



AUSTRALIAN
SENATE

Senate Standing Committee for the
Scrutiny of Delegated Legislation

Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate_sdsc

11 June 2020

The Hon Dan Tehan MP
Minister for Education
Parliament House
CANBERRA ACT 2600

Via email: Minister@education.gov.au

CC: dlo@education.gov.au

Dear Minister,

Tertiary Education Quality and Standards Agency Determination of Fees No. 1 of 2020 [F2020L00549]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to this matter.

Availability of independent merits review

Senate standing order 23(3)(i) requires the committee to examine each legislative instrument as to whether it unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations and interests.

Schedule A of the instrument determines the fees payable for certain assessment activities conducted by, and applications made to, the Tertiary Education Quality and Standards Agency (TEQSA). Schedule B permits TEQSA to waive or refund all or part of a fee set out in Schedule A where specified circumstances exist.

A decision by TEQSA to waive or refund all or part of a fee appears to involve at least an element of discretion, and has the potential to affect the rights and interests of higher education providers. Consequently, such decisions appear to be suitable for independent merits review. However, the committee understands that the decisions are not reviewable.

In relation to decisions under section 1 of Schedule B, the committee understands that any discretion afforded to TEQSA to refuse to waive all or part of a fee is rarely used. The committee also understands that TEQSA has waived the relevant fee in most if not all instances where the discretion has been enlivened.

The committee understands that section 2 of Schedule B is a new provision which is designed to give effect to the Australian Government's higher education relief measure, which provides for TEQSA to waive or refund fees for all applications by registered providers that fall due between 1 January 2020 and 30 June 2021. The committee also understands that TEQSA has publicly stated that all fees payable by registered providers will be waived, and that the discretion to allow refunds to be refused will only be enlivened in the narrow range of circumstances where providing refunds would be inconsistent with the policy authority for the instrument (for example, where an applicant seeks to take advantage of the fee relief measure by bringing forward applications long before they are due).

The committee appreciates that, in practice, there may be limited circumstances in which it would be necessary to provide for independent merits review in relation to a decision by the TEQSA to waive or refund a fee. However, from a scrutiny perspective, the committee remains concerned that there may still be circumstances in which a person or entity may wish to have an adverse decision reviewed. The committee considers that it would be appropriate to provide for merits review in these circumstances.

Further, where an instrument excludes or fails to provide for independent merits review, the committee expects the explanatory statement to identify established grounds for excluding review, by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merit review?* The committee notes that no such grounds are identified in the explanatory statement to the instrument.

With regard to the matters outlined above, the committee requests your detailed advice as to:

- **the appropriateness of amending the instrument to provide that decisions by the Tertiary Education Quality and Standards Agency (TEQSA) to waive or refund fees are subject to independent merits review; and**
- **if it is considered that the decisions are not appropriate for independent merits review, the characteristics of the decisions that would justify their exclusion from merits review, by reference to established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?***

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

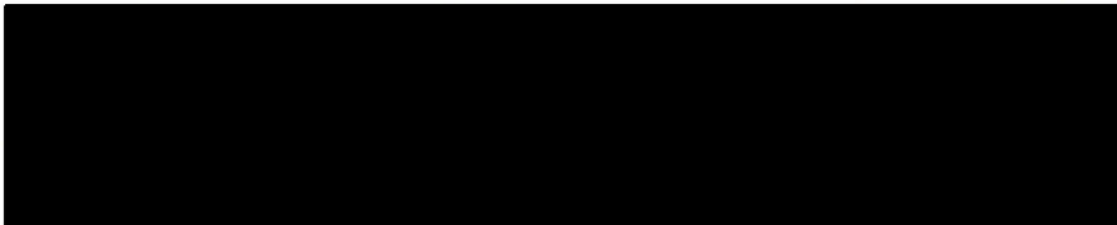
Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **25 June 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



The Hon Dan Tehan MP
Minister for Education

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7350

Our Ref: MC20-018650

27 June 2020

Senator the Hon Concetta Fierravanti-Wells
Chair
Standing Committee for the Scrutiny of Delegated Legislation
sdlc.sen@aph.gov.au

Dear Senator Fierravanti-Wells

Concetta,

Thank you for your letter of 11 June 2020 regarding the Tertiary Education Quality and Standards Agency Determination of Fees No. 1 of 2020 [F2020L00549]. I appreciate the time you have taken to bring this matter to my attention.

The Tertiary Education Quality and Standards Agency (TEQSA) is carefully considering the matters you have raised. In particular, the question of any amendment to provide for merits review requires consultation between TEQSA and the Attorney-General's Department (AGD), in accordance with the *Legal Services Directions 2017*. TEQSA is currently consulting with the AGD. Once I have received TEQSA's advice, I will provide the Committee with a further substantive response.

I note your indication that the Committee may give notice of a motion to disallow the instrument as a precautionary measure to provide time for the committee to consider information received, and I will ensure that a substantive response is provided as soon as possible.

Thank you for raising this matter with me.

Yours sincerely

DAN TEHAN



The Hon Dan Tehan MP
Minister for Education

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7350

Our Ref: MS20-002031

21 JUL 2020

Senator the Hon Concetta Fierravanti-Wells
Chair
Standing Committee for the Scrutiny of Delegated Legislation
sdlc.sen@aph.gov.au

Dear Senator Fierravanti-Wells

Concetta,

Thank you for your letter of 11 June 2020 regarding Tertiary Education Quality and Standards Agency Determination of Fees No. 1 of 2020 [F2020L00549]. In the letter, the Committee sought my advice as to the appropriateness of amending the instrument to provide for independent merits review of decisions to waive or refund fees.

In my earlier letter of 27 June 2020, I indicated that the Tertiary Education Quality and Standards Agency (TEQSA) was carefully considering the matters you have raised and that, once I received TEQSA's advice, I would provide the Committee with a substantive response.

Following further consideration of this issue, TEQSA has advised that it will amend the instrument to provide for merits review in relation to waiver and refund decisions under the instrument. I have asked TEQSA to provide the Committee with a copy of the amendment instrument once it has been made.

Thank you for raising this matter with me.

Yours sincerely

A large black rectangular redaction box covering the signature area of the letter.

DAN TEHAN



Senator the Hon Concetta Fierravanti-Wells
Chair
Standing Committee for the Scrutiny of Delegated Legislation
sdlc.sen@aph.gov.au

Dear Senator Fierravanti-Wells,

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

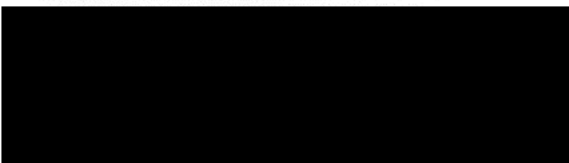
I refer to your correspondence of 11 June 2020 to the Hon Dan Tehan MP, Minister for Education, and his reply of 27 June 2020.

I can confirm that TEQSA has amended the *Tertiary Education Quality and Standards Agency Determination of Fees No. 1 of 2020* through the *Tertiary Education Quality and Standards Agency Determination of Fees (Amendment) 2020*. The new instrument came into effect on the 5 August 2020 and incorporates merit review rights for waiver and refund decisions.

You can view both the *Tertiary Education Quality and Standards Agency Determination of Fees (Amendment) 2020* instrument and the accompanying Explanatory Statement by clicking on the following link <https://www.legislation.gov.au/Details/F2020L00985/Download>.

I thank you for raising this matter.

Kind Regards,



Professor Nicholas Saunders AO
Chief Commissioner and A/g Chief Executive Officer
5 August 2020



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**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600
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27 August 2020

The Hon Dan Tehan MP
Minister for Education
Parliament House
CANBERRA ACT 2600

Via email: Minister@education.gov.au

CC: dlo@education.gov.au

Dear Minister,

**Tertiary Education Quality and Standards Agency Determination of Fees No. 1 of 2020
[F2020L00549]**

Thank you for your response of 21 July 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

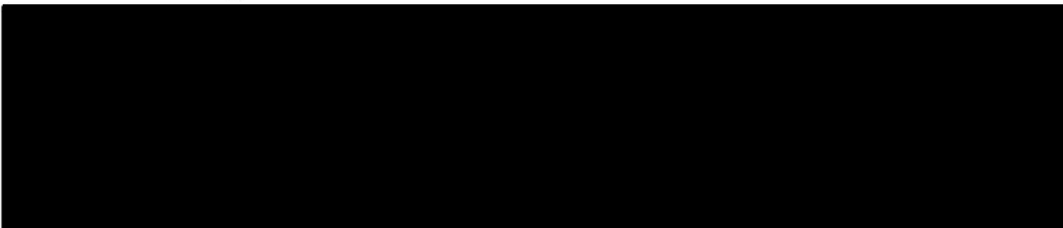
The committee considered your response at its private meeting on 26 August 2020. On the basis of your advice, the committee has concluded its examination of the instrument.

The committee welcomes the Tertiary Education Quality and Standards Agency's amendment to the instrument to provide for independent merits review, which addresses the committee's scrutiny concerns. This action has been listed as an implemented undertaking in *Delegated Legislation Monitor 9 of 2020*.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells
Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation