

Submission
No 21

**INQUIRY INTO THE GOVERNANCE OF NSW
UNIVERSITIES**

Name: Dr Robin Fitzsimons

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Robin B Fitzsimons
MB BS B Sc (Med) PhD FRACP
Neurologist

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**To :- The Secretary to The General Purpose Standing Committee
No 2 Inquiry of the NSW Legislative Council.**

Re University Governance.

Dear Madam

I thank the Committee for the opportunity to respond to certain questions in relation to University Governance. At the outset I should mention that I have been a Fellow of The University of Sydney Senate elected by the graduates since 1997. I was re-elected in robustly contested elections in 2001 and 2005, when, on each occasion, some 10,000 graduates voted by post. The views expressed here are personal and do not purport to be those of the University, although I do not believe them to be at all inconsistent with the submission by The University of Sydney, which submission I support. The University is aware that I am making a personal submission – which is based in significant extent on the experience which comes to me from having been on The University Senate over such a period.

Rather than answer each question 'one-by-one', as the University's formal submission has done, I shall instead address some of these questions in the context of more general observations on universities and their governance. I shall then specifically refer to the 'Protocol issue' (Question 9).

Four overarching considerations stand out. One is university autonomy. Another is the principle of each university's individuality. ('One size does not fit all'). A third relates to the generic qualities of universities, whose missions are normally radically different from those of most corporations ; this places limitations on the significances of comparisons with corporate governance. A fourth relates to the reality that each university lives in a nationally and internationally competitive environment.

Autonomy. I refer to the attached articles written for 'The Canberra Times' and 'The Sydney Morning Herald' which form a part of this submission. You

will see that I quote Chris Patten (Chancellor of Oxford University and himself a former UK Minister for Education) to effect that a 'university is not a branch office of a Department of Education. Independence is vital'. That is absolutely true. The paradox is that universities, like the judiciary, serve their local and international communities best when their independence is respected. That is because the very nature of their mission is to educate and to question. You will also see that I describe the negative effects on German universities when that independence has not been respected.

So, whereas Government clearly has an overall responsibility to maximize its citizens' access to top quality education, it should not be tempted to interfere in details of the running of universities and in their internal relationships, except *in extremis*. However, it may usefully provide suggestions, and – crucially – provide an external environment in which university missions and service are facilitated.

The importance of alumni in university governance. It is also appropriate for Government to facilitate the conditions which will enable its universities to perform at the highest levels *internationally*. (I live for the day when overseas students will be as anxious to come to Sydney as ours are to go to Oxford or Cambridge or Harvard or Stanford). Australian universities have been plagued by relative poverty in this respect. We increasingly rely on our alumni to help financially to support the university. Alumni taken together are already overwhelmingly the major financial stakeholder in older universities such as Sydney. It is not just the HECS or other fees they have paid, but also the otherwise income-earning time (for undergraduates, at least three years) they have forfeited in the process of earning their degrees. Alumni have a vested interest in maintaining the international standing of the degrees thus earned. They have a right to expect those they elect to regard the maintenance of the university's standing and academic reputation as an essential component of their stewardship of the university, while recognizing that those elected 'represent' no group, but are there to promote the interests of the university as a whole. Nothing could have been more potentially counter-productive about the 2004 *draft* University of Sydney legislation than to have attempted to remove the rights of alumni directly to elect five members of the University Senate. There were letters of complaint coming in literally from around the world (the US and the UK) about such a proposal. Fortunately it was then corrected in the final Bill and Act. But it was not without a fight. The importance of that word 'direct' cannot be overstated. Voting for significant numbers of the university governing body gives alumni an ongoing sense of belonging to and ownership of the university. They are more likely then to support its interests in very practical ways. Elected members should *not* be replaced with *ex officio* personnel. Given that not that long ago alumni elected *ten* of twenty-six well-credentialed members of the University Senate, and that that these days some ten thousand alumni vote in the University of Sydney Senate elections there could even be a case for increasing these numbers (from five) and perhaps decreasing the numbers of government appointees. At the University of Sydney's request our Senate retained its full 22 members, when cuts had been mooted. I appreciate that other universities (and indeed others at Sydney) may have a slightly different

viewpoint, but I think nevertheless that it is a viewpoint which should be borne in mind. The proportions of executive government appointees on university governing bodies are at an historic high (they were not decreased when the size of the Senate was cut back c 1989). That being so, it should be important that the Minister is to significant extent 'fettered' by Statute when making these appointments, so that blatant political appointments or persons with conflict of interest (eg an *ongoing* primary loyalty to a competing institution) are not appointed by Government. Sydney currently has a Resolution in relation to advising government on these appointments. The Protocols' removal of an automatic political (legislator) presence on university governing bodies has been a very good thing. We at present have one very helpful legislator on the Senate, and party politics are certainly not obvious during our deliberations – and nor should they be.

I suspect that the 'measurement' of university governance against norms in the corporate world reached a head in the mid-decade as a result of intense lobbying from certain corporate quarters. Sure it is very sensible indeed for universities to look to see what can be learnt from the corporate world – for instance in risk management. But it would be very unwise to accept corporate norms uncritically, given the very different missions of corporations and universities.

Indeed, given the failure of financial icon upon financial icon in the 'global financial crisis' the question might just as well be asked what corporations might usefully learn from universities. (I would answer this by suggesting that larger and more diversified boards, subject to real elections, might be some insurance against 'group think' of the 'in-group'. I have often seen a 'left – field' question resulting in constructive re-appraisal of plans).

Indeed, so convinced was I of the importance of 'taking on board' what might usefully be learnt from the corporate world that last year I attended an intensive week-long course run by The Australian Institute of Company Directors. I learned a great deal – not least that the answers to some of the sorts of questions you ask should be based on no hard-and-fast concept of where responsibilities should lie. Whereas it is generally true that 'managers manage and directors direct', this belies a complexity of interactions; it is also true that the balance of responsibilities will vary from time to time according to relative strengths and weaknesses of the CEO and the Board. In determining what should be considered at Board level, the 'impact factor' (or the capacity for a decision to harm a company) will be a major concern.

I was therefore intrigued by the apparent premise of question 5, which referred to the opportunities for governing bodies and chancellors to interfere in responsibilities which more properly lie with the Vice-Chancellor as Chief Executive Officer. You might equally well ask generically whether or not there are opportunities for a Vice-Chancellor to interfere in functions more properly the responsibility of the governing body or Chancellor. (I hasten to add that that is not at present the case at Sydney). Inevitably, in *any* human organization, issues of demarcation will arise from time to time. At the end of the day, I respectfully submit that these are situations for each university

governing body to sort out, each bearing in mind its own history and mission – not government. Although I recognize that the position of Vice-Chancellor has many analogies with that of a company 'Chief Executive Officer', the designation 'CEO' is not one ever heard at The University of Sydney (and I suspect many other universities). I think it would be better *not* to adopt this term for what are after all very different sorts of organizations.

Universities differ from corporations not only in their missions, in which they also differ one from another, but also by having a much wider diversity of 'stakeholder', and also by covering a much wider diversity of subject-matter. I have heard it asserted that The University of Sydney is a more complex organization than BHP (although would that we had the latter's resources, even in these straitened times).

It is not surprising then that more complex issues of governance may arise.

Given that each NSW university has a different history and plays to different strengths, it would be unwise to seek to impose a common mode of governance on every university.

Issues raised in your document re the Chancellor. Here again we have a situation where the importance of appreciating both the difference between a corporation and a university, and the difference between different universities is absolutely critical. A Chancellor is not simply the Chair of a Board (although, as it happens, the chairing of Senate and committees is virtually the only statutory function of our Chancellor). In the case of The University of Sydney the Chancellor has in living memory always been a person with a long pre-existing association with the University. There is an analogy with the Governorship or Governor-Generalship in that the Chancellor has an Ambassadorial role not usually exercised – at least to the same degree – by Company Chairs. We have chosen to choose our Chancellor with a strongest (unwritten) emphasis on that person being someone who will embody all that is best about the university and who will reflect those characteristics to the outside world (a phraseology in effect adapted from Mr Keating with respect to a putative Australian President). It is perhaps happy 'happenstance' that our present remarkable and remarkably hard-working Chancellor also happens to be Governor of NSW. That two of the last three Chancellors have been Professors reflects an emphasis on reflecting academic attainment to the outside world. I am aware that other universities seem to have opted for more of a 'corporate look'. So be it. The question of who is to be Chancellor is essentially for members of the University. Our University Senate has in recent times consulted our Alumni before making a decision. (I wonder whether other Universities have thought of doing this, or whether it remains a secretive in-house decision). Although our Chancellor is elected by the governing body, I have a personal view that electing the Chancellor by alumni, as Oxford does (see enclosures) could have something to commend it, particularly in relation to entrenching alumni attachment to the university.

The nuances of the duties of Chancellor and relationships with the governing body and Vice-Chancellor are for the governing body of each university to decide – and indeed probably from time to time to adapt according to external

circumstances and different people's skill sets in different domains – and not one which the government should normally seek to influence. This means that the functions of Chancellor should *not* be codified in legislation. This happens to be in line with the fact that the functions of corporate Board Chairmen are not codified in legislation; they are *primus inter pares*. If there is an evident conflict between Chancellor and Vice-Chancellor then it is for the university governing body to seek to resolve it according to principles based on the overall good of the university; this may involve formally reviewing delegations, as is in any case normal corporate practice.

Question 9.

The question relates to the Protocols. The Federal Government has now removed financial penalties from non-compliance with these Protocols. The University of Sydney Senate has not recently formally reviewed the Protocols – there is a great deal of other strategic and compliance business which takes up the unpaid time of Senate Fellows. The fact that a university may not yet have reviewed the Protocols ought not therefore necessarily to be taken as an indication of whether that that university agrees or disagrees with them. It would be appropriate to mention one matter where the Protocols are at variance with the University's standing policy.

I mention two items. The first is the Protocol on 'limited terms'. I must declare an 'interest', in that were I to decide to wish to stand again for election to The University of Sydney Senate I would be affected by 'limited terms' provisions, and require approval of two thirds of Senate even in order to submit myself to the voters. This is a most unusual – even extraordinary – requirement for a democratic organization where there are traditionally real and robustly contested elections. Parliamentary terms are not limited, let alone affected by the goodwill of fellow-parliamentarians. (Corporation directors are 'de facto' appointed on the recommendation of Nominations Committees, and their tenure is very rarely affected by individual voters). The arguments for limiting the terms of office-bearers are quite different. I am all in favour of limiting the US President to 8 years in office!

The Protocol on 'limited terms' is contrary to standing University of Sydney Senate policy which is that maximum terms should NOT apply to 'the Vice-Chancellor, the Chair of the Academic Board and elected Fellows'. (The Protocols exempt only the first two of these categories). See Item 8, p 17, Senate minutes 7.10.03.

The reasons that Senate did not wish to prescribe maximum terms for *elected* Fellows were that (i) the democratic process, with robustly conducted elections, gave the electors the right to determine who is 'dead wood' and who are 'ongoing contributors'. In practice, the voters have a habit of disposing of incumbents with alacrity. Often elections are 'issues-based'. (I have always stood on issues of academic standing and international engagement). (ii) the 'limited terms' provisions are a superficial translation of corporate governance principles. In the corporate

world it is usually considered desirable for one or more directors to 'outlast' the CEO. But VCs traditionally have much longer tenure than company CEOs. (It was a trifle presumptuous, c 2003, for Professor Di Yerbury, then in office as Macquarie VC for some 18 years and Chair of the AVCC, to be part of suggesting much more limited terms for governing bodies – thereby potentially limiting the effective watchdog abilities of those governing bodies). (iii) In reality the turnover of Senate Fellows is such that the threat of loss of corporate memory and useful networks is probably a much greater problem than that of there being unproductive 'time-servers'. (This is a really important practical point – I venture to suggest that there are ways in which I can contribute more on Senate now than when I joined eleven years ago) (iv) the manner of the introduction of 'limited terms' to Parliament itself flouted accepted mores of good governance in that it was *retrospective*. It would have been better NSW governance to make the terms for any affected governing body members to begin to count from the *next election* (rather than from prior elections) after the introduction of the legislation (as would be proper). This legislation is therefore paradoxically flawed on the basis of governance principles!

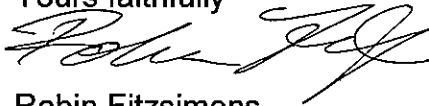
There is a provision for an over-ride by *two thirds* of a governing body, but the problem with that is that it could create an improper incentive for a governing body member not to be 'difficult' or questioning, as is his or her duty ; a better over-ride would be to require persons standing again for Senate in whatever capacity to obtain the signatures of X (say 50 or 100) nominating members of the University (graduates, staff, or students). Or simply to abolish the provision altogether as it relates to elected members of governing bodies.

I recall that another cause for concern about the Protocols related to the potential for removal of an elected member of a university governing body by procedures which appeared significantly less fair and robust than those which apply to company directors. We rather hoped that this was all very theoretical, as indeed it has proved to be. But there was a discomfiture about it.

(I am not here referring to the by-law procedures for removal of a Chancellor or Deputy Chancellor from these respective *offices*, which are sensible given the importance of their retaining the confidence in these roles of the Fellows who appointed them to those offices. I suspect Sydney is the only NSW University which has such a provision in its by-laws).

I would be happy to provide any further comment, should this be required

Yours faithfully



Robin Fitzsimons