UNIVERSITY GOVERNANCE

Blinking Dons or Donning Blinkers: Fiduciary and Common Law Obligations of Members of Governing Boards of Australian Universities

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Introduction and Objectives

In 1995 the Higher Education Management Review (the Hoare report)[2] proposed that members of governing bodies should take increased responsibility for the accountability, management and administration of universities.[3] The Committee identified four elements of probity that need to be clarified for governing body members. These were disclosure of interests, fiduciary responsibility, liability, and indemnity. The Hoare report went on to suggest that relevant legislation for governing bodies include a requirement that members disclose the nature of any direct or indirect interest (pecuniary or other) in matters being considered or about to be considered at a meeting of the governing body.[4] More recently the Commonwealth Department of Education, Science and Training has implemented another study on university governance which contains a number of concerns about the nature of the legal obligations of

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2 *Higher Education Management Review 1995*, Report of the Committee of Inquiry, AGPS, Canberra, 1995

3 Note 2 at 13

4 Note 2 at 13

members of governing bodies, particularly those relating to the issue of whether the members are trustees or delegates.[5]

Lawyers would appreciate that well established equitable doctrines surrounding the notion of fiduciary duty embrace the four elements above described and apply them to the governance of modern corporations. What is not so clear is the extent to which members of university governing boards are caught by these doctrines in their management of universities. This paper will address that issue.

Content

This paper will examine the equitable obligations of members of governing bodies of Australian public universities. There is no case law specifically on management of Australian universities, accordingly we will cover:

- The nature of a university;
- The nature of a fiduciary duty;
- British and Australian law on the liability of members of statutory boards;
- Fiduciary law in American universities;
- Application of fiduciary law to Australian universities;
- Statutory indemnity provided to councillors;
- Enforcement.

The Nature of a University

Universities, it would seem, began life in medieval Europe as communities of scholars and students who sought to study the few extant manuscripts, which were usually of a religious nature. Beach notes that, "[t]he English word 'university' is derived from the

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5 Meeting the Challenges, the Governance and Management of Universities DEST, Canberra, August, 2002 at 21 – 22. This matter has been resolved legally, in favour of the notion that the duties are owed to the university, by the decision in *Bennetts v Board of Fire Commissioners of New South Wales* (1967) 87 WN (Pt 1) 307 discussed post, but seems to trouble Federal inquiries; see also Senate Employment, Workplace Relations, Small Business and Education References Committee Universities in Crisis, Canberra, 27 September 2001, at para 4.50.

medieval Latin term *universitas*, meaning 'community' or corporation."[6]

In the 1902 Jubilee celebrations at the University of Sydney Professor MacCallum explained what a university is. He pointed to the traditional notion of a university as a "society", "where the principle of combination is supplied by the intellect itself", where "merit is all", "an ideal republic, which is founded on reason and right".[7] He explained the history of the term "university":

> The *Universitas* meant the society, the community, as though the circumstance of fellowship between the members were the one essential thing. And yet it has another side, which is perhaps even more important still. When I was young, the original meaning of the word was generally forgotten, and it was popularly explained as referring to the universality of the knowledge which a University imparts. The gradual displacement of the old meaning by the new seems to me most significant; for, despite the derivation, this *is* the idea which in point of fact we associate with a University now.[8]

In 1904, the Royal Commission on the University of Melbourne explained the characteristics of a university:

> A University is a place where education is combined with the advancement of knowledge, and that the teaching of a University is based on the principle that knowledge is desirable for the influence which knowledge and the search for knowledge exert upon ourselves, and not merely for the power which they confer of improving our external surroundings. The first of these characteristics distinguishes a University from a school, the second from a workshop or college with purely technical aims.[9]

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6 Beach J A, "The Management and Governance of Academic Institutions" (1985) 12 *Journal of College and University Law* 301 at 304

7 University of Sydney, Record of the Jubilee Celebrations of the University of Sydney, William Brooks and Co, Sydney, 1903, 39 at 52 - 54

8 Note 7 at 54

9 *Royal Commission on the University of Melbourne: Final Report*, Government Printer, 1904, at 9 (quoting Professor Rucker from London University)

The Commission formulated a similar test:

> It is too commonly supposed that the object of a University is to train students to obtain degrees. Although this is doubtless an important function, yet, its chief object is to educate – that is, to fully develop the faculties of the students, and to extend the bounds of knowledge, and the power of applying science to the varied departments of national life and industry.[10]

In the 1942 Royal Commission into the University of Western Australia a university was described as:

> the centre of learning and culture in the State. It should be not merely a collection of buildings where knowledge is imparted and research is undertaken, but a source of stimulus and inspiration to its teachers and its scholars, a place where discussion and the interchange of ideas can have free play and be disseminated for the mental uplift of humanity.[11]

In 1952 Professor Wright described a university as:

> [a]llowing for the deficiencies of a short definition, a University is a social group of people devoted to the pursuit of what is true.[12]

In 1998 a Full Bench of the Australian Industrial Relations Commission discussed the nature of a university. Using Griffith University as an example the Commission commented on s 4 of the *Griffith University Act 1971*(Qld):

> The passages quoted from *Halsbury* identify the character of a university as an incorporated charitable foundation of a distinctive rank. The characteristics of the foundation include the status and personality of a corporate body, established by

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10 Note 9

11 *Report of the Royal Commissioner, The Hon. Mr Justice Wolff, on the Administration of the University of Western Australia* Government Printer, 1942, at 40

12 Wright R D, *Extracurricular Relationships between Members of Staff and Students in the University Memorandum to Professorial Board*, University of Melbourne Professorial Board minutes, 18 March, 1952 at 4 of the Memorandum

> an instrument of foundation emanating in those times from the Crown. The staff and students are the primary constituents of the corporate body together with the organs of management of it … It may be noted that the State therefore performs a primary role in the foundation of all Australian universities.
>
> The statutes to which we were referred reflected the multipartite constitution of the university … subsection 4(1) of the *Griffith University Act 1971* is relatively typical…
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> Similarly, the statutes generally establish each university as a body corporate with the powers incidental to that form of legal personality, and to the university's function as a body politic for the self governance of those who constitute the university from time to time. The functions of universities are accurately summarised in the following passage:
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> "The objects or functions of a university are to provide facilities for teaching and research in such branches of learning as the statute may determine, to confer degrees and generally to promote university education and the advancement of knowledge." [13]

The recognition in these passages that a university is a corporation[14] is obvious to a lawyer and important to this article.[15] Corporations are

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13 *National Tertiary Education Industry Union and Australian Higher Education Industrial Association* 526/98 N Print Q0702 <http://www.osiris.gov.au/html/decisions/98/MISC-98/2/IA011590.htm>, at para 2.3.3 citing *Halsbury's Laws of Australia* Vol 10 Chapter 160 at 302 – 411

14 In an excellent article Suzanne Corcoran traces the definition of a university and its corporate attributes, noting that universities possess the standard corporate characteristics of legal personality, membership, legal purpose and self government, concluding that "universities are simply special purpose corporations" and "fringe dwellers in the world of multinational corporate groups"; Corcoran S, "First Principles in the Interpretation of University Statutes" (2000) 4 *Flinders Journal of Law Reform* 143 at 145,146, and 156. In a separate article Corcoran notes that universities "are older than most corporate forms"; Corcoran S, "Living on the Edge: Utopia University Ltd" (1999) 27 *Federal Law Review* 265 at 271

15 Obvious to a lawyer, but not to an Australian Senate Committee investigating universities which stated: "Indeed, a council holds fiscal and legal responsibility for the operations of a university, which is not an incorporated body." Senate Employment, Workplace Relations, Small Business and Education References Committee *Universities in Crisis*, Canberra, 27 September 2001, at para 4.53.

managed by governing boards, commonly known as directors, and the individuals on these boards owe fiduciary duties to their corporations, the director / company relationship being recognised as within the class of standard fiduciary categories.[16] Given that universities are in fact corporations it logically flows that their governing boards similarly owe fiduciary duties to their universities. Despite the simplicity of this logic we will persevere to establish the point as a legal proposition and to discover not just the *existence* but the *nature* of the fiduciary duty. Some examples from university statutes may assist.

The *Universities Legislation Amendment (Financial and Other Powers) Act 2001* (NSW) amended the incorporating legislation of the public universities in New South Wales. All New South Wales universities now have as an object:

> (1) …the promotion, within the limits of the University's resources, of scholarship, research, free inquiry, the interaction of research and teaching, and academic excellence.

And a common function:

> (2) The University has the following principal functions for the promotion of its object:
>
> > (b) the encouragement of the dissemination, advancement, development and application of knowledge informed by free inquiry.

Section 3 of the *La Trobe University Act 1964* (Vic) provides:

> There shall be established in Victoria a University to be known as "La Trobe University" consisting of a Council and such graduates, diplomates, and members of the academic and other staff as may be prescribed and the enrolled students of the University.
>
> The University shall be a body politic and corporate by the name of "La Trobe University" and shall have perpetual succession and a common seal and shall be capable in law of suing and of being sued and of taking purchasing holding

16 See for example Mason J in *Hospital Products v United States Surgical Corporation* (1984) 58 ALJR 587 at 608

> demising selling transferring conveying mortgaging or otherwise disposing of real and personal property for the purposes of and subject to this Act and of doing and suffering all acts matters and things which bodies corporate may by law do and suffer.

It is important to understand the nature of a university and its business to gain a better insight into the nature of the fiduciary duty owed by its councillors. The special knowledge discovery and dissemination role possessed by universities and described in the various quotations and statutes above[17] places particular duties on its councillors to ensure the university meets this noble obligation. It further impacts on the nature of powers possessed by the council as a whole and those acting with delegated authority under it. It can be argued that the special trust placed by society and the state in the knowledge discovery and dissemination role of a university means that university councillors have a sacred trust to ensure that this object is met and that no aspect of their governorship can impact negatively on this. Those who might argue that the management of the modern "enterprise or entrepreneurial" [18] university is similar to the management of a modern corporation may easily overlook this function. The risks inherent in modern capitalism, which are part of modern corporate management, have no role in a university if these put at issue this fundamental knowledge objective of a university.

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17 This is discussed in significant detail in: Jackson J G, *Legal Rights to Academic Freedom in Australian Universities*, Unpublished PhD thesis ,University of Sydney, 2002

18 Characterised as having "strong executive control" and described in detail in Senate Employment, Workplace Relations, Small Business and Education References Committee, *Universities in Crisis*, Canberra, 27 September 2001, at para 4.4–4.6. The Committee raised concerns about "the emergence of a managerial culture which is said to be at odds with traditional academic values; and a declining level of commitment to serving the public good through the provision of essential skills" at 4.5.

The nature of a fiduciary duty

There are relationships which by their very nature have been held to be fiduciary: In *Hospital Products v United States Surgical Corporation*[19] Mason J described these:

> The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations (cf. Phipps v Boardman [1967] 2 A.C. 46, at p 127), viz., trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions 'for', 'on behalf of', and 'in the interests of' signify that the fiduciary acts in a 'representative' character in the exercise of his responsibility, to adopt an expression used by the Court of Appeal. [20]

Sealey describes the origins of fiduciary law noting that in the nineteenth century the broader use of the term "trust" contracted to its present technical meaning and the term "fiduciary" was used to describe relationships which though "trust like" fell short of the full definition of a trust.[21] He goes on to classify fiduciary relationships into four categories. For present purposes the first two categories of fiduciary relationship are relevant:

> Category 1: Where a person is in control of property which is that of another; [22]

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19 *Hospital Products v United States Surgical Corporation* (1984) 58 ALJR 587

20 Note19 at 608

21 Sealey L S, "Fiduciary Relationships" [1962] *Cambridge Law Journal* 69 at 71 - 72

22 Note 21 at 74

> Category 2: Where a person has entrusted to another the performance of a job so that an undertaking is given to act on that person's behalf.[23]

Sealey makes the obvious point that these categories will often overlap:

> although almost the whole of Category 1 will usually fall also under this head, [he is referring to Category 2] many other relationships are included – for instance employer and employee, the Crown and its servants, and solicitors, agents, partners, directors and promoters even when their activities do not involve the control of property.[24]

Noting that the categories are not closed, Parkinson states that once one moves beyond the trust analogy the various applications of fiduciary "relationships involve either the management of property, or other positions of trust of a financial nature."[25] He believes that the notion that directors are trustees of the company is misleading, pointing especially to the commercial risks directors have to take to fulfil their role. [26] However he certainly describes them as fiduciaries who must act honestly, in good faith for the benefit of the company as a whole, exercise their powers only for proper purposes, and to give adequate consideration to the exercise of those powers.[27]

Of particular interest for present purposes is Finn's examination of the fiduciary relationship in relation to public officials where he concludes that:

> Beyond the trust, beyond the company, the most fundamental of fiduciary relationships in our society is the relationship

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23 Note 21 at 75

24 Note 21 at 76

25 Parkinson P, "Fiduciary Obligations" in Parkinson P (Ed), *The Principles of Equity*, LBC, 1996 at 341

26 Note 25 at 328

27 Note 25 at 327

> which exists between the community (the people) and the State and its agencies.[28]

And later:

> This, however, is not to say that public officials who misuse public property for their own benefit are not liable to account, for example, for any gains thereby made and on orthodox fiduciary grounds: no less so than the company director or the trustee, their relationship to property they hold manage, etc. is fiduciary in character…[29]

And noting that the courts have used the same standard as applied to public officials, Finn concludes:

> A public officer is liable to account to the authority under which office is held, be it the Crown or a statutory authority for any gain made as a result of disloyal conduct.[30]

A commonly used description of the fiduciary concept is that of Dawson J in *Hospital Products:*

> There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other.[31]

Ong describes this as an "implicit dependency" and one which cannot arise from the beneficiary's failure to use legal means, such as

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28 Finn P, "The Forgotten 'Trust': The People and the State*"*, *An International Conference on Equitable Doctrines and Principles*, QUT Brisbane, 6 – 8 July, 1994 at 1

29 Note 28 at 14

30 Note 28 at 31

31 Note 19 at 628

bargaining for appropriate legal terms.[32] Hence in *Hospital Products* a relationship of distributor of products for a supplier was not held to be a fiduciary relationship because all that was created was a regular commercial relationship created by an ordinary commercial contract.

It is clear from the outset that this implicit dependency exists where a board is given management and financial control over the property and business of a company, which is one of the standard fiduciary applications as indicated in the passage cited previously from Mason J. Accordingly, in the next part of this paper we turn to an examination of English and Australian cases involving charitable and municipal corporations to assist in the definition of fiduciary duty regarding management in the public context, and especially in relation to universities.

British and Australian law on the liability of members of statutory boards

(i) Early English Decisions Involving Charitable and Municipal Corporations

The Charitable Corporation v Robert Sutton and others [33] is a very early case describing breach of trust and mismanagement in a charitable corporation. The Charitable Corporation was set up by charter to lend money to "poor people" allowing them to avoid the use of pawnbrokers. Various internal controls had initially been put in place to control the granting of loans and the taking of pledges to support these loans. But subsequently these rules were broken when a John Thompson was appointed warehouse keeper. He created fictitious pledges and the corporation lent him large sums of money ultimately creating losses of around £350,000. Under the charter various people had been appointed as the committee in charge of the corporation. A group of five including Thompson were directly involved in the fraudulent activities of Thompson and were liable in the first place. However Lord Hardwick found that the committee or directors not directly involved in the conspiracy could also be liable. In doing so he made some critical comments:

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[32] Ong DSK "Fiduciaries: Identification and Remedies" (1986) 8 *University of Tasmania Law Review* 311 at 319

[33] *The Charitable Corporation v Robert Sutton and others* (1742) 2 ATK. 402

- The employment of directors was of a mixed nature, firstly that of a public office because it came from royal charter. Secondly he found they were "agents to those who employ them in this trust, and who empower them to direct and superintend the affairs of the corporation";[34]
- Accordingly they could be liable for acts of commission or omission, and if they left the management entirely to others they could be guilty of breach of trust;[35]
- The fact that the position was merely honorary and providing no benefit to the committee was no excuse because by "accepting of a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence". [36]

The second element, leaving management to others, raises issues discussed later in the decisions *Re City Equitable Fire Insurance Company Ltd* [37], *Darvall v North Sydney Brick and Tile Co Ltd*[38] and *Daniels v Anderson.*[39]

The early cases also demonstrate that governing bodies such as city councils were obliged to act in accordance with their charters.

In *Attorney-General v Wilson*[40] for instance, members of the outgoing governing body of the Municipal Corporation of Leeds deliberately put funds belonging to the corporation in the hands of trustees to avoid the application of a new law controlling municipal corporations which created a new council. Accordingly the funds were diverted from the Corporation's legal custody and for other purposes, not unrelated to previous activities of the Leeds Corporation. This conduct was held to be unlawful. Lord Cottenham, making specific reference to the agency/trustee principle in *The*

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34 Note 33 at 405

35 Note 33 at 405; a point which is made in *Re City Equitable Fire Insurance Co* [1925] 1 Ch 407 and in the seminal American *Stern v Lucy Webb Hayes National Training School for Deaconesses and Missionaries* 381 F Supp 1003 (1974) (*The Sibley Hospital Case*). Both cases are covered in detail post.

36 Note 33 at 406

37 *Re City Equitable Fire Insurance Company Ltd* [1925] Ch 407

38 *Darvall v North Sydney Brick and Tile Co Ltd* (1989) 15 ACLR 230

39 *Daniels v Anderson* (1995) 16 ACSR 607

40 *Attorney-General v Wilson* (1842) Cr & Ph 1 (41 ER 389)

Charitable Corporation v Robert Sutton and others, held that the members of the governing body had a duty to the Leeds Corporation as its trustees and agents to preserve and protect the property confided to them[41] and accordingly were liable for any loss occasioned by the alienation of the property. It should be emphasised that the members of the governing body did not appear to be acting for any form of personal gain and probably were acting in what they thought was the best interests of the municipality, nevertheless the breach of trust was found.

(ii) More Recent British Decisions

In Re French Protestant Hospital v Attorney-General[42] Danckwerts J of the Chancery Division had to determine the powers of those in control of the French Protestant Hospital to amend by-laws so as to allow the payment of professional fees to certain of their members. The French Protestant Hospital was incorporated by Royal Charter in 1718. The Charter allowed the governor, deputy governor and 37 other governors to amend by-laws. The Board proposed to amend the by-laws to allow a solicitor and surveyor who were on the board to remain there if their firms received fees for acting in a professional capacity towards the charity.

Danckwerts J held that the governors of the corporation were in a fiduciary position in relation to the corporation and its property, and, apart from any provision in the constitution of the corporation, had no right to remuneration; it was improper for the directors to amend by-laws to enable payment to be made to themselves and therefore the proposed amendment was invalid. Even though technically the corporation was trustee of the property of the charity, Danckwerts J held that he was bound to look at the real situation which exists:

> It is obvious that the corporation is completely controlled by the governor, deputy governor, and directors, and it is, therefore, those persons who, in fact, control the corporation and decide what shall be done. Those persons are as much in a fiduciary position as trustees in regard to any acts which are done in regard to the corporation and its property. It would be

41 Note 40 at 397

42 *In Re French Protestant Hospital v Attorney-General* [1951] 1 All ER 938

> entirely illegal if they were simply to put the property, or the proceeds of the property of the corporation, in their pockets and make use of it for their own individual purposes or for their purposes as a whole, and not for the purposes of the charitable trust for which the property is held. Therefore, it seems to me plain that they are, to all intents and purposes, and for the purposes of this case, bound by the rules which affect trustees.[43]

Danckwerts J went on to cite Lord Herschell in *Bray v Ford* [44] that fiduciaries are not entitled to make a profit or place themselves in a position where their interest and duties may conflict. He drew no distinction between the duties of the board in that case which involved a limited company which existed for charitable purposes, and the board before him which was managing a charity formed under a royal charter. For him the critical point seemed to be the control exercised by the board over the property of another. Once that control was established the fiduciary duties flowed.

In *R v Secretary of State for the Environment and Others ex parte Claridge; R v Secretary of State for the Environment ex parte London Borough of Camden* [45] a question arose out of the abolition of the Greater London Council under local government legislation and the distribution of its assets by the London Borough of Camden. Kerr LJ in the Queens Bench Division held that where there has been no infringement of any statutory authority, but where there is an allegation of breach of fiduciary duty as a result of improper balancing between constituents, then the "court can only interfere if the authority can be shown to have acted irrationally, ie unreasonably in the Wednesbury (Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223) sense". [46]

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43 Note 42 at 940

44 *Bray v Ford* [1896] AC 44

45 *R v Secretary of State for the Environment and Others ex parte Claridge; R v Secretary of State for the Environment ex parte London Borough of Camden*, 13th July 1987, <http://www.lexis.com>, The Times July 14, 1987, The Independent, July 15, 1987

46 Note 45

Stanway v Attorney-General [47] is a recent case involving the winding up of a charity, the Royal Masonic Hospital in West London. Litigation ensued against the Board of Management of the charity in relation to various transactions entered into, including the purchase of an existing nursing home. It was alleged that entry into the agreement was a breach of duty on the part of the Board and that the operation of the home was in breach of trust and fiduciary duty. Other allegations were that the Board allowed the hospital to be used for a substantial non Masonic use and that money allocated for celebration of the hospital's diamond jubilee involved a significant loss to the charity.

Lloyd J thought, without finally deciding the point, that the members of the board owed fiduciary duties. He stated:

> I doubt whether it is right to say that the relevant duties were only those of skill and care, since what is at issue is whether the Board caused or allowed property of the charity to be used or applied for purposes outside its objects. That seems to be likely to be the subject of a fiduciary duty rather than merely a duty of skill and care. However, I do not need to, and do not, decide that point.[48]

He held that the Defendant's application to strike out the claims should fail.

In a recent Court of Appeal decision, *Equitable Life Assurance Society v Allen David Hyman* [49] Lord Woolf MR in *obiter* summarised the law in relation to fiduciary duties of public bodies:

> …there is a well established tradition, especially in relation to local authorities, of regarding public bodies as being under a fiduciary duty similar to that owed by trustees: (see Roberts v Hopwood [1925] AC 578, Prescott v Birmingham Corporation [1955] CL 210 Vaisey J (p.226 and Jenkins LJ (pp 235 to 237)) and Bromley LBC v GLC [1983] 1 AC 768, Lord Denning MR (pp 776/7) and Lord Wilberforce (p 815)

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47 *Stanway v Attorney-General* , <http://www.lexis.com>, The Times, November 25, 1999

48 Note 47 at 3

49 *Equitable Life Assurance Society v Allen David Hyman* [2000] EWCA Civ 5

> Parliament confers wide discretionary powers on the Government of the day, so that they can be used in the nation's and the public's interests. Local authorities have wide discretionary powers conferred upon them so that they can be used in the interest of the locality and those who reside there. (I would not accept that today any group such as the ratepayers can be singled out as the beneficiary of local government powers.) The recipients of the powers, whether national or local, are in very much the same position as they would be if they had fiduciary powers conferred upon them. The powers are entrusted to them so that they can exercise them on behalf of the public or a section of the public. The public places its trust in the public bodies to exercise their powers for the purposes for which they are conferred. The importance of the House of Lords' decision in *Padfield v Minister of Agriculture* [1968] AC 997 is that it made this clear.[50]

(iii) An Australian Decision on Statutory Boards

The next case to be considered is especially important in this analysis. There have been few cases in Australia involving the fiduciary duties of members of statutory boards[51] and no cases involving the fiduciary duties of university councillors. However, it can be argued convincingly that a university council is but another example of a statutory board, though one which traditionally may have a higher level of independence from Ministerial direction than many others. Universities and their councils are established by Acts which confer significant management authority on a governing body which is representative in nature. In *Bennetts v Board of Fire Commissioners*

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50 Note 49 at 5

51 Finn notes that the 19th Century Victorian Supreme Court was quite prepared to find personal liability of local government councillors for their illegal acts and for those of the council: Finn PD *Law and Government in Colonial Australia*, Oxford University Press, Melbourne 1987 at 101. He also describes the application in Victoria of the principle in *Mersey Docks Trustees v Gibbs* (1864) LR 1 HL 93 in *Victorian Woollen & Cloth Manufacturing Company v Board of Land and Works* (1881) 7 VLR 461 at 468, where the Board was held to be a trustee for the public acting in the execution of a public statutory trust and hence liable for the negligence of its officers and servants for the negligent construction of a railway embankment causing flooding to the plaintiff's property (at 468).

of New South Wales [52] Street J described this representative process in the context of the Board of Fire Commissioners:

> A great many public undertakings are controlled by boards or commissions set up in a manner consistent with the manner in which the present board is set up. By the terms of their statutes, boards such as this comprise a number of persons nominated or chosen by various groups, each of which nominating or choosing groups has a direct interest in the public undertaking controlled by the board. Each of the persons on such a board owes his membership to a particular interested group; but a member will be derelict in his duty if he uses his membership as a means to promote the particular interests of the group which chose him.[53]

In this case Street J had to determine whether an individual member of the Board who had been elected by members of a trade union could act in the interests of those who elected him or whether he had to act in the interests of the Board. He held:

> The consideration which must in board affairs govern each individual member is the advancement of the public purpose for which parliament has set up the board. A member must never lose sight of this governing consideration. His position as a board member is not to be used as a mere opportunity to serve the group which elected him.[54]

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52 *Bennetts v Board of Fire Commissioners of New South Wales* (1967) 87 WN (Pt 1) 307

53 Note 52 at 309 - 310

54 Note 52 at 310. This legal view would be supported in practice by former University of New England Vice Chancellor Robert Smith who rejects the notion that university governing bodies should be made up of "delegates, persons with a responsibility to represent a particular point of view and with an obligation to report back to the constituency": Smith R T, "Higher Education in The Public Policy Agenda: Hard Federalism and Soft Federalism" in Cutt J and Dobell R, *Public Purse Public Purpose: Autonomy and Accountability in the Groves of Academe*, Institute for Research on Public Policy 1992 at 109. See also see also Senate Employment, Workplace Relations, Small Business and Education References Committee *Universities in Crisis*, Canberra, 27 September 2001, at para 4.50. That Committee was not convinced however that better management decisions would flow from the removal of elected members representing groups such as staff or students: at 4.75.

The outcome is not surprising and is generally consistent with the common law position on the obligations of nominee directors on boards of limited companies.[55] Of more importance for present purposes is Street J's ready acceptance of a proposition raised by counsel for the Board of Fire Commissioners that the duties owed on these statutory boards are fiduciary in nature, akin to the duties owed by company directors. In the case the issue arose in the context of whether a board member would have an absolute right to examine confidential documentation even though it may be used for ulterior purposes which could harm the organisation. The passage which is later accepted by Street J is:

> It is contended by Mr. Staff that the right of a board member, as, indeed, is said to be the right of other persons with similar fiduciary obligations such as company directors, is a right recognised by the courts as being necessary in aid of the execution of the fiduciary duties cast upon the members of the bodies within whose affairs contests such as these arise. Mr. Staff denies that a board member has an absolute right to inspect a document such as this, and contends that it is a right essentially and fundamentally linked to the execution of the duty cast upon a board member. He refers, by way of analogy, to an observation in the judgment in *Edman v. Ross* (1), a case concerning the right of a director of a company to inspect and take copies of company documents. The following passage appears: "The right to inspect documents and, if necessary, to take copies of them is essential to the proper performance of a director's duties, and, though I am not prepared to say that the court might not restrain him in the exercise of this right if satisfied affirmatively that his intention was to abuse the confidence reposed in him and materially to injure the company, it is true, nevertheless, that its exercise is, generally speaking, not a matter of discretion with the court

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55 See for example the two decisions by Jacob J in *Levin v Clarke* (1962) NSWR 686; *Re Broadcasting Station 2GB* Pty Ltd [1964-5] NSWR 1648. Jacob J's views suggest it might be possible to provide in the articles or in an instrument appointing a director that a director could be appointed to represent the interests of a third party. In a University this means that the University statute should be carefully examined for any sign that elected representatives may act in Council matters in favour of their constituency, an unlikely possibility. Despite the case the matter still attracts the attention of universities and bureaucrats, see the recent Department of Education Science and Training Report, *Meeting the Challenges, the Governance and Management of Universities*, DEST, August, 2002 at 21 - 22

> and that he cannot be called upon to furnish his reasons before being allowed to exercise it. In the absence of clear proof to the contrary the court must assume that he will exercise it for the benefit of his company."[56]

Later Street J concluded:

> I agree with Mr Staff's contention…. The principle governing the manner in which that conflict should be resolved is that the overriding duty is the duty to the board, and that that duty must not be compromised in any degree whatever.[57]

The case established the link in Australia between the fiduciary duties of members of statutory boards and the fiduciary law that has been applied to company directors. It allows us to analyse that law and with a degree of caution, apply it to universities in conjunction with the law that has developed in relation to charitable and municipal corporations. Before doing that it is instructive to examine American universities to discover how, if at all, their courts have dealt with fiduciary duties at the management level.

Fiduciary Law in American Universities

In order to determine the scope of legal liability attributed to governing bodies in universities and colleges in the United States of America (USA), it is first necessary briefly to examine the history of the development of tertiary education in that country, given that historical origins inform the structure of universities and colleges and still have an impact on their governance.

In the USA, colleges were first established by religious organisations[58] and were dependent for their existence and

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56 Note 52 at 312

57 Note 52 at 313

58 Harvard, for instance was the very first American college and was established by the Congregational Church, which dominated it for its first 200 years. See Berry, Charles R & Buchwald, Gerald J, "Enforcement of College Trustees' Fiduciary Duties: students and the Problem of Standing" (1974) 9 *University of San Francisco Law Review* 1

maintenance on funds sourced from "private charitable subscription or donation, public lottery or subsidy, and the sale of perpetual scholarships."[59] They were private universities and colleges.[60] The structure of the private university is best described in one of the earliest cases concerning university governance – the *Dartmouth College Case*[61]. The case involved an action in trover for the recovery, by Dartmouth's original Trustees, of the books and seal pertaining to the governance of the college. Chief Justice Marshall held that the property should, indeed, be returned to the original Trustees because:

> [t]he charter granted by the British crown to the trustees of Dartmouth College…is a contract within the meaning of that clause of the constitution…which declares that no state shall make any law impairing the obligations of contracts.[62]

Accordingly, the attempt by the New Hampshire legislature to alter the charter (or contract) was held to be unconstitutional. Further, the case is also significant because it establishes that such colleges were both *corporate* in structure and *charitable* by nature. The corporate model applicable was styled by Justice Marshall as eleemosynary:

> The eleemosynary sort of corporations are such as are constituted for perpetual distributions of the free alms or bounty of the founder of them, to such persons as he has directed. Of this are all hospitals for the poor, sick and impotent; and all colleges both in our universities and out of them…They are private corporations.[63]

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59 Berry, Charles R & Buchwald, Gerald J, "Enforcement of College Trustees' Fiduciary Duties: students and the Problem of Standing" (1974) 9 *University of San Francisco Law Review* 1 at 5

60 We use the terms college and university interchangeably and refer to Beach, Note 6 at footnote 23 where he discusses the case of *Yale University Town of New Haven* 71 Conn.316, 42 A 87 (1899), where the court looked back at the history and interchangeability of the terms "college" and "university" to determine its response at 86-91

61 *The Trustees of Dartmouth College v Woodward* 4 L Ed 629 (1819); 17 US (4 Wheat) 518 (1819)

62 Note 61 at 629-630

63 Note 61 at 641

Not all of the universities and colleges in the USA remain private, however, their structure remains corporate: a model accepted as applicable to all writers (excepting Berry and Buchwald[64]). They are corporations whose legal identity can be located in applicable state constitutions, statutes or charters of incorporation.

However, as it was said in the *Dartmouth College Case* [65], "[t]here are divers sorts of corporations; and it may be safely admitted, that the legislature has more power over some than over others." On one end of the spectrum lies the private university model with authority emanating from its charter of establishment.[66] At the other end of the same spectrum are those educational institutions created by express statute or state constitution. They operate as "subagencies of state…government."[67] Such are public corporations, over whom the state would appear to exert greater power then its private counterpart – depending on the terms of the grant.

The authority associated with governance of these corporations (both public and private), which originates from the fundamental source that established the institution as a legal entity, is devolved to its directors, which in the parlance of the USA are most commonly called trustees, directors or regents. "Incorporation gives the university, through its trustees or directors, the power to do all things necessary to fulfill its purpose of education…"[68]

The Powers of Trustees

In public institutions the authority of the Trustees is now defined and limited by the legislation of the relevant state, or constitutional provisions which create the Boards of Trustees for the institution. Such laws generally confer power on the Board itself as an entity separate from its individual constituents. Individual Trustees have the

64 Note 59 at 15

65 Note 61 at 640

66 See Beach JA, "The management and Governance of Academic Institutions" (1985) 12 *Journal of College and University Law* at 301

67 Note 66 at 309

68 Note 59 at 14

power to act on behalf of the board, pursuant to some board by-law, resolution or other delegation of authority from the board.[69]

The scope of the powers of the Boards of Trustees in universities has been enunciated in several cases and while not "sweeping", such scope has been found to be fully competent to allow for the good governance of universities. The following are examples, not an exclusive list. These cases confirm that Boards of Trustees are the bodies empowered to govern universities, and this includes control of education, finances and human resources.

Power of regents versus other parts of university

In *Searle v Regents of the University of California*[70] the powers of the Board of Trustees were examined and it was said that "the constitutional mandate which vests the regents with 'full powers of organization and government' of the university grants to them as a corporation 'all the powers necessary or convenient for the effective administration of the trust.'"[71] Accordingly, the standing orders which enabled the regents to grant power to the academic senate to authorise courses and curricula were not to be construed as abridging or limiting the rights and powers of the regents themselves. This case arose in the context of a dispute over whether the regents or the faculty had control over accreditation for courses. The disputed course was one in which the well-known activist, Eldridge Cleaver, had been authorised to give 50% of the lectures (pursuant to the authority granted to the Berkeley division of the academic senate, who approved the arrangement). The regents refused to accredit the course. The outcome was that the authority of the academic senate was held to be "neither exclusive nor irrevocable", [72] while the authority of the regents remained rock solid. As will be shortly discussed a similar outcome is likely in Australia given the distribution of power in University statutes.

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69 Kaplin, WA and Lee B, *The Law of Higher Education* , 3rd ed, Jossey-Bass Publishers, San Francisco, 1995 at 80

70 *Searle v Regents of the University of California* 23 Cal App 3d 448 (1972)

71 Note 70 at 452

72 Note 70 at 451

In Re Antioch University (and the later appeal of *Cahn and Cahn v Antioch University)*[73] explored the delineation between the Board of Trustees and the university's constituent units. The case arose as a dispute between the university, which was located in Ohio, and the law school in Washington DC. It tested the extent to which the law school could operate independently of the university. It was held that the former deans of the law school owed a fiduciary duty to the university, not to students and clients of the law school. The ultimate authority for financial matters at the law school was vested in the Board of Trustees.

Ultra vires conduct: Power to invest, and power to appoint and dismiss

In *First Equity Corporation of Florida v Utah State University*[74] the plaintiff was a company of stock brokers who sued the university over its failure to pay for the stocks ordered by the university's assistant president of finance. The court held that the Board of Trustees did not have the requisite authority to purchase the particular stock involved. Therefore the Trustees could not authorise the assistant vice president or any other agent to make the purchases – *nemo dat non habet*. To determine the extent of power accorded to the Trustees it was necessary to look to the originating instrument(s).

In *Baker v Southern University,*[75] the court held that the power of the Board of Trustees did include the power to delegate authority to the chancellor to dismiss and/or appoint personnel. The court held that the statutes gave broad powers to "supervise and manage the university system…to exercise all the power to direct, control, supervise and manage the University."[76] That included the power to delegate the authority to appoint or dismiss. The power of delegation was not found to exist, however, in *Blanchard v Lansing Community College* [77] where a faculty member challenged his discharge because the

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73 *In Re Antioch University* 418 A 2d 105 (DC 1980) and *Cahn and Cahn v Antioch University* 482 A2d 120 (DC app 1984)

74 *First Equity Corporation of Florida v Utah State University* 544 P2d 887 (Utah 1975)

75 *Baker v Southern University* 604 So. 2d 699 (La Ct App 1992)

76 Note 75 at 701

77 *Blanchard v Lansing Community College* 370 NW 2d 23 (Mich Ct App 1985)

Board of Trustees had not voted on the matter. The Board, for its part, argued that it delegated the power to hire and discharge to various administrators. The court held that, in this instance, the power to discharge was expressly committed to the discretion of the board and was not delegable. This power to employ and dismiss was also confirmed on the Board of Trustees in *Worzella v Board of Regents of Education*[78] and was held to be a power that could not be "restricted, surrendered, or delegated away."[79]

Power to exclude students

The power to exclude students was found to exist in both *Foley v Benedict*[80] and *Gleason v University of Minnesota*[81], the court noting in *Gleason* that, "the government of the university as to educational matters is exclusively vested in the Board of Regents…."[82]

The Obligations of Trustees

The original structure and funding arrangements of the private universities had ensured that trustees were subject to the overriding and continuous scrutiny of those that provided the endowments, given that such funds were usually "subject to a retained power in the subscriber to fill vacancies on the board of trustees."[83] Thus the religious organisations, which had established the colleges, maintained effective control which did not admit trustee discretion. With the gradual diminution of religious control and the need to provide permanent ongoing funding, the role of the trustee in universities has changed. The role is no longer merely titular, but is now analogous to the corporate director with all the attendant responsibilities (and opportunities for mismanagement, non-management and conflict of interest).

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78 *Worzella v Board of Regents of Education* 93NW 2d 411

79 Note 78 at 413

80 *Foley v Benedict* 55 SW (2d) (1932)

81 *Gleason v University of Minnesota* 104 Minn 359 (1908)

82 Note 81 at 362

83 Note 59 at 6

Berry and Buchwald[84] also claim that the powers given to the university by incorporation,

> subject trustees to the responsibilities of corporate directors. In the strict corporation sense, [the]… responsibilities take the form of a duty of care and a duty of loyalty. The duty of care imposes on the directors the obligation to act in their corporate capacity in good faith and with the degree of diligence, care and skill which ordinary prudent men would exercise under similar circumstances. The duty of loyalty imposed on directors, ... requires them to act solely in the interests of the corporation and to forgo conflicts of interests.

Later it will be submitted that this would also adequately summarise the position in Australia. The above speaks of a comprehensive (fiduciary) duty owed by the Trustee of an institution of higher education to (in the case of a university) the public and to the members of that university and any discussion of that duty must include the seminal case of *Stern v Lucy Webb Hayes National Training School for Deaconesses and Missionaries*[85] (*The Sibley Hospital Case*). The case is of significance because it is the first case in American jurisprudence to thoroughly analyse the obligations of the Trustees of a private charitable organisation and to set out guidelines which attach to those obligations. As such, the decision has been seen as highly relevant to educational as well as charitable institutions.[86]

The Sibley Hospital Case was a class action by certain of the hospital patients, representing all patients of the hospital. They alleged that the Trustees for the nonprofit, charitable hospital "conspired to enrich themselves and certain financial institutions with which they were affiliated by favoring those institutions in financial dealings with the Hospital and that they breached their fiduciary duties of care and loyalty in the management of Sibley's funds."[87] The facts reveal that soon after the establishment of the hospital, in 1960, the Sibley Board

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84 Note 59 at 14

85 *Stern v Lucy Webb Hayes National Training School for Deaconesses and Missionaries* 381 F Supp 1003 (1974) (*The Sibley Hospital Case*)

86 Harpool D, "Minimum Compliance with Minimum Standards: Managing Trustee Conflicts of Interest" (1998) 24 *Journal of College and University law* 465 at 469

87 Note 85 at 1007 per Gesell J

of Trustees, revised the corporate by-laws, determining that a new Board was to be established with a membership of 25–35 Trustees. Executive and Finance Committees were also established, to open accounts, approve and review budgets amongst other duties. It is worth noting that, neither Committee met nor conducted any business from the time of establishment until 1971.

It was accepted, in fact, that the finances of the hospital were almost entirely managed by Dr Orem, who was the Hospital Administrator, and Mr Ernst, the Treasurer, who dominated the Board. The other Board members were described as merely accepting the recommendations and decisions of Orem and Ernst – giving them "cursory supervision"[88]. This situation continued from the early 1950's until Dr Orem's death in 1968, after which Mr Ernst maintained effective control until his death in 1972. It was only after Mr Ernst's death that the other Trustees "assumed an identifiable supervisory role over investment policy and Hospital fiscal management in general."[89]

As to the first claim, of conspiring to enrich themselves, the plaintiffs failed to prove the charge of conspiracy between the trustees and the financial institutions, given that there was no proof of any agreement – either express or implied – to sustain it.

The second claim, charged the Trustees with breach of duty, specifically mismanagement, non-management and self dealing. Importantly, in order to determine if any breaches had occurred, it was necessary to establish the standard of care owed by these Trustees. This was dealt with early in the judgment, when Justice Gesell indicated that the law was not settled, given that the "charitable corporation is a relatively new legal entity which does not fit neatly into the established common law categories of corporation and trust.…" but that, "the modern trend is to apply corporate rather than trust principles in determining the liability of directors of charitable corporations, because their functions are virtually indistinguishable from those of the 'pure' counterparts."[90] This standard is lower, less stringent, for the corporate director.

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88 Note 85 at 1008

89 Note 85 at 1008

90 Note 85 at 1013

Mismanagement

It was held that both trustees and corporate directors are liable for losses that are occasioned by negligent mismanagement, however while the trustee will be liable for simple negligence, the director must be found to have been grossly negligent. The degree of care is such that directors "are required to exercise ordinary and reasonable care in the performance of their duties."

Non-management

However, as Gesell J said in relation to non-management, "[t]otal abdication of the supervisory role,..is improper even under traditional corporate principles." [91] He found that the individual Trustee defendants had failed to supervise the hospital investments and found that they had breached their fiduciary duties in this regard.

Self-dealing

Firstly it was established that neither trustees nor directors were absolutely barred from "placing funds under their control into a bank having an interlocking directorship with their own institution. In both cases, however, such transactions will be subjected to the closest scrutiny to determine whether or not the duty of loyalty has been violated."[92] Again the standard is different, such that the trustees could be found in breach for mere negligence however, the director would need to show "entire fairness" or "full disclosure" of any actual or potential conflict of interest.[93] Finding evidence of deficiency here, the court then detailed procedural steps for a Trustee to take in order to avoid a conflict of interest. The court's recommendations were that

- There must be prior disclosure of all real and potential conflicts of interest;
- A Trustee must not participate in any decision where there is a conflict;

91 Note 85 at 1014
92 Note 85 at 1014
93 Note 85 at 1014

- The remaining (disinterested) Trustees should make an objective decision, which is in the best interests of the institution;
- All of these proceedings need to be scrupulously documented, by the board secretary keeping accurate minutes of such meetings.

The application of the corporate standard rather than that of the trustee was confirmed in the later case of *The Corporation of Mercer University et al v Smith et al*. [94] Taft College and Mercer University entered into a merger agreement and the central issue for determination was whether Taft was a charitable trust or a nonprofit corporation. In holding that it was a corporation, Hunt J said that "[o]ur holding is consistent with those of most jurisdictions … in applying corporate rather than trust principles to resolve questions concerning colleges, universities and other nonprofit corporations …."[95]

It is said by Harpool that *Sibley Hospital* is a "landmark" case (which has been affirmed in later judgments) and that the "result … is that courts apply a duty of care to board members requiring trustees to discharge their duties with the care that an ordinary, prudent person in a like position would exercise under similar circumstances. A trustee of a college or university is bound by a fiduciary duty of loyalty, as measured by an objective test that requires the trustee to use ordinary care and act in good faith while attempting to make decisions in the best interest of the college or the university."[96]

The implications for institutions of higher education in both the USA – and Australia – are clear. Board members have powers defined by the instrument(s) that have been the originating source of the grant, and by the interpretations of those instruments by the courts. Further they owe a duty of care to the university, the public and all the members of the community of that institution; a duty which will be tested as against the corporate standard.

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94 *Corporation of Mercer University v Smith* 258 Ga 509 (1988)

95 Note 94 at 511. See also *The Regents of the University of Maryland v Joseph B Williams* (G&J 365 (1838) for a good consideration of the structure of a corporation (public and private) as it applies to universities.

96 Harpool D, Note 86

Application of fiduciary law to Australian universities

Terminology

Australian universities generally split the governance and academic functions along the lines described in Table 1.

Table 1: University Statutes Table

State	University Act	Name for Governing Body	Name for Academic Body
Victoria	*Australian Catholic University Act 1990*	Senate	Academic Board
	Deakin University Act 1974	Council	Academic Board
	La Trobe University Act 1964	Council	Academic Board
	Monash University Act 1958	Council	Academic Board
	Melbourne University Act 1958	Council	Academic Board
	Victoria University of Technology Act 1990	Council	Academic Board
	Royal Melbourne Institute of Technology Act 1992	Council	Academic Board
	Swinburne University of Technology Act 1992	Council	Academic Board
	University of Ballarat Act 1993	Council	Academic Board
Western Australia	*Edith Cowan University Act 1984*	Council	Academic Board
	University of Notre Dame Act 1989	Board of Governors	Academic Council
	University of Western Australia Act 1911	Senate	Academic Board
	Murdoch University Act 1973	Senate	Academic Council
	Curtin University of Technology Act 1966	Council	Academic Board
South Australia	*The Flinders University of South Australia Act 1966*	Council	Senate
	University of Adelaide Act 1971	Council	Senate
	University of South Australia Act 1990	Council	Academic Board

	University of New England Act 1993	Council	Academic Board
	University of Western Sydney Act 1997	Board of Trustees	Senate
	University of Newcastle Act 1989	Council	Senate
	University of New South Wales Act 1989	Council	Academic Board
	University of Wollongong Act 1989	Council	Academic Senate
	University of Sydney Act 1989	Senate	Academic Board
	Southern Cross University 1993	Council	Academic Board
	Macquarie University Act 1989	Council	Academic Senate
	Charles Sturt University Act 1989	Council	Academic Senate
	University of Technology Act 1999	Council	Academic Board
Queensland	*Queensland University of Technology Act 1998*	Council	Academic Board
	University of the Sunshine Coast Act 1998	Council	Academic Board
	University of Southern Queensland Act 1998	Council	Academic Board
	University of Queensland Act 1998	Senate	Academic Board
	Griffith University Act 1998	Council	Academic Committee
	James Cook University Act 1997	Council	Academic Board
	Central Queensland University Act 1998	Council	Academic Board
	Bond University Act 1987	Council	Academic Senate
Northern Territory	*Northern Territory Act 2000*	Council	Academic Board
Tasmania	*University of Tasmania Act 1992*	Council	Academic Senate
ACT	*University of Canberra Act 1989*	Council	Academic Board
	Australian National University Act 1991	Council	Academic Board

The Table reveals that the typical name for the governing body is *Council*, and for the academic body it is *Academic Board*. Those are the terms used in this paper.

The academic advisory role of academic board is not always described in the university statute, or may be the subject of a by-law or council resolution. However the *University of Canberra Act 1989* (Cth) provides in s 19:

> 19 (1) There is to be an Academic Board.
>
> (2) The Board-
>
> > subject to the Statutes, is responsible under the Council for all academic matters relating to the University; and may advise the Council on any matter relating to education, learning or research or the academic work of the University.

Similarly the *Royal Melbourne Institute of Technology Act 1992* (Vic) states in s 28:

> 28 Academic Board
>
> There shall be an Academic Board for the purposes of—
>
> academic oversight of prescribed academic programs and courses of study of higher education of the University; and providing advice to the Council on the conduct and content of those programs and courses.

A university too will have certain traditions which effect the way in which Council is to act, for example a certain deference to an academic board in relation to purely academic matters. On the other hand, as shown by the American decision *In Re Antioch University* [97] discussed previously, such traditions could not override power vested in council by a constituting instrument such as a university statute. Accordingly an Australian university statute vesting management power in a council is certainly of a much higher order than power imagined to be held by an academic board, dean or faculty

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[97] Note 73. See also the Court of Appeal for Ontario decision in: *Kulchyski v Trent University* <http://www.ontariocourts.on.ca/decisions/2001/html> in relation to bicameral university governance.

as in the *Antioch case*. Similarly the American decisions in *Searle v Regents of the University of California*[98] and *Gleason v University of Minnesota*[99] would support the power of the council over various parts of the university.

This paper concentrates on the legal obligations of councils and councillors rather than the role of academic boards, or other university bodies. It is acknowledged that part of the fiduciary duty of university councillors will be to ensure that decisions reached at council level have been duly considered by those bodies bound to give it advice, whether that be under the university statute as above or through resolutions of council itself.

Fiduciary powers

The precise nature of a fiduciary relationship will normally turn on the way in which it is defined in the documentation constituting the relationship. As Deane J said in *Chan v Zacharia*:[100]

> It is necessary to identify the nature of the particular fiduciary relationship claimed to exist in any case and to define any relevant obligations which flowed from it.

In a university key documentation will be the functions given to councils in the constituting university act. Typical functions of councils are described in Table 2. One university from each state is included as typical of the function and powers allocated to Council

98 Note 70

99 Note 81

100 *Chan v Zacharia* (1984) 154 CLR 184 at 194; to similar effect see *Breen v Williams* (1996) 186 CLR 71 at 82, and *Maguire v Makaronis* (1997) 188 CLR 449 at 464, per Brennan CJ, Gaudron McHugh & Gummow JJ where they talk of "the ascertainment of the particular obligations owed" and what would constitute a failure to discharge those obligations.

Table 2 University Council Functions

University Act	Council Function
University of Canberra Act 1989 (Cth)	10 (1) Subject to this Act and the Statutes, the Council has the entire management of the University. (2) The Council is to act in all matters concerning the University in the way it thinks will best promote the interests of the University. (3) The powers of the Council include, but are not limited to, the power to appoint persons (whether members of the staff of the University or not) to positions of responsibility within the University.
University of New South Wales Act 1989 (NSW)	8 (1) There is to be a Council of the University. (2) The Council is the governing authority of the University and has the functions conferred or imposed on it by or under this Act.
University of Adelaide Act 1971 (SA)	9 The Council is the governing body of the University and has as its principal responsibilities- (a) overseeing the management and development of the University; and (b) devising or approving strategic plans and major policies for the University; and (c) monitoring and reviewing the operation of the University.
Royal Melbourne Institute of Technology Act 1992 (Vic)	7. The Council is the governing authority of the University and has the direction and superintendence of the University.
University of Tasmania Act 1992 (Tas)	9 (1) The Council is the governing authority of the University. (2) The Council is to act in all matters concerning the University in the way it considers will best advance the interests of the University.

	(3) The Council has power to do all things necessary or convenient to be done for or in connection with the performance of its function as the University's governing authority and, in particular, has power (a) to appoint persons to positions of responsibility within the University; and (b) to allocate funds and otherwise determine the best use of the resources of the University. (4) The Council must establish an audit committee and may establish other committees to perform or exercise any of its functions or powers. (5) A committee may include persons who are not members of the Council.
The University of Queensland Act 1998 (Qld)	8 Functions of senate (1) The senate is the university's governing body. (2) The senate has the functions conferred on it under this or another Act. 9 Powers of senate (1) The senate may do anything necessary or convenient to be done for, or in connection with, its functions. (2) Without limiting subsection (1), the senate has the powers given to it under this or another Act and, in particular— (a) to appoint the university's staff; and (b) to manage and control the university's affairs and property; and (c) to manage and control the university's finances.
Northern Territory University Act 2000 (NT)	8 University affairs to be conducted by Council (1) Subject to this Act, the affairs of the University shall be conducted by the Council. (2) All acts and things done by the Council, or in the name of or on behalf of the University with the express or implied authority of the Council, shall be deemed to have been done by the University.

University of Western Australia Act 1911 (WA)	13	Subject to this Act and the Statutes, the Senate may from time to time appoint deans, professors, lecturers, examiners, and other officers and servants of the University, and shall have the entire control and management of the affairs and concerns of the University, and may act in all matters concerning the University in such manner as appears to it best calculated to promote the interests of the University.
	14	Control and management of property
	(1)	The Senate shall have the control and management of all real and personal property at any time vested in or acquired by the University; and may set out roads, streets, and open spaces, and erect and maintain buildings upon and otherwise improve any land or other property as in their absolute discretion they may think fit, and may apply any trust funds of the University to any such purposes.

In these examples university councils are clearly designated by legislation as governing and managing bodies with extensive management powers. The functions are not dissimilar to the typical clause in a company's constitution represented by the replaceable rule in s 198A of the *Corporations Act 2001* (Cth):

> (1) The business of a company is to be managed by or under the direction of the directors
>
> (2) The directors may exercise all the powers of the company except any powers that this Act or the company's constitution (if any) requires the company to exercise in general meeting.

Indeed with enabling legislation two Australian private universities have been incorporated under predecessors to the *Corporations Act 2001* (Cth). The Australian Catholic University and Bond University were incorporated under the Victorian and Queensland Companies Codes respectively. In the case of Bond University, the university company is a company limited by guarantee and the University Council is the board of directors of that company: *Bond University Act 1987* (Qld) Section 2. For such *Corporations Act* universities the existence of fiduciary duties is simply taken for granted, and to some extent over shadowed by the onerous statutory obligations under the

Corporations Act on those director/councillors. The statutory recognition in the *Bond University Act* of those university councillors as directors supports the general proposition being advanced in this paper that public university councillors are in a similar director like position with commensurate duties and fiduciary obligations.

The way management power is distributed in a university will, in one respect, be rather different to that in a modern company limited by shares operating under *the Corporations Act 2001* (Cth). A university act may make an exhaustive grant of power and control over the assets and management of the university, or may vest some reserve powers in a minister such as the power to sell or mortgage certain assets or borrow money.

The critical feature is that university acts grant significant control to the council over all matters not reserved to a minister, and it is in relation to this power and control that the fiduciary duty arises in university councillors. Just as a fiduciary duty arises in municipal councillors to not place themselves in a position of conflict of interest and duty as in the cases described above, a fiduciary duty will arise in university councillors, because in them the community places assets in the form of real and personal property to be managed for the purpose of knowledge discovery and dissemination. No doubt the community also places a significant public trust of the type discussed by Finn attracting one of his "fundamental fiduciary relationships."[101]

However it is relatively safe to assume that certain fundamental aspects of a councillor's fiduciary duty do not vary, just as they do not vary in relation to different types of company formed under the *Corporations Act 2001* (Cth).

The governing body of a university has been described as being composed of the trustees for the institution:

101 Note 28

> While membership can be a source of prestige to the incumbent and of patronage to those who nominate or elect, the governing body ought to be seen by the university community and by the polity and society as being composed of trustees for the institution. [102]

If the authors are simply suggesting that councillors have to act in a fiduciary way towards the institution, which they must represent in preference to any sectional interests they have, the suggestion is benign and supported by law. If on the other hand there is an implication that Councils should act like traditional trustees and act to simply preserve the trust property this would miss the clear language of the Australian statutes which talk of governance and management. It is obvious from Table 2 above that legally the role of a council in Australia is far more than that of mere protective trustee. Berry and Buchwald reject such a trust model in the context of American universities. They say:

> Another analogy which has been applied to the university is that of the trust. Traditional trust law renders trustees liable to execute the express terms of the trust instrument. Unlike the corporate director, whose job is to maximise the profits of the corporation, the trustee acts as conservator of the trust fund. He is charged with the duty of insuring that the funds are sufficient to accomplish the purpose for which they were entrusted to his care…. The application of trust law to the university, however, exhibits precisely the same shortcoming as the corporate analogy. The characterization of the university charter as the trust instrument seems to impose stringent duties on the trustee. However, university charters fail to designate an identifiable class of trustee.[103]

This contains shades of the history of the trust that Sealey described above. Trust law was simply inappropriate to apply to boards of directors and the like because of the very matters referred to in the above paragraph. However this did not stop the courts from

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102 Wood F and Smith R, "Governing bodies of 26 Australian Universities" (1992) 14 (1) *Journal of Tertiary Education Administration* 61 at 63

103 Note 59 at 15 - 16

developing the law of the fiduciary and applying it to such bodies, be they public or private.

Berry and Buchwald also rejected the corporate model as not representing a complete analogy for university governance, suggesting that no one stands in the same position as the corporate shareholder, shares are not sold, elections not held, and the duties of care and loyalty not being owed to shareholders.[104] Whatever might be the case in the United States, the corporate model stands up, at least legally, in Australia. Universities are at law designated as body corporates, they have memberships often including students, past students and academic staff.[105] Furthermore Australian public universities make provision for elected members on their councils. Berry and Buchwald concentrated on companies with a share capital. Clearly universities do not have shareholders but this is certainly not a defining feature of a corporation under Australian law, as evidenced by companies limited by guarantee formed under s 112 of the *Corporations Act 2001* (Cth) which have members not shareholders, and do not distribute profits to these members. The guarantee form of corporation is commonly used in Australia for the incorporation of educational bodies such as Bond University, private schools and colleges. The apparent limitation on the analogy to the company under Australian law lies in the fact that university councils may have specific restrictions placed on their power to lease or dispose of land

104 Note 59 at 15

105 See for example s 4 of the *Melbourne University Act 1958*, section 5 of the *University of Tasmania Act 1992*, s 4 of the *Southern Cross University Act 1993*, s 4 of the *University of Wollongong Act 1989* which include full time academic staff and graduates and students as members. Less typical are the *University of Western Australia Act 1911* and the *University of Queensland Act 1998* which do not. The Senate Committee report badly misunderstood this notion of staff and students as members: They say "There are many stakeholders in a university, but there are no shareholders." Speaking of Councils they also say: governing bodies "are not analogous to company boards because there are no shareholders". Senate Employment, Workplace Relations, Small Business and Education References Committee, *Universities in Crisis*, Canberra, 27 September 2001, at para 4.59 and 4.54. Both points miss the fact that shareholders are a subset of the broader concept of member, and accordingly their representatives who sit on university councils are the equivalent of directors who, after all, are elected shareholder representatives on the boards of public companies. The Senate also missed hundreds of years of university history surrounding the concept of a university as a community or company of scholars, see for example cases such as *Rex* v. *Cambridge University* (1723) 1 Stra. 557. Accordingly any attempt to remove elected members from councils denies what a university is, and the corporate status of those members.

which may require ministerial approval. But even this does not detract from the corporate status of the university, it still is a separate entity where the power is divided between minister and council. Even in private corporations one can see a distribution of power between board and others such as the members,[106] where certain activities may require the approval of the members in a general meeting.

Accordingly a university in Australia is a corporation. Its governing body is its council and its membership is defined as its academic staff and students. A university possesses the right to sue and be sued, it has perpetual succession and an independent legal existence, albeit one with, in some cases, reserved power over specified matters to a minister. In this sense Australian public universities are like other corporations formed by governments for some public good, such as schools, hospitals, or other statutory corporations established to render a public service, for example, the distribution of power, telephone and railway services. The fact that some of these latter government bodies have been "privatised" in Australia and elsewhere completes the corporate analogy.

This raises another matter. Do fiduciary obligations on the directors of the corporation only arise after privatisation? Lawyers would dismiss such a proposition as ridiculous. Fiduciary obligations arise on or before incorporation, though the nature and implementation of that obligation may vary from a body formed with non profit motives to one with profits as a primary goal. This is particularly the case in so far as risk is concerned, which is the issue Berry and Buchwald were wrestling with in their trustee versus corporation comparison. In Australia, as we have seen in relation to the United States, lawyers would test the nature of the fiduciary obligation by examining the constitution of the body under question. If powers are reserved to a minister, the board must be careful not to exercise those powers, indeed to do so would constitute a breach of fiduciary duty to the university, because they would be acting *ultra vires*. On the other hand, a university council could not be liable for not exercising a power they did not have.

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106 Furthermore some companies may contain constitutional provisions vesting some or all power in one director only. See for example the extreme example of this in *Whitehouse v Carlton Hotels* (1986) 70 ALR 251 where the article placed all powers and authorities vested in the board of directors in the hands of one governing director.

We can conclude that members of university councils owe fiduciary duties to the university. This being the case, councillors must act in good faith for the benefit of the university as a whole, or as it was put by Lord Northington in *Aleyn v Belchiet* [107]: "No point is better established than that, a person having a power, must exercise it bona fide for the end designed, otherwise it is corrupt and void". This in turn means that strict obligations will be imposed on councillors and specifically they must:

- not make undisclosed gains from their office, or through personal contracts with the university ;
- not compete with the university;
- avoid actual and potential conflicts of duty and interest;
- not make improper use of property or confidential information of the university;
- not misuse university funds;
- use powers given to them for proper purposes;
- act with certain levels of skill and care.

We now examine these elements.

Not make undisclosed gains from their office, or through personal contracts with the university

(a) remuneration

In company law if a director is to be paid a fee an authority to enable payment must be contained in the articles. Lindley LJ said in *Re George Newman and Co* [108]:

> Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of company's assets, unless authorised so to do by the instrument which regulates the company or by the

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107 *Aleyn v Belchiet* (1758) 1 Eden 132 at 138; 28 ER 634 at 637, per Dixon J *Mills v Mills* (1938) 60 CLR 150 at 185

108 *Re George Newman and Co* [1895] 1 Ch 674

> shareholders at a properly convened meeting. The shareholders, at a meeting duly convened for the purpose, can, if they think proper, remunerate directors for their trouble or make presents to them for their services out of assets properly divisible amongst the shareholders themselves.[109]

Danckwerts J made it very clear in *In Re French Protestant Hospital v Attorney-General*[110] that a similar principle applies in charitable corporations. In modern universities there is no regular convocation or mechanism for university members[111] to approve payments to councillors but normally they are not paid fees and are not employees of the university. If this were to change, any attempt to pay fees to all members of council[112] would need legislative authority because a council could not authorise payment to itself under the principles described in *Re George Newman* and the *French Hospital case*.

The vice chancellor's salary will need to be determined by the council or by a chancellor, or chancellor's committee holding clearly delegated authority. The vice chancellor will be a remunerated member of council but under normal fiduciary principles obviously would have to be absent during any remuneration discussions.

(b) Contracts

If members of university councils entered into contracts with their universities without adequate disclosure to the Council of their obvious conflict they would breach their fiduciary duty and the contract would be voidable at the university's option. The test adopted

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109 Note 108 at 686

110 Note 42

111 As to the concept of membership in a university see Corcoran S, "Living on the Edge: Utopia University Ltd" (1999) 27 *Federal Law Review* 265 at 274–275; and Jackson J G, *Legal Rights to Academic Freedom in Australian Universities*, Unpublished PhD thesis, University of Sydney, 2002 at 327–333; see also Bartholomew CW & Nash PG, "Tenure of Academic Staff" (1958) 1(5) *Vestes* 10; and *King v The Chancellor, Masters and Scholars of the University of Cambridge* (1723) 1 Stra. 557

112 The possibility of remuneration has been raised by DEST in its report: *Meeting the Challenges, the Governance and Management of Universities* DEST, Canberra, August, 2002 at para 113; DEST notes that the *Victorian Review of University Governance* also has raised this issue, at para 14.

by the courts in the directors' cases is not a simple test of adequacy of bargain between director and company. Rather the test is adequacy of disclosure.

The rule is explained by Lord Cranworth in *Aberdeen Railway v Blaikie Bros*[113]

> This, therefore, brings us to the general question, whether a director of a railway company is or is not precluded from dealing on behalf of the company with himself or with a firm in which he is a partner. The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is, of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal, and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect. So strictly is the principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into …[114]

In *Hely-Hutchinson v Brayhead Ltd* Denning LJ had this to say:

> It seems to me that when a director fails to disclose his interest, the effect is the same as non disclosure in contracts uberrimae fidei, or non disclosure by a promoter who sells to the company property in which he is interested: see Re Cape Breton Co (1884) 26 Ch D 221; Burland v Earle [1902] AC 83. Non disclosure does not render the contract void or a nullity. It renders the contract voidable at the instance of the company and makes the director accountable for any secret profit which he has made.[115]

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113 *Aberdeen Railway v Blaikie Bros* [1843–60] All ER Rep 250

114 Note 113 at 252

115 *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 at 585

In cases involving directors the disclosure had to be made to the shareholders, though more commonly an article was inserted to allow disclosure to the board. This is acceptable.[116] In a university there is obvious difficulty in disclosing to the members. Councils should therefore examine their university act for what it might say, if nothing, the Council should ensure that a bylaw exists requiring full disclosure to Council of conflicts of interest by councillors. This should extend to family companies and other associated persons.

The position at equity is therefore that the councillor cannot deal with the university unless there has been full disclosure. The nature of this disclosure in company cases has been described by Lord Cairns in *Liquidation of Imperial Mercantile Credit Association v Coleman*:[117]

> A director, then, claiming to give validity to a contract which otherwise would be invalid must show that he has, in letter and in spirit, complied with the provisions of the clause. Now has the Respondent done so? Did he 'declare', or, as that word implies, show clearly his interest? His interest might be anything, from the absolute ownership of the property sold, down to a right of a nominal charge on or payment out of it. Did he, then 'declare' what his intention was? Certainly he did not. A man declares his opinion or his intentions when he states what his opinion is, or what his intentions are, not that he has an opinion or that he has intentions; and so, in my opinion, a man declares his interest, not when he states that he has an interest, but when he states what his interest is. [118]

(c) Loans to councillors

It is unlikely that the issue of loans to councillors would arise in universities, though it is not impossible to imagine that vice chancellors or other senior executive staff might seek access to cheaper loans as part of a remuneration package. However given the long history of issues relating to loans to directors and the need for special rules in Chapter 2E of the *Corporations Act 2001* (Cth) to control these the matter is worth considering.

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116 Note 115 at 549

117 *Liquidation of Imperial Mercantile Credit Association v Coleman* (1873) LR 6 HL 189

118 Note 117 at 205

One issue is whether the granting of such a loan would be within the power of the Council under the university statute. That point and its potential fiduciary breaches aside there still remains the question of benefit to the university. Loans to executives at low interest raise issues relating to benefit to the university[119] as opposed to the individual, and could be challenged as constituting a breach of fiduciary duty. At a later stage there could be a serious conflicts issue in relation to the collection of a loan if the executive was in default.

Not compete with the university; avoid actual and potential conflicts of duty and interest; not make improper use of property or confidential information of the university; not misuse university funds.

As described above university councillors could attempt to use their positions on a university council to their own advantage. This might be done by influencing the council in the obtaining of lucrative contracts for themselves or their private companies, a very obvious breach.[120] Even senior company employees (and this principle would certainly catch university employees) can be liable for breach of the very strict law controlling fiduciaries and their duties. This is demonstrated by *Green v Bestobell Industries Pty Ltd.*[121]

Green managed the Victorian insulation division of Bestobell Industries and was found in that position to have a degree of autonomy [122] and "the complete control of all human, financial and contractual resources within the branch"[123] Green, using his family company Clara Pty Ltd, tendered successfully for a job. Bestobell tendered for the same job, but was ranked third. An action for damages against Green for breach of contract may have failed because "the breach did not necessarily cause damage to his employer"[124]

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119 For company cases on loans see *Ring v Sutton* (1980) 5 ACLR 546 and *Paul A Davies (Australia) Pty Ltd (in liq) v PA Davies* (1983) 1 ACLC 1091

120 *Cook v Deeks* [1916–17] All ER Rep 285, see also *Peso Silver Mines Ltd v Cropper* (1966) 58 DLR (2d) 1 and *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1

121 *Green v Bestobell Industries Pty Ltd* (1982) 1 ACLC 1

122 Note 121 at 5

123 Note 121 at 10

124 Note 121 at 7

Instead an action was brought against him for breach of fiduciary duty where the remedy sought was an account of the profits made by his family company. This remedy was granted because he had placed himself in a position where there was a real and possible likelihood of conflict between his duties and his interests, an unacceptable position for a fiduciary.[125]

Furs Ltd v Tomkies[126] illustrates another potential problem area for councillors, especially those who may also be executive officers involved in the sale of assets of a university. This would certainly catch vice chancellors and other senior officers. Tomkies, managing director of Furs Ltd had the job of selling Furs Ltd's tanning business. A company from New Zealand emerged as a likely buyer. Tomkies told the New Zealanders that a most important aspect was knowledge of the formulas for the operation of the tanning processes. The sale went ahead, Tomkies in the meantime agreed to quit Furs Ltd and work for the New Zealanders, his contract obliging him to disclose the formula to his new employers. This was held to be a breach of his fiduciary obligations to Furs and he was accordingly declared liable to account to Furs for the benefits he had received in breach of fiduciary obligation.

This case stands as a telling reminder to senior university staff contemplating a job move. There have been rumours in the system of senior staff members causing their university to enter into contracts with third parties who subsequently employ those staff members. *Furs* demonstrates that this can place that employee in a very difficult position, particularly as they may find themselves on the other side in future negotiations using information which remains the property of the university. The facts will not always be as clear as in *Furs* where the new employer imposed a contractual obligation to reveal the secret processes, and accordingly many senior ex university employees may not be called to account, though technically in breach.

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125 See also Paul A Davies (Australia) Pty Ltd (in liq) v P A Davies (1983) 1 ACLC 1091 and Paul A Davies (Australia) Pty Ltd (in liq) v P A Davies (1982) 1 ACLC 66, and Natural Extracts Pty Ltd v Stotter (1997) 24 ACSR 110, Furs Ltd v Tomkies (1936) 54 CLR 583

126 *Furs Ltd v Tomkies* (1936) 54 CLR 583

Use powers given to them for proper purposes and allowing university to act *ultra vires*

The *Furs* example highlights another matter. It could be the case that the contract entered into by the senior university officer had only minor advantage for the university, and was made mainly to advance that person's career. Such a cynical exercise of a fiduciary contracting power is clearly a breach of duty because the power is being exercised in an *ultra vires* manner. The law on the *ultra vires* exercise of fiduciary powers was stated by Lord Wilberforce in the Privy Council in *Howard Smith Ltd v Ampol Petroleum Ltd*:[127]

> Self interest is only one, though no doubt the commonest, instance of improper motive; and, before one can say that a fiduciary power has been exercised for the purpose for which it was conferred, a wider investigation may have to be made. This is recognised in several well-known statements of the law. Their Lordships quote the clearest (Hindle v John Cotton Ltd (1919) 56 SLR 625 at 630, 631, per Viscount Finlay) which has so often been cited:
>
> > Where the question is one of abuse of powers, the state of mind of those who acted, and the motive on which they acted, are all important, and you may go into the question of what their intention was, collecting from the surrounding circumstances all the material which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in discharge of their powers in the interests of the company or were acting from some bye-motive, possibly of personal advantage, or for any other reason.[128]

In *Whitehouse v Carlton Hotels* the High Court considered the law where there may be mixed motives behind a director's exercise of power. [129] In the passage below Mason, Deane and Dawson JJ are discussing the power of directors to allot shares where there is a

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127 *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] 1 All ER 1126

128 Note 127 at 1133

129 *Whitehouse v Carlton Hotels* (1986) 70 ALR 251

mixture of competing good and bad motives,[130] but the principle they describe is of broader application:

> In such cases of competing purposes, practical considerations have prevented the law from treating the mere existence of the impermissible purpose as sufficient to render voidable the exercise of the fiduciary power to allot shares (see *Mills v Mills* (1938) 60 CLR 150 at 185–6 and note, as to Dixon J's apparently inadvertent use of the word 'void', *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112 at 142). In this court, the preponderant view has tended to be that the allotment will be invalidated only if the impermissible purpose or a combination of impermissible purposes can be seen to have been dominant 'the substantial object' (per Williams ACJ, Fullagar and Kitto JJ, *Ngurli Ltd v McCann* at 445 quoting Dixon J in *Mills v Mills* at 186 and see Harlowe's Nominees at 493); 'the moving cause' (per Latham CJ, *Mills v Mills* at 165). The cases in which that view has been indicated have not, however, required a determination of the question whether the impermissible purpose must be 'the' substantial object or moving cause or whether it may suffice to invalidate the allotment that it be one of a number of such objects or causes. As a matter of logic and principle, the preferable view would seem to be that, regardless of whether the impermissible purpose was the dominant one or but one of a number of significantly contributing causes, the allotment will be invalidated if the impermissible purpose was causative in the sense that, but for its presence, 'the power would not have been exercised' (per Dixon J, *Mills v Mills* at 186). It is, however, unnecessary to express a concluded view on the question of precise formulation of the relevant test in such cases since the present case does not raise any problem of competing permissible and impermissible purposes.

Both passages highlight the need for university councillors and senior executives to recognise that when they act they may be exercising a fiduciary power. If that exercise is entirely motivated by self interest they will find they have breached their fiduciary duty to the university.

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130 A good motive might be that a company needs finances, a bad motive might be that the allotment of shares was made simply to stave off a takeover.

If an exercise of a fiduciary power is the result of mixed motivations the court is likely to apply the "but for" test described above. The important point is that the court will not limit its examination of the exercise of a fiduciary power to just those circumstances involving personal interest on the part of the fiduciary, but will also examine the purpose behind the exercise of the power, and circumstances where that exercise may not have been within the grant of power.

The question of ultra vires conduct has arisen in the courts in relation to an Australian university. In *Australia and New Zealand Banking Group Limited and Michael Tyler v The University Of Adelaide and The State Bank Of South Australia*[131] a question arose as to whether the University of Adelaide in granting a lease to the State Bank, if at a rental less than the "maximum reasonable obtainable", had acted outside the power of the University. Sub-Section 4(3) provided:

> The University shall not, without the approval of the governor, grant a lease in respect of any of its property unless the lease provides for the payment to the University of an amount of rental that is the maximum reasonably obtainable.

Perry J made it clear that if this was a mandatory direction to the university and if the rental was less than the maximum reasonably obtainable, the lease would be *ultra vires* and void.[132] As a matter of construction he found it was not a mandatory direction.[133] His judgment makes it clear that a university acting outside of its statute will find that contracts made as a consequence are invalid. Furthermore, though not mentioned in Perry J's judgment, a university council or other officer authorising *ultra vires* behaviour may also have breached its fiduciary duty to the university because it has allowed it to act outside its power. This latter conduct may be protected by an immunity clause if there is one, as to this see post. The protection provided for *ultra vires* contracts under the corporations law would not seem to apply, and unless protected by other legislation governing contracts by statutory authorities, a

131 *Australia and New Zealand Banking Group Limited and Michael Tyler v The University Of Adelaide and The State Bank Of South Australia* [1993] SASC 3836 (10 March 1993)

132 Note 131 at para 20

133 Note 131 at para 31

university and its council may find itself in a great deal of difficulty. This *ultra vires* point was demonstrated in cases described above such as *Attorney-General v Wilson* [134] (placing funds beyond control of a municipal corporation); *In Re French Protestant Hospital v Attorney-General*[135] (payment of fees); *Stanway v Attorney-General* [136] (unsubstantiated allegations of non Masonic uses); and was also firmly made in the quotations above from *Equitable Life Assurance Society v Allen David Hyman*.[137] The American university cases more graphically demonstrate the *ultra vires* issues: *First Equity Corporation of Florida v Utah State University*[138] (no authority to invest in a particular way); *Baker v Southern University*[139] (the power of the Board of Trustees included the power to delegate authority to the chancellor to dismiss and/or appoint personnel) but should be contrasted to *Blanchard v Lansing Community College* [140] and *Worzella v Board of Regents of Education*[141] where there was no power to delegate dismissal powers.

Skill and Care

The most well known and cited case on skill and care concerned the failure of a board of directors to control their managing director who had engaged in fraud resulting in massive losses of the company's funds and the liquidation of the company. This case is *Re City Equitable Fire Insurance Co*.[142] The liquidator sued the directors and auditors of the company, and though the case does not set the skill and care hurdle at a particularly high level, it is very likely that Romer J would have found against the directors but for an article in the company's constitution which exempted directors from liability for losses unless wilful neglect or default could be shown. He said:

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134 Note 40
135 Note 42
136 Note 47
137 Note 49
138 Note 74
139 Note 75
140 Note 77
141 Note 78
142 Note 37

> In the present case, both the auditors and the respondent directors failed in some matters to perform their strict duty, and but for the provisions of Article 150, I should have had, in respect of those matters, to grant some relief to the official receiver. [143]

Romer J made some important statements about director's duties. Directors are to take:

> reasonable care to be measured by the care an ordinary man might be expected to take in the circumstances on his own behalf.[144]

Subsequently he watered down this objective test in three ways:

> A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience. [145]
>
> A director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings, and at meetings of any committee of the board upon which he happens to be placed.[146]
>
> A director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.[147]

A second case regarding the supervision of managing directors by boards is *Darvall v North Sydney Brick and Tile Co Ltd*.[148] This is notable for a powerful dissent by Mr Justice Kirby when he was president of the New South Wales Court of Appeal, now of the High Court. He thought two directors were negligent for not investigating

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143 Note 37 at 500
144 Note 37 at 428
145 Note 37 at 428
146 Note 37 at 429
147 Note 37 at 429
148 Note 38

properly the conduct of their managing director in regard to certain financial dealings. Kirby P stated:

> Directors of corporations cannot immure themselves from a scrutiny of their purposes by asserting that they acted honestly and with good intention for this or that legitimate purpose. The purpose may be scrutinised by a court to see if this assertion should be accepted. The directors cannot, by donning blinkers, ignore the plain facts disclosed to them and then assert that they acted bona fide in the best interests of the company. A more rigorous standard of conduct is required by the law.[149]

A third company law example is the New South Wales Court of Appeal decision in *Daniels v Anderson*.[150] A company (AWA) failed to provide appropriate accounting and management systems over its foreign currency transactions, leaving these in the hands of only one person. The company's auditors were found to have been negligent in not advising the board of the problems with its internal control. However the auditors were able to argue successfully that the board (both executive and non executive members) was also negligent. It is this latter finding that is important for present purposes because the court made it very clear that a board owes duties of care and skill under the tort of negligence, requiring them to take reasonable steps in their guidance and monitoring of the company. Failure to inquire is no defence, directors are under a continuing obligation to keep informed about the activities of the company. Clarke and Sheller JJ concluded:

> A person who accepts the office of director of a particular company undertakes the responsibility of ensuring that he or she understands the nature of the duty a director is called upon to perform. That duty will vary according to the size and business of the particular company and experience or skills that the director held himself or herself out to have in support of appointment to the office. None of this is novel. It turns upon the natural expectations and reliance placed by share-holders on the experience and skill of a particular director. The duty is a common law duty to take reasonable care owed

149 Note 38 at 251 - 2

150 Note 39

> severally by persons who are fiduciary agents bound not to exercise the powers conferred upon them for private purpose or for any purpose foreign to the power and placed, in the words of Ford and Austin, *Principles of Corporations Law*, 6th ed at 429, at the apex of the structure of direction and management. The duty includes that of acting collectively to manage the company. Breach of the duty will found an action for negligence at the suit of the company.[151]

It is interesting to note that *City Equitable* and *Daniels v Anderson* stem from a fundamental failure of the boards to put in place control systems, they do not suggest that boards have to be involved directly in day to day management. The cases are directly applicable to university management. The one university that contains a business judgment rule for its Council, the University of Tasmania,[152] may find that this applies to business judgements requiring a decision, and

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151 Note 39 at 668

152 Section 11A and s 11B of the University of Tasmania Act 1992 provide:
11A (1) In this section,
"business judgment" means any decision to take or not to take action in respect of a matter relevant to the functions of the Council.
(2) A member of the Council is to exercise his or her powers and discharge his or her duties with the degree of care and diligence that a reasonable person would exercise if he or she –
(a) were a member of the Council in the Council's circumstances; and
(b) occupied the office held by, and had the same responsibilities within the Council as, the member.
(3) A member of the Council who makes a business judgment is taken to meet the requirements of subsection (2), and his or her equivalent duties at common law and in equity, in respect of the judgment if he or she –
(a) makes the judgment in good faith for a proper purpose; and
(b) does not have a material personal interest in the subject matter of the judgment; and
(c) informs himself or herself about the subject matter of the judgment to the extent he or she reasonably believes to be appropriate; and
(d) rationally believes that the judgment is in the best interests of the University.
(4) The member's belief that the judgment is in the best interests of the University is taken to be a rational one unless the belief is one that no reasonable person in his or her position would hold.
11B A member of the Council is to exercise his or her powers and discharge his or her duties –
(a) in good faith in the best interests of the University; and
(b) for a proper purpose.

might not apply to negligence as in a failure to act, supervise or monitor.[153]

While the examples of breach of fiduciary duty described above could arise in a university, particularly among its senior employees, it is far more likely at Council level that the inaction of councillors rather than their actions will become a source of liability for negligence. Modern universities and their vice chancellors may attempt to use their councils as a sort of community representative body in whom a public trust, but little more, is reposed. In this sense they might be regarded as nothing more than a senior advisory group to whom vice chancellors and university executives might be tempted to grudgingly and selectively report on a regular basis, or a body to whom a decision is referred where this is politically expedient.[154] Even the fact that some councils could perceive themselves as being the body to whom power has been allocated at law would be resisted by some vice chancellors who would not regard the councils as a genuine decision making forum. It is submitted that many councillors are quite happy for this to be the case. Busy people performing an unsalaried position certainly do not want too much decision making or detail. Periodically they may get involved in the selection/dismissal of vice chancellors and chancellors, but often they will, or prefer to, read about the big decisions involving universities in the press along with the rest of us.[155]

A matter of particular concern to the Senate Committee was the commercial activities of universities. Noting that state auditor generals had limited control over university corporations the Committee concluded that there were questionable and high risk commercial practices taking place.[156] The Committee raised a more serious and related matter:

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153 In *ASIC v Adler* Santow J found that "In order for the safe-harbour "statutory business judgment rule" to be relied upon, the director must first have made a business judgment." *ASIC v Adler* [2002] NSWSC 171 at para 372.

154 The Senate Committee report quoted Professor Sawyer speaking of the senior executives at one university as saying "They have created governance structures which depend on them, rather than oversee them." Senate Employment, Workplace Relations, Small Business and Education References Committee *Universities in Crisis*, Canberra, 27 September 2001, at para 4.61.

155 Witness the dismissal of Professor Steele from Wollongong University: *NTEIU v University of Wollongong* [2001] FCA 1069 (8 August, 2001)

156 Senate Employment, Workplace Relations, Small Business and Education References Committee *Universities in Crisis*, Canberra, 27 September 2001, at

> An academic from the University of Technology Sydney refers to the fact that in times of financial stringency, senior staff are frequently on overseas trips. These are perceptions of the rise of an entrepreneurial class of academics, who receive favourable treatment, and a perception of the existence of academic 'carpet baggers' who operate in off-shore campuses. It is difficult not to give credence to the resentment that this situation provokes, and easy to understand why 'institutional procedures' are used to undermine such activities. This is likely to occur in universities where 'corporate enterprise' culture assumes a dominance over the council or the senate, and where vice-chancellors and council members mistake their institution for an enterprise rather than a university.[157]

If both matters are based in fact they directly represent a complete failure of university councils to monitor and control their senior executives. Furthermore they expose such councillors to negligence actions under the *City Equitable* and *Daniels v Anderson* principles. We respectfully agree with the next paragraph in the Senate Report:

> Processes that ensure full accountability for the decisions of university councils and administrations are central to the issue of governance. The advent of the 'enterprise university' puts a much greater level of responsibility on councils and administrations to ensure that taxpayers, students and providers of private funds have some guarantee that quality higher education and research is being delivered.[158]

Very little power is given by university legislation to anyone other than the councils, though the vice chancellor may be described as a chief executive officer. But can councils remain at ease if they remain in a position of comfortable ignorance? The cases suggest they

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para 4.40 and 4.43. This was also raised by the more recent DEST inquiry suggesting significant scope for improvement: *Meeting the Challenges, the Governance and Management of Universities* DEST, Canberra, August, 2002 at 17.

157 Senate Employment, Workplace Relations, Small Business and Education References Committee *Universities in Crisis*, Canberra, 27 September 2001, at para 4.33

158 Note 157 at para 4.34

cannot. If university councils allow their executive officers to dictate the council and university agenda they may be negligent in their most important duty which is to monitor and control this executive in whom they will have delegated significant management power. As noted above this failure of the board to monitor senior management has been represented in important case law on skill and care in public companies. University councillors should not assume that the recent developments in negligence law represented by Anderson will be confined to public companies. That this is not the case was affirmed in the Western Australian Supreme Court decision in *Permanent Building Society v Wheeler*[159] where Ipp J stated:

> It is also significant, as regards matters of policy, that the tortious duty not to be negligent, and the equitable obligation on the part of a trustee to exercise reasonable care and skill, are in content, the same. [160]

That this duty of care is not a new one is confirmed by English decisions discussed earlier such as *The Charitable Corporation v Robert Sutton and others*[161] and *Attorney-General v Wilson*.[162] The latter case discussed the duty of the municipal councillors to preserve and protect the property confided to them. *Stanway v Attorney-General* [163] also contained allegations of breach of duty. *Stern v Lucy Webb Hayes National Training School for Deaconesses and Missionaries*[164] is a major American authority subsequently applied in relation to universities in *The Corporation of Mercer University v Smith*.[165] In the former decision again it was nonfeasance which proved the undoing of the trustees, specifically the failure to supervise hospital investments. Accordingly the Americans speak of a duty of requiring trustees to discharge their duties with the care that an ordinary, prudent person in a like position would exercise under similar circumstances, similar wording indeed to that emerging from the Australian decisions referred to above.

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159 *Permanent Building Society v Wheeler* (1994) 14 ACSR 109

160 Note 159 at 166. Malcolm CJ and Seaman J concurred in Ipp J's judgment.

161 Note 33

162 Note 42

163 Note 47

164 Note 85

Statutory indemnity provided to councillors

Kirby J's comments in *Darvall v North Sydney Brick and Tile Co Ltd*.[166] are particularly important when one examines clauses in University statutes indemnifying councillors. Table 3 lists typical clauses. Not all university Acts include such clauses.

165 Note 94

166 Note 38 at 251 - 252

Table 3 University Statues and Exclusion of Liability Clauses

State	University Acts	Exclusion of Liability Clauses
	Australian Catholic University Act 1990	No immunity clause in Act. *Corporations Act* applies.
VIC	*Melbourne University Act 1958*	Section 16A The University shall indemnify and keep indemnified each member of the council or of a committee constituted by resolution of the council or by or under a statute or regulation against all actions suits claims and demands whatsoever (whether arising during or after the term of office of that member) in respect of any act or thing done or omitted to be done by that member in good faith in the exercise or purported exercise of any power or duty conferred or imposed upon the council or committee or upon any member or members thereof by or under this Act.
	Monash University Act 1958	Section 25A The University shall indemnify and keep indemnified each member of the Council and any member of a Committee constituted by resolution of the Council or by or under a Statute or regulation against all actions or claims (whether arising during or after the term of office of that member) in respect of any act or thing done or omitted to be done in good faith in the exercise or purported exercise of any powers or duty conferred or imposed upon the Council or Committee or upon any member or members of the Council by or under this Act.

VIC	*La Trobe University Act 1964*	Section 25AA The University must indemnify and keep indemnified each member of the Council and any member of a committee constituted or appointed by resolution of the Council or by or under a Statute or regulation against all actions or claims (whether arising during or after the term of office of that member) in respect of any act or thing done or omitted to be done in good faith in the exercise or purported exercise of any powers or duty conferred or imposed on the Council or committee or on any member or members of the Council or committee by or under this Act.
	Victoria University of Technology Act 1990	Section 21 - As for Latrobe University
	Royal Melbourne Institute of Technology Act 1992	Section 21 - As for Latrobe University
	University of Ballarat Act 1993	Section 21 - As for Latrobe University
WA	*Edith Cowan University Act 1984*	No immunity clause in Act
	University of Notre Dame Act 1989	No immunity clause in Act
	University of Western Australia Act 1911	No immunity clause in Act
	Murdoch University Act 1973	No immunity clause in Act
	Curtin University of Technology Act 1966	No immunity clause in Act

SA	*The Flinders University of South Australia Act 1966*	No immunity clause in Act
	University of Adelaide Act 1971	No immunity clause in Act
	University of South Australia Act 1990	No immunity clause in Act
NSW	*University of New England Act 1993*	Section No matter or thing done or omitted to be done by: (a) the University, the Council or a member of the Council, or (b) any person acting under the direction of the University or the Council, if the matter or thing was done or omitted to be done in good faith for the purpose of executing this or any other Act, subjects a member of the Council or a person so acting personally to any action, liability, claim
	University of Western Sydney Act 1997	Section A matter or thing done or omitted to be done by the University, the Board or a member of the Board, or any person acting under the direction of the University or the Board, does not, if the matter or thing was done or omitted to be done in good faith for the purpose of executing this or any other Act, subject a member of the Board or a person so acting personally to any action, liability, claim or demand.
	University of New South Wales Act 1989	As for University of New England
	University of Wollongong Act 1989	As for University of New England
	University of Sydney Act 1989	As for University of New England
	Macquarie University Act 1989	As for University of New England

NSW	*Southern Cross University Act 1993*	As for University of New England
	University of Newcastle Act 1989	As for University of New England
	Charles Sturt University Act 1989	As for University of New England
	Univrsity of Technology Act 1989	As for University of New England
QLD	*Queensland University of Technology Act 1998*	No immunity clause in Act
	University of the Sunshine Coast Act 1998	No immunity clause in Act
	University of Southern Queensland Act 1998	No immunity clause in Act
	University of Queensland Act 1998	No immunity clause in Act
	Griffith University Act 1998	No immunity clause in Act
	James Cook University Act 1997	No immunity clause in Act
	Central Queensland University Act 1998	No immunity clause in Act
	Bond University Act 1987	No immunity clause in Act
NT	*Northern Territory Act 2000*	No immunity clause in Act

TAS	*University of Tasmania Act 1992*	Indemnification Section 22 The University is to indemnify each person who does or purports to do, or omits or purports to omit to do, any act or thing in good faith under the direction of the University or the Council or otherwise for the purpose of administering or executing this Act against any action, liability, claim or demand in respect of that act or omission.
ACT	*University of Canberra Act 1989*	No immunity clause in Act
	Australian National University Act 1991	No immunity clause in Act

As indicated in Table 3 indemnity clauses are used in New South Wales, Victorian and Tasmanian universities. However these do not provide as much protection as some councillors may have expected. In particular they only apply while the councillor is acting in good faith.

Noting that this paper has concentrated on fiduciary duties it follows that if the conduct represents a breach of fiduciary duty, the indemnity might not apply. Corcoran suggests it is possible that a director who has acted honestly and in good faith may escape liability under an immunity clause, even though they may have been liable for breach of fiduciary duty. The example she provides is where a director has exercised powers in good faith for a purpose later found to be improper as in *Howard Smith Ltd v Ampol Petroleum Ltd*.[167] It may be a little dangerous to put too much confidence in a finding that there can be a good faith breach of fiduciary duty, simply because the councillor acts honestly.

167 Corcoran S, "The Legal Liability of Statutory Boards – Public Corporations Act 1993 (SA)" (1993) *6 Corporate and Business Law Journal* 95 at 100

The standard immunity clause in New South Wales states:

> A matter or thing done or omitted to be done by the University, the Board or a member of the Board, or any person acting under the direction of the University or the Board, does not, if the matter or thing was done or omitted to be done in good faith for the purpose of executing this or any other Act, subject a member of the Board or a person so acting personally to any action, liability, claim or demand.

It should not be assumed that this will protect a councillor from suit from negligence for not properly monitoring senior executives or fellow councillors who may have been acting like the managing director in *City Equitable* or one of Kirby P's blinker donners.

In *Puntoriero v Water Administration Ministerial Corporation*[168] the High Court had to interpret the words "exercise any function" in an immunity clause in s 19(1) of the *Water Administration Act 1986* (NSW). The subsection did not exempt the Water Administration from its liability for supplying polluted water, and operated only in respect of positive acts, not omissions. The Court (Kirby J dissenting) took a narrow or "jealous"[169] interpretation of the immunity, Callinan J in particular pointing to the earlier High Court decisions in *Board of Fire Commissioners (NSW) v Ardouin*[170] and *Australian National Airlines v Newmam*[171]. In the latter case Callinan J concluded:

> To gain a statutory protection against liability for an omission under an immunity provision, the provision should not only ordinarily so provide in express terms, but also that such provision should generally be strictly construed.[172]

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168 *Puntoriero v Water Administration Ministerial Corporation* (1999) 165 ALR 337

169 Note 168 at 342 per Gleeson CJ and Gummow J. See also the discussion of this case in Rockford F, "Issues of University Governance and Management giving Rise to Legal Liability" (2001) *Journal of Higher Education Policy and Management* 49 at 60

170 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105

171 *Australian National Airlines v Newman* (1987) 162 CLR 466

172 Note 168 at 367

In relation to the New South Wales immunity clauses it should be noted that the act or omission has to be "for the purpose of executing this or any other Act". This curious wording could attract the strict construction Callanan J spoke of, it being a little difficult to see how the omission of not properly monitoring conduct of senior officers can either be in good faith or for the "purpose of executing" the respective Acts.

The immunity clauses in the Victorian universities apply to omissions, and these also apply a good faith test, see for example s 25AA of the *La Trobe University Act 1964* (Vic). Similarly the University of Tasmania Act 1992 (Tas) applies to omissions, but its business judgment rule only applies to decisions.

Conclusions

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 their universities.

Various tests from judges and writers were proposed in the first section of this paper to determine whether councillors owe fiduciary duties to their universities. Sealey spoke of two categories, control of another's property[173] and where an undertaking is given to act on another person's behalf. Similarly Mason J described the notion of a fiduciary giving an undertaking to act for or on behalf of or in the interests of another person in the exercise of a power or discretion.[174] The university statutes vest management power in university councils meeting Parkinson's relationships which "involve either the management of property, or other positions of trust of a financial nature".[175] This contains the fundamental elements of a fiduciary relationship described by Mason J and Sealey. Dawson J described reliance and vulnerability, paraphrased as implicit dependency by Ong.[176] Finally, one of Finn's "fundamental fiduciary

173 Note 21 at 74
174 Note 16 at 608
175 Note 25 at 341
176 Note 32 at 319

relationships"[177] is that which exists between the community and the State and its agencies, and requiring public officers, in this case university councillors, to account to the university for breach of fiduciary duty.

Furthermore, the English charitable and municipal cases where fiduciary duties have been found, contain these various elements. In *Re French Protestant Hospital v Attorney-General*[178] Danckwerts J spoke of control over property, and Lloyd J in *Stanway v Attorney-General* [179] similarly alluded to the property control function. American cases similarly find a fiduciary duty, reaching a highpoint in *Stern v Lucy Webb Hayes National Training School for Deaconesses and Missionaries*[180] and the duty does apply in universities: *The Corporation of Mercer University v Smith.* [181] There is no doubt then that councillors owe fiduciary duties to their universities.

Once a finding is made that a particular relationship is fiduciary in character, well known and strict obligations of utmost good faith apply. These include obligations to not make undisclosed gains from their office, or through personal contracts with the university; not compete with the university; to avoid actual and potential conflicts of duty and interest; to not make improper use of property or confidential information of the university; not to misuse university funds; and to use powers given to them for proper purposes while not allowing the university to act in breach of its statute. The latter was found to be a particularly important matter because universities will not be saved by provisions in the *Corporations Act 2001* (Cth) validating *ultra vires* contracts.

A suggestion was made that the high level university statutory functions relating to knowledge discovery and dissemination may well inform the nature of the fiduciary and negligence duties owed by university councillors and senior staff, it being commonly stated in our courts that the precise nature of any fiduciary duty will flow from and be determined by the constituting instrument.

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177 Note 28
178 Note 42
179 Note 47
180 Note 85
181 Note 94

There are also clear obligations on university councillors to act with levels of skill and care, it is likely a court would speak of a duty requiring councillors to discharge their duties with the care that an ordinary, prudent councillor in a like position would exercise under similar circumstances. This paper cited a number of concerns raised in the Senate Committee Inquiry *Universities in Crisis*, specifically those regarding a perceived lack of supervision in relation to commercial companies run by universities, and also absence of accountability in overseas activities. A normal bureaucratic response to such concerns is to amend legislation controlling universities, a matter raised in the DEST inquiry. Specifically DEST raised these matters for "consideration and discussion":

- Should university enabling Acts be amended to:

  clarify the role of the governing body?

  clarify the duties of members of governing bodies?

  reduce further the size of governing bodies?

  clarify conflict of interest provisions for members?

  remove provisions for Parliamentary, Ministerial and Governor-in-council appointments?
- Should consideration be given to the remuneration of governing board members?
- Should the Commonwealth work with State/Territory governments and the university sector to develop a good practice manual for university governance that might include:

  good practice models in respect of the size and structure of the governing body?

  information on the duties and responsibilities of governing body members?[182]

Some of these matters are beyond the ambit of this paper, others are not. For example we believe the role of the governing body is quite clear at law, though we note the above suggestion that better

182 *Meeting the Challenges, the Governance and Management of Universities* DEST, Canberra, August, 2002 at para 129.

information on duties and responsibilities should be given. This paper has demonstrated there are already very significant common law and equitable obligations on councillors, and these place high levels of fiduciary responsibility upon them. Nevertheless, it might be that some councils have not acted in accordance with their onerous management obligations and some consideration could be given to spelling these out in university statutes as has been done in the *Corporations Act 2001* (Cth) or in sections 11A and 11B of the *University of Tasmania Act 1992* (Tas), or indeed to the introduction of criminal sanctions as in s 184 of the *Corporations Act* to control high level offending conduct involving, for example, fraud.

An alternate possibility would be for the Commonwealth to legislate to extend the coverage of the *Corporations Act* to universities relying on the reference of powers over corporations previously given by State governments to the Commonwealth.[183] It was noted above that the Australian Catholic University and Bond University are caught under this legislation as corporations established under predecessor legislation.

The equitable duties of members of governing boards are quite clear, they are fiduciaries, and the duties that flow are well established. Accordingly, the suggestion in the DEST report that conflict of interest provisions might require clarification is probably unnecessary *at law*, though there are some councillors who could be unaware of their responsibilities and would benefit from communication as to what their duties are.

The doubts that do remain in the area of duties relate to the precise obligations owed under common law in negligence and the extent to which statutory immunity applies. Kirby P's dissent in *Darvall v North Sydney Brick and Tile Co Ltd*[184] raises a particular spectre for councillors suggesting that a failure to inquire is not consistent with good faith. This is worrying because the immunity provisions depend on the presence of good faith for their operation.

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183 See Sections 3 and 4 of the *Corporations Act 2001* (Cth). We have assumed in this paper that the *Corporations Act* does not apply to public universities, this assumption needs further examination, especially when the university operates outside of its home state. A further avenue for research relates to the constitutional issues surrounding university regulation.

184 Note 38

A further area of concern in relating to duties is where a university establishes commercial operations and lacks the proper skill at council level to monitor and control these. This may lead to another issue, the operations may be established under other law such as the *Corporations Act*, thereby exposing Council to unforeseen obligations under that legislation.

A residual question which we have not addressed and not covered in the various government reports is whether there should be *any* immunity. State law is inconsistent on this matter.

Another issue related to duties and again not covered in various reports is the issue of *ultra vires* conduct of universities and the personal liability of councillors and contractual invalidity that could flow from this. It is submitted that this is an area in need of clarification and legislative reform, reform that occurred in company law in 1961- 1962 in Australia, and which has more recently been removed as a problem area for *Corporations Act* companies.

The DEST report raised issues relating to remuneration, earlier in this paper the point was made that this may well require statutory amendment if it is to be introduced.

A further matter only briefly alluded to in the DEST report[185] and beyond the scope of this paper is the question of enforcement of breach of duties by university councillors or the executive. While it is clear that employed members of councils, such as vice chancellors would be subject to control by the Council itself, it is less clear who else could enforce such a breach. Specifically would a member of the university have a right to commence derivative proceedings in the

185 *Meeting the Challenges, the Governance and Management of Universities* DEST, Canberra, August, 2002 at para 112. The Report said: "There are currently few formal mechanisms to ensure that the duties of members of governing bodies are enforced. Consideration could be given to strengthening the sanctions which might be applied to members breaching their duties. One approach which could be explored is the amendment to the University of Tasmania Act 1992 which enabled the State Minister to dismiss from office, on the recommendation of two thirds of the University's Council, a member who fails to carry out their duties."

name of the university against an errant councillor or indeed council, in the event that council itself chose not to proceed? Again if universities were brought under the control of the *Corporations Act* this matter would be resolved, because of the oppression and representative remedies provided under that legislation in section 232 and 236 respectively.