FEDERAL COURT OF AUSTRALIA

Raffles College Pty Ltd v Tertiary Education Quality Standards Agency [2015] FCA 734

Citation:	Raffles College Pty Ltd v Tertiary Education Quality Standards Agency [2015] FCA 734
Parties:	**RAFFLES COLLEGE PTY LTD v TERTIARY EDUCATION QUALITY STANDARDS AGENCY and SECRETARY, DEPARTMENT OF EDUCATION AND TRAINING**
File number:	NSD 787 of 2015
Judge:	**PERRAM J**
Date of judgment:	20 July 2015
Catchwords:	**EDUCATION** – whether *Education Services for Overseas Students Act 2000* (Cth) (ESOS Act) demanded certain approach to decision making or required regard be had to certain matters – consideration of regulatory framework for higher education providers **ADMINISTRATIVE LAW** – whether Tertiary Education Quality Standards Agency required to employ risk management approach when considering whether to make recommendation to Secretary regarding education provider registration – whether objects of ESOS Act in s 4A were mandatory relevant considerations
Legislation:	*Acts Interpretation Act 1901* (Cth) s 25D *Administrative Appeals Tribunal Act 1975* (Cth) s 35(3) *Education Services for Overseas Students Act 2000* (Cth) ss 4A, 8, 9AA, 9AB, 9AD, 9AE, 9AF, 9AG, 9AH, 15, 21, 46A, 46B, 46D *Tertiary Education Quality and Standards Agency Act 2011* (Cth) ss 2, 9, 132 *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007*
Cases cited:	*Kutlu v Director of Professional Services Review* (2011) 197 FCR 177 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24

Date of hearing:	17 July 2015
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	41
Counsel for the Applicant:	Ms C Ronalds SC and Ms B Tronson
Solicitor for the Applicant:	DC Balog & Associates
Counsel for the Respondents:	Ms A Mitchelmore
Solicitor for the Respondents:	Australian Government Solicitor

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 787 of 2015**

BETWEEN:	**RAFFLES COLLEGE PTY LTD** **Applicant**
AND:	**TERTIARY EDUCATION QUALITY STANDARDS AGENCY** **First Respondent**
	SECRETARY, DEPARTMENT OF EDUCATION AND TRAINING **Second Respondent**

JUDGE:	**PERRAM J**
DATE OF ORDER:	**20 JULY 2015**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The Applicant pay the Respondents' costs.
3. The Applicant bring in a draft order in the Administrative Appeals Tribunal in the manner foreshadowed at [41] of these reasons within 7 days.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

(Revised from transcript)

1 This is an application for judicial review of two administrative decisions made by the first respondent, TEQSA, in relation to a college conducted by the applicant (Raffles). The matter first came on before me in the duty list on 6 July 2015 on Raffles' application for an interlocutory injunction. The result of that application was the matter was heard urgently on Friday 17 July 2015. These reasons will be expressed more briefly than they might otherwise have been in more leisurely circumstances.

2 The case concerns the regulatory framework which governs the provision of higher education to overseas students. The framework is federal and is found in the *Education Services for Overseas Students Act 2000* (Cth) (the 'ESOS Act'). Under s 8(1) of the ESOS Act, it is an offence for a person, broadly speaking, to provide or offer to provide an educational course to an overseas student at a specified location unless the provider is registered to provide that course at that particular location. The full text of section 8(1) is as follows:

> '**8 Offence: providing or promoting a course without a registered provider**
>
> (1) A person is guilty of an offence if the person:

> (a) provides a course at a location to an overseas student; or
>
> (b) makes an offer to an overseas student or an intending overseas student to provide a course at a location to that student; or
>
> (c) invites an overseas student or intending overseas student to undertake, or to apply to undertake, a course at a location; or
>
> (d) holds himself, herself or itself out as able or willing to provide a course at a location to overseas students;
>
> unless:
>
> (e) the person is registered to provide that particular course at that particular location; or
>
> (f) the person does so in accordance with an arrangement that the person has with a registered provider for that particular course for that particular location.'

3 Pursuant to this provision, Raffles was registered under the ESOS Act on 7 August 2006 to provide higher education to overseas students at premises at 99 Mount Street, North Sydney. That registration was due to expire on 16 June 2015, following various earlier extensions of the initial registration.

4 Because simplicity and clarity are the central aims of most Commonwealth legislative endeavours, it is no surprise that there is a parallel federal system of regulation for the tertiary education sector. The Act performing this function is the *Tertiary Education Quality and Standards Agency Act 2011* (Cth) (the 'TEQSA Act'). It seeks to regulate the standards at which tertiary education is provided and, because the Commonwealth has no direct legislative power to regulate education, this law takes the form, via s 8, of a law with respect to corporations, external affairs and territories.

5 The TEQSA Act provides for a regime of registration of higher education providers and operates, by s 9, to exclude the operation of State and Territory higher education laws which purport to regulate the same subject matter. The TEQSA Act's provisions commenced in a series of stages, by s 2, but, relevantly, State and Territory higher educational laws were left with a concurrent operation until 29 January 2012 when the registration provisions came into force. In December 2012, Raffles applied to renew its registration under both the ESOS and TEQSA Acts. The decision-maker under both Acts is sometimes the Secretary, but sometimes TEQSA itself, which is established under its own Act (see s 132). TEQSA put Raffles' application under the ESOS Act, with which this case is concerned, to one side, whilst it dealt with the application under the TEQSA Act. It refused that application on

21 August 2014. There is presently pending in the Administrative Appeals Tribunal an application to review that decision.

6 On 28 January 2015, Raffles notified TEQSA that it would now be providing its courses from new premises at Parramatta from 2 March 2015. Of course, Raffles needed to be registered to do so and the following day TEQSA sent Raffles the appropriate forms to apply for registration under s 9AG of the ESOS Act. TEQSA reminded Raffles of its obligations in that regard on 9 February 2015, and on 10 February 2015 Raffles applied to add its education courses at Parramatta to the register, which is called the Commonwealth Register of Institutions and Courses for Overseas Students, or, for those who like acronyms, 'CRICOS'.

7 On 27 February 2015, TEQSA staff visited the Parramatta site and prepared a report. A subsequent report was prepared for TEQSA by a contractor called Quorum Australia QA Pty Ltd, following another site visit, and this was furnished to TEQSA on 12 April 2015. These reports identified a number of instances of non-compliance with the relevant requirements. Many of those requirements are set out in an instrument called the *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007* (the 'National Code').

8 On 24 April 2015, TEQSA wrote to Raffles and indicated that it was proposing to refuse both the earlier registration renewal application lodged in December 2014 and the application to add Parramatta to Raffles' CRICOS registration. Raffles replied to this letter on 22 May 2015. On 11 June 2015, TEQSA made two decisions which, for reasons which I will return to shortly, both took the form of recommendations. It concluded that Raffles had:

(a) defaulted under s 46A(1) of the ESOS Act by relocating from North Sydney to the Parramatta site and thereby failed to provide the courses to students at the location on the agreed start date and ceased to provide courses to students at North Sydney after the course had started;

(b) contravened the requirement in s 46B(2) of the ESOS Act that a provider notify the Secretary of a default within three business days;

(c) failed to notify students in relation to whom it had defaulted of the fact of that default, contrary to s 46B(4) of the ESOS Act;

(d) failed to discharge its obligations within 14 days after the default by arranging for an offer in an alternative course at the applicant's expense or a refund, contrary to s 46D;

(e) failed to update its records on the Provider Registration and International Student Management System ('PRISMS'), contrary to s 46B(6) of the ESOS Act;

(f) contravened s 15 of the ESOS Act and Standard 1.1 of Part D of the National Code by providing false and misleading information to overseas students about its capacity to provide courses at the Parramatta site;

(g) contravened s 21 of the ESOS Act by failing to have complete student records and information and lacking administrative procedures to confirm student details every six months;

(h) contravened Standard 2.2 of Part D of the National Code by failing to have documented procedures to assess student portfolios or document assessments, and failing to implement a policy to assess whether students' English language proficiency was appropriate for the course for which enrolment was sought;

(i) contravened Standard 7.4 of Part C of the National Code by allowing students to study courses for longer periods than that for which the courses were registered under CRICOS, otherwise than in the circumstances permitted by the National Code; and

(j) found that the applicant had failed to implement its own procedures with respect to granting and recording course credit, which gave rise to substantial concerns about the applicant's capacity to provide a satisfactory standard of education.

9 TEQSA's original letter of 24 April 2015 had enclosed a report which set out the assessment of Raffles' compliance with, inter alia, the National Code. That was a substantial document. Raffles' responsive letter of 22 May 2015 was directed at those matters and dealt with each of the alleged breaches seriatim. Raffles' response to each allegation was divided, in effect, into two parts. First, what rectifying steps it had taken in respect of the past breaches and also what future steps it was taking by way of preventative measures to ensure ongoing compliance. By reference to TEQSA's letter of 24 April 2015 and Raffles' letter of 22 May 2015, it is thus possible to chart the debate with reasonable clarity.

10 In relation to the suggestion in (a) (that it had breached s 46A(1) of the ESOS Act by relocating to Parramatta), Raffles submitted that it was doing all that it could by having the location added to its registration, to which much of the balance of the submission was directed.

11 In relation to the suggestion in (b) (that it had failed to notify the Secretary within three days of a default, in this case relocating to a location in respect of which it was not registered),

Raffles seemingly accepted this to be the case. Further, in relation to (b) and also to (e), which concerned Raffles' obligations to notify the Secretary of the defaults, it acknowledged its obligations to enter these matters in the PRISMS database.

12 In relation to (c) and (d), Raffles said that it had issued letters to all of the international students notifying them of this. It did not notify them of their present entitlement to enrol elsewhere, it is said, because to do so it would lose a large amount of business unnecessarily if ultimately it was registered in respect of Parramatta.

13 In relation to (d) (that is a requirement to offer alternative courses at its own expense within 14 days), it made an offer to arrange the transfer of students to alternative courses elsewhere, at its own expense, or refund students' 'unspent tuition fees', but only if students did not want to study at Parramatta, i.e. it did not deal with a contingency that no registration was ultimately obtained.

14 In relation to (f) (that is the allegation that it had provided misleading information to students about its capacity to offer services at Parramatta), it admitted that it had sent letters to all of the relevant students about the default, had updated its website to reflect the fact that it was not currently registered and had informed TEQSA of a new Documents and Records Management Policy, a draft of which it enclosed, designed to ensure such misleading statements were not made in the future.

15 In relation to (g) (the allegation concerning missing student records), Raffles submitted that it had updated all of its current student records in PRISMS. It conceded that there were 27 missing student addresses, but it pointed out this was out of a total of 546. Of the 27 which were missing, only six related to second term enrolments in 2015 and 21 related to prior, that is expired, terms. Of the six current enrolments, three students were either deferring or withdrawing. Of the remaining three students, Raffles had succeeded in locating, in one case, the signed agreement about which TEQSA had complained. Another had not been eligible to enrol in term 1 and needed to undertake an ELICOS course. His registration had therefore been updated to provisional. The gravamen of this submission was, I suppose, to show the currency of the situation and to provide reasons why it might not be unnatural not to have completed his details. In relation to the third student, she had decided, apparently, not to proceed.

16 In relation to (h) (the contravening of the National Code by failing to have documented procedures to assess student portfolios and to assess their English language abilities), Raffles submitted that whilst it was true that it did not have IELTS tests on file, each of the five students in respect of whom this was said to be a problem had satisfied its English proficiency policy, in that they had already completed in part or in full other courses of study showing that they were proficient in English. For example, two of the students had already done two years of study at an advanced diploma level. The position of each of the five students was addressed. Significantly, the English language proficiency policy was not attached or disclosed to TEQSA.

17 In relation to (i) (that Raffles had changed the length of courses without approval from TEQSA), Raffles said that this had only related to the Fashion Design major within the Bachelor of Design course and had occurred due to scheduling issues in the final year. In response it was no longer enrolling students in terms 2 and 4 who would need the extra term.

18 In relation to (j) (implementing its own procedures about recording course credits), Raffles submitted that five of the seven students involved had transferred from other colleges with the suggestion, I suppose, that the record keeping deficiencies had their origins elsewhere. It had changed its procedures to ensure that this did not happen in the future.

19 TEQSA's recommendation dealt with all of these issues. For each issue it set out the concern, the evidence and Raffles' submission, before reaching a conclusion. I will not set it out. It is a detailed document. However, to give the flavour of it I will set out the section dealing with the English language requirements:

> '64. Standard 2.2 of Part D of the National Code requires that a provider has documented procedures, and implements those procedures, to assess whether a student's qualifications, experience and English language proficiency are appropriate for the course into which admission is sought.
>
> 65. RCDC did not provide a copy of its English language proficiency policy, though the forms on student files (and attached to RCDC's response) indicate that a student is required to possess IELTS 6.0 at admission. TEQSA staff and Quorum Australia identified eight student files where students were admitted without providing evidence that they possessed IELTS 6.0.
>
> 66. RCDC's response attempted to explain the particular issues raised in relation to these students, though it provided no explanation of the basis on which RCDC had assessed those students as possessing the requisite level of English language proficiency or the relationship between RCDC's explanation and the documented procedures RCDC is required to have and apply in relation to applicants for admission.

67. Similarly, RCDC's only response to findings by Quorum Australia that RCDC had no processes in place to assess student portfolios or document assessments was to indicate that RCDC is in the process of formalising assessment rubrics, and to refer to proposed arrangements for a compliance auditor (whose appointment was advertised the day before RCDC's response was submitted) and to set up a new student management system.

68. TEQSA concluded that RCDC fails to comply with Standard 2.2 of Part D of the National Code, on the basis that the required procedures are not in place and RCDC provided no evidence that the steps it intends to take will satisfactorily address TEQSA's concerns.'

20 The point to be made here is that it provided detailed and responsive reasons. No attack is made by Raffles on this aspect of TEQSA's decision making process. It is not said, for example, that the reasoning process disclosed was irrational or *Wednesbury* unreasonable or that it had denied Raffles procedural fairness by failing to deal with a substantively advanced submission.

21 To understand the challenge which is made it is necessary to grasp the final conclusions to which TEQSA came. These were at paras [87] to [94] of the recommendation and were as follows:

'87. In order for TEQSA to make a recommendation under section 9AA of the ESOS Act that RCDC's registration be renewed under section 9AB, or that RCDC's courses at the Parramatta location be added to RCDC's registration under section 9AG, TEQSA would be required to give the Secretary a certificate that states that the provider has clearly demonstrated the capacity to provide education of a satisfactory standard. The certificate would also need to relate to RCDC's compliance with the National Code.

88. In the event that TEQSA made a recommendation under section 9AA for RCDC's registration to be renewed, the Secretary would need to have no reason to believe that RCDC:

a. is not complying, or will not comply, with the ESOS Act or the National Code;

b. does not have the clearly demonstrated capacity to provide education of a satisfactory standard; or

c. is unlikely to be able to provide education of a satisfactory standard.

89. These reasons set out conclusions about a range of areas in which RCDC is not complying with the ESOS Act and the National Code. TEQSA gave RCDC a reasonable opportunity to address TEQSA's concerns, and in many cases TEQSA notified RCDC of particular requirements of which RCDC appeared not to have previously been aware.

90. While RCDC has described (often in general terms) the measures that it intends to take to address these areas of non-compliance, TEQSA considered that RCDC's response did not affect TEQSA's conclusions that RCDC fails to meet the relevant requirements of the ESOS Act and the National Code.

91. In light of these conclusions, and having regard to the matters discussed above in relation to Standard 12.1 of Part D of the National Code, TEQSA also had substantial concerns that RCDC does not have the capacity to provide education of a satisfactory standard.

92. The National Code and the ESOS Act impose obligations on providers. Those obligations are not designed to require a designated authority, such as TEQSA, to direct a provider as to the means by which the provider must effect compliance with its legislative responsibilities, or the means by which the provider ensure that it provides education of a satisfactory standard. It is RCDC's responsibility to ensure that these obligations are met.

93. These concerns arise in relation to matters which are central to the provision of the requisite standard of education, such as ensuring that students possess the requisite standard of English prior to admission and undertaking an assessment of the appropriateness of credit with a view to maintaining the integrity of its courses.

94. Having regard to these matters, TEQSA decided not to recommend under section 9AA of the ESOS Act that RCDC's registration be renewed under section 9AB of the ESOS Act, or that RCDC's courses be added to the Parramatta location under section 9AG of the ESOS Act. TEQSA considered that given the scope of non-compliance, the failure by RCDC to satisfactorily address this non-compliance after being given an opportunity to do so and TEQSA's substantial concerns about RCDC's capacity to provide education of a satisfactory standard, this decision is consistent with the risk management approach required by subsection 9AA(2) of the ESOS Act.'

22 Raffles' challenge to this reasoning is twofold. First, it submits that TEQSA has failed, as it was required by law, to use a risk management approach in making its recommendation. Secondly, it puts that TEQSA had failed to take into account a mandatory consideration, to wit, the fact that it was an object of the Act, 'to protect and enhance Australia's reputation for quality education and training services.'

23 The first argument turned on s 9AA(2) of the ESOS Act. Section 9AA provides as follows:

'**9AA Recommendation by designated authority that approved provider be registered to provide a course at a location**

(1) A designated authority may recommend that an approved provider for a course for a location be registered under this Act to provide that course at that location to overseas students.

Risk management approach

(2) A designated authority must use a risk management approach when considering whether to make such a recommendation.

Recommendation may relate to new or existing registration

(3) A designated authority may make such a recommendation:

(a) for the purposes of the Secretary registering an approved provider under section 9AB; or

(b) for the purposes of the Secretary adding one or more courses at one or more locations to a provider's registration under section 9AG.'

24 The second argument turned on the explicit objects of the ESOS Act in s 4A (more specifically s 4A(b)) which provides as follows :

'**4A Objects**

The principal objects of this Act are:

(a) to provide tuition assurance, and refunds, for overseas students for courses for which they have paid; and

(b) to protect and enhance Australia's reputation for quality education and training services; and

(c) to complement Australia's migration laws by ensuring providers collect and report information relevant to the administration of the law relating to student visas.'

The legislative architecture

25 The ESOS Act makes it an offence by s 8, as I have already indicated, to provide courses to overseas students at a location unless the provider is registered for that course at that location. The decision by which a provider is to be registered is made by the Secretary under s 9AB. The Secretary cannot register a provider unless a designated authority has made a recommendation that it do so under s 9AA: see s 9AB(1) of the ESOS Act. Additionally, by reason of s 9AH, the Secretary cannot register a provider unless in possession of a certificate from the designated authority as to the provider's suitability. In this case the designated authority was TEQSA.

The relevant considerations ground

26 Raffles submitted that TEQSA did not address itself to the question of what the impact of its decision would be on the reputation of Australia for quality education and training services. It made specific reference to the reports attached to TEQSA's letter of 24 April 2012. A part of the first report referred to 'Standard 14: staff capability, educational recourses and premises'. Under that heading, and a further sub-heading 'Findings', it was said:

'The evidence from the inspection by TEQSA staff confirmed that the education resources including facilities and equipment were adequate to support student learning outcomes.'

27 It also indicated that this issue had not been fully assessed, by way of a check box with those words next to it. Raffles' point, in a nutshell, was that one could not sensibly refuse to register a provider whose educational standards were accepted to be adequate without taking that adequacy into account in the course of a decision. An underlying submission to this was that all of the defects which TEQSA had pointed to were of a record-keeping nature. For that argument to work it is necessary to show that TEQSA was required by law to consider that matter. There is no explicit requirement in the ESOS Act that it do so, at least in terms. Raffles, therefore, pointed to the objects clause set out above, s 4A.

28 What is required to be taken into account in the course of making an administrative decision under an enactment was explained by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 in these terms:

> '(b) What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors – and in this context I use this expression to refer to the factors which the decision-maker is bound to consider – are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act.'

29 So what is required in this case is an implication from the subject matter, scope and purpose of the Act. In this case it is apparent that the object described in s 4A(b) is achieved by the machinery of which the recommendation forms but a part. Section 9AA is contained in Div 3 of Pt 2, which share the title 'Registration of approved providers'. If TEQSA makes a recommendation that a provider should be registered it must issue a certificate under s 9AH and the Secretary cannot act without that certificate: see s 9AB(1)(e). Section 9AH provides:

> '**9AH Certificate from designated authority**
>
> For the purposes of paragraphs 9AB(1)(e) and 9AG(1)(b), a designated authority who recommends under section 9AA that an approved provider be registered to provide a course at a location must give the Secretary a certificate, in the form approved by the Secretary for the purposes of this section, that:
>
> (a) relates to the provider's compliance with the national code; and
>
> (b) except in the case of a provider mentioned in subsection 9B(1)—states that the provider has satisfied the designated authority that the provider is fit and proper to be registered; and
>
> (c) in any case—states that the provider has the principal purpose of providing education; and

(d) states that the provider has clearly demonstrated the capacity to provide education of a satisfactory standard (including by having an appropriate business model and access to adequate financial resources, for example); and

(e) if applicable, states that the provider meets the ELICOS Standards; and

(f) if applicable, states that the provider meets the Foundation Program Standards; and

(g) states the results of the designated authority's risk assessment of the provider; and

(h) states the conditions (if any) that should apply to the provider's registration for the course for the location, in view of the results of that risk assessment; and

(i) if the certificate is for the purposes of paragraph 9AB(1)(e)—states the period (of no less than 2 years and no more than 5 years) for which the provider should be registered.

Note 1: For paragraph (b), the designated authority must have regard to the matters referred to in section 9B in deciding whether a provider is fit and proper to be registered.

Note 2: For paragraph (c), see section 5A for when a higher education provider has the principal purpose of providing education.'

30 I would infer that each of the matters in subparas (a) to (g) of s 9AH are mandatory matters which must be taken into account in making a recommendation under s 9AA. In my opinion it is through this list that the Parliament has decided to achieve the object in s 4A(b). I do not think, in light of the list in s 9AH and its mandatory nature, that there is any need for a residual obligation on TEQSA to consider the object in s 4A(b) in a freestanding way. Consequently, I do not accept that it provided an additional mandatory consideration for TEQSA to assess.

31 In any event, even if it did or even if the argument were to be recast to allege that s 9AH(d) provided an equivalent mandatory consideration, I consider that the subject matter was in fact taken into account. It is apparent from what I have said above that TEQSA was not satisfied that appropriate arrangements were in place to ensure that students had an adequate command of the English language. Although this concern was not expressed in terms of the ability of Raffles to provide education at a satisfactory standard, it can hardly have related to anything else.

32 It is implicit in that observation that I reject the submission that the defaults identified by TEQSA were only record-keeping matters. In my opinion that understates the significance of many of them, particularly the ones concerned with the ability of the students to speak English at an adequate level. I reject the allied argument based on s 25D of the *Acts*

Interpretation Act 1901 (Cth), that because the matter was not explicitly referred to in TEQSA's recommendation it can inferred that it was not taken into account. Section 25D provides:

> '**25D Content of statements of reasons for decisions**
>
> Where an Act requires a tribunal, body or person making a decision to give written reasons for the decision, whether the expression "reasons", "grounds" or any other expression is used, the instrument giving the reasons shall also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.'

33 The question of whether TEQSA thought Raffles' educational standards were satisfactory was not a material fact to which this section applied.

The risk management approach

34 Section 9AA(2) of the ESOS Act required TEQSA to apply a risk management approach when considering whether to make a recommendation. A series of other decisions under Div 3 are conditioned in a similar way, for example a decision to impose conditions on registration (see ss 9AD(3)(b) and 9AE(4)) and to remove or vary such conditions (see s 9AF(3)). The issue of a certificate under s 9AH (set out above) also requires, by subsection (g), a 'risk assessment of the provider', a different but related concept. 'Risk assessment' is defined in s 5 in these terms:

> '***risk assessment*** of a provider means an assessment of the risk of the provider being unable to satisfy the obligations of a provider under this Act.'

35 On the other hand, the expression 'risk management approach' is not defined. However, I consider that in both concepts the risks that are being referred to must be the same risks. I infer that because the same word is used, and one should approach the interpretation of the Act on the basis that where Parliament uses a particular word it intends it to have a consistent meaning throughout the statute. That being so, the meaning of 'risk' in both expressions is the risk of a provider being unable to satisfy the obligations of a provider under the Act. Because a certificate under s 9AH necessarily comes after the process of making a recommendation under s 9AA, the obvious inference is that 'risk assessment' is what results from the application of a 'risk management approach'.

36 If that be so, a risk management approach is an approach which addresses itself to the risk that a provider will be unable to comply with its obligations under the ESOS Act. I reject the

submission made on Raffles' behalf that that construction effectively treats the expression 'risk management approach' as having the same meaning as 'risk assessment'. The difference between the two concepts is the difference between a process and an outcome. A risk management approach is the process and the risk assessment is the outcome which follows from the application of that process. Reference was made to two matters by Raffles said to assist its argument. The first of these concerned various dictionary definitions of the expression 'risk management' and the second concerned various remarks made during debate on the passage of the bill. I do not regard either of those as throwing very much light on the matter.

37 This Court has jurisdiction to determine whether TEQSA adopted a risk management approach. If it did not, then it will not have complied with s 9AA(2) which appears to be mandatory in its terms. It was assumed, without any express argument, on both sides that non-compliance with s 9AA(2) would result in the invalidity of the recommendation. I propose to adopt that submission: cf *Kutlu v Director of Professional Services Review* (2011) 197 FCR 177 (FC). Accordingly, this Court may examine whether TEQSA in fact adopted the required approach.

38 It is to be emphasised that in doing so one does not ask whether TEQSA conducted a good, bad or indifferent risk management approach. The question is solely whether the approach it adopted bears the requisite character, viz. whether it can be said that that which was done involved the application of a risk management approach. The extract from TEQSA's reasons at [87]-[94] that I have set out above, in my opinion, abundantly shows that it addressed itself squarely to the question of whether there was a risk that Raffles might be unable to comply with its obligations. In my opinion, it is difficult to describe that as other than a 'risk management approach'.

39 The last part of para [94], which says that its decision is consistent with a risk management approach, is not, as was submitted, mere window dressing but accurately reflected the realities of what TEQSA had done. In those circumstances I conclude that TEQSA complied with its obligations under s 9AA(2). Accordingly, the application will be dismissed with costs.

Confidentiality

40 During the course of the hearing, a question arose as to whether the Court should suppress the name of Raffles insofar as it concerned its proceedings in the Administrative Appeals

Tribunal. At the time, I indicated that I did not think that such an order was necessary and said that I would give reasons when I delivered the Court's judgment on the main cause. The reasons I delivered orally on Monday 20 July 2015 (which are set out above), by oversight on my part, did not include any reasons on that issue. I have added these two paragraphs at the end of the reasons I revised from the transcript from 20 July 2015 to deal with it.

41 I was informed that in Raffles' appeal to the Administrative Appeals Tribunal the Tribunal had made an order that its name be suppressed. Presumably, this was pursuant to the power in s 35(3) of the *Administrative Appeals Tribunal Act 1975* (Cth). I would not read that power as extending to prevent a party informing this Court of the existence of such proceedings or as preventing the Court in the discharge of its functions from referring to such a matter in its reasons if necessary. As a counsel of practicality it is sensible, however, to arrange the making of an order in the Tribunal permitting reference to that appeal in these proceedings. In this case, as I am fortuitously a Presidential Member of the Tribunal, I will ask the parties to bring in an order in the Tribunal permitting publication for the purposes of these proceedings and that order I will make in that capacity with effect from the commencement of the proceedings in this Court.

I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram.

Associate:

Dated: 27 July 2015