

**Submission
No 65**

INQUIRY INTO NEW SOUTH WALES UNIVERSITY SECTOR

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Submission to the Legislative Council Standing Committee on Social Issues
Inquiry into the New South Wales University Sector

Dear Committee

I am Professor of Constitutional Law at Monash University. I make this submission on my own behalf and not on behalf of Monash University.

This submission makes two central points: (i) the processes for constituting the governing bodies of university are inappropriate and (ii) the governing bodies of university are essentially unaccountable. This submission also outlines proposed amendments to legislation to remedy these deficiencies.

Table 1: Members, governing bodies and accountability lines of organisations

	Public university	Public company	Charity / Not-for-profit (usually incorporated association or company limited by guarantee)
Who are the legal members of the organisation?	Academics, professional staff, students, alumni	Shareholders	Members
Governing body	University council (sometimes has other names)	Board of directors	Board of directors or Committee of management
Who is the governing body accountable to?	Unclear / Nobody?	Shareholders	Members

Australian public universities are large and complex organisations. So too are public companies and many charities. But there is a fundamental contrast in respect of governance accountability. There are multiple and direct lines of accountability from the governing bodies of public companies and charities to the members of those organisations. The lines of accountability from the governing bodies of Australian universities to the members of Australian public universities are significantly weaker or non-existent.

Australia’s public universities are constituted by Acts of Parliament.¹ Those statutes generally provide that the university is constituted by the governing body, the academic staff, the professional staff, the students and the alumni of the university.² An important consequence of this is that these people are, in respect of the composition of the entity, in a position equivalent to shareholders in a public company or the members of a charitable entity. The courts have recognised that the staff, students and alumni of a university cannot be equated merely with the employees and customers of a company.³

Mechanisms of accountability of governing body to members of organisation

Compared to the mechanisms of accountability of the governing bodies of public companies and charities to the members of those entities, the mechanisms of accountability of the governing bodies of public universities to the members of public universities are weak or non-existent.

Table 2: Mechanisms of accountability

	Public university	Public company	Charity / Not-for-profit
1. Who chooses members of the governing body?	Predominantly non-members	Members of organisation	Members of organisation
2. Can the organisation’s members remove individual persons on the governing body?	Only the minority of positions that are staff- or student-elected	Yes	Yes
3. Can the organisation’s members spill the entire governing body?	No	Yes	Yes
4. Is the governing body and its appointed Executives subject to questioning by members at a compulsory general meeting?	No	Yes	Yes

NB: Green shading indicates existence of accountability mechanism. Red shading indicates non-existence or existence of a weak version of accountability mechanism.

1. Who chooses members of the governing body?

The governing bodies of Australian public universities are majority-unelected. The proportion of governing body members elected by university members ranges from 13% to 38% among Australian public universities, with an average of 25% of governing body members being elected by university members.⁴ Most are appointed by government or by the university councils themselves.

¹ The Australian Catholic University is the outlier here. It is a public university recognised by, but not constituted by, Acts of Parliament.

² See John Orr, *University Law: Pursuing Fruits of Knowledge* (PhD thesis, Queensland University of Technology, 2020) pp 334-338 (https://eprints.qut.edu.au/200455/1/John_Orr_Thesis.pdf).

³ *University of Western Australia v Gray (No 20)* [2008] FCA 498 [22] (French J).

⁴ National Tertiary Education Union, *The Corporatisation of University Governance in Australia* April 2024) p 3

By contrast, the members of the governing body of a public company are elected by organisation members (with only a limited ability for the governing body to appoint a person to the governing body),⁵ and the same is generally true of charities.⁶

2. Can the organisation's members remove individual persons on the governing body?

The ability to remove a person from an organisation's governing body is an important accountability mechanism. This accountability mechanism exists in respect of public companies and charities but does not exist in respect of universities.

The law gives the shareholders of a public company the power to remove any individual director from the board of directors by resolution.⁷ The members of charities usually also have the power to remove any member of the charity's governing body.⁸

By contrast, the members of a public university do not have power to remove any individual member of university council. They have power to remove only the minority of members of university councils that are chosen by the members.⁹

3. Can the organisation's members spill the entire governing body?

The ability to 'spill' the entire governing body of an organisation is a significant accountability mechanism. This accountability mechanism exists in respect of public companies and charities but does not exist in respect of universities.

The law gives the shareholders of a public company the power to spill the entire board of directors through the 'two strikes' rule, which is activated if 25% or more of shareholders vote to reject the company's remuneration report two years in a row.¹⁰ The power to remove individual directors is also exercisable in respect of multiple directors. Members of charities also usually have the power to spill the entire governing body of the organisation, and can also exercise the power to remove individual members of the governing body in respect of multiple individuals.

The members of public universities have no power to spill entire university councils. Indeed, there is no power in anyone or any group to spill the entire membership of a university council.

(<https://betterunis.nteu.au/wp-content/uploads/2024/05/NTEU-The-Corporatisation-of-University-Governance-April-2024.pdf>).

⁵ *Corporations Act 2001* (Cth) Pt 2D.3 Div 1 Sub-div A.

⁶ See, eg, Australian Charities and Not-for-profits Commission, *Template constitution for a charitable purpose company limited by guarantee* cl 37; NSW Fair Trading, *Model constitution for an incorporated association* cl 14, 15.

⁷ *Corporations Act 2001* (Cth) s 203D.

⁸ See, eg, Australian Charities and Not-for-profits Commission, *Template constitution for a charitable purpose company limited by guarantee* cl 40.1(c); NSW Fair Trading, *Model constitution for an incorporated association* cl 17(2).

⁹ See the various university statutes.

¹⁰ *Corporations Act 2001* (Cth) Pt 2G.2 Div 9.

4. Is the governing body and its appointed Executives subject to questioning by members at a compulsory general meeting?

By law, public companies must hold annual general meetings at which certain things must happen,¹¹ including: members must be permitted to ask questions about or make comments on the management of the company, members must be permitted to ask questions of the company's auditor, and the company's annual financial report, sustainability report, directors' report and auditor's reports must be laid before the meeting. Members also have a right to put resolutions to the meeting.¹² Similar obligations exist in respect of charities.¹³

By contrast, there is no obligation to hold general meetings of members of public universities, university councils are not subject to public questioning by members, and the members of public universities have no ability to put resolutions concerning the governance of the organisation.¹⁴

Recommendations

There is a need to implement clear and robust accountability mechanisms for university councils. There is no justification for governance accountability to be weaker in Australian public universities than in public companies and charities.

The statutes constituting NSW universities should be amended to establish the following accountability mechanisms:

1. The members of the organisation have the power to remove any individual member of the organisation's governing body,
2. The members of the organisation have the power to spill the entire governing body of the organisation, and
3. The members of the organisation have the ability to ask questions about or make comments on the management of the organisation and ask questions of the organisation's auditor in a public forum.

The NSW Parliament has full power to do this. There is no federal law preventing amendments of this kind. These amendments would be quick and easy to do, and would not cost the NSW taxpayer any money.

I trust this submission is of assistance.

Yours sincerely

Professor Luke Beck

¹¹ *Corporations Act 2001* (Cth) Pt 2G.2 Div 8.

¹² *Corporations Act 2001* (Cth) s 249N.

¹³ Australian Charities and Not-for-profits Commission, *Template constitution for a charitable purpose company limited by guarantee* cll 18, 27; NSW Fair Trading, *Model constitution for an incorporated association* cll 28, 29.

¹⁴ Orr, p 294.