

Annual Meeting of the Chairs of Academic Boards Curtin University of Technology 2007

Academic Boards: Legal Issues

Reference: Chapter 2 Jackson and Varnham *Law
for Educators: School and University Law in
Australia* Lexis Nexis 2007

Constitutional issues

- Universities controlled by a confusion of State and Federal control
- Federal power comes from the Grants power, hence conditional funding.
- Future federal power may come from corporations power: “The Commonwealth’s corporations power does not give it the power to establish a university. While it may allow the Commonwealth to assume some accreditation functions (for example, to recognise an established body as a university and to accredit courses and providers), this would only be in respect of constitutional corporations” [Nelson:*Building Better Foundations*]

Constitutional issues (continued)

- A constitutional corporation is one that is a trading financial or foreign corporation.
- *Quickenden v Commissioner O'Connor of the Australian Industrial Relations Commission* held that the University of Western Australia is a trading corporation
- But because of the decision in an earlier High court case, *NSW v Commonwealth* the Federal government cannot legislate for the establishment of a new university in a State using the corporations power.

What is a university

- As noted a university is a corporation. A group of people with common objectives seek corporate status for their organisation. The state confers that via a general statute as in the *Corporations Act 2001* (Cth) or via a separate act of parliament, such as a state act creating a university.
- It is not possible to establish a corporation at common law, the status is conferred as a privilege by the state.

Nature of university

- In *National Tertiary Education Industry Union and Australian Higher Education Industrial Association* a university was described “as an incorporated charitable foundation of a distinctive rank. The characteristics of the foundation include the status and personality of a corporate body, established by an instrument of foundation emanating from the Crown. The staff and students are the primary constituents of the corporate body together with the organs of management of it ... It may be noted that the State therefore performs a primary role in the foundation of all Australian universities.”

Example

- ***University of New England Act 1993(NSW)***
- Section 4
- A University is established by this Act, consisting of:
- (a) a Council, and
- (b) Convocation, and
- (c) the professors and full-time members of the academic staff of the University and such other members or classes of members of the staff of the University as the by-laws may prescribe, and
- (d) the graduates and students of the University.
- Section 5:
- The University is a body corporate under the name of the University of New England.

Definition from protocols

- A definition of a university is contained in the *National Protocols for Higher Education Approval Processes* which state:
- 1.13 An Australian University is an institution which meets nationally agreed criteria and is established or recognised as a university under State, Territory or Commonwealth legislation.
- 1.14 An Australian University will demonstrate the following features:
 - authorisation by law to award higher education qualifications across a range of fields and to set standards for those qualifications which are equivalent to Australian and international standards
 - teaching and learning that engage with advanced knowledge and inquiry

Protocols (continued)

- • a culture of sustained scholarship extending from that which informs inquiry and basic teaching and learning, to the creation of new knowledge through research, and original creative endeavour
- • commitment of teachers, researchers, course designers and assessors to free inquiry and the systematic advancement of knowledge
- • governance, procedural rules, organisation, admission policies, financial arrangements and quality assurance processes, which are underpinned by the values and goals outlined above, and which are sufficient to ensure the integrity of the institution's academic programs, and
- • sufficient financial and other resources to enable the institution's program to be delivered and sustained into the future.

UNE Section 6

- **UNE Section 6**
- (1) The object of the University is the promotion, within the limits of the University's resources, of scholarship, research, free inquiry, the interaction of research and teaching, and academic excellence.
- (2) The University has the following principal functions for the promotion of its object:
 - (a) the provision of facilities for education and research of university standard,
 - (b) the encouragement of the dissemination, advancement, development and application of knowledge informed by free inquiry,
 - (c) the provision of courses of study or instruction across a range of fields, and the carrying out of research, to meet the needs of the community,

UNE continued

- (d) the participation in public discourse,
- (e) the conferring of degrees, including those of Bachelor, Master and Doctor, and the awarding of diplomas, certificates and other awards,
- (f) the provision of teaching and learning that engage with advanced knowledge and inquiry,
- (g) the development of governance, procedural rules, admission policies, financial arrangements and quality assurance processes that are underpinned by the values and goals referred to in the functions set out in this subsection, and that are sufficient to ensure the integrity of the University's academic programs.

Management Triangle

- The *legislation* incorporating universities usually creates a governing body typically called the council(sometimes senate), to whom a chief executive officer (the vice chancellor) reports, and a senior academic body, known as the academic board (or senate).
- A fourth and forgotten group are the university members, often expressed as academic staff and students

View of Chancellors and VCs

- Ideally, a balance is set between external accountability (that maintains public confidence in the operation of a university) and each university's capacity to set its own direction to achieve its objectives.
- A number of different elements are required for this to be effective:
 - the Council or Senate, which provides the body independent of Government but responsible in the public interest for the operation of the university;
 - the universities' objectives, as established by Council and drawing on advice from senior management;
 - a Vice-Chancellor and executive managers, responsible to the Council for the effective management of the university; and
 - an academic board, responsible to Council for ensuring the academic quality and credibility of the university's operations as an educational institution

University Council

- **CURTIN UNIVERSITY OF TECHNOLOGY ACT 1966 - SECT 21**
- **Powers of Council 21 . Powers of Council**
- Subject to this Act and the Statutes, the Council —
- (a) may provide such courses of education not below tertiary level as it thinks fit and may in accordance with this Act award appropriate degrees, diplomas and certificates or honorary awards;
- (b) may from time to time appoint persons to the Staff of the University and other officers and engage employees for the University;
- (c) has the entire control and management of the affairs, concerns and property of the University;
- (d) may, with the approval of the Minister, provide any course that is below the level of tertiary education; and
- (e) may act in all matters concerning the University in such manner as appears to it best calculated to promote the objects and interests of the University.

Vice Chancellor

- **CURTIN UNIVERSITY OF TECHNOLOGY ACT 1966 - SECT 14**
- **14 . Chief executive officer**
- (1) The Council shall appoint and may terminate the appointment of a person to be the chief executive officer of the University.
- (2) The chief executive officer shall hold office as such for such period and on such conditions as the Council determines.
- (3) The chief executive officer has such powers and duties as are prescribed and unless otherwise expressly provided therein, the chief executive officer may delegate any of those powers and duties to any person or committee of persons.

Academic Board

- **MURDOCH UNIVERSITY ACT 1973 - SECT 21**
- **Academic Council**
- (1) It shall be the duty of the Senate to establish by Statute an Academic Council.
- (2) The membership of the Academic Council shall consist of —
- (a) the Vice-Chancellor;
- (b) members of the academic staff of the University appointed by virtue of their office;
- (c) persons elected from amongst the members of the University; and
- (d) persons co-opted by reason of their qualifications, interest or experience for the purpose of making a specific contribution to the deliberations of the Academic Council.

Murdoch University

- (3) The number of members who shall comprise the Academic Council from time to time, the method of their appointment and selection, their term of office, the conduct of proceedings and all other matters in the opinion of the Senate necessary or desirable to ensure the effective exercise of the functions of the Academic Council may be prescribed by Statute.
- (4) The functions of the Academic Council shall include —
- (a) the discussion and submission to the Senate of opinions and recommendations on academic policy, academic development, the admission of students, instruction, studies and examinations, research, the admission to degrees, the discipline of the University and any other matters which in the opinion of the Academic Council are relevant to the objects of this Act;
- (b) the furnishing to the Senate of reports on all matters referred to it by the Senate for consideration; and
- (c) such other acts or matters as may be conferred or imposed by Statute, and the Academic Council shall have all such powers as may be necessary to discharge its functions.

UNIVERSITY OF SYDNEY ACT 1989 s 15

- **Academic Board**
- (1) There is to be an Academic Board of the University, consisting of: (a) the Vice-Chancellor, and (b) such other persons as the Senate may, in accordance with the by-laws, determine.
- (2) Subject to subsection (1), the constitution and functions of the Academic Board are to be as prescribed by the by-laws.

Melbourne University

- **Melbourne University Act 1958 - SECT 28**
- **Constitution of the academic board and its powers and duties 28.**
Constitution of the academic board and its powers and duties
- (1) There shall be an academic board as constituted by the statutes and regulations of the University.
- (2) The academic board-
- (a) may make to the Council any recommendation about the academic affairs of the University; and in particular may make to the council any recommendations as to studies and discipline in the University;
- (b) shall report to the council on all matters submitted to it by the council for report;
- (c) shall have such other powers and duties as are conferred or imposed upon it by or under this Act or any other Act or any statutes or regulations of the University; and
- (d) subject to any statutes or regulations of the University may regulate its own proceedings.

UNSW

- But those statutes were the exceptions: more likely the Academic Board is named in the statute but its functions not described for example:
- **UNIVERSITY OF NEW SOUTH WALES ACT 1989 - SECT 14**
- (1) There is to be an Academic Board of the University, consisting of: (a) the Vice-Chancellor, and (b) such other persons as the Council may, in accordance with the by-laws, determine. (2) Subject to subsection (1), the constitution and functions of the Academic Board are to be as prescribed by the by-laws.

Chair of Academic Board

- Often named in the statute and given a position on University council eg: UNSW ACT section 9
- **Constitution of Council**
- (1) The Council is to consist of: (a) 3 official members, being: (i) the Chancellor (if the Chancellor is not otherwise a member of the Council), and (ii) the Vice-Chancellor, and (iii) the person for the time being holding the office of President of the Academic Board (if that person is not the Vice-Chancellor) or of Deputy President of the Academic Board (if the President is the Vice-Chancellor).....

Common law duties of Councillors (including the chair of A Bd)

Councillors must act in good faith for the benefit of the university as a whole. Specifically they must:

- • avoid actual and potential conflicts of duty and interest;
- • use powers given to them for proper purposes;
- • act with appropriate levels of skill and care;
- • not make undisclosed gains from their office, or through personal contracts with the university ;
- • not compete with the university;
- • not make improper use of property or confidential information of the university;
- • not misuse university funds.

These are now supported by the Governance protocols:

- Protocol 3 prescribes list of duties which largely correspond to the duties councillors would have at common law , these propositions in turn have also been added to statutes

UNIVERSITY OF QUEENSLAND ACT 1998 - SECT 26A

- **Member's function, and obligations about function** (1) A member has the function of ensuring the senate performs its functions and exercises its powers appropriately, effectively and efficiently.
- (2) In performing the function, a member—
- (a) must act honestly and in the best interests of the university; and (b) must exercise reasonable skill, care and diligence; and (c) must disclose to the senate any conflict that may arise between the member's personal interests and the interests of the university; and (d) must not make improper use of his or her position as a member, or of information acquired because of his or her position as a member, to gain, directly or indirectly, an advantage for the member or another person.

Protocols

- The Governance Protocols do not mention the concept of an academic board though they do require universities to have an appropriate system of delegations: Protocol 7.5.10.
- The obligation in Protocol 7.10.5 (k) of “overseeing and monitoring academic activities of the higher education provider” is one such matter that would be subject to such delegation by the Council.
- The *National Protocols for Higher Education Approval Processes* places quality assurance obligations on university councils : likely to be delegated to academic boards because they include, *inter alia*, academic standards.

Improper or Corrupt behaviour etc?

- Does academic board have a role to play where it suspects improper or corrupt behaviour at the level of vice chancellor or council?
- Does it have any standing to correct behaviour of the council or the vice chancellor?
- Certainly academic boards have significant defacto power and power to pass resolutions within their scope criticising or commenting on malfeasance.
- This does not give the academic board power to proceed in a court, except in the instance where the behaviour of others was preventing it meeting its statutory duties and functions where these are defined.

A particular role for the Chair

- A better strategy would be for the academic board to resolve in a way which supported its chairperson taking action on the university council.
- Typically the chair of academic board is on council, and accordingly is a person who has legal obligations to act as a fiduciary and to comply with the governance protocols as expressed through that university's act.
- It also follows that the chair has positive obligations to act, if not to do so would breach common law or statutory duties. As noted previously a fiduciary cannot idly sit by and ignore the unlawful or negligent acts of his/her fellow members of council. Far from lacking standing to act, the fiduciary *must* act.

Is Chair subject to direction by Academic Board

- Could an academic board resolve to direct its chair to act in a particular way on council?
- The chair has to act at all times in the best interests of the University and not in the interests of academic board, *per se*, or any electoral group

Must council accept academic board advice

- Finally, must a university council consider the advice offered to it by academic boards?
- Part of university councillors' fiduciary and statutory duties to act in good faith, reasonable diligence and for a proper purpose will be to ensure that matters considered at council level have been duly discussed by those bodies bound to give it advice, especially any body such as an academic board charged under a statute with the giving of advice on academic matters.
- However council probably only bound if statute gave a power to academic board and not to council (unlikely)

Questions for discussion

- 1. If you suspected your vice chancellor was corrupt what would you do about it?
- 2. If Council overrode an Academic Board recommendation for a new award what would your Academic Board do? What would you do as Chair?
- 3. If the Vice Chancellors Executive prevented a new course approval going to Council because the degree could not be funded what would you do as Chair of A Bd?
- 4. As Chair of Academic Bd to whom do you report? Why?

Questions (continued)

- 5. As chair of Academic Board are you on Council? Why? Why not?
- 6. What constitutes the establishment of valid and binding “policy” at your university?