

Submission
No 23

INQUIRY INTO THE GOVERNANCE OF NSW UNIVERSITIES

Organisation: National Tertiary Education Industry Union, NSW Branch
Name: Ms Genevieve Kelly
Position: NSW State Secretary
Date received: 18/02/2009



The Director
General Purpose Standing Committee No. 2
Parliament House
Macquarie St
Sydney NSW 2000

13 February 2009

To whom it may concern

Find attached the National Tertiary Education Union NSW Division (NTEU) Submission to the "Inquiry into governance of NSW universities".

The NTEU attaches a high priority to participating in public debate on issues affecting the university sector. Our members have a wide range of expertise in governance issues.

My own experience includes post graduate teaching in corporate governance, experience on private sector boards, University Board of Governors and Local Government, and a former member of the Australian Institute of Company Directors.

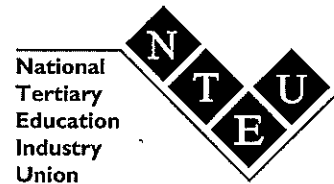
The NTEU would like to give evidence to the Inquiry at the hearings.

Regards,

Ms Genevieve Kelly (AM) BSW M.Com.

NSW State Secretary

NTEU (NSW)



National Tertiary Education Union (NSW Division)

PO Box 906, Darlinghurst
New South Wales, Australia 1300
Tel 02 9212 5433
Fax 02 9212 4090

NTEU Submission

To the

General Purpose Standing Committee No. 2

Inquiry into the governance of NSW universities

Organisation: National Tertiary Education Industry Union (NSW Division)

Contacts: Ms Genevieve Kelly, State Secretary

Mr Mark Dolahenty, Senior Industrial Officer

Ms Amanda McCormack, Organiser

Details:

Date: 18 February 2009

Good governance is not about interest groups, nor just about the relationships between the university and industry. It is about ensuring that the public interest is underwritten by democratic principles and a culture of free inquiry.

Dr Carolyn Allport NTEU National President
Address to "University Governance into the 21st Century"

The NTEU commends the NSW parliament on its decision to establish an inquiry into university governance. University education is a vital part of the education structure in Australia and we need a strong and viable university sector in order to build a strong economy and robust democracy. Recent events in NSW have highlighted some of the problems within university governance in Australia which have intensified over the last decade.

This submission will raise the issues of university governance that the NTEU sees as the most pressing, and we will be available to expand on all matters raised in this submission at the hearing of the Inquiry.

The National Tertiary Education Union NSW Division (NTEU) represents the professional and industrial interests of staff employed at New South Wales universities. Our membership is composed of academic, research, administrative, technical and other general staff employed in the New South Wales higher education sector.

NTEU Policy on University Governance has been developed by its National Council which is made up of elected representatives from universities across Australia.

The NTEU believes that university governance should be guided by the following principles:

- Governing bodies should ensure that academic/intellectual freedom and institutional autonomy are guaranteed and protected when defining the University's primary responsibilities as a public institution.
- University staff and students play a vital role on governing bodies. The selection or election of many members of governing bodies is based on the fact that they are expected to understand the perspective of important sections of the university community. Members on university governing bodies have a responsibility to act as a conduit for views within the university community, including its external environment.
- Members on governing bodies have the right to communicate with all university stakeholders and the general public about outcomes of governing body deliberations.
- Members on governing bodies should receive full and timely provision of essential information about the operation of the university.

- Governing bodies should have in place a formal programme of professional development for members, going beyond initial induction of their duties and responsibilities, and codes of conduct as members of the governing body.
- Adequate workload release provisions and child care should be made available for staff involved in governing bodies.
- A flexible approach to size and composition of governing bodies, as this should be determined by the needs of the institution itself. Governing bodies should have a minimum of 18 members to ensure an appropriate diversity of experience.
- Involvement of members of any State or Commonwealth parliament can be positive and should be left to the discretion of the institution concerned.
- Risk management procedures should include the need for an evaluation and review of the performance of governing bodies.
- Measures to oversee controlled entities should include the stipulation that resulting documentation be made publicly available.

This submission will expand further these principles in relation to the terms of reference set by the Committee.

Terms of Reference 1-7

1. *Any apparent lack of clarity in the roles of governing bodies and Vice-Chancellors and the consequential opportunities for conflict*
2. *Any apparent lack of clarity in the delineation of duties of governing bodies and the Chancellors*
3. *Identification of the roles and responsibilities of the Vice-Chancellor, the governing body and the Chancellor in relation to the formation of University policy and grievance procedures, and the communication of such policies to the student body*
4. *The appropriateness of changes in the duties and responsibilities of governing body members*
5. *Opportunities for governing bodies and Chancellors to intervene in the responsibilities that more properly lie with the Vice-Chancellor as Chief Executive Officer*
6. *Current and possible future mechanisms for reviewing the performance of Chancellors and governing body members in discharging their responsibilities*
7. *Protocols for addressing poor performance of Chancellors and governing body members*

The effectiveness of government bodies in NSW universities needs to be assessed in the context of their role as vital public institutions. The governing body of the academic corporation should not operate in an identical fashion to

those of private sector corporations. The NTEU believes that any attempt to uncritically transplant private sector corporate governance principles into the university sector is inappropriate. Whilst universities must be fiscally responsible and comply fully with all auditing and legislative requirements, they are not required to distribute profits to shareholders. There are unique obligations placed on universities, as they form part of the nation's social and economic infrastructure with a public responsibility.

Governing bodies of universities, broadly speaking, makes decisions about, and have oversight of the strategic directions and decisions required to ensure the effective operation of the academic enterprise. The character of the university's governing body has influence on the university's governance structures and their deliberations. The governance of the academic enterprise should be exercised within an environment that encourages academic freedom, develops a culture of free inquiry, and ensures that students receive a quality pedagogically sound education with appropriate professional support.

Governance at universities can be broken into three broad areas: the governing body of which the Chancellor is the chair/presiding member; academic board/senate which considers matters relating to the academic life of the university and is generally chaired by a person elected from its membership, and; an operational/management arm which implements the governing body decisions and is headed by the Vice-Chancellor.

Good governance at all levels of decision making in the university is necessary to ensure that the institution can excel. In recent times university decision making has been dominated by a corporate managerialist culture which has undermined the academic integrity of teaching, learning and research, and the practice of good pedagogy. Decision making fora in relation to teaching, learning and research development within the university must involve full academic debate on such development, rather than only by financial objectives.

Decisions made at academic board/senate and the governing body influence each other, and affect how the operations of the university function. The character of governing bodies (its members and culture), Chancellors, and Vice-Chancellors differ between institutions and change over time. This diversity will invariably lead to some overlapping of roles and areas that could best be described as "grey". This is not, in and of itself, necessarily adverse to the efficient functioning of the university as they provide scope for discussion and resolution given the particular circumstances and time in which universities find themselves. These discussions enable transparency in decision making, and engage governing bodies in defining their primary responsibilities.

The NTEU notes, that members on governing bodies are likely to have different views about the universities' interests in determining their institutions' primary responsibilities. This does not mean that the members of the governing body are not acting to promote the universities' object and interests.

Further, the fact that members of a governing body have a different view to the Vice-Chancellor and/or Chancellor does not automatically mean that a member of a governing body has a conflict of interest as sometimes has been claimed. Robust debate amongst members of governing bodies is most likely to produce the best quality outcomes in decision making.

There are difficulties in definitively legislating the exact roles, duties and functions that governing bodies, academic boards/senates, Chancellors, and Vice-Chancellors require to perform their responsibilities, as there is overlap between the three arms of governance. The circumstances of universities change over time such that roles, responsibilities and functions may necessitate modification.

Conflict has occurred within at least one NSW university about what is meant by the Vice-Chancellor being the "chief/principal executive officer". It is difficult to legislate for common sense and the NTEU does not support rigid formulation of the roles of Chancellor and Vice-Chancellor. It should however be made clear that it is not the role of the Chancellor to intervene in the day to day management of the university and that there are high standards of performance expected of a Chancellor who is responsible for the oversight of a great public institution.

Governing bodies, with a clear idea of their primary responsibilities, can monitor and review their own practices. It is important that the monitoring and review of roles, duties and functions involve the whole governing body and are not undertaken by one member or some form of "inner cabinet". How governing bodies determine to undertake monitoring and review should be discussed by the governing body concerned. Governing bodies, through the enabling legislation of NSW universities, do not, as part of their functions have any responsibility to monitor the performance of the Chancellor, but they do for the Vice-Chancellor and the governing bodies themselves. The NTEU believes that members of the governing body, other than the Chancellor or Vice-Chancellor, do not require their individual performance monitored and reviewed. The monitoring and reviewing of the governing bodies' performance, as a whole, provides feedback to non-Chancellor and non-Vice-Chancellor members on their performance.

Recommendation:

That the review and monitoring of the governing bodies' performance should be undertaken by the whole governing body. The monitoring and review process should be discussed by the governing body concerned to determine how this is to occur.

Legislating specific roles, functions and duties for governing bodies, its membership, Chancellors and Vice-Chancellors is taking a one size fits all approach. Prescriptive legislation would not recognise and engage with the diversity of institutional types in NSW and could cause difficulties due to changing circumstances of individual universities. Providing scope for there to be robust, transparent and constructive discussion, and mechanisms for monitoring and review that involve the whole governing body will ensure that

responsibilities that specifically lie with one of the official members on the governing body are more likely to be picked up before there is a governance crisis.

Effectiveness of governing bodies is dependent on the quality of the relationships developed between members of that body and the culture being one that is robust, open, constructive, and with a strong stakeholder emphasis in decision making. Stakeholders of NSW universities include staff, students, NSW Government, professional bodies, the communities in which the university is located, and their graduates. In this sense, it is difficult to legislate the quality of the relationships that exist between members, and the culture of universities' governing bodies. Providing a programme of professional development that brings together members outside of the governing body's room, and addresses gaps in knowledge will help to increase the quality of the governing body overall. Training should involve a high quality and relevant induction programme for new members, and, more broadly, all members should receive training in how to access and interpret institutional data/information, particularly financial information.

Recommendation

Each NSW university governing body should have in place a formal programme of professional development that goes beyond ensuring that members are aware of the nature of their duties and responsibilities, and codes of conduct. Types of training should include: accessing institutional data and information, how to read financial reports, risk management processes, and reviewing and monitoring processes.

As universities are self governing bodies, in the first instance conflicts that arise between members (especially between Vice-Chancellors and Chancellors) should be able to be worked out between the members concerned, failing that at the governing body level. There are already procedures within the individual university acts to take action against all members on governing bodies, including for non-performance. In the case of the Vice-Chancellor and Chancellor there could be an additional requirement that in order to serve out their contract or term to its expiry that they also receive the confidence of the governing bodies.

Recommendation

That Vice-Chancellors and Chancellors require the confidence of the governing body to serve out the tenure of their contract/term of appointment.

Terms of Reference 8

The representation on governing bodies, and their committees, of staff and students and the current and appropriate balance between external members and elected representatives,

Staff and student participation in governance is critical to the ability of universities to work in the public interest. Typically, five or six of the governing

body members are elected student and elected staff representatives, out of approximately 22 members which are a combination of elected and external members. Staff and students are key stakeholders of universities and bring extensive expertise to their role on university governing bodies. Staff have the professional responsibility and right to engage with the governance of their institution. Further, these rights are central to the international conventions, including the UNESCO *Recommendation on the Status of Higher Education Teaching Personnel*, which Australia has ratified. The recommendation states:

Higher education teaching personnel should have the right and opportunity, without discrimination of any kind, according to their abilities, to take part in the governing bodies and to criticise functioning of higher education institutions, including their own, while respecting the right of other sections of the academic community to participate, and they should also have the right to elect a majority of representatives to academic bodies within higher education institutions.

There is no inherent conflict of interest in these members of the university community participating in the strategic overview and oversight of the University.

External members also have a legitimate presence on governing bodies and should be left to the discretion of the institution concerned.

The rationale for many members of governing bodies' selection or election is that they have special knowledge. The complex relationships between universities, business, public sector and community are reflected in the composition of universities' governing bodies. Members of governing bodies, whether elected or selected, offering the perspectives they have, is a part of how they act in the interests of the university.

Terms of Reference 9

Proposals for changes to the various acts governing NSW universities and to the National Higher Education Governance Protocols to address any systemic causes found

Governing Body monitoring the performance of the Chancellor

As noted above, in the individual university legislation there is no specific function for governing bodies to monitor the performance of the Chancellor. The university enabling acts would require an amendment to add this function to governing bodies.

Commercial activities undertaken by universities

The NTEU acknowledges that cuts to real levels of government funding have seen universities engage in more commercial activities in an attempt to expand and diversify their funding bases. Under NSW enabling legislation all NSW universities now have explicit rights to enter into, and undertake, commercial activities. With this opportunity also comes a statutory

requirement for all NSW universities to properly manage their commercial activities. The legislation places this responsibility in the hands of the governing body, and in accordance with their delegation authority.

Within policy, universities have identified guidelines and procedures for assessing and managing commercial activities including, but not limited to, the assessment of their feasibility, due diligence procedures, risk assessment, and the reporting and monitoring mechanisms for commercial activities.

The State enabling Acts of universities also require reporting on the Register of Commercial Activities, however this is only *by request* from the Minister.

Particular concerns in the management responsibility are:

1. NSW Universities engage in a significant level of organisational change and restructuring of their academic and administrative units. In such an environment the responsibility for overseeing and managing commercial activities in accordance with NSW university legislation (as delegated by the governing council), and compliance with university Commercial Guidelines, can lapse. In the worst case scenario there are instances where organisational change has resulted in a significant time gap in the proper keeping of the Commercial Register.
2. There needs to be more stringent reporting requirements and compliance checks on the proper keeping of the required Registers - currently under the Acts this is discretionary by the Minister only.
3. Clear and transparent mechanisms for the inclusion and capturing of controlled entities' commercial activities are required to ensure that the university Commercial Activities Register has proper integrity in keeping with obligations under the relevant university enabling Act.
4. Despite there being clear procedures and guidelines for the assessment of the feasibility and potential returns of commercial ventures and activities, *before* they are commenced in practice, the changing structure of an institution along with the imperative to secure income streams from external sources, may encourage short cuts and poor decision making.
5. A perceived lack of confidence in the integrity of the Commercial Register and the capacity of governing bodies and or their delegated authorities within the university to manage and monitor activities that clearly impact on publicly funded education.

National Higher Education Governance Protocols

In relation to the National Higher Education Governance Protocols, the NTEU notes that they are no longer tied to Commonwealth Grant Scheme (CGS) funding, and believes that this a positive step for the sector.

The NTEU believes that government proposals on university governance should be based on a set of broad principles, rather than imposing a prescriptive and formulaic set of protocols. Good governance is better fostered through the universities' governing bodies discussing these issues rather than by legislative obedience.

In relation to the National Higher Education Governance Protocols, the NTEU makes the following comments.

Protocol 1

The NTEU agrees with the suggestion that the Institution must have its objectives specified in the enabling legislation.

Protocol 2

The NTEU agrees that it is vital for university governing bodies to adopt a clear definition of their primary responsibilities. In addition to those responsibilities set out in Protocol 2 the NTEU would add:

- Ensuring that the university fulfils its roles as a public institution, including its broader community roles and responsibilities.
- Ensuring that academic/intellectual freedom and institutional autonomy are guaranteed and protected in the external and internal functions of the university.

While it is important that the governing body should not delegate approval for any listed primary responsibilities, Protocol 2 should stress this is different from seeking advice from sources outside of the governing body.

Protocol 3

The NTEU believes that university students and staff on governing bodies already act as stated in Protocol 3, that is, "solely in the interest of the university taken as a whole". Protocol 3 must accept that there will be different and conflicting views concerning what is "in the interests of the university taken as a whole".

As part of this, Protocol 3 should explicitly state that the rationale for selection or election of many members of governing bodies is precisely because they are expected to understand the perspective of a particular constituency that is important to the university.

Members of governing bodies have the right and, indeed, responsibility to communicate with all university stakeholders and the general public, including the right to make critical comment. Acting as a conduit for the views of particular constituencies is a key function of members of governing bodies.

The vital act of keeping their constituency informed about the deliberations of the governing body and seeking their views and advice is not a conflict of interest, and the NTEU recommends that the Protocol should be changed to explicitly clarify this.

Protocol 3 needs to be amended to accept that the members of governing bodies have a right to the full and timely provision of essential information about the operation of the institution on whose governing body they serve. Formal recognition of these aspects of university governance is important to ensure that Protocol 3 is not used as a pretext to remove elected staff and student representatives.

Any move to change the enabling legislation of universities to specify the duties of members of the governing bodies and to introduce sanctions for their breach, would only be supported by the NTEU if it were based on a Protocol that incorporates the changes suggested above.

Protocol 4

The NTEU actively supports the proposal that each governing body should have in place a formal program of professional development for members. This should go beyond merely ensuring that members are aware of the nature of their duties and responsibilities and include, at a minimum, training in areas such as how to access and interpret institutional data, particularly financial information, and a high quality and relevant induction program for new members.

As part of professional development obligations of universities, Protocol 4 needs to ensure adequate workload release provisions are in place for staff involved in governing bodies and other governance functions of the institution, including compensation for expenses such as childcare.

Protocol 5

Protocol 5 needs to be amended to ensure a more flexible approach to size and composition of governing bodies that attempts to ensure a better balance between breadth of membership and depth of expertise.

The NTEU notes the considerable body of emerging research that indicates that size has no significant bearing on how university governing bodies operate.

It is important that governing bodies seek to balance their many interests and obligations with a mix of professional, industry and education skills that reflect their roles as business, educational and community institutions. As part of this, staff and students are key stakeholders of universities and rightfully occupy places on university councils. They bring extensive expertise to their role as part of their knowledge, and commitment to, their institutions.

The participation of members of any State or Commonwealth parliament or legislative assembly can be a positive for governing bodies and should not automatically be ruled out. They can enhance parliament's understanding of the university's work and vice versa, as well as improve accountability and consultative processes between institutions and governments. The participation of members of State or Commonwealth parliaments should be left to the discretion of the institution.

The NTEU recommends Protocol 5 be amended to state that the size of a governing body should have a minimum of 18 to ensure an appropriate diversity of experience.

Protocol 6

The NTEU agrees that there is a need for systematic and transparent procedures for the nomination or appointment of governing body members, as opposed to those who are elected. The NTEU also agrees with the suggestion that such procedures could be delegated to a nominations committee of the governing body.

There should be measures to encourage diversity in membership and community participation, including the participation of Indigenous people and Members of Parliaments.

Protocol 7

The NTEU agrees with the need for the institution to codify and collate its internal grievance procedures and make these public. This should also recognise the rights and responsibilities held by the Institution, staff and students under relevant State and Territory legislation.

Protocol 8

The NTEU agrees that the annual report of the institution should be used for reporting on high-level outcomes required by the Commonwealth.

Protocol 9

The NTEU believes that risk management should include the need for an evaluation and review of the performance of governing bodies.

Protocol 10

The NTEU believes that each institution has an obligation to keep the Commonwealth and State Ministers for Education informed of any significant event affecting the institution or its subsidiaries that may impact on its legislative obligations.

The NTEU believes that the proposal for universities to sign Funding Agreements with the Commonwealth represents an unprecedented intrusion on institutional autonomy and that funding should not be tied to universities' governance arrangements.

Protocol 10 should be amended to highlight the role of the State and Territory Governments in university governance. Substituting the word Minister for "ministers" could most effectively achieve this.

Protocols 11 and 12

The NTEU agrees with the measures recommended in Protocol 11 and Protocol 12 to effectively oversee controlled entities, but given the importance of universities' public accountability obligations, this Protocol should be amended to state that such documentation should be publicly available.

Conclusion:

The NTEU welcomes the decision of the NSW parliament to review and make recommendations on university governance in NSW. We are available for any further comment on matters raised and would be happy to assist by making available to the Committee any relevant research material to which we have access.