

# A brief history of changes to university governance in Australia

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## Introduction: the erosion of universities as communities of scholars

Ever since the Dawkins reforms of the tertiary sector were implemented by the Hawke Government in the late 1980s, Australian universities have been increasingly subjected to federal regulation through legislation such as the *Tertiary Education Quality and Standards Agency Act 2011* in return for university funding. The rationale provided by successive federal governments for this progressive loss of autonomy is that universities must be more “accountable”, “modern”, and “responsive to community needs”. In the process, universities have increasingly been re-constituted in corporate forms and subject to the same rules and logic as businesses.

It is important that the hundreds of thousands of people who work and study in the Australian tertiary sector, as well as their families, friends and local communities, understand the history of how university governance has been changed over the last fifty years. These changes have involved a gradual diminution of the collegial model of the university as a community of scholars modelled on the best of democratic processes to teach students about civic engagement in the broader community. Today staff and students have little direct input into important decision-making processes by university councils. University councils oversee transactions amounting to tens of billions of dollars across the sector, and their decisions affect the lives and livelihoods of millions of Australians. These changes have progressively resulted in more autonomy for university councils and vice-chancellors, who have effectively been empowered as CEOs of financial and trading corporations.

Despite governments’ rhetoric about university accountability and responsiveness to community needs, no tertiary sector or local community experience or expertise is currently required of appointed members to universities’ governing bodies (most of which are known as councils), as was once the case. Ministerial and parliamentary oversight of university councils has also been largely removed. Contrary to their purported intentions, successive government “reforms” have resulted in the creation of a vastly overpaid and unaccountable cadre of executives at virtually all of Australia’s universities. These individuals act with almost complete impunity, showing little concern, and frequently open contempt, for the staff, students, and communities which they are supposed to serve. Their lack of accountability has enabled them to significantly increase their own salaries and the size of the managerial class involved in monitoring and controlling academic and professional staff. Members of council, who tend to be disproportionately appointed from the financial sector without any tertiary sector experience, increasingly rubber stamp these executive decisions.

These problems with university governance have arisen at the same time as successive Australian governments have squeezed university funding in real terms on a per student basis, periodically capping student numbers, and investing one of the lowest percentages of GDP in university research and scholarship of any developed country. In this austere funding environment the only available source of increased revenue has been international students, who pay full fees. Diminishing real term funding, coupled with little governance accountability, has resulted in increasing class sizes, casualization of the workforce, and an over-reliance on international student fees and extra-curricular financial arrangements, including privatization of degrees within public universities. This has created a two-tier tertiary system. All of these things have contributed to the erosion of the university experience as an institution of higher learning and a community of scholars for many students.

Current university governance structures are not fit for purpose. Their inadequacies have been highlighted by the lacklustre response of university executives to the COVID pandemic, which is likely to result in a 10-20% reduction of university revenue over the next few years, and the loss of 20,000 to 30,000 jobs across the sector. It is

also apparent in the failure of university executives to mount any credible opposition to the current package of “reforms” currently being proposed by the Federal Minister for Education. Driven by an evidence-free ideological prejudice informed by conservative “culture war” rhetoric, Minister Tehan wants to make it far more expensive to engage in any kind of study that might involve developing students’ critical thinking skills. Ironically, the Minister himself and almost half of the current Federal Cabinet hold arts degrees.

Amendments to the current state- and territory-based university governance legislation are sorely needed. Those amendments would reinstate some decision-making power to staff and students, and bring more transparency and accountability to university governance. Such amendments would also enable academics to refocus our efforts on quality research and teaching, with fair pay and conditions for all employees, and higher standards of education and support for Australian students. Australia, Australians and the many countries which send their students to be educated here will all benefit from university governance reform.

The following sections are intended to raise public awareness about the changes that have been made to university governance over the last fifty years. Because there have been different responses to federal intervention in the Australian tertiary sector by the states and territories, it is not possible to capture all of the relevant nuances. The main focus is, therefore, the state of New South Wales, and my own academic institution, the University of Wollongong (UoW). Where relevant, however, the legislation pertaining to other states and territories is discussed.

### **The problem with treating universities as corporations, rather than bodies corporate**

Following the Dawkins reforms in the late 1980s, which also introduced Higher Education Contribution Schemes and expanded the number of higher education providers to create more “competition” in the tertiary sector, Australian universities were initially treated as bodies corporate, rather than as financial and trading corporations (see Clause 9 of the original *University of Wollongong Act 1972*). It has been argued that a legal precedent was set by the full bench of the Federal Court in a case relating to the University of Western Australia in 2001, which purportedly enabled governments to treat Australian universities as financial and trading corporations, even though these are not their primary functions [1]. Although the details of this court ruling and its consequences are open to debate, the Coalition appears to have interpreted the ruling as enabling successive federal governments to impose even greater regulatory oversight on Australian universities under Australian corporate law, and in particular, the *Corporations Act 2001*.

With the introduction of the *Higher Education (Amalgamation) Act 1989*, the Federal Government was empowered to indirectly exert greater control over university governance through the states and territories. The Act obliged state and territory governments to introduce university-specific acts throughout the country, including the *University of Wollongong Act 1989*. This was done in order to make the state legislation consistent with the federal reforms following the Federal Government’s major shakeup of the sector. Ever since 1989, therefore, the NSW legislation has stipulated how all university councils in the State should be constituted. The initial version of the *University of Wollongong Act 1989* stipulated the composition of the University Council, along with term limits, rules for appointment and election, and the required expertise of external appointments, although these are in several cases substantially different from the current legislation.

In other words, since 1989, the constitution of the UoW Council, and those of all the other NSW university councils based in the state of NSW, have been written into the NSW Government legislation. The same legislative procedures were initiated by the other states and territories, although the subsequent amendments have varied according to which political parties have been in power at the state and territory levels.

This was the expressly stated rationale for changing the governance structures of Australian universities in the Dawkins Report of 1988:

there are some governing bodies which are too large for effective governance, and too often a tendency for members of governing bodies to see their primary role as advocates for particular interests. Often in these cases there is a confusion of roles and objectives, to the detriment of strong and decisive management. While some members may feel responsibility to represent the views of particular sections of the institution or the wider community from which they are drawn, they have an overriding responsibility to act in the best interests of the institution [2].

Such sentiments were repeated in the *Report of the Higher Education Management Review Committee* (a.k.a. the Hoare Report), commissioned by the Commonwealth Federal Government in 1995, and by Federal Minister for Education, Brendan Nelson, in the Nelson Report, which further advanced the notion that universities are corporations:

Universities are not businesses but nevertheless manage multi-million dollar budgets. As such they need to be run in a business-like fashion [3].

The result of these shared sentiments is that both the Coalition and some Labor governments have eroded university autonomy and the ability of staff and students to have any substantive input into the management of Australian universities. All of the historical versions of the relevant NSW acts can be found here by scrolling down the list: <https://www.legislation.nsw.gov.au/#/browse/asMade/acts/U> The stipulated governance requirements for universities in the other Australian jurisdictions can be found in the relevant state and territory legislation websites.

### **Successive Federal Coalition Governments impose corporate-style governance on the tertiary sector**

All Australian university governance provisions were written into the various states' and territories' legislation before Federal Minister for Education Brendan Nelson's legislative changes of 2003, i.e. the *Higher Education Support Act 2003*. The main thrust of Nelson's reforms were that "Universities will be able to increase HECS fees by up to 30 per cent and double the number of full fee-paying students. Universities will have to undertake workplace reform and meet proven productivity and teaching quality benchmarks before they access the newly available funding." The 2003 Act also banned compulsory student unionism [4].

The original version of the *Higher Education Support Act 2003* included in Section 33-15 a clause (1.a) that "the Commonwealth Grant Scheme Guidelines impose on higher education providers requirements to be known as the National Governance Protocols". However, that is the only reference to university governance in that legislation. The same is true of the currently in force version of the *Higher Education Support Act 2003*.

There appears to be nothing in the current Federal legislation, including the *Tertiary Education Quality and Standards Agency Act 2011* or the *Higher Education Standards Framework (Threshold Standards) 2015* that requires universities to have the current council and senate governing structures. There is nothing about governance in the former act, other than a requirement for the legislation to be consistent with the *Public Governance, Performance and Accountability Act 2013*. This condition is repeated in various places in the current version of the *Higher Education Support Act 2003* (e.g. Section 167-10). Nor is there anything specific in the 2015 act about council composition, or how members are chosen and appointed in this legislation. It does, however, stipulate that university councils should include "independent members", and that at least two members should be "ordinarily resident in Australia" (see Clause 6). This latter provision appears to be particularly bizarre, and does not guarantee independence. There is also a requirement for periodic independent reviews of the effectiveness of the governing body and academic governance processes at least every seven years (Clause 6.1.3d). This is something that all interested parties should check to see when it was last done at each institution, and by whom. This clause in the Framework 2015 (6.1.4) is particularly pertinent to efforts at reform:

The governing body takes steps to develop and maintain an institutional environment in which freedom of intellectual inquiry is upheld and protected, students and staff are treated equitably, the wellbeing of students and staff is fostered, informed decision making by students is supported and students have opportunities to participate in the deliberative and decision making processes of the higher education provider.

To conclude this section, none of the federal tertiary legislation contains any specific requirement that a majority of university council members need to be external appointments. The requirement for a majority of members of university councils to be external appointments is, however, reflected in the current NSW legislation, i.e. *Universities Governing Bodies (University of Wollongong) Order 2012* in Clause 8B.6. Nevertheless, while this condition is not contained in the original version of the *University of Wollongong Act 1989*, the specified composition from 1989 onwards implies that external members will always be in a majority.

### **The National Governance Protocols for Higher Education Providers**

These protocols were first introduced following the Nelson reforms in 2004, and required all state and territory governments to comply with their incorporation into existing university legislation.

The following protocol as specified in the original legislation stipulated the kinds of officials required to be on Council. It removed the requirements for nominated members to have tertiary or local community experience, and prohibited state and federal MPs from sitting on university councils. We can thus see how proscriptive were these requirements, and involved a further undermining of the ability of staff and students to participate in crucial university decision-making processes.

7.5.35 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.

The following protocol requires that professional development be provided to members of university council, and that it should assess its own performance.

7.5.30 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.

These protocols were repealed by the Federal Labor Government in 2008.

### **ALP repeal of Coalition higher education legislation in 2008**

In 2008, the recently elected Labor Federal Government passed the *Higher Education Support Amendment (Removal of the Higher Education Workplace Relations Requirements and National Governance Protocols*

*Requirements and Other Matters) Act 2008*. The National Governance Protocols have shaped all of the university governance structures in place throughout Australia, including the provision that a majority of members should be external appointees (which is supposed to include both the Chancellor and Vice Chancellor). According to Bede Harris (2014), the University of Adelaide is the only university in Australia which has ten out of 21 places on its university council that are elected by staff, students and graduates, with South Australian universities more generally being free of government nominees. The Victorian university legislation does not require universities in Victoria to have elected members of staff or students on their councils, although they do all appear to have a few such members.

Bede also notes that all of the Australian universities retained the council structures that had been in place since 1989 following the repeal of Brendan Nelson's "reforms" by Labor in 2008. Bede says the higher education reforms introduced by Federal Labor in 2008 abolished the federal government legislation requiring universities to constitute councils in the manner specified by Nelson and the Coalition in 2003. However, other than those requirements contained in the National Governance Protocols, there was no federal legislation specifying how councils should be constituted. Bede suggests that none of the universities subsequently took the opportunity to push for reform, and academics and the tertiary education unions appear to have been oblivious of the fact that they could have wrested back some control of councils during the period from 2008 to 2011[5]. Certainly, the executives of Australia's universities had no interest in alerting anyone to this fact.

### **Changes to university governance created by the *NSW Government's Universities Governing Bodies Act 2011***

As already noted above, there were specific Council constitutional requirements in the original post-Dawkins state acts created throughout Australia in 1989, as well as in the NSW 2005 legislation (e.g. the *University of Wollongong By-law 2005*). However, these have all been superseded by the *Universities Governing Bodies Act 2011*, which the Coalition introduced soon after it came into power in NSW in 2011. The changes were passed into law for UoW via the *Universities Governing Bodies (University of Wollongong) Order 2012*.

All of the NSW universities had similar orders introduced in 2012. This legislation changed the provisions in the *University of Wollongong Act 1989* concerning the standard governing body provisions to make them consistent with the *Universities Governing Bodies Act 2011*. All of the relevant clauses contained in the *Universities Governing Bodies (University of Wollongong) Order 2012* are now included as clauses in the current version of the *University of Wollongong Act 1989*. There were only minor changes to the Council governance clauses between 1989 and 2012 (see below).

With respect to the legislation covering the constitution of the University Council under the *University of Wollongong Act 1972*, Clause 15 states there had to be two parliamentary members (one from each of the House of Assembly and the Legislative Council who were elected by members of those bodies), two official members (the Chancellor and Vice-Chancellor), four nominated members (appointed by the Governor following recommendations from the Minister) and elected student and non-student members. The elected members consisted of two elected students, three members elected by the Convocation (i.e. external appointments), three university professors and one non-professorial academic elected by the academics, one member of professional staff elected by their peers. The total number of members of Council was therefore eighteen, with seven of the positions occupied by staff and students.

With respect to the make-up of the Council as specified in the original *UoW Act 1989* and its subsequent iterations to 26 October 2004, it stated that there had to be two NSW Parliamentarians (one from each of the House of Assembly and the Legislative Council), three members of the University Executive (the Chancellor, Vice Chancellor and the President of the Academic Senate), four Ministerial appointees, four elected members (two from academic staff, one from non-academic staff, and one from the student body), and four non-staff, non-student members of the Convocation (i.e. external appointments). One other external member could be appointed (Clauses

9.6 and 9.7). The total number of members of Council was therefore normally seventeen, and no more than eighteen.

Thus, we can see that changes to the structure of the University Council were implemented as early as 1989, with the executive and external appointees each being granted an additional seat, and the number of staff and student representatives being decreased from seven to four. Consequently, there was a 57% reduction in staff and student representation on the Council as of 1989. However, the requirement to include two elected NSW Parliamentarians on the Council arguably provided an additional element of critical scrutiny which has since been lost.

University Council governance provisions were changed by the NSW Labor Government in 2005 and remained in place until 2011, although they could have been challenged and changed following Federal Labor's success in passing the *Higher Education Support Amendment (Removal of the Higher Education Workplace Relations Requirements and National Governance Protocols Requirements and Other Matters) Act 2008*. In the 2005 to 2011 versions of the *UoW Act 1989*, it is specified that there must still be three members of the University Executive (the Chancellor, Vice Chancellor and the President of the Academic Senate), but six rather than four Ministerial appointees, one or more external persons appointed by the Council, and six rather than four elected members (two from academic staff, one from non-academic staff, one from the undergraduate student body, one from the postgraduate student body, and one graduate). It also stated that there could be no more than 22 members in total (Clause 9 Constitution of Council). This version of the Act also allowed the Minister for Education to appoint a NSW MP to the Council, but only if that person was nominated by the Council, and there could be no more than two MPs on Council at any one time. It also stated that at least two members of Council had to have financial expertise, and one with commercial expertise (Clause 9.5), but otherwise repeated the original wording of the Act regarding tertiary education expertise for the six external appointments (Clause 9.1b). It also states for the first time that the majority of members of the Council must be external persons (Clause 9.7).

Interestingly, these changes, instituted under a NSW Labor Government, included an increase in the staff and student level of representation, although not to pre-1989 levels. It also increased the number of Ministerial appointments, but watered down the requirement for NSW MPs to be included.

One of the changes instituted in 2012 was that it altered the number of Council members from three Council-appointed [6] and six Ministerial-appointed members, to seven Council and two Ministerial members (Clause 3c). It also specifies that "the Council is to consist of a minimum of 11, and a maximum of 22, members" (Clause 8B.1), and that the "total number of members is to be determined from time to time by a resolution passed by at least two-thirds of the members of the Council" (Clause 8B.2). It also specifies that there need to be official members, elected members, Council appointed members, and ministerially appointed members. This clause also appears in the December 2001 version of the Act as Clause 9.1, but it requires that there be two "parliamentary members" (rather than "Ministerially appointed members"), one of whom is an MLC, and the other an MLA. Currently, the Council itself is empowered to determine the number of members (other than official members) in each category (Clause 8B.4). Likewise, changes to these rules are required to be supported by at least two-thirds of members (Clause 8B.5). Nor can the number of members of any one of these categories constitute a majority of the total number of members (Clause 8B.7).

At present, the UoW Council has five business externals, one graduate external, with the Chancellor included as an "external" if deemed to be so by a majority of Council members, making six (or seven?) externals out of seventeen members.

In Clause 8B.1 of the current UoW Act, and given the specifications of roles in Clause 8D, there have to be at least two staff and one student representatives on Council at all times (one professional member and one academic member of staff). There also have to be no more than six external members, plus three official members (the

Chancellor, the VC and President of Academic Senate). Given the rules about majorities in Clause 8B.7, there could never be more than six members in any of the categories.

The rules about the three official members are the same as those in the original version of the 1989 Act and its subsequent iterations to 2012. However, the different iterations of the UoW Act between 1989 and 2012 also specified that there need to be at least two academic members of staff (not just one, as in the current legislation). There is also only one student representative mentioned in the current version of the Act. There is also mention of an elected graduate representative in Clause 8D of the current version of the UoW Act “if the constitution rules so provide”.

It is also important to note that the appointed members’ specified expertise in Clause 9 of the UoW Act was far broader prior to being overturned by the NSW Coalition Government in 2012/13. This is the wording of the Act as it existed between 2005 and the end of 2011:

- (b) 6 external persons appointed by the Minister from, as far as practicable, the following categories:
  - (i) persons experienced in the field of education or the arts,
  - (ii) persons experienced in technology, industry, commerce or industrial relations,
  - (iii) persons who are practising, or have practised, a profession,
  - (iv) persons associated with Illawarra and the South Coast, and
- (c) one or more external persons (being such number as is prescribed by the by-laws) appointed by the Council

However, the relevant clause in the Act relating to the experience required of appointed members of Council (i.e. those members appointed by the Council but not by the Minister) was as follows in the Act as it was at the end of 2004:

- (i) who are members of Convocation (but who are not members of the academic or non-academic staff of the University having the qualifications referred to in paragraph (a) (ii) or (b) (ii) or students of the University having the qualifications referred to in paragraph (c) (ii),
- (ii) who have such qualifications as may be prescribed by the by-laws, and
- (iii) who are elected by members of Convocation in the manner prescribed by the by-laws.

This is in stark contrast to the current wording of the Act, which is as follows:

#### 8C Qualifications and experience of members

##### (1) Of the members of the Council:

- (a) at least 2 must have financial expertise (as demonstrated by relevant qualifications and by experience in financial management at a senior level in the public or private sector), and
- (b) at least one must have commercial expertise (as demonstrated by relevant experience at a senior level in the public or private sector).

##### (2) All appointed members must have expertise and experience relevant to the functions exercisable by the Council and an appreciation of the object, values, functions and activities of the University.

It should be noted that this wording about the experience of members of the Council having financial and commercial expertise does not only pertain to the external appointees. It applies to the whole Council. This wording has been in the Act since 2005.

The extraordinary emphasis on financial and commercial expertise that has been in evidence in the appointments made to the UoW Council over the last several years, as opposed to the tertiary experience across multiple

disciplines specified in the older legislation, clearly indicates that a broader mix of expertise could easily be required of externally appointed members. The changes to the Act post-2012 instigated by the NSW Coalition Government have completely removed the ability of the Minister to appoint members with tertiary, professional and community expertise. This has led to a diminution of the ability of the Council to exercise its fiduciary and governance duties, as well as the ability of staff, students and the broader community to hold it to account for its decisions.

### **Changes to the Functions of Council in the UoW Act 1989-2012 & the current UoW Act**

With respect to “Part 4 Functions of Council” in the UoW Act 1989-2012, there are some significant amendments that were made between 2011 and the present, following the election of the NSW Coalition Government. These amendments confer to the Council and Vice Chancellor a considerable amount of additional discretionary power over university finances and decision-making more generally. Several clauses in the pre-2012 Act required approval from the Minister before certain kinds of decisions and procedures could be changed. Many of these provisions have now been removed. There appears to be no sound reasoning for these checks and balances to have been removed.

For example, Clause 16.1B.e1 is an insert that empowers the Council to make financial adjustments based on its own financial risk assessments. Clause 16.1.d is an amendment that empowers the Council to be able to borrow or raise funds “without limitation”, removing the obligation of Council to gain approval from the Governor upon the recommendation of the Treasurer. Clause 17.2 is another insert which empowers Council to delegate to the Vice-Chancellor any function it deems appropriate, who can in turn sub-delegate as he or she wishes. Clauses 18.2 and 18.2A are inserts which empower Council to deal with all property transactions, removing the previous requirement to seek and gain approval of the Minister. Clause 18.4A is an insert which empowers Council to “enter into a voluntary planning agreement under the *Environmental Planning and Assessment Act 1979*”. It did not previously possess any such powers. Clauses 21B.1 and 21B.2 empower the Council to create, amend or replace the Guidelines for the Council, without the approval of the Minister, as was previously required.

Thus, we can see how the 2012 amendments and insertions to the UoW Act 1989 have invested enormous additional decision-making power in the hands of the Council, and, by extension, the Vice-Chancellor. Considering the many questionable financial decisions that have been made by the current Council and Vice-Chancellor, there clearly needs to be much greater genuinely independent oversight of its multi-billion dollar portfolio of investments, and its fiduciary duties to staff, students and the broader Australian community.

### **UoW’s Performance and Remuneration Committee**

Currently, the NSW legislation relating to the constitution of the Performance and Remuneration Committee consists only of the Chancellor, the Deputy VC and two members drawn from the external members of Council. In other words, there is no possibility of internal scrutiny by staff of the performance and remuneration of the university and the executive. There is nothing in the federal legislation that requires this committee to be structured in this way.

### **Conclusions**

Academic and professional staff throughout Australia have been subjected to increasing levels of performance monitoring and micro-management of our activities by successive federal governments. University managers impose “change management” and “curriculum reviews” on staff every two or three years, creating a constant state of anxiety and an increasing inability for many of us to do our jobs to the best of our ability. Indeed, this seems to be the intention of such practices, which routinely and callously undermine academic collegiality and our ability to adequately teach and support our students.



Despite the claims of successive federal government reports, and the prejudices of many conservative politicians, there does not appear to have been any time during the last five decades when Australian university staff and students held any significant decision-making power within their own institutions. However, there have certainly been times, and there remain some jurisdictions (SA) and institutions (University of Adelaide), when and where staff and student input into university decision-making processes have been, and are, more valued and appreciated.

The erosion of work and pay conditions for academic and professional staff on casual and continuing contracts, together with the diminution in the quality of teaching and support provided to students throughout the country, is a national disgrace. Sycophancy is rewarded, and criticism punished. Truth-telling, which is supposed to be one of the foundational principles motivating academic life, is only valued by university executives and many of our political and business leaders when it serves the interest of capital, rather than the communities in which we all live and work.

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[1] Bede Harris, "Corporatisation, Managerialism and the Death of the University Ideal in Australia", *Journal of Politics and Law*, Vol. 7, No. 2, 2014, pp. 66-67.

[2] Commonwealth of Australia, Department of Education and Training. (1988). *Higher Education: a policy statement*. Canberra: Australian Government Publication Service, p. 102.

[3] Commonwealth of Australia, Department of Education, Science and Training. (2003). *Our Universities: Backing Australia's Future*. Canberra: Australian Government Printing Service, p. 15.

[4] See: <https://www.abc.net.au/worldtoday/content/2003/s947659.htm>

[5] Harris 2014, pp. 67-69.

[6] This is a bit of a furphy, however, as the earlier legislation only said "one or more". But effectively, given the membership constraints in the 2005 to 2011 version of the Act, it meant no more than three appointed by Council.