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Duty, Discretion and Conflict

University Governance and the Legal Obligations of University Boards

Suzanne Corcoran

Australian universities like to adopt private-sector practices when it suits them. But they often remain perilously vague about the legal implications of doing so. In the second part of our governance feature Suzanne Corcoran examines the uncertain legal status of our prevailing governance culture.

In recent years university governance has come in from the cold, so to speak, and is now the subject of some debate in political and academic venues. The core issue for debate is the appropriateness and effectiveness of current university governance structures. This debate is particularly critical in light of the increased professionalisation of universities and university administrators; and, the increased extension of university activities beyond teaching and research to other more complex, often hybrid, activities which may carry with them new legal and commercial risks.

University Governance

A starting point has to be a clarification of what we mean when we talk about 'university governance'. As a legal matter, governance is not just a question of how one structures the governing board of an institution. That may seem like stating the obvious but most proposals for reform of governance, corporate or university, focus principally on the responsibilities of board members and ignore very important structural and institutional issues. (For example the government's *Backing*

Australia's Future paper). Governance, in fact refers first of all to the legal allocation of decision making power within a university between various governance structures (such as faculties, academic boards, senates and councils) and administrative or 'management' structures (such as departments, divisions, pro-Vice-Chancellors, deputies and Vice-Chancellors). It is an ecosystem with interdependent parts. Secondly, governance also refers to the allocation of both responsibility and accountability for the exercise of that decision making power. The legal validity of corporate acts will often depend on whether principles of corporate governance have been observed.

A number of key features of university governance are critical to any practical discussion of the legal obligations of governing boards. First, universities in Australia are organised as corporations. As such they come with a pre-packaged governance system by virtue of their corporate status. With few exceptions, universities in Australia are corporations constituted under their own individual Acts and these Acts determine the particularities and idiosyncrasies of their governance structures. Thus, there is no one model of governance that applies to all university corporations. Nevertheless, there is a legal and constitutional structure implicit in the use of the corporate vehicle. There are also common law and fiduciary principles which apply to all university corporations unless specifically altered either by a university's own Act or the general law applicable to corporations.¹

The corporate governance structure implicit in the use of the corporate vehicle for universities is majoritarian and democratic rather than collegial. This reflects the corporate nature of the university. Majority rule prevails within most university decision-making structures and there has traditionally been a system of voting by all members for the election of university officers and rules. This is similar to the role of the shareholder in the business corporation in that it sets up an internal accountability system. Collegiality (consensus decision-making) operates also within traditional university structures but at the micro level of departments and faculties rather than at the university wide level. This majoritarian democratic culture has been weakened to a substantial degree by changes which have removed or marginalised the implicit common law rules and explicit governance framework.

As noted above, the focus of most discussions about university governance has been on the governing boards or councils. This is inadequate because it ignores the other members and groups that make up the university. It also has led to the phenomenon that university governing boards are both too powerful and too weak. They are also extremely vulnerable in a legal liability sense. A further problem related to the single-minded focus on governing boards is a confusion about the difference between governance and management. This can lead to a turf fight between those whose job it is to manage

and those who would govern. (Illustrations of this phenomenon have been seen in recent years at Sydney and Adelaide universities.)

The institutionalisation of management that has occurred in all corporations has also occurred in universities. Unfortunately that phenomenon has not been accommodated in university statutes. This has led to a great deal of confusion regarding the proper place of executive management within university decision-making structures. Indeed, the proliferation of Deputy Vice-Chancellors, Pro Vice-Chancellors and Heads of mega-Faculties or so-called 'Divisions' have clear line-management functions but generally speaking, no defined role in university Acts. What is worse, their positions often conflict with the roles and responsibilities of other university bodies established by university Acts, such as academic boards and faculties.

Further, insufficient attention has been paid to governance issues facing the university as a group of people, that is the totality of university members. In fact, for some, if not most cases, it is difficult to determine who the members of a university are, at least as a legal matter. This is true despite the fact that university statutes usually give some indication of who would be considered a member.² The question of who is entitled to be considered a 'member' of the institution is as important for the university corporation as is the question of who is a 'shareholder' of a business corporation. Not only can it make a great difference in terms of legal rights and obligations, it is also a critical issue in the architecture of governance. The residual powers of a corporation rest with the membership.

The extent of university involvement in commercial ventures has developed dramatically in the past decade. Most universities are now more akin to corporate groups than individual corporations. The combination of complex corporate organisational structures with varying degrees of commercial purpose requires management specialisation and governance expertise beyond the traditional framework of the academic and research purpose of universities. Risk management is now a serious concern for university managers and governing bodies. Also, inter-entity liability issues can be real and serious.³

Every corporate entity needs a method for dealing with internal disputes and for ensuring compliance with the entity's internal rules or by-laws. In the university corporation, and indeed in many old corporations, this function was performed by the Visitor. The role of the university Visitor as the arbiter of internal disputes has been reduced due to a combination of factors. These include the ceremonial status of those appointed to the position, the characterisation of many disputes as industrial rather than internal and the reluctance of universities to manage their own dispute resolution. The suggested appointment of a university ombudsman is interesting because it would in many ways reduplicate the role of

the Visitor and would only be more successful if a competent individual were appointed to fill the position. This is because most disputes concern academic assessments at one level or another.

Finally, universities are legal persons but not real persons. The university when it acts does so through the individuals who are responsible for its governance and management. This means that individuals involved in university governance and management are involved in two levels of legal accountability: accountability for the actions of the university and accountability for their own actions either as a group (for example the governing board) or individually. This duality of capacity to act is a hallmark of all corporations including university corporations. In addition to individual capacity, there is also the question of entity liability, that is the primary liability of the university itself which may depending on the circumstances, give rise to secondary or derivative liability of individuals within the university.

It seems clear that the contemporary Australian university has outgrown the traditional model implicit in the older university enabling Acts. What is needed is a new governance model that is flexible enough to accommodate continuing change while giving appropriate voice to the different facets of the university corporation. For example, thirty years ago when I was at university, universities had very little commercial activity as such. Now most major universities have numerous commercial entities or ventures. It is therefore necessary to develop legal and financial risk strategies that recognise the expanded legal liability inherent in commercial activity.

Legal Obligations

The legal obligations of governing boards operate to ensure that board members fulfil their office. They balance the broad discretion inherent in the decision making power of board members by imposing strict accountability standards. One can divide those obligations into two interdependent classes, obligations imposed by statute and obligations imposed by the common law.

The legal world today is a world of statutes. Universities are in fact prime examples of this phenomenon. Universities come into being by operation of statutes. In Australia, for the most part this has been done by individual enabling Acts, although general incorporation statutes can be used. For University board members, their primary legal obligations will be determined by their own enabling legislation and the power and duties con-

ferred by that Act (not the mission statement) and any other delegated legislation or regulations under that Act.

The principal statutory questions related to board activity will be: whether, under the university Act, the proper persons or groups are exercising a power of the university; whether the proper party is acting within the ambit of the powers conferred by the Act; and, whether the action or decision taken is itself consistent with the Act. All of these issues will be determined by reference to the relevant Act and interpreted against the background of the common law. The numerous other

statutes which apply to universities in one way or another impose an obligation of oversight on board members (and on others within the university). That obligation is to ensure that the university and its members comply with the law. This is an expanding area of legal obligation and consequent potential liability as uni-

versities and their controlled entities engage in commercial enterprises and greater financial risk.

There are two principle duties imposed by the common law: the duty of care and the duty of loyalty. Both duties operate to ensure that actions taken, and decisions made, on behalf of the university are made in the appropriate circumstances and context. The duty of care relates to whether board members do their job, and, in particular, how they exercise their powers. The duty requires that board members exercise their power with due care, skill and diligence. Skill and diligence are different aspects of due care in the performance of an office. Chronic lack of attendance at board meetings may be an indication that an individual is not exercising appropriate care and diligence. Similarly, inattention to board papers or to board business will indicate a failure to exercise due care and skill.

The business of the governing board is to make informed decisions on behalf of the university and to oversee the management of the university. As a general rule, conduct of board members which inhibits or undermines the integrity of the decision making process or ignores the oversight obligation may breach the duty of care. For example, it is the job of the board to monitor and review university administration, particularly the performance of the chief officers of the university. It is also the job of the board to monitor financial and commercial risk and to approve budgets and business plans. This is no easy job as vice-chancellors and their delegates circle the globe engaging foreign partners in new educational joint ventures while expanding their commercialisation efforts at home. Failure on the part of board members to be actively engaged in these oversight responsibilities can be a breach of the duty of care, skill and diligence.

It seems clear that the contemporary Australian university has outgrown... the older university enabling Acts. What is needed is a new governance model that is flexible enough to accommodate continuing change ...

The second primary duty, the duty of loyalty focuses on the loyalty owed to the university by board members. The duty is often described as the duty to act in the best interests of the university and not for an improper or collateral purpose.

There are at least three elements to this duty: identifying the entity to whom loyalty is owed; identifying the relevant interests of that entity; and choosing between competing or conflicting interests (for example, the interests of employees versus student interests). While there are no clear rules for choosing between competing interests, such as employees or students, there is one very clear rule when the competing interest is a personal or professional interest of the individual board member. That is, the duty requires that board members put the interests of the university before their own interest and before any other office or duty that a board member might have.

All the legal rules regulating conflicts of interest relate to this duty to engage in decision making in the interests of the university free from improper influences. Conflicts of interest may be of various kinds, for example, conflicts between the interest of the university and personal interests, such as personal financial interests; or conflicts between duty and duty where an individual holds two positions which conflict or may potentially conflict. Within a university the most likely conflicts are between duty and duty; for example NTEU reps, student officers, and clearly student politicians. Such individuals are exposed to the risk of liability for improper use of office, that is using their office to gain an advantage for someone else to whom they also owe a duty.

The duty of loyalty also includes what is sometimes referred to as the duty to maintain an active discretion. That is, board members must be able to actually make decisions in the best interest of the university. This means they cannot delegate all or a substantial part of their decision making power unless they have already considered the ultimate end of the decision delegated and determined that it will be in the best interest of the university.

Potential conflicts of interest can sometimes be permitted provided there is disclosure of the interest and approval of all concerned. However, where a conflict is material and actual, best practice today requires not only exclusion from the voting process but from access to all relevant board papers and from any discussion at a meeting. This does not mean that individuals with potential conflicts should be excluded from membership on boards. They are often individuals with a perspective or expertise which makes a great contribution to the general work of the board. However, when they are

directly conflicted for some reason they should be excluded from deliberation and voting on the matter concerned. (For example, the Vice-Chancellor should not vote to approve his or her own employment contract or any action which would result in a financial bonus of any kind.)

The case of the University of Adelaide

In July 2000, a novel system of corporate governance was introduced at the University of Adelaide in South Australia.

All powers of the university council were delegated to the University's (then new) Chancellor, Robert Champion de Crespigny.⁴ Eleven members of the 20 member council voted in favour of delegating all powers of the council to the Chancellor who would be advised and assisted, according to the resolution, by a new Chancellor's committee. The

Chancellor's committee would not be elected or representative of council in composition and would have no formal delegated power. The rationale for the move was the perceived value of a smaller committee and the need for council to be available 'seven days a week'.⁵

To my knowledge, these arrangements, although formally passed by the council, were never implemented. I mention them here as an example of an attempt in good faith to corporatise or streamline university governance, but one which raised substantial legal questions concerning the duty of council members. The legal issues included the question of whether the university council's new operating structure conformed to the requirements of the university's Act,⁶ notwithstanding the good intentions of all concerned. In addition, the new arrangements raised questions under public and private law regarding the possible breach of legal duties imposed upon members of council.

The major legal risk was that the delegation arrangements at Adelaide University were illegal in the sense that they were contrary to the requirements of the *University Act*. If that were the case, then actions taken on behalf of council by the Chancellor and/or the newly constituted Chancellor's committee would be therefore be void or voidable. In addition, the arrangements created the risk that council members would breach legal duties owed to the University by not bringing an active decision making process to University affairs. Finally, the University and individual members of council risked increased potential liability for decisions of committees or individuals deemed to be their actual or implied agents. This was particularly worrisome due to the lack of any 'good faith' indemnifica-

The new Chancellor's committee ... looked remarkably like a management committee. This almost certainly would have intruded into the proper sphere of management and ... the statutory responsibilities of the Vice Chancellor.

tion for council members in the *University of Adelaide Act*.

As noted earlier, members of a university board must exercise their individual discretion for the benefit of the university concerned. While governing boards will routinely delegate certain of their powers, it is highly unusual for a board to delegate all of its powers.⁷ This is because of the legal duties related to board actions and decision-making.

From a risk management perspective the Adelaide council delegation created additional risk by distancing (at least in terms of time) those with an obligation to oversee management and to develop policy for the university from the actual decision making processes related to those obligations. This is not something governing boards ought to do. Finally while the council delegation provided for eventual ratification by council of all committee decisions, principles of agency law could operate to bind the university despite a later refusal to ratify by the council.

The University of Adelaide is a corporation formed pursuant to the *University of Adelaide Act 1971* (No 41 of 1971) as amended. Section 9 of that Act (as it was in July 2000) provided that the Council is the governing body of the University and has as its principal powers overseeing the management and development of the University; devising and approving strategic plans and major policies for the University; and, monitoring and reviewing the University's operation.

Section 10 provided for delegation by Council. Council could delegate any of its powers (except the power to delegate) to any officer or employee of the University. In the event of such a delegation Council retained the ability to act.⁸ This power would be subject to the rule that academic matters can only be delegated to academic staff.⁹ Section 11 stated that Council needed a quorum of 11 to transact business. Decisions were decisions of a majority, with a casting vote for the presiding officer.

The Act stated that there should be a Chancellor and Vice-Chancellor, but did not enumerate any of their powers. Presumably, the Chancellor and Vice-Chancellor would have had the ordinary powers which attached to those offices from time to time. That presumption would be subject to any clear indication to the contrary in an instrument of appointment or service contract.

Sections 9, 10 and 11 clearly assumed that the Council would act as a body and would exercise the specific powers provided for in the Act. The delegation power spoke of the delegation of 'any powers' but not the delegation of 'all powers'. A delegation of 'all powers' would cut against the intention that the Council operate as a 'governing body'. Although unusual in modern practice, there was no power under the Act to delegate to a committee. Which is what, in substance, had been constructed by delegation to the Chancellor where such delegation could only be exercised with the majority consent of the new Chancellor's committee.¹⁰ In essence, the council

had reconstructed the decision making body in a way contrary to the intention of the University Act.

In 1996 all South Australian universities had their councils restructured after an independent Review Committee was commissioned by Dr Bob Such, Minister for Employment, Training and Further Education to report on the governance of universities and the extent to which there should be changes in the functions, powers and composition of councils.

In that report, *Balancing Town and Gown*,¹¹ the role of university councils in South Australia was considered and recommendations were made to facilitate the decision making processes of councils. The role of council was described as one involving the setting of general directions and the development of strategic policy:

It is most important that the role of the Council be well defined and understood and that it be differentiated from the role of management. Generally speaking a Council's role is to ensure that all aspects of what should be managed are being attended to. Essentially a Council is there to supervise, review and if necessary challenge management's proposals and activities. It should require the development of strategy and policy by the management for approval of the Council. It should approve general principles and directions, the allocation of resources and the general style and 'culture' of the university. It should delegate the operational aspect of managing to the Vice-Chancellor who should be held accountable for the manner in which it is carried out.¹²

The report was issued soon after a Commonwealth report, *Higher Education Management Review* (the Hoare Report) and adopted many principles from the Commonwealth report including specifically the Hoare Report's discussion of governance and the use of committees by university governing bodies. The report acknowledged that councils often use committees 'to focus on specific aspects of the governing body's functions' but warned that 'care must be taken that committees do not undermine the effective operation of the governing body in discharging its responsibilities by reducing the role of the governing body to endorsing work done elsewhere.'¹³

The recommendations of *Balancing Town and Gown*, formed the basis of statutory amendments to the various South Australian University Acts. As a result of those amendments, the membership of the council was reduced and changed and the powers of the council were redefined from their previous description as the 'entire management and superintendence of the affairs of the University' to the present configuration. The quorum for council decisions was raised from eight to eleven, a fact which suggests greater accountability and involvement of council members rather than less involvement as was the case in the scheme which had been adopted for the University

of Adelaide.¹⁴ Indeed, implementation of the changes were meant to 'strengthen, enliven and render more efficient' the operations of university councils.¹⁵

Despite these good intentions, a number of issues arose with regard to the *University Act* and the arrangements put in place by Adelaide University Council. Broadly speaking these issues arose because of the 'policy of the law', when viewing the *University Act* as a set of principles governing the decision making structure of the University.¹⁶ Those governance principles were undermined by the new arrangements which marginalised the role and responsibility of council and its accountability to the university and the community.

Two of these problems were related to delegation. First, delegation was too broad in that it purported to delegate all powers and all responsibilities of the council to the Chancellor.¹⁷ This was inconsistent with the university governance principles set out in the *University Act*. Even if such a delegation were expressly provided for in the *University Act*, there would be a further legal question as to whether a delegation of all powers of council would have to be a unanimous delegation by all members of council.¹⁸ Delegation was too broad also in that it permitted the Chancellor to exercise the general decision making discretion of council without consulting council beforehand.¹⁹ It was not a delegation merely to do defined tasks but to exercise the discretions of council. This was particularly true given the concurrent move by the council to reduce the number of meetings of council to four per year.²⁰

Another set of problems related to council membership. The membership of council under the *University Act* was meant to bring to the council's decision-making different perspectives and different talents. This was done by stipulating categories of membership and by providing for election of members from certain constituencies. The question of the appropriate size and membership of councils was a major pre-occupation of the *Balancing Town and Gown* report and the subsequent amending legislation. Both reports made specific recommendations including the continuance of elections for representatives of the academic and general staff and the students.²¹ Because of the self-governing nature of the university, a council made up entirely of members selected by council itself seemed a dangerous path, when that question was debated in Parliament.²² The resulting 1996 amendments to the *University Act* reflected that concern. The representative composition of council and the election process for

selecting representative members of council would both have been circumvented by the new governance arrangements.

Another set of issues related to transparency and accountability. With the exception of certain confidential matters, university council meetings are generally open to members of the community. This ensures a level of transparency and accountability in the conduct of university business which is consistent with the public nature of a university and the substantial public funding provided to universities. The 'Chancellor's committee' established under the new governance arrangements at Adelaide would not have been open to observers from either the University or the wider community. This went against a fundamental principle of public accountability applicable at least to publicly funded universities.²³

The central concern of both the Commonwealth report, *Higher Education Management Review* and of the *Balancing Town and Gown* report was the distinction between the management role of the university Vice-Chancellor and the governance role of the council.²⁴ Both reports were concerned that councils be involved in governance and not in management, and both went to some lengths to make recommendations that would focus university councils on governance and oversight issues and not on day to day management questions which are the responsibility of the Vice-Chancellor or other university officers. The activities of a governing body were stated to be 'principally those of guidance and review, rather than executive management'.²⁵ The redefinition of the powers of council in the 1996 amendments to the *University Act* clearly expressed this redirection of Council activity.

The new Chancellor's committee at Adelaide University looked remarkably like a management committee. This almost certainly would have intruded into the proper sphere of management and also could have intruded on the statutory responsibilities of the Vice-Chancellor.²⁶ Furthermore, it presented the risk that council would be distracted from its own statutory responsibilities.

Alongside concerns that the new arrangements contravened the statutory regime for university governance at Adelaide were issues concerning the potential breach of legal duties imposed on members of council. This was because a situation had been created in which the university council assumed a reactive position rather than a leadership position in regard to its principal role as a deliberative body.

... potential board liability for exercise of its power is directly related to the unique structure of the entity involved and the legislation which gives it legal recognition. The legal rules are of necessity very general and deceptively simple. But, when they bite, it can be very painful for all concerned.

The most specific duty which the arrangements under-
mined was the duty of council members to preserve their dis-
cretion. However, other duties were relevant to the scheme as
structured or, as it might operate, in a practical sense. These
included the duty to exercise due care and skill, with its com-
ponent of deliberative attention to situations or transactions
coming before the council;²⁷ the duty to act in the best inter-
est of the university which requires the exercise of active dis-
cretion;²⁸ and, the duty to act for a proper purpose which has
a component of constitutional propriety.²⁹ There was also the
danger that transactions to which the University would be a
party would be void or voidable, and a danger that Council
members would incur personal liability.

Conclusion

The example of the University of Adelaide's governance con-
troversy helps illustrate and make real what can be a very
abstract legal set of rules. The major business of a governing
board is decision making of one kind or another. It is a dis-
cretionary power and therefore also difficult to define without
a factual context. Furthermore, potential board liability for
exercise of its power is directly related to the unique structure
of the entity involved and the legislation which gives it legal
recognition. The legal rules are of necessity very general and
deceptively simple. But, when they bite, it can be very painful
for all concerned.

Putting to one side any suggestion that Australian universi-
ties should have a uniform Act (this would involve very real
practical and constitutional questions), what changes to cur-
rent university governance practice could improve the ability
of university governing boards to fulfil their legal and institu-
tional duties? The following are a few possibilities.

Membership of the University

University Acts should clarify who is a formal member of
the university. This establishes for legal purposes (such as
standing to bring an action) who has a role and interest in
university governance. Clearly, the traditional members of uni-
versities, academic staff and officers should be included and
probably could not be excluded. Members of council, on the
other hand, are not currently defined as members of the uni-
versity. They would need recognition in the university Act.
Students would also not normally be included but can be if an
Act so provides.

Two-tier Boards

Because of the extension of university commercial interests
and the professionalisation of university governance, consid-
eration should be given to the establishment or recognition
of two-tier boards (some kind of academic equivalent to the
European corporate model). In fact most universities have

some semblance of this with governing boards and academic
boards. What should be clarified in university Acts is the
respective role of each and their interaction. Academic mat-
ters, in particular assessment matters should go no higher
than the academic board in terms of decision making. All
matters concerning academic staff generally should go to the
academic board for advice and comment before going to the
governing board. Similarly, student matters should get some
formal student input before going to the governing board.

Membership of the Governing Board

Membership should probably be limited to something between
20 and 25 depending on the size of the university. This is
not because smaller boards make better decisions. Six people
considering a problem will come to a better qualitative solu-
tion than two people although two will be able to act more
quickly and more efficiently. That tension between quality and
efficiency will always involve a trade-off. What is important
is that all members can participate in discussion and informa-
tion sharing in the available time. This is impossible if the
board is too large. Membership should include individuals
who bring important perspectives to governance such as staff
and students and individuals who have needed expertise,
such as financial, legal or educational. Board membership
should not be dominated by management division heads, such
as deputy Vice-Chancellors, pro vice chancellors, and so on.
However, important division heads should attend and report
as non-members.

Academic Boards

Academic boards should have board representation by aca-
demic staff and academic support staff who have the expertise
required to make academic assessments and ensure academic
quality control within the institution. This board should also
comment and advise on matters involving strategic planning
which have an impact on academic programmes or academic
working conditions

Frequency of Meetings and Delegation

Meeting should not be so infrequent as to call into question
the ability of a governing board to perform its oversight and
monitoring duties. Similarly, delegations to committees of the
board should be within limited terms of reference and not
extend to a de facto mini-board making decisions that can and
should properly go to the entire board.

Conflicts of Interest

University boards should have a clear policy dealing with
material conflicts of interest. Individuals with conflicts should
declare those conflicts and, if material, not participate in dis-
cussion or voting on the item. Conflicts when declared should
be recorded in the minutes of the meeting. Boards should be

aware of the problems concerning conflicts of duty and duty and the potential legal liability for improper use of position.

Information Monopolies/ Inform, Attend and Advise

Adequate information must be provided to boards in an accessible form and in a timely manner. Papers tabled at meetings should not be voted on until the following meeting where possible. Those with important information should be asked to keep the board informed on a regular basis, particularly with respect to important matters likely to require board attention in the future. They should also be asked to attend and/or advise when necessary. Professional development also contributes to the information and knowledge base of boards. Regular presentations concerning aspects of university business, including finance and budget, controlled entities and foreign exposure should be part of a board's programme.

Good Faith Indemnification

Members of governing boards and academic boards should be given a good faith indemnification by the university Act. Given the voluntary nature of their positions and the continued possible relevance of liability for acts later found to be outside the power of the board, some protection for actions taken in good faith would be reasonable.

Good university governance will always involve a balance between the quality of decision making (the number of active minds bringing relevant information to the decision making process) and efficiency (the speed with which consensus can be reached). That balance will need re-calibration as circumstances change. In adapting principles of university governance the challenge is to continue to make the one (*uni*) voice represent that of the whole (*versitas*). **u**

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Endnotes

- 1 See S Corcoran, 'Living on the Edge: Utopia University Ltd.' (1999) 27 *Federal Law Review* 265; S Corcoran, 'First Principles in the Interpretation of University Statutes' (2000) 4 *Flinders Journal of Law Reform* 143.
- 2 Ibid. Membership is usually linked to some contribution (or value given) in money or kind.
- 3 See discussion of Melbourne University Private in S Corcoran, 'Living on the Edge: Utopia University Ltd.', supra.
- 4 See Minutes Adelaide University Council meeting 31 July 2000, Item 2.2.
- 5 See *The Advertiser* 1.8.00 at p 11; see also *The Australian Higher Education Section*, 2.8.00
- 6 *University of Adelaide Act 1971* (No 41 of 1971) as amended.
- 7 See discussion in Ford, Austin and Ramsay, *Ford's Principles of Corporations Law* (11th ed 2003) at paras 7.264 and 8.300. A delegation of all powers of the board to a 'governing director' has been accepted practice in Australia in small private companies but not in publically-held compa-

nies. See *Whitehouse v Carlton* (1987) 70 ALR 251 at 256-257 (H Ct of A); *Hannes & Ors v MJH Pty Ltd* (1992) 10 ACLC 400 at 408-410.

8 The Act does not define 'officer' or 'employee'. The Chancellor is clearly not an 'employee' of the university but probably is an 'officer'. The Chancellor's committee established under the new arrangements does not stipulate that committee members must be officers or employees of the university.

9 *Ex Parte Forster; Re Sydney University* (1963) 63 SR (NSW) 723.

10 This committee appeared to be a committee of the Council not a committee of the Chancellor. See Minutes of the Adelaide University Council meeting 31 July 2000, Item 2.2, espec the membership provisions.

11 *Balancing Town and Gown, Report of the South Australian Review of University Governance*, February 1996. Review chaired by Alan McGregor.

12 *Balancing Town and Gown*, at 10 citing: Commonwealth, *Higher Education Management Review* (the Hoare Report).

13 Ibid at iv and 17.

14 This larger number for a quorum was added by amendment in Legislative Council. See Hansard, Parliamentary Debates SA, Legislative Council, Thursday 1 August 1996, pp 1968-1970.

15 Hansard, Parliamentary Debates SA, Vol 2, House of Assembly 1995-1996 Wednesday 20 March 1996. p 1155.

16 *Duncan v McDonald* [1997] 3 NZLR 669 at 684; See W Gummow, *Change and Continuity, Statute, Equity and Federalism* (OUP 1999) at 6. See also *Nelson v Nelson* (1995) 184 CLR 538; *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215; *Acts Interpretation Act 1915* (SA) s 22.

17 See Minutes of the Adelaide University Council meeting 31 July 2000, Item 2.2, para 5.

18 *Coronation Syndicate Ltd v Liliensfield* [1903] TS 489.

19 Minutes of the Adelaide University Council meeting 31 July 2000, Item 2.2, para 3(v).

20 Ibid.

21 *Balancing Town and Gown*, at 14-15; Hansard, Parliamentary Debates SA, Legislative Council, Thursday 1 August 1996, pp 1969-1970.

22 See discussion of selection versus election. Hansard, Parliamentary Debates SA, Legislative Council, Thursday 1 August 1996, pp 1969-1970.

23 See *Australia & New Zealand Banking Group Limited and Michael Tyler v University of Adelaide and the State Bank of South Australia* (1993) 59 SASR 587 at 595 (Perry J).

24 The distinction between management and governance was also a central issue in a recent New Zealand case: *The Association of University Staff of New Zealand v University of Waikato*, supra n28. See also *Hughes Aircraft v Aircservices Australia* (1997) 76 FCR 151 at 246-248 and cases cited therein.

25 Commonwealth, *Higher Education Management Review* (the Hoare Report); *Balancing Town and Gown*, at 17.

26 The role of the Vice-Chancellor is equivalent to the role of a managing director or chief executive of a business corporation. *The Association of University Staff of New Zealand v Margaret Anne Wilson & Ors* (22-23 March 1999) H Ct of NZ No 31.3.99 at para 35; See P Redmond, *Companies and Securities Law* (3ed 2000) at p 271. See also *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549; [1968] 3 All ER 98; [1067] 3 WLR 1408; *AWA Ltd v Daniels* (1992) 7 ACSR 463; 10 ACLC 933 at 1014-1015. For a discussion by Rogers J of the role of the chairman of a board, and the role of the chief executive or managing director. See also, American Law Institute, *Principles of Corporate Governance* (1994) Vol 1 at 83 - 86.

27 *Daniels v Anderson* (1995) 16 ACSR 607, 13 ACLC 614, See also *Public Corporations Act 1993* (SA) for examples of what constitutes appropriate care, skill and diligence in the context of a public corporation in SA.

28 *Blackwell v Moray & Anor* (1991) 9 ACLC 924 [NSW SC Cohen JJ]. See also *Australian Metropolitan Life Insurance v Ure* (1923) 33 CLR 199; *Darvall v North Sydney Brick and Tile Co* (1989) 16 NSWLR 260; 15 ACLR 230.

29 *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 837.