

Orr J¹, “Corporate Governance and members’ rights at Australian Public Universities”, paper presented at the Corporate Law Teachers Association Conference 2007, Melbourne.

ABSTRACT:

Corporate members have important legal rights that are incorporated into the statutory and common law of Australia. These members’ rights serve as a protective mechanism against abuse and mismanagement by those that govern corporate business. Australian universities are statutory corporations, some of which have statutory member provisions in their enabling legislation. Universities are being forced to venture further into commercial operations to survive and in some instances are undertaking unacceptable risks in their commercial activities. Some universities are experiencing difficult financial times and the following question is raised: What avenues do university members have to protect themselves where their university’s commercial ventures threaten to undermine the core purpose of higher education?

The presentation will discuss some legal characteristics of Australian public universities as they relate to university members and members rights.

.....
Introduction

Corcoran² notes that university membership “is a very important and...a very poorly understood concept” and it is surprising that little has been written on university membership and membership rights. Some brief discussion has made its way into academic commentary. Considine³ briefly raised a number of questions concerning the interpretation of university statutes as they related to membership and the relationship between members, members’ rights and the modern Australian universities; Jackson and Cowley⁴ note that “Universities are corporations governed by councils and typified under many incorporating acts as having a membership which includes academic staff and students. Furthermore it can be argued that where membership is not spelt out clearly in a university’s incorporating statute that academic staff and perhaps students may be able to argue common law membership rights of the universities”; and Corcoran⁵ noted that the “Classes of members and requirements for membership in Australian universities can be and generally are

¹ John ORR is a lecturer at the University of Southern Queensland, Toowoomba, Qld and is currently undertaking PhD research at Southern Cross University, Lismore, NSW.

² UMPA. Transnational Education Symposium Who Benefits? Who Pays?, The Public University in a Corporate Environment, University of Melbourne, 24th November 2000. Refer also to S. Corcoran, ‘Living on the Edge: Utopia University Ltd’ (1999) 27 *Federal Law Review* p265ff, and S. Corcoran, ‘First Principles in the Interpretation of University Statutes’ (2000) 4 *Flinders Journal of Law Reform*.]

³ Considine D, “University Governance, Corporations and Cultures: The Impact of Corporate Law on the Development of Appropriate Regulation, Compliance and Recognition of Diverse University Cultures.” *Proceedings of the Australian Universities Quality Forum 2004 AUQA Occasional Publication*.

⁴ Jackson J and Cowley J, University Governance, Blinking Dons or Donning Blinkers: Fiduciary and Common Law Obligations of Members of Governing Boards of Australian Universities, 2002, 6, *Southern Cross University Law Review*.

⁵ See n.2

stipulated by statutes (enabling acts)” and notes that the Flinders University, states that the university consist of a council and academic staff and students. Similarly the membership of the University of Melbourne, as described in its enabling act, includes members of council, various categories of staff, academic staff, students and graduates.” “Membership is also important in relation to the jurisdiction of the university visitor, because the jurisdiction of the visitor extends only to members of the university”

Importantly university members ’ rights could serve as a protective mechanism within the university system to guard against abuse and mismanagement and to ensure that university business is carried out in accordance to its statutory mandate. The following discussion will address three important issues concerning universities and university membership. Firstly to discuss the corporate status of universities, secondly to identify the persons who are members of Australian universities and thirdly to examine the legal rights that members of Australian universities have.

The discussion will be defined by the following three subheadings:

1. **What is the legal status of Australian public universities?**
2. **Do universities have members?**
3. **What rights do university members have?**

.....

1. What is the legal status of Australian public universities?

The courts have been consistent in their description of the legal characteristics of Australian public universities. Generally the courts⁶ are of the view that:

It may be assumed that as the University is a statutory corporation established by Act of Parliament, as a public institution, to promote the public purpose of higher education, its decisions, including those of relevant committees are subject to the scrutiny of the Courts.⁷

Although “[t]he idea of a public institution is rather fuzzy” and has raised some question⁸ it is clear that “[public] universities in Australia are not wholly private bodies, entitled to govern themselves or enter private arrangements as they please.”

In any event Australian public universities are a type of corporation commonly referred to as a “statutory corporation”, they are incorporated by their own Act of Parliament, for example, the University of Southern Queensland is created by the

⁶ See for example *Ex parte King: Re Sydney University SR NSW* (1944) Vol 44 19 at 33; *Ex parte Foster: Re University of Sydney* (1963) SR(NSW) 723 at 730; *Clark v University of Melbourne* (1979) VR 67 at 73; *National Tertiary Education Industry Union, Re - 526/98 N Print Q0702* [1998] IRCommA 589 (11 May 1998), per Justice Munro, Senior Deputy President Watson, Commissioner Smith; *Quickenden v Commissioner O'Connor of the Australian Industrial Relations Commission* [2001] FCA 303; and *Griffith University v Tang* [2005] HCA 7

⁷ *Norrie v Auckland University Senate* [1984] 1 NZLR 129 at 135, and at 140. Although there is some question as to whether a university is a puSee *Harding v. University of New South Wales* [2002] NSWCA 325 Heydon JA Hodgson JA Young CJ in Eq;

⁸ See *Harding v. University of New South Wales* [2002] NSWCA 325

University of Southern Queensland Act 1998 (Qld); Deakin University is created by the *Deakin University Act 1974 (Vic)*.....

Public universities are not incorporated under the *Corporations Act 2001 (Cth)* (although a question hangs over the Australian Catholic University) and they are generally (Cf company s.9 and Part 5.7 body) not subject to the *Corporations Act*. The university is not an instrumentality or agency of the Crown⁹ but, although it has not been judicially determined, are likely to be treated as a public authority created for public purposes.¹⁰

The term "statutory corporation"¹¹ simply refers to a body corporate, which is created by statute and whose purpose, functions and powers are conferred by statute. Australian public universities are each established by a State/Territory legislation and in the case of the Australian National University, Commonwealth legislation¹². The establishing legislation provides that the university shall be a 'body corporate' or in the case of most Victorian universities a "body politic and corporate" and proceeds to endow it with a legal capacity. University enabling legislation¹³ generally provide that the university has

-
- a. perpetual succession; and
 - b. shall have a common seal; and
 - c. is capable in law of suing and being sued; and
 - d. may acquire, hold and dispose of real and personal property; and
 - e. is capable of doing and suffering all acts, matters and things that a body corporate may by law do or suffer.
-

The special public purpose of universities is an important consideration to the establishment of the legal status of universities and in identifying universities as a specific species of statutory corporation.¹⁴

All of the university enabling acts establish universities as a body corporate. The characteristics of corporations were detailed by Hungerford J in *WorkCover Authority*

⁹ *National Tertiary Education Industry Union, Re - 526/98 N Print Q0702* [1998] IRCCommA 589 (11 May 1998), per Justice Munro, Senior Deputy President Watson, Commissioner Smith

¹⁰ Flinders University, Governance and administration, Council Handbook, Section 2: Responsibilities, Liabilities and Rights of Council Members, http://www.flinders.edu.au/polsec/handbook_s2.html

¹¹ See *Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at p.68.

¹² *Australian National University Act 1991 (Cth)*

¹³ For example see the *University Of Ballarat Act 1993 - s. 4*

¹⁴ "The public purposes for which the University has been established are thus defined and the activities which constitute the "single business" of the University are the activities carried on by the University to effect that purpose"¹⁴; Cases that assist to identify the public purpose and objects of a public university: *Norrie v Auckland University Senate* [1984] 1 NZLR 129 at 135, and at 140; *Ex parte Forster*; *Re University of Sydney* (1963) 63 SR (NSW) 723; *Harding v. University of New South Wales* [2002] NSWCA 325; *Clark v University Melbourne* [1978] VR 457; *Quickenden v Commissioner O'Connor of the Australian Industrial Relations Commission* [2001] FCA 303; *Griffith University v Tang* [2005] *esp.* Kirby J

of *New South Wales (Inspector Keelty) v The Crown in Right of the State of New South Wales (Police Service of New South Wales)*¹⁵ as follows:

“In *Halsbury's Laws of England* (4th ed, 1974, vol 9, Ch 1(1)) the definitions and characteristics of corporations were detailed "a corporation may be defined as a body of persons (in the case of a corporation aggregate) or an office (in the case of a corporation sole) which is recognised by the law as having a personality which is distinct from the separate personalities of the members of the body or the personality of the individual holder for the time being of the office in question" (para 1201), the learned editors identified two main classes of corporation, namely, "corporations aggregate and corporations sole" (para 1202).”

The term ‘body corporate’ can only refer to two types of bodies corporate:

1. "a corporation may be defined as a body of persons (in the case of a corporation aggregate) or
2. an office (in the case of a corporation sole); *Halsbury's Laws of England* (4th ed, 1974, vol 9, Ch 1(1)) cited in *WorkCover Authority of New South Wales (Inspector Keelty) v The Crown in Right of the State of New South Wales (Police Service of New South Wales)* [2000] NSWIRComm 234 per Hungerford J at 15

A corporation sole is a body politic having perpetual succession, constituted in a single person; examples being the Public Trustee; and an archbishop are each a corporation sole.¹⁶ Universities are not constituted in a single person and are not a corporation sole.

If a university is not a corporate sole it is a corporate aggregate. An aggregate of members form the constituent parts of the body corporate. With reference to a corporate aggregate it has been said “to find the essence of corporateness in the permanent existence of the organized group, the " body " of "members", which remains the same body though its particles change.”¹⁷

It is interesting that the Victorian enabling legislation establishes each university as “body politic and corporate”. These terms have been judicially considered¹⁸ and concluded that the expression ‘body politic’ is a body corporate but one constituted for a public purpose. Considering that a public university’s functions are of a public nature to facilitate higher education and research for the benefit of community needs; perhaps it could be said that all public universities could be referred to as bodies politic.

¹⁵ [2000] NSWIRComm 234 at para 15.

¹⁶ See further *WorkCover Authority of New South Wales (Inspector Keelty) v The Crown in Right of the State of New South Wales (Police Service of New South Wales)* [2000] NSWIRComm 234 per Hungerford J at 15.

¹⁷ Professor F W Maitland in *Selected Essays* (1936, Books for Libraries Press, Inc) quoting *Fineux CJ* cited in *WorkCover Authority of New South Wales (Inspector Keelty)* see n.16

¹⁸ *Melbourne Harbour Trust Commissioners v Colonial Sugar Refining Co Ltd* (1925) 36 CLR 230 per Isaacs J at p 279; *WorkCover Authority of New South Wales (Inspector Keelty)* see n.16 at 22.

2. Do universities have members?

University statutes are not uniform they do not echo the same form. Some university statutes speak expressly of membership while others are silent. An examination of the whole of the enabling legislation will be required to determine university membership.

An examination of the legislation that establishes the Australian public universities reveals a marked difference in the way that membership is dealt with. There are three broad categories of approaches to university membership within the enabling legislation. The three approaches can be categorised as follows:

- i. express provision for university members;
- ii. provision for the constituent parts of the university that implies university membership; and
- iii. legislation is silent on university members.

i. Express provision for university members.

Under the first approach the express provision spells out the classes of members. A clear example of a university's enabling act expressly providing for membership is found in s.4 of the *Melbourne University Act 1958* (Vic) as follows:

4. (1) establishes the body politic and corporate by the name of "The University of Melbourne" which under that name consists of-
- (a) a council and its members;
 - (b) the graduates;
 - (c) the professors;
 - (d) members of the academic staff;
 - (e) members of the faculties and boards of studies;
 - (f) the graduate students;
 - (g) the undergraduate students;
 - (h) the diplomates;
 - (i) such members of the staff of the University, other than the academic staff, as are designated from time to time by the council;
 - (j) such members of the staffs of the affiliated colleges as are designated from time to time by the council as members of the University; and
 - (k) such students (if any) as are neither graduate students nor undergraduate students.

S.4(3) makes it clear the the (sic) persons referred to in paragraphs (a) to (k) of sub-section (1) shall, subject to sub-section (4), **be members of the University**¹⁹ and be bound by its statutes and regulations.

- s.4(4) Where a person is in a category which would make him or her, a member of the University,
- a. requests the council to permit him to remain in that category but not to be considered as a member of the University; and

¹⁹ emphasis added.

(b) gives reasons justifying his request which are satisfactory to the council-
the council may grant his request.

The express provision makes it clear that the classes of persons named in s. 4(1) are members of the University of Melbourne. It is worth noting that the University's statutes and regulations bind the members but nothing in the Act provides for general member rights.

ii. provision for the constituent parts of a university.

An example of an enabling statute that provides of the constituent parts of the body corporate is found in the s.4 *Southern Cross University Act 1993* (NSW) as follows:

A University ...consisting of:
(a) a Council, and
(b) the professors and full-time members of the academic staff and... other members or classes of members of the staff of the University as the by-laws may prescribe, and
(c) the graduates and students of the University

The term "Consisting of" has not been judicially considered in Australia but the Court of Appeals of Wisconsin was of the opinion that:

"Consisting. Being composed of or made up of. This word is not synonymous with 'including,' for the latter, when used in connection with a number of specified objects, always implies that there may be others which are not mentioned."²⁰ To be made up or composed (usually fol. by *of*)" AMERICAN HERITAGE DICTIONARY 402 (3RD ED. 1992), in material part, defines "consist" as "To be made up or composed." None of [the] authorities defines "consist" in an inclusive sense."

An important point to be made here is that the term "consisting of" is used in university statutes rather than the term "including; thus the limits of persons who are members can be conclusively determined by reference to the provision. The earlier discussion²¹ on the university as a corporate aggregate is important here. The persons specified in the section can be interpreted to be members that aggregate to form the constituent parts of the body corporate.

Is there a leap of faith in that 'should the term 'consisting of' be interpreted to mean the body corporate membership consisting of?

The rules of statutory interpretation require the statutory intention of the provision to be found in the language of statute and "the scope and object of the Act as a whole having regard to the requirements and its place in the legislative scheme."²²

²⁰ *Madison Teachers, Inc. v Madison Metropolitan School District*, Court of Appeals of Wisconsin, October 19, No. 93-3323, 1995 before Eich, C.J., Gartzke, P.J., and Sundby, J.(dissent)

²¹ see text accompanying note 17.

²² *Tasker v Fullwood* (1978) 1 NSWLR 20 in *Gypsy Jones* (1988). See also *Tickner v Bropho* (1993)).

In *Tickner v Bropho* (1993) the cannons of statutory interpretation was expressed as follows:

"The fundamental object of statutory construction in every case is to ascertain the legislative intention by reference to the language of the instrument viewed as a whole.

In other words the provision in the university statute cannot be considered in isolation of its context. The inquiry requires an investigation to examine whether there are other provisions within the enabling legislation that refer to 'members' or 'membership' of the university.

A number of university enabling acts allow for a conscientious objection to being a member. All NSW legislation have similar provisions as to the 'consisting of' provision per s.4 SCU Act which allows for a Conscientious objection to being a member of the university (on request with reasons discretion of the council/senate; similar provisions are found in Uni Tas s.5(1); Uni Sydney s.32; and SCU s.26 – Exemption from membership of body corporate

Some university enabling acts discuss members within other provisions for example:

- ANU s.39; validity of acts and proceedings – “an act or proceeding of the members...of a university is not invalid merely because of a defect in the appointment, election or admission of any member of the university body...”
- s.4 University of WA s.4 the heading “University consist of Senate, Convocation and members” but does not expressly provide who are members within the provision;
- s. 44 Charles Darwin Uni protection from liability inter alia, a member of the university (person) is not civilly or criminally liable for an act or omission by the person in good faith in the exercise or purported exercise of a power or function; and
- Murdoch University specifies that the Vice Chancellor may delegate any function, power or duty to a person who is a **member of the university**²³

Some universities have made statutes, regulations or by-laws concerning the membership of the university. For example:

La Trobe University, *Statute 3 - Membership of the University*²⁴ states:

1. “University of Melbourne Regulation 17.1.R9 made under Statute 17.1 Membership of the university; especially “Membership of the University, in addition to the privileges and rights attracted by membership of the body corporate, also attracts the right to vote in elections affecting the interests of the members overall, or in their several categories.”; and

Swinburne University of Technology, *Statute 7 Members of the University*²⁵ states:

7 The members of the University are:

²³ Emphasis added.

²⁴ made in accordance with the *La Trobe University Act 1964*

²⁵ made in accordance with the *Swinburne University of Technology Act 1992*

- (a) the members of the Council; and
- (b) the members of the staff of the University; and
- (c) the students of the University; and
- (d) the graduates and diplomates of the University and of the former Eastern Institute, Prahran College and Swinburne Institute; and
- (e) the holders of prescribed certificates issued by the University or by the former Eastern Institute, Prahran College or Swinburne Institute; and
- (f) the members of the staff of Swinburne Student Union Incorporated; and
- (g) the members of the staff of the Swinburne Sports Association Incorporated.

iii. **legislation silent on university members**

An example of an enabling statute that is silent on university membership are the relatively uniform provisions in all Queensland statutes which may be exemplified by s.4 *University Of Southern Queensland Act 1998* as follows:

4(2)(a) The university is a body corporate

The USQ Act is silent as to members of the university.²⁶ It should be noted that there is a transitional provision relating to former university corporations, which could be interpreted to relate to members. Where the enabling act is silent how are the members of a university determined?

The court had to determine whether or not a statutory corporation had members in *Re The Honey Pool of Western Australia*²⁷. In that case a statutory corporation was established under the *Honey Pool Act 1978* (WA) which had public functions and no provisions on corporate membership. The body corporate structure in Honey Pool was similar to that of a university in that both bodies corporate have public functions and are subject to the control of the Minister and participants have no dividend from assets, curtailed voting rights, no control in general meetings of the affairs of the body corporate, no proprietary rights, no right of inspection of the books, and no beneficial interest in its assets.

Nonetheless the Court found that the 'participants'²⁸ of Honey Pool were members of the statutory corporation established as the Honey Pool of Western Australia under the *Honey Pool Act 1978* (WA)

3. What rights do university members have?

²⁶ Note that the situation would be different if there were Statutes, Regulations or By-Laws referring to university membership.

²⁷ (1988) 13 ACLR 712 per Seaman J

²⁸ Under the *Honey Pool Act* a "participant" means: "A person who voluntarily delivers honey to the Board for a pool or on whose behalf honey is so delivered, and where honey is so delivered on behalf of any partnership agreement, includes each party to such an agreement."

The rights of members of statutory corporations is an area of law not well known and should be defined in the enabling legislation. However university enabling legislation are relatively silent (apart from provision relating to voting rights) on the issue.

“A corporation created by parliament, like any other corporation, is subject to the general law of corporations to the extent that its incorporating statute does not make special provision.”²⁹ Hence universities are subject to the common law to the extent that their enabling legislation does not expressly provide otherwise.

In *Esso v Comm Taxation* (1998) the Court was clear in that the “statute may abrogate the common law, in so far as it is inconsistent with the operation of the statute, but only within the area covered by the statute.”³⁰ The university legislation is generally silent on university member rights but do not attempt to abrogate the common law rights of members. Do university members have common law rights?

Before considering the common law rights of members it is noteworthy to consider that the rights of members of trading corporations. (registered under the *Corporations Act* 2001 (Cth) Members rights and remedies are an important aspect to company law and have received statutory protection by their inclusion in the *Corporations Act*. After a brief discussion on the statutory rights of members the common law rights of members will be addressed as they relate to university members. Please consider the following table and consider what advantage, if any, could university members enjoy from exercising member rights.

Member’s rights Statute v common law		
Statutory right	Common law right	Common law detail
Oppression remedy; ss. 232-233	Oppression remedy	<i>Gambotto</i> , “misuse and abuse of power...`burdensome, harsh and wrongful” and modern court may adopt the unfairness concept (easier to establish) and note the fraud on the minority exception to the rule in <i>Foss v Harbottle</i>
Statutory Derivative Action; ss. 236-237	Derivative Action	<i>Foss v Harbottle</i> [proper plaintiff rule] and exceptions <ul style="list-style-type: none"> - fraud on the minority (misuse/abuse of power - personal/individual right eg contract - ultra vires - interests of justice <p>...prohibitive costs...unknown whether leave will be granted.</p> <p>Cook v Deek</p>
Winding up; s.461	Nil	Part 5.7

²⁹ Austin RP & Ramsay IM, *Ford’s Principles of Corporations Law 12th ed*, Lexis Nexis Butterworths, Australia, 2005, p.37 at [2.090]

³⁰ see also *Western Australia v The Commonwealth* (1995) 183 CLR 373

Injunction; s.1324	Injunction	Injunction
Examine books; s.247A	Examine books; access records, Nil	<p>Re university <i>Wimshurst v Vice-Chancellor, Macuarie University</i> [2002] NSWADT</p> <ul style="list-style-type: none"> - no automatic right - must be a particular matter in dispute; and applicant has a special interest distinct from other members (does not arise from the status of member; stanham); Claremont Petroleum. - Must establish ‘proper and sufficient reason’ to access records; and - not contrary to the university’s best interests; Hume v Unity cited in <i>Wimshurst v Vice-Chancellor, Macuarie University</i> [2002] NSWADT
s. 250E right to vote at GM	Right to vote	<i>As per statutory right to vote on members of the governing body. No residual power in GM. See also Link Agricultural Pty Ltd v Shanahan & Ors</i> [1998] VSCA 3
s.140 statutory contract	Contract	<p>Statutes, regulations, by-laws (if any) may operate as a contract between the members and the university; <i>Wedderburn [1957] CLJ 193 cited in Stanham v National Trust (1989)</i></p> <p>May be a right in contract to have the university’s business conducted in accordance with its enabling legislation.</p>

Conclusion

Corporate members have important legal rights to protect against abuse and mismanagement of government. The issue of Australian university membership is generally not well understood, especially in regard to the exercise of member rights. The presentation discussed some legal characteristics of Australian public universities as they relate to university members and members rights and raised some focus on the issue of university membership. Perhaps the enforcement of university members’ rights may be found to be a valuable resource for members of Australian public universities in monitoring conflicts of interest, ensuring confidentiality, promoting the best interest of the university and ensuring responsible stewardship of valuable university resources.