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AUSTRALIA**

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*Chief Executive Officer:*  
Dr Glenn Withers AO

Our Ref: G-04-023

17 January 2012

Dr Carol Nicoll PSM  
Chief Commissioner  
Tertiary Education Quality and Standards Agency  
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enquiries@teqsa.gov.au

Dear Dr Nicoll

### **Fees for TEQSA Services**

Universities Australia welcomes this opportunity to make the following comments on the proposed fees for TEQSA services through 2012-13 as provided to us in an email dated 3 January 2012.

While Universities Australia and other stakeholders were informed in November 2011 that the TEQSA fee structure would be provided in January 2012, we do have significant concerns that the material provided on 3 January does not provide a sufficient basis for informed consultation. We wish particularly to draw attention to the following matters:

### **The basis of the Proposed Fees**

It is difficult to comment on the proposed fees without a better understanding of the reasoning behind the figures. This would no doubt be explained at least to a significant extent in a Cost Recovery Impact Statement (CRIS), which we understand has not yet been published.

The proposed fees are provided effectively as raw figures, with little indication about how they were developed, other than an indication that they were developed with reference to existing regulatory fees. Given that TEQSA has been authorised through its legislation to impose fees on a partial cost recovery basis, Universities Australia ultimately would need a more detailed analysis that demonstrates how any proposed fees are connected to the costs expected to be incurred by TEQSA in the course of its regulatory functions. We do not consider that a simple referral to historical precedents will prove an adequate basis for a fee structure and ask that TEQSA provide more detailed calculations before further consultation.

Related to the preceding point, Universities Australia also seeks further information about the relative fee levels for the different categories of education provider. While appreciative of the complexities involved, we would appreciate the provision of data to support the apparent idea that the registration of larger, more

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complex universities requires more resources to complete than those of smaller, less complex private providers. There is the potential for some concern in this context that better-resources and well-regulated institutions may end up subsidising smaller providers out of proportion to the actual complexity of the registration and accreditation tasks, which naturally would be contrary to TEQSA's own principle of proportionality. On this point we note the Explanatory Memorandum and Regulatory Impact Statement for the Threshold Standards, in its brief discussion of fees, suggests that the fees for registration of a university were mostly in the \$40-50,000 range, which is well below the \$90,000 in the proposed fee structure. Again, further explanation of the basis of the fees would assist us in understanding this divergence.

Critically, the proposed fees are listed as the maxima for any given service. Unfortunately, no information is provided which suggests what the minima would be (if any) nor any suggestion as to how the actual amount for any given service at a specific institution would be calculated, or how the fees would be scaled within this amount. Again, particular complications arise in this context because of the specific legislative requirement that TEQSA impose only fees, and that any impositions therefore must do no more than correlate with corresponding regulatory costs.

Nevertheless, Universities Australia wishes to emphasise that we do not necessarily consider that the proposed fees are unreasonable or excessive. Without the evidence and calculations that lie behind the figures provided, it simply is the case that such an assessment cannot conclusively be made.

### **Scope of the Fee Structure**

It is unclear whether the services listed in the proposed fee structure are the only ones for which a fee will be charged. We note that the table does not provide fees for occasional audits, nor for registration and other costs incurred as part of the requirements of the *Education Services for Overseas Students Act 2000*. Lack of clarity as to the amount of any additional fees to be charged will have impact on institutional budgeting, and thus they should be made available as part of the consultation process.

### **Consultation Process and the Passage of the Legislative Instrument**

In terms of the consultation process around the fee structure, while understanding the time and other inevitable constraints operating upon TEQSA, Universities Australia has concerns relating to the current exercise. The lack of detailed information noted above, and the short time period for consideration, present serious difficulties for Universities Australia and its members in providing comment, and risks complication under the relevant consultative stipulations for government regulations. This is highly undesirable, as both the sector and TEQSA desire the prompt achievement of regulatory certainty in the context of fee structures.

In previous correspondence and documentation, including the Explanatory Statement for the *Determination of Fees (AUQA Audits) No. 1 of 2011* and the Explanatory Statement for the Threshold Standards, it is noted that it was envisaged that a comprehensive fee instrument, including a Cost Recovery Impact Statement, would be developed in consultation with stakeholders. To date, we have not been provided with the CRIS, which would greatly assist us in commenting on the fee structure, and contribute to a more complete process for determining regulatory fees.

### **Legislative Scrutiny**

We note that a consideration relevant to all the matters raised thus far is that the proposed fees have been determined under the powers of Section 158 of the *Tertiary Education and Quality Standards Agency Act 2011* (TEQSA Act), and as a legislative instrument, will be subject to the to *The Legislative Instruments Act 2003* (LIA). The instrument will also be subject to scrutiny by the Senate Committee on Regulations and Ordinances (SCRO). Universities Australia is concerned that the fee structure, in its current form, may have difficulty passing the scrutiny of the SCRO on at least two fronts.

Firstly, according to the LIA the contents of a legislative instrument should be subject to appropriate consultation, including the provision for adequate opportunity for stakeholder comment if at all possible. Given the comment made earlier in this submission, it clearly is arguable that the timeline provided to Universities Australia (and presumably other stakeholders) before the fees are put into effect on 29 January 2012 is sub-optimal in this regard. Our view is that the reasons for the abbreviated consultation therefore should be elucidated in the Explanatory Statement in order to reassure both the sector and the SCRO.

Secondly, we note that a legislative instrument must have certainty of meaning and operation, both as a matter of practice and as a matter of law, particularly in the context of the imposition of public exactions, and in association with the statutory language of “determination”. There are concerns that the lack of clarity around the method of calculation and the idea of the “maximum fee”, whatever its currency and desirability as a matter of administrative practice, may cause concern for the SCRO, especially if any of the relevant fees are considered by different parts of the sector to be potentially excessive. Without a detailed explanation of the basis of the fees, such consideration is possible.

## Way Forward

Notwithstanding all of these points, Universities Australia understands the real time constraints under which TEQSA is operating in erecting a fee regime; the need that such a regime indeed be in place by 29 January; and the complexities of wider governmental imperatives operating upon this process. Consequently, Universities Australia suggests that the following approach be adopted in relation to the stipulation of the relevant fees.

*In terms of principle*, and without wishing to pre-empt further discussion on what specific form the final fee structure may take, Universities Australia proposes the following as relevant principles:

- As a matter both of legislative and practical requirement, Fees charged should be clearly connected to the actual cost incurred by TEQSA in undertaking the service. This connection is likely to reflect the following:
  - The size and complexity of the organisation or course being assessed;
  - The resources required to assess the organisation or course; and
  - The nature of the relative risk of the organisation or course;
- By reference to legal and administrative requirements of certainty, fees should be set amounts, rather than maxima
- So far as possible, fees should not be inextricably linked to the broad category of provider, which only tends to distance the connection between the charge for the service provided and the cost of providing the service by reference to the individual application of the factors set out above. It is accepted that it will not be practical for TEQSA to calibrate every fee by reference to an individual case, but it should be feasible to more closely approximate this than presently is suggested, for example, by reference to narrower sub-categories derived from such factors as size, assessment of complexity etc.

*In terms of process*, Universities Australia recognized the challenges faced by TEQSA in comprehensively formulating a fee structure in full accordance with these principles, at a time when its data is limited and its experience in the operation of the relevant legislative mechanisms virtually non-existent. In short, further evidence is required for TEQSA to effectively formulate a permanently operable fee regime.

Our suggestion would be that TEQSA, in response to the present consultative exercise, formulate a set of specific fees so far as possible in accordance with the principles enunciated here, based upon what historical and other evidence presently exists, but explicitly stated as being interim in nature. A formal indication then could be given that these fee amounts would be formally reviewed after a given period – say, one year – with a new fee instrument fully in accordance with the relevant principles being made after full consultation and on the basis of much enriched evidence immediately thereafter. This process both would allow TEQSA to reach its preliminary timeline, and arrive at a comprehensive fee schedule within a reasonable time.

Universities Australia would strongly urge TEQSA to move to the position of a final, evidence-based structure as quickly as possible, with a view of maintaining confidence in its legislation's financial base.

Universities Australia is committed to working with TEQSA to ensure that the ultimate fee structure is equitable and appropriate for its purpose.

Yours sincerely

A handwritten signature in black ink that reads "Glenn Withers". The signature is written in a cursive, flowing style.

Dr Glenn Withers AO  
**Chief Executive Officer**