

**WHEN IS AN AUDITOR REALLY A REGULATOR? THE
METAMORPHOSIS OF THE AUSTRALIAN UNIVERSITIES QUALITY
AGENCY: IMPLICATIONS FOR AUSTRALIAN HIGHER EDUCATION
PUBLIC POLICY**

DOUGLAS BLACKMUR*

The Australian Universities Quality Agency (AUQA) is a company owned by national, state and territory Ministers of Education. It is not a *de jure* regulatory authority. This article argues, however, that AUQA performs an important *de facto* public regulatory role in respect of the performance of various institutions, and that the implications of this for public policy ought to be explored. The analysis in this article is confined to the university part of AUQA's activities. AUQA performs a role whereby the performance of Australian universities is measured against objectives and standards, some of which are determined by parties external to the universities. These parties include AUQA. Some of the externally determined standards are implicit, others are explicit.

AUQA's *de facto* regulatory powers can be exercised in two principal ways. Its Board can, firstly, recommend sanctions to government if it is not satisfied with the responses of a university to its requirements. Secondly, it can exert significant pressure on universities through highly public processes of engagement with those universities which AUQA decides do not meet its expectations. This article adduces evidence of AUQA's *de facto* regulatory behaviour. It outlines some public policy implications and suggests, for example, that this behaviour be governed, in general, by the principles of efficient regulation, and, in particular, by Australian government regulation impact statement processes. The article also argues that efficient implementation of these proposals cannot be achieved under AUQA's current legal form.

I INTRODUCTION

The Australian Universities Quality Agency (AUQA) is a company limited by guarantee under Australian corporations law. It was established in 2000. The members of the company are the national, state and territory ministers responsible for higher education in the Australian federal political system.¹ Engagement with

* Extraordinary Professor, University of the Western Cape, South Africa. I acknowledge the assistance of Myles McGregor-Lowndes, Queensland University of Technology, on certain matters of Australian corporations law. Gina Verberne discussed many of the arguments with me and advised on style and presentation. Glyn Davis, University of Melbourne, commented extensively on the analysis. A very special debt is owed to Gavin Moodie, Griffith University. His unstinting willingness to advise me on the dynamics of Australian higher education regulation, and to offer robust criticisms of my arguments, is deeply appreciated. The usual caveats apply. A version of this article was accepted as a reserve paper by the chair of the local organising committee of the 2007 International Network of Quality Assurance Agencies in Higher Education, Toronto Conference. A senior member of AUQA (and INQAAHE), however, overruled this decision.

¹ The Constitution of AUQA contains some notable provisions. The chair of meetings of members, for example, is occupied by the chair of 'the Ministerial Council' which body is not defined or otherwise mentioned in the Constitution. To give it its full title, this body is

AUQA's quality assurance processes is compulsory for Australian universities. Refusal by a university to participate invites the possibility of severe sanctions.² AUQA's objects, as far as they are relevant to universities, are

- (a) to arrange and manage a system of periodic audits of quality assurance arrangements relating to the activities of Australian universities ...;
- (b) to monitor, review, analyse and provide public reports on quality assurance arrangements in self accrediting institutions ...;
- (c) to report on the criteria for the accreditation of new universities ... as a result of information obtained during the audit of institutions ...; and
- (d) to report on the relative standards of the Australian higher education system and its quality assurance processes, including their international standing, as a result of information obtained during the audit process.³

Discharging at least parts of this mandate arguably poses some significant challenges for AUQA. Thus, for example, in respect of object (d) it is difficult to understand how judgments on 'the relative standards of the Australian higher education system and its quality assurance processes, including their international standing' could properly be made on the basis of information obtained during audits of Australian institutions. At the very least, relevant international comparative material would also need to be obtained. A related point can be made with respect to object (c) in that institutional audits may or may not provide information adequate to meaningful reports on the nature of the criteria against which applications for university status might be determined.

In the event, AUQA has chosen to concentrate its efforts on achieving the first two objects. In this respect

AUQA bases its audits on each organisation's own objectives, together with the MCEETYA *National Protocols for Higher Education Approval Processes* ...and other relevant legal requirements or codes to which the organisation is committed. The major aim of the audit is to consider and review the procedures an organisation has in place to monitor and achieve its objectives.⁴

This is, however, arguably misleading. AUQA has moved well beyond its 'auditing and reporting' mandate to become the *de facto* regulator of important aspects of Australian university performance. This article adduces evidence in

the joint national, state and territory Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA). Constraints on conflict of interest in the case of directors are relatively weak, and there is nothing in the Constitution which actually obliges the directors to meet. In the case of board meetings which are not quorate, an individual director may convene a general meeting of members (i.e. of Ministers, not the Board!) to deal with the agenda. AUQA, *Constitution of Australian Universities Quality Agency* (2000) clauses 6.3(b), 13.2, 13.4, 14.2(d) <www.auqa.edu.au> at 17 November 2006.

² *Higher Education Support Act 2003* (Cth).

³ AUQA, *Constitution of Australian Universities Quality Agency*, above n 1, clause 1.5.

⁴ AUQA, *Report of an Audit of Murdoch University* (2006) 1 <www.auqa.edu.au> at 17 November 2006.

support of this contention, and argues that a case can be made for extending the accountability processes which govern AUQA's activities to include those typically applied by both Australian and other governments to independent, statutory regulators in general. The most effective way of achieving this may be to reconstitute AUQA as, or to replace it with, a national, statutory regulator. If the national government is not inclined to do this by legislation, MCEETYA agreement to impose a revised accountability regime on AUQA in its current legal form, which accepts its regulatory *fait accompli*, may be a feasible policy option. Other options include a fundamental redesign of the processes and institutions of higher education quality assurance in Australia; instructing AUQA to abandon its regulatory policies; and maintaining the *status quo*. These options are considered briefly.

II AUQA: *DE FACTO* REGULATION OF AUSTRALIAN UNIVERSITY PERFORMANCE

There is no suggestion in any of AUQA's publicly available documents that its role is predominantly regulatory. Quite the contrary: this function, according to AUQA, is performed by governments.⁵ AUQA acknowledges that its audits embrace certain activities and standards which are externally imposed on universities through, for example, legislation.⁶ In terms of its own responsibilities, however, AUQA maintains that it 'does not impose an externally prescribed set of standards upon auditees, but rather uses, as its primary starting point for audit, each organisation's own objectives'.⁷ AUQA's Audit Manual, other AUQA documents, and, for example, the report of the audit of Murdoch University (one of the most recent), however, contain considerable evidence that AUQA's own goals and standards are, in fact, imposed on auditees in important instances. This is a defining characteristic of regulatory purpose and effect.

Evidence which supports these contentions can be found, in the first instance, in a consideration of AUQA's Mission Statement which includes a promise that 'AUQA will provide public assurance of the quality of Australia's universities and other institutions of higher education'.⁸ Such assurance must, however, require AUQA to define either national standards, or standards for each university, which it believes the public will accept or which it has been mandated to decide on behalf of the public.⁹ AUQA necessarily imposes, therefore, external standards (its own or those which it guesses the public would endorse) on universities despite its assertions to the contrary. It is, furthermore, only prepared to respect self-regulation with respect to the dimensions of objectives as long as universities do not set 'inappropriate' objectives and as long 'as institutional pride and academic professionalism means that low objectives are rarely set'.¹⁰ Regulation of Australian

⁵ AUQA, *AUQA Information* (2006) <www.auqa.edu.au> at 17 November 2006.

⁶ AUQA, *Audit Manual. Version 2.1* (2005) 10 <www.auqa.edu.au> at 17 November 2006.

⁷ *Ibid* 1. See also, 'Testing time for quality agency', *The Age* (Melbourne), 24 April 2002.

⁸ AUQA, *AUQA Information*, above n 5.

⁹ AUQA, paradoxically, does not regard the general public as a stakeholder in its activities. Public submissions on AUQA's performance were not solicited during the recent AUQA Review. There is, furthermore, no evidence in any of its documents that AUQA has ever engaged in any form of dialogue in order to obtain an understanding of the criteria and/or standards concerning university performance which the general public might regard as acceptable.

¹⁰ AUQA, *Frequently Asked Questions* (2006) <www.auqa.edu.au> at 27 November 2006.

higher education quality is thereby conducted in terms of principles which include those associated with a 'fitness-of-purpose' approach.¹¹

AUQA, moreover, has certain goals for Australian universities. These include, for example, 'the growth of an organisational culture in HE that values quality and is committed to continuous improvement'.¹² Valuing quality presumably means that each university demonstrates a commitment to a policy which requires all participants to meet, or exceed, certain minimum standards in respect of all of its activities. Continuous improvement, by the same token, presumably means that each university raises its minimum standards for each of its activities 'continuously' and meets or exceeds them. It may also involve each university revising the range of its activities (qualities) within the constraints defined by, for example, statutes and subordinate legislation.

Pursuit of these goals in effect involves the imposition of standards prescribed by AUQA upon Australian universities in respect of their processes and outcomes and, obviously, their resource allocation and budgetary processes and decisions. AUQA's implicit minimum standard with respect to expenditures is that each university must allocate financial and other resources to the extent necessary to satisfy all AUQA's requirements. Other priorities must yield to these. On occasions, individual universities may be able to persuade AUQA that certain requirements cannot be met for budgetary reasons or that attending to other matters is preferable, but this is likely to be the exception rather than the rule. In this context, AUQA has maintained 'that recommendations and affirmations in audit reports may have resource implications, and that this can pose difficulties for the University. Accordingly, AUQA does not prioritise these findings; it is the responsibility of the auditee to respond in a manner consistent with its local context'.¹³ Neither of these qualifications, however, contradict the conclusion that AUQA implicitly assumes that university budgets are adequate to finance all of its requirements within its nominated time period.

AUQA's model of a 'quality audit' includes a process of judging the extent to which a university's 'planned arrangements ... are suitable to achieve objectives'.¹⁴ Such a judgment, however, cannot be made without AUQA employing standards against which it assesses matters of suitability. With respect to the objectives themselves, the AUQA model requires that they be determined against 'appropriate benchmarks'.¹⁵ How, then, is 'appropriate' defined? In this respect a university may explain to AUQA the nature of the benchmarks it used in setting objectives. Even if, however, AUQA endorses these it must necessarily be comparing them to its own standards of what constitutes appropriate benchmarks. Some support for this contention also comes from a claim to the effect that AUQA has 'made it compulsory for universities to compare themselves on several measures against international counterparts'.¹⁶

AUQA is also concerned with other dimensions of the processes by which objectives are decided. Thus 'AUQA audit panels are likely to discuss with the

¹¹ The AUQA Review panel characterises AUQA's audit model as 'the fitness-for-purpose model'. The panel clearly failed to identify the 'fitness-of-purpose' features of the model. AUQA, *Review of the Australian Universities Quality Agency. Final Report* (2006) 9 <www.auqa.edu.au> at 17 November 2006.

¹² AUQA, *Audit Manual. Version 2.1*, above n 6, 7.

¹³ AUQA, *Report of an Audit of Murdoch University*, above n 4, 2.

¹⁴ AUQA, *Audit Manual. Version 2.1*, above n 6, 9.

¹⁵ *Ibid.*

¹⁶ G Craven, 'A lighter hand on the leading rein', *The Australian* (Sydney), 14 June 2006.

auditee such things as the ways in which particular objectives have been decided, the factors which were taken into account in their development and the stakeholders that were consulted'.¹⁷ Given that such discussions are conducted to inform audit judgments, AUQA must again necessarily be referring to its own criteria and standards (or those of which it approves) in respect of such process matters. A model of appropriate stakeholder consultation is, for example, implicit in these audit arrangements.

The execution of policies and strategies is audited by AUQA in terms of questions such as 'Is the approach being implemented in the best possible manner?' This judgment, however, can only be made by reference to criteria and standards with respect to 'best' which, ultimately, AUQA must sanction. Presumably it does not uncritically accept a university's definition of 'best'. AUQA also examines 'an organisation's results as a means of determining how well the deployment is achieving the planned approach'.¹⁸ Determining 'how well' involves comparing outcomes with benchmarks which, in the final analysis, are subject to AUQA approval.¹⁹

AUQA's claim that it does not impose an externally prescribed set of standards on each Australian university is, moreover, extremely difficult to sustain in the light of the fact that it makes 'judgments about the appropriateness and effectiveness of quality assurance plans and processes, and their relation to nationally and internationally accepted good practices'.²⁰ Unless AUQA concedes to *each* university the right to determine what constitutes 'nationally and internationally accepted good practices' (a contradiction), and to confine its audits to confirming or denying university statements as to the extent to which these have been met, then it is a nonsense to claim that criteria and standards approved by AUQA are not integral to its audit processes and requirements of universities. And what constitutes 'good practices' is often contested ground and far from settled doctrine. This approach is, moreover, consistent in important respects with a model which uses audit for purposes of periodic university accreditation (a function, incidentally, implied by AUQA's Object 3 and Object 4).

The AUQA audit model imposes a further external standard on universities. The audit process emphasises peer review. Regardless of their preferences, universities have no choice but to have their qualities assured by means of the characteristics, processes and standards which define AUQA's peer review model, even though audit need not necessarily be conducted in this manner, and even though peer review involves risks (which may or may not be worth accepting) which include the possibility that some members of review panels may employ their own personal criteria and standards in conducting an AUQA audit.²¹ The manner in

¹⁷ AUQA, *Audit Manual. Version 2.1*, above n 6, 9.

¹⁸ *Ibid.*

¹⁹ It would be interesting to examine precisely how AUQA audit panels actually establish the causal connections between implementation processes and outcomes. Presumably AUQA's methods of establishing the linkages have eliminated the risk of *post hoc ergo propter hoc* contamination.

²⁰ AUQA, *Audit Manual. Version 2.1*, above n 6, 17.

²¹ This may occur if panellists are asked to evaluate sometimes complex systems of, for example, strategic planning, strategic management, corporate governance, budgeting, investment and capital allocation, and industrial relations which lie outside their fields of professional expertise. The temptation to rely on personal experiences and opinions, and/or to defer to the judgments of any other panel members who are experts in some or all of these matters, may be particularly strong under these circumstances (even though AUQA's auditor training attempts to address this). Especially where matters of policy design and implementation are concerned, it is arguable that a review process which

which Australian universities are accountable to the wider community in matters of quality assurance is clearly regulated in important respects in terms of a non-negotiable 'one size fits all' model the nature of which is determined and administered by an external body.

AUQA's audit report on Murdoch University provides illustrations of the use of external standards. This report, for example, asserts that academics at Murdoch and elsewhere are 'increasingly ... being employed on a casual basis ...' and are 'operating under a less academically friendly industrial relations climate'. Such circumstances are claimed to constitute a source of threats to the continuation of the university's commendably 'strong institutional culture of identity, enthusiasm, and commitment'.²² Aspects of Murdoch's performance were thus audited by AUQA on the basis of the panel's criteria and standards with respect to what it considered was 'appropriate' public policy in matters of employment relations.

The Report also commends Murdoch 'for achieving consistently high outcomes in the course experience questionnaire survey, and ... for achieving high research performance outcomes'²³ for a university of its age and size'.²⁴ Several questions arise in this regard. Does Murdoch, for example, determine through various internal processes what is meant by 'high' in these contexts? If so, did AUQA simply endorse ('validate') these meanings? If not, how was 'high' determined and by whom? And which particular standards of research performance explicitly recognise institutional 'age and size'? Are these standards exclusive to, and determined by, Murdoch, or are they systemic and developed or endorsed by AUQA?

The quality of the relationships between Executive Deans and Heads of School at Murdoch was audited by AUQA. It found that 'this interface is not optimal in some instances'.²⁵ Optimality, however, must be defined in terms of some standards: what are the dimensions of an optimal interface in this context? A key issue for the purposes of this article is whether the panel's judgment was based on Murdoch's standards of optimality or on other standards endorsed by AUQA. If the latter, then AUQA's conclusion was clearly based on externally imposed standards. Attention is also drawn in the Murdoch audit report to 'a large and potentially problematic number ...' of Academic Board sub-committees.²⁶ Such a judgment must be informed by some principles and standards of organisational design – is the AUQA report suggesting that Murdoch's arrangements are inconsistent with its own preferred design principles and standards or with those contained in other models of organisational structure of which AUQA approves?

Similar considerations arise in connection with AUQA's judgments concerning Murdoch's risk identification and management model, its strategic planning model,

draws together a range of appropriate experts has superior net advantages compared to peer review.

²² AUQA, *Report of an Audit of Murdoch University*, above n 4, 10.

²³ The AUQA Report on the Murdoch audit makes reference to research productivity measures and to Murdoch's performance with respect to them. But the measures are not productivity measures at all. Increases in the dollar amount of research income from various sources do not measure productivity changes, while Murdoch's movement in a national research productivity ranking from 14th in 2001 to 8th in 2004 is not evidence of improved research productivity at Murdoch either: it is quite possible for an institution's research productivity to fall over time even though its performance is rising in the rankings. *Ibid* 40.

²⁴ *Ibid*.

²⁵ *Ibid* 12.

²⁶ *Ibid* 13.

and matters of gender.²⁷ The Murdoch audit report also provides an illustration of what might arguably be called ‘soft regulation’ in that the University apparently thought it politic for the structure of its 2005 whole-of-institution audit performance portfolio to be ‘influenced by AUQA’s audit practices’, and for the panel, which conducted this audit, to be chaired by an AUQA auditor.²⁸

The language used in AUQA’s Audit Manual testifies to the agency’s regulatory character: ‘There is an expectation on the part of society, state and federal governments, and AUQA itself, that an institution ... will take whatever actions are necessary in relation to AUQA’s audit findings and recommendations’.²⁹ One test of the presence of regulatory power is to examine the options available to an agency if its requirements are not met to its satisfaction. If it can, at the very least, initiate a ‘sanctions’ process, then it possesses regulatory power.³⁰ In the case of AUQA’s expectations ‘funding could be at risk if action were not taken’.³¹ But much more than university funding is arguably at risk under these circumstances. The Australian Qualifications Framework Advisory Board could conceivably remove the program/institution from the list of programs/institutions authorised to enrol international students. In the ultimate, a relevant government could dis-establish any university which did not meet AUQA’s requirements.³²

The process whereby AUQA ensures that its requirements are met involve, briefly, a university progress report which must be publicly available, and which must meet a standard to the effect: ‘that an informed person reading the Audit Report recommendations and the Progress Report would be able to understand what has been done and whether it addressed the issue[s] raised by AUQA’. If the report does not, in AUQA’s judgment, meet this standard then this is conveyed to the university together with, amongst other things, a deadline by which the report must be rectified. Failure to do this to AUQA’s satisfaction triggers correspondence with the relevant minister and a mandatory consultation process between, on the one hand, two people from the auditee (selected by the auditee) and, on the other, one AUQA staff member and one AUQA auditor (selected by AUQA). If this process does not produce agreement then the AUQA Board issues a report to the minister ‘possibly recommending a sanction’.³³ AUQA, by the same token, has the authority to accept a university’s explanation if it fails to implement a recommendation.³⁴ There is thus the potential here for AUQA to perform a *de facto* legislative function as it builds up

²⁷ Ibid 14, 17, 19, 48.

²⁸ Ibid 20.

²⁹ AUQA, *Audit Manual. Version 2.1*, above n 6, 29. AUQA’s (self-conferred?) mandate to speak on behalf of ‘society’ is discharged selectively and strategically. AUQA determined that the panel which conducted the recent AUQA Review, for example, would not invite submissions from the general public from within and outside Australia. Instead, consultation was restricted to the AUQA Board, staff, auditees, auditors, and other selected parties. Members of the public apparently were thought to have nothing worthwhile to contribute to the AUQA Review. How AUQA can claim, as it does, that it nourishes public confidence in the quality of Australian higher education while at the same time excluding the general public from any input into its Review is arguably self-serving and elitist.

³⁰ The act of recommending a sanction is tantamount to a sanction in and of itself especially if the recommendation, or the threat to make one, is public knowledge (or is threatened to be made public knowledge).

³¹ AUQA, *Audit Manual. Version 2.1*, above n 6.

³² Personal communication from G Moodie with the author, 16 June 2006.

³³ AUQA, *Audit Manual. Version 2.1*, above n 6, 31.

³⁴ There is scope for a university to offer ‘sound reasons why the Recommendation/Affirmation will not be pursued’. ‘Sound’ is determined against AUQA’s standards: this involves the use of regulatory power. Ibid 30.

a body of 'case law' which reflects the grounds on which it has accepted any such explanations.³⁵

III AUQA AS A REGULATOR: IMPLICATIONS FOR PUBLIC POLICY

AUQA has assumed important regulatory responsibilities. It is thus pertinent to enquire into what criteria and standards ought to govern its performance, and, more broadly, whether AUQA is necessarily the best means by which governments can regulate the quality of Australian higher education. This section of the article is largely concerned with the former question, although some matters relevant to the second will be raised briefly.

AUQA is exempt from some accountability processes since MCEETYA did not conceive of it as a regulator. AUQA's objects are not regulatory in nature, but its Board and management have interpreted them in ways, and have implemented processes, which have transformed AUQA into a regulatory authority.³⁶ This *de facto* state of affairs arguably requires a ministerial response. The options could include terminating AUQA's regulatory behaviour; conferring upon AUQA the legal form and powers of an independent, statutory regulatory authority; maintaining its current legal form but imposing revised accountability requirements; dissolving AUQA in favour of alternative regulatory arrangements; or maintaining the *status quo*. Adoption of the latter option would come at the cost of maintaining a public fiction that AUQA is not a regulatory body³⁷ and permitting AUQA to remain outside several of the accountability and other rules and processes which typically govern the performance of regulatory bodies.

These rules and processes relate to matters which include defining purpose, and, particularly, objectives clearly; deciding whether the regulator is to be independent in the sense that it can determine either matters of policy and procedure (the independent central bank model) or matters of procedure only (the principal and agent model); defining governance structures and rules; determining accountability arrangements; the nature of the relationships between the quality regulator and other higher education regulatory instruments; and operational procedures and values. Space limitations prevent a comprehensive analysis of the ways and extent to which AUQA's performance is currently determined by such accountability and other rules and processes. Some selected issues are nevertheless analysed briefly.

OECD has maintained that regulators 'need to be protected from the risk of capture and also need to receive clear objectives and missions to fulfil their role

³⁵ In determining which grounds are acceptable in each case, AUQA may, moreover, have to form a view on, say, the merits of matters in dispute between certain parties. A university, for example, may claim an inability to implement an AUQA recommendation on the grounds that it is prevented by the circumstances of a dispute it is having with its student body, or with another university. In order to determine whether this is an acceptable reason for non-compliance with a recommendation, AUQA presumably would have to reach judgments on various aspects (including the merits?) of the claims of the disputing parties. If such judgments, furthermore, influenced the dynamics of the dispute, then AUQA, presumably against its will, could nevertheless find itself playing a role, albeit indirect, in dispute settlement, a far cry from quality audit.

³⁶ Instances of 'mission drift' were also identified in the AUQA Review Report. AUQA, above n 11, 9.

³⁷ This fiction is maintained in the AUQA Review Report. *Ibid* 4.

within the regulatory framework'.³⁸ Clarity and precision in the matter of objectives was not achieved in AUQA's case.³⁹ MCEETYA's failure to define concepts such as 'audit', 'quality' and 'quality assurance' in AUQA's Constitution arguably gave its Board and management the space to extend AUQA's mandate unilaterally to embrace matters outside its objects such as regulation and 'managing for continuous quality improvement'.⁴⁰ Such action amounts to a form of capture from within. AUQA's regulatory demands, moreover, may have placed burdens on universities beyond those envisaged when its Constitution was drafted.⁴¹ On these grounds alone, there is a case for AUQA's current objects to be reconsidered and redrafted.

Much regulation internationally is conducted by independent, public bodies. Any reform of quality assurance regulatory systems in Australian higher education will need to address issues such as the meaning to be given to the concept of independence. Majone⁴² has argued that the term 'independent agency' is an oxymoron:

The core concept of agency implies a relationship in which the principal retains the power to control and direct the activities of the agent. In which sense, then, can one speak of an 'independent agency'? ... [T]his question exposes a serious conceptual ambiguity in prevailing ideas about the delegation of powers to regulatory agencies. There are two main reasons for delegating regulatory ... powers: to reduce decision-making costs ...; or to enhance the credibility of long-term policy commitments ...⁴³

When the former motive predominates, 'the key problem the political principals face is the tendency of the agent to enact outcomes different from the policy preferred by those who originally delegated powers. Ideally, principals should appoint agents who share their policy preferences, but this may be impossible or too costly'. On the other hand, 'when enhancing credibility is the main reason for

³⁸ OECD, 'Designing Independent and Accountable Regulatory Authorities for High Quality Regulation' (Working Party on Regulatory Management and Reform, Proceedings of an Expert Meeting, OECD, London, 10-11 January 2005) 4; F Gilardi, 'Assessing the performance of independent regulatory authorities' in 'Designing Independent and Accountable Regulatory Authorities for High Quality Regulation' (Working Party on Regulatory Management and Reform, Proceedings of an Expert Meeting, OECD, London, 10-11 January 2005) 58-9.

³⁹ AUQA, *Review of the Australian Universities Quality Agency. Final Report*, above n 11, 9.

⁴⁰ 'Continuous quality improvement' is essentially a motherhood and apple pie slogan. Uncritical adoption of such a policy ignores the possibilities that, for example, consumers (funders) may not always want it, or may not be prepared (or able) to meet the additional costs of securing it. One of the problems with what AUQA calls 'general thinking about quality' is that it implicitly assumes that the benefits of quality 'improvements' necessarily always exceed the costs of obtaining them. Reliance on this assumption removes the obligation to think seriously about the trade-offs which are involved when the resources which could be devoted to 'quality improvement' have alternative uses. It is intellectually far easier to assume these matters away. AUQA, *Frequently Asked Questions*, above n 10.

⁴¹ D Arculus, 'The Better Regulation Task Force' in 'Designing Independent and Accountable Regulatory Authorities for High Quality Regulation' (Working Party on Regulatory Management and Reform, Proceedings of an Expert Meeting, OECD, London, 10-11 January 2005) 51.

⁴² G Majone, 'Strategy and Structure: the Political Economy of Agency Independence and Accountability' in 'Designing Independent and Accountable Regulatory Authorities for High Quality Regulation' (Working Party on Regulatory Management and Reform, Proceedings of an Expert Meeting, OECD, London, 10-11 January 2005) 126-55.

⁴³ *Ibid* 126.

delegating powers ... the most efficient “technology of commitment” consists in choosing a delegate whose policy preferences differ from the (short-run) preferences of the delegating principal’.⁴⁴

In AUQA’s case, ‘independence’ is understood to mean that it must ‘be responsive to the policies of the Members but will act independently of the Members and will develop and adhere to its own policies, procedures and priorities consistent with the objects for which it was formed’.⁴⁵ This provision does not indicate decisively whether MCEETYA embraced the ‘reduction of decision-making costs’ or the ‘long-term policy credibility’ justification for delegating certain powers to AUQA. It is a matter which arguably should be addressed since it has implications, for example, for the structure of, and appointments to, the AUQA board as well as the nature of its mandate. Majone has suggested that, in a globalising world, the credibility rationale will become more important and that ‘our thinking about agency independence should reflect this fact’.⁴⁶ Acting on this advice would afford higher education quality assurance policy a status equivalent to monetary policy. The benefits, costs and risks of such a decision with respect to the economic dynamics of Australian higher education deserve detailed analysis. It would mean, amongst other things, an accountability regime which differed in some respects from that which would govern a principal/agent relationship between governments and AUQA as a regulator. Some accountability processes would, by the same token, be common to both.

These include exposure to Regulation Impact Statement (RIS) processes which is a fundamentally important characteristic of systems of regulatory accountability in Australia and internationally.⁴⁷ If higher education quality regulation in the future is to continue to be conducted predominantly by bodies sanctioned by the state, rather than by more decentralised, market-oriented processes, then ensuring that such regulation is managed and evaluated in terms of RIS mechanisms would seem essential (the general argument is developed by, for example, the Australian Productivity Commission).⁴⁸

There are presumably some public expectations in democratic political cultures to the effect that independent regulatory bodies, regardless of the rationale for their independence, will be accountable to parliament. This might assume various forms. In AUQA’s case these could include relevant national, state and territory ministers

⁴⁴ Ibid.

⁴⁵ AUQA, *Constitution of Australian Universities Quality Agency*, above n 1, clause 1.6. Presumably the ‘policies of Members’ refers to policies determined by MCEETYA, and not to those of the individual governments which are represented on MCEETYA.

⁴⁶ Majone, above n 42.

⁴⁷ Productivity Commission, Commonwealth, *Regulation and its Review 2004-05* (2005) xiii-xxi, 93-6.

⁴⁸ Regulation Taskforce, Commonwealth, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business* (2006) ch 7; See also: OECD, *Designing Independent and Accountable Regulatory Authorities for High Quality Regulation*, above n 38, 5, 14; Majone, *Strategy and Structure: the Political Economy of Agency Independence and Accountability*, above n 42, 149-50; P Nicolaidis, ‘Regulation of Liberalised Markets: A New Role for the State? (or How to Induce Competition Among Regulators?)’ in ‘Designing Independent and Accountable Regulatory Authorities for High Quality Regulation’ (Working Party on Regulatory Management and Reform, Proceedings of an Expert Meeting, OECD, London, 10-11 January 2005) 164. It is somewhat surprising that AUQA has escaped the application of RIS processes which apply ‘to all Ministerial Councils and national standard-setting bodies’ given that it is a creation of a Ministerial Council. Productivity Commission, above n 47, xiv.

answering parliamentary questions, and requirements that AUQA appear regularly before parliamentary select committees and table an annual report in all parliaments which could become the subject of parliamentary debates and approval. Under its current legal form, AUQA is not obliged to comply with these requirements. Other means of addressing issues of the accountability of an independent regulatory authority include processes whereby behaviour inconsistent with its mandate could be detected and corrected; rules obliging it to conduct open board meetings and to document the reasons for each decision,⁴⁹ and ensuring that it is bound by freedom of information legislation.⁵⁰

If AUQA's regulatory activity is to be conducted essentially in terms of the principal/agent, 'economising on decision-making costs' model,⁵¹ then matters of mission drift could be identified through RIS processes and managed, in the Australian context, under the authority of the Office of Regulation Review (ORR).⁵² An appropriate model, furthermore, might be based on the 1996 Congressional Review Act. Universities, moreover, might be empowered to seek judicial relief from implementing certain AUQA's requirements on the grounds that these were outside its mandate. Further accountability safeguards would include systems of appeals against regulatory decisions to specialist bodies which can be found in several European jurisdictions.⁵³ Processes of judicial review are also available.⁵⁴ Under current arrangements, AUQA is subject to neither.⁵⁵ As far as freedom of information legislation is concerned, AUQA is not bound by national and state statutes.⁵⁶

There are several principles of efficient regulation apart from those which relate specifically to matters of accountability.⁵⁷ They have been defined by bodies such as the OECD, the Australian Productivity Commission and the Better Regulation Task

⁴⁹ Arculus, above n 41, 49; Majone, above n 42, 150.

⁵⁰ G Majone, 'Agency Independence and Accountability' in 'Designing Independent and Accountable Regulatory Authorities for High Quality Regulation' (Working Party on Regulatory Management and Reform, Proceedings of an Expert Meeting, OECD, London, 10-11 January 2005) 52.

⁵¹ Such economising involves, for example, relying on professional regulatory expertise and contextual knowledge as well as providing a scapegoat to minimise the costs to politicians should something go wrong.

⁵² For the United Kingdom, see: P Hampton, 'Key findings from the Hampton Review' in 'Designing Independent and Accountable Regulatory Authorities for High Quality Regulation' (Working Party on Regulatory Management and Reform, Proceedings of an Expert Meeting, OECD, London, 10-11 January 2005) 68; See also: S Lopez-Ayllon and A Haddou-Ruiz, 'Lessons from the Mexican Experience' in 'Designing Independent and Accountable Regulatory Authorities for High Quality Regulation' (Working Party on Regulatory Management and Reform, Proceedings of an Expert Meeting, OECD, London, 10-11 January 2005) 54.

⁵³ V Norman, 'Reform of regulatory agencies in Norway' in 'Designing Independent and Accountable Regulatory Authorities for High Quality Regulation' (Working Party on Regulatory Management and Reform, Proceedings of an Expert Meeting, OECD, London, 10-11 January 2005) 42.

⁵⁴ OECD, 'Designing Independent and Accountable Regulatory Authorities for High Quality Regulation', above n 38, 5; Arculus, above n 41, 50.

⁵⁵ Candidates for judicial review would include the principles, processes and outcomes associated with AUQA's decisions regarding what constitutes acceptable reasons for non-compliance with its recommendations.

⁵⁶ AUQA, *AUQA Policies. Policy 011: Freedom of Information* (2006) <www.auqa.edu.au> at 17 November 2006.

⁵⁷ D Blackmur, 'The South African MBA Review and the Principles of Efficient Regulation' (2006) 12(1) *Quality in Higher Education* 81-94.

Force in the United Kingdom.⁵⁸ Limitations of space prevent a full discussion in this article, but AUQA as a regulator could be constrained, for example, to issue 'notice-and-comment' invitations as part of its audit programme. Rather than AUQA determining who the stakeholders are with respect to any of its activities, such invitations would assist to define them through a process of self-selection.⁵⁹

Apart from processes of stakeholder identification, the principles of efficient regulation include, for example, a requirement to the effect that regulation should be proportional to risks.⁶⁰ In the Australian context this may involve a reformed AUQA confining its investigative, and regulatory (assuming they continue), activities to those universities and/or issues over which there have been complaints or other evidence of community and/or client dissatisfaction. Such a risk management approach might, furthermore, exempt universities which rank highly in, say, selected international league tables from AUQA's processes unless specific, potentially major concerns were identified. Bodies such as various Ombudsmen, Auditors-General and the like may be required to provide such intelligence.⁶¹ AUQA's regulatory resources might thus be concentrated to greater net advantage.

On a wider canvas, AUQA's overall policies, processes and performance might be audited and evaluated by a statutory body such as an Auditor-General or the ORR with powers to require that its regulatory behaviour conform to appropriate practices. Such enquiries may involve, amongst other things, satisfaction surveys of AUQA's clients and the general public. Investigations conducted under the authority of such independent bodies would be arguably superior to the recent review of AUQA on the grounds that the terms of reference, the 'long list' of review panel members and stakeholders were all decided by AUQA itself.

There is also a case for subjecting AUQA's performance (and, indeed, the performance of all independent, statutory regulators) to the scrutiny of the competition authorities. AUQA is a monopoly in that universities have no option but to engage with its processes: they cannot seek substitutes no matter how prestigious, expert or authoritative they may be. The behaviour of a monopoly regulator may sometimes have deleterious net effects on, in this case, the performance of the higher education sector and on the economy as a whole. Addressing this, (and the matter of the monopoly regulator's incentives to adopt appropriate international practices), through instruments which include competition in the regulation of Australian higher education may be a policy option worth evaluating.⁶²

⁵⁸ OECD, *OECD Guiding Principles for Regulatory Quality and Performance* (2005) <www.oecd.org> at 17 November 2006; Productivity Commission, *Regulation and its Review 2004-05*, above n 47; Regulation Taskforce, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, above n 48; Better Regulation Taskforce, *Regulation - Less is More: Reducing Burdens, Improving Outcomes* (2005).

⁵⁹ Majone, above n 42, 150.

⁶⁰ Arculus, above n 58, 49.

⁶¹ How, for example, would important contradictions between AUQA's evaluation of the characteristics of a university's risk management systems, and that conducted by an Auditor-General, be resolved? I assume that relationships (including matters of responsibilities and jurisdiction) between AUQA and other bodies such as Ombudsmen and Auditors-General are currently governed by various protocols.

⁶² Some issues are raised in: Nicolaides, above n 48. Theoretical issues in higher education quality regulation are discussed in: D Blackmur, 'The Public Regulation of Higher Education Qualities: Rationale, Processes and Outcomes' in Alberto Amaral, Maria Joao Rosa and Don Westerheijden (eds), *Qualms About Quality: Regulating, Translating and Transforming Quality Assurance in Higher Education* (2007). Something similar was contemplated in New Zealand in the late 1990s. One of the principal weaknesses in the

Exploring the option of replacing AUQA with an independent, statutory authority under national legislation would involve, amongst other things, careful attention to specifying its mandate. This matter is of major higher education public policy significance, and cannot be analysed in this article beyond some preliminary observations. If, for example, a new regulator is to be concerned with 'quality' then this concept requires precise definition. Quality may be conceptualised in terms of attributes and standards.⁶³ Public policy typically specifies various desired attributes of a higher education system and institutions. These may include characteristics such as teaching, research, access for members of socially disadvantaged groups, internal governance, reliance on non-government sources of funds and so on. Minimum standards for each attribute can be established against which performance is evaluated by an independent body in order to meet credibility expectations. Whether some or all of these characteristics and/or standards must be systemic, or specific to each university, is a key issue. Whether a single regulatory agency would have oversight of all of these is another. A different approach, furthermore, would involve a regulatory body acting as a complaints' investigator and/or adjudicator of last resort. Student, graduate and other client (including members of the general public) concerns would drive this system in which self-regulation would also play a central role.

Much of the discussion in this section of the article has addressed some of the issues associated with the option of conferring upon AUQA the legal form and powers of an independent, statutory regulatory authority. Other options have also been mentioned. Terminating AUQA's regulatory behaviour and relying instead on the reputation effects of any adverse audit reports to provide an incentive for changes in university behaviour seems consistent with AUQA's existing constitutional objects. The option of maintaining its current legal form but imposing revised accountability requirements may mean treating AUQA as a special case for which no substantive grounds exist and would arguably complicate existing legislation unduly by requiring AUQA to be treated as an exception. Dissolving AUQA in favour of alternative regulatory arrangements of a more market-oriented variety may well be a viable option but only if the whole structure of Australian higher education regulation were to be reformed comprehensively along these lines.⁶⁴ The impact of the pressures identified by Davis on both Australian universities and on the current system of higher education regulation (which includes AUQA as a *de facto* regulator of quality) may ultimately require a move away from sector-specific regulation undertaken by statutory authorities in favour of regulation through general competition and consumer protection law.⁶⁵

proposals was that the players and referee were identical in each of two of the regulatory bodies.

⁶³ See Blackmur, above n 62.

⁶⁴ On the structure, and the challenges posed to it, see: G Davis, 'Tiers or tears? The regulation of Australian higher education' (The Inaugural Melbourne Politics Lecture, The University of Melbourne, Melbourne, 22 November 2004). A scenario sketched by Davis envisages Australian post-compulsory education much more segregated, diverse and competitive in ten year's time than at present. Regulatory powers in this future are exercised by 'an independent body modeled on contemporary financial regulatory organisations The role of [this body] is to set and monitor standards before an organisation can call itself a college, teaching or research university. It provides accreditation and ensures consistent quality control for the sector.' Ibid 9.

⁶⁵ Nicolaides, above n 48, 156, 160.

IV CONCLUSION

Contemporary political circumstances seem to favour a fundamental reconsideration of the objectives and means of Australian higher education regulation. The Productivity Commission, for example, has noted the national government's 'commitment to reducing the regulation of universities, as well as reducing red tape and unnecessary reporting requirements'.⁶⁶ Various aspects of AUQA's methods and performance, moreover, have been criticised recently by the then Australian Vice-Chancellors' Committee.⁶⁷ The most important development in this context, however, is arguably the Australian National University's disquiet over the legal requirement that it engage with AUQA's audit and other regulatory processes.⁶⁸

The evidence discussed in this article establishes that AUQA, contrary to its public position, has moved well beyond its constitutional objects and has become a *de facto* regulator of Australian higher education quality. In this light, and leaving aside contemporary political developments, its current legal form, accountabilities and at least some of its policies and practices require significant reform. AUQA's current legal status as a company limited by guarantee under the corporations law, for example, insulates it from freedom of information legislation, judicial review, RIS processes and direct accountability to parliaments. Unless there are compelling reasons for this state of affairs to continue, the alternative of establishing an independent, statutory regulatory authority in its place is at least worth evaluating. Constitutional impediments to this seem to have largely disappeared given recent court decisions which have widened the scope of the corporations power available to the Australian national parliament.⁶⁹ Other alternatives stay under notice. These include confining AUQA to a clearly defined 'audit and report' function. The pressures for change to the nature and structure of Australian higher education, furthermore, may, however, ultimately force policy-makers to contemplate abandoning sector-specific bodies such as AUQA altogether in favour of a more general regulatory model.

⁶⁶ Productivity Commission, *Regulation and its Review 2005-05*, above n 47, 45.

⁶⁷ AVCC, *Australian University Offshore Quality Assurance: Refining not Re-defining* (2005) <<http://www.universitiesaustralia.edu.au/documents/publications/policy/submissions/AVC-C-Refining-not-Re-defining.pdf>> at 29 May 2007.

⁶⁸ J Hare, 'ANU refusing to undergo AUQA audit' (2006) 16(49) *Campus Review*.

⁶⁹ G Moodie, 'How to resist the takeover', *The Australian* (Sydney), 29 November 2006; Personal communication from G Moodie with the author, 5 December 2006.