

INQUIRY INTO THE GOVERNANCE OF NSW UNIVERSITIES

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Inquiry into the governance of NSW universities

Submission by

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Introduction

This submission from the Australian Government Department of Education, Employment and Workplace Relations (DEEWR) describes the Australian Government's role in relation to university governance in the context of the recently amended legislative framework and subsequent proposal to develop and implement a voluntary code of best practice governance.

Legislative framework pertaining to university governance

NSW legislation

NSW universities are incorporated as entities under State legislation that is specific to each university. These Acts define the governance framework applicable to a particular university.

Typically a university's legislation will include particular provisions relating to:

- the appointment of a Chancellor, Vice-Chancellor and other members of the university's governance structure;
- the governing body and its constitution, representation and methods of appointment of members;
- the governing body's functions; and
- the roles and responsibilities of certain members of the governing body.

The legislation does not specify in detail the arrangements that apply to governing bodies or Chancellors' day-to-day relationships with Vice-Chancellors.

Commonwealth legislation

The *Higher Education Support Act 2003 (Commonwealth)* (HESA) originally included measures that related directly to the governance of universities and other higher education providers. The HESA and associated Guidelines required universities to comply with National Governance Protocols (NGPs) as a condition for receiving part of their Commonwealth Grant Scheme (CGS) funding. CGS funding is provided for student places. Compliance with the NGPs was required for eligibility for incremental funding increases of 2.5 per cent per year for 2005, 2006 and 2007 and for retention of that funding in subsequent years.

A copy of the NGPs is at APPENDIX A.

In September 2008 the *Higher Education Support Amendment (Removal of the Higher Education Workplace Relations Requirements and National Governance Protocols Requirements and Other Matters) Act 2008* amended the HESA and the NGPs were removed as a condition of CGS funding.

During the period that the NGPs were linked to CGS funding increases the Minister for Education found that all NSW universities were compliant. The Australian Government's rationale for removing the NGPs included:

- that the measures necessary for setting out university the governance arrangements had already been enacted through amendments to the various pieces of state and territory legislation and universities had taken the necessary steps to ensure compliance with these measures;
- that the removal of the NGPs would reduce red tape and bureaucracy for universities and make the costs associated with compliance available for the delivery of teaching and reasearch outcomes;
- a non-legislative voluntary code that sets out best practice university governance principles that is developed and implemented by the higher education sector would provide universities with greater flexibility in their governance arrangements and support institutional diversity.

Under the HESA, universities and other higher education providers must meet, as a condition of funding, the quality and accountability requirements of the HESA. These include being subject to quality audits which are undertaken by the Australian Universities Quality Agency (AUQA).

Following the removal of the NGPs as a specific condition of CGS funding the Australian Government stated that it regards the NGPs as an ongoing benchmark for good governance practice pending the establishment of a voluntary code. It will regard any substantial non-compliance with the NGPs, whether reflected by an AUQA quality audit, or otherwise, as a potential breach of the HESA's quality and accountability requirements.

Future directions - development of a voluntary code

The Australian Government, in removing the NGPs as a specific condition of CGS funding, made a commitment to support the development of a voluntary code of best practice governance. It is intended that the NGPs will be replaced by this voluntary code and that it will be owned and mandated by the higher education sector rather than being mandated by governments.

Universities Australia and the University Chancellors' Council have agreed to be involved in developing the voluntary code in conjunction with the Joint Committee on Higher Education (JCHE), which comprises Commonwealth and State/Territory officials.

In 2007 the JCHE conducted a review – commissioned by the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA) - of the impact of the NGPs and the scope for their enhancement. The review report, and a recommendation seeking endorsement of the JCHE working together with Universities Australia and the University Chancellors' Council, to develop a voluntary code has been submitted to the Australian Education Systems Officials Committee (AESOC). Subject to the committee's endorsement, the report and recommendation will be submitted for MCEETYA's consideration.

APPENDIX A - NATIONAL GOVERNANCE PROTOCOLS FOR HIGHER EDUCATION PROVIDERS¹

Protocol 1: the higher education provider must have its objectives and/or functions specified in its enabling legislation.

Protocol 2: the higher education provider's governing body must adopt a statement of its primary responsibilities, which must include:

- (a) appointing the vice-chancellor as the chief executive officer of the higher education provider, and monitoring his/her performance;
- (b) approving the mission and strategic direction of the higher education provider, as well as the annual budget and business plan;
- (c) overseeing and reviewing the management of the higher education provider and its performance;
- (d) establishing policy and procedural principles, consistent with legal requirements and community expectations;
- (e) approving and monitoring systems of control and accountability, including general overview of any controlled entities. A controlled entity is one that satisfies the test of control in s.50AA of the *Corporations Act*²;
- (f) overseeing and monitoring the assessment and management of risk across the higher education provider, including commercial undertakings;
- (g) overseeing and monitoring the academic activities of the higher education provider;
- (h) approving significant commercial activities of the higher education provider.

The higher education provider's governing body, while retaining its ultimate governance responsibilities, may have an appropriate system of delegations to ensure the effective discharge of these responsibilities.

Protocol 3: the higher education provider must have the duties of the members of the governing body and sanctions for the breach of these duties specified in its enabling legislation. Other than the Chancellor, the Vice-Chancellor and the Presiding Member of the Academic Board (s) each member must be appointed or elected *ad personam*. All members of the governing body must be responsible and accountable to the governing body. When exercising the functions of a member of the governing body, a member of the governing body must always act in the best interests of the higher

¹ These protocols apply to those higher education providers defined as table A providers in the HESA. All NSW universities are table A providers.

² All references to the *Corporations Act* are to the *Corporations Act 2001* (Commonwealth) as in force from time to time.

education provider.

Duties of members must include the requirements to:

- (a) act always in the best interests of the higher education provider as a whole, with this obligation to be observed in priority to any duty a member may owe to those electing or appointing him or her;
- (b) act in good faith, honestly and for a proper purpose;
- (c) exercise appropriate care and diligence;
- (d) not improperly use their position to gain an advantage for themselves or someone else; and
- (e) disclose and avoid conflicts of interest (with appropriate procedures for that purpose similar to those for public companies).

There should be safeguards, exemptions and protections for members of a higher education provider's governing body for matters or things done or omitted in good faith in pursuance of the relevant legislation. Without limitation, this should include such safeguards, exemptions and protections as are the equivalent of those that would be available were the member a director under the *Corporations Act*. The higher education provider (with the exception of those subject to the *Corporations Act*) must have a requirement that the governing body has the power (by a two-thirds majority) to remove any member of the governing body from office if the member breaches the duties specified above included in its enabling legislation. A member must automatically vacate the office if he or she is, or becomes, disqualified from acting as a Director of a company or managing corporations under Part 2D.6 of the *Corporations Act*.

Protocol 4: each governing body must make available a programme of induction and professional development for members to build the expertise of the governing body and to ensure that all members are aware of the nature of their duties and responsibilities. At regular intervals the governing body must assess both its performance and its conformance with these Protocols and identify needed skills and expertise for the future.

Protocol 5: the size of the governing body must not exceed 22 members. There must be at least two members having financial expertise (as demonstrated by relevant qualifications and financial management experience at a senior level in the public or private sector) and at least one member with commercial expertise (as demonstrated by relevant experience at a senior level in the public or private sector). Where the size of the governing body is limited to less than 10 members, one member with financial expertise and one with commercial expertise would be considered as meeting the requirements. There must be a majority of external independent members who are neither enrolled as a student nor employed by the higher education provider. There must not be current members of any State or Commonwealth parliament or legislative assembly other than where

specifically selected by the governing body itself.

Protocol 6: the higher education provider must adopt systematic procedures for the nomination of prospective members of the governing body for those categories of members that are not elected. The responsibility for proposing such nominations for the governing body may be delegated to a nominations committee of the governing body that the Chancellor would ordinarily chair.

Members so appointed must be selected on the basis of their ability to contribute to the effective working of the governing body by having needed skills, knowledge and experience, an appreciation of the values of a higher education provider and its core activities of teaching and research, its independence and academic freedom and the capacity to appreciate what the higher education provider's external community needs from that higher education provider.

To provide for the introduction of new members consistent with maintaining continuity and experience, members' terms must generally overlap and governing bodies must establish the maximum period to be served. This should not generally exceed 12 years unless otherwise specifically agreed by the majority of the governing body.

Protocol 7: the higher education provider is to codify its internal grievance procedures and publish them with information about the procedure for submitting complaints to the relevant ombudsman or the equivalent relevant agency.

Protocol 8: the annual report of the higher education provider must be used for reporting on high level outcomes.

Protocol 9: the annual report of the higher education provider must include a report on risk management within the organisation.

Protocol 10: the governing body is required to oversee controlled entities by taking reasonable steps to bring about the following:

- (a) ensuring that the entity's board possesses the skills, knowledge and experience necessary to provide proper stewardship and control of the entity;
- (b) appointing some directors to the board of the entity who are not members of the governing body or officers or students of the higher education provider, where possible;
- (c) ensuring that the board adopts and regularly evaluates a written statement of its own governance principles;
- (d) ensuring that the board documents a clear corporate and business strategy which reports on and updates annually the entity's long-term objectives and includes an annual business plan containing achievable

and measurable performance targets and milestones; and

(e) establishing and documenting clear expectations of reporting to the governing body, such as a draft business plan for consideration and approval before the commencement of each financial year and at least quarterly reports against the business plan.

Protocol 11: A higher education provider must assess the risk arising from its part ownership of any entity (including an associated company as defined in the Accounting Standards issued by the Australian Accounting Standards Board), partnership and joint venture. The governing body of the provider must, where appropriate in light of the risk assessment, use its best endeavours to obtain an auditor's report (including audit certification and management letter) of the entity by a State, Territory or Commonwealth Auditor-General or by an external auditor.