

# THE INTEGRATION OF LEARNING OUTCOMES AND GRADUATE ATTRIBUTES IN THE AUSTRALIAN HIGHER EDUCATION SECTOR

## PART I: INTEGRATION, EVIDENCE AND LEGAL CONSEQUENCES

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*Australian Commonwealth-funded reports and academic literature suggest that it is difficult for universities to produce convincing evidence that the institutions have comprehensively and systematically developed the learning outcomes and graduate attributes promoted in their educational policy. While the higher education sector has reported numerous successful curriculum mapping approaches since 2011, specifically focused on the development of course learning outcomes and graduate attributes, an ongoing concern for the sector is the difficulty of providing conclusive evidence demonstrating graduate achievement of the outcomes and the standard of the achievement. This two-part series considers the integration of learning outcomes and graduate attributes from a legal perspective. Part I discusses the difficulties associated with the implementation of learning outcomes and graduate attributes, and the potential legal consequences that universities may face from affected stakeholders, if providers are unable to produce persuasive evidence demonstrating the integration of the learning outcomes and graduate attributes. Part II outlines measures universities can implement to mitigate their potential legal liability. Although the formation and integration of learning outcomes and graduate attributes is an important issue in higher education internationally, the focus of this paper will be on the higher education sector within Australia.*

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## I INTRODUCTION

It is a legal requirement that all Australian higher education providers specify the expected learning outcomes for each course of study offered by the institution.<sup>1</sup> Although the Australian government mandates the implementation and assurance of learning outcomes, the government does not specify how the learning outcomes should be drafted, implemented and assessed. Instead, this is up to the discretion of the provider to develop their own unique set of learning outcomes. Some higher education providers use their learning outcomes and graduate attributes to market their courses and differentiate their graduates from the graduates of other institutions.<sup>2</sup>

Despite the legal mandate requiring the implementation of learning outcomes, national Commonwealth-funded projects exploring the topic have indicated that implementation of learning outcomes and graduate attributes by higher education providers has been ‘often neglected’,<sup>3</sup> of ‘patchy implementation’<sup>4</sup> and ‘elusive’.<sup>5</sup> Furthermore, measurement of graduates’ attainment of the learning outcomes and attributes has been ‘found to be difficult, time-consuming or impossible’.<sup>6</sup> National projects have suggested that there is a need to develop measures of ‘assuring outcomes for graduates’, ‘assuring standards of graduate outcomes’ and ‘new, efficient and effective ways of judging and warranting these generic outcomes’.<sup>7</sup>

- 1 *Higher Education Standards Framework (Threshold Standards) 2015* (Cth) standard 1.4 (*‘Threshold Standards’*).
- 2 Beverley Oliver and Trina Jorre de St Jorre, ‘Graduate Attributes for 2020 and Beyond: Recommendations for Australian Higher Education Providers’ (2018) 37(4) *Higher Education Research and Development* 821, 823; Simon Barrie, Clair Hughes and Calvin Smith, *The National Graduate Attributes Project: Integration and Assessment of Graduate Attributes in Curriculum* (Final Report, 2009) 6.
- 3 Barrie, Hughes and Smith (n 2) 20.
- 4 Simon C Barrie, ‘Understanding What We Mean by the Generic Attributes of Graduates’ (2006) 51(2) *Higher Education* 215, 218. See also David Spencer, Matthew Riddle and Bernadette Knewstubb, ‘Curriculum Mapping to Embed Graduate Capabilities’ (2012) 31(2) *Higher Education Research and Development* 217, 218, quoting Susan M Jones et al, ‘Designing and Mapping a Generic Attributes Curriculum for Science Undergraduate Students: A Faculty-Wide Collaborative Project’ (Conference Paper, Science Teaching and Learning Research including Threshold Concepts Symposium, 28–29 September 2007) 40; Wendy Green, Sarah Hammer and Cassandra Star, ‘Facing Up to the Challenge: Why Is It So Hard to Develop Graduate Attributes?’ (2009) 28(1) *Higher Education Research and Development* 17, 18, quoting Simon Barrie, ‘Rethinking Generic Graduate Attributes’ (2005) 27(1) *Higher Education Research and Development Society of Australasia News* 1, 3 and Barrie, ‘Understanding What We Mean by the Generic Attributes of Graduates’ (n 4) 218.
- 5 Barrie, Hughes and Smith (n 2) 41.
- 6 Beverley Oliver, *Assuring Graduate Outcomes* (Good Practice Report, 2011) 3.
- 7 Ibid 3–4. See also Beverley Oliver, *Assuring Graduate Capabilities: Evidencing Levels of Achievement for Graduate Employability* (Final Report, July 2015) 10 (*‘Assuring Graduate Capabilities’*).

The focus of the academic literature concerning learning outcomes and graduate attributes in the higher education sector has primarily concentrated on exploring the nature of, meaning and approaches to, and assuring the implementation of, the learning outcomes and graduate attributes. Despite the number of reports that have highlighted the shortcomings in the higher education sector with respect to general implementation of learning outcomes and graduate attributes, there has not yet been a broad analysis of the legal consequences that may flow as a result of these shortcomings. This area is of significant importance as the higher education sector is increasingly moving towards ‘an evidence-based culture of accountability’,<sup>8</sup> particularly with the recent announcement of the Morrison government’s introduction of performance-based funding, through the Commonwealth Grant Scheme.<sup>9</sup> Under the performance-based funding model, higher education providers’ funding will be assessed across four indicators:

[G]raduate employment outcomes, student success, student experience, and participation of Indigenous, low socio-economic status, and regional and remote students. Graduate employment outcomes will account for 40 per cent of funding, with the other three measures weighted at 20 per cent each.<sup>10</sup>

This two-part article will address the gap in the academic literature. Part I consists of an exploration of the potential legal consequences for higher education providers that are unable to adequately demonstrate the measures that they have taken to assure that their students and graduates have attained their promoted learning outcomes and graduate attributes, and to the requisite standards. Part II will go on to consider measures that higher education providers can implement to reduce their potential legal liability with respect to the integration of their promoted learning outcomes and graduate attributes.

Although the term ‘higher education provider’ encompasses several categories,<sup>11</sup> this paper series focuses specifically on how Australian universities have handled the implementation and assurance of learning outcomes.<sup>12</sup> This paper focuses on Australian universities because the majority of the national projects and reports that have been conducted exploring this issue have concentrated on the practices of universities, as opposed to the practices of higher education providers

8 Oliver, *Assuring Graduate Outcomes* (n 6) 13.

9 Dan Tehan, Department of Education, Skills and Employment (Cth), ‘The Future of Australian Universities Focuses on Achievement’ (Media Release, 2 October 2019) <<https://ministers.education.gov.au/tehan/future-australian-universities-focuses-achievement>>.

10 Ibid. See also Paul Wellings et al, *Performance-Based Funding for the Commonwealth Grant Scheme* (Report for the Minister for Education, 30 June 2019) <<https://www.dese.gov.au/higher-education-reviews-and-consultations/resources/final-report-performance-based-funding-commonwealth-grant-scheme>> for a detailed explanation of the performance-based funding scheme. It should be noted that the performance-based funding scheme begins on a small base — funding will be allocated incrementally and will gradually increase yearly: at 61–3. Therefore, it is likely that the initial impact of the performance-based funding scheme on Australian universities will be minor.

11 *Threshold Standards* (n 1) pt B.

12 The definition of ‘Australian University’ can be found at *ibid* pt B1.2.

generally.<sup>13</sup> The reports have highlighted deficiencies with respect to universities' practices, and as a result, this paper seeks to highlight the legal consequences that may arise from those identified shortcomings.

This paper (Part I) begins by explaining the concepts of learning outcomes and graduate attributes, and outlines the legislative framework regulating this area and the difficulties associated with its implementation. It then considers the legal consequences that might arise from actions brought by relevant stakeholders, namely: the Australian government, students, graduates, and industry (specifically graduate employers). Finally, the article highlights the implications for Australian universities moving forward, and argues that there is a need for universities to further investigate and implement measures to accurately measure the acquisition of learning outcomes and graduate attributes. An exploration of these measures is the focus of the second paper (Part II).

Reflecting on the literature and results of national Commonwealth-funded projects on the implementation of learning outcomes and graduate attributes, it appears that, subject to action by the regulator, Australian universities are unlikely to face legal consequences for failing to adequately demonstrate coverage of their promoted learning outcomes and graduate attributes in the near future. As the higher education sector continues to move increasingly more towards 'an evidenced-based culture of accountability',<sup>14</sup> however, the likelihood of legal action does increase. Consequently, the authors contend that higher education providers need to take action today, by investing in the development of resources that better evidence the integration and acquisition of learning outcomes and graduate attributes, in order to minimise future legal risk.

## **II LEARNING OUTCOMES AND GRADUATE ATTRIBUTES**

Over the past two decades, the distinction between the terms 'learning outcomes' and 'graduate attributes' has become increasingly blurred, and the terms seem to be used interchangeably throughout the higher education sector and in academic literature.<sup>15</sup> The authors contend that although learning outcomes and graduate attributes reflect similar ideals and are interrelated, from a legal perspective the two are distinct.

The Tertiary Education Quality and Standards Agency ('TEQSA'), the regulator for the Australian higher education sector, describes graduate attributes as '[g]eneric learning outcomes that refer to transferable, non-discipline specific

13 See, eg, Barbara de la Harpe et al, *The Bfactor Project: Understanding Academic Staff Beliefs about Graduate Attributes* (Final Report, 2009); Beverley Oliver, *Teaching Fellowship: Benchmarking Partnerships for Graduate Employability* (Final Report, December 2010) ('*Teaching Fellowship*'); Barrie, Hughes and Smith (n 2); Oliver, *Assuring Graduate Outcomes* (n 6); Oliver, *Assuring Graduate Capabilities* (n 7).

14 Oliver, *Assuring Graduate Outcomes* (n 6) 13.

15 Oliver and Jorre de St Jorre (n 2) 822.

skills that a graduate may achieve through learning that have application in study, work and life contexts'.<sup>16</sup> Usually, graduate attributes reflect the attributes and values that a higher education provider promotes their graduates to have acquired upon successful completion of an award qualification at the institution, regardless of the course of study completed. Graduate attributes are usually institution-wide attributes that university management establish and require all faculties and schools to embed into their courses of study and curriculum. These generic attributes are often designed with a distinct focus and emphasis on graduate employability.<sup>17</sup>

Contributing to the interchanging use of the terms within the sector is that higher education providers have adopted different phrases to describe their institution's generic learning outcomes that their graduates will acquire upon graduation. Commonly used terms within the higher education sector are: 'graduate attributes, competencies, qualities or outcomes; generic attributes; transferable, employability or soft skills; and core capabilities'<sup>18</sup> — all of which refer to the same thing. Therefore, the reference to graduate attributes in this paper also encapsulates the other commonly used terms.

Generally, the term 'learning outcomes' can encompass learning objectives at a unit, course or institutional level — this is largely dependent on the context which the term is used.<sup>19</sup> In the legislative framework regulating higher education in Australia, the term 'learning outcomes' is referred to with respect to a 'course of study' offered by a higher education provider, which can be 'assessed at unit level, course level, or in combination'.<sup>20</sup> However, the legislative drafters adopted a broad conceptualisation of the term and state that learning outcomes encompass not only discipline-specific knowledge and skills (which are generally expected of learning outcomes at a course level), but also generic 'knowledge and skills required for employment and further study', and 'skills in independent and critical thinking' (which are broad skills that are commonly referred to within institution-level graduate attribute statements).<sup>21</sup> It is contended that this broad conceptualisation has aided the blurring of the two terms and has led to their interchangeable use in the higher education sector.

16 'Glossary of Terms', *Tertiary Education Quality and Standards Agency* (Web Page, 2021) <<https://www.teqsa.gov.au/glossary-terms>>.

17 See, eg, Oliver, *Assuring Graduate Outcomes* (n 6) 10; Oliver, *Assuring Graduate Capabilities* (n 7) 8; Oliver, *Teaching Fellowship* (n 13) 10.

18 Jennifer Hill, Helen Walkington and Derek France, 'Graduate Attributes: Implications for Higher Education Practice and Policy' (2016) 40(2) *Journal of Geography in Higher Education* 155, 155.

19 Christina Do and Leigh Smith, 'Higher Education Providers' Liability to Students for Failing Adequately to Embed Learning Outcomes in the Educational Experience' (2021) 42(1) *Adelaide Law Review* 173, 177–8.

20 *Threshold Standards* (n 1) standard 1.4.4.

21 *Ibid* standards 1.4.2(c)–(d).

The global introduction of learning outcomes and graduate attributes in the higher education sector was the result of government intervention to address the universally acknowledged ‘skills gap’.<sup>22</sup> The requirement for higher education providers to incorporate learning outcomes was a government measure to ensure institutional accountability that university graduates were acquiring the necessary skills for the purpose of employment.<sup>23</sup> In Australia, the underlying objective of learning outcomes and graduate attributes is to provide a measure for stakeholders, ie students, universities, employers and government agencies, to quantify learning against skills that are expected to optimise graduate employability,<sup>24</sup> but also more broadly, to equip graduates with the necessary qualities to be ‘agents for social good in an unknown future’.<sup>25</sup>

Despite the skills-based agenda push in the higher education sector, governments globally have not prescribed what skills should form the basis of a university’s learning outcomes — this is largely left to the discretion of universities. In Australia, there have been a number of government-funded projects exploring how to best frame and formulate learning outcomes.<sup>26</sup> Despite the lack of prescription, there are a number of generic skills that commonly appear in universities’ learning outcomes and graduate attributes, such as:

1. Written and oral communication
2. Critical and analytical (and sometimes creative and reflective) thinking
3. Problem-solving (including generating ideas and innovative solutions)
4. Information literacy, often associated with technology
5. Learning and working independently
6. Learning and working collaboratively
7. Ethical and inclusive engagement with communities, cultures and nations.<sup>27</sup>

22 Lorraine Anderson, ‘The Learning Graduate’ in Carey Normand and Lorraine Anderson (eds), *Graduate Attributes in Higher Education: Attitudes on Attributes from across the Disciplines* (Routledge, 2017) 4, 7.

23 Ibid 5.

24 In the context of learning outcomes and graduate attributes, the term employability is defined as ‘a set of achievements — skills, understandings and personal attributes — that makes graduates more likely to gain employment and be successful in their chosen occupations, which benefits themselves, the workforce, the community and the economy’: Mantz Yorke, ‘Employability in Higher Education: What It Is — What It Is Not’ (Learning and Employability Series One, Higher Education Academy, 2006) 8.

25 John Bowden et al, *Generic Capabilities of ATN University Graduates* (Report, 2000) <<https://webarchive.nla.gov.au/awa/20091024230048/http://www.clt.uts.edu.au/TheProject.htm>>, quoted in Simon C Barrie, ‘A Research-Based Approach to Generic Graduate Attributes Policy’ (2004) 23(3) *Higher Education Research and Development* 261, 262.

26 See, eg, the results for a search of ‘graduate attributes’ at the following link: Universities Australia, *Learning and Teaching Repository* (Web Page) <<https://ltr.edu.au/>>.

27 Oliver, *Assuring Graduate Outcomes* (n 6) 2 (emphasis omitted). See also Hill, Walkington and France (n 18) 156.

As there is a large body of academic literature about how to best draft and assess learning outcomes and graduate attributes, this discussion is not included in this paper.

## **A Legislative Framework**

In Australia, the regulatory body that is responsible for overseeing the higher education sector is TEQSA, pursuant to the *Tertiary Education Quality and Standards Agency Act 2011* (Cth) (*TEQSA Act*).<sup>28</sup> The *TEQSA Act* sets out the requirements that an institution must comply with in order to be registered as a ‘higher education provider’,<sup>29</sup> thereby permitting the university to offer and deliver courses of study that upon successful completion, results in the receipt of a higher education award.<sup>30</sup> All courses of study offered by a university must be accredited.<sup>31</sup> TEQSA is responsible for registering higher education providers and accrediting courses of study.<sup>32</sup> However, universities who are registered in the “‘Australian University’ provider category’ can also be authorised to partially or fully self-accredit.<sup>33</sup>

The *Higher Education Standards Framework (Threshold Standards) 2015* (Cth) (*Threshold Standards*), enacted pursuant to s 58 of the *TEQSA Act*, outlines the *Higher Education Standards Framework* (*HES Framework*).<sup>34</sup> Part A of the *HES Framework* contains the *Standards for Higher Education* (*Standards*) which ‘represent the minimum acceptable requirements for the provision of higher education in or from Australia by higher education providers registered under the *TEQSA Act 2011*’.<sup>35</sup> The *Standards* are organised into seven domains:

1. Student Participation and Attainment;
2. Learning Environment;
3. Teaching;
4. Research and Research Training;
5. Institutional Quality Assurance;
6. Governance and Accountability; and

28 *Tertiary Education Quality and Standards Agency Act 2011* (Cth) pt 8 (*TEQSA Act*).

29 *Ibid* pt 3.

30 *Ibid* s 4.

31 *Ibid*.

32 *Ibid* ss 134(1)(a)–(b).

33 *Ibid* s 45. See also ‘Search the National Register’, *Tertiary Education Quality and Standards Agency* (Web Page, 2020) <<https://www.teqsa.gov.au/national-register>>.

34 Note: The *Threshold Standards* (n 1) revoked the *Higher Education Standards Framework (Threshold Standards) 2011* (Cth).

35 *Threshold Standards* (n 1) 2. It is a condition of registration that a higher education provider ensures that the courses of study offered by the institution are consistent with the ‘Threshold Standards’: *TEQSA Act* (n 28) s 26.

7. Representation, Information and Information Management.<sup>36</sup>

Stipulations with respect to learning outcomes are outlined in ‘1: Student Participation and Attainment’. Specifically, standard 1.4 states:

1. The expected learning outcomes for each course of study are specified, consistent with the level and field of education of the qualification awarded, and informed by national and international comparators.
2. The specified learning outcomes for each course of study encompass discipline-related and generic outcomes, including:
  - a. specific knowledge and skills and their application that characterise the field(s) of education or disciplines involved
  - b. generic skills and their application in the context of the field(s) of education or disciplines involved
  - c. knowledge and skills required for employment and further study related to the course of study, including those required to be eligible to seek registration to practise where applicable, and
  - d. skills in independent and critical thinking suitable for life-long learning.
3. Methods of assessment are consistent with the learning outcomes being assessed, are capable of confirming that all specified learning outcomes are achieved and that grades awarded reflect the level of student attainment.
4. On completion of a course of study, students have demonstrated the learning outcomes specified for the course of study, whether assessed at unit level, course level, or in combination.<sup>37</sup>

It is important to note that standard 1.4 only specifies the assurance of learning outcomes, and does not specifically refer to graduate attributes. Therefore, higher education providers within Australia are only technically legally obligated to integrate learning outcomes for each course of study the institution offers.<sup>38</sup> There is no specific legal mandate for higher education providers to formulate or integrate generic institutional-wide graduate attributes, except where the graduate attribute would fall under the broad definition of learning outcome within standard 1.4. It appears that the broad legislative conceptualisation of the term learning outcomes has influenced universities to incorporate discipline-specific learning outcomes at a course level and generic graduate attributes at an institutional level, such as critical thinking skills, in order to ensure that their institutions comply with their legal obligations under the *TEQSA Act*. Usually, the course learning outcomes are the implementation of the institution’s broader graduate attributes in the context of

36 *Threshold Standards* (n 1) pt A. For an overview of the *HES Framework*: see Tertiary Education Quality and Standards Agency, *Higher Education Standards Framework (Threshold Standards) 2015 – TEQSA Contextual Overview* (Overview, 1 January 2017).

37 *Threshold Standards* (n 1) standards 1.4.1–1.4.4.

38 *Ibid* standard 1.4. Higher education providers are required to comply with the conditions of registration contained within *TEQSA Act* (n 28) div 2. Specifically, s 26 states that courses of study provided by higher education providers must comply with the ‘Threshold Standards’.

the relevant course of study.<sup>39</sup> It is generally accepted that generic graduate attributes ‘entail different features in different disciplinary contexts’, so teaching of the attributes is best integrated with disciplinary content.<sup>40</sup>

Although a higher education provider is not legally obligated to integrate institutional-wide graduate attributes, if a higher education provider represents that their graduates will attain certain attributes upon successfully completing a course of study at their institution, the institution is legally required to assure the representation is accurate and not misleading. This is covered by ‘7: Representation, Information and Information Management’ of the *Standards*:

1. Representation of the higher education provider, its educational offerings and charges, whether directly or through agents or other parties, is accurate and not misleading. ...
5. Representations, whether expressed or implied, about the outcomes associated with undertaking a course of study, eligibility for acceptance into another course of study, employment outcomes or possible migration outcomes are not false or misleading.<sup>41</sup>

The legal consequences of failing to comply with the *Standards* will be discussed subsequently in this paper.

It is important to note that the learning outcomes referred to in the *Standards* are separate from the Australian Qualifications Framework (‘AQF’) learning outcomes and the Learning and Teaching Academic Standards Threshold Learning Outcomes (‘TLOs’). It appears that some higher education providers have used the AQF learning outcomes and the TLOs to frame their institution’s learning outcomes and graduate attributes — the legal requirements under the *Standards* are additional to the AQF and TLOs.

The AQF is a national policy regulating education and training qualifications in Australia, which outlines generic learning outcomes for each qualification level.<sup>42</sup> The AQF generic learning outcomes are defined as ‘transferable, non-discipline specific skills a graduate may achieve through learning that have application in

39 See, eg, Leigh Smith and Christina Do, ‘Law Students’ Awareness of University Graduate Attributes’ (2018) 11 *Journal of the Australasian Law Teachers Association* 68, 70.

40 Spencer, Riddle and Knewstubb (n 4) 217.

41 *Threshold Standards* (n 1) standards 7.1.1–7.1.5.

42 See Australian Qualifications Framework Council, *Australian Qualifications Framework* (2<sup>nd</sup> ed, January 2013) <<https://www.aqf.edu.au/publication/aqf-second-edition>> (‘AQF’). In 2019, a review of the AQF was undertaken. The final report can be accessed here: *Review of the Australian Qualifications Framework* (Final Report, 24 October 2019) <<https://www.dese.gov.au/higher-education-reviews-and-consultations/resources/review-australian-qualifications-framework-final-report-2019>>. Although the government has accepted all the recommendations of the review, the implications are beyond the scope of this paper: see Dan Tehan and Michaelia Cash, ‘A New Future for VET and Higher Education’ (Joint Media Release, Department of Education, Skills and Employment, 9 December 2019) <<https://ministers.dese.gov.au/tehan/new-future-vet-and-higher-education>>.

study, work and life contexts. The four broad categories in the AQF are: fundamental skills; people skills; thinking skills and personal skills'.<sup>43</sup>

The AQF learning outcomes are not discipline specific, they represent generic skills that a graduate is expected to acquire upon successfully completing a specific qualification level.<sup>44</sup> For example, under the AQF, a bachelor's degree is classified as a level seven qualification,<sup>45</sup> and a master's degree is classified as a level nine qualification.<sup>46</sup>

In 2010, the Australian government commissioned the Australian Learning and Teaching Council ('ALTC') to coordinate the development of TLOs in eight disciplines.<sup>47</sup> The eight disciplines were: architecture and building; arts, social sciences and humanities; business, management and economics; creative and performing arts; engineering and information and communications technology; health, medicine and veterinary science; law; and science.<sup>48</sup> Each discipline area developed a set of TLOs which specified the 'minimum discipline knowledge, discipline-specific skills and professional capabilities ... that are expected of a graduate from a specified level of program in a specified discipline area'.<sup>49</sup> The discipline-specific TLOs are to be applied in conjunction with the broad AQF standards.

## **B Implementation of Learning Outcomes and Graduate Attributes**

Although the Australian government mandates the incorporation of learning outcomes, the legislation is silent with respect to the drafting, implementation and assurance of the learning outcomes — this is largely left to the discretion of the higher education institution. This discretionary approach taken by the Australian government is consistent with the regulatory principles it has prescribed for TEQSA when exercising its powers under the *TEQSA Act*<sup>50</sup> — namely the principles of 'regulatory necessity', 'reflecting risk' and 'proportionate regulation'.<sup>51</sup> The last two decades saw a shift in Australia towards 'an evidence-based culture of accountability in higher education'.<sup>52</sup> Universities have been

43 *AQF* (n 42) 95.

44 The *AQF* specifies learning outcomes for each *AQF* level and qualification type: *ibid* 9.

45 *Ibid* 47.

46 *Ibid* 59.

47 Australian Learning and Teaching Council, *Bachelor of Laws: Learning and Teaching Academic Standards Statement* (Report, December 2010) 3 <<https://cald.asn.au/wp-content/uploads/2017/11/KifetetalTASStandardsStatement2010.pdf>>.

48 *Ibid*.

49 *Ibid*.

50 *TEQSA Act* (n 28) s 13.

51 *Ibid* ss 14–16.

52 Oliver, *Assuring Graduate Outcomes* (n 6) 13.

required to demonstrate how they teach, assess and confirm that all specified learning outcomes are achieved by their students; usually ‘proxy measures such as self-reported data’ are used.<sup>53</sup>

The discretionary nature of the government’s approach with respect to implementation of learning outcomes has resulted in many government-funded projects in Australia exploring best approaches to frame and implement graduate attributes.<sup>54</sup> A significant number of projects have focused on the purpose and drafting of graduate attributes.<sup>55</sup> However, recently more projects have explored the best tools and processes for assuring successful implementation, assessment and measurement of graduate attributes.<sup>56</sup>

The ‘patchy implementation’ of learning outcomes within the higher education sector,<sup>57</sup> can be arguably linked to the discretionary policy adopted by the Australian government. Despite universities adopting different missions and approaches to fostering learning outcomes and graduate attributes, the most common approach and tool employed within the Australian higher education sector is curriculum mapping.<sup>58</sup> However, curriculum mapping is not without its limitations.<sup>59</sup> As a result academic literature has suggested that in conjunction with curriculum mapping, the integration of learning outcomes and graduate attributes should be incorporated into extracurricular tools and self-managing learning spaces for students, such as student and graduate paper-based or electronic

53 Ibid 12, citing Barrie, Hughes and Smith (n 2) and Oliver, *Teaching Fellowship* (n 13).

54 See, eg, the results for a search of ‘graduate attributes’ at the following link: Universities Australia, *Learning and Teaching Repository* (Web Page) <<https://ltr.edu.au/>>.

55 See, eg, Tracy Taylor et al, *Facilitating Staff and Student Engagement with Graduate Attribute Development, Assessment and Standards in Business Faculties* (Final Report, August 2009); Gery Karantzas, *Shaping the Future of Psychology through Developing and Assessing Graduate Attributes Using Collaborative Learning* (Final Report, 2014); de la Harpe et al (n 13).

56 See, eg, Susan Ryan et al, *Creating Student-Focussed, Web-Learning Resources to Support the Development of and Provide Evidence of Occupational Therapy Students’ Graduating Competencies* (Final Report, 2013); Simon Barrie et al, *Assessing and Assuring Australian Graduate Learning Outcomes: Principles and Practices within and across Disciplines* (Final Report, 2014); Barrie, Hughes and Smith (n 2); Oliver, *Assuring Graduate Outcomes* (n 6); Oliver, *Assuring Graduate Capabilities* (n 7).

57 See above n 4 and accompanying text.

58 See, eg, Oliver and Jorre de St Jorre (n 2) 826; Oliver, *Assuring Graduate Outcomes* (n 6) 17; Oliver, *Teaching Fellowship* (n 13) 9–10.

59 See, eg, Jennifer Sumsion and Joy Goodfellow, ‘Identifying Generic Skills through Curriculum Mapping: A Critical Evaluation’ (2004) 23(3) *Higher Education Research and Development* 329, 342; Romy Lawson et al, *Hunters and Gatherers: Strategies for Curriculum Mapping and Data Collection for Assuring Learning* (Final Report, 2013) 32–3; Barrie, Hughes and Smith (n 2) 14; Green, Hammer and Star (n 4) 18; Oliver, *Teaching Fellowship* (n 13) 18; Hill, Walkington and France (n 18) 157.

portfolios, passports or the like.<sup>60</sup> Whilst there has been uptake on the use of student portfolios as a tool to demonstrate and measure student attributes, engagement with portfolios has been sporadic across the sector.<sup>61</sup>

## **1 Curriculum Mapping**

Curriculum mapping is the most prevalent approach adopted by Australian universities to ensure the integration of their learning outcomes and graduate attributes. The use of curriculum mapping can be traced back to the 1980s, although this practice was predominantly used in the primary and secondary education sector.<sup>62</sup> However, since the Commonwealth increased accountability and reporting requirements in the higher education sector in 2011,<sup>63</sup> institutions have adopted curriculum mapping processes to meet reporting requirements.

At its simplest, curriculum mapping ‘is a technique for recording time on task data and then analyzing this data to determine the “fit” to the officially adopted curriculum and the assessment/testing program’.<sup>64</sup> Curriculum mapping allows institutions and academics to present the learning experience of their students graphically, namely the ‘big picture’ of what the institution and academics intend for the students to learn, when and duration.<sup>65</sup> In the higher education context, curriculum mapping process can be executed at various levels, namely unit, course, faculty and institutional levels.<sup>66</sup>

Curriculum mapping is regarded as a useful tool for ‘operationalizing outcome-based education’.<sup>67</sup> It is through the use of curriculum maps that universities are able to chart where their learning outcomes and graduate attributes are taught and assessed. The use of curriculum maps serves two purposes. Firstly, to ensure that the learning outcomes are scaffolded and embedded into the course curriculum; and second, curriculum maps are used by institutions for auditing and quality

60 See, eg, Mantz Yorke and Lee Harvey, ‘Graduate Attributes and Their Development’ [2005] (128) *New Directions for Institutional Research* 41, 55, cited in Clair Hughes and Simon Barrie, ‘Influences on the Assessment of Graduate Attributes in Higher Education’ (2010) 35(3) *Assessment and Evaluation in Higher Education* 325, 330; Hill, Walkington and France (n 18) 157.

61 See generally Gillian Hallam et al, *ePortfolio Use by University Students in Australia: Informing Excellence in Policy and Practice* (Final Report, August 2008).

62 Chia-Ling Wang, ‘Mapping or Tracing? Rethinking Curriculum Mapping in Higher Education’ (2015) 40(9) *Studies in Higher Education* 1550, 1552.

63 Oliver, *Assuring Graduate Outcomes* (n 6) 13.

64 Fenwick W English, ‘Contemporary Curriculum Circumstances’ in Fenwick W English (ed), *Fundamental Curriculum Decisions* (Association for Supervision and Curriculum Development, 1983) 1, 13.

65 Heidi Hayes Jacobs, *Mapping the Big Picture: Integrating Curriculum and Assessment K–12* (Association for Supervision and Curriculum Development, 1997) 61, quoted in Wang (n 62) 1552.

66 Spencer, Riddle and Knewstubb (n 4) 219.

67 RM Harden, ‘AMEE Guide No 21: Curriculum Mapping’ (2001) 23(2) *Medical Teacher* 123, 136.

assurance purposes, to provide evidence demonstrating integration of the expected learning outcomes for internal and external auditing.<sup>68</sup>

In 2011, Oliver (in a Commonwealth-funded project exploring the assurance of graduate outcomes) reported that there were many universities that were investing significant resources into curriculum mapping tools and programs for the purposes of their ‘quality assurance processes’.<sup>69</sup> However, it was also reported that some institutions were relying on ‘simple grids showing where outcomes [were] taught, practiced or assessed’, and that this approach was often perceived as ‘time-consuming ... and of limited value’.<sup>70</sup> A 2013 report by Lawson et al noted that engagement of assurance of learning varied by discipline: ‘it became clear that [assurance of learning] was much less developed in the disciplines of law, pharmacy, engineering, and nursing’.<sup>71</sup> Hence, while ‘[f]rom the 17 law schools represented, 14 (82%) had some formal mapping process in place to structure the development of skills and assure learning at particular points in the program. ... Mapping tools were generally not used’.<sup>72</sup>

One of the recommendations that was made from the 2011 report was that there should be more initiatives focussing on ‘creating or disseminating more sophisticated digital curriculum mapping or course aggregation systems’<sup>73</sup> as such systems would likely make the process ‘more authentic and less onerous’.<sup>74</sup> Subsequent reports have indicated that new approaches to curriculum mapping focussing specifically on learning outcomes and graduate attributes have been referred to in literature, including systematic institutional-wide curriculum mapping.<sup>75</sup> For the purposes of curriculum review and enhancement, coordinated degree-wide analysis has also ‘become more prevalent’.<sup>76</sup> It appears that curriculum mapping continues to be the most prevalent method adopted by higher education providers within Australia for assuring sufficient integration of learning

68 See, eg, Barrie, ‘Rethinking Generic Graduate Attributes’ (n 4) 3; Green, Hammer and Star (n 4) 18; Sumsion and Goodfellow (n 59) 333.

69 Oliver, *Assuring Graduate Outcomes* (n 6) 4–5.

70 Ibid 5.

71 Lawson et al (n 59) 49.

72 Ibid.

73 Oliver, *Assuring Graduate Outcomes* (n 6) 5.

74 Ibid 17.

75 Beverley Oliver, ‘Graduate Attributes as a Focus for Institution-Wide Curriculum Renewal: Innovations and Challenges’ (2013) 32(3) *Higher Education Research and Development* 450, 458; Oliver and Jorre de St Jorre (n 2) 826.

76 Oliver and Jorre de St Jorre (n 2) 826, citing Lawson et al (n 59).

outcomes and graduate attributes. Curriculum mapping also continues to remain a focal point for Australian scholarship.<sup>77</sup>

## **2 Student Electronic Portfolios**

In addition to curriculum mapping practices, Australian universities have also relied on student electronic portfolios systems as a means of evidencing student acquisition of learning outcomes and graduate attributes.<sup>78</sup> Student electronic portfolios provide ‘the facility to enable students to store and update records of their achievements both in terms of the development of discipline specific skills and the acquisition of broader Graduate Attributes’.<sup>79</sup> The use of student electronic portfolios has had widespread support in North America and Europe,<sup>80</sup> and increasing interest and uptake within Australia although sporadic across the higher education sector.<sup>81</sup>

A key aspect of student electronic portfolios is that students are required to take ownership of their own learning and evidencing.<sup>82</sup> Student electronic portfolio systems focus on:

1. Skills development including [learning outcomes and/or] Graduate Attributes,
2. Recording achievements, and
3. Personal development.<sup>83</sup>

Su has suggested that while system-based approaches, such as curriculum mapping, are necessary to assess and assure the integration of learning outcomes and graduate attributes, ‘the person-based approach [such as student electronic portfolios] supplements it by addressing the development of meaningful graduate

77 See, eg, John Andrew O’Rourke et al, ‘Are We All on Course? A Curriculum Mapping Comparison of Three Australian University Open-Access Enabling Programs’ (2019) 59(1) *Australian Journal of Adult Learning* 7; Janelle Wilkes and Jackie Reid, ‘Development and Application of a Distributed Leadership Framework to the Curriculum Mapping of Quantitative Skills in First-Year Undergraduate Agriculture Degrees’ (2019) 27(4) *International Journal of Innovation in Science and Mathematics Education* 14; Owen Hicks, ‘Curriculum in Higher Education: Confusion, Complexity and Currency’ (2018) 5 *HERDSA Review of Higher Education* 5.

78 See, eg, Oliver, *Assuring Graduate Outcomes* (n 6) 15; Oliver, *Assuring Graduate Capabilities* (n 7) 15. See generally Sarah Lambert and Linda Corrin, ‘Moving towards a University Wide Implementation of an ePortfolio Tool’ (2007) 23(1) *Australasian Journal of Educational Technology* 1, especially at 3; Hallam et al (n 61).

79 Lambert and Corrin (n 78) 2, citing Joe Luca, David Polinelli and Julie Howell, ‘Creating E-Portfolios to Support Student Career Opportunities’ in Neville Smythe (ed), *Apple University Consortium Academic and Developers Conference: Digital Voyages 2003* (University of Adelaide, 2003) 16-1. For a detailed explanation of the purposes of electronic portfolios: see Hallam et al (n 61) 3–6.

80 Luca, Polinelli and Howell (n 79) 1.

81 See generally Hallam et al (n 61).

82 Lambert and Corrin (n 78) 2.

83 Ibid.

attributes for students in their evolving life and career'.<sup>84</sup> It is contended that students are more likely to genuinely engage with learning outcomes and graduate attributes through this student-centred, self-directed learning approach.<sup>85</sup>

Although self-directed learning is a key feature of the student electronic portfolio system, a prevalent challenge associated with its implementation is student engagement,<sup>86</sup> amongst other reported difficulties.<sup>87</sup> Given the widely reported challenges associated with student electronic portfolios,<sup>88</sup> this may be the reason for its sporadic uptake within the Australian higher education sector.

### **C Difficulties Associated with the Implementation of Learning Outcomes and Graduate Attributes that May Have Legal Consequences**

It has been widely acknowledged in both Commonwealth-funded reports and academic literature that there are a number of difficulties associated with the integration of learning outcomes and graduate attributes within the higher education sector.<sup>89</sup> The major concerns are associated with how universities are able to produce convincing evidence that their promoted learning outcomes and graduate attributes are assured and measured. This frank assessment is illustrated in the following excerpts.

In 2009, Barrie, Hughes and Smith stated in *The National Graduate Attributes Project: Integration and Assessment of Graduate Attributes in Curriculum* for the ALTC:

Though graduate attributes have been enshrined in educational policy and embraced for their promotional and marketing potential, the sector has produced little convincing evidence of authentic curriculum integration or of impact on student learning.<sup>90</sup>

In 2011, similar sentiments were echoed in Oliver's *Assuring Graduate Outcomes* report for the ALTC:

84 Yahui Su, 'Self-Directed, Genuine Graduate Attributes: The Person-Based Approach' (2014) 33(6) *Higher Education Research and Development* 1208, 1216.

85 Ibid.

86 Ali Jafari, 'The "Sticky" ePortfolio System: Tackling Challenges and Identifying Attributes' (2004) 39(4) *EDUCAUSE Review* 38, 40, cited by Oliver, *Assuring Graduate Outcomes* (n 6) 15.

87 See, eg, Luca, Polinelli and Howell (n 79) 2.

88 Oliver, *Assuring Graduate Outcomes* (n 6) 15.

89 See, eg, Barrie, Hughes and Smith (n 2) 20; Spencer, Riddle and Knewstubb (n 4) 218; Barrie, 'Understanding What We Mean by the Generic Attributes of Graduates' (n 4) 218; Green, Hammer and Star (n 4) 18; Oliver, *Assuring Graduate Outcomes* (n 6) 3; Lawson et al (n 59) 32.

90 Barrie, Hughes and Smith (n 2) 6.

Measurement of these outcomes is uncommon because, as reported in the literature, it has been found to be difficult, time-consuming or impossible. There is an urgent need to find new, efficient and effective ways of judging and warranting these generic outcomes.<sup>91</sup>

More recently, Sandri, Holdsworth and Thomas, in a 2018 article, highlighted a range of issues associated with the measurement of graduate attributes.<sup>92</sup> These include, the ‘[c]ontextual nature of capabilities’ and the difficulty ‘[e]stablishing links between capability and learning within degree programs’.<sup>93</sup> While Sandri, Holdsworth and Thomas offer some suggestions on what a tool to measure such attributes might look like,<sup>94</sup> the article does not develop the tool itself, reflecting the elusiveness of a satisfactory mechanism for measuring the acquisition of graduate attributes.

In 2018, Oliver and Jorre de St Jorre acknowledged that while many universities ‘have invested significant time and resourcing into processes to assure graduate attributes (such as course mapping), a gap that often remains is development and consistent implementation of appropriate strategies for engaging students’.<sup>95</sup>

Consequently, while the higher education sector has come a long way in demonstrating that the learning outcomes and graduate attributes are embedded into assessable curriculum, the difficulties now lie in producing convincing evidence demonstrating that students have actually achieved the set learning outcomes and graduate attributes; and the level of student attainment as per standard 1.4.

## **1 *The Disconnect between the Intended Curriculum and the Learned Curriculum***

Porter suggested that curriculum can be divided into four stages:

- Intended — statements of the knowledge and skills that students are expected to learn and develop over the course of the curriculum;
- Enacted — knowledge and skills that are covered and taught;
- Assessed — knowledge and skills that are tested to measure student performance and attainment of the assessed content; and

91 Oliver, *Assuring Graduate Outcomes* (n 6) 3.

92 Orana Sandri, Sarah Holdsworth and Ian Thomas, ‘Assessing Graduate Sustainability Capability Post-Degree Completion’ (2018) 19(1) *International Journal of Sustainability in Higher Education* 2, 7–10.

93 Ibid 7, 9.

94 Ibid 10–11.

95 Oliver and Jorre de St Jorre (n 2) 827, citing Trina Jorre de St Jorre and Beverley Oliver, ‘Want Students to Engage? Contextualise Graduate Learning Outcomes and Assess for Employability’ (2018) 37(1) *Higher Education Research and Development* 44.

- Learned — knowledge and skills that are acquired and experienced by the student.<sup>96</sup>

A major limitation associated with curriculum mapping is that it generally depicts the ‘intended curriculum’ (usually set by the institution, faculty or school management), which does not necessarily reflect the curriculum that is ultimately enacted and assessed by teaching staff, or the curriculum that is learned by students.<sup>97</sup> Universities that neglect to coordinate or implement their learning outcomes or graduate attributes policy adequately at various levels of management (institution, faculty and school) are perceived as treating the curriculum mapping process as merely a ‘bureaucratic approach to quality assurance’.<sup>98</sup> Such an oversight can lead to a compliance culture, where management and academic staff engagement with curriculum mapping process is limited to a ‘tick and flick’ approach.<sup>99</sup> Unfortunately, the literature suggests that there appears to be a tendency for many Australian universities to engage with learning outcomes and graduate attributes as a ‘bureaucratic necessity rather than an intellectual or scholarly endeavour’.<sup>100</sup> Although a superficial adoption of a curriculum mapping may suffice for institutions collating self-reported data to submit to TEQSA to demonstrate where in the curriculum their learning outcomes are covered, it does not necessarily demonstrate that ‘all specified learning outcomes are achieved [by students upon completion of their chosen course of study] and that grades awarded reflect the level of student attainment’.<sup>101</sup>

Commentary suggests that the key to fostering broader institutional support and engagement with learning outcomes and graduate attributes is through the empowerment of academic teaching staff, and students.<sup>102</sup> Without active support and involvement from these two key stakeholder groups, it is difficult to envisage circumstances where alignment would be achieved across the intended, enacted, assessed and learned curriculum. However, research in this space has raised concerns about the extent of staff and students’ awareness and understanding of learning outcomes and graduate attributes, and how it fits into the institution’s broader learning and teaching framework.<sup>103</sup>

96 Andrew C Porter, ‘Curriculum Assessment’ in Judith L Green, Gregory Camilli and Patricia B Elmore (eds), *Handbook of Complementary Methods in Education Research* (Lawrence Erlbaum Associates, 3<sup>rd</sup> ed, 2006) 141, 141.

97 Oliver, *Teaching Fellowship* (n 13) 18.

98 Barrie, Hughes and Smith (n 2) 14. Please note that the Final Report indicated that universities often neglect the way in which it ‘coordinates and approaches the implementation of its graduate attributes policy’: at 20.

99 Oliver, *Teaching Fellowship* (n 13) 18, quoted in Lawson et al (n 59) 32.

100 Barrie, Hughes and Smith (n 2) 6.

101 *Threshold Standards* (n 1) standard 1.4.3.

102 See generally Barrie, Hughes and Smith (n 2); Oliver, *Teaching Fellowship* (n 13).

103 See, eg, Barrie, Hughes and Smith (n 2) 7; Smith and Do (n 39).

One of the common criticisms that is raised with respect to the implementation of learning outcomes and graduate attributes is that the outcomes and attributes are often not well-defined, and can be too broad.<sup>104</sup> While the use of generic language to frame the learning outcomes and graduate attributes permits for the learning outcomes and attributes to be transferable across disciplines, the lack of specification requires staff to subjectively interpret the outcomes and attributes when enacting and assessing the outcomes and attributes.<sup>105</sup>

A serious oversight that contributes to the disconnect between the intended, enacted, assessed and learned curriculum is that the perspectives of academic staff are often neglected in the process of implementing learning outcomes and graduate attribute policies.<sup>106</sup> Research suggests that involving academics in the formation, mapping and integration of learning outcomes and university graduate attributes increases the likelihood of successful integration as ‘they are the principal source of curriculum development’.<sup>107</sup>

It is critical for university senior management to take active measures to ensure that the learning outcomes and graduate attributes policies that they formulate and map throughout the intended curriculum, are reflected in the curriculum that is ultimately enacted, assessed and learned. Failing to implement coordinated approaches to facilitate and engage consistent implementation of the institution’s learning outcomes and graduate attributes policies, can result in failing to meet the institution’s legal obligations under the *Standards* and obligations with respect to promotional claims made to students, graduates and employers.

Exploring teaching and learning practices and tools that are designed to align the intended and learned curriculum is covered in Part II of this two-part article. What is evident from the academic literature investigating this space is that more needs to be done by Australian universities to ensure that their intended and learned curriculum are aligned. That is, the learning outcomes and graduate attributes that are set by the universities are actually learned by the students, and in turned acquired upon graduation.

## **2 Evidence of Achievement of Learning Outcomes and Graduate Attributes**

Despite measures taken by management in universities to integrate graduate attributes in their courses, literature exploring the topic has recognised that it is very difficult for institutions to provide convincing evidence that the graduate attributes are comprehensively and systemically developed by their graduates.<sup>108</sup>

104 Barrie, ‘Understanding What We Mean by the Generic Attributes of Graduates’ (n 4) 218.

105 Ibid.

106 Alex Radloff et al, ‘Assessing Graduate Attributes: Engaging Academic Staff and Their Students’ (Conference Paper, ATN Assessment Conference, 20–21 November 2008) 3.

107 Oliver, *Teaching Fellowship* (n 13) 18, citing Graduate Careers Australia, *University and Beyond 2007: A Snapshot of Things to Come* (Report, 2008).

108 Barrie, Hughes and Smith (n 2) 6.

In particular, it is very difficult for institutions to produce evidence demonstrating that their graduates have indeed achieved the required graduate attributes and to measure the standard at which the graduates have attained the attributes.<sup>109</sup> As a result, the higher education sector has turned to ‘proxy measures’, such as self-reported curriculum maps, as a method of demonstrating how learning outcomes and graduate attributes are ‘developed, assessed [and] assured’.<sup>110</sup> As previously highlighted, these proxy measures can be one dimensional and often only reflect where and when the learning outcomes and graduate attributes are taught, rather than the extent to which (if at all) they have been achieved.

There have been a number of collaborative initiatives and projects between universities broadly aimed at assuring the standard and quality of student achievement of learning outcomes. These have included, for example, the Group of Eight Quality Verification System,<sup>111</sup> *Assuring Learning and Teaching Standards through Inter-Institutional Peer Review and Moderation*,<sup>112</sup> and *Achievement Matters: External Peer Review of Accounting Learning Standards*.<sup>113</sup> The underlying purpose of these projects has been to assure that the achievement of learning outcomes at one institution is comparable to other equivalent institutions across Australia.<sup>114</sup> To determine the validity and comparability of course learning outcomes, these initiatives have largely relied on cross-institutional peer review and moderation practices — unidentifiable samples of students’ assessments from the same discipline, course level and grade level are exchanged between the institutions involved.<sup>115</sup> Usually, samples of students’ final year assessments are used in the evaluation process. While these initiatives provide an opportunity to assure the validity of the learning outcomes that are covered in the selected assessment, and more broadly the comparability of grades across the institutions involved, they do not comprehensively assure that all the learning outcomes associated to the course of study are sufficiently acquired by students completing the course of study.

Relying on summative grades as a method of demonstrating acquisition of learning outcomes is generally not reliable,<sup>116</sup> as grades are attributed to units, not specifically to each learning outcome. Technically a student could pass a unit but not successfully demonstrate achievement of one or more of the assessed learning

109 Ibid 7.

110 Oliver, *Assuring Graduate Outcomes* (n 6) 12.

111 ‘Group of Eight Quality Verification System’, *The University of Adelaide* (Web Page, 28 July 2021) <<https://www.adelaide.edu.au/learning/quality-assurance/benchmarking/go8-quality-verification-system>>.

112 Geoff Kerri-Lee Krause et al, *Assuring Learning and Teaching Standards through Inter-Institutional Peer Review and Moderation* (Final Report, 2014).

113 Phil Hancock et al, *Achievement Matters: External Peer Review of Accounting Learning Standards* (Final Report, April 2015).

114 See Kerri-Lee Krause et al (n 112) 5; Hancock et al (n 113) 5.

115 See Kerri-Lee Krause et al (n 112) 6; Hancock et al (n 113) 5–6.

116 Oliver, *Assuring Graduate Capabilities* (n 7) 10.

outcomes covered within that unit. By extension, it is also possible that a student could successfully complete a course of study, but fail to adequately demonstrate achievement of one or more of the set learning outcomes for the course of study.

In 2015, Oliver completed an ALTC National Teaching Fellowship titled *Assuring Graduate Capabilities: Evidencing Levels of Achievement for Graduate Employability*, to explore supplementary approaches that universities were utilising to evidence students achievement of their set graduate attributes, with a specific focus on employability.<sup>117</sup> The outcome of the fellowship resulted in the creation of Course Learning Outcomes and Standards ('CLOS') templates, which are essentially 'course-wide rubrics',<sup>118</sup> (with input from course leaders, students and university advisory boards) downloadable from the public Assuring Graduate Capabilities website.<sup>119</sup> The underlying purpose of the CLOS were to 'guide judgement (rather than measurement) of overall achievement'.<sup>120</sup> The CLOS templates were intended for both academics to use in their assessment practices, but also for students to gauge their own abilities.<sup>121</sup> Furthermore, the fellowship sought to uncover how the CLOS templates could be usefully implemented within university-wide portfolio systems, so that 'students take responsibility for gathering and synthesising evidence of [their] achievement' and assess their skills against the CLOS.<sup>122</sup>

Whilst the outputs from the 2015 fellowship have provided tools to assist in evidencing levels of achievement of learning outcomes and graduate attributes, the utilisation of these tools nevertheless require academic staff uptake. Reports and literature have generally acknowledged that despite the significant focus on learning outcomes and graduate attributes within the higher education sector in Australia, there appears to be a 'lack of "buy in" by academic teaching staff'.<sup>123</sup> Whilst reports and literature have acknowledged that the sector has a pressing challenge to develop transparent methods and tools assuring graduate achievement of the set learning outcomes and graduate attributes,<sup>124</sup> it appears that a more imminent challenge is for universities to motivate and empower academic staff to be actively engaged in the integration, teaching and assessment of the set learning outcomes and graduate attributes.

117 Ibid.

118 Ibid 12. In the Final Report, Oliver states that she prefers to use the term CLOS opposed to rubrics as there is confusion associated with the term 'rubrics': at 15.

119 Ibid 14.

120 Ibid 12.

121 Ibid.

122 Ibid 15.

123 Oliver, *Teaching Fellowship* (n 13) 14; Lawson et al (n 59) 33, citing Barrie, Hughes and Smith (n 2). See also *ibid*.

124 See, eg, Oliver, *Assuring Graduate Outcomes* (n 6) 6.

### III LEGAL CONSEQUENCES

There are various participants in the higher education sector that have different stakes in the formation and acquisition of course learning outcomes and graduate attributes. The key stakeholders are: TEQSA which regulates the higher education sector within Australia, students who ultimately become graduates upon successfully completing a course of study and employers who employ the graduates.

This section of the paper explores the legal consequences that may arise for universities that are unable to adequately demonstrate the measures that they have taken to assure that their students and graduates have attained the promoted learning outcomes and graduate attributes to the requisite standards. The legal consequences will be explored from the perspectives of the key stakeholders that could potentially be affected and the causes of actions that may be available to them.

#### A TEQSA

As discussed above, the Australian higher education sector is regulated by TEQSA. While TEQSA has a range of powers under the *TEQSA Act*, its exercise of those powers is, to a considerable extent, shaped by the principles for regulation specified under s 13 of the *TEQSA Act*. Broadly speaking, these principles introduce reasonableness,<sup>125</sup> necessity,<sup>126</sup> a holistic consideration of the entity subjected to the exercise of the power,<sup>127</sup> and proportionality.<sup>128</sup>

It is useful at this point to more fully explore the way in which TEQSA operates as a regulator. A 2013 review of TEQSA found that:

First, there is support for a national regulator. Secondly, and equally importantly, there is a need to strengthen the legislative framework within which TEQSA operates to provide a better guide as to the meaning of the principles of regulatory necessity, risk and proportionality across the sector and, as a consequence, TEQSA's approach to regulation. This is the first step in changing a culture of top-down data collection in tertiary education that has become widespread and cost-insensitive.<sup>129</sup>

The 2013 review raised a number of criticisms of TEQSA's approach to regulation, including a failure to adequately take into account the specific context of each

125 *TEQSA Act* (n 28) s 14.

126 *Ibid.*

127 *Ibid* s 15.

128 *Ibid* s 16.

129 Kwong Lee Dow and Valerie Braithwaite, *Review of Higher Education Regulation* (Report, August 2013) Letter to the Minister <<https://www.dese.gov.au/download/1463/expert-panels-review-higher-education-regulation-report/1585/document/pdf>>.

institution,<sup>130</sup> failure to meaningfully engage with institutions,<sup>131</sup> a problematic risk framework,<sup>132</sup> and a failure to offer practical advice when those being regulated sought clarity on particular matters.<sup>133</sup> As a consequence of the criticism raised in the 2013 review, *Ministerial Direction No 2 of 2013* (*'Direction'*) was made.<sup>134</sup> Part 2 of the *Direction* stated:

The Government seeks to support higher education providers to deliver teaching, learning and research of the highest quality. This will require the application of a deregulatory and quality enhancement philosophy and deliberate action to remove red tape, to enable providers to spend more time on the things they do best and less on compliance and reporting.<sup>135</sup>

The *Direction*, consequently, significantly refocused TEQSA's activities on registration, accreditation, and application.<sup>136</sup> A subsequent review of TEQSA, conducted by Deloitte Access Economics, resulted in a 2017 report, which had a much more favourable view of TEQSA's operation when compared with the 2013 report.<sup>137</sup> The 2017 review also proposed the repeal of the *Direction*.<sup>138</sup> The government largely accepted the recommendations put forward by the 2017 review,<sup>139</sup> and the *Direction* was repealed at the end of 2019.<sup>140</sup> While it appears that TEQSA is being viewed more favourably now than in its initial stages, there is still considerable room for improvement. For example, in its 2018–19 Annual Report, TEQSA noted that '[f]ifty-nine per cent of providers rated TEQSA as good or excellent in assuring and regulating the sector without unnecessarily impeding the efficient operation of higher education providers'.<sup>141</sup>

It is apparent from the above quotation that 41% of providers did not rate TEQSA as good or excellent with respect to this criterion. There is therefore at least some concern within the higher education sector about the burden created by TEQSA

130 Ibid 43–4.

131 Ibid.

132 Ibid 44–5.

133 Ibid 46.

134 Minister for Education (Cth), *Ministerial Direction No 2 of 2013* (22 October 2013) (*'Direction'*). See Deloitte Access Economics, *Review of the Impact of the TEQSA Act on the Higher Education Sector* (Report, March 2017) 13–14.

135 *Direction* (n 134) pt 2.

136 Ibid cl 4(i).

137 Deloitte Access Economics (n 134) ii.

138 Ibid.

139 Department of Education and Training (Cth), *Review of the Impact of the TEQSA Act on the Higher Education Sector: Australian Government Response* (Report, 23 November 2018).

140 Minister for Education (Cth), *Notice of Revocation of Ministerial Direction No 2 of 2013* (12 December 2019).

141 Tertiary Education Quality and Standards Agency, *Annual Report 2018–2019* (Report, 30 September 2019) 18 <<https://www.teqsa.gov.au/latest-news/publications/teqsa-annual-report-2018-19>>.

and its regulation. With this context in mind, it is appropriate to examine the specific powers that TEQSA has under the *TEQSA Act*.

Part 6 of the *TEQSA Act* is concerned with inspection. The inspection powers granted to TEQSA are very broad and include, for example, the ability to demand information,<sup>142</sup> to copy or keep documentation,<sup>143</sup> for an authorised officer to enter and investigate premises,<sup>144</sup> to use computers and other devices,<sup>145</sup> and to exercise force (but not on people).<sup>146</sup> TEQSA has, therefore, considerable powers with which it can inform itself in relation to the compliance (or lack thereof) of an Australian higher education provider with the relevant standards. The question then becomes, in the event of a failure to comply, what can TEQSA do? Part 7 of the *TEQSA Act* is concerned with enforcement, however, the note to s 98 makes reference to both ss 32 and 53 of the *TEQSA Act*.<sup>147</sup> It is therefore useful to briefly consider these first. The core of s 32(1) is relatively straightforward. It states, ‘TEQSA may impose other conditions on a registered higher education provider’s registration’.<sup>148</sup> Section 32(1) then goes on to outline some examples of the types of conditions that can be imposed, including, for example, ‘restricting or removing the provider’s ability to provide an accredited course’.<sup>149</sup> Similar in nature to s 32, but narrower in focus, s 53(1) states that ‘TEQSA may impose conditions on the accreditation of a course of study’.<sup>150</sup> TEQSA does use their powers to impose conditions. By way of illustration, the University of Tasmania received re-registration in September 2019 subject to two conditions, which can be viewed via the National Register (TEQSA’s database of higher education providers).<sup>151</sup> The first condition related to the reporting of ‘student performance data’ while the second related to the currency of policy and procedure.<sup>152</sup> Breaching a condition of registration or accreditation can result in a civil penalty.<sup>153</sup>

142 *TEQSA Act* (n 28) s 63.

143 *Ibid* s 66.

144 *Ibid* ss 70–1.

145 *Ibid* s 71(2).

146 *Ibid* s 74.

147 *Ibid* s 98.

148 *Ibid* s 32(1).

149 *Ibid* s 32(1)(d).

150 *Ibid* s 53(1).

151 ‘University of Tasmania: Re-Registration 25 September 2019’, *Tertiary Education Quality and Standards Agency* (Web Page, 25 September 2019) <<https://www.teqsa.gov.au/national-register/condition-decision/re-registration-25-september-2019>>. An overview of the National Register can be found here: ‘About the National Register’, *Tertiary Education Quality and Standards Agency* (Web Page, 2021) <<https://www.teqsa.gov.au/about-national-register>>.

152 ‘University of Tasmania: Re-Registration 25 September 2019’ (n 151).

153 *TEQSA Act* (n 28) ss 113–14.

In addition to the ability to impose conditions, TEQSA is also empowered (pursuant to pt 7 of the *TEQSA Act*) to impose administrative sanctions.<sup>154</sup> These sanctions can be imposed where s 98 is applicable.<sup>155</sup> Broadly speaking, s 98 will be applicable where there has been a ‘fail[ure] to meet the *Threshold Standards*’<sup>156</sup> or non-compliance with a condition,<sup>157</sup> amongst other considerations. The sanctions relate to registration and accreditation, either of which can be shortened or cancelled.<sup>158</sup> Therefore, theoretically, TEQSA could seek to deregister a higher education provider. Such a situation is unlikely to be common given that TEQSA has published information about its approach to compliance and enforcement, where ‘voluntary compliance’ is given primacy.<sup>159</sup> That being said, enforcement action is a possibility:

While TEQSA prefers to engage cooperatively with providers to assure quality, and to rely to the extent possible on providers’ own quality and assurance processes, TEQSA will actively pursue compliance and enforcement action where it deems it necessary to ensure the promotion and protection of students and the reputation of the higher education sector.<sup>160</sup>

Given that TEQSA has an extensive range of powers available to it, how does it actually approach the question of regulation? In addition, how can the potential failure of a higher education provider to ensure the acquisition of learning outcomes and graduate attributes be dealt with through that regulation? TEQSA uses a ‘risk-based approach’, which can be found in its Risk Assessment Framework (‘RAF’).<sup>161</sup> The latest available full version of the RAF is from March 2019.<sup>162</sup> Consequently, that is the version that will be discussed here. Importantly, the risk assessment is an annual process.<sup>163</sup> Simply put, TEQSA will draw on information available to it to create a risk assessment,<sup>164</sup> provide the provider with

154 Ibid pt 7 div 1 sub-div A.

155 Ibid s 98.

156 Ibid s 98(a).

157 Ibid ss 98(b)–(c).

158 Ibid ss 99–101.

159 ‘TEQSA’s Approach to Compliance and Enforcement’, *Tertiary Education Quality and Standards Agency* (Web Document, 22 May 2018) 2 <<https://www.teqsa.gov.au/latest-news/publications/teqsas-approach-compliance-and-enforcement>>.

160 Ibid 5.

161 ‘TEQSA’s Risk Assessment Framework’, *Tertiary Education Quality and Standards Agency* (Web Document, 7 March 2019) <<https://www.teqsa.gov.au/latest-news/publications/risk-assessment-framework>> (‘RAF’).

162 Ibid. Note that a review of the RAF took place in 2019. TEQSA is implementing some changes for 2020, but has signalled that further changes will take place for 2021: ‘Risk Assessment Framework’, *Tertiary Education Quality and Standards Agency* (Web Page, 2020) <<https://www.teqsa.gov.au/risk-assessment-framework>>.

163 ‘RAF’ (n 161) 5.

164 The information can come from a range of different sources: ibid 4.

an opportunity to respond,<sup>165</sup> and then specify what action(s) if any, will be taken.<sup>166</sup> TEQSA has a range of actions available to it, which include doing nothing, making a ‘recommendation’ or ‘request for information’, engaging in ‘regulatory action’ or deferring any required action until a ‘scheduled assessment process’ (eg an upcoming re-registration).<sup>167</sup> Risk assessments are significant both because they can result in regulatory action against a provider, but also because they are linked with ‘scheduled assessment processes’ such as re-registration and/or accreditation.<sup>168</sup> Essentially, the lower risk the higher education provider is seen to be, the less onerous the scheduled assessment process will be.<sup>169</sup>

Risk assessments are based on an evaluation of four main areas of risk, namely: ‘regulatory history and standing’, ‘students (load, experience and outcomes)’, ‘academic staff profile’ and ‘financial viability and sustainability’.<sup>170</sup> These are further broken down in apps 1 and 2 of the RAF, into a range of specific risk indicators.<sup>171</sup> For example, ‘student load’ and ‘attrition rate’ are both considered in relation to the broader question of risk to students.<sup>172</sup> With respect to learning outcomes and graduate attributes, risk indicator five, ‘graduate satisfaction’, is linked to standard 1.4 of the *Threshold Standards*.<sup>173</sup> Although the exact reason for the connection is not made explicit (beyond reference to ‘the quality of teaching’),<sup>174</sup> presumably if a graduate felt that they had not acquired the learning outcomes and/or graduate attributes associated with their course of study, their satisfaction will be reduced. It should be noted, however, that such an outcome would presume that the graduate knew of the relevant learning outcomes and/or graduate attributes for their course of study, not necessarily something that should be assumed.<sup>175</sup> Learning outcomes and/or graduate attributes could also potentially be linked to risk indicator two, ‘attrition rate’,<sup>176</sup> in the sense that if a student was aware of the learning outcomes and/or graduate attributes, and felt that they were not adequately being acquired, that may contribute to the decision to drop a course.

To get a better sense of TEQSA’s expectations in relation to learning outcomes and graduate attributes, reference to the Guidance Note: Course Design (Including

165 Ibid. Note, ‘unless specifically requested’ the response is optional: at 5.

166 Ibid 10.

167 Ibid.

168 Ibid.

169 Ibid 10–11.

170 Ibid 7.

171 Ibid 14–33.

172 Ibid 14, 21.

173 Ibid 15.

174 Ibid.

175 Smith and Do (n 39) 80.

176 ‘RAF’ (n 161) 14.

Learning Outcomes and Assessment) ('Guidance Note') is appropriate.<sup>177</sup> Under the heading 'Risks to Quality', TEQSA notes:

Failure to meet the requirements of the *HES Framework* leads to risks of learning outcomes and course designs not being fit for higher education, particularly in relation to the level of advanced inquiry involved, with a consequent degradation of qualifications. There is also a risk that learning outcomes are poorly defined or not defined at all, and that they may be narrowly focused rather than embracing specific, generic, employment-related and life-long learning outcomes as expected of contemporary higher education. ... If the achievement and assessment of expected learning outcomes are not aligned for the course of study overall, there is a risk of learning outcomes not being achieved or not being adequately assessed, or of some outcomes being assessed excessively to the detriment of others that are given little attention or ignored.<sup>178</sup>

Although limited detail is provided in the RAF, the Guidance Note is much clearer: learning outcomes and/or graduate attributes are important considerations with respect to risk and, as can be seen from the above extract, there are multiple ways that they can link to risk.<sup>179</sup> The Guidance Note goes on to specify what higher education providers are required to do to convince TEQSA that the learning outcomes and/or graduate attributes are being acquired.<sup>180</sup> These draw particular attention to the outcomes and/or attributes themselves (for example, whether an outcome in a bachelor level course is appropriate for a course of that level), as well as the need for a connection to be established between the outcomes and/or attributes and evidence of student assessment to ensure that the latter is sufficiently linked to the former.<sup>181</sup> Like the RAF, the Guidance Note indicates that the level of detail that TEQSA may require with respect to these matters will vary depending upon the level of risk.<sup>182</sup>

The question then becomes, how are Australian higher education providers perceived by TEQSA from a risk perspective? In July 2019, TEQSA published a report on *Key Risk Findings on Australia's Higher Education Sector*.<sup>183</sup> Table 1, below, illustrates the extent to which Australian providers were assessed at low, medium, or high risk with respect to each of the risk indicators in the RAF:

177 'Guidance Note: Course Design (Including Learning Outcomes and Assessment)', *Tertiary Education Quality and Standards Agency* (Web Document, 11 October 2017) <<https://www.teqsa.gov.au/latest-news/publications/guidance-note-course-design-including-learning-outcomes-and-assessment>>.

178 Ibid 2.

179 Ibid.

180 Ibid 4.

181 Ibid.

182 Ibid.

183 Tertiary Education Quality and Standards Agency, *Key Risk Findings on Australia's Higher Education Sector* (Report, 15 July 2019) <<https://www.teqsa.gov.au/latest-news/publications/key-risk-findings-australias-higher-education-sector>>.

Table 1. TEQSA 2018 Risk Indicator Ratings<sup>184</sup>

Risk Indicator	Low (%)	Medium (%)	High (%)
Student Load	77	14	9
Attrition	41	18	41
Progress	78	16	6
Completions	90	8	2
Graduate Satisfaction	55	33	12
Graduate Destinations	67	19	14
Senior Academic Leaders	67	25	8
Student-to-Staff Ratio	79	9	12
Casual Academic Staffing	62	22	16
Financial Viability	72	21	7
Financial Sustainability	64	30	6

TEQSA use these risk indicators to narrow down to two broad risks, namely ‘risk to students’ and ‘risk to financial position’.<sup>185</sup> Based on the 2018 data, 23% of for-profit, 67% of non-for-profit and 88% of university providers were rated at low risk for risk to students (with 47%, 27% and 10% respectively for moderate risk and 30%, 6% and 2% respectively for high risk).<sup>186</sup> For risk to financial position, 44% of for-profit, 55% of not-for-profit and 83% of university providers were deemed low risk (44%, 40% and 14% respectively for moderate risk and 12%, 5% and 3% respectively for high risk).<sup>187</sup> Financially, both the not-for-profit and university providers had fewer providers rated low risk compared with the 2017 data.<sup>188</sup> The implications of the risk assessment are significant; the higher the risk, the more evidence TEQSA will want to see from the provider, and the more likely it is that TEQSA will require action on the part of the provider to ensure compliance. Given that the ‘graduate satisfaction’ risk indicator has the second lowest percentage of low risk providers, and it is the risk indicator explicitly linked to standard 1.4 (ie the standard about learning outcomes) then it is possible that learning outcomes and/or graduate attributes will come under considerable scrutiny from TEQSA.

Earlier, in the discussion of TEQSA’s risk assessment, it was noted that TEQSA may seek to defer required action until a provider’s scheduled assessment.<sup>189</sup> Here,

184 Data in the table extracted from *ibid* 19.

185 *Ibid* 8.

186 *Ibid* 22.

187 *Ibid* 23.

188 *Ibid*. Given the impact of COVID-19 on the Australian higher education sector, the authors anticipate that financial risk will likely increase in the near future.

189 See above n 167 and accompanying text.

re-registration will be used as an example.<sup>190</sup> According to TEQSA, re-registration is centred around a ‘Core Plus model’, described as requiring providers to

submit minimum evidence relating to a set of core standards in the *HES Framework* with their applications. The model is designed to reduce evidence requirements and create more efficient regulatory assessment for low-risk providers. Higher-risk providers are required to submit additional evidence against other selected standards on a case-by-case basis, according to risk profile and regulatory track record.<sup>191</sup>

Risk is again a prominent consideration, and as noted in the description extracted above, can place an additional burden on the higher education provider. The core standards can be found in the Application Guide for Registered Higher Education Providers: Renewal of Registration for Existing Providers.<sup>192</sup> They are listed in app A, and include standards 2.3.1–2.3.5, 2.4.4, 2.4.5, 5.1.2, 5.2.1–5.2.4, 5.3.1–5.3.7, 6.1.3, 6.2.1, 6.3.2 and 7.1.4 (if relevant).<sup>193</sup> Notably, standard 1.4 is not included. This omission (and that of a range of other standards) is identified and explained in a note to the appendix. The note specifies, in essence, that evidence of compliance with the core standards will be used to assess compliance with the non-core standards.<sup>194</sup> With respect to re-registration, therefore, learning outcomes and/or graduate attributes are unlikely to be a focal point for TEQSA (although, as noted, they will still be considered) subject to a situation where TEQSA has identified an aspect of risk with respect to the learning outcomes and/or graduate attributes. In such a case, TEQSA may choose to explicitly assess standard 1.4.<sup>195</sup>

While the discussion in this section has so far concentrated on TEQSA and its powers under the *TEQSA Act*, the case of *Kweifio-Okai v Australian College of Natural Medicine [No 2]* (*‘Kweifio-Okai [No 2]’*) merits a brief comment.<sup>196</sup> The case concerned the non-renewal of a contract of employment.<sup>197</sup> Here, the Australian College of Natural Medicine had become aware of alleged misconduct and conducted an investigation (prompted by an email chain in which the employee instructed a subordinate to ignore an instruction from a higher-level superior).<sup>198</sup>

190 There are different requirements for, for example, the initial application to become a provider: see ‘Before Applying to Become a Higher Education Provider’, *Tertiary Education Quality and Standards Agency* (Web Page, 2021) <<https://www.teqsa.gov.au/before-applying-higher-education-provider>>.

191 ‘Renewing Registration’, *Tertiary Education Quality and Standards Agency* (Web Page, 2022) <<https://www.teqsa.gov.au/renewing-registration>>.

192 ‘Application Guide for Registered Higher Education Providers: Renewal of Registration for Existing Providers’, *Tertiary Education Quality and Standards Agency* (Web Document, 29 August 2018) <<https://www.teqsa.gov.au/latest-news/publications/application-guide-registered-higher-education-providers-renewal>>.

193 Ibid 16–17.

194 Ibid 17.

195 Ibid 5–6.

196 [2014] FCA 1124 (*‘Kweifio-Okai [No 2]’*).

197 Ibid [3].

198 Ibid [17]–[20].

The matter came before Tracey J of the Federal Court of Australia, with both an interim and substantive decision.<sup>199</sup> In the former, Kweifio-Okai sought an interlocutory injunction.<sup>200</sup> The application was rejected.<sup>201</sup> The *TEQSA Act* is mentioned in passing in the decision (as a basis upon which the applicant sought to challenge the conduct of the respondent),<sup>202</sup> and explored more fully in the substantive decision. The former employee alleged that there had been a breach of three standards in the (then applicable) *Higher Education Standards Framework (Threshold Standards) 2011* (Cth), relating primarily to course currency and staff competency.<sup>203</sup> Aside from the brief discussion of the *TEQSA Act* and TEQSA's powers under it, what is interesting are the challenges raised by the Australian College of Natural Medicine, most notably to the standing of the former employee to seek a declaration under the *TEQSA Act*.<sup>204</sup> Tracey J found that the former employee had provided insufficient evidence to establish a breach, and so did not explore the standing question in-depth.<sup>205</sup> However, Tracey J did make the following observation:

Even had I been persuaded otherwise I would not have been prepared, as a matter of discretion, to grant the relief sought. The standards are expressed in broad and general terms. A determination of whether or not a provider had complied with them will, almost always, involve the need for value judgments to be made by people with the necessary expertise. Under the *TEQSA Act* that task, initially, at least, is placed in the hands of the Agency. Provision is made for internal review and then, if need be, a further decision on the merits by the Administrative Appeals Tribunal. These entities are much better placed than the Court to make the necessary judgments and assessments ... A further consideration which tends against the grant of relief (even if otherwise available) is the fact that the applicant has not referred any of his complaints to the Agency.<sup>206</sup>

Tracey J's comments in the extract above are interesting for three reasons. First, they highlight the complexity surrounding any question of whether there has, or has not been, compliance with the *Standards* (although the case related to the 2011 standards, the 2015 standards can be considered similarly broad) and the 'value judgments' that must be exercised in such a situation.<sup>207</sup> Second, and arguably more importantly, Tracey J indicates a reluctance on the part of a court to intervene in an area where there is a clear role for a regulator such as TEQSA. On one reading of the above extract, therefore, TEQSA can be seen as a gatekeeper with respect to

199 *Kweifio-Okai v Australian College of Natural Medicine* [2014] FCA 746 ('*Kweifio-Okai*'); *Kweifio-Okai* [No 2] (n 196).

200 *Kweifio-Okai* (n 199) [11].

201 *Ibid* [19].

202 *Ibid* [5].

203 *Kweifio-Okai* [No 2] (n 196) [32].

204 *Ibid* [35].

205 *Ibid* [36].

206 *Ibid* [37] (citations omitted).

207 *Ibid* [37].

action in relation to a breach relating to the *Standards*. Third, Tracey J's comments indicate that Kweifio-Okai could have made a complaint directly to TEQSA. This is relatively straightforward to do. Complaints information can be readily found on the TEQSA website,<sup>208</sup> and there is a readily accessible online form.<sup>209</sup>

It is important to note also that there are potential criminal offences that can arise in the present context. For example, a failure to comply with s 75(2) of the *TEQSA Act* (relating to the ability of an 'authorised officer' with a warrant to question people and demand documentation) is an offence.<sup>210</sup> Similarly, ss 69 and 76 of the *TEQSA Act* (both dealing with self-incrimination) make reference to s 137.1 (dealing with the provision of 'false or misleading' information or documentation to a Commonwealth agency) and s 149.1 ('[o]bstruction of Commonwealth public officials') of the *Criminal Code*, created pursuant to the *Criminal Code Act 1995* (Cth).<sup>211</sup>

What then, are the implications of the preceding discussion? First, TEQSA is trying to strike a difficult balance between, on the one hand, maintaining the quality of the higher education sector in Australia through regulation and compliance, and on the other, limiting the burden on providers. It appears that in recent years, TEQSA has become more successful in finding that balance.<sup>212</sup> Second, TEQSA has a wide range of powers that are available to it under the *TEQSA Act*, including for example, the ability to impose a condition on a provider's registration.<sup>213</sup> Third, TEQSA's approach is focused on the concept of risk, and overall the risk to students and risk to the financial viability of the provider are central.<sup>214</sup> Fourth, and most importantly, where TEQSA forms the view (whether from an annual risk assessment or from a scheduled assessment) that there may be non-compliance with standard 1.4, the regulator has a range of powers which can significantly impact upon a higher education provider. Fifth, as the case of *Kweifio-Okai [No 2]* illustrates, a court is likely to defer to the expertise and authority of TEQSA with respect to compliance with the relevant standards.<sup>215</sup> Overall, therefore, it can be said that TEQSA has considerable power with respect to the failure of an Australian higher education provider to ensure the acquisition of learning outcomes and/or graduate attributes.

208 'Raising a Complaint or Concern', *Tertiary Education Quality and Standards Agency* (Web Page, 2022) <<https://www.teqsa.gov.au/raising-complaint-or-concern>>.

209 'Raising a Complaint or Concern: Online Form', *Tertiary Education Quality and Standards Agency* (Web Page, 2022) <<https://www.teqsa.gov.au/raise-concern-form>>.

210 *TEQSA Act* (n 28) s 75(3).

211 *Ibid* ss 69(2)(f), 76(2)(e); *Criminal Code Act 1995* (Cth) sch 1 ss 137.1, 149.1.

212 Deloitte Access Economics (n 134) ii.

213 *TEQSA Act* (n 28) s 32(1).

214 It is beyond the scope of the present paper to consider in detail the amendments to TEQSA's RAF for 2020 and beyond. However, they are explained by TEQSA: 'Risk Assessment Framework' (n 162).

215 *Kweifio-Okai [No 2]* (n 196) [37].

## B Students

The relationship between students and their higher education provider is legally complex — regulated by ‘a “hybrid” of private and public law elements’.<sup>216</sup> Students who believe their higher education provider has not taken measures to ensure that ‘all specified learning outcomes are achieved [by students] and that grades awarded reflect the level of student attainment’,<sup>217</sup> can seek redress through: the higher education provider’s internal complaint management system; a relevant regulatory body; or pursuing a private legal action through the courts or tribunals.<sup>218</sup> The nature of their concern will largely dictate the option(s) available to them.<sup>219</sup>

### 1 Internal and External Complaint Management

A student can make a formal complaint with their higher education provider.<sup>220</sup> The *HES Framework* specifies the mechanism that a higher education provider must have in place to address student complaints.<sup>221</sup> If the student is dissatisfied with the decision and reasoning provided by the institution, they can request an internal appeal and if still dissatisfied, an external appeal.<sup>222</sup> If the appeals fail to resolve the grievance, the student may be able to seek assistance (where relevant) from the Australian Competition and Consumer Commission (‘ACCC’) or TEQSA.

Due to limited resources and funding, however, the ACCC seeks to only investigate matters that are aligned to their regulatory priorities in light of public policy.<sup>223</sup> Kamvounias and Varnham indicate that while a large number of higher education queries and complaints by students have been submitted to regulatory bodies like

216 Bruce Lindsay, ‘Complexity and Ambiguity in University Law: Negotiating the Legal Terrain of Student Challenges to University Decisions’ (2007) 12(2) *Australia and New Zealand Journal of Law and Education* 7, 7, quoting Francine Rochford, ‘The Relationship between the Student and the University’ (1998) 3(1) *Australia and New Zealand Journal of Law and Education* 28, 43.

217 *Threshold Standards* (n 1) standard 1.4.3.

218 The discussion in this section is intended to provide a summary of the main legal avenues potentially available to students. For a more comprehensive analysis, see: Do and Smith (n 19).

219 An international student may have additional protections under the *Education Services for Overseas Students Act 2000* (Cth), however this Act is beyond the scope of the present paper.

220 ‘Higher Education Student Complaints’, *Australian Government: Study Assist* (Web Page) <<https://www.studyassist.gov.au/support-while-you-study/higher-education-student-complaints>>.

221 *Threshold Standards* (n 1) standard 2.4.

222 *Ibid* standard 2.4.3.

223 ‘Compliance & Enforcement Policy & Priorities’, *Australian Competition and Consumer Commission* (Web Page, 2021) <<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>>.

the ACCC, ‘very few’ have been actioned.<sup>224</sup> TEQSA, meanwhile, is restricted in the types of complaints that it can accept. If a student’s complaint is concerning a course of study offered by a university or academic staff, then the student must demonstrate how their complaint concerns a potential contravention of the *HES Framework*.<sup>225</sup> TEQSA will not necessarily respond to each complaint, but rather record the complaint in its information gathering for the purpose of regulating the sector.<sup>226</sup>

## 2 Private Legal Action

A student may seek to bring private legal action against their university. Such an action could take one of multiple forms, including, for example, an alleged breach of the *Australian Consumer Law* (‘*ACL*’),<sup>227</sup> educational negligence,<sup>228</sup> or breach of contract.<sup>229</sup> While each type of action would pose its own specific challenges, there are two significant hurdles that will likely need to be overcome by a student plaintiff in most actions. These relate to the low likelihood of judicial intervention and the need to demonstrate loss or damage.

- 224 Patty Kamvounias and Sally Varnham, ‘Getting What They Paid for: Consumer Rights of Students in Higher Education’ (2006) 15(2) *Griffith Law Review* 306, 325. However, recently the ACCC have taken a number of actions against vocational education and training providers for contravention of the *Australian Consumer Law*: see, eg, *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq)* [No 5] [2019] FCA 1544.
- 225 See generally *TEQSA Act* (n 28) s 134. Section 134 outlines the functions and powers of TEQSA — its primary function is to ensure regulated entities, ie higher education providers operating within Australia, are complying with the *TEQSA Act*, which includes the *HES Framework* contained within the Act: see also, ‘Raising a Complaint or Concern’ (n 208).
- 226 ‘Higher Education Student Complaints’ (n 220).
- 227 *Competition and Consumer Act 2010* (Cth) sch 2 (‘*ACL*’). See generally Stephen Corones, ‘Consumer Guarantees and the Supply of Educational Services by Higher Education Providers’ (2012) 35(1) *University of New South Wales Law Journal* 1.
- 228 See generally Ian M Ramsay, ‘Educational Negligence and the Legalisation of Education’ (1988) 11(2) *University of New South Wales Law Journal* 184; Rosemary Antonia Dalby, ‘A Human Rights Analysis of a Claim for Educational Negligence in Australian Schools’ (SJD Thesis, Queensland University of Technology, July 2013); Caroline Cohen, ‘Australian Universities’ Potential Liability for Courses That Fail to Deliver’, *Colin Biggers & Paisley Lawyers* (Web Page, 15 December 2016) <<https://www.cbp.com.au/insights/insights/2016/december/australian-universities-potential-liability-for-c>>.
- 229 See generally *Bayley-Jones v University of Newcastle* (1990) 22 NSWLR 424; Jim Jackson, ‘Regulation of International Education: Australia and New Zealand’ (2005) 10(2) *Australia and New Zealand Journal of Law and Education* 67, 74; Lindsay (n 216) 10–11; Lisa Goldacre, ‘The Contract for the Supply of Educational Services and Unfair Contract Terms: Advancing Students’ Rights as Consumers’ (2013) 37(1) *University of Western Australia Law Review* 176, 188; Rochford, ‘The Relationship between the Student and the University’ (n 216) 28–9. However, it is unlikely that the entirety of the relationship is purely contractual, due to the legislative instruments and university by-laws that regulate the relationship: see, eg, Lindsay (n 216) 7; Goldacre (n 229) 188; Francine Rochford, ‘The Contract between the University and the Student’ in Sally Varnham, Patty Kamvounias and Joan Squelch (eds), *Higher Education and the Law* (Federation Press, 2015) 82, 87.

First, Australian courts have shown a general reluctance to interfere and adjudicate on matters involving academic judgment.<sup>230</sup> New Zealand and United Kingdom courts have adopted similar approaches.<sup>231</sup> Regarding matters of academic judgment, Kirby J acknowledged that traditionally courts tend to

decline to review: the marking of an examination paper; the academic merit of a thesis; the viability of a research project; the award of academic tenure; and internal budgets. Others might be added: the contents of a course; particular styles of teaching; and the organisation of course timetables.<sup>232</sup>

Claims made by aggrieved students concerning academic matters are generally regarded as non-justiciable,<sup>233</sup> as opposed to claims questioning how an academic decision was reached and if ‘principles of natural justice have been observed’.<sup>234</sup> The body of case law concerning the quality and standard of educational services have tended to be addressed in the context of application for summary dismissal<sup>235</sup> and strike out applications often pursued by the university.<sup>236</sup> Hence, a student plaintiff’s first challenge would be to convince the court a claim relating to failure to adequately embed learning outcomes and graduate attributes should be considered by the court; cases such as *Kweifio-Okai [No 2]*, discussed earlier in the paper, suggest it would be difficult.<sup>237</sup>

Second, in order for an aggrieved student to succeed in their claim against their university, the student must demonstrate quantifiable loss or damage. Australian case law and commentary suggest that it is difficult for an aggrieved student to adequately demonstrate loss or damages recoverable at law against their university with respect to matters relating to the quality and standard of educational services

230 See, eg, *Griffith University v Tang* (2005) 221 CLR 99, 121 [58] (Gummow, Callinan and Heydon JJ), 156 [165] (Kirby J) (*‘Griffith University’*); *Hanna v University of New England* [2006] NSWSC 122, [66] (Malpass AsJ); *Walsh v University of Technology, Sydney* [2007] FCA 880, [86] (Buchanan J); Dennis Farrington and David Palfreyman, *The Law of Higher Education* (Oxford University Press, 2<sup>nd</sup> ed, 2012) 333; Joy Cumming, ‘Where Courts and Academe Converge: Findings of Fact or Academic Judgment’ (2007) 12(1) *Australia and New Zealand Journal of Law and Education* 97, 99; Goldacre (n 229) 180.

231 See, eg, *Norrie v Senate of the University of Auckland* [1984] 1 NZLR 129; *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752.

232 *Griffith University* (n 230) 156–7 [165] (citations omitted).

233 Goldacre (n 229) 177.

234 *Hines v Birkbeck College* [1985] 1 Ch 524, 542 (Hoffmann J).

235 See, eg, *Yee v Hort* [2012] FMCA 391. The student commenced legal action against the Australian National University (‘ANU’) College on grounds of misleading conduct and maladministration with respect to course delivery. ANU College made a summary dismissal application on grounds that there was no cause of action and no reasonable prospect of success. The Federal Magistrates Court of Australia dismissed the student’s application.

236 See, eg, *Mathews v University of Queensland* [2002] FCA 414 (*‘Mathews’*). The University of Queensland sought to strike out the student’s amended statement of claim and/or dismiss the proceedings on grounds that there was no reasonable cause of action and the proceedings were frivolous and vexatious. The Federal Court of Australia struck out the student’s amended statement of claim and dismissed the proceedings.

237 *Kweifio-Okai [No 2]* (n 196) [32]–[37] (Tracey J).

rendered.<sup>238</sup> But this can be largely attributed to the fact that ‘the cases that have run to trial have tended to involve self-represented litigants, and so will often be unsatisfactory in their analysis or argument’.<sup>239</sup> A further complication could arise in some cases, whereby there may be a need to demonstrate a causal link between the failure to embed learning outcomes and graduate attributes and the loss or damage suffered.<sup>240</sup> Given the above considerations, therefore, outside of a favourable outcome from an internal complaint, it would likely be both difficult and time consuming for a student plaintiff to seek a remedy for the failure to adequately embed learning outcomes and graduate attributes.

### **C Graduates’ Employers**

It is unlikely that employers of students or graduates of universities have viable causes of action available to them to commence legal action against the institution for failing to ensure adequate coverage of their promoted learning outcomes and/or graduate attributes. In order for an aggrieved employer to succeed in their claim against a university, the employer must demonstrate quantifiable loss or damage — given the difficulties aggrieved students have had establishing loss or damage,<sup>241</sup> employers are likely to experience similar difficulties.

## **IV LEGAL IMPLICATIONS AND RECOMMENDATIONS**

Although Australian universities are legally obligated to integrate learning outcomes into each course of study the institution offers,<sup>242</sup> analysis of the potential causes of actions against a university who is unable to adequately demonstrate coverage of its promoted learning outcomes and/or graduate attributes suggests that students (and their subsequent employers) are unlikely to have strong legal grounds to seek redress. Despite this, legal commentators have speculated that the increasing perception that students are consumers of educational services will likely lead to an increase in student litigation for perceived inadequacies with

238 See, eg, *Fennell v Australian National University* [1999] FCA 989, [9]–[14]; *Mathews* (n 236); *Kamvounias and Varnham* (n 224) 311–12; *Goldacre* (n 229) 212, citing Rochford, ‘The Relationship between the Student and the University’ (n 216) 34 and Francine Rochford, ‘Suing the Alma Mater: What Loss Has Been Suffered?’ (2001) 13(4) *Education and the Law* 319.

239 Rochford, ‘The Contract between the University and the Student’ (n 229) 85. See, eg, *Mathews* (n 236).

240 For example, consider (1) the need to demonstrate reliance in a misleading and deceptive conduct case under the *ACL*: see, eg, *Ford Motor Company of Australia Ltd v Arrowcrest Group Pty Ltd* (2003) 134 FCR 522, 538 [116] and (2) the need to show factual causation in negligence: see, eg, *Civil Liability Act 2002* (WA) s 5C(1)(a).

241 See above n 238 and accompanying text.

242 *Threshold Standards* (n 1) standard 1.4.

respect to educational services rendered by the universities.<sup>243</sup> Therefore, in order to adequately protect themselves from an anticipated increase in associated legal action, universities need to ensure adequate coverage of their set learning outcomes and graduate attributes, and have evidence readily available of both coverage and student acquisition of those outcomes.

Currently, TEQSA, the regulator of the Australian higher education sector, has the greatest potential to use the law (through the exercise of its functions and powers under the *TEQSA Act*) to enforce greater compliance with standard 1.4 of the *Threshold Standards*. An institution which has inadequate coverage of their promoted learning outcomes and/or graduate attributes, may be investigated by TEQSA and could face an array of sanctions if the claims are established, including administrative sanctions,<sup>244</sup> civil penalties,<sup>245</sup> removal of accreditation<sup>246</sup> or withdrawal of registration.<sup>247</sup> Given that over the last two decades there has been a shift in Australia towards ‘an evidence-based culture of accountability in higher education’,<sup>248</sup> universities may be faced with greater scrutiny from the regulator. Furthermore, under the Morrison government’s performance-based funding, universities risk receiving less funding if they are unable to demonstrate graduate attainment and achievement of graduate employment outcomes.<sup>249</sup>

Despite the academic commentary openly acknowledging that the implementation of learning outcomes and graduate attributes by universities has been ‘often neglected’, of ‘patchy implementation’, and ‘elusive’,<sup>250</sup> TEQSA’s risk-based approach suggests that universities will be made aware of any potential risks (including those that relate to standard 1.4) through the annual risk assessment, and providers will have the opportunity to remedy them prior to more serious consequences arising. However, given the prestigious standing afforded to ‘universities as knowledge discoverers [sic] and disseminators’,<sup>251</sup> universities should adhere to principles of good administrative practice by actively ensuring coverage of the *Standards*, and the institution’s own statutes and by-laws. Needless to say, it is in the best interest of universities to avoid legal disputes and investigations to ensure that their resources are utilised effectively, and negative publicity avoided where possible.

243 See, eg, Sam Middlemiss, ‘Legal Liability of Universities for Students’ (2000) 12(2) *Education and the Law* 69; Goldacre (n 229); Kamvounias and Varnham (n 224); Rochford, ‘Suing the Alma Mater: What Loss Has Been Suffered?’ (n 238); Corones (n 227); Rochford, ‘The Relationship between the Student and the University’ (n 216).

244 *TEQSA Act* (n 28) pt 7 div 1.

245 *Ibid* pt 7 div 2.

246 See, eg, *ibid* ss 32(1)(c)–(d), 99.

247 *Ibid* pt 3 divs 1, 3.

248 Oliver, *Assuring Graduate Outcomes* (n 6) 13.

249 Tehan (n 9).

250 See above nn 3–5 and accompanying text.

251 Jim Jackson, ‘The Marketing of University Courses under Sections 52 and 53 of the *Trade Practices Act 1974* (Cth)’ (2002) 6 *Southern Cross University Law Review* 106, 118.

Moving forward, it would be prudent for universities to invest in learning and teaching projects that focus on assuring learning outcomes and graduate attributes, with a particular focus on evidencing the achievement of those outcomes. This recommendation is not new: Oliver, in her 2011 *Assuring Graduate Outcomes* report for the ALTC, made similar recommendations.<sup>252</sup> Almost a decade since Oliver's report, it appears that this is still an ongoing issue for the higher education sector.<sup>253</sup> Investing in learning and teaching initiatives that focus on evidencing the acquisition of learning outcomes will not only ensure that the university is compliant with their legal obligations under the *TEQSA Act*, but it will mean the institution is taking active steps to engage in learning and teaching best practice which can be shared across the higher education sector.

Part II of this two-part article outlines measures that universities can implement to reduce their potential legal liability with respect to their integration of their promoted learning outcomes and graduate attributes. The measures that are presented in Part II are specifically designed to assist universities discharge their legal obligations and produce convincing evidence demonstrating the integration of their promoted learning outcomes and graduate attributes.

## V CONCLUSION

Despite the legal mandate requiring universities to assure the implementation of learning outcomes with respect to courses of study offered by institutions,<sup>254</sup> there is consensus within the higher education sector that there are common difficulties experienced with respect to the coverage of learning outcomes.<sup>255</sup> The main difficulties associated with the implementation of learning outcomes and graduate attributes are: disconnect between the intended curriculum (where learning outcomes are often established by university management) and the learned curriculum (what students ultimately learn);<sup>256</sup> and the lack of convincing evidence of achievement and measurement of the learning outcomes by students.<sup>257</sup> It is evident that more work is needed in the higher education sector to develop measures of assuring attainment of learning outcomes for graduates.

Universities that do not have adequate measures in place to demonstrate adequate coverage of their promoted learning outcomes and graduate attributes are exposing themselves to legal risk from potentially aggrieved stakeholders. In particular, due to the increasing commercialisation of the higher education sector, it is predicted that aggrieved students are increasingly more likely to commence legal action

252 Oliver, *Assuring Graduate Outcomes* (n 6) 3–5.

253 Sandri, Holdsworth and Thomas (n 92) 2.

254 *Threshold Standards* (n 1) standard 1.4.

255 See above n 4 and accompanying text.

256 Oliver, *Teaching Fellowship* (n 13) 18, citing Porter (n 96).

257 Barrie, Hughes and Smith (n 2) 6.

against their university for perceived poor quality of services rendered. However, the body of existing case law and legal commentary suggest that legal actions against universities on the issue of coverage of learning outcomes and graduate attributes are unlikely to succeed, as courts are generally reluctant to adjudicate on matters concerning ‘academic judgment’.<sup>258</sup>

The Morrison government’s introduction of performance-based funding (of which graduate employment outcomes is a significant measure), through the Commonwealth Grant Scheme,<sup>259</sup> demonstrates a move by the government towards a more ‘evidence-based culture of accountability in higher education’.<sup>260</sup> As a result, moving forward, the higher education sector can likely expect greater scrutiny from TEQSA with respect to graduate employment outcomes. Therefore, assuring the integration of learning outcomes in the intended and learned curriculum through evidence and documentation should be, if not already, a priority of universities.

258 See above n 230 and accompanying text.

259 Tehan (n 9).

260 Oliver, *Assuring Graduate Outcomes* (n 6) 13.