels. Australia also needs a quality higher education system to sustain the international education industry which is Australia’s third largest export.²⁴

²³ Australian Education International (2010) *Stronger, simpler, smarter ESOS: Supporting International Students: Review of the Education Services for Overseas Students (ESOS) Act 2000*, 5. Accessed at <http://www.aei.gov.au>.

²⁴ ‘*Transforming Australia’s Higher Education System*’, Commonwealth of Australia, 2009.

The Review's recommendations were adopted by the Commonwealth Government rapidly. The components were provision for a strong regulatory framework for quality assurance, 'world standard' research, and a funding framework that supports greater participation, student access and choice and growth in student places. In March 2011, the Prime Minister announced a new student-centred, demand-driven higher education system towards a target of 40 per cent of Australian 25-34 year olds having a bachelor level or above qualification by 2025.²⁵

Bradley's recommendations embodied an agenda for reform of the higher education sector which essentially entailed a massive 'upgrade' of university and TAFE infrastructure to 'meet the requirements of Australia in terms of teaching and learning and research into the future'.

The reform agenda (over a ten year period) was set out in terms of these principles:

- Transforming access to higher education, particularly for lower socio-economic students (SES) and the promotion of greater equity and diversity by allocating funding on the basis of student-demand, and greater income support for students who most need it;
- Promoting a sustainable sector in terms of funding for teaching and learning, and research;
- Enhancing quality and accreditation;
- Improving tertiary pathways and 'greater connectivity' between universities and the VET sector;
- Creating a new stronger relationship between Government and educators, with agreed funding 'compacts'.

The two fundamental aims at its core, in anything less than an ideal world, could create tensions. The first is the establishment of national regulators, and second directs the sector to widening participation, which, in the absence of drastic overhaul of the compulsory education sector, must inevitably lead to lowering of admission standards. The strengthening and transforming access to higher education by low socio-economic students (SES) is to be facilitated by a new system of allocating Commonwealth funding based on student demand. The improvement of pathways between the higher education and the VET sectors was to be achieved through the establishment of a single Ministerial Council able to focus on the sector across the states, territories and the

²⁵ Speeches of the Prime Minister, Julia Gillard, 4, 5 & 9 March 2011, accessed at <http://www.deewr.gov.au/HigherEducation/Review/Pages/FutureDirectionsforTertiaryEducation>.

Commonwealth. This body is now constituted as the COAG²⁶ Standing Council on Tertiary Education, Skills and Employment (SCOTESE).²⁷ Also, the body known as the Australian Qualifications Council would focus on connectivity and articulation between the tertiary education sectors.²⁸

Building a new relationship between government and education providers is to be based on agreed mission-based compacts with each university in respect of both research and teaching and learning (known as Facilitation and Performance Compacts). These Compacts are key to the achievement of the government's goals for higher education.²⁹ Essentially, they are based on specific performance targets for universities, and attendant reward funding for achieving specific aims in line with government strategy. They are three year agreements which enable universities to set out their own missions which are distinctive but in line with the national objectives for higher education. They are however mechanisms for accountability of universities for the government's investment. A preservation of academic freedom is legislated for in a provision which states that each "Table A" and Table B" higher education provider, essentially public and private universities, must have a policy 'that upholds free intellectual inquiry in relation to learning, teaching and research'.³⁰ The extent of national regulation and standards prescription however cannot fail to give rise to questions relating to the extent of true individual autonomy.

The speed of implementation of the recommendations in 2010, 2011 and continuing, have the university and VET sectors 'dancing on a moving carpet'.³¹

Implementation

²⁶ Council of Australian Governments.

²⁷ Its purpose is stated as: 'to ensure Australia's workforce and productivity needs are met through increased participation, educational attainment and skills development'. Primarily it aims to ensure high quality tertiary education and training through the strengthening of regulatory arrangements in the tertiary education and training sectors.

²⁸ Standing Council on Tertiary Education, Skills and Employment (SCOTESE), referred to above. Also included for the VET sector was a policy aimed at expanding the ambit of Skills Australia and renewal of the TAFE infrastructure.

²⁹ (CTH) *Higher Education Support Act 2003* s 19.110. In formulating the compacts, the government entered into a period of discussions with each university from 2011 and forty-one compacts for the period 2011-2013 have now been completed: *Summary Report on Mission-based Compacts 2011-2013*, Australian Government, Department of Industry, Innovation, Science, Research and Tertiary Education (DSIRTE).

³⁰ (CTH) *Higher Education Support Act 2003* s 19.115. Important to note Section 4 of the newly formulated Provider Standards (discussed below) that require that: 'The higher education provider promotes and protects free intellectual inquiry and expression in its higher education learning, teaching, and research activities'.

³¹ As in "Don't let the rug be pulled from under your feet, learn to ..."

1. The establishment of the national regulatory body: The Tertiary Education Quality and Standards Agency

As heralded by those announcements and shortly thereafter, the (CTH) *Tertiary Education Quality and Standards Act 2011* was enacted and the national regulator for higher education was born on 30 July 2011. The legislation covers all providers of higher education in Australia, public sector and private universities, overseas universities operating in Australia and private providers of tertiary education. The Act sets out its objects as:³²

- to provide for national consistency in the regulation of higher education; and to regulate higher education using:
 - a standards-based quality framework; and
 - principles relating to regulatory necessity, risk and proportionality; and
- to protect and enhance: Australia's reputation for quality in higher education and training, Australia's international competitiveness and excellence, diversity and innovation in the higher education sector;
- to encourage a higher education system that is appropriate to Australia's social and economic needs, to protect students by requiring quality in higher education, and to ensure that students undertaking higher education have access to information.³³

Since 1 January 2012, the Tertiary Education Quality and Standards Agency (TEQSA) has had primary responsibility for the regulation of higher education in Australia.

The role of TEQSA as a preventative and proactive regulator is underpinned by three basic principles, derived from the objects above:

- i) The principle of regulatory necessity;
- ii) The principle of reflecting risk; and
- iii) The principle of proportionate regulation.

They are emphasised as being especially important to enable consistent regulation and to encourage on ongoing dialogue with sector providers in relation to their own self-evaluation.

2. The components of the national regulatory system

³² (CTH) *Tertiary Education Quality and Standards Agency Act 2011* s.3

³³ *Ibid* s.3 (c).

2.1 A National Register of Providers

Importantly, an entity must be registered nationally by TEQSA thus appear on the Register of Higher Education Providers³⁴ before it can confer any regulated higher education award.³⁵

Australian universities remain authorised to self-accredit their courses of study, whereas other registered higher education providers must have their courses accredited by TEQSA.³⁶ “Australian University” is one of the categories for provider registration. The other categories of providers which may be registered to offer an Australian higher education award or an overseas higher education award are listed, in the Provider Category Standards, as ‘Higher Education Providers’ and are “Australian University College”, “Australian University of Specialisation”, “Overseas University and “Overseas University of Specialisation”. In order to be registered, a provider must comply with the newly formulated standards framework known as the *Higher Education (Threshold) Standards 2011*.

2.2 A Higher Education Standards Framework and the Threshold Standards

The framework is a series of standards to be made by the Minister on the advice of the Higher Education Standards Panel.³⁷ These comprise the Provider Standards, the Qualification Standards, the Teaching and Learning Standards, Information Standards and Research Standards.³⁸ The first two, the Provider Standards and the Qualification Standards, known as the *Higher Education (Threshold) Standards 2011*, were completed and formalised by legislative instrument on 4 January 2012.³⁹ As these Standards provide the basis for TEQSA regulation they were necessarily completed first in order for TEQSA to begin operations at the beginning of this year, for new providers to apply for registration and for those universities which are the first ‘cabs off the rank’ to

³⁴ (CTH) Tertiary Education and Quality Standards Agency Act 2011 s 198.

³⁵ Ibid s.1. An award is defined as an Australian or overseas higher education award (if it relates to a course undertaken at Australian premises).

³⁶ Ibid Part 3.

³⁷ Ibid Part 9.

³⁸ Ibid Part 5 s 58.

³⁹ See *Higher Education Threshold Standards 2011*, made pursuant to (CTH) *Tertiary Education Quality and Standards Agency Act 2011* s 58(1).

apply for re-registration.⁴⁰ The remaining three are referred to as ‘non-threshold standards’ and are yet to be defined.⁴¹ In addition, TEQSA has issued a Regulatory Risk Framework.⁴²

The Provider Standards, (which include the Provider Registration Standards, the Provider Category Standards and the Provider Course Accreditation Standards), were developed based on the previously-existing National Protocols.⁴³ They set out the requirements for a higher education provider to be registered and for accreditation of their courses, and for a determination as to whether a higher education provider meets the requirements for registration.⁴⁴ The Registration requirements relate to matters such as financial viability and safeguards, corporate and academic governance, the primacy of academic quality and integrity, management and human resources, responsibilities to students, and physical and electronic resources and infrastructure. Their primary aim is stated as ensuring that the provider is a legally accountable, reputable entity, responsible for the higher education it provides.

The Category Standards provide that an Australian University self-accredits and delivers a comprehensive set of courses at both undergraduate and postgraduate level; researches, contributes to higher education outcomes through the advancement of knowledge; implements good practices in teaching and student learning support; demonstrates engagement and commitment to communities; and maintains higher education delivery. Of constitutional importance is the requirement that the application for registration (or re-registration) has the support of the relevant Commonwealth, State or Territory Government.⁴⁵ The Accreditation Standards provide for matters such as that the course design is appropriate and meets the qualification standards, course resourcing and information is

⁴⁰ The latter are the universities, such as my own, the University of Technology, Sydney, who had been due in 2012 for cyclical review under the previously existing national quality body, the Australian Universities Quality Agency (AUQA). This body ‘parachuted in’ to undertake reviews of providers on cyclical basis, commonly five-yearly for public sector universities, rather than having an overarching responsibility for quality and standards in higher education on an ongoing basis (which TEQSA now has).

⁴¹ There is now some doubt as to the definition and form of these Standards, expressed in Communiques no 2 and 3 from the Higher Education Standards Panel in August and September 2012.

⁴² February 2012. Accessed at www.teqsa.gov.au. Discussed below.

⁴³ See n 10.

⁴⁴ (CTH) *Tertiary Education Quality and Standards Agency Act 2011* s 58(1) (Minister may make Standards by legislative instrument), (CTH) *Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Act 2011* Sch 3, Part 6 (Threshold Standards are a subset of the Higher Education Standards Framework). For the Regulatory Risk Framework, see below.

⁴⁵ The Category Standards may be accessed at www.comlaw.gov.au.

adequate, admission criteria are appropriate, teaching and learning are of high quality, assessment is effective and requires the achievement of expected student learning outcomes and course monitoring, review, updating and termination are appropriately managed.⁴⁶

Discussion is ongoing relating to the formulation of the non-threshold standards and their relationship with the threshold standards.⁴⁷ To initiate the discussion on the Teaching and Learning Standards, the Higher Education Standards Panel issued a paper entitled '*Developing a Framework for Teaching and Learning Standards in Australian Higher Education and the Role of TEQSA*'.⁴⁸

Currently there is investigation underway into how the Research Standards may link to the *Australian Code for the Responsible Conduct of Research*.⁴⁹ The most recent version of this Code, published in 2007, was developed by the National Health and Medical Research Council (NH&MRC), the Australian Research Council (ARC) and Universities Australia. It provides guidance in responsible research practice and covers a wide range of topics associated with research: practical in terms of management of research data and materials and the publication and dissemination of research findings; and other matters concerning proper research conduct and ethics.

The Information Standards are also yet to be released and thus far little attention has been paid to defining their concept and role. It is assumed that they will be based on the principle of proper information sharing between higher education providers and their key stakeholders, particularly students and their parents. Clearly, these Standards should be aimed at eliminating any potential for misleading and deceptive conduct not only in advertising and promotional material but also relating to university publications such as prospectuses and calendars. These are all matters which have

⁴⁶ Explanatory Statement, *Higher Education Standards Framework (Threshold Standards) 2011*, 8-9.

⁴⁷ See Communique Number 2 – August 2012, issued by the Higher Education Standards Panel.

⁴⁸ In this context, see Krause K-L, Barrie S, Scott G (2012) '*Mapping Learning and Teaching Standards in Australian Higher Education: An Issues and Options Paper*'. Accessed at www.uws.edu.au/_data/assets/pdf_file/000/000000/KerriLee_website.pdf. Following a detailed analysis of the feedback received, the Panel issued a Communique in September 2012 summarising its response.

⁴⁹ This Code is aimed at guiding institutions and researchers in responsible research practices and promotes integrity in research for researchers. Accessed at <http://www.nhmrc.gov.au/guidelines/publications/r3>.

been the subject of litigation in Australian courts and tribunals, and of complaint to state and federal ombudsmen offices.⁵⁰

In a Communique issued August 2012 the Higher Education Standards Panel, reiterated that it is not contemplated that regulation will be expanded further than the Threshold Standards. In the Panel's own words this then raises questions about the role of non-threshold standards and what importance should be placed on their development.⁵¹

2.3 A Regulatory Risk Framework⁵²

... by applying a risk-based approach, TEQSA may adjust the frequency and intensity of regulatory review and quality assurance activities based on its risk assessment of a higher education provider. The regulatory burden on providers is reduced where possible and TEQSA's resources are more effectively targeted.⁵³

The Framework aims to enable TEQSA to identify the risks at a provider and sector level, and provide responses to them. In so doing it plays a key part in TEQSA's functions of regulation and quality assurance in the diverse and complex higher education sector in Australia.⁵⁴ The emphasis is stated to be on an ongoing dialogue between TEQSA and providers about their own risk identification and management, in particular requiring them to focus on their risks relative to the Threshold Standards. Where serious risk is identified, TEQSA will be able to intervene.

Initially, TEQSA will use the Framework to create and maintain 'risk profiles of all higher education providers' and the principles underpinning its policy are set out as:

⁵⁰ For a comprehensive discussion of this area, see Kamvounias P & Varnham S (2006) 'Getting What They Paid For: Consumer Rights of Students in Higher Education' 15(2) *Griffith Law Review* 288-306, and with respect to the revamped consumer protection regime see Corones S (2012) 'Consumer Guarantees and the Supply of Educational Service by Higher Education Providers' 35(1) *University of New South Wales Law Journal* 1-30; also within a full coverage of university/student grievances, see Kamvounias P & Varnham S (2010) 'Legal Challenges to University Decisions Affecting Students in Australian Courts and Tribunals' 34(1) *Melbourne University Law Review* 107-140.

⁵¹ *Higher Education Standards Panel- Communique Number 2 (August 2012)*.

⁵² The Framework and Explanatory Material may be accessed at:

<http://www.teqsa.gov.au/sites/default/files/TEQSA%20Regulatory%20Risk%20Framework%20Feb%202012.pdf>.

Much of the material here is reproduced from the document '*TEQSA Regulatory Risk Framework*' accessed as above.

⁵³ *TEQSA Regulatory Risk Framework*. Accessed at

<http://www.teqsa.gov.au/sites/default/files/TEQSA%20Regulatory%20Risk%20Framework%20Feb%202012.pdf>

⁵⁴ The legislative function and principles applying to the exercise of the function of TEQSA in relation to risk are set out in ss 13 & 15 *Tertiary Education Quality and Standards Agency Act 2011*.

- Risk management is a foundation to effective and proportionate regulation, based on compliance with the Threshold Standards;
- It is recognized that it is neither desirable nor possible to eliminate all risk, and some measure is imperative for innovation and growth;
- The approach to risk management should be holistic based on the best available data;
- It should be subject to expert interpretation, taking into account wider operating, social and historical contexts of different institutions;
- Risk management should be based on two-way communication and should be seen as an active and evolving process.

TEQSA states its approach to ‘regulatory risk management’ under the Framework to be, within the context of the legislation and its ‘evolution as an organization’, alignment with its ‘tolerance for risk’ based on the view that the Threshold standards are challenging, as is the dynamic–risk fraught environment of higher education.

It has emphasised that risk profiles prepared under the Framework are not intended to constitute ‘performance profiles’ of providers, or result in a new form of ‘provider ranking’. Such a result could obviously prove damaging for providers and have a negative impact on students, and it is unclear how this outcome will be prevented. TEQSA does point to other avenues such as the “MyUniversity” website which will enable students and their parents to make decisions armed with accurate performance information. It remains unclear as to what information will ultimately appear on that site.

For individual providers, TEQSA’s risk management process will be undertaken by the obtaining of information and data both from the providers and from publicly available sources. The process will be undertaken annually and at any time when new information is available or there are significant changes. This process involves six steps: risk context (key information on the provider’s environment), risk assessment (using data and expert analysis), risk controls assessment (in discussion with the provider), risk analysis (summative assessment post the above step), risk evaluation (overall qualitative determination against ‘priority risk consequence areas’ – risk to students, risk of provider collapse and risk to sector reputation for quality. The final step in this

process is the action assessment (overall recommendation subject to the three regulatory principles of TEQSA).

Many universities are currently engaged in their own comprehensive risk assessment exercises in line with TEQSA's evaluation process.

2.4 The revised Australian Qualifications Framework (AQF) and the Qualifications Standards

The newly revised AQF forms the basis for the Qualifications Standards in the TEQSA Higher Education Threshold Standards 2011,⁵⁵ and qualifications from each education and training sector in Australia have been incorporated into the Standards with implementation from July 2011. In line with a major recommendation of the Bradley Review, the Framework is aimed at facilitating connectivity and thus articulation between qualifications at all levels, particularly in this case between higher education and VET.

The AQF was first introduced in 1995 to underpin the national system of qualifications in Australia which encompass higher education, vocational education and training, and schools. It covers each education and training sector, including vocational education and training (VET) and higher education. It provides the standards for Australian qualifications, and is an integrated policy, now a set of standards, comprising matters such as the learning outcomes for each AQF level and qualification type, the specifications for the application of the AQF in the accreditation and development of qualifications, the policy requirements for issuing AQF qualifications and for linkages and pathways. At the time of writing the AQF is still releasing its standards, for example it recently called for submissions on proposed changes to graduate certificates and diplomas. Discussion in the sector indicates that these proposals will be universally rejected by universities.

A central feature of government policy is the aim of much greater participation in higher education, obviously an aim with considerable funding implications.

Funding Issues: Demand-Driven Education and Widening Participation

⁵⁵ Made pursuant to (CTH) *Tertiary Education Quality and Standards Agency Act 2011* s 58(1) (Minister may make Standards by legislative instrument), (CTH) *Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Act 2011* Sch 3, Part 6 (Threshold Standards are a subset of the Higher Education Standards Framework).

The funding of higher education had, in 2003, changed dramatically with the introduction of the (CTH) *Higher Education Support Act 2003*.⁵⁶ This Act provides for the Commonwealth to give financial support for higher education and certain vocational education and training through grants and other payments made to higher education providers, such as universities.⁵⁷ The Act also provides financial assistance to students.⁵⁸

The Commonwealth-provided funding grants are payable to any eligible higher education provider under the Commonwealth Grant Scheme on the basis of student places.⁵⁹ The Guidelines under that scheme were determined according to the Minister's allocation of Commonwealth supported places for the year of the grant. Historically, the amount granted to the Higher Education Provider (HEP) was determined by the number of Commonwealth supported places that the Minister allocated and the Commonwealth contribution amount for each such place. The Commonwealth government agreed to provide a certain number of Commonwealth supported places in a funding agreement with the HEP.

Annually, the Minister and the HEP negotiated the number of places and the discipline mix to be provided by the HEP. Disciplines were split into seven 'funding clusters', each of which was allocated a specific Commonwealth contribution amount under the (CTH) *Higher Education Support Act 2003*.

The implementation of the Bradley Report changes this system. While the functioning of the Commonwealth Grant Scheme remains basically the same, the fundamental premise underlying the funding provisions for higher education providers is significantly altered. The (CTH) *Higher Education Support Amendment Act (Demand Driven Funding System and other Measures) Act 2011*⁶⁰ introduced demand driven funding of undergraduate places at public universities with effect from 1 January 2012.

⁵⁶ A Base Funding Review of Higher Education, led by Professor Jane Lomax-Smith, released its report in December 2011, but at October 2012, the Government is yet to release its response (n 19).

⁵⁷ (CTH) *Higher Education Support Act 2003* s 16.1 defines 'higher education provider'.

⁵⁸ As outlined above.

⁵⁹ (CTH) *Higher Education Support Act 2003* Pt 2-2.

⁶⁰ The amendments are incorporated as Part 2.2, (CTH) *Higher Education Support Act 2003*.

Rather than there being an agreed number of Commonwealth supported places in a given year, determined by reference to the number of places in each funding (or discipline) cluster, public universities are now able to determine the number of students they enrol in bachelor level courses (excluding medicine) and will receive funding for these places. Universities are able to increase the number of Commonwealth supported places they offer in particular disciplines in response to employer and student demands.⁶¹ These moves are of course, in pursuance of the demand-driven education and widening participation recommendations of the Bradley Review, and the government's ensuing target of 20 per cent of higher education undergraduate enrolments from lower education backgrounds (SES). In tandem, the government introduced a suite of measures aimed at better student support. These were largely in terms of raising the means level of parental income lowering the age of independence of students, in order to qualify for Youth Allowance or ABSTUDY.

A growing sector with greater numbers and more diverse students necessarily requires a wider range of services, health, social and cultural. By the (CTH) *Higher Education Legislation Amendment (Student Services and Amenities) Act 2011* the Commonwealth Government reintroduced a student services and amenities fee.⁶² Universities and other higher education providers are now able to charge a compulsory union fee in order to assist them in the provision of these services.⁶³

While a much greater participation in higher education as an aim is to be applauded, its implications for course quality are obvious and it has attracted some controversy. By being funded for increasing enrolments of students, arguably universities will be tempted to enrol larger quotas of those less able.⁶⁴ Of course, while this is not by itself detrimental, it is clear that greater resources

⁶¹ From January 2012, all higher education institutions who receive government funding are required to be registered with the Tertiary Education Quality and Standards Agency (TEQSA) (discussed above).

⁶² The ability to charge this fee was removed earlier by the Howard government with a policy of Voluntary Student Unionism. The latter remains unchanged.

⁶³ (CTH) Higher Education Support Act 2003 ss19.37, 19.38. Although it should be noted that this legislation goes some way to ameliorating the effect of the Voluntary Student Unionism (VSU) rules brought in by the previous coalition government in 2006, it does not reverse it. VSU took away the right for student unions to collect a mandatory fee to pay for campus activities, including political campaigns by student activists.

⁶⁴ Universities determine admission to their courses based on Australian Tertiary Admission Ranks (ATARs) which are

could be needed for the supply of more support and more intensive teaching. It has been predicted by the Group of Eight universities⁶⁵ that the inevitable result is either a high attrition rate or a lowering of standards.⁶⁶ The flow on from the first effect could be less student satisfaction and a greater willingness to challenge university decisions. Strategies for managing this risk should well assume a greater importance. In any event, the ‘blowing’ of the Government’s budget continues to receive much media attention.⁶⁷

The widening participation strategies underpinned by these two legislative instruments are accompanied by continuing and fresh endeavours to improve the access to and participation of indigenous students to tertiary education.

Indigenous Education

The Australian Institute of Aboriginal and Torres Strait Islander Studies was established in 1989 to foster the development of Aboriginal and Torres Strait Islander education.⁶⁸

Under the (CTH) *Indigenous Education (Targeted Assistance) Act 2000*, the Minister can make an agreement with an education provider for recurrent expenditure for Aboriginal Study Assistance Scheme ('ABSTUDY') approved courses, and with education and other providers for the funding of particular projects.⁶⁹ The objects of the Act are aligned with the 21 goals of the National Aboriginal and Torres Strait Islander Education Policy (the 'AEP')⁷⁰ and include:

- (1) increasing the involvement of Indigenous people in educational decisions;

based on a student’s performance in Higher School Certificate (HSC) in years 11 and 12.

⁶⁵ Made up of the ‘older’ universities: University of Sydney, the University of Melbourne, Monash University, the University of New South Wales, the University of Queensland, the University of Adelaide, the University of Western Australia and the Australian National University.

⁶⁶ Group of Eight (GO8), ‘University Admissions (Policy Note No 3, Group of Eight, February 2012),5. Accessed at http://go8.edu.au/documents/go8-policy-analysis/2012/go8policynote3_universityadmissions.pdf.

⁶⁷ Note *Australian Higher Education*, 4 July 2012 “Minister rejects talk of plan to limit students”, the Minister’s response to much discussion of the over-spending of the government’s budget. See also “*Private Providers Share in Cream: relaxation of over-enrolment buffer for universities a bonanza for sector*” *The Australian Higher Education* 25 July 2012, which reports an unintended result in that many students are attracted to private providers and away from public university courses with larger enrolments.

⁶⁸ (CTH) *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* s 4

⁶⁹ (CTH) *Indigenous Education (Targeted Assistance) Act 2000* s 3.

⁷⁰ Accessed at http://www.dest.gov.au/sectors/indigenous_education .

- (2) providing for equal access to education by Indigenous people;
- (3) ensuring equity of participation by Indigenous people in education;
- (4) achieving equitable and appropriate educational outcomes for Indigenous people; and
- (5) developing culturally appropriate education services for Indigenous people.

In the higher education sector, provision is made for Indigenous education agreements for the purpose of advancing these objects.⁷¹ The appropriation of funds for ABSTUDY and non-ABSTUDY assistance is also provided for.⁷²

The advancement of opportunity for indigenous education in all sectors remains a priority for successive Commonwealth governments and there is a commitment to reconciliation and improving outcomes for Aboriginal and Torres Strait Islander peoples across the key areas of early childhood, education, training and skills, and employment and workplace relations. The Commonwealth Department of Education, Employment and Workplace Relations (DEEWR) launched its first Reconciliation Action Plan (RAP) 2009–2011 on 27 May 2009 during National Reconciliation Week. The second RAP 2011–2014 was launched on 26 October 2011 as a ‘living document’ which sets out practical and defined targets that provide a framework of priorities for the next three years.

The Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People conducted by the Australian Government and led by Professor Larissa Behrendt released its report on 14 September 2012. It made 35 recommendations relating to increasing the number of indigenous students and staff to a target of 2.2% of the total university population. The sector awaits the Government’s response.

⁷¹ (CTH) *Indigenous Education (Targeted Assistance) Act 2000* ss 10-11.

⁷² (CTH) *Indigenous Education (Targeted Assistance) Act 2000* ss 13-15.

Quality in Research – Excellence in Research Australia (ERA)

How best the Government may ensure value for its research money is an ongoing debate. Research funding is designed to provide compensation for the direct costs of research borne by universities and research strategy is, in line with comparative jurisdictions, driven increasingly by the need for the return on investment to be demonstrated. Currently, the funding is provided pursuant to the legislative instrument made under the (CTH) *Higher Education Support Act 2003* and known as (CTH) *Other Grants Guidelines (Research) 2010*. Grants to support research by, and the research capability of, are higher education providers are divided primarily into three different headings: Research Infrastructure Block Grants (RIBG), Joint Research Engagement (JRE), and Sustainable Research Excellence (SRE).⁷³ Grants to support the training of research students are made under the Research Training Scheme (RTS) and the Commercialisation Training Scheme (CTS).⁷⁴ Until now, under these schemes research funding for universities was based on quantitative information supplied by each university (known as the HERD collection and based on research outputs of academics), Higher Degree Research students' completions, and research income from specific grants.

The national body with responsibility for research and research funding is the Australian Research Council (the 'ARC'), established by the (CTH) *Australian Research Council Act 2001* as a statutory authority under the control of the Minister. The ARC is now within the portfolio of Industry, Innovation, Science, Research and Tertiary Education (DIISRTE or Innovation) within the Commonwealth Government. Its mission is *to deliver policy and programs that advance Australian research and innovation globally and benefit the community*. In seeking to achieve its mission, the ARC provides advice to the Government on research matters.

.Since 2010 the ARC has administered Excellence in Research for Australia (ERA) which assesses research quality within Australia's higher education institutions, and is based on a qualitative analysis based on research impact. Its stated aims are to give government, industry, business and the wider community assurance of the excellence of research conducted, and also to provide a national stocktake, by research discipline areas, of research strength against international benchmarks. The

⁷³ Chapter 1, *Other Grants Guidelines (Research) 2010*.

⁷⁴ Chapter 2, *Other Grants Guidelines (Research) 2010*.

sector is suspicious as to the true agenda, and as it moves towards the release of the latest ERA results, the government releases ‘snippets’ which indicate this suspicion is not totally unfounded.

Initially in undertaking this assessment and with a stated emphasis on research impact, the ERA publications were assessed on a quantitative basis, in relation to a list of journal rankings. The first ERA round was conducted in this way in 2010. Before the second round in 2012, the ERA announced that these rankings would be abandoned and instead the quality of research would be measured using a combination of indicators and expert review by committees comprising experienced, internationally-recognised experts. Who this will be and how it will operate is unclear. This method is welcomed by the GO8 universities with robust research histories, but it can only tend to disadvantage the new universities, such as the ATN, group with developing research cultures.

Part of the process is an Excellence in Research Impact trial. In March 2011 the Minister for Innovation, Industry, Science and Research announced that ERA outcomes would inform the funding of research education through a ‘modified Research Training Scheme’.⁷⁵ The fear is that the sector is heading in a direction where the government is ‘micro-managing’ a university’s activities through placing much greater constraints on the funding of higher research degrees. It may be that following the release of the results of the recently undertaken ERA round the government may provide that unless a particular discipline in a university achieved a certain level, it will not be funded for HDR students in that area.

The sector awaits a formulation of the Research Standards and can only speculate on what direction they will take.

As discussed above, the position in relation to international education in Australia particularly concern as to its reputation abroad as a provider of education of a high quality and standard, was one of the most significant factors precipitating reform of the sector.

⁷⁵ For a full discussion of the factors surrounding the suspected government agenda, see “*Defining Quality for Research Training in Australia: A Consultation Paper*” Australian Government, October 2011.

International Education – Australia as a quality education destination

Between 2008 and 2011, more than 400,000 international students a year have studied in Australia on student visas, with the large majority choosing to study in Australia because of Australia's reputation as a safe, high quality education destination.⁷⁶

In line with other jurisdictions such as the UK, the US and New Zealand, Australia has many thousands of international students studying across all sectors of education and they represent a significant source of funds for Australian universities.⁷⁷ The dependency of universities and the government on the income from international students has significant potential to impact upon quality. The Victorian Ombudsperson has also noted concern about revenue pressures.⁷⁸

While the ideal of universities as independent centres of teaching and research remains important, they are not well placed to self-regulate their dealings with international students when they are competing for those students and are reliant on them for a large part of their revenue

Commonwealth legislation provides the framework for the export of education services and training by providing for the registration of all higher education institutions that accept fee-paying overseas students. All providers of education services to overseas students are not only bound by the provisions of the (CTH) *Education Services to Overseas Students Act 2000*, the regulations made pursuant to that Act and equivalent State and Territory legislation, but they are also bound by the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2001 (The ESOS Code 2007). Under Part C of the ESOS Code, all providers must be registered with CRICOS.⁷⁹ The Code provides a set of standards to registered providers

⁷⁶ Lawson C (2012), *Student Voices: Enhancing the experience of international students in Australia*, Australian Education International, June. Accessed at <https://aei.gov.au/research/Publications/Documents/Student%20voices%20-%20FINAL.pdf>.

⁷⁷ In this context, see the Report conducted by the John Curtin Institute of Public Policy for the Australian Technology Network of Universities released in 2010: Phillimore J and Koshy P, '*The Economic Implications of Few International Education Students in Australia: Final Report*' August 2010. Also the GO8 Group of Universities Education Statement, '*The Importance of international education for Australia*', accessed at <http://www.go8.edu.au/university-staff/agreements/the-importance-of-international-education>.

⁷⁸ (2011) Victorian Ombudsman, '*Investigation into how universities deal with international students*', 71. Accessed at <http://www.ombudsman.vic.gov.au>. It is of interest to note that both the Victorian Ombudsman and its New South Wales counterpart conducted investigations and issued reports and guidelines earlier in response to an increase in the numbers of students complaints: Ombudsman Victoria (2005) *Review of Complaint Handling in Australian Universities*, and New South Wales Ombudsman, (2006) *Complaint Handling at Universities: Best Practice Guidelines*. While these complaints were from local students also, the fact that a significant number of them were from overseas students is reflected in the recent establishment of the Overseas Student Ombudsman as a branch of the Commonwealth Ombudsman. This office does however deal only with complaints against public sector providers.

⁷⁹ The Commonwealth Register of Institutions and Courses for Overseas Students. Accessed at

which set out the obligations in delivering education and training to overseas students. These must be met at the time of CRICOS registration and throughout the registration period. The Code recognises the particular position of the overseas student in respect of complaints relating to courses, because of migration controls which may lead to an inability to stay in Australia to pursue appeals and remedies in respect of complaints and grievances relating to courses. Standard 8 provides that registered providers' complaints and appeals processes must be independent, easily and immediately accessible and inexpensive for the parties involved. In addition the provider must have arrangements in place for an independent body to hear complaints and appeals arising from the provider's internal processes, and the student must be advised of these arrangements.⁸⁰ On 1 July 2012 TEQSA assumed full responsibility for registration, compliance and monitoring functions under the ESOS Act.

Complaints by overseas students against their education services provider may be made, in the case of public universities, to the State or Territory Ombudsman, or in the case of ACT institutions to the Commonwealth Ombudsman. In 2011 the (CTH) *Ombudsman Act 1976* was amended to establish an Overseas Students Ombudsman within that office.⁸¹ However, the Overseas Ombudsman has the power to investigate complaints of overseas students in respect of the actions of only private registered providers of education services to overseas students in any Australian jurisdiction.⁸² The Overseas Ombudsman also has the power to give private registered providers advice and training about the best practice for handling complaints by overseas students and to investigate actions of providers on his or her initiative.⁸³

In recent years factors have conspired to prevent Australia from consolidating and building on its attractiveness as a destination for study by overseas students.⁸⁴

At its peak in 2009 there were 491,565 international students enrolled in courses in Australia. Since that time enrolments have fallen. And the numbers of new

www.cricos.deewr.gov.au. This includes providers from all education sectors.

⁸⁰ The National Code 2007 is available at www.aei.gov.au.

⁸¹ (CTH) Ombudsman Act 1976, Part 11C, ss 19ZI.

⁸² Ibid, s 19ZJ (1)(a), (3).

⁸³ Ibid, s 19ZJ (1)(b), 2(a), 2(b).

⁸⁴ Knight M (2011) Introduction, [Strategic Review of the Student Visa Program 2011..](#)

students enrolling are declining faster than the overall enrolment numbers. This is causing serious problems for the viability of the sector. A range of factors have contributed to this including increased global competition, changes to Australia's migration settings and a rising Aussie dollar. Many in the sector refer to these, and other factors, as creating "the perfect storm".

Issues relating to standards of education were addressed in the Bradley Review and in the subsequent TEQSA regime with its quality assurance and regulation framework.

In addition however, and as noted by Knight above, there are many factors which also have had a significant impact on the reputation of Australia as a preferred destination for students wishing to study in Australian universities in the past few years. One related to problems concerning student visas issued to international students during their studies. In recognition of the seriousness of the problem to Australia's export industry in 2010 the Federal government initiated a strategic review of the student visa program, the report from this review conducted by Michael Knight was submitted in June 2011. The recommendations contained in the report are to be implemented in three stages, the first two being introduced in November 2011 and March 2012. They make a wide variety of changes including matters such as reducing the financial requirements for some student applications, more flexible arrangements for English language study, genuine temporary entrant requirements, streamlined visa processing and more flexible work conditions for overseas students during their study in Australia. The third stage was in a Bill introduced into the lower house in March 2012 and has passed its first reading. The *Migration Legislation (Student Visas) Amendment Bill 2012* aims to abolish automatic student visa cancellation.

The other matters which have had a detrimental effect on Australia's reputation for international education have been safety issues and the adverse publicity in home countries surrounding shameful incidents, for example the assaults on Indian students in Melbourne, Victoria. These issues are fundamentally related to a lack of a concerted approach to pastoral care rendering it often patchy at best. Such issues are now being seriously addressed within most Australian universities. Another factor is also the publicity surrounding the collapse of some private provider institutions. A combination of the CRICOS procedures and the new national regulatory regimes in higher education and in the VET sector is designed to address this problem. Additional factor which is outside the control of the universities is the rise in the Australian dollar, rendering Australian higher education fees less attractive in relation to those in the UK, Europe and the US.

The Australian Government also moved quickly to investigate and bring in measures to deal with those problems which are within their control in two major areas. This review investigated the issues facing the sector generally which threaten Australia's reputation as offering a world class quality education and was conducted by the Hon Bruce Baird. His report '*Stronger, simpler, smarter ESOS: supporting international students*', was submitted in 2010. Essentially Baird made recommendations in these areas:

- more support for international students and improved information
- stronger consumer protection mechanisms to ensure students are protected from unscrupulous operators
- improved regulation of Australia's international education sector
- improved support for those who study and live in Australia including having somewhere to go when problems arise.

The Commonwealth government is progressively moving to address the Report's recommendations. In response it has recently passed three new pieces of legislation, as amendments to the (CTH) *Education Services for Overseas Students Act 2000*. The *Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Act 2012*, the *Education Services for Overseas Students (Registration Charges Amendment (Tuition Protection Service) Act 2012* and the *Education Services for Overseas Students (TPS Levies) Act 2012* aim to offer greater protection to overseas students in respect of their tuition fees by setting up a Tuition Protection Service. This service acts as an insurance based on risk for overseas students in respect of fees paid for discontinued courses.

To support Australian education institutions to deliver a high quality international education experience, the Council of Australian Governments developed the *International Students Strategy for Australia 2010-2014* (the ISSA). The ISSA is designed to "support a high-quality experience for international students, in order to ensure a sustainable future for quality international education in Australia".⁸⁵

⁸⁵ COAG, 2010.

The University/Student Relationship

The basis of the relationship a university has with its students has been the subject of judicial consideration in the UK and New Zealand but is yet to be definitively decided in Australia. In the words of Kirby J in the High Court of Australia:

Can I just ask a question? It was common ground when we were told of this at the special leave hearing that there is no contractual relationship. I am curious about that. Would not the respondent have paid fees? I accept that this has been common ground and maybe it ought not and cannot be revived now, but would you just illuminate why that was common ground? I just have to put it out of my brain even though it will not seem to go away.⁸⁶

The traditional view here as elsewhere was that as students are members of the university university/student matters were governed solely by the university statutes and bylaws. This included the resolution of grievances (by students and staff alike) internally.⁸⁷ This is no longer considered to be entirely the case, particularly in the newer universities. While the relationship of students with the university is undoubtedly founded in the university statutes and the many bylaws, policies and rules made under that legislation, it is also partly governed by external state and commonwealth law. There is now an acceptance in the comparative jurisdictions that the relationship is also based partly on contract.⁸⁸ While there has in recent years been some speculation by commentators, and a handful of cases which allude to a contractual relationship,⁸⁹ the courts in Australia are yet to definitively accept this relationship as a matter of law.

The discussion has been of particular importance both in considering the ability of students to question course quality and the delivery of desired outcomes and to the debate as to whether students can truly be positioned as ‘consumers’. The discussion as to the particular nature of the

⁸⁶ Kirby J in the High Court of Australia in *Griffith University v Tang*, Transcript of Proceedings, [2004] HCA Transcripts 227 (21 June 2004).

⁸⁷ Notably this was argued by the university in New Zealand in the case of *Grant, Woolley, Staines & Grant v Victoria University of Wellington* (High Court of New Zealand, Wellington Registry, Ellis J, CP 312/96 unreported). The argument was rejected by Ellis J in the High Court.

⁸⁸ For example, in the UK in *Clark v The University of Lincolnshire & Humberside* [2000] EWCA Civ 129; in New Zealand, *Grant, Woolley, Staines & Grant v Victoria University of Wellington* (High Court of New Zealand, Wellington Registry, Ellis J, CP 312/96 unreported).

⁸⁹ For example, see Astor H ‘Australian Universities in Court: Causes, Costs and Consequences of Increasing Litigation’ (2008) 19 *Australasian Dispute Resolution Journal* 156; Kamvounias P & Varnham S ‘In-House or in Court: Legal Challenges to University Decisions’ (2006) 18 *Education and the Law* 1; Rochford F ‘The Relationship between the Student and the University’ (1998) 3 (1) *Australia and New Zealand Journal of Law and Education*, 38.

relationship, at least in the ‘consumer’ context, may be rendered largely redundant by changes in the consumer protection regime in Australia which make it more readily available to students in pursuing this kind of grievance against their university. The new national regime of Australian Consumer Law (ACL) provides, in Schedule 2 of the (CTH) *Competition and Consumer Act 2010*, for its application to the supply of education services by higher education providers. The statutory guarantees introduced by the new consumer regime are not dependent on a contract for enforcement and thus have greater potential for student availability. The guarantees in respect of services, which include ‘instructional’ services, state that the services shall be rendered with due care and skill, and that they will be of a nature, quality, state or condition that they may reasonably be expected to be fit for any purpose made known by the ‘consumer’.⁹⁰

Hitherto, it has generally been accepted by courts and tribunals that the ‘misleading and deceptive’ provisions of state and federal consumer legislation⁹¹ apply to higher education but historically students’ actions have been defeated by their failure to prove loss.⁹² The new legislation does not remove the difficulties for a court or tribunal in identifying and quantifying a student’s loss suffered as a result of deficiencies in the service or inaccuracies in information. Undoubtedly however, university administrators and judicial bodies are likely to see more threats and actions based on the ‘student as consumer’ concept.⁹³

Closely related are the many issues relating to student dissatisfaction with university decisions and student misconduct.

Student Grievances and misconduct matters

⁹⁰ ss 60 and 61, *Australian Consumer Law*. The new regime also contains provisions relating to unfair contractual terms which may well have application to a university/student contract. For a comprehensive discussion, see also Rochford F ‘So Sue Me – the Australian Consumer Law in Higher Education’. Paper presented at the Annual Conference of the Australia and New Zealand Education Law Association (ANZELA), 3-5 October 2012, Rotorua, New Zealand.

⁹¹ For example, s 52 (CTH) *Trade Practices Act 1974*, now replaced by s 18 (CTH) *Competition and Consumer Act 2011*.

⁹² See, for example, *Fennell v ANU* [1999] FCA and *Kwan v University of Sydney Foundation Program Pty* [2002] NSWCTTT 83. Also see Kamvounias P & Varnham S ‘Getting What They Paid For: Consumer Rights of Students in Higher Education’ (2008) *Griffith Law Review Special Issue*, 306-332.

⁹³ See Corones S ‘Consumer Guarantees and the Supply of Educational Services by Higher Education Providers’ (2012) 35(1) *The University of New South Wales Law Journal*, 1-30, and Fleming H ‘*Student Legal Rights in Higher Education: consumerism is official, but is it sustainable?*’ Paper presented at the 20th Annual Conference of the Australia and New Zealand Education Law Association (ANZELA), 2-4 October 2011, Darwin, Australia.

The University Visitor has a long tradition, inherited from the UK university system, of being the body responsible for the internal resolution of disputes between universities and their members (their students and staff).⁹⁴ The founding statutes of many Australia universities still make provision for the office of Visitor, with the Governor in the relevant jurisdiction being in that role in the case of public universities.

However, in most universities, the visitorial jurisdiction to deal with internal disputes has now been removed and the Visitor has merely a ceremonial role. Where the visitorial jurisdiction remains, the Visitor may deal with disputes arising from the interpretation and administration of the university's internal statutes, ordinances or regulations, and has the power to right a wrong done to a member or holder of office in the university, but not to deal generally with rights and liabilities.⁹⁵

A cursory look through the reports of Australian state and federal courts and tribunals reveals a not inconsiderable number of student challenges to all manner of decisions made by universities. These include those relating to admission, course content, assessment, academic progress and misconduct. Equally, there is a wide variety of courses of action which students pursue.⁹⁶ Against public universities there is the public law Application for Judicial Review. However, though finding acceptance in the state courts, the High Court affectively closed that availability to students in the case of *Griffith University v Tang*,⁹⁷ at least in relation to Commonwealth and Queensland legislation governing judicial review. The majority of Judges there found that decisions made pursuant to university policies and processes were not 'administrative decisions' made 'under an enactment' so as to be challengeable in public law.⁹⁸

⁹⁴It should be noted however that the extent of the Visitor's jurisdiction was often in dispute. See for example Matthew J G 'The Office of the University Visitor (1980) *University of Queensland Law Journal* 152, and Sadler R J 'The University Visitor: Visitorial Precedent and Procedure in Australia' (1981) *University of Tasmania Law Review* 2.

⁹⁵ For discussion of the functions and role of university visitors in Australia see *Bayley-Jones v University of Newcastle* (1990) 22 NSWLR 424; 21 ALD 746 SC(NSW); *Re Mitchell* (1992) 57 SASR 573; *Re La Trobe University*; *Ex parte Hazan* [1993] 1 VR 7.

⁹⁶ For a comprehensive analysis of student/university litigation, see Kamvounias P & Varnham S 'Legal challenges to University Decisions Affecting Students in Australian Courts and Tribunals' (2010)34(1) *Melbourne University Law Review*. 140-180. For a current list of reported cases, see Jackson J, Fleming H, Kamvounias P & Varnham S 'Student Grievances and Discipline Matters Project Report' (2009).

<http://www.olt.gov.au/resources?text=student+grievances+and+discipline+matters>

⁹⁷ (2005) 213 ALR 724.

⁹⁸ The applicable legislation was (CTH) *Administrative Decisions (Judicial Review) Act 1977*, and (Qld) *Judicial Review Act 1991*.

There may well be however the ability for Australian students to challenge university decisions at common law or in specific instances under other enactments, for example under Commonwealth or State freedom of information or privacy legislation.⁹⁹ Consistent with judicial authority elsewhere, Australian courts and tribunals are disinclined to allow judicial scrutiny of decisions involving academic judgement or assessment.¹⁰⁰ A handful of students have taken private law suits in negligence with almost universal lack of success. In one case it was accepted that the student had a potential claim in negligence but the plaintiff failed to return to pursue this argument in substance.¹⁰¹ As noted above, students have thus far encountered hurdles in using consumer protection provisions, but this may be about to change.

Far and away the most common action taken against Australian universities is in the area of discrimination. In most cases the allegations are thinly veiled attempts to persuade a court or tribunal to revisit a decision of academic judgement in respect of the students. The students' allegations of discrimination may be either racial, gender based, or on the grounds of the student's disability. The allegations may be made as a breach of the (CTH) *Disability Standards for Education 2003*, under the (CTH) *Disability Discrimination Act 1993* or the equivalent state legislative provision in a state tribunal or court. The statutes provide that it is unlawful direct or indirect discrimination where the complainant (the aggrieved person) was treated differently on the basis of their physical characteristic.¹⁰² Most frequently in these cases, the courts or tribunals, while showing considerable sympathy for the student where the treatment has clearly been unfair, will be unmoved to find that discrimination has been proven in terms of the statutes.¹⁰³ The situation is similar with almost all actions and the case law in this area documents a series of failed proceedings for students. The almost universal lack of success is either on technical grounds or on the facts.

While it is clear that litigation is not working for students, neither can it be working for universities in terms of time, money and energy expended on fighting such claims in the courts.

⁹⁹ For example, a student at the University of Melbourne succeeded in overturning a decision of the university not to release assessment marking schemes, in *McKean v University of Melbourne (General)* [2007] VCAT 1310 (31 July 2007).

¹⁰⁰ *Griffith University v Tang* (2005) 221 CLR 99 per Kirby J at 165, *Hanna v University of New England* [2006] NSWSC 122 (5 April 2006), *Walsh v University of Technology, Sydney* [2007] FCA 880 (15 June 2007).

¹⁰¹ *Dudinski v Griffith University* [1999] FCA 740

¹⁰² (CTH) *Disability Discrimination Act 1992*, ss 5 & 6.

¹⁰³ For a comprehensive discussion of students' actions in discrimination against their universities, see Varnham S & Kamvounias P, 'Unfair, Unlawful, Or Just Unhappy? Issues Surrounding Complaints of Discrimination Made by Students against Their Universities in Australia' (2009) 14(1) *International Journal of Law and Education*, 5-22.

Many Australian universities now have a Student Ombudsperson, for example, the University of Technology, Sydney has the office of the Student Ombud, whose terms of reference are modelled on the public service ombudsman and the powers are of investigation and recommendation. Other universities have a Dean of Students, for example, the Australian National University, whose role may range from acting in an advisory capacity to investigation and mediation.¹⁰⁴

Conclusion

It has been the aim of this paper to outline the major changes and innovations in tertiary education in Australia over the past few years. To say that the sector in Australia has undergone significant upheaval is an understatement, and the sands continue to shift. The sector has mostly embraced TEQSA and adapted to the idea of a national regulator and registration, the Higher Education Standards and the Regulatory Risk Framework. The objections of many universities that they are ‘caught in the web’ designed for the oversight of private providers has largely abated.

In terms of research, the second round of ERA has taken place and while so far, the sky hasn’t fallen in, the feeling is that the real impact is yet to come. The sector awaits release of the Research Standards and the Teaching and Learning Standards (the non-threshold standards), and many universities have taken the opportunity to have input into this discussion.

The effects of demand driven education on the sector will take some time to surface and there are many doomsayers.¹⁰⁵ The challenges are obvious, not the least being how best to increase participation in higher education without any sacrifice to quality within budgetary constraints. Another primary question concerns that the relationship between all the new and reshaped bodies: the Higher Education Standards Panel, TEQSA, and other groups such as the Office of Learning and Teaching (OLT) and the Advancing Quality in Higher Education (AQHE) reference group? Where does the Compacts system fit and how will it pan out for universities? Will the five TEQSA

¹⁰⁴ For a report on university grievance and misconduct matters in Australia, see ‘Student grievances and discipline matters: Final Report’ and ‘Good Practice Guide for handling complaints and appeals in Australian universities’ (2009) Jackson J, Fleming H, Kamvounias P and Varnham S. Accessed www.olt.gov.au (the Office of Learning and Teaching website).

¹⁰⁵ One of the possible unintended consequences was reported in a national newspaper as helping private providers as ‘an increasing pool of would-be students rejects universities’. Tim Jordan of Think Education is quoted as saying ‘Students are not enjoying sitting in a 1000-seat hall without access to a lecturer’ *The Australian*, 25 July 2012.

sets of standards operate separately in terms of regulation of both self-accrediting universities and non-self-accrediting institutions (private providers) and will TEQSA be bound to consider only those Standards as formulated or can other factors be taken into account? How will the sector cope, or importantly, aim to reduce, the inevitable ensuing paper work and bureaucracy?

And what of the central group of stakeholders, on whom the system relies, the academics? They seem to be overlooked thus far. Comfortingly, this chasm has been recognised by Dr Carol Nicholl, Chief Commissioner of TEQSA who has stated that in her view one of the tensions in the new environment within the sector is that between the senior executives, and the ‘lived experience’ of academics as it plays out on a daily basis.¹⁰⁶ The many, often competing demands on individual academics are ever clearer. They are at the forefront of maintaining quality in their courses, and excellence in teaching and learning. They are required to demonstrate quality in their research by evidence of its impact. All the while they must deal with and absorb the rapid advance of technology into all aspects of their work.

The government is under pressure to ensure the fiscal sustainability of higher education outside the vulnerabilities of the international market, and the sector awaits its response to the Final Report of the Review of Bulk Funding.¹⁰⁷ In a demand-driven system, how much longer will it be able to resist the argument for deregulation of university fees? A troubling report has just been released report by the Grattan Institute, a government ‘think-tank’ which proposes a new public-interest test for government investment in higher education.¹⁰⁸ In essence it propounds the removal of university subsidies for courses for which the private benefit to the student in terms of job opportunities, income and status, outweigh the benefit to society. The media statement heralding release of the report says:

Tuition subsidies merely redistribute income to students and graduates. The general public particularly those who do not go to university, are worse off. They forgo other government benefits or pay higher taxes while receiving nothing additional in return.¹⁰⁹

¹⁰⁶ Dr Carol Nicholl, “Higher Education: Risky Business?” Q & A Academic Board Forum, University of Technology, Sydney, 26 July 2012.

¹⁰⁷ n 21.

¹⁰⁸ “*Graduate Winners: Assessing the public and private benefits of higher education*’ Andrew Norton, Grattan Institute, Australia, August 2012.

¹⁰⁹ Media Release, ‘*Graduate Winners should pay more*’, Grattan Institute, Australia, 5 August 2012.

And the author goes on to say that in most cases and in his view, students would take their courses irrespective of the size of the subsidy. In essence, the report minimizes the effect of tuition subsidies generally, saying that the public benefit of increasing the intellectual capital of any nations – increased taxation revenues, greater productivity and growth – could be achieved without the government’s paying. Alarming, at first blush it runs counter to the government strategy of demand-driven education and widening participation. However it is viewed, the report provides a strange and limited interpretation of ‘public benefit’. It is heartening that the response of the Government to the proposals has, thus far, been less than enthusiastic. The Minister, the Hon Chris Evans, is reported as saying that increased fees would only act as a disincentive to students, but would also act as a deterrent to graduates undertaking work in high need, low paid areas.¹¹⁰ However, this is the current Labour government. Many predict a change to the right-wing Liberal party in the next election, further unsettling an already disturbed sector.

And then there is the ‘big question’: are the models of a university and a university education sustainable into the future? In the view of another Australian Vice-Chancellor:¹¹¹

The organisational forms, cultures and practices which developed over the centuries to provide university education for society’s elite have been stretched and panel beaten as far as they will go for an era of mass participation in higher education. The model is too expensive, capital-intensive and inflexible. Students cannot afford to pay the proportion now expected of them, governments are wondering about value for money, industry support is marginal at best, philanthropy has higher priorities and academics increasingly say they are worn out by it.

If he is right, what will the sector look like in 2025?

¹¹⁰ ‘Uni study grants ‘no benefit’ to public’, *The Australian*, 6 August 2012.

¹¹¹ Professor Stephen Parker ‘Time to trade in a well-worn university model’ *Campus Review* 2 October 2012.

