TEQSA and risk-based regulation

Considerations for university governing bodies

Jeanette Baird

The advent of a new national regulatory and quality assurance regime in Australia, through the Tertiary Education Quality and Standards Agency (TEQSA), presents additional requirements to university governing bodies, for compliance with standards and for risk management. This paper discusses TEQSA's approach and potential vulnerabilities for TEQSA as the regulator. It then analyses issues for the membership, role and conduct of university governing bodies arising from TEQSA's requirements. The challenges and potential hazards of TEQSA's model for university governing bodies are outlined, with particular reference to the differences between the risk management and strategic goals of institutions and of the regulator. While focusing on the situation in Australia, the analysis is relevant to university governance in other countries where risk-based regulatory approaches are under development.

Introduction

Australia has had a new national quality assurance and regulatory system for all providers of higher education, including universities, since 2012. A new agency, the Tertiary Education Quality and Standards Agency (TEQSA), is obliged under its legislation to ensure its regulatory regime complies with the principles of reflecting risk, proportionate regulation and regulatory necessity.

The proponents of TEQSA have indicated that its use of risk-based regulation will be a leading-edge development for higher education quality assurance internationally (Bradley, 2011), although there is weak evidence for its role in improving quality assurance (see Edwards, 2011, for a review).

All university governing bodies have an interest in ensuring that risks to their own university are well-managed. The intersection of institutional risk management and sector-wide risk-based regulation can therefore be expected to be of particular interest to governing bodies, for its implications for the performance of their duties.

Although the principle of reflecting risk originally may have been interpolated into the TEQSA legislation at the insistence of the universities (Group of Eight, 2011: Gallagher, 2012), it accords with international interest by governments in improving regulatory regimes through differential attention to institutions of higher and lower risk across diverse industry sectors (Bartle, 2008; OECD, 2010; Peterson & Fensling, 2011) and in risk-based public policy-making (Rothstein & Downer, 2008, 2012).

The potential for risk-based approaches to be applied to higher education and specifically to quality assurance in higher education has been recognised over the past several years (Raban & Turner, 2006; Huber, 2009; Edwards, 2011; HEFCE 2012). And, at the level of practice in Australia, risk ratings were being used some by State bodies before TEQSA assumed their higher education regulatory functions (VRQA, 2010). Moreover, at the same time, universities in many countries have given – and been asked to give – much more attention to internal risk management (HEFCE, 2005; Bayaga & Moyo, 2009; Brewer & Walker, 2010).

TEQSA's regulatory principles sound admirable in theory but when combined with the standards that all providers are expected to meet continuously and a formal, structured approach to risk management, its risk-based regulation has significant implications for the governance of universities. Certainly – although perhaps somewhat worryingly – governing bodies of universities such as the Australian National University and the University of Melbourne cannot assume that just because their university has an international reputation, TEQSA will automatically regard them as 'low-risk' providers (Cram, 2010; Hilmer, 2012).

In exploring the considerations for university governance of the new regulatory framework, the contents of TEQSA's regulatory and quality assurance toolbox are unpacked, with a discussion of the challenges in implementing risk-based regulation. Subsequent sections of the paper analyse the requirements and actions needed by university governing bodies to respond to TEQSA. Challenges of the TEQSA approach for regulated institutions are then discussed, with commentary on both opportunities for improved university governance and hazards for governing bodies.

TEQSA's regulatory and quality assurance toolbox

TEQSA's regulatory and quality assurance toolbox is extensive (Craven, 2011). Under its legislation, the Tertiary Education Quality and Standards Agency Act 2011, TEQSA possesses the typical powers of many external quality assurance agencies in respect of institutional accreditation (registration) and programme accreditation of providers. A set of Threshold Standards for each of these forms of accreditation has been enacted (TEQSA 2011), and it is these standards that TEQSA must use in the exercise of its functions. One particular feature is that all providers (including universities) are expected to be continuously compliant with these accreditation standards. It is not enough for a provider to only demonstrate that it complies at the time of accreditation.

TEQSA has been given the usual authority to seek and obtain information, but its authority is supplemented by broader and more hard-edged powers to enter premises and seize documents if necessary. Other features of the legislation give TEQSA effective power to take action if it has any concerns about a provider's compliance with the standards. A provider must disclose to TEQSA each material change, including changes to 'key personnel' such as members of the governing body. The actions that TEQSA can take could be anything from a letter of inquiry to the commencement of a new accreditation process.

TEQSA may also conduct thematic reviews of issues across the Australian higher education sector or across groups of providers.

In addition to these powers, TEQSA has also developed a Regulatory Risk Framework, with the laudable aims of making transparent and systematic its approach to risk-based regulation against its standards for providers and programmes.

> 'Regulatory risk management as detailed in this Framework is a precursor to more formal regulatory intervention. Regulatory risk enables TEQSA to identify and understand risk to quality higher education, at both a provider and sector level, and informs decisions about where to focus and prioritise TEQSA's regulatory activity in response'. (TEQSA, 2012)

TEQSA has identified the major risks it wishes to prevent. These are: risks to students, e.g. a failure to 'deliver quality educational outcomes'; the risk of provider collapse; and a risk to the Australian higher education sector's reputation for quality.

The Framework sets out 46 risk indicators, grouped under TEQSA's provider standards. Some of these indicators suggest obvious risks to compliance, such as 'a history of significant breach of standards', but others identify organisational features that may or may not prove to be a risk to standards, such as an 'overseas body corporate'.

TEQSA has conducted preliminary risk scans and states that it intends to undertake more comprehensive risk assessments, and then to discuss with individual providers the risk controls they have in place, to arrive at its own final risk profile for each provider. This is an ambitious agenda, driven by an apparent desire by TEQSA to become the 'risk manager' for the entire Australian higher education sector (Gallagher, 2012). The extent to which such a role would limit university autonomy is unknown but must be a concern of this approach to external quality assurance.

Many external quality assurance agencies would dream of having such a large and flexible range of powers as TEQSA but there are of course challenges in ensuring that these powers, when used together, do not result in a disproportionate regulatory burden or, indeed, that they do not distort the behaviour of universities and other higher education providers in ways that are undesirable for the sector as a whole. Others have addressed the potential for TEQSA to impose an increased regulatory burden (e.g. Hilmer, 2012). The discussion below suggests that university governing bodies will need to be alert to the potential for such distortion.

Challenges for risk-based regulators

The vulnerabilities for agencies in using risk-based regulation, including agencies with responsibility for higher education, have been well-addressed by various authors (Baldwin and Black, 2007, 2010; Peterson & Fensling, 2011; King, 2011; Raban, 2011; Rothstein, 2011).

The potential dangers include assuming that the agency's views on what constitutes a risk will always be the same as those of government or the public generally, especially if the public's views mix both subjective perceptions of risk and objective evidence. Other challenges lie in an expectation that all major risks can be identified by the agency, while ensuring the agency does not neglect apparently low-level risks that become pervasive and over time erode the standing of the sector as a whole. Further, there is the difficulty of demonstrating a counterfactual (avoidance of problems) as a public benefit to weigh against the possibly substantial public costs of the agency's risk identification and mitigation activities. This demonstration of benefits can be more difficult if investigations are conducted in confidence.

Depending on the approach taken, risk-based regulation may place too great an emphasis on the risk posed by individual providers rather than on how to raise compliance across the sector. The agency may also fail to consider the relative merits of cheaper and more expensive interventions to reduce risk across the sector (Baldwin & Black, 2007).

Some of these vulnerabilities seem likely to be magnified in the higher education sector, where the extent to which particular developments present risks to quality is not clear. As an example, the significant 'unbundling' of academic work, to separate programme design from teaching, may or may not present a risk to quality in a mass higher education system.

To counter these vulnerabilities, an agency such as TEQSA is likely to respond in some sensible ways, by developing open public statements on the approach it will take, such as TEQSA's Regulatory Risk Framework, and conducting periodic thematic reviews or research to investigate the extent to which an issue in the sector presents a credible threat to the maintenance of standards. Other actions that can be taken include: requiring providers to continuously disclose significant changes or developments; ensuring that standards are regularly updated in line with changing norms; and supporting quality enhancement activities to improve compliance.

All these forms of response are provided for in the TEQSA legislation, although as yet TEQSA has not shown any particular inclination to support quality enhancement activities.

However, agencies such as TEQSA may also try to limit their vulnerabilities by other strategies. These include: taking an all-embracing and conservative view of risk; seeking very large amounts of information from providers (Gallagher, 2012); following up media reports in case there is fire underneath the smoke (and because government ministers expect it); using both scheduled reviews and risk-based approaches; and, in effect, doing everything they can to ensure they are not 'blindsided' by the unexpected. It seems probably that TEQSA will not be immune to a temptation to reduce the risks it assumes when implementing risk-based regulation.

TEQSA's current model for risk-based regulation is arguably provider-centric, rather than risk-centric. An alternative model, not yet developed by TEQSA but certainly available to it, would be for it to engage a wide range of stakeholders in an inclusive 'social dialogue' (Bartle, 2008; Peterson & Fensling, 2011) about the major broad risks to quality in higher education. Notwithstanding TEQSA's intention to engage with individual providers in dialogue about their risk and risk controls, and its use of thematic reviews, the approach described by TEQSA to date appears more quantitative and technocratic (Bartle, 2008) than one designed to address the larger uncertainties about risks in mass or near-universal higher education.

Direct considerations for university governing bodies of TEQSA's standards and risk-based approaches

The TEQSA model raises both direct and indirect considerations for the conduct and functions of university governing bodies. Direct considerations arise from the Provider Standards and risk indicators that address corporate governance, while the indirect consequences derive from requirements for continuous observance of the Standards, continuous disclosure and the Regulatory Risk Framework as a whole.

It should not be forgotten that all Australian universities have had prior experience of mandatory National Governance Protocols that were once linked to funding. Those universities that are members of Universities Australia have signed on to a Voluntary Code of Best Practice for the Governance of Australian Universities (UA, 2011) that covers many of the matters that are included in, or implied by, the Provider Standards.

Provider Standards on corporate governance

Several of the TEQSA Provider Standards on corporate governance are very similar to those in the Voluntary Code, although the Code includes much greater detail about the functions and duties of members and governing

Table 1: TEQSA risk indicators for corporate and academic governance

Risk indicator	*Explanation*
Weak academic governance structure	A clear academic governance structure plays a key role in protecting the integrity of the provider's core activities of teaching and research (where applicable to provider category). Considerations would include whether academic governance arrangements provide a clear separation between corporate and academic governance (including a properly constituted academic board and course advisory committees), support the maintenance of academic standards, and whether independent student organisations are incorporated into processes.
Weak corporate governance structure / processes	Sufficient capacity for good leadership, with respect to both corporate and academic governance, is important to effective functioning as a higher education provider and managing the delivery of education outcomes. Consideration of appropriateness of qualifications and experience of senior executives, including mix of academic and corporate leadership. Governance processes include clarity of roles, responsibilities, policies and corporate processes (e.g. planning, conflict of interest, internal audit, etc)
Weak risk management plan / processes	Lack of an effective risk management plan / capability can result in ineffective allocation of resources and compromise the achievement of objectives.

Source: TEQSA Regulatory Risk Framework, February 2012

body performance. These Standards address: expertise-based membership of the governing body; monitoring of risk and risk controls; and the establishment and review of an appropriate system of delegations, for financial, academic and managerial activities. These requirements, and related requirements, such as the requirement that members of the governing body be 'fit and proper' persons, are unlikely to be problematic, although they may be onerous to report on.

Provider Standard 3.3 states: 'The higher education provider's corporate governance arrangements demonstrate a clear distinction between governance and management responsibilities'. The implication is that universities may need to actually define for themselves what the difference is between governance and management, and state how the difference is observed in practice. However, early indications are that some universities may be using organisational structural diagrams to 'show' a separation between governance and management without actually describing what the separation means.

In similar vein, Provider Standard 3.7 states: 'The higher education provider's corporate governing body protects the academic integrity and quality of the higher education provider's higher education operations through academic governance arrangements that provide a clear and discernible separation between corporate and academic governance, including a properly constituted academic board and course advisory committees'. The requirement for an academic board is not an issue for Australian universities but it is not clear if TEQSA will seek other forms of evidence to demonstrate that this requirement is met.

In general, however, university governing bodies will not be affected to any significant extent by these requirements, which can be satisfied through documenting existing practice or by developing new statements to overtly indicate compliance.

Risk indicators

The Regulatory Risk Framework sets out three risk indicators for corporate and academic governance, with explanations, as shown in Table 1.

These indicators, in effect, amplify the requirements in the Provider Standards, but the second and third of these highlight the extent to which TEQSA may make qualitative judgments about whether or not corporate governance or risk management is 'weak', even if there is no breach of the Provider Standards. These indicators also introduce an element of double jeopardy, as presumably any non-compliance with the Provider Standards, or other 'risk flags' could lead to a 'risk flag' being placed on corporate governance as well. The third of these indicators raises issues because it may suggest that a university's identification and mitigation of risk should match TEQSA's risk assessment, which as discussed below should not be the case.

Indirect consequences for university governing bodies of TEQSA's standards and risk-based approaches

Continuous compliance

Providers are expected to continuously comply with TEQSA's Provider and other Threshold Standards. Governing bodies presumably will need to receive and consider regular reports on the university's compliance and any instances of non-compliance (Pattison, 2011), and a number of Australian universities have already set up elaborate compliance templates. Some of the other Provider Standards may require action by university governing bodies, especially those on financial sustainability and the promotion and protection of free intellectual inquiry.

Continuous disclosure and motivational posture

University governing bodies will need to know what has been reported under the 'material changes' (continuous disclosure) provisions of the legislation, but they will also need to know why. That is, a university will need to establish its 'motivational posture' (Braithwaite *et al.*, 2007) towards TEQSA, where motivational postures are defined as:

> 'conglomerates of beliefs, attitudes, preferences, interests, and feelings that together communicate the degree to which an individual accepts the agenda of the regulator, in principle, and endorses the way in which the regulator functions and carries out duties on a daily basis.' (Braithwaite ***et al.***, 2007, p. 138)

Early signs are that some universities will choose not to engage closely with TEQSA, and will take a view that many possible 'material changes' are not useful to disclose. Various presentations and media articles have expressed universities' concerns about regulation by TEQSA (e.g. Hilmer, 2012; Larter & Maiolo, 2012) while stopping short of issuing a direct challenge to the regulator. However, other universities seem likely to adopt quite different motivational postures, working collaboratively with TEQSA.

Need to gain intelligence of TEQSA's views on risks that it will investigate

TEQSA's interactions with providers on matters of risk are confidential. Although this is helpful to the individual provider, other universities may find it difficult to obtain information or intelligence on the types of risks that TEQSA has investigated and why, needing to obtain details from personal networks or occasional media reports (Lane, 2012b). Such information is nonetheless important, to assist the university to monitor its own potential for an 'inquiry' from the regulator and to confirm its motivational posture.

Risk management

Universities need sophisticated risk management systems, not only to meet their own internal needs but also for the governing body to monitor the university's ratings against the TEQSA risk indicators, and to avoid other triggers in the legislation that would draw attention to themselves and thus may require the university to engage in discussions with the regulator to justify the university's risk controls and stance. There is also a need to ensure that the governing body itself does not present an area of risk.

From an institutional perspective, TEQSA's risk-based regulation seems likely to produce the slightly paradoxical situation that avoiding the regulator's attention may be the biggest external risk to be managed, due to reputational risks (Power *et al.*, 2009).

Many Australian universities have very well-developed enterprise risk management systems, but they will now need to extend these further, to ensure a balance between the university's approach to risk and that of TEQSA, as discussed below.

Governing body membership

There has been a pronounced turn in Australia to expertise-based membership of university governing bodies in Australia, reinforced by the TEQSA Provider Standards and risk indicators. University governing bodies will need to address requirements for expertise, possibly at the extent of stakeholder and community membership. They may find they need members with stronger skills in risk management, as well as more members with demonstrated expertise in higher education. Certain governing body members will acquire additional work in monitoring compliance with TEQSA requirements and reviewing the associated risk factors.

Opportunities and potential hazards for university governing bodies

Opportunities

TEQSA's Standards and Regulatory Risk Framework seem likely to act as they are intended to in drawing the attention of governing bodies to key features of university performance and operations. Indeed, there may be opportunities for governing bodies to use TEQSA's requirements to improve the accountability of management and the quality of reporting they receive. Governing bodies may be able to refer to TEQSA's requirements for good corporate governance processes if they need to press for additional support or professional development to better fulfil their roles.

A number of TEQSA's risk indicators draw attention to important areas of outcomes, e.g. student retention and progress, financial sustainability and graduate employability. These indicators may already be among the university's key performance indicators, or if not, there is a case to say they should be. There are thus opportunities for alignment between the indicators that the university governing body should monitor and those that TEQSA will monitor.

There may also be opportunities for university governing bodies to receive better-integrated reporting. TEQSA's approach implies an incorporation of the 'compliance' aspects of quality assurance into risk management, and it has been suggested that these could be further aligned with university financial and strategic planning (Edwards, 2011).

Hazards

The major hazards for university governing bodies of the TEQSA model include: increased business uncertainty; assuming that the university's attitudes to risk should be the same as TEQSA's; assuming that TEQSA's requirements suffice for the university's internal quality assurance; giving too much attention to conformance obligations and too little to innovation; and the costs of compliance.

As the regulator of a quasi-market sector, TEQSA aims to set conditions for market-based transactions to occur with confidence. However, TEQSA's approach may have the effect of actually increasing business uncertainty for universities.

As noted above, there are challenges for universities in finding out what TEQSA will construe as a risk or as a material change. TEQSA invites higher education institutions to discuss with it any innovations or new arrangements that may seem to fall outside the provider standards but, at this stage, TEQSA is not able to provide 'binding rulings' on how it formally would treat such changes. The likelihood of such uncertainty is magnified where there are several regulators, as there continue to be in Australian higher education (including the state and territory auditors-general), that may well have different views about risks (Peterson & Fensling, 2011).

'Who is at risk, and whether they can self-manage that risk, is an important consideration in deciding whether and what type of regulatory intervention is required…' (Peterson & Fensling, 2011, p.14). It is not yet clear what would convince TEQSA, as the regulator, that any specific university could self-manage risks such as a rising attrition rate.

Importantly, governing bodies should not assume that the university's and TEQSA's ideas about risk will be, or should be, the same. TEQSA's objective is to minimise risks to the sector as a quasi-market system but for a university, the purpose of risk management is not risk management *per se* but rather the management of possible threats to the achievement of its strategic objectives (Brewer, 2012).

TEQSA's risk indicators focus on the negative aspects of risk whereas, for an enterprise, risk has the potential upside of increased reward. A university's risk appetite for new ventures may well be greater than that of TEQSA, especially if the consequences of realised risks are lower for the university than for the 'national reputation' as envisaged by TEQSA.

Further, institutions are better placed to know their own risks than any external body. An emphasis on addressing TEQSA's risk factors should not mean that other internal risks or risk symptoms are overlooked. It is possible, therefore, that a university's enterprise risk management will need to be augmented, to accommodate two parallel but not identical series of risk assessments and controls, one for TEQSA requirements and one for the university's strategic and operational needs.

A university's risk appetite for new ventures may well be greater than that of TEQSA, especially if the consequences of realised risks are lower for the university than for the 'national reputation' as envisaged by TEQSA.

Another potential hazard is that too great an emphasis on meeting the regulator's requirements could disturb the equilibrium between conformance and performance (Cornforth, 2004; Carnegie & Tuck, 2010) in university governance and strategy (Hare, 2012). While this may seem improbable, university governing bodies will need to be clear-sighted in distinguishing between the university's needs and their obligations under the TEQSA legislation.

TEQSA's Threshold Standards are minimum standards: they are not designed to focus on excellence. Therefore, university governing bodies should not assume that merely meeting TEQSA's requirements will be adequate to ensure the quality of outcomes it desires.

All universities need to innovate, and continually renew themselves, and their governing bodies must give sufficient attention to what is coming over the horizon. The signs are that Australian university governing bodies will need to consider their university's strategic positioning extremely carefully over the next few years. There are simply too many studies that suggest serious consequences for traditional universities from a combination of disruptive change and current stresses (Christensen, 2011; Gallagher, 2012; Price & Kennie, 2012). The new strategic choices made by governing bodies will need internal quality assurance mechanisms that prioritise the most critical elements of the 'brand 'offer'.

Moreover, the strategic decisions of universities in shaping their future paths will inevitably bring them into conflict with TEQSA Standards, which after all are 'lagged' standards based on normative consensus views of minimum good practice. The Standards are built around the twin conceptions of 'providers/institutions' and 'programmes', even as the rise of open courseware and other software tools suggests they should focus more on 'unbundled' components, such as the quality of teaching and student learning or the validity of assessment.

A final hazard that university governing bodies must be alert to is the overall regulatory burden and the costs of 'managing' the regulator, including the costs of personnel and time. Some of these costs are: providing information to the regulator, including disclosures; intelligence-gathering about the regulator, and discussions with the regulator about risk controls. To these must be added the costs of scheduled institutional re-registration and possible participation in thematic reviews.

Conclusions

Much has been written about the challenges for regulators of implementing risk-based regulation, but there is less commentary on the effects on the regulated institutions. Although the principle of risk-based regulation in higher education appears reasonable, the ways in which it is given effect could present particular challenges for university governance.

The analysis above has drawn out a range of issues for Australian university governing bodies in coming to terms with TEQSA's approach. Some of these issues are easily addressed but even the primarily administrative activities to produce elaborate demonstrations of compliance will take time and energy. Other matters have the potential to shape the business and conduct of governing bodies in more significant and possibly counterproductive ways.

Determining a 'motivational posture' towards TEQSA is one early task. University governing bodies need to be alert to their responsibilities in respect of TEQSA's requirements and to the subtle differences between systems that meet the university's needs and those that address TEQSA compliance. They must avoid the potential for 'TEQSA work' to take their attention from difficult strategic choices and to distort their perspectives on risk.

The Australian higher education sector is not yet fully convinced of the value of TEQSA's model of risk-based regulation. Some have even suggested that a risk-based approach may undermine international confidence in the overall quality assurance regime (Lane, 2012a). This seems unlikely, as it appears that TEQSA will continue with regular scheduled provider reviews in addition to its ongoing risk monitoring. However, universities collectively may have a role to play in initiating dialogue with TEQSA on how its risk-based approach can become more pro-active in supporting the Australian higher education sector.

Several other countries have developed, or have indicated a desire to develop, risk-based approaches to quality assurance and regulation for their higher education sectors. The observations in this paper may assist university governing bodies in those countries to assess the likely effects of such approaches on their behaviour and conduct.

Jeannette Baird is Adviser, Office of Higher Education, Papua New Guinea. From August 2011 to May 2012, she was employed by TEQSA.

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